Chapter
08

Trade restrictions and sanctions: Perspective of European industry in a multi-layered compliance scenario

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1. INTRODUCTION

In the debate on the implementation of embargoes and sanctions in case of violation, this Chapter is aimed at highlighting the perspective of European industries in particular in the field of aerospace and defence. Whenever confronted with United States-origin items or technical information, contractors dealing with items classified as dual-use or military operate in a "multi-layered" compliance scenario. Several sets of regulations require compliance with embargoes and restrictions at different levels, and non-compliance may entail different sanctioning measures. Through analysis of a "corporate perspective" this chapter wants to focus on the lessons learned for the businesses and the importance of a robust internal compliance programme.

2. EMBARGOES, SANCTIONS AND PENALTIES IN CASE OF VIOLATIONS

Export controls are intimately linked to the ability of governments to guarantee their national security and the attainment of foreign policy objectives. In this sense, implementing effective enforcing measures is key to ensure their implementation. These may target governments of third countries, but also non-state enti-

ties and individuals and specific "blacklisted" persons, firms and organizations. While some are more widely used than others, the general goal is always to force a change in behavior.

The enactment of arms embargoes, the decision to restrict trade with certain countries through import and export bans, but also specific entities, may affect whole countries'economy but also target specific companies or even individuals, like in the case of asset freezes and travel bans. If this happens mainly in instances where a close circle of people is able to influence foreign policy decisions, such measures are also often adopted to react to specific export control violations.

When a natural or legal person commits a violation, the authority/ies responsible for enforcement may hand out sanctions ranging from administrative penalties to criminal charges, up to life imprisonment, and even death penalty, as is the case in Malaysia since the Strategic Trade Act of 2010.[391]

More frequently, suspension of export licences is a tool used by licencing authorities whenever a change in the political situation of the country of final destination justifies it, but may also be utilized to sanction specific abuses. A policy of licence denial or "debarment" for exporters that committed violations may also be a convenient corrective measure, often enforced through the adoption of "black lists".

In spite of a varied toolbox, striking the right balance to effective, proportional and dissuasive sanctions may be challenging. "Smart" sanctions remain a key question as their deployment is rarely precise enough to affect only the targeted entity or economy, without impact on the rest of the related supply chain.

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391 David Albright, Paul Brannam, and Christina Walrond, "Malaysia finally adopts national export controls", Institute for science and international security (ISIS report April 2010). www.isis-online.org

3. INTEGRATING A "MULTI-LAYERED" COMPLIANCE SCENARIO

In times when sanctions and export controls are forcing themselves onto the corporate compliance agenda as never before, extra-territoriality of US regulations adds to the complexity of the task by requiring multiple requirements to be conciliated and integrated in each company's internal compliance programme.

In a domain that is by definition very relevant to national security interests, differences exist in the European Union in the interpretation, administration and enforcement at member states' level. On the other hand, when dealing with US-origin goods, US regulations are enforced extra-territorially: as a result of theories of "extended jurisdiction", the United States *de facto* attribute nationality to items originated in the country. As a consequence, whenever these items are listed in specific "control lists" and correspond to the criteria for control, US regulations will apply on the items, wherever located, and to their re-transfer or re-export to third party recipients within the same country or abroad. In this context, American export controls represent an additional burden for European companies.[392]

Therefore, a company established in the European Union member state will need to take into account national and/or European regulations applicable to their products, embargoes and sanctions adopted by the UN Security Council, but also the laws of the respective countries of suppliers and subcontractors and eventually the laws of the country of the customer.

Each of these can have an impact on supply chain coordination, and ultimately influence the company's ability to respect contractual obligations.

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392 Rosa Rosanelli, "US Export Control Regulations Explained to the European Exporter: A Handbook", University of Liège, January 2014. Available: http://local.droit.ulg.ac.be/jcms/service/index.php?serv=49&cat=3

4. EXPORT CONTROLS: A EUROPEAN CORPORATE PERSPECTIVE

Although not legally binding in the European Union, from the point of view of exporters, compliance with US regulations is inevitable.

Corporate interests need to preserve their businesses, avoid sanctions, protect their reputation, and guarantee their ability to maintain the robustness of their global supply chain and be able to participate to public procurement tenders.

In the most recent years, European economic operators have witnessed that US export control violations can lead to severe fines and criminal or civil sanctions, but also to loss of market shares, ban from receiving any US items, and important reputational damage both for companies and senior executives.

In 2012, French aeronautics spare parts company Aerotechnics France was accused to have illegally exported US military items to Iran: the names of the company and of its CEO were added to the US Entity List. When a new company was created from it, with a new managerial board, the Commerce Department evidenced a direct nexus with the previous company and listed the new firm and CEO as well. Only months later, the names were finally taken off the list.[393]

Not always sanctions are rooted in willful misconduct: sometimes the complexity of regulations may entail violations for lack of knowledge or understanding, or lack of competent resources to be full-time responsible for export compliance. The broadness of certain regulations, which in general do not require knowledge, sometimes imposes an extremely challenging task on exporters.

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393 See Department of Commerce,Bureau of Industry and Security, Addition of Certain Persons to the Entity List and Implementation of the Entity List Annual Review Changes, Federal Register Volume 77, no. 25, April 2012.

On 25 February 2016, the Office of Foreign Assets Control ("OFAC") announced that Halliburton Atlantic Limited had settled charges in connection with unlicenced exports to the joint venture that was granted the concession to the Cabinda Onshore South Block in Angola.[394] While the US Department of Treasury does not enforce sanctions on Angola, the issue was that Unión Cuba-Petróleo (CUPET) owns a 5% interest in this joint venture.

The Cuban Assets Control regulations are different from other OFAC provisions, in that they prohibit any dealings in property in which any Cuban "has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect". In this sense, the transfers would have been illegal even if CUPET had a 0,0001% interest in an Angolan company that had a 0,0001% interest because the regulation covers "any interest … direct or indirect".[395]

In the case of Halliburton and OFAC above, it appears evident that while non compliance with the regulations entails objective liability, the risk for businesses is very high as it is extremely challenging to confirm that there is no Cuban interest, past or present, in any foreign customer before exporting goods or services to that customer. For US foreign affiliates in the European Union, there may be additional challenges: under Article 5 of Council regulation 2271/96, there is clearly a prohibition to comply with extraterritorial laws such as the US National Defence Authorisation Act, the Cuban Liberty and Democratic Solidarity Act, and the US Iran and Libya Sanctions Act. Complying with those extraterritorial requirements may entail, in other words, a violation of EU regulations, directly applicable in each EU Member State and on the same level as national law.

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394 Office of Foreign Assets Control (OFAC), Enforcement Information for February 25, 2016,https://www.treasury.gov/resourcecenter/sanctions/CivPen/Documents/20160225_Halliburton.pdf.

395 C. Burns, "Haliburton Fined for Exports to Angolan Entity with a 5 Percent Cuban Owner", February 26, 2016, http://www.exportlawblog.com.

On 22 February 2016, OFAC announced that CGGVeritas S.A, a French company, and its US and Venezuelan affiliates had agreed to settle allegations related to exports of US-origin parts and equipment for oil and gas exploration and seismic surveys to two vessels in Cuban waters, in violation of the US embargo on Cuba, in spite of the potential conflict between the US and EU Regulation.[396]

When passing from theory to practice of export controls, it is clear that an element to be taken into account is the intrinsic political and technological nature of these regulations and the need of industries to have clear and discernible guidance. Striking the right balance to "smart" restrictions means identifying clear guidance and adapting requirements for exports to the different types of products, their specific end user and end-use, and resist to the temptation to "stick a political label" on a country or a category of products.

A more recent example in the European debate concerned the development of a so-called "human security" approach, taking into consideration the links between security and human rights. While the categories of goods that are subject to authorisation are by definition "sensitive" or potentially "dangerous", the general political principle of taking into account potential consequences of a transfer on international security and human rights violations should be already integrated in the general considerations of each licencing authority. However, making it a criterion in itself would be very risky, because of its political and generic non-specific nature and consequent confusion for the businesses to determine what constitutes a violation but also because this could make it very easy to be manipulated.

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396 Office of Foreign Assets Control, Enforcement Information for February 22, 2016, https://www.treasury.gov/resourcecenter/sanctions/CivPen/Documents/20160222_CGG.pdf.

5. CONCLUSION

It has been already mentioned how critical it is for European businesses to integrate multi-layered compliance requirements in their internal compliance schemes.

If extra-territorial enforcement of US export control regulations on the territory of other States has been subject to debate in the European Union since the early 1980s, and compliance with certain laws has been explicitly prohibited by the EU, implementation of US export control regulations is nevertheless a requirement in any internal compliance programme of companies that although legally incorporated in Europe, procure items, receive technical data and cooperate with international partners on programs including US technology or that are by-products of US technologies.

In a context where responsibility for violation is objective, a key role to prevent sanctions is played by the establishment of internal compliance programmes ("ICPs"), which allow providing evidence that best efforts to prevent violations from occurring have been put in place and that the firm is engaged in ensuring compliance as a priority. In this sense, Management commitment is extremely relevant: management needs to lead by example and can ultimately take the essential decisions, such as committing to sufficient resources or encourage personnel to report anomalies without fear of retaliation.

An effective ICP entails standardizing operational written compliance policies and procedures, creating safeguards and engage personnel making it accountable. Because of the complexity of regulations and the difficulty to explain extraterritorial regulations, training and awareness-raising are very important, and need to be accompanied by continuous risk assessment and lean management.

Part 02.

Implementation of penalties and sanctions by States