Growing divergences between US and EU sanctions: the impact of a fast-moving sanctions landscape on compliance efforts

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Changes in the geopolitical landscape have created new divergences between US and EU sanctions and it is increasingly challenging for businesses operating globally to design their compliance programmes in a way that preserves business opportunities.

Russia and Iran have come under the spotlight as prime examples of growing divergences between US and EU sanctions. In respect of Russia, the US extended the scope of its restrictive measures, through the Countering American Adversaries Through Sanctions Act ('CAATSA') in August 2017 and the 'oligarch designations' in April 2018. By contrast, EU sanctions against Russia have not been substantially amended since the end of 2014, and certain Member States, such as Italy, are reportedly pushing for such sanctions to be scrapped altogether. As the UK has been the chief proponent of EU sanctions against Russia, the EU position could be open to change post-Brexit.

In respect of Iran, and following the US' decision to withdraw from the Joint Comprehensive Plan of Action ('JCPOA'), sanctions were progressively re-imposed on 6 August and 4 November 2018. Conversely, the EU reiterated its commitment to the JCPOA and, in an effort to tackle the extra-territorial effects of the reinstated US sanctions, the so-called 'Blocking Statute' was updated effective 7 August 2018.

Divergence in the scope of applicable sanctions and designations, or their interpretation, is not a novel issue. However, the growing rift between US and EU sanctions, and the potential for further divergences, create additional compliance hurdles.

Traditionally, economic operators have sought to limit sanctions risks to the furthest extent possible by designing comprehensive programmes which aim at compliance with the most restrictive sanctions regimes worldwide. Sanctions policies and contractual clauses are routinely drafted by reference to the sanctions imposed by both the US and the EU. For example, in the insurance sector, the Lloyds' LMA 3100 clause, one of the most common sanctions clauses, provides for compliance with Australian, EU, UK and US trade or economic sanctions laws.

In our globalised world, businesses can be subject to the sanctions laws of numerous jurisdictions. A compliance policy and programme based on the most stringent applicable requirements ('catch-all compliance programme'), should therefore – at least theoretically – allow multinational operators to limit their risks on each market.

Catch-all compliance programmes facilitate, to a certain extent, the burden of compliance for businesses. However, divergences in sanctions laws globally significantly complicate the setting-up, implementation and monitoring of such programmes. Businesses must navigate complex sanctions regimes, understand their similarities and divergences and ensure that the programme remains at all times accurate and up-to-date.

In that respect, Brexit will likely add a further layer of complexity, as economic operators will need to delve into the intricacies of another independent sanctions regime.

Arguably, a catch-all compliance programme cannot deliver best-in-class results. From a legal perspective, it may not address the somewhat novel issue of conflicting sanctions regimes. Economic operators may not always be able to act in compliance with both US and EU laws. In such situations, economic operators would be caught between a rock and a hard place and forced to proceed with a difficult balance of interests.

From a business perspective, the conservative nature of a catch-all compliance model, while legitimate, means that transactions that would in fact be permitted based on applicable laws are not always carried out.

A catch-all compliance programme creates risks of over-shooting. To preserve business interests while managing the ever-growing complexity of divergent sanctions laws, businesses, in their compliance efforts, should consider the sanctions laws that are actually applicable to a transaction, rather than base their assessment on the most restrictive ones. Much like sanctions evolved, global compliance programmes should evolve into targeted compliance programmes.

But, in a globalised world, is it really feasible to move toward targeted compliance programmes? Carrying legitimate transactions may be impeded by third-party considerations. By way of example, financiers and insurers may be subject to different sanctions laws and block a transaction that is legitimate for the other parties, while IT platforms may restrict access to their services in certain sanctioned locations. Businesses should also consider the possible reputational damage of carrying legitimate transactions, that are however prohibited under another jurisdiction's sanctions laws.

Compliance programmes need to consider the collateral impacts of 'someone else's sanctions laws' and the perception the general public may have of their activities. Divergences in sanctions laws multiply these collateral impacts and, thereby, make compliance a difficult balancing act. ■




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