US and EU embargo Crimea, and US adopts new Ukraine sanctions law

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As the events in Ukraine and Russia continue to unfold, the reaction by the US and the EU, including imposing sanctions, will impact individuals, businesses, and entire sectors.

As a polycentric firm, with no headquarters, no dominant culture and no flag, and with partners throughout the world, including Russia, Ukraine and Central and Eastern Europe, Dentons is particularly well positioned to explain the nuances that surround every facet of these complicated developments to our clients.

This client update contains an analysis of the policy issues arising from the current situation in Ukraine.

We try to present the facts as they are known, and the potential ramifications of what might happen, without taking a position that could be perceived as political in any way. We believe this is the best way to serve our clients.

On December 18, 2014, President Obama signed the Ukraine Freedom Support Act ("UFSA"), the first law directly targeting Russia and its economy in response to events in Ukraine.[1] On December 19, 2014, President Obama also executed a new Executive Order and General License 4 that, together, impose a trade embargo with Crimea except for certain agricultural and medical goods. These prohibitions align with the EU's new sanctions against Crimean investment which took effect December 20, 2014.

UFSA targets the Russian defense and energy sectors, provides for extraterritorial sanctions on non-US financial institutions, and authorizes funding for a variety of military, non-military, and "soft power" activities. Most of the sanctions under UFSA are discretionary, and, accordingly, UFSA by its terms imposes few new sanctions. Nevertheless, UFSA offers a number of tools which, if utilized, could dramatically expand the reach of US Ukraine-related sanctions.

Below are the key elements of UFSA's sanctions provisions, a short summary of the new US and EU sanctions against Crimean investment, and their implications.

Sanctions under UFSA

Defense sector

UFSA **requires** the President to impose three or more of a specified list of sanctions on Rosoboronexport within 30 days of signing. The law also **requires** the President to impose three or more specified sanctions on any entity owned or controlled by the Russian Government or Russian national(s) that the President determines has knowingly manufactured, sold, transferred, or brokered arms, into Syria, Ukraine, Georgia, Moldova, or other designated country without that country's consent. Russian entities that supported the manufacture, sale, transfer or brokerage of arms are also subject to such sanctions.

UFSA **permits but does not require** the President to impose three of a specified roster of sanctions on any person,

Energy sector

US or non-US, who makes a significant investment in a Russian offshore, Arctic, or shale oil project. Moreover, the law **requires** the President to prohibit the provision of any debt of greater than 30 days maturity or any equity (of whatever maturity) by US Persons[2] to Gazprom, the large natural gas company majority owned by the Russian state, if the President determines that Gazprom has withheld "significant" natural gas supplies from NATO member countries, or any of Ukraine, Georgia or Moldova.[3]

Menu of sanctions; exceptions

UFSA provides a menu of nine sanctions from which the President may choose when imposing penalties in the defense and energy sectors, as discussed above. These nine include: the prohibition of US Export-Import Bank assistance, US government procurement bans, export restrictions for arms and dual-use items, blocking property and interests in property within US jurisdiction, blocking payments or credit subject to US jurisdiction, prohibition of dealing in debt and equity of the sanctioned person, visa bans, and sanctions on the principal executive officers of sanctioned entities. UFSA also sets out certain carve-outs and discretionary exemptions, such as granting the President authority to waive sanctions for national security reasons for specific transactions.

Financial institutions

UFSA also **permits but does not require** the President to impose extraterritorial sanctions on non-US financial institutions. Specifically, the law authorizes the President to prohibit the opening, or impose strict conditions on the maintaining in the US, of a correspondent account or payable-through account by a non-US institution where that non-US institution has knowingly facilitated a significant transaction (1) involving any UFSA-sanctionable activities (e.g., selling arms into Ukraine) or (2) on behalf of any Russian designed as a "Specially Designated National" under Ukraine-related sanctions.

Termination

UFSA provides that sanctions imposed under its authority will terminate on the date when the President submits a certification to certain committees of the US Congress that the Russian Government has ceased undermining the "peace, security, stability, sovereignty, or territorial integrity" of Ukraine, including by political agreement.

In addition to the sanctions provisions, UFSA authorizes funds for arms and other defense services and training to Ukraine, and non-military assistance including in the energy sector and civil society arena. UFSA also authorizes funds for expanding broadcasting in the former Soviet Union, and for democracy and civil society organizations in Russia.

US Sanctions against Crimea

In addition to UFSA, President Obama issued a new Executive Order which imposes an embargo on trade with Crimea with limited exceptions.[4] The new Executive Order prohibits US Persons from investing in Crimea, or importing or exporting any goods, services, or technology to/from Crimea. It also prohibits financing or otherwise facilitating any transaction of a non-US Person if the transaction would be one prohibited for the US Person.

This most recent Executive Order also raises sanctions risks for both US and non-US persons doing business with Russian entities by targeting those individuals and entities doing business in Crimea. The new Executive Order authorizes the blocking of any property or interests in property in US jurisdiction of any person (US or non-US) who the US Treasury Secretary, in consultation with the US Secretary of State, determines: (1) is operating in Crimea (2) leads an entity operating in Crimea, (3) is owned or controlled by, or acts on behalf of (directly or indirectly) a person blocked under this new Executive Order, or (4) has materially assisted or provided support in support of a person blocked under this new Executive Order.

The US Treasury Department's Office of Foreign Assets Control (OFAC) also announced a General License 4, which exempts from the new Executive Order the export or reexport of certain agricultural commodities, medicine, medical supplies, or replacement parts for medical supplies (provided that such replacement parts are designated "EAR99" for US export control purposes). General License 4 does not extend to military or law enforcement purchasers or importers.

EU Sanctions against Crimea

The EU also adopted broad new sanctions targeting investments in Crimea. The new sanctions prohibit the purchase of Crimean real estate or equity in Crimean companies, the provision of loans or investment services to Crimean companies, and tourism to Crimea. The new sanctions furthermore ban exports of goods and technology, or the provision of technical assistance, brokering, construction, or engineering services, in any of the (i) transport, (ii) telecommunications, and (iii) energy sectors, as well as (iv) in the prospecting for, and exploration and production of oil, gas, and mineral resources, to any Crimean entity, or for use in Crimea.[5] These new EU sanctions apply to all EU Persons, defined as companies organized in any EU member state, any EU citizen or national, or persons in the territory of the EU. Contracts signed prior to September 20, 2014, are exempted.

Implications

The President of the United States already possessed wide-ranging authority to impose new Ukraine-related sanctions (or scale back existing sanctions), as the existing Executive Orders and Sectoral Sanctions Identification (SSI list) clearly demonstrated. UFSA, however, lays the foundation for Ukraine-related sanctions to become extraterritorial in the financial sector in their future iterations. It also represents the first time that Congress has passed a law imposing sanctions on Russia, even while it largely leaves it to the discretion of the President to calibrate those sanctions.

Interestingly, UFSA provides for a sanctions mechanism which has previously been deployed only in US Iranian-related sanctions: the prohibition on, or imposing of strict conditions on maintaining in the US, of a correspondent account or payable-through account by a non-US institution. A critical difference is that under UFSA, it remains in the President's discretion to impose this sanction, whereas under Iranian-related sanctions legislation it is mandatory. Nevertheless, the mere fact that UFSA provides this as a potential sanction may spur non-US financial institutions to increase the risk profile of facilitating a transaction which could trigger it (e.g, facilitating a transaction with a Russian SDN).

In signing UFSA, President Obama stated that he did not intend to impose sanctions under the new law. Nevertheless, the potential for an expansion in extraterritorial sanctions, in particular against financial institutions outside of the US, is a significant development. It is clear that the US and EU continue to see sanctions as an important tool to put pressure on the Russian Government.

For more information on the sanctions, see "US and EU Expand Ukraine-Related Sanctions: New Energy Sector Restrictions," "New sanctions increase uncertainty of shipments to Russia," and "New sectoral sanctions and new SDNs: US expands Ukraine-related sanctions."

1. Executive Orders 13660, 13661, and 13662 were adopted pursuant to the President's authorities under the Constitution and IEEPA, the International Emergency Economic Powers Act (50 U.S.C. §§ 1701 et seq).
2. A US Person is any US citizen or permanent resident, entity organized under the laws of a US jurisdiction (and its foreign branch), and any individual actually present in the territory of the US.
3. The energy sector sanctions provisions also grant the President the authority to impose additional licensing requirements or restrictions on the export or re-export of items for use in the energy sector of Russia, although the President already has this pursuant to his existing authority.
4. Executive Order "Blocking Property of Certain Persons and Prohibiting Certain Transactions with Respect to the Crimea Region of Ukraine". This most recent Executive Order was not numbered at the time of the publishing of this Client Alert.
5. The new EU sanctions list 165 new goods subject to an export prohibition.

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