

# Latest developments in sanctions targeting Russia

Association of European Businesses  
11 December 2018  
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# Sanctions developments since 14 September 2018

- Latest developments on 6 April 2018 designations – repeated license extensions
- First secondary sanctions designation
- CBW Act sanctions – when will the other shoe drop?
- DETER, DASKAA & other pending US sanctions legislation
- Other developments

# Update on 6 April 2018 SDN designations

- Repeated extensions of general licenses allowing winding down of pre-existing and certain other transactions with most corporate targets:
  - General Licenses 13D, 13E, 13F, 13G, 13H issued – frequent brief extensions, most recently until 21 January 2019, of the the deadline to divest debt & securities in En+, GAZ, Rusal & three subsidiaries
  - General Licenses 14A, 14B, 14C, 14D issued — frequent brief extensions, most recently until 21 January 2019, of the deadline for transactions for wind-down & maintenance of pre-existing operations with Rusal & its subs
  - General Licenses 15A, 15B, 15C issued — multiple extensions, most recently until 21 January 2019, of the deadline for transactions for wind-down & maintenance of pre-existing operations with GAZ Group. (N.b. GL 15A not granted until 19 October.)
  - General License 16A, 16B, 16C, 16D issued – frequent brief extensions, most recently until 21 January 2019, of the deadline to wind down pre-existing operations with En+ and EuroSibEnergog & their subs. N.b. unlike GLs 14D & 15C, GL 16D does not allow payments to these SDNs; unblocking of funds (except of their US subsidiaries); or exports from USA
  - n.b., General License 12C, allowing wind-down of operations with most of the 6 April corporate designates, expired 5 June 2018. Current licenses cover only the above Deripaska subsidiaries.
  - Bear in mind that US persons must file with OFAC a detailed report on transactions pursuant to these licenses within 10 business days of their expiration.
- OFAC has justified repeated extensions as necessary to give time to study Deripaska’s “complex proposals” for divestiture.

# CAATSA refresher

- One of CAATSA’s major “innovations” was the threat of secondary sanctions
- Risk of SDN designation for non-US persons (including Russians) found to have “facilitated a significant transaction or transactions, including deceptive or structured transactions”, on behalf of any sanctioned person; test for “significance” involves 7 subjective tests (Section 228).
- Risk of seemingly more limited exclusionary sanctions (partial/total cut-off from US economy) against persons found to have:
  - engaged in “significant” transactions with listed persons Russian defense or intelligence entities, only some of which are sanctioned (Section 231 – applies to US persons too)
  - made “significant” investments in projects for the exploration and development of shale, Arctic offshore and deepwater oil projects in Russia (not outside Russia) (Section 225)
  - made “significant” investments/transactions (\$1m or \$5m in any year) concerning Russian energy export capabilities – but permissive, not mandatory; and only after consultation with US allies (Section 232)
  - made a \$10m+ investment in Russian privatization that “unjustly benefits” Russian officials/family/associates (Section 233)
  - provides material technology or support to persons engaged in significant activities undermining cybersecurity (Section 224)
- Foreign financial institutions facilitating transactions with SDNs or prohibited energy/defense transactions also face loss of US correspondent banking privileges (Section 226)

# CAATSA developments

- CAATSA section 231 “List of Specified Persons”
  - This list was expanded on 20 September to include six new legal entities and 27 individuals. But mostly focused on Syria and cyber actors, so less significant to business than the original list which includes many non-sanctioned (or non-SDN) entities with significant civilian operations, e.g. Rostec, UEC, United Instrument Mfg.
  - Uncertain application to subsidiaries
- Secondary sanctions: for over a year after enactment, no secondary sanctions under CAATSA. Congressional testimony by senior administration officials in late August stated that US preference is for “voluntary” compliance and consultation with allies, with secondary sanctions being a failure of diplomacy – but still a tool to be used.
- 20 September 2018: first (and to date only) secondary sanctions, under Section 231. Not unexpectedly, an egregious case: major advanced weapons purchase by Chinese army department and its head. Unexpectedly, sanctions included designation as SDNs. Grounds for worry, or relief?
  - “State encourages all persons to avoid engaging in transactions with entities on the LSP that may risk sanctions, including high-value, major transactions for sophisticated weapons systems”
- Still no move to implement any sanctions contemplated (but not required) by CAATSA, e.g. against Russian energy pipelines or against entities in the railway and metals and mining & mineral industries.

# CBW Act sanctions: refresher

- Announced 6 August; text published in Federal Register & took effect 27 August.
- Required to be implemented pursuant to Chemical & Biological Weapons Control and Warfare Elimination Act of 1991 (CBW Act, 22 USC § 5605), due to US gov't determination that Russia used Novichok in Salisbury, England.
- Two stages of implementation: one immediately, second conditionally if Russia does not take corrective measures within 90 days.
- Restrictions are more akin to a trade embargo than to sanctions: have region-wide application, rather than implemented against named entities (although some restrictions effectively only apply to state-owned entities (SOEs)).
- Although sanctions are required by CBW Act, specific sanctions can be waived in whole or in part on US national security grounds – requires certification to Congress
- N.b., US trade restrictions apply not only to exports from the US, but also to:
  - Re-exports of US-origin items wherever located (e.g. from a German purchaser to Russia)
  - Re-exports of foreign goods with incorporated/bundled/commingled US content, subject to a de minimis US content threshold by value (historically 25% for Russia)
  - Deemed exports (i.e. sales to a foreign national within the US; often applies to software)

# CBW Act sanctions: first stage (refresher)

- First stage (effective from 27 August 2018):
  - Ban on all exports (re-exports) to Russia of goods & services controlled under International Traffic In Arms Regulations (ITAR), except case-by-case licenses still possible for space program.
  - Termination of all financing for arms sales.
  - Termination of all US government export financing, credits and other financial assistance for exports to Russia (e.g. by Ex-Im Bank).
  - Ban on all exports (re-exports) to Russia of dual-use items controlled under the Export Administration Regulations (EARs), except licenses are (i) not required for GOV, ENC, RPL, BAG, TMP, TSU, CIV and AVS license exceptions in 15 CFR § 740; and (ii) are still possible on a case-by-case basis for exports (and re-exports) for:
    - Exports (re-exports) necessary for flight safety of civilian fixed-wing passenger aircraft
    - Exports (re-exports) to wholly-owned subsidiaries of US companies
    - Deemed exports to Russian nationals
    - Exports (re-exports) in support of government space cooperation and commercial space launches
    - Exports (re-exports) for commercial end-users and civil end-users in Russia.
  - License applications for exports of dual-use items under the EARs which are permitted per the above will be reviewed with a “presumption of denial”, if the end-user is an SOE
  - In reality, stage one does little to change the status quo vis-à-vis the practical application of US export controls.
- N.b., the prohibition on humanitarian assistance required under CBW Act was waived.

# CBW Act sanctions: second stage (1)

- State Dep't announced on 6 November 2018 that RF did not take statutorily required corrective measures, making second round sanctions inevitable.
- For second stage, US administration must, after consulting with Congress, impose at least three of the following sanctions:
  - Opposing loans & technical assistance to Russia by multilateral financial institutions
  - Prohibition on US banks making any loans to Russian government, except loans for food & agricultural exports and under existing agreements
  - Prohibition on all US exports to Russia (except food & agricultural products)
  - Restrictions on imports into US from Russia (except under existing agreements; may include energy products)
  - Downgrading of diplomatic relations
  - Suspension of flights by Russian state-owned carriers (Aeroflot) to the US
- Contract sanctity: performance of contracts entered into before first stage is allowed, unless US government specifically extends sanctions to such contracts
- These sanctions could be announced any day, although no formal deadline per se. Any waivers take effect only 15 days after being announced.
  - Five weeks later, we are still waiting...
  - Outgoing GOP chairman of the House Foreign Affairs Committee criticized the lack of a timeline.



## CBW Act sanctions: second stage (2)

- Second stage sanctions (like first stage) will endure for at least one year, but may be lifted if the RF government takes specific corrective steps (very doubtful.)
- The government may waive or limit the scope of any sanction on US national security grounds, but must explain the action to Congress.
- Some sanctions are obviously more severe than others, especially:
  - A ban on new RF debt
  - Ban on US exports to Russia arguably the most severe step
- Trump administration's implementation of CAATSA and CBW Act stage one sanctions suggest it will not seek aggressive implementation, but (i) the administration's sanctions policy is not predictable; and (ii) it is under significant pressure by Congress.
- Best-case scenario:
  - Downgrading of diplomatic relations
  - Opposition to MFI loans and assistance
  - Suspension of flights or ban on Russian imports, with considerable waivers

# DETER, DASKAA et al.

- Various bills introduced in Congress in 2018 would significantly escalate sanctions. Most significant are DETER and DASKAA
- Defending Elections from Threats by Establishing Redlines Act (DETER).
  - Thermonuclear – would designate every “Kremlin List” oligarch, all state energy companies & state banks as SDNs in case of future electoral interference.
  - 15 Senators joined as co-sponsors in wake of Helsinki press conference - 9 Democrat, 8 GOP sponsors.
- Defending American Security From Kremlin Aggression Act of 2018 (S. 3336, introduced 8 August 2018 (after Helsinki)). Three Democrat, three GOP sponsors. Inter alia:
  - 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.
  - Prohibits dealings by US persons in Russian sovereign debt issued 180+ days after DASKAA; and requires one Russian state bank (to be selected by the executive branch) to be added to the SDN list.
- Virtually no chance of adoption before Congress adjourns around the end of the year, whereupon the bills automatically die. Will they be introduced & gain momentum in the next Congress?
  - Trump’s 12 September 2018 executive order imposing sanctions for electoral interference, and especially the successful completion of the US midterm elections in November, has reduced some of the impetus
  - Likely to be substantially amended & fine-tuned before any new bill is introduced.
  - May depend on 2d round of CBW Act.
  - Thankfully no Trump-Putin press conferences in Paris or Buenos Aires!

# Other developments

- In EU, status quo prevails largely due to unanimity requirement, but also due to greater trade flows and interdependence with Russia.
  - Calls by some member states for sanctions due to Skripals etc. have subsided. Germany has come out against new sanctions for Kerch Strait tensions.
  - Individual designations (e.g. for Siemens turbines, Kerch Strait Bridge, Donbass elections) continue
  - Some enforcement measures, e.g. investigation into Dutch firm Dieseko
  - UK has legislative framework in place to implement its own sanctions post-Brexit
  - Increased use by UK of Unexplained Wealth Orders
- EU adopted blocking statute (Regulation 2271/96) vis-à-vis US sanctions against Iran. Possible analogue for US sanctions against Russia?
  - Probably not yet.
  - And of limited efficacy under US law.
- Iran-style non-monetary “SPV” exchange?
- Sanctions as an impetus for de-offshorization?

# Questions?



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