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## The Legal Aspects of Sanctions

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## Legal grounds for imposition of sanctions: WTO

*The General Agreement on Tariffs and Trade (GATT 1947) Articles XIV and XIV bis*

### Members of GATT 1947 are:

- not required to disclose any information if it is contrary to **their essential security interests**
- not prevented from taking any action considered necessary for the protection of **their essential security interests**
- not prevented from taking any action in pursuance of their obligations under the United Nations Charter **for the maintenance of international peace and security**

*The General Agreement on Trade in Services (GATS) Article XXI*

### Members of GATS:

- are not prevented from the adoption of **measures necessary to protect** public morals or to maintain public order, protect human, animal or plant life or health, to secure compliance with laws or regulations relating to **safety**, in particular;
- not required to disclosure any information if it is contrary to **their essential security interests**
- not prevented from taking any action considered necessary for the protection of **their essential security interests**

## Legal grounds for imposition of sanctions: US (1)

### The President of the United States is authorized to:

- declare **national emergency** (i.e., to issue a declaration of emergency with respect to the unusual and extraordinary threat)  
*The National Emergencies Act Section 201.(a)*
- declare national emergency and exercise the authorities to deal with any **unusual and extraordinary threat**, which has its source in whole or substantial part outside the United States, **to the national security, foreign policy, or economy of the United States**  
*The International Emergency Economic Powers Act (IEEPA) 50 U.S. Code § 1701*
- suspend/restrain the entry of all aliens/class of aliens (as immigrants or nonimmigrants) if finds the entry **detrimental for the interest of the United States**  
*The Immigration and Nationality Act Section 212(f)*
- designate and empower the head of any executive body/official who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President  
*The United States Code Section 301 of Title 3 of (The President)*

## Legal grounds for imposition of sanctions: US (2)

### Sanctions imposing acts:

- The President of the United States is authorised to waive the initial application of sanctions with respect to a sanctioned person only if the President submits to the U.S. Congress a written determination that the waiver—is **in the vital national security interests** of the United States  
*The Countering America's Adversaries Through Sanctions Act (CAATSA) Section 222*
- The President of the United States finds that the actions and policies of sanctioned persons **constitute an unusual and extraordinary threat to the national security** and foreign policy of the United States and **declares a national emergency** to deal with that threat (e.g., block the property of the certain persons)  
*The President Executive Orders 13660, 13661, 13662 of March, 2014 Title 3*
- The President of the United States takes additional steps with **with respect to the national emergency**  
*The President Executive Orders 13685 of December, 2014 Title 3*

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**US Sanctions  
Imposed on Russia**  
AEB Legal and Compliance & Ethics  
Committees

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**General Overview of US  
Sanctions**

## Menu of US Sanctions

### I. Specially Designated Nationals and Blocked Persons (“SDNs”)

- Lists of blocked parties - SDNs
- Entities owned 50% or more by one or more SDNs also blocked

### II. Sectoral Sanctions Identification List Parties

- Entities in the finance, energy, defense sectors of Russia
- Patchwork of export restrictions
- Russian Entity List parties
- Russian Oil Industry end-uses
- Military end-user/end-use
- “High technology” items
- Broad-based embargo on Crimea

### III. US export controls (Bureau of Industry and Security, BIS) on dual use and military items

- BIS: a prior authorization is required for almost all products subject to EAR99 and shipped to Russia
- Presumption of license denial (military end use or military end user)
- Non-proliferation sanctions (5 Russian producers of weapons)

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## Who Must Comply with US Sanctions?

- Apply to “US Persons”
- Entities organized under US laws and their non-US branches
- Individuals and entities in the United States, even temporarily
- US citizens and permanent resident aliens (“Green Card” holders) wherever located or employed
  - N.B.: Separately incorporated foreign subsidiaries of US companies are not US Persons for purposes of the US Russia/Ukraine sanctions
- Non-US Persons if:
  - They cause violations by US Persons
  - They export, reexport, transfer items or services subject to US jurisdiction
- Non-US persons that deal with SDNs may face the risk of being designated as SDNs themselves (even when they are not required to comply)
- N.B.: transactions in USD

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### Codification of US Sanctions and New Restrictions for Russia (CAATSA)

- On August 2, 2017 the US President signed "Countering America's Adversaries Through Sanctions Act" ("**CAATSA**")
- CAATSA imposed certain additional sanctions targeting Iran, Russia, and North Korea
- Main developments under CAATSA:
  - i. codified the Ukraine-related sanctions in effect as of August 1, 2017 (Executive Orders 13660, 13661, 13662, and 13685)
  - ii. codified the current sanctions targeting significant malicious cyber-enabled activity (Executive Orders 13694 and 13757)
  - iii. tightened the existing sectoral sanctions by modifying Directives 1, 2 and 4
  - iv. introduced additional (new) secondary sanctions that may be imposed on any non-US persons



## CAATSA – Secondary Sanctions (1)

Additional (new) secondary sanctions may be imposed on the following non-US persons:

1. "foreign sanctions evaders" (Section 228.2)
2. persons responsible for, or complicit in, serious human rights abuses in any territory forcibly occupied by Russia (i.e., Crimea)
3. persons who undermine cybersecurity on behalf of the Russian Government
4. engaged in "significant transactions" with Russia's intelligence and defense sectors ("GRU" and FSB)
5. make and/or facilitate large investments in Russian energy export pipelines
  - by selling, leasing, or providing to Russia goods, services, technology, information, or support, and
  - this could directly and significantly facilitate the maintenance, expansion, construction, modernization, or repair of energy pipelines, and
  - the investment / transaction or any combination of investments is not less than USD 1 mln, or the annual aggregate investments are not less than USD 5 mln
  - sanctions to be imposed "in coordination with" US allies

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## CAATSA – Secondary Sanctions (2)

6. persons related to corrupt privatizations of Russian state-owned assets
  - by investing or facilitating investments of not less than USD 10 mln, or
  - any combination of investments of not less than USD 1 mln each, which in the aggregate equals or exceeds USD 10 mln in any 12-month period
7. persons who provide Syria "significant" financial, material or technological support materially contributing to the ability of the Government of Syria to:
  - acquire or develop chemical, biological, or nuclear weapons or related technologies;
  - acquire or develop ballistic or cruise missile capabilities
  - acquire or develop destabilizing numbers and types of advanced conventional weapons
  - acquire significant defense articles, defense services, or defense information, or items that are on the US Munitions List

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## US Sectoral Sanctions (1)

CAATSA introduced a possibility of imposition of sectoral sanctions on **state-owned** entities operating in the railway, or metals and mining sector

CAATSA modified **Directive 1** (relates to the Russian financial services sector)

- On **September 29, 2017** OFAC adopted the amendments to Directive 1 introduced by CAATSA as follows:
  - Directive 1 **now** prohibits US Persons from engaging in transactions in the provision of financing for
  - the following entities subject to Directive 1, i.e.: Bank of Moscow; Gazprombank; Russian Agricultural Bank; Sberbank; Vnesheconombank and VTB Bank
  - for new debt or new equity issued on or after
    - July 16, 2014 and before September 12, 2014 of longer than 90 days maturity
    - September 12, 2014 and before November 28, 2017 of longer than 30 days maturity
    - November 28, 2017 - of longer than 14 days maturity

## US Sectoral Sanctions (2)

CAATSA modified **Directive 2** (relates to the Russian energy sector)

- On **September 29, 2017** OFAC adopted the amendments to Directive 1 introduced by CAATSA as follows:
- Directive 2 **now** prohibits US persons or persons within the United States transacting in, providing financing for
- the following entities subject to Directive 2: AK Transneft, Gazprom Neft, Novatek and Rosneft
- for new debt issued on or after
  - July 16, 2014 and before November 28, 2017 of longer than 90 days maturity
  - November 28, 2017 - of longer than 60 days maturity
- Directive 2 does not place any restrictions on equity in the listed companies

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## US Sectoral Sanctions (3)

CAATSA did **not** modify **Directive 3** (applies to the Russian defence sector)

- Directive 3 was issued on September 12, 2014, prohibits US Persons from engaging in
  - all transactions in, the provision of financing for, and other dealings in
  - new debt of longer than 30 days maturity for
  - the entity subject to Directive 3, i.e. Rostec
- No restrictions have been placed on the equity of a party subject to Directive 3

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## US Sectoral Sanctions (4)

CAATSA modified **Directive 4** (applies to the Russian energy sector)

- Amendments introduced by CAATSA will come into force within 90 days (in November 2017)
- Directive 4 imposes restrictions on Gazprom, Gazprom Neft, Lukoil, Rosneft and Surgutneftegas, or their property or interests in property, in the projects where the mentioned designated person has a controlling interest or a substantial non-controlling ownership interest of 33% or more
  - prohibits US Persons from directly or indirectly providing, exporting, or re-exporting any US or non-US goods, services (except financial services), or technology
  - in support of exploration or production for deepwater (defined as greater than 500 feet), Arctic offshore, or shale projects in Russia
  - that have the potential to produce oil, or oil *and* gas
  - except for the potential to produce *only* gas

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## US Sectoral Sanctions (5)

- New amendments to Directive 4 aim to apply the restriction on supplies of goods and services to oil exploration and production to any deep water, Arctic offshore or shale project for the exploration or production of oil
  - expanding the scope of Directive 4 to cover projects with the potential to produce oil outside of Russia (in addition to inside Russia)
  - but narrowing it by excluding projects where a designated person holds, directly or indirectly, less than 33% ownership interest
- Note: the types of services targeted by Directive 4 include drilling services, geophysical services, geological services, logistical services, management services, modelling capabilities, and mapping technologies. Financial services such as clearing transactions or providing insurance for the above activities are not covered by Directive 4.

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## US Sanctions on Crimea

## Unwinding Crimean Operations

**Executive Order 13685** issued by the US President on December 19, 2014 established serious restrictions on doing business in Crimea that must be observed by all US persons

The transition period provided by the US authorities for winding down business expired on February 1, 2015 (OFAC General License No. 5)

What is not prohibited by the sanctions (OFAC General Licenses):

- License No. 4 - agricultural products and specifically listed medical supplies (i.e., medicinal preparations and medical devices and replacement parts thereof on a “part-for-part” basis)
- Licenses No. 6 and 7 – non-commercial transfers of funds to or from Crimea, including operation of an account in US banks (individuals only)
- License No. 8 – non-commercial transactions on receipt and transmission of (i) telecommunications and (ii) mail and express couriers

Note: the above listed operations cannot be conducted with respect to or in cooperation with Specially Designated Nationals (SDN's)

## Handling Crimea Operations Going Forward

E.O. 13685 prohibits any acts aimed at evading or avoiding the sanctions

Doing business in Crimea by subsidiaries of US entities is not prohibited per se, but is subject to **substantial limitations** on:

- supplies to Crimea of products of US origin
- provision of services by US companies
- operations of subsidiaries with restricted “elements” (for example, managers are US nationals, or decisions should be approved by board of directors represented by US nationals, etc.)

Examples of non-restricted business activities (OFAC General Licenses No. 4, 6, 7 and 8):

- unrestricted medical supplies or services
- replacement of US-made goods with goods of other origin
- **Notes:** “*De Minimis*” rule for US content must be observed (25% and 10% for goods subject to EAR99)
- the origin of goods from other countries should be reconsidered

Note: Review every Crimea transaction on a case-by-case basis

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## Summary of US Restrictions on Crimea

- Executive Order 13685 of December 19, 2014
- Prohibits:
  - Imports into the US of goods, services or technology from Crimea;
  - Exports, reexports sale or supply from the US or by a US person of any goods, services or technology to Crimea;
  - New investment in Crimea; and
  - Any approval, financing, facilitation or guarantee by a US person of a transaction by a foreign person where the transaction would be prohibited if performed by a US person;
- Blocking provision for person determined to:
  - Operate in Crimea;
  - Be a leader of an entity operating in Crimea;
  - Be owned or controlled by or to have acted for or on behalf of a blocked person
  - Have materially assisted, sponsored, or provided financial, material or technological support for goods or services to or in support of a blocked person; and
- Travel ban for blocked persons

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