ECONOMIC EMBARGOES

Sanctioning clarity

By Peter Lichtenbaum and Lisa Peets

Europe has traditionally been less aggressive than the US in the use of economic embargoes against 'rogue states', but it is increasingly imposing autonomous sanctions in advance or on top of – and often tougher than – those from the UN. But to ensure their effective operation and provide Europe's business community with much-needed certainty, clearer and more co-ordinated guidance from the Commission and member states is needed.

The new trend began with the EU's imposition of restrictive measures against Iran in July 2010, and gathered momentum during the 'Arab spring', with the adoption of additional European sanctions against Egypt, Tunisia, Libya and Syria. And indications are that the EU – following the UK's lead – will soon strengthen measures against Iran further.

The EU measures can be significant. After the Gaddafi regime fell, member states began releasing funds frozen following the February 2011 imposition of the EU's sanctions against Libya; these funds reportedly amount to nearly €30 billion in France, Germany and the UK alone.

Arms embargoes

EU sanctions do not impose a comprehensive prohibition on dealings with targeted countries. Instead, they typically provide for specific prohibitions and/or obligations, with some limited exemptions. Most EU sanction regulations include an embargo on arms and equipment that could be used for internal repression and a freeze of assets belonging to designated individuals and/or entities. They may also include additional prohibitions focused on the main sources of government revenue in the targeted country.

While arms embargoes or prohibitions on dealing with specific industries directly affect certain sectors, freezing assets has the most significant impact across the widest spectrum of companies. This measure consists of two elements: a freeze of funds and 'economic resources', and a parallel prohibition on making any funds or economic resources available, directly or indirectly, to or for the benefit of parties designated in the relevant sanctions.

As economic resources are defined to include 'assets of every kind', the prohibition extends to the provision of any goods and, in certain situations, prohibits the provision of services as well. The effects of asset freezes are particularly pronounced in cases where the EU designates important economic actors affiliated with a sanctioned regime, such as ports, financial institutions or other state-owned companies.

The increased use of sanctions during the past year has exposed critical weaknesses in the EU sanctions regime – the foremost being a lack of coherence. While sanction regulations are adopted at EU level, they are implemented and enforced by member state authorities.

This decentralisation often leads to a diverging interpretation of sanction rules across the EU. For example, the prohibition on making funds and economic resources available generally extends beyond the designated parties themselves, to entities owned or controlled by the designated persons. But there is no uniform threshold for control among member states, meaning that a transaction with a controlled entity that is prohibited in one state may be permitted in another. Member states also take different approaches to the need for and/or the availability of licences for similar transactions.

Another issue is that while some authorities have deep experience administering sanction regulations and are able to provide guidance on how they interpret the EU regulations, many other authorities – even in some larger states – are underresourced. This can lead to delays in responses to sanction-related queries or obtaining licences. For example, in some markets it took months to obtain a licence for humanitarian deliveries to Libya, for which the EU regulation provides specific licensing exceptions.

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Coherence

At times, the Commission refers questions about implementation and enforcement to national authorities, which then refer the same questions back to the Commission. The Commission and Council have made efforts to add clarity and coherence, but greater convergence is needed in the sanctions context.

Consistent application of EU sanctions would help companies doing business in Europe better understand what activities are permitted, and thereby promote the policy goals of these programmes. In the first instance, this would involve increased co-ordination between the Commission and the member states on sanctions implementation. Building on this, the Commission could publish sanctions-related briefings to accompany new measures and regularly update best practice guidance to help companies understand what is required.

Without these steps, the lack of legal certainty and the often divergent interpretations of the same provisions will continue to create confusion among companies seeking to comply with EU sanctions and will undermine the EU's new sanctions initiatives.

Peter Lichtenbaum and Lisa Peets are partners in the Washington DC and Brussels offices respectively of global law firm Covington & Burling

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