

# CLIENT UPDATE

## THE EFFECT OF THE CRISIS IN UKRAINE ON RUSSIAN DEALS

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What a ten days it has been! In Kiev, growing protests, snipers and a rapid change in government resulted in unrest in various parts of Ukraine, particularly in Crimea and other Eastern cities; a response from Russia; and a wide range of reprisals from governments outside the region, including the imposition of targeted sanctions by the US and EU. The situation could get more complicated, including the prospect of Crimea seceding from Ukraine as soon as next week.

This update does not summarize or judge the causes of the most recent events. However, our clients, friends and colleagues are calling with a wide range of legal questions about the effects on deals, operations, pending lawsuits, etc. Here is a sampling of issues that have come up in the last two weeks. Of course, we expect the answers below to evolve as the facts and law change. The situation is likely to evolve very quickly.

### WHAT IS THE SCOPE OF THE CURRENT SANCTIONS IMPOSED?

The current US and EU (excluding the UK) sanctions are described in our recent client memo on the topic, "[United States and European Union Adopt Ukraine-Related Sanctions](#)". Canada and other countries have implemented similar restrictions, which are beyond the scope of this client update.

In the US, President Barack Obama signed an Executive Order dated March 6, 2014, that authorizes the US Treasury Secretary to "block" the property of any person he determines has: undermined democratic processes or institutions in Ukraine; threatened the peace,

security, stability, sovereignty or territorial integrity of Ukraine; or engaged in certain other related activities. To date, the Treasury Secretary has not yet designated any individuals or entities under the Executive Order.

The European Union has meanwhile imposed an asset freeze on the assets of 18 individuals associated with the former Ukrainian government. The asset freeze took effect on March 6, 2014. The targeted individuals include former Ukrainian president Viktor Yanukovich, former Prime Minister Mykola Azarov and 16 others suspected of misusing Ukrainian state funds or violating human rights.

### **HOW MAY THE SCOPE OF SANCTIONS CHANGE?**

The scope of sanctions may also become broader. For example, US sanctions could be targeted to a particular industry or type of transaction, but the worst case is a complete trade embargo. This could take the form of blocking the property of all of a country's nationals (as the US has done with Cuba) or prohibiting all transactions with someone located in the country (as the US has done with Iran). This seems unlikely in the case of Russia.

Further still, with respect to Iran, the US has taken the additional step of imposing "secondary" sanctions — up to and including blocking of property — on companies in other countries that engage in transactions with designated Iranian entities or significant transactions with Iran's petroleum, shipping and other sectors and on their corporate officers.

The EU could also additionally impose sanctions targeted to a particular industry or type of transaction, such as, for example, banking or insurance, or trade in particular products. A complete trade embargo is very unlikely, as are US-style secondary sanctions.

The Council of the EU has also said that it will meet on Monday, March 17 to decide whether to impose an asset freeze on certain Russian individuals and entities.

### **THE CURRENT SANCTIONS PLACE RESTRICTIONS ON "BLOCKED PERSONS." IF AN INDIVIDUAL OR ENTITY WITH WHOM I AM WORKING IS OR BECOMES BLOCKED, WHAT IS PROHIBITED?**

The US sanctions prevent the blocked person from engaging in any transaction directly or indirectly with a US person or anyone in the US. That includes imports, exports (including re-exports of US-origin goods), services, banking transactions and any other kind of transaction. As a practical matter, the blocked person will not be able to engage in US-

dollar denominated transfers or large US-dollar foreign exchange transactions, because the banking system routes those transactions through correspondent banks in the US, which will block the funds.

The EU asset freeze means that EU persons are prohibited from dealing in or making funds or economic resources available to the listed individuals or entities. EU asset freezes are similar in effect to US blocking orders.

**IF SANCTIONS ARE IMPOSED ON A COMPANY, WHAT INDIVIDUALS ARE THEY LIKELY TO AFFECT?**

Often, when the US blocks a company’s property, it will also block the property of the company’s owners, principal executives and managers overseeing the activity that caused the company to be sanctioned. In that case, those individuals will be subject to all of the above restrictions. They also will be denied entry into the US. It is unlikely that the US would block the company’s lower-level employees.

Where the EU blocks a company, it will typically do so because it is controlled by an individual of concern, who will also typically be blocked. Other employees or shareholders of the company are unlikely to be subjected to additional restrictions, unless there are specific concerns in respect of them.

**IF SANCTIONS ARE IMPOSED ON A COMPANY, WILL THEY APPLY TO TRANSACTIONS WITH AFFILIATES? WHAT ABOUT JOINT VENTURES TO WHICH THE BLOCKED PERSON IS A PARTY?**

If property of a company or individual is blocked, then property of any entity owned 50% or more by that company or individual is also automatically blocked. And of course, the US can always choose to block the subsidiaries’ property specifically.

EU sanctions do not automatically affect affiliates. However, transactions or structures designed to use affiliates to bypass sanctions may contravene EU (and US) prohibitions on circumventing sanctions or facilitating their contravention.

**IF MY COMPANY HAS SECURITIES LISTED IN THE SANCTIONING JURISDICTION, MUST WE COMPLY WITH THE SANCTIONS WORLDWIDE?**

The listing of a non-US company’s securities in the US does not trigger an obligation to comply with US sanctions laws. However, a non-US company must comply with US

sanctions laws in its US operations. Companies organized under the law of a US jurisdiction must comply with US sanctions laws anywhere in the world.

The answer is also “no” under EU law, unless the company is registered in an EU country. However, all activities or businesses that take place (in whole or in part) within the territory of the EU will be subject to EU sanctions.

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In addition to these questions, a myriad of other more specific sanctions issues have come up, as well as issues related to other legal areas. Some of these are enumerated below. Of course, we are prepared to discuss any of the following and similar matters, depending on the circumstances of the deal.

- Will there be a grace period for performance of existing contracts with a sanctioned company or individual?
- I hold listed securities of a company that may become sanctioned. If it does, must I divest? Am I permitted to sell if I choose to?
- May a blocked person litigate or arbitrate in a sanctioning jurisdiction?
- If the borrower under a USD loan becomes a blocked person, is it possible for the borrower to service its regular payments of interest and principal?
- If my contract counterparty is sanctioned as a blocked party, may I assert a defense of “illegality” for failing to perform? Are there any other consequences for me under the contract or otherwise? Does the choice of law for a contract affect sanctions implications?
- What if the contract has multiple counterparties, some of whom are blocked and some of whom are not?
- Russia has mentioned imposing economic counter-measures, including confiscating property of certain foreign companies. What kinds of claims can I make in the event of such expropriation? Can I do anything to improve my case now? Can this risk be insured?
- Has a “Material Adverse Change” occurred under my share purchase agreement or credit agreement?
- What additional disclosure is required in my listing prospectus/offering circular?

- I've structured my operations in Ukraine – including in Crimea – after careful tax planning. If Crimea joins Russia, what happens to the tax status of my Crimean operations?
- What types of contingency plans should I be making for employees?

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Please do not hesitate to contact us with any questions.

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