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Sanctions Challenges in the Global Development Sector

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BAKER & MCKENZIE

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Agenda

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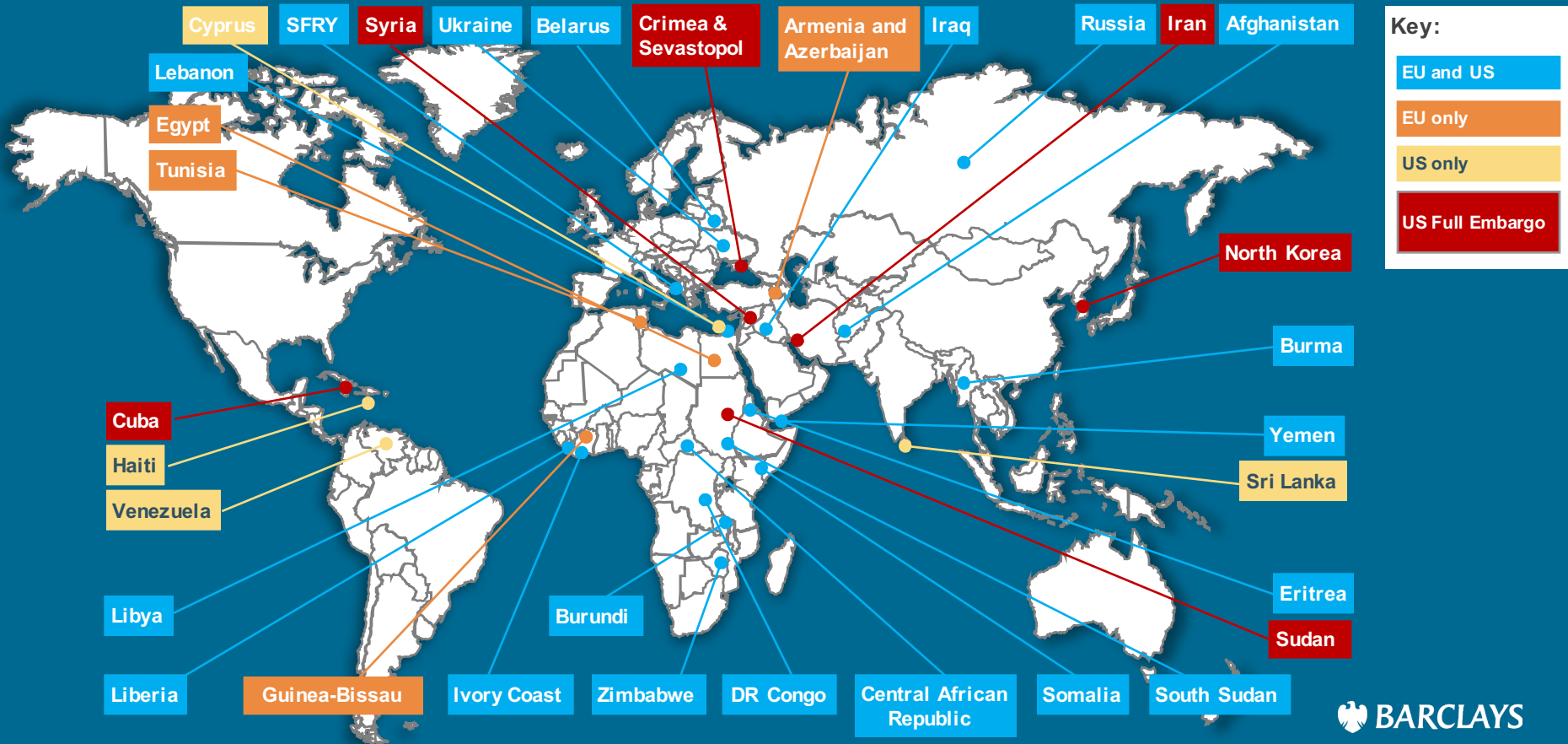
Sanctions Overview and Scope

Types of Sanctions Measures

- **Restricted Person (“List-based”) Programmes**
- **Product (Export) Control Programmes**
- **Country-wide (“Country-based”) Programmes**

**Many banks, companies, international organisations and non-profits
are subject to both US and EU jurisdiction**

EU and US Restrictive Measures



Jurisdictional Scope of EU Sanctions

Apply to:

Entities

- **Non-profit registered in an EU Member State and its EU and non-EU branches**
- **Non-profit registered outside the EU in respect of any business conducted in the EU**

Individuals

- **Trustees, directors, officers, employees, agents, etc. located in the EU (irrespective of nationality)**
- **Trustees, directors, officers, employees, agents, etc. that are nationals of an EU Member State (even if located outside the EU)**

Jurisdictional Scope of US Sanctions

Apply to:

US Persons

- US companies and their non-US branches
- US citizens and permanent residents (“Green Card” holders) wherever located
- Any person on US soil

Other Persons

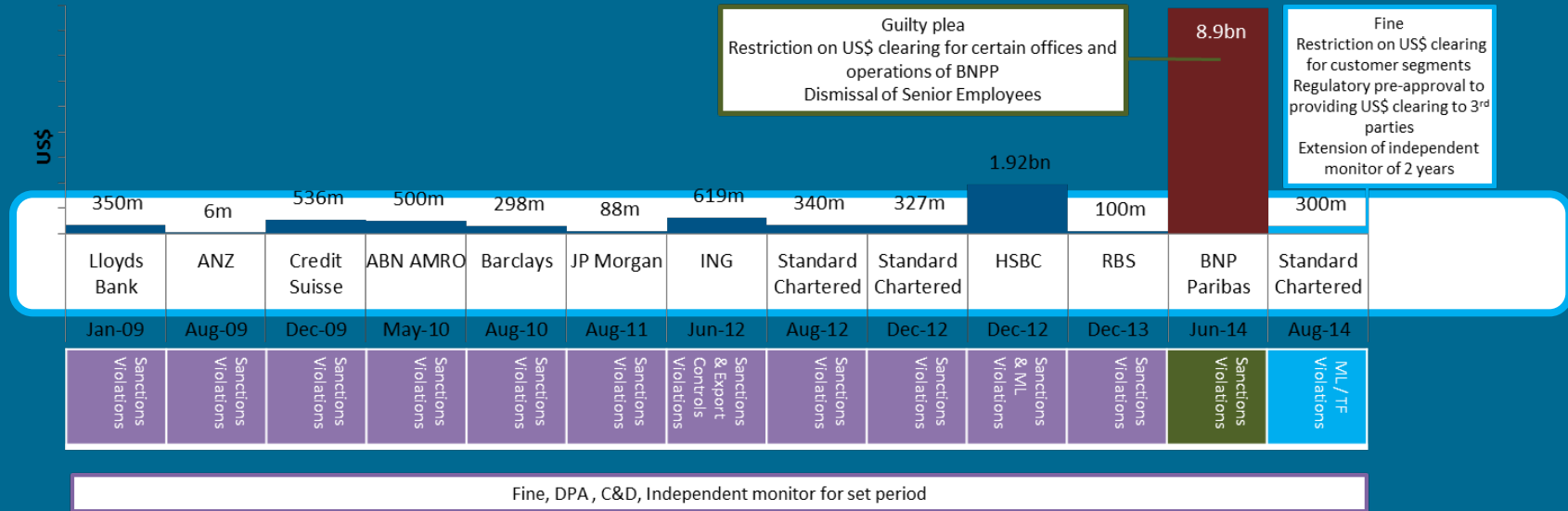
- Non-US entities owned or controlled by US Persons (e.g., foreign subs) for Cuba & Iran
- Non-US Persons in some cases, e.g. where they cause violations by US Persons

US Items

- Goods, software, or technology that are US origin or contain certain degree of “controlled” US content (more of an export control than a sanction)

Regulatory Environment – Fines

Enforcement actions used to deter conduct with increased fines and penalties covering both Sanctions and Money Laundering related failures.



Designated Person Programmes

Restricted Person Programmes

Who: Listed on Sanctions Lists

- Sanctions lists set out EU Designated Parties and US Specially Designated Nationals (“SDNs”) (together “DPs”)
- DPs can be a wide range of parties, anywhere in the world (e.g., companies, banks, public bodies, individuals and even charities)

What: Prohibition on Dealing

- Includes providing or receiving funds, goods, services or anything else of value
- Covers direct and indirect dealings (e.g. through third party)
- Obligation to freeze (or block) assets

Defences

- Knowledge defence under EU laws if “*did not know, and had no reasonable cause to suspect*” violation
- US requires coverage by licences or exemptions

Risk of Indirect Dealings

- DP relationship to Y could include:
 - Shareholder (sole/majority/minority) / Subsidiary
 - Director
 - Contractor / sub-contractor
 - Spouse or other family relationship



Risk of Indirect Dealings – Case Study

- Aid4Children UK proposes to work with Cairo's Child, a charity set up in Egypt to help orphaned and vulnerable children in the region.
- Cairo's Child is majority owned by Egypt Aid, which is in turn controlled by an individual DP.
- Providing funds or economic resources to Cairo's Child may therefore be considered to be indirectly making funds or economic resources available to or for the benefit of a DP.



Mitigating the Risk of Dealings with DPs

**Documented standardised screening process
(including allocation of responsibilities)**

Screen information in your possession against publicly available lists and information

Clearly document analysis

Risk-based approach, such as enhanced diligence, for higher risk territories

Due diligence on parents, directors and other associated third parties (e.g. donors, partners, beneficiaries, banks)

Compliance and Screening in Non-Profit Sector

Particular Risks for Non-Profits

Non-Profits vulnerable to financial crime abuse due to:

- High levels of trust and confidence, goodwill of employees/volunteers
- Work in high-risk countries (such as Syria, Iran, and Zimbabwe) where corruption is often high, and terrorists or other criminals are known to operate
- Funds received from anonymous donors – risk of receiving funds from sanctioned individual (DP)
- Extended logistical networks – need to collect, retain, transfer and deliver resources related to operational activity
- Large transitory workforces
- Cash income/fluctuating income levels
- Complexity and increased risks of working overseas

“The Commission sees terrorist abuse as one of the greatest risks facing the charitable sector today.”

William Shawcross, Charity Commission

Due Diligence Processes (cont.)

Range of practical steps to ensure the provenance of funds; know the people and organisations the charity works with; and identify and manage associated risks

Know Your Donors

- Identify and verify
- Understand source of funds

Know Your Beneficiaries

- Who Individuals are
- Understand use of funds

Have clear policies and procedures

Look out for suspicious or unusual circumstances

Record diligence processes and reasons for decisions

Know Your Partners

- Identify and verify
- Understand business and ability to deliver services

Know Your Donors

Identify and verify the source of donations

Screen available information on donors against sanctions lists

Document procedures for staff to recognize suspicious circumstances

Suspicious circumstances surrounding donations, include unusually large sums, increased frequency, or difficulty in tracing the donor

If there are any doubts, report concerns to the Charity Commission and consider whether to refuse the donation

Know Your Donors – Case Study

An unfamiliar donor from an organisation based in Turkey wishes to donate a one-off payment £1,500,000 to be used in Syria. You have never dealt with this donor before and are unfamiliar with their organisation and its work.

The donor has given the funds on the condition that your charity use the funds for the benefit of a specific organisation in Syria and that particular individuals assist with the work of the charity. The donor has also requested that unspent funds are returned to it in Euros.

What red flags can you identify in this situation?

Know Your Partners

**Identify and verify potential partners: What is the partner's business?
What services/goods will they provide you?**

Screen partners' names and (identifiable) shareholders and directors against sanctions lists

Be alert to suspicious activities, conduct, or requests

Risks are greater where:

- **The project proposal is vague;**
- **The partner's business structure is complex making it difficult to identify the beneficial owner;**
- **The project proposal involves delegating work to other unknown partners;**
- **It is difficult to contact the partner; or**
- **The project involves unusual payment mechanisms, requests for cash, or money to be paid into an account that is not in the name of the partner.**

Know Your Partners – Case Study

Your charity is considering partnering with a foundation based in Sudan, with a view to distributing aid to victims of conflict in the region.

As part of the project, you will transfer funds to the partner, who will use the funds to distribute aid on the ground. You have not worked with the partner foundation before and the project proposal is currently vague and lacking technical and financial details. The foundation has also suggested delegating a portion of the work to a newly formed organisation in Sudan to act as local representatives for the project.

What should you do before commencing a partnership with the foundation?

Know Your Beneficiaries

Due diligence and screening will depend on volume of beneficiaries and nature of the benefit

Ensure funds, goods, or services are not made available for benefit of DPs

Monitor the use of funds to ensure that they reach the intended destination and that they are not used for improper purposes

Non-profits should report any suspicious circumstances to the Charities Commission and, where necessary, apply for a licence if dealing with DPs

Know Your Beneficiaries – Case Study

Your charity has set up an aid distribution centre in Iran whereby it will provide food, clothing, and financial assistance to vulnerable women from a number of towns.

The number of potential beneficiaries is relatively high and a beneficiary list has been provided to your charity. You have not been provided with identity documents for the beneficiaries. The payments eventually requested turn out to be significantly higher than originally budgeted.

What should you do to ensure that the donations to the potential beneficiaries are not abused?

Country-Wide Programmes and Exemptions / Licences Relevant for Non-Profits

US Comprehensive Sanctions on 6 Territories



US Comprehensive Sanctions – Overview

US Persons prohibited from engaging in virtually any dealings involving sanctioned country (unless exempt/licensed)

“Dealings” includes goods, services, and payments either directly or indirectly

Most banks will not be able to clear any payments (unless transaction exempt/licensed) – e.g. if US Persons, systems, dollars, etc. involved

All persons (even non-US Persons) prohibited from supplying any “controlled” US-origin items or foreign-made items with more than *de minimis* amount of “controlled” US content

De minimis threshold and definition of “controlled” content varies among countries

Exports/reexports may require authorisation from OFAC, BIS, or both

US General Licences

Exceptions to prohibitions in sanctions regulations

- **Allow any transaction that meets the specific conditions**
- **Usually published as part of the regulations of a particular sanctions program**
- **Sometimes published as ‘free standing’ licences in the Federal Register and/or on OFAC’s website**
- **May be subject to reporting obligations and other conditions or limitations (e.g. copy of contract for UN business)**

US General Licences – Example 1

- **NGO general licences in Iran, Syria, Sudan & North Korea authorise e.g.**
 - **Humanitarian**
 - **Food/Agricultural Exports**
 - **Education**
 - **Human rights**
- **UN general licences in Iran, Sudan, Syria, & North Korea authorise UN employees, contractors, and grantees to conduct UN business**
- **Conditions / restrictions for above vary, e.g.**
 - **Funds transfer limits and reporting requirements for NGO activities in Iran**
 - **US Person recordkeeping requirements related to UN activities in Sudan**

US General Licences – Example 2

Agricultural commodities, medicine and medical devices

- **Restrictions differ across Cuba, Crimea, Iran, Syria and Sudan regimes**
- **Specific licensing policy applies for items not covered by general licence (e.g. certain foods, medicines or non-listed medical devices)**
- **Subject to financing restrictions for some countries, such as requiring:**
 - **Cash payment in advance**
 - **Financing by third-country banks**
 - **Letter of credit issued by non-sanctioned bank (must be initially advised, confirmed, etc. by a third-country bank before it is advised, confirmed, or dealt in by a US bank)**
 - **No direct payment or debit by US bank to account in sanctioned country**

US Exempt Transactions - Example

Exemptions: Statutory provisions that remove particular categories of transactions from the President's congressionally authorised powers for imposing sanctions

- **For example, Informational Materials**
 - **Generally no restrictions on export or import of information or informational materials**
 - **Informational materials include (but are not limited to) publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD-ROMs, artworks, and news wire feeds**
- **Does not include information “not fully created and in existence at the date of the transactions”**

US Sudan Sanctions – Overview

Application

Applicable to almost all dealings by US persons, including indirect provision of services

Most banks will not be able to clear any payments related to Sudan (unless transaction exempt/licensed) given extensive US connections within the banks – US Persons, systems, dollars, etc.

Exemptions

Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, & marginalized areas in/around Khartoum largely exempt from restrictions, subject to certain conditions

Transactions to/from/with South Sudan generally permitted (removed from sanctions July 2011)

Non-profit must confirm that funds are not transferred, or services provided, to, by, or through the Government of Sudan or a DP



Indirect Services of US Person– Case Study

- Aid4Children UK is conducting a project to provide medical services to children in non-exempt areas of Khartoum, Sudan.
- Aid4Children contracts with a consultant located in the U.S. to draft a program plan. The program plan will be used to design the program to provide medical services in non-exempt areas of Sudan.
- Accordingly, this could be viewed as the indirect provision of services by a US person to Sudan and must be permitted under special or general license.



US Sudan Sanctions – Exemptions/Licences (1)

- Exemption for import/export of pre-existing “information or informational materials”
- Exemption for “humanitarian donations” by US Persons of food, clothing, & medicine intended to relieve human suffering
- Exemption for transactions in Sudan for “journalistic activity” by persons regularly employed in such capacity by news-gathering organizations
- Exports:
 - All persons prohibited from supplying to Sudan non-EAR 99 US-origin goods or foreign-made goods containing more than 10% non-EAR99 US content
 - Export transactions may require authorisation from both OFAC & BIS



US Sudan Sanctions – Exemptions/Licences (2)

- **General licence for transactions for the conduct of official business of US Government and UN by employees, contractors, & grantees of US Government, UN, & UN agencies/programmes/funds**
 - **Contractors/grantees must provide copy of contract/grant to US Persons before US Persons engage in or facilitate transactions & US Persons must maintain records of transactions for 5 years**
 - **General licence for sales & exports/reexports of certain food only (not medicine/medical supplies), subject to conditions, e.g.:**
 - **Shipment within 12 months of the signing of the contract for export/reexport**
 - **No exports/reexports to military or law enforcement purchasers or importers**
 - **Case-by-case specific licences for excluded food & medicine/medical supplies**
 - **Subject to specific payment terms, e.g. cash in advance, open account**



US Sudan Sanctions – Exemptions/Licences (3)

§501.801 Registration of NGOs

- If specifically authorised in relevant sanctions regulations (e.g. Sudan), NGOs engaged in humanitarian or religious activities may apply for registration number from OFAC
- Registration numbers are issued on case-by-case basis and authorise certain otherwise prohibited transactions by or on behalf of the registered NGO, e.g. the exportation of goods, services, & funds for the purpose of relieving human suffering
- Authorised transactions for registered NGOs are either specified by the statement of licensing policy in the relevant sanctions regulations or by the OFAC letter issuing the registration number
- Registered NGOs conducting transactions authorised by their registrations should reference their registration number on all payments and funds transfers and on all related documentation, including purchasing, shipping, & financing documents



US Syria Sanctions – Exemptions/Licences (1)

- Various exemptions (inc. information, US Gov. official business, etc.)
- US Persons can give a charitable donation to US or third-country NGOs, but cannot make donations directly to Syria or entities in Syria (without a specific licence)
- General licence for NGOs providing services to Syria supporting not-for-profit activities (e.g., humanitarian, education, democracy building, preservation of cultural heritage sites, etc.)
- General licence for conduct of official UN business
 - Contractors/grantees must provide copy of contract/grant to US Persons prior to US Person facilitating/engaging in transactions



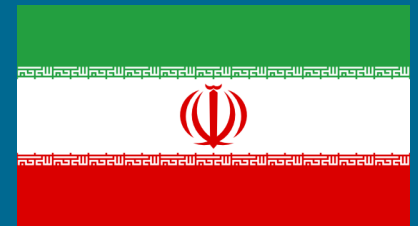
US Syria Sanctions – Exemptions/Licenses (2)

- EAR99 US-origin food or medicine may be exported to Syria without specific licence from OFAC or BIS
- Case-by-case BIS licensing treatment for medical devices (inc. EAR99) & “controlled” medicine for the benefit of the Syrian people
- OFAC general licence authorises exports/reexports of items subject to US jurisdiction authorised by BIS, services “ordinarily incident” to such exports/reexports, & installation/repair/replacement of such items
- Separate OFAC general licence authorises US Persons to provide services “ordinarily incident” to export/reexport to Syria of non-US origin food, medicine & medical devices that would be EAR99 if subject to US jurisdiction



US Iran Sanctions – Exemptions/Licences (1)

- Various exemptions (inc. information, US Gov. official business, humanitarian donations of food, clothing & medicine to relieve human suffering)
- General licence for “journalistic activities and establishment of news bureaus” in Iran for US news reporting organizations & their employees
- General licence for official activities of UN, World Bank, IMF, IAEA, ILO, WHO & their employees, contractors, & grantees
- General License E authorises NGOs to export/reexport services for certain non-profit activities designed to directly benefit the Iranian people
- Specific licences may be granted for other similar projects, e.g.:
 - Conferences/training to support human rights
 - Educational/cultural/sports exchange programs



US Iran Sanctions – Exemptions/Licences (2)

- Ag/Med General Licences authorise export/reexport of food (inc. vitamins), most EAR99 medicine, & EAR99 medical supplies on OFAC List of Medical Supplies
 - Broader than Syria (food/medicine only) and Sudan (food only) general licensing policies
- Ag/Med Specific Licences required for exports/reexports of EAR99 agricultural commodities other than food, certain medicine, & medical devices other than basic medical supplies
 - Not possible to obtain specific licence for non-EAR99 products (unlike for Syria and Sudan)
- Conditions on Ag/Med general & specific licences include:
 - No exports to Iranian military or law enforcement
 - Shipment of products within 12 months of entry into contract for sale
 - No SDN involvement
 - Specific payment terms



What Your Bank Needs to Know

- **Details of Specific Licence, General Licence or Exemption relied on?**
 - **If possible, copy of relevant licences and contracts.**
- **Who is responsible in the organisation for approval of FinCrime compliance?**
- **Ultimate use of funds? How are projects/beneficiaries selected?**
- **Identity of payer and payee and ultimate beneficiaries (directly or indirectly)?**
- **Route for funds to reach payee and names of banks involved? Currency of transactions?**
- **Who will deliver the programme being funded (NGO or local partner)?**
- **What due diligence have the parties conducted on beneficiaries, partners/suppliers?**
- **Any links to government or sanctioned persons?**

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