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COMPLIANCE OFFICER BULLETIN

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SANCTIONS AND EXPORT CONTROLS

1 Introduction

The past year has seen the continued importance and effect of arms embargoes and economic sanctions imposed by the European Union, the United States and the United Nations against a number of states. Tensions between Western powers and, in certain instances, the League of Arab States, on the one hand and Iran and Syria on the other remain high. Meanwhile, whilst the fall of the Gaddafi regime in Libya has resulted in the end of significant hostilities in the country, companies and investors should be aware that certain EU sanctions against the country remain in effect.

2 Overview of current sanctions regimes

2.1 Iran

On March 24, 2012, the new Council Regulation (EC) 267/2012 ("Regulation 267/2012") came into force, replacing Regulation 961/2010, and implementing the EU Council's Decision 2012/35/CFSP. Regulation 267/2012 serves as the main source of authority with respect to most of the European Union's restrictions and sanctions on trading with Iran. It is effective in all EU Member States and applies to all legal and natural persons subject to the jurisdiction of these Member States.

The subject matter of Regulation 267/2012 is broad and any company considering its application to its current or future trading and commercial activities with Iran will need to proceed cautiously. Regulation 267/2012 includes continuing prohibitions on the sale, transfer, brokering or financing of the following equipment, resources and technology:

CONTENTS

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- Military equipment and technology (falling under the Common Military List).
- Software designed for information security (see the list at Annex I of Regulation 267/2012).
- Nuclear reactors and related equipment, materials processing equipment, various electronics components, sensors and lasers, and navigational, avionic and propulsion systems (see the list at Annexes I and II of Regulation 267/2012).
- Equipment and technology used for the exploration, production, refining and/or liquefaction of oil or gas products (see the list at Annex VI of Regulation 267/2012). This prohibition is subject to certain exclusions at art.10 of the Regulation.
- Importing oil, petroleum products or petrochemicals into the European Union if such products originated or are exported from Iran (see the lists at Annexes IV and V of the Regulation 267/2012). This prohibition is subject to certain exclusions at art.12 of the Regulation.
- To sell or purchase a variety of metals and diamonds (see the lists at Annexes II and VII of Regulation 267/2012).
- Investing in or with, or providing financing to, any Iranian persons or entities where such persons or entities engage in manufacturing or other activities related to the above prohibitions.

As with earlier sanctions against Iran, under art. 23 of Regulation 267/2012, the assets and economic resources of persons specified in the Annexes of the Regulation shall be frozen. It is prohibited to deal with or make any funds or resources available to such persons. Separately, art.30 of Regulation 267/2012 imposes strict guidelines and possible limitations on the transfer of funds to and from an Iranian person, body or entity.

However, in certain circumstances, specific items or categories from the above list that would be presumed to be prohibited may be traded with Iranian entities if such items fall within certain specific exceptions (see, for example, Articles 6, 7, 10, 12 and 21 among others), or where such items are listed under Annex 3 of Regulation 267/2012 and an authorisation is obtained from the competent authority in the relevant EU Member State.

It is significant to note that the scope of prohibitions set out at art.11 of Regulation 267/2012 on the import, purchase, transport or financing of Iranian crude oil or petroleum products increased on July 1, 2012. Article 12 of this Regulation provides derogations from the prohibition at art.11, but these derogations expired on July 1, 2012, meaning that as from July 1, 2012:

- trade contracts entered into before January 23, 2012 are prohibited from execution; and
- the provision of third-party liability insurance and environmental liability insurance and reinsurance for Iranian crude oil and petroleum products is prohibited.

Subsequent amendments to the Regulation may not all be consolidated in the original Regulation itself and the contents of any amendment should therefore be confirmed by looking at the separate amending Regulations themselves.

2.2 Syria

In May 2011, shortly after the Syrian government's violent reprisals against civilian protests, the European Union enacted sanctions against Syria by imposing asset freezes on designated persons, entities and bodies, and restrictions on the provision of economic resources to such persons (the then Council Regulation (EC) 442/2011).

With the situation in Syria deteriorating, the European Union has significantly increased the scope of sanctions in place through the enactment of the new Council Regulation (EC) 36/2012 ("Regulation 36/2012") on January 19, 2012 (repealing and replacing Regulation 442/2011). On May 15, 2012, the European Union moved to freeze the assets of additional Syrian persons and entities by bringing into force Regulation 410/2012 which amends the list of persons and entities whose assets are frozen at Annex II of Regulation 36/2012.

The range of items, categories and activities prohibited in the new Regulation 36/2012 closely resembles the prohibitions placed on Iran. Restrictions and prohibitions have been placed on the sale, transfer, brokering or financing of, among others, the following kinds of equipment, resources and technology:

- Equipment that might be used for internal repression (see the list at Annex I of Regulation 36/2012), or that is listed in the Common Military List.
- Software designed for information security which might be used for the monitoring of telephone or internet communications (see the list at Annex V of Regulation 36/2012).
- Such equipment and technology used for the exploration, production, refining and/or liquefaction of oil or gas products (see the list at Annex VI of Regulation 36/2012). This prohibition is subject to certain exclusions at art.10 of the Regulation.
- Importing oil, petroleum products or petrochemicals into the European Union, if such products originated or are exported from Syria. This prohibition is subject to certain exclusions at art.7 of Regulation 36/2012.
- Investing in or with, or providing financing to, any Syrian persons or entities where such persons or entities engage in manufacturing or other activities related to the above prohibitions.
- Such equipment and technology (see Annex VII of Regulation 36/2012) for the construction or installation of new power plants for electricity production.
- Restrictions on the provision of financial services by credit and financial institutions to engage in activities with Syrian financial institutions or to provide insurance or reinsurance to private or public entities.

As noted with respect to the Iranian sanctions, it may be possible in certain circumstances for companies to obtain derogations from the effect of the sanctions from the competent authorities in their Member State or where Regulation 36/2012 provides an automatic derogation (e.g. where an agreement for prohibited goods was signed on a date excluded from the effect of the Regulation).

2.3 Libya

On October 23, 2011, following several months of intense fighting, the National Transitional Council ("NTC"), the opposition to Colonel Gaddafi's regime, declared the liberation of Libya and the official end of the war in Libya. The end of the war has not meant an end to all fighting and continuing danger in the country. Low-level insurgencies by former Gaddafi loyalists still continue to fight the NTC in remote parts of Libya.

Despite the end of major hostilities in Libya, companies should be aware that EU sanctions are still in force. The EU sanctions regime against Libya was principally regulated by Council Regulation (EC) 204/2011 ("Regulation 204/2011"). Regulation 204/2011 has been amended numerous times to modify the list of persons and entities affected by asset freezes. The following categories of prohibitions remain in effect at the present date:

- the direct or indirect trading or participation in the provision of equipment that may be used for internal repression or that is listed in the Common Military List (subject to derogations set out in Regulation 204/2011 that may be obtained from the competent authorities in the EU Member State);

- the assets of a number of significant Libyan persons and entities (at Annexes II and III) remain frozen (subject to possible derogations under Regulation 204/2011 that may be obtained from the competent authorities in the EU Member State that permit certain limited releases of frozen assets in specific circumstances).

Since the end of significant hostilities in Libya in the autumn of 2011, the European Union has moved to gradually ease the scope of sanctions against Libya. The most significant actions taken in this direction include:

- The removal on September 2, 2011 of the freeze placed on the assets of 28 Libyan entities including, most significantly, the main port authorities and a number of oil companies and banks (Regulation 872/2011).
- On December 22, 2011, Regulation 1360/2011 amended Regulation 204/2011 by removing the names of the Central Bank of Libya and the Libyan Arab Foreign Bank from the list of entities subject to asset freezes. However, it should be noted that the Libyan Investment Authority and the Libyan Africa Investment Portfolio remain on the list of Libyan institutions whose assets remain frozen.
- The amendments to Regulation 204/2011 to provide the opportunity to seek derogations from the competent authorities in the EU Member States of restrictions and prohibitions in the Regulation, in particular on the freeing of the frozen assets of Libyan persons and organisations in specific circumstances.

There is no expiry date on the current sanctions regimes. The sanctions regimes will continue to exist until the European Union repeals the Regulations. Persons and entities named in Annexes to the Regulations, and with whom trading activity is either limited or wholly prohibited, must be reviewed by the European Union at least every 12 months. The European Union's failure to review any such Annex does not mean that that Annex expires automatically, or that those persons or entities are automatically removed from the Annexes.

Sanctions regimes are rarely repealed in one single instance. They are usually amended gradually by the removal over time of prohibitions over categories of trade and the removal of persons and entities from Annexes of prohibited persons. It is therefore essential for companies continually to monitor changes in the UN, EU and US sanctions regimes to ensure their continued compliance.

3 Overview of export controls

3.1 The Export Control Organisation ("ECO")

The ECO is responsible for legislating, assessing and issuing export, trade transhipment and trade control licences for specific categories of "controlled" goods. These encompass a wide range of items including so-called dual-use goods, torture goods, radioactive sources, as well as military and other prohibited items. Whether a licence is required depends on various factors such as whether the items are listed on the UK Strategic Export Control Lists, subject to end-use controls or to sanctions.

If items exported from the United Kingdom are controlled, then a licence is needed to export legally. Exporters are responsible for complying with the law, understanding the regulations and keeping themselves informed.

All licence applications are risk assessed on a case-by-case basis, with regard to the Consolidated EU and National Arms Export Licensing Criteria. Licences are issued by the Secretary of State for Business, Innovation and Skills ("BIS"). There are several reasons why governments aim to control the export of goods, depending on the nature and destinations of the proposed export. The export of strategic goods and technology is the specific remit of the ECO. Exports are controlled for various reasons, including:

- concerns about internal repression, regional instability or other human rights violations;
- concerns about the development of weapons of mass destruction;
- foreign policy and international treaty commitments including as a result of the imposition of EU or UN trade sanctions or arms embargoes;
- the national and collective security of the United Kingdom and its allies.

Export controls are not unique to the United Kingdom. All countries should have some form of export control policy, legislation and enforcement mechanisms. The United Kingdom has a well-developed and coherent export control system based on EU and national legislation.

As set out in para.2.1 above, there are a wide range of sanctions in place on Iran and exporters will need to ensure that any business dealings that they engage in do not contravene these. At Box 1, we summarise the countries subject to the most significant EU and UK sanctions and export controls.

Box 1: Summary table of UK and EU export controls and sanctions ("sanctions table") 2012

Note: This sanctions table has been compiled against current UK and EU legislation governing export controls, restrictions, prohibitions and sanctions as of September 2012. Some of the provisions contained in the current legislation have been omitted. *Please consult the relevant legislation for further clarification.*

Sanctioned country	Exports	Arms embargo	Restrictions on admission	Investment services	Technical assistance	Financial assistance	Imports	Insurance	Asset freeze
Afghanistan	x	x	x		x				x
Belarus	x	x			x	x			x
Bosnia & Herzegovina			x						x
Burma	Susp*++	x	Susp*	Susp*	Susp*++	Susp*++	Susp*		Susp*+++
Croatia									x
Democratic Republic of Congo		x	x						x
Egypt									x
Eritrea		x	x		x	x			x
Iran	x	x	x	x	x	x	x	x	x
Iraq	x	x							x
Ivory Coast	x	x	x		x	x			x
Lebanon									x
Liberia		x	x		x	x	x		x
Libya	x	x	x		x	x	x		x
North Korea	x				x	x			x
Republic of Guinea	x	x	x		x	x			x
Somalia	x	x	x	x	x	x			x
Sudan	x				x	x			x
Syria	x	x	x		x	x	x		x
Tunisia									x
Yugoslavia & Serbia									x
Zimbabwe	x	x	x		x	x			x

* Suspended until April 30, 2013.

++ Except relating to the arms embargo and the embargo on equipment which might be used for used for internal repression.

+++ Some individuals have been removed from the list of persons subject to the asset freeze with effect from May 16, 2012—refer to legislation for details.

3.1.1 Standard Individual Export Licences

Ordinarily, an exporter must ascertain whether an export licence is required. This is achieved by making an application for a Standard Individual Export Licence ("SIEL"). A SIEL allows:

- the export of specific items as listed on the licence;
- specific quantities and value for each item; and
- specific end user and consignee.

The consignment does not all have to be shipped in a single shipment. The SIEL application may be made online via the SPIRE website. A SIEL is normally valid for two years. Whilst 70 per cent of SIEL applications are processed within 20 days, it is more likely that a SIEL application for a shipment to Iran will take a minimum of 40 days due to additional checks.

3.1.2 Open Individual Export Licences

Rather than obtain a SIEL, it may be possible to apply for and obtain an Open Individual Export Licence ("OIEL"). An OIEL is specific to an individual exporter and covers multiple shipments of specific product to specified destination(s) and/or, in some cases, specified consignees/end users. OIELs are a concessionary form of export licensing for exporters with a proven track record of applications for SIELs (i.e. an exporter will have made at least 20 relevant SIEL applications in the previous year), or have a good business case supporting the reasons for requiring an OIEL. If a licence is granted, an exporter will be required to secure a written undertaking from each consignee to whom it exports that the items are not intended for re-export to a destination which is not listed as permitted on the licence. This undertaking can be valid for a period of a year. The exporter will also be required to maintain records of documents concerning shipments under the OIEL for the duration specified on the licence, and make them available for inspection by BIS officials as required. An application for an OIEL will likely take four to six months. There is nothing to stop an exporter applying for a SIEL and an OIEL concurrently.

3.1.3 Temporary export licences

If a temporary export licence is granted (e.g. for demonstration or exhibition purposes), the exporter must return to the United Kingdom any goods exported under it within 12 months of their date of export. Monitoring arrangements are in place to verify compliance. If necessary, the exporter may apply in writing to have this period extended. The exporter must not dispose of any items exported under a temporary licence while they are abroad. The exporter may, however, apply for a licence to permit permanent export of the items. All applications must be made in writing and must provide an explanation for the request.

3.1.4 Open General Export Licences

Open General Export Licences ("OGLs") are licences which remove the need for an exporter to apply for an individual licence. OGLs allow for the export of specified controlled items by any exporter, provided the shipment and destinations are eligible. However, an OGL is unlikely to be made available to cover shipments to Iran.

3.1.5 The ECO and export controls

The ECO is not an executive agency; it has a clear and distinct identity and task—to discharge the Secretary of State's responsibilities to license the export of military, dual use and other restricted or prohibited goods from the United Kingdom (and certain aspects of the "brokering" of such goods from the United Kingdom). It runs the process, working closely with the Foreign and Commonwealth Office and the Ministry of Defence.

There are two reasons why goods might require an export licence. First, if they appear on one of the "control lists"—lists of military and dual-use goods which are largely defined by the four international export control regimes; secondly, if the goods are not listed but if an exporter has been informed, is aware, or suspects, that they are going to be used for military purposes or in a Weapons of Mass Destruction ("WMD") programme—these are the "end use" controls.

It is emphasised that "export" does not just mean shipping goods. Transfers of controlled technology are also covered, so taking a laptop overseas with technical specifications on it constitutes an "export" and

may require a licence. Imparting technical information in an email or phone call to someone overseas is similarly caught.

3.2 Specific export controls relating to Iran

The normal export control regime applies to exports to Iran, with some additions. First, the European Union operates a complete embargo on military exports and dual-use items to Iran.

In addition to the control lists, the end use controls still apply. So, even if a proposed export does not appear on any of the lists, there is a chance that it will end up needing a licence if the exporter knows, or if BIS tells the exporter, that there is a risk it will be diverted to a WMD programme.

Finally, there are the brokering controls. A broker should apply for a licence if the broker is based in the United Kingdom and is arranging the transfer of goods from anywhere in the world to Iran.

3.2.1 How are these controls applied?

The UK government sees the Iranian WMD programmes as a major threat to world peace. It considers that these programmes are actively seeking to procure a wide range of goods and technology, including from the United Kingdom. This does not apply only to specialised kit, but also to the kind of things that all large industrial plants need, such as technology for power generation. The UK government considers that those who operate the WMD programmes also control large swathes of the Iranian economy, giving them ready access to a wide range of front companies for their activities. It follows that there is a high risk that anything that could be of use to Iranian WMD is likely to find itself in the wrong hands once it reaches Iran.

BIS looks carefully, not just at what the export is meant to be used for, but what it could be used for. Where BIS has doubts, it will not issue a licence.

BIS cooperates closely with other governments, especially within the European Union, to seek a consistent approach. All EU governments work to the same control list. Where one EU government refuses a licence, this information is available to the others and they consult one another as necessary. Ultimately, however, the decision is for each government to take.

3.2.2 What this means for the exporter: the process

The objective of the ECO is to provide a service to exporters which is transparent, predictable and as quick as it can be. In the context of exports to Iran, this can be very difficult to do. Anyone who is thinking of doing the kind of business with Iran that might need export licences needs to be prepared for a process that brings certain frustrations.

In terms of licence turnaround times, ECO advertises that it aims to process 70 per cent of licences within 20 working days. In practice, licences to Iran tend to fall within the 30 per cent that take longer. This is because the ECO must go through the thought process set out above of considering whether the proposed export is likely to fall into the wrong hands, and how much damage it could do if it does. This, by definition, takes time. Sometimes, it takes more time than it should because the ECO has a relatively small pool of specialist advisers who can at times get overwhelmed by high levels of demand. Sometimes, it takes more time because the ECO might have to consult another EU government, whose response time is not within its control.

The other part of the ECO's process that is currently taking longer than it should is the Rating Service, by which it advises an exporter whether or not their goods need a licence. This is because its technical officers have to give top priority in the first instance to advising HMRC on shipments that they have detained at the border, and in the second instance to processing actual licence applications.

In terms of the predictability of the process, exporters often make the very reasonable point that ECO should at least be able to decide whether or not their goods need a licence and stick to that decision. Unfortunately, the ECO does not always do that. Especially in respect of exports to Iran, its view of the export is influenced by its view of the Iranian customer and that can change over time. If the ECO receives new information, then it can and will stop a shipment to which it had previously given a green light. This means that even if a licence is granted or an exporter is advised that no licence is required, this does not mean that the ECO cannot step in to prevent shipment at a later stage. An example of this is given in Case Study 1.

Case Study 1

In January 2006, XYZ Ltd was contacted by an Iranian company, to manufacture components for a German manufactured gas turbine. The German manufacturer informed XYZ that it had a licence agreement to build the turbine in Iran.

XYZ contacted the Department of Trade and Industry ("DTI") (BERR's predecessor) to ask whether or not an export licence would be required for the goods it was proposing to export to Iran. The DTI responded by advising that it appeared a licence was not required for this particular export. However, the DTI advised the exporter to read the enclosed Supplementary Guidance Note on the Weapons of Mass Destruction ("WMD") End-Use Control ("Guidance Note").

The Guidance Note provided that:

(a) end-use control may be invoked at any time before the goods leave the United Kingdom;

(b) ratings are not binding if information subsequent to the rating has been received which may change the earlier assessment; and

(c) if the exporter previously had the goods rated as "NLR" (i.e. no licence required) under the WMD end-use control, then this rating only applies for that specific export, and to that specific end user, and only at the time of the application.

The Iranian customer was not on the "Iran list".

XYZ Ltd thereafter made various shipments of the goods to Iran without incident. However, in 2008 HM Revenue & Customs ("HMRC") detained a particular shipment pending licensing and end-use control checks. This led to correspondence between XYZ Ltd, HMRC and the ECO, the outcome of which was that XYZ Ltd was informed that it would in fact need an export licence for the goods. It duly applied for one, but its application was rejected. The reason given was that there was an unacceptable risk that the goods would be diverted to a WMD programme of concern.

XYZ Ltd appealed that decision, arguing that there was no way that the goods could be used for anything other than power generation. The appeal was, however, rejected. Reasons for that rejection were given in a letter. Broadly, it was said that much had changed since the rating enquiry had been made in early 2007, and that the ECO's concerns were not limited to items that could form an integral part of a weapon but extended to equipment that could play more of a supporting role to a WMD programme. It was also pointed out that the Iranian customer had been added to the "Iran list" (although it was only added after XYZ Ltd launched its appeal).

The upshot of the inability to export the goods in question was that XYZ Ltd went into administration and its business was sold by the administrators. The goods were bespoke and could not be sold elsewhere. The former director of XYZ Ltd alleged that other European companies were said to have continued to supply similar turbine parts to Iran.

Finally, there is the fact that shipments heading for Iran are likely to be detained by HMRC at the border. If HMRC feel they need to check out the export control status of the goods, they contact the ECO. The ECO treats these enquiries as top priority, in the knowledge that any delays at this point cause expense for the exporter. If the ECO knew about the shipment and had decided that there were no concerns, it would tend to try to unblock it within a couple of days. If the shipment came as a surprise to the ECO and, at first sight, raised concerns, this process could take a lot longer. Any UK exporter exporting to Iran would be wise to liaise with the ECO in a regular, open and transparent manner. In the author's experience, the ECO is incredibly hard wording and keen to resolve matters swiftly wherever it can. Whilst sticking steadfastly to its rules and processes of engagement, the ECO frequently "pulls out all the stops" when a UK exporter has an urgent matter to be dealt with.

3.2.3 What this means for the exporter: the decision

Once the exporter has navigated the process of seeking advice on whether an export licence is needed, it needs to be prepared for the decision when it comes. It may be that the ECO issues a licence, or advises the exporter that no licence is needed. However, the exporter may well receive a message back from the ECO advising that a licence has been refused because of the risk of diversion for WMD use.

The ECO does have an appeal process, which an exporter can use to submit any new information to persuade the ECO it is wrong. The ECO does not refuse licences lightly. Where it does, it is often because it has some information that has made it worried. Exporters often tell the ECO that they know and trust their customer and that they are certain that the goods are going to be used for the stated purpose, but the bottom line is that if the ECO is worried about an Iranian customer it is likely to stay worried.

3.2.4 How can the exporter make the process easier?

Receiving a licence for an export to Iran is problematic. It is not possible to make it easy. But there are ways in which the exporter can help itself.

The first step is to know the control rating of the goods—in other words, do they appear on a list? The exporter will probably need to do this only once. If it is established that the goods do not appear on a control list, the likelihood is that this will not change. If an exporter has concrete plans to make a shipment and is unsure about whether or not the goods are controlled, the exporter should apply for a Standard Individual Export Licence.

If the exporter discovers that the goods are not listed, then the exporter needs to get a view from the ECO about the end user to whom the goods will be shipped. The first port of call should be the published "Iran list" (see Box 2) which contains a list of entities which are publicly known to be of concern. However, the fact that a customer is not on this list does not mean that it is permitted to ship to that customer and use can be made of the Iran end-user advice service, which offers a 48-hour turnaround by email.

Box 2: The Iran list

This list is compiled and published by the Export Control Organisation ("ECO"), identifying certain entities, companies and organisations in Iran. It is intended to help exporters judge which of their exports might potentially be of concern on end-use grounds, based on the ECO's previous decisions regarding exports, or proposed exports, to each entity, company or organisation. This information may be factored into business planning, to help exporters make informed decisions on whether or not to contact the ECO and apply for a licence for specific exports.

The list may be amended from time to time and should be checked regularly if an exporter is planning business with Iran. The entities included on the list are mainly based on the ECO experience of either invoking the WMD End-Use Control or refusing licences due to unacceptable risks of diversion to a WMD programme of concern.

Entities and organisations are also included where they have been named in licence applications that have been refused. In addition, there are other entities included in the list, for whom the ECO may not have received applications or enquiries in which to invoke the End-Use Controls or refuse a licence, but for whom there is publicly available information indicating their involvement in WMD programmes of concern.

Article 6 of the Export Control Order 2008 concerns persons having grounds for suspecting that an export is or may be intended for WMD purposes. Inclusion of an entity on the BIS Iran list does not necessarily indicate that an export licence would be refused. Conversely, non-inclusion of an entity on the list does not necessarily mean that ECO would have no end-use concerns with exports to that entity.

Box 2: The Iran list (continued)

Checking against the list can never be regarded as a substitute for a case-by-case assessment by the ECO in a licence application, including identifying the items to be exported, end-user undertaking, entities involved and other circumstances and information available at the time of application. Entities on the list may give cause for concern whatever their involvement in an export transaction may be. This includes being end users, consignees and third parties.

The inclusion of an entity on the list does not constitute an exporter being "informed" under art.4 of Council Regulation (EC) No 428/2009 (end-use controls). Therefore, inclusion on the list does not indicate that a licence must always be applied for under the WMD end-use control, for exports to that entity, company or organisation.

Publication of this list does not invalidate any existing licences that specifically permit an export to an entity on the list.

There is no way round the fact that exporting a wide range of goods to Iran is problematic. Government policy overall is not to encourage or promote trade between the United Kingdom and Iran. That said, the ECO argues that it does not put gratuitous bureaucratic obstacles in the way of legal trade, and will help exporters navigate their way through the export control jungle to the extent that it can.

4 Contractual protection against sanctions

4.1 The evolution of the requirement for a sanctions clause—OFAC

The Office of Foreign Assets Control ("OFAC") has been around a long time, but had not been widely heard of until recently. It is now making its presence known and felt. OFAC is the primary US agency responsible for the administration of US economic sanctions. OFAC maintains a list of "Blocked Vessels" with whom transactions are specifically prohibited or restricted. Blocked Vessels fall within the SDN list which stands for specially designated nationals. It is no accolade to be designated as "special" by OFAC.

4.2 Blocked Vessels

OFAC has designated IRISL (the Islamic Republic of Iran Shipping Line), and other affiliated entities worldwide as proliferators of weapons of mass destruction. They name hundreds of vessels that are collectively labelled "Blocked Vessels". Blocked Vessels must be physically blocked should they enter US jurisdiction. Freight forwarders and shippers may not charter, book cargo on, or otherwise deal with Blocked Vessels. Only US persons are subject to this prohibition. Banks falling into the definition of a "US person" are required to reject any funds transfer referencing a Blocked Vessel. Banks must contact OFAC should the name of a Blocked Vessel appear in shipping documents presented under a letter of credit, or if noticed in a documentary collection, or under an electronic funds transfer.

OFAC fines

In 2008, the aggregate of OFAC's civil penalties and settlements was reportedly $3.5 million. In 2009, this figure reportedly rose to $772 million and many of the entities who entered into voluntary settlements with OFAC were banks. Allegedly, these banks had been accused of stripping out references to Iran and other sanctioned countries from swifts going to the United States—hence their nickname the "strip club" banks.

4.3 Who is a "US person"?

All "US persons" must comply with US economic sanctions. A US person may be any of the following:

- Any individual or entity located within or operating from the United States. If an individual is born in and resides in any country and happens to be in the United States on business, then he is caught whilst physically present in the United States.
- Any US citizen or permanent resident alien (i.e. a "green card" holder), wherever located—it does not matter where in the world such individual is—this would cover a US citizen living and working in London or Singapore.
- The worldwide operations of any entity organised under US law, excluding affiliates that are not formed under US law. Therefore, technically an English limited company which is an affiliate of a US company would be excluded but if it was a branch office it would be included.

4.4 US banks and blocked vessels

Any transfer of US dollars via the banking system by a non-US person in connection with a transaction involving a Blocked Vessel is at risk of being rejected. Many traders and institutions are beginning to refuse to enter into transactions unless they have a robust sanctions clause which allows for the rejection of any blocked vessel which may have been nominated. However, it is all too easy to become innocently embroiled in a claim for non performance because of a sanctions clause, or, as is being experienced with greater frequency, a badly worded sanctions clause.

The primary reason non-US persons are reacting is that they risk not getting paid, because funds may be rejected. Let us take a simple example. XYZ Ltd, an English company contracts with ABC Ltd, a Singapore company, to sell ABC Ltd 30,000 tonnes of coal. The goods will be delivered free on board ("FOB") by XYZ Ltd at a port in Asia from where they will ship the goods to an end user in Dubai. Under the contract of sale on FOB terms, ABC Ltd must nominate a vessel to come and pick up the goods at the Asian port. ABC Ltd is paying US$20 million for the goods and has opened a letter of credit in favour of XYZ Ltd in order to pay. The obligation of XYZ Ltd is to deliver the goods at the ships rail at the Asian port. XYZ Ltd might have no interest in where the goods are going or which ship is shipping the goods. After loading, documents will be presented to the bank under the letter of credit and XYZ Ltd will be paid. But let us imagine that an IRISL vessel which is named as a blocked vessel on the OFAC list is nominated by ABC Ltd. When the bills of lading are presented for payment under the letter of credit, at some point in time, that dollar payment will go through a bank in the United States. That payment is unlikely to be processed when a US bank sees reference to the blocked IRISL vessel in the bills of lading. That is going to leave XYZ Ltd unpaid. The exposure is a commercial one arising out of the fact that the payment is in US dollars. XYZ Ltd and ABC Ltd have not breached any laws applicable to them, but payment will not be made. If the goods are perishable foodstuffs and will not be released until payment is made, one can imagine the further problems caused and claims which will arise.

Let us consider further possible scenarios in the world of trading:

Example 1

Since the contract was signed between XYZ Ltd and ABC Ltd the market has moved and the price of the coal has increased by 35 per cent, and XYZ Ltd could increase its profit if only it could terminate the contract with ABC Ltd and sell to a third party in Dubai, who will pay a premium over the price agreed with ABC Ltd.

ABC Ltd is the FOB buyer and has nominated the vessel. ABC Ltd was not aware of OFAC sanctions concerning Blocked Vessels. ABC Ltd's trader was desperate to clinch a deal and did not read the terms and conditions of the contract signed with XYZ Ltd. ABC Ltd's shipping team nominated an IRISL vessel, a Blocked Vessel listed in the SDN List.

Meanwhile, XYZ Ltd is desperate to extricate itself from the contract and consults its lawyer who reviews the contract and notes the following clause:

> "It is a condition of this contract that the party nominating a vessel shall not nominate a vessel named by the US Treasury Department's Office of Foreign Assets Control ('OFAC') in the Alphabetical Listing of Vessels That Are the Property of Blocked Persons or Specially Designated Nationals, Appendix B to 31 CFR Chapter V (the 'SDN Vessel List')."

XYZ Ltd's lawyer sends a letter to ABC Ltd, as follows:

> "Dear ABC Ltd,
>
> We refer to contract number 61536 for the sale to you of 30,000mt of coal. You have nominated an IRISL owned vessel which is listed on the SDN List. As such you have breached a fundamental condition of our contract. The contract is now terminated and we shall be holding you responsible for all our losses."

XYZ Ltd then resells the cargo to a new buyer in Dubai at a significantly higher price.

Example 2

Let us consider an example from the buyer's perspective, staying with the scenario of XYZ Ltd selling coal to ABC Ltd. XYZ Ltd is an English company. Just prior to the contract being executed, the President of Syria (hypothetically) issued a sanctions proclamation which stated that no entity or person may enter into or perform a contract with any company incorporated in England. Shortly after ABC Ltd contracted with XYZ Ltd, the market dropped and ABC Ltd was contractually obliged to buy the coal from XYZ Ltd at a very high price. ABC Ltd would rather it did not have to perform the contract. ABC Ltd contacts its lawyer who reviews the contract and concludes that the new Syrian sanctions must be treated with the utmost seriousness. ABC Ltd's lawyer notes the following clause contained in the contract:

> "Each party to this contract agrees to comply with all sanctions regulations, including those issued or adopted from time to time by the US government including OFAC, as if such sanctions regulations are applicable to them and will not be liable in damages to the other in respect of such compliance."

ABC's lawyer advises that ABC Ltd are contractually obliged to comply with Syrian sanctions. The clause states that both parties must comply with *all* sanctions regulations *as if* they were applicable to them and this would naturally include (our hypothetical) Syrian sanctions notwithstanding the fact that Syria otherwise has nothing whatsoever to do with the parties or the contract. ABC Ltd advise XYZ Ltd that they are terminating the contract and will have no liability to XYZ Ltd. ABC Ltd buy coal instead from a third party at a significantly reduced price.

These types of difficulties are occurring with greater frequency. Many contracts contain clauses which purport to protect a party against sanctions, but when they are analysed in more detail they may sometimes do more harm than good.

Case Study 2: Exposure for English companies whose non-EU subsidiaries trade with Iran

The corporate structure of UK Ltd

UK Ltd is involved in the manufacture and sale of medical products (the "Products"). UK Ltd has a wholly owned subsidiary incorporated in and operating out of Turkey called Turkey Ltd. Turkey Ltd has customers in Turkey and Iran, to whom it sells the Products. UK Ltd and Turkey Ltd are not an "Iranian person, entity or body" as defined under the Regulation.

The distribution agreement

Pursuant to an exclusive distribution agreement with UK Ltd, Turkey Ltd has exclusive distribution rights (granted to it by UK Ltd) in Turkey and Iran for the marketing, sale and service of the Products. Under the exclusive distribution agreement, Turkey Ltd orders the Products it requires from UK Ltd and pays UK Ltd for the Products it purchases. UK Ltd ships the Products direct to Turkey Ltd's warehouse in Turkey for its Turkish customers and direct to Turkey Ltd's Iranian customers, for Turkey Ltd's Iranian customers. In addition, Turkey Ltd receives a modest arm's-length fee from UK Ltd for its distribution and marketing activities.

UK Ltd's involvement in the Iranian business

With respect to Iranian sales, Turkey Ltd's Iranian customers tend to operate through one Iranian agent in Iran ("Iranian Co") who is the local "go between" between Turkey Ltd and the Iranian customer. UK Ltd interacts with Turkey Ltd only in relation to Iranian sales. This includes assisting with the tender process, logistics, shipping, contract management and back office support. Such interaction does not result in UK Ltd being exposed to a breach of applicable sanctions regimes—even if Turkey Ltd receives payment from a bank subject to the EU asset freeze. This is in part because Turkey Ltd takes ownership and control of the contractual relationship with Iranian customers. It is relevant that Turkey Ltd's role is not a sham. Further, UK Ltd staff may sometimes travel abroad to Turkey to assist with an inspection or readiness for tender. However, all such support services are provided by UK Ltd to and for Turkey Ltd. The UK Ltd employees are wearing a "UK Ltd hat" in the provision of such services to its subsidiary. There is no breach of the Regulation if UK Ltd sells Product to Turkey Ltd or assists Turkey Ltd with back office functions. Further, shipment of product by UK Ltd direct to Iran is not prohibited provided that the products does not fall within the export prohibitions which are the responsibility of the Department for Business, Innovation and Skills.

The contracts

If Turkey Ltd wishes to sell Products to the Iranian Customer, it will purchase Products from UK Ltd under a separate contract, i.e. under the exclusive distribution agreement. UK Ltd will not enter into sales contracts with Iranian Co or the Iranian customer. Therefore, there will always be two separate sales contracts: (i) a contract between Turkey Ltd and the Iranian Customer (or between Turkey Ltd and Iranian Co who acts as local distributor to the Iranian customer) (the "Second Contract"). These contracts will have independent obligations and will always be separate from each other.

It is emphasised that the Iranian Customers and Iranian Co are not subject to the EU or UN asset freeze and the Products are not prohibited or restricted. As such, UK Ltd could in fact have a direct commercial relationship with Iranian Co or the Iranian Customer—so long as a bank which is subject to an asset freeze ("Designated Bank") is not involved. However, some Iranian customers have previously used a Designated Bank to pay Turkey Ltd. Does UK Ltd's knowledge of a bank which is a Designated Bank being involved in a transaction (as described above) constitute a breach of any prohibition? It will not constitute a circumvention or facilitation of the contravention of any prohibition of the Regulation if UK Ltd continues to perform the Second Contract with Turkey Ltd, knowing that the letter of credit has been opened in favour of Turkey Ltd by a Designated Bank. UK Ltd, is not liable and neither are its directors, or any of its employees.

Case Study 2 (continued)

UK nationals assisting Turkey Ltd

It is important to distinguish between a UK national employed by UK Ltd who is assisting Turkey Ltd whilst wearing a "UK Ltd hat" in relation to a contract where it is known that a Designated Bank is paying Turkey Ltd on the one hand, and a UK national employed by or acting for Turkey Ltd who is assisting Turkey Ltd whilst wearing a "Turkey Ltd hat" in relation to a contract where it is known that a Designated Bank is paying Turkey Ltd on the other hand. The former should not create any exposure, but the latter situation will create exposure for the UK national employed by or acting for Turkey Ltd if such UK national is actively participating in Turkey Ltd's business—including in the capacity of a director of Turkey Ltd—once it is known that a Designated Bank is involved.

The board of directors of Turkey Ltd consists of different individuals/nationals worldwide. In particular, two of the directors of Turkey Ltd are UK nationals (the "UK Directors of Turkey Ltd"). The UK Directors of Turkey Ltd wish to ensure they are in full compliance with the Regulation, and if they face any risk as a result of acting in their capacity as directors of Turkey Ltd which cannot be safely mitigated then they will consider relinquishing their positions.

If a non-Designated Bank is involved, then there are unlikely to be any applicable prohibitions contained in the Regulation which may create exposure for a UK Director of Turkey Ltd. Exposure only arises once it is known by a UK Director of Turkey Ltd that a Designated Bank is being used by the Iranian customer to pay Turkey Ltd. If those UK Directors of Turkey Ltd take a step back and cease further involvement in the transaction once it becomes known that a Designated Bank is involved, would this avoid any personal liability? The UK directors of Turkey Ltd are exposed in their capacity as directors of Turkey Ltd if Turkey Ltd receives monies from a sanctioned bank. Where the UK Directors of Turkey Ltd have the ability to direct that Turkey Ltd act without involving designated persons entities or bodies (such as designated Iranian banks), they must do so or risk breaching the EU Regulations. If they are in a position to ensure that Turkey Ltd acts in a particular way, then the course of action described above (essentially allowing them to step back and adopt a "neutral" stance) may be perceived as participating in activities the object of which is to circumvent certain measures (see Article 41 of the Regulation). It should be noted that omissions as well as actions can count as prohibited behaviour for the purposes of the EU Regulation. Likewise, there does not have to be any actual breach of a prohibition for the circumvention prohibition to be engaged.

As such, the UK Directors of Turkey Ltd should resign and be replaced by non EU nationals.

Authorised signatories

The UK Directors of Turkey Ltd are authorised signatories for Turkey Ltd, i.e. they authorise bank transfers. UK Directors of Turkey Ltd may wish to consider their position in acting as authorised signatories for Turkey Ltd. The UK Directors should cease to be authorised signatories for Turkey Ltd's bank accounts and they should be replaced by non EU nationals.

Penalties

The Iran (European Union Financial Sanctions) Regulations 2012 provide criminal penalties in the United Kingdom for any breaches of the prohibitions contained in Regulation 267/2012.

A company incorporated in the European Union may be liable for a breach of the Regulation. In addition, the directors of the company may be liable for the actions of the company if the offence is committed with the consent or connivance of such directors. Any EU national may be personally liable for a breach wherever they are in the world. Liability is criminal liability and the penalties are:

- on summary conviction, a maximum of three months' imprisonment and a £5,000 fine;
- on conviction on indictment, a maximum of two years' imprisonment and an unlimited fine.

Conclusion

As long as:

- the UK Directors of Turkey Ltd (and any other EU nationals who are directors of Turkey Ltd) relinquish their positions as directors of Turkey Ltd and cease to be authorised signatories for Turkey Ltd;
- UK Ltd does not receive funds sent from Iran (including through one or more intermediaries) into a UK bank account unless a licence is granted permitting this; and
- UK Ltd seeks and obtains authorisation from HM Treasury prior to receiving monies from Turkey Ltd

then on the basis that the summary of the Iranian trade is as described above, there is no exposure for UK Ltd, Turkey Ltd and their respective officers and employees under UK and EU sanctions.

It is worth noting that UK Ltd may receive such funds into a UK bank account if it obtains a licence permitting it to do so from HM Treasury. The granting of such licence should be automatic because the goods fall within the definition of medical goods, which benefit from an exemption. However, in practice it will be difficult to find a UK bank willing from a commercial viewpoint to accept the payment.

5 Tips on interpretation of Council Regulation (EU) No 267/2012 ("the Regulation")

Council Regulation (EU) No 267/2012 ("the Regulation") is directly applicable in the United Kingdom. It repealed and replaced Council Regulation (EU) 961/2010 and its financial restrictions measures are substantially the same as those in the predecessor Regulation.

5.1 Notification and authorisation requirements

- Notifications of transfers of less than €40,000 can be submitted to the Treasury at any point prior to the transfer actually being made.
- Notifications for speculative transfers are unnecessary.
- If any of the transaction details (payer, payee, payment route etc) change, it will be necessary to submit a new notification.

5.2 Are there some transfers for which it will be necessary for the payment service provider of both payer and payee to notify or seek authorisation?

There may be some cases where it appears under art.30 that the payment service provider of both the payer and payee should notify or seek authorisation. For example, where a transfer is made from one Iranian entity to another and both have EU banks. It is only necessary in such cases for the payer's payment service provider to notify or seek authorisation. In particular, see art.30(3)(a)(vi), which provides that where there is more than one EU payment service provider acting as an intermediary, only the first payment service provider to process the transfer is required to comply with the notification/authorisation obligation.

5.3 Is it possible to obtain authorisation when there is a designated person involved in a transfer?

If the payment engages the asset-freezing prohibition it cannot be made unless under Treasury licence. Licences may only be issued if the relevant conditions of an applicable licensing ground are satisfied. Where such a licence has been issued, no art.30 authorisation is required.

5.4 If a bank's business unit is outside of the European Union, must it also comply with Regulation 267/2012? Does it make a difference if it is a branch or subsidiary?

Article 49 sets out who is subject to the Regulation. A branch of a legal entity incorporated or constituted under the law of a Member State would be caught by the Regulation, even if that branch were located outside the European Union. A subsidiary incorporated or constituted outside the European Union, under non-EU law, would not be caught.

5.5. Article 10 of Regulation 267/2012 permits the continuation of "prior contracts" relating to the Iranian oil and gas sector that would otherwise be subject to art.9. Is there a dual reporting obligation to the Export Control Organisation (for the contractual exemption) and the Treasury (for related financial transactions caught art.30)?

Yes, if a contract is considered by a party to fall under art.10 and transfers of funds in relation to that contract fall under art.30, there will be reporting requirements under both provisions by notifying the Department for Business, Innovation & Skills ("BIS"). If such a notification has been made, the customer or its bank should communicate this to the Treasury as part of any prior authorisation request under art.30. The Treasury will liaise with BIS as necessary.

5.6 Activity by other EU countries

5.6.1 Where a transfer of funds has been notified or authorised by the Treasury, is there also a requirement to notify or to seek authorisation from other Member States?

Each transfer of funds only needs one notification or authorisation within the European Union. Where notification has already been made to, or authorisation granted by, a competent authority in the European Union, it is not necessary for further notifications to be made or authorisations sought.

5.6.2 What are the reporting requirements for EU intermediaries where the remitting and beneficiary banks are outside the European Union? What if there is more than one intermediary?

All EU financial institutions are subject to Regulation 267/2012 by virtue of art.49. Article 30(3)(a)(vi) imposes express notification and authorisation obligations on the payment service providers which are not those of the payer and/or payee but are acting as intermediaries in the European Union.

An EU-based intermediary payment service provider which knows or has reasonable cause to suspect it is involved in a transfer to which art.30 applies should start from the assumption that it should be required to notify or seek authorisation.

Where there is more than one EU intermediary, the obligation will fall in principle on the first EU intermediary to process the transfer in the European Union.

If it is not possible for an EU intermediary to know or have reasonable cause to suspect that the transfer that it is processing involves an Iranian person, entity or body as payer or payee (or both), it cannot be found liable for failing to comply with the art.30 requirements.

5.6.3. Will the Treasury link up notifications and authorisations from other competent authorities?

Article 30(4) places an obligation on Member States to inform other Member States when an authorisation has been rejected. The Treasury will not know about other competent authorities'

authorisations, or notifications made to them, unless specifically informed of them. Financial institutions are asked to advise the Treasury if notification or authorisation has been confirmed by another Member State's competent authority in other cases where otherwise, notification or authorisation would be required from the Treasury. This helps ensure that duplicate authorisations are avoided.

5.7 Definitions

5.7.1 Does the definition of "electronic transfer of funds" include transactions made on credit and debit cards, ATM withdrawals and direct debits as detailed in para.9 of Regulation 1781/2006?

"Transfer of funds" is defined in art.1(t) of Regulation 267/2012. It includes transfer of funds made by electronic and non-electronic means (under the predecessor Regulation, only electronic transfers were caught). Electronic transfer of funds excludes transactions made on credit and debit cards, ATM withdrawals and direct debits. Transactions made on credit and debit cards, ATM withdrawal and direct debits, as well as transactions made by cash cheques and accountancy orders, fall under the definition of non-electronic transfer of funds.

5.7.2 Do BACS payments fall within the definition of "transfer of funds"?

Yes—BACS payments fall within the definition of "transfer of funds". Where a payment service provider knows or reasonably suspects from the information available that BACS payments are to/from an Iranian person, entity or body the necessary notification or authorisation should be submitted to the Treasury if the relevant thresholds are exceeded.

5.7.3 How does the definition of "transfer of funds" at art.1(t) relate to correspondent banking?

An example of this is where a customer of a New Zealand branch of an EU incorporated bank, "Bank A", wants to pay Euros to an Iranian person's Swiss bank account. The Euro hub for Bank A is in London. The funds and SWIFT messages would transfer from Bank A's NZ branch to Bank A London; from Bank A London to the Swiss Euro clearer; from Swiss Euro clearer to the Swiss bank account. Where would the obligation to notify or seek authorisation fall? What if there are many EU banks within the chain?

Article 49(d) applies Regulation 267/2012 to any legal person, entity or body which is incorporated or constituted under the law of a Member State. So Bank A would be subject to art.30, as would its New Zealand branch. As the payment service provider to the payer, it would fall on Bank A's New Zealand branch to notify or seek authorisation. If this branch notifies or seeks authorisation, there is no obligation on correspondent banks within the European Union also to notify/seek authorisation. The situation would be different if the New Zealand bank was not a branch of an EU incorporated bank, but a subsidiary incorporated under New Zealand law and therefore not subject to the Regulation. It would have no obligation to notify or seek authorisation. But Bank A in London would be making a transfer of funds to an Iranian person, via the Swiss Euro clearer, and our view is that Bank A is treated as if it were the payer's payment service provider in these circumstances and so must notify/seek authorisation. Where there is more than one intermediary, the obligation will fall on the first bank of entry into the European Union.

5.7.4 What is the definition of "indirectly"? Does art.30 apply to transfers that are made indirectly?

The term "indirectly" is a standard term that banks are used to complying with in the context of asset freezing, such as art.23. It typically refers to a payment made by person X to a designated person, Z via a third party, Y. It is a matter of fact in each particular case whether a payment will be made indirectly to a designated person.

The term "indirectly" is not used in this sense in art.30, but art.30(2) reads:

> "These provisions shall apply regardless of whether the transfer of funds is executed in a single operation or in several operations which appear to be linked."

This language would indicate that art.30 would apply to a payment made from X to Z (an Iranian person, entity or body) via Y.

If it is not possible for an EU financial institution which is in the middle of a chain of transfers to obtain sufficient information to know, or reasonably to suspect that the transaction falls within art.30, banks may benefit from art.42(2).

5.8 Linked transactions

5.8.1 Article 30(2) of Regulation 267/2012

As noted in para.5.7.4 above, art.30(2) of Regulation 267/2012 states that art.30 applies:

> "regardless of whether the transfer of funds is executed in a single operation or in several operations which appear to be linked."

It is necessary to seek authorisation for aggregated payments adding up to over €40,000 when the only common factor is that the remitter/beneficiary is the same Iranian person and there is no common underlying transaction (e.g. all electronic payments to and from accounts held for Iranian residents by EU payment service providers).

If the sole common factor is that the remitter/beneficiary is the same Iranian person, entity or body, the Treasury does not need to authorise these transfers.

5.8.2 What is the definition of "linked operations" and over what period of time should they be linked?

Article 30(2) gives examples of "operations which appear to be linked":

- a series of consecutive transfers from or to the same Iranian person, entity or body which are made in connection with a single obligation to make a transfer of funds, where each individual transfer falls below the threshold set out in para.1 but which, in aggregate, meet the criteria for notification or authorisation; and
- a chain of transfers involving different payment service providers or natural or legal persons which effects a single obligation to make a transfer of funds.

Whether a series of transfers is made in a linked operation will depend upon the facts of each case. It is clear that a series of loan repayments, such as for a mortgage, are linked. Similarly, a schedule of payments under a letter of credit or bond would also be linked. Consideration should be given to issues such as the timing of the transfer (is it regular, whether daily, monthly or yearly?) the parties to the transaction and the sum involved.

If a payment service provider anticipates that over the course of time, linked transfers such as repayments under a loan will add up to an amount which exceeds a relevant threshold for the purposes of art.30, the payment service provider must submit a notification/seek authorisation prior to the relevant threshold(s) being met.

A linked operation would also include where there are two or more links in a chain of transfers. For example an Iranian importer (or their payment service provider) of EU goods gives a payment order to a bank in Dubai, who then gives a second and separate payment order to the EU exporter (or their payment service provider). These separate transfers are a linked operation, because together they permit the Iranian importer to discharge a payment obligation to the EU exporter. It is accepted that banks may not always know the origins of a transfer.

Article 31(1) requires that the link between the transactions is explained in the notification/application and underlying documents.

5.9 Who should notify or seek authorisation?

5.9.1 Where does the obligation fall when the electronic transfer of funds is to an Iranian person, entity or body?

Article 30(3)(a)(i) states that:

> "notifications and requests for authorisation relating to the transfer of funds to an Iranian person, entity or body which is located outside the Union, shall be addressed by or on behalf of the payment service provider of the payer".

The reporting obligation in this example would be on the payer's payment service provider if the payer's payment service provider is in the European Union. If not, the obligation would be on the payer (see art.30(3)(a)(iii)).

Article 30(3)(a)(iv) states that:

> "notifications and requests for authorisation relating to the transfer of funds to an Iranian person, entity or body which is located within the Union, shall be addressed by or on behalf of the payment service provider of the payee."

The reporting obligation in this example would be on the payee's payment service provider. This would even appear to be the case where the payer and/or its payment service provider is in the European Union.

5.9.2 Where does the obligation fall when the electronic transfer of funds is from an Iranian person, entity or body?

Article 30(3)(a)(ii) states that:

> "notifications and requests for authorisation relating to the transfer of funds from an Iranian person, entity or body, which is located outside the Union, shall be addressed by or on behalf of the payment service provider of the payee."

The reporting obligation in this example would be on the payee's payment service provider if the payee's payment service provider is in the European Union. If not, the obligation would be on the payee (see art.30(3)(a)(iii)).

Article 30(3)(a)(v) states that:

> "notifications and requests for authorisation relating to the transfer of funds from an Iranian person, entity or body, which is located within the Union, shall be addressed by or on behalf of the payment service provider of the payer."

The reporting obligation in this example would be on the payer's payment service provider ("PSP").

Article 30 does not contemplate on whom the notification/authorisation obligation falls in the event that both the payee and its PSP are outside the European Union. However, as a matter of practicality, and to meet the objective of art.30, Treasury would advise that should the payee also be outside the European Union, the obligation is best met by the payer's PSP; and if the payer's PSP is outside the EU, by the payer itself.

5.9.3 Where does the obligation fall where none of the payer, payee or their respective payment service providers is located within the Union but an intermediary payment service provider does fall within scope of the Regulation?

The intermediary payment service provider must comply with the obligation to notify or seek authorisation—see art.30(3)(a)(vi). Where there is more than one payment service provider acting as an intermediary, only the first payment service provider to process the transfer is required to comply with the obligation to notify or seek authorisation.

5.9.4 Where does the obligation fall when the transfer of funds is effected by non-electronic means?

Where the transfer of funds is to an Iranian person, entity or body the obligation to notify and seek authorisation falls to the payer. Where the transfer of funds is from an Iranian person, entity or body the obligation to notify and seek authorisation falls to the payee.

5.9.5 If a company exports goods to Iran and receives payment from a Dubai bank to his account in the European Union, who must notify or seek authorisation?

The ultimate payer is the importer of the goods in Iran, so the funds are transferred from Iran to the European Union, via Dubai. This would be classed as a linked operation. Therefore, the payment service provider of the EU exporter should notify or seek authorisation (art.30(3), second paragraph).

If it is not possible for the payment service provider of the EU exporter to know or have reasonable cause to suspect that the transfer that it is processing ultimately comes from Iran, it cannot be found liable for failing to comply with the art.30 requirements (art.42(2)).

The EU exporter also has a responsibility to ensure that proper notification or authorisation procedures are followed, either by ensuring that its payment service provider has full information about the transaction (and any linked operations), or by informing the Treasury itself, where required.

5.9.6 Banks are seeing an increase in remittances via Dubai trading companies, where it is almost impossible to determine whether the funds originate from Iran. How should we treat such transfers?

If a bank knows or suspects that a transfer of funds involves an Iranian person, entity or body, the necessary notification or authorisation should be submitted together with details of the information on which its knowledge or suspicion is based. If in doubt, the bank should notify or seek authorisation.

It is also worth pointing out that the obligation to notify or seek authorisation does not only rest with the payment service provider—art.30(3)(a)(iii) also places an obligation on payers and payees.

Article 42(2) protects banks where they are not able to determine if the transfer form Dubai represents a stage in a series of transfers which effect a payment by an Iranian person, entity or body.

5.10 Due diligence requirements

5.10.1 Determining whether an individual is an "Iranian person"

Article 30 applies to transfers of funds to and from Iranian persons, entities and bodies. The definition of Iranian person, entity or body in art.1(o) includes "any natural person in, or resident in, Iran".

Whether a person should be considered as resident in Iran will depend on the circumstances of each case. Factors that may be relevant to an assessment of his or her residency status include:

- duration and frequency of time spent in the country;
- purpose of being in the country (e.g. short-term study, vs long-term employment);
- main place of residence;
- the person's visa and immigration status;
- the person's tax status.

If a financial institution has reasonable cause to suspect that a transfer of funds is to or from a natural person in or resident in Iran, it should comply with the provisions of art.30 if one or other of the thresholds is met. If there is insufficient information to be able to determine that there is a reasonable cause so to suspect, then the institution will be afforded protection by art.42(2).

5.10.2 Determining whether an entity is "owned or controlled"?

The term "owned or controlled" is used in both art.23 (asset freezing) and in the definition of Iranian person, entity or body in art.1(o) which in turn is relevant to the provisions of art.30.

The ownership or control of an entity will depend on the facts of each case. Some cases will be clear cut. For example a wholly owned subsidiary is clearly owned and controlled by its parent whilst a publicly listed company in which a designated person or an Iranian person, entity or body has a less than 1 per cent shareholding is unlikely to be owned or controlled by such person. Others will not be so clear cut, such as a 45 per cent stake held by a designated person or an Iranian person, entity or body in a company.

When considering this issue, the types of information that may be relevant include:

- size of shareholding, including in comparison to the holdings of other shareholders (e.g. where a designated person or an Iranian person, entity or body holds 40 per cent but no other shareholders hold more than 5 per cent, this may indicate control by the designated person or Iranian person, entity or body);
- nature of shares held—some shares may carry voting rights while others may not;
- the management of the entity (e.g. the composition of the board of directors);
- the entity's Articles of Association;

- voting/veto rights;
- ability to exercise power over important matters affecting the company.

In the context of art.30, if the institution has reasonable cause to suspect that a legal person, entity or body ("X") is owned or controlled directly or indirectly by one or more of the persons or bodies listed in art.1(o)(i)–(iii) (the definition of Iranian person, entity or body) and that it is processing a transfer of funds to or from X, the institution should comply with the provisions of art.30. If there is insufficient information to give rise to a reasonable cause to suspect ownership or control, then the institution will be afforded protection by art.42(2).

5.10.3 Is there a requirement to carry out due diligence on payees and payers to ensure that art.30 is not engaged?

Payment service providers should note that under art.42(2), the prohibitions set out in the Regulation do not give rise to liability of any kind on the part of the natural or legal persons or entities concerned, if they did not know, and had no reasonable cause to suspect, that their actions would infringe these prohibitions.

If a payment service provider's normal due diligence checks give rise to a suspicion that a payment is to or from an Iranian person, entity or body, the payment service provider should carry out further investigations. What those steps comprise is a matter for the payment service provider and depends on the payment service provider's assessment of the risk of the transfer in question being subject to art.30.

5.11 What should a bank tell its customer in the event that the Treasury refuses to authorise a transaction? Should it end its relationship with the customer if a transfer is refused authorisation?

If the Treasury refuses to authorise a transaction it will communicate this openly to the bank. The bank will be free to pass on the information to its customer.

Unlike in money laundering legislation, there is no tipping off provision in the Regulation 267/2012. It will be the transaction itself that will be unauthorised, rather than the customer relationship. In such circumstances, the bank would not be legally obliged to discontinue the customer relationship; it is a commercial decision for a bank as to whether it wishes to continue a relationship with a customer.

5.12 Where a firm is a member of a syndicate for a loan facility that involves an Iranian entity, are payments to and from the non-Iranian agent bank (for drawdown, interest or principle repayment) subject to art.30?

Where the agent bank is in the European Union, then the obligation will be on them to notify/seek authorisation if they are making transfers to, or receiving transfers from, an Iranian person, entity or body. Where the agent bank is not in the European Union, the syndicated banks will need to consider whether the payments they are making/receiving are from or to an Iranian person, entity or body.

5.13 How are trade instruments and bonds affected by Regulation 267/2012? Do all open trade agreements have to be reviewed?

If a transfer of funds is due to be made under a trade instrument or bond, and it is caught by art.30, it will be subject to notification or authorisation. Similarly, if the payment is due to or from a designated person then it will be subject to the requirements of arts.23–29 of the Regulation. Of course, if 12 such payments are authorised or exempt from the asset freeze, art.30 does not apply (but it remains to be complied with if art.29 is engaged).

Separately, the Regulation places prohibitions on the sale, purchase or brokering of public or public-guaranteed bonds issued after July 26, 2010 to or from certain Iranian entities. This prohibition is set out at art.34.

The Regulation does not require a review of all open trade agreements, but financial institutions would be expected to conduct appropriate due diligence to ensure that transfers in connection with such agreements are compliant with the Regulation

5.14 What is the status of notifications given to/authorisations obtained from the Channel Islands and Isle of Man authorities?

It should be noted that, while the Channel Islands and the Isle of Man have enacted their own legislation adopting Regulation 267/2012, these jurisdictions are not part of the European Union. Therefore, in the case of any art.30 transfers of funds which involve parties in one or more of these jurisdictions and in the United Kingdom, the Treasury remains the competent authority for the purposes of the Regulation and the appropriate notifications and requests for authorisation should be directed to the Treasury, notwithstanding any notifications given or authorisations obtained from authorities on the Channel Islands and the Isle of Man.

6 Financial Restrictions (Iran) Order 2011

6.1 Introduction

UK financial and credit institutions are impacted by the Financial Restrictions (Iran) Order 2011 ("the Order") which came into effect on November 21, 2011—they must cease business relationships and transactions with all banks incorporated in Iran, including all subsidiaries and branches of such banks, wherever located, and the Central Bank of Iran. This makes it substantially more difficult for UK companies to trade with Iranian companies who have a banking relationship with an Iranian bank. However, UK exporters remain free to receive payment from Iranian customers who operate a bank account with a non-Iranian bank. The Treasury made the Order in exercise of the powers conferred by Sch.7 to the Counter-Terrorism Act 2008 ("2008 Act").

6.2 Application of the Direction

6.2.1 Relevant persons

All persons operating in the financial sector are impacted (i.e. persons operating as credit or financial institutions in the United Kingdom). "Credit institution" and "financial institution" are defined in para.5 of Sch.7 (as amended by s.48(1) of the Terrorist Asset-Freezing Act 2010). All persons operating in the financial sector, including their branches wherever located, are referred to in the direction to the Order ("Direction") as "relevant persons" and are subject to the requirements of the Direction.

The definitions of credit institution and financial institution in Sch.7 are essentially the same as those in the Money Laundering Regulations 2007, but the definition of financial institution also includes insurance companies, as defined by s.1165(3) of the Companies Act 2006.

In summary, the requirements of the Direction apply to:

- all persons operating in the UK financial sector as financial or credit institutions;
- all branches of such persons, wherever those branches are located.

The requirements of the Direction do not apply to:

- any subsidiaries of a UK financial or credit institution, where those subsidiaries are incorporated outside the United Kingdom;
- any subsidiaries of a UK financial or credit institution, wherever located, where those subsidiaries are not financial or credit institutions.

6.2.2 Designated persons

The Direction imposes requirements in relation to transactions and business relationships with "designated persons", as follows:

- all banks incorporated in Iran;
- all subsidiaries and branches of banks incorporated in Iran, wherever those subsidiaries and branches are located;
- the Central Bank of Iran.

6.2.3 What are the requirements of the Direction?

The Direction requires relevant persons not to enter into, or continue to participate in, any transaction or business relationship with a designated person, unless licensed by the Treasury, but our experience is that most financial institutions will refuse to become involved in a transaction or business relationship with a designated person—even if it is legitimate for them to do so.

"Business relationship" has the meaning set out in para.45 of Sch.7 to the 2008 Act:

> "a business, professional or commercial relationship between a relevant person and a customer, which is expected by the relevant person, at the time when contact is established, to have an element of duration."

In short, relevant persons must not enter into new transactions or business relationships with designated persons, unless licensed by HM Treasury.

6.2.4 What does this mean for existing transactions or business relationships with designated persons?

Relevant persons must not continue to perform any existing transaction or undertake any activity pursuant to an existing business relationship with designated persons, unless licensed to do so by HM Treasury. An existing transaction or business relationship is one that was entered into by the relevant person with a designated person prior to the Direction coming into force on November 21, 2011. Existing business relationships should cease immediately in order to comply with the Direction, unless permitted to continue under one of the licences. Any relevant person party to an existing transaction or business relationship with a designated person must not make any payment to or process any payment from a designated person, or in any other way act pursuant to a transaction or business relationship, unless authorised to do so under licence.

The requirements of the Direction only apply to transactions and business relationships between relevant persons and designated persons. These include but are not limited to:

- the transmission of funds or value between a relevant person and a designated person;
- the accrual, creation or other provision of funds or value for a designated person;
- the exchange of financial or credit documents with a designated person;
- acting upon the instructions of a designated person;
- acting under a contract agreed with or pursuant to an obligation owed to a designated person.

In relation to transactions which involve transfers from a relevant person to a designated person, the following are prohibited by the Direction:

- Any payment made by a relevant person where the intended recipient is a designated person, either for its own account or that of a customer. Such a payment will be prohibited, even if it is made through one or more intermediaries.
- Any payment transmitted by (but not originated by) a relevant person where the intended recipient from the originator's point of view is a designated person, either for its own account or that of a customer.

In relation to transactions which involve transfers from a designated person to a relevant person, the following are prohibited by the Direction:

- the processing of a transfer of funds from a designated person to a relevant person, either for its own account or that of a customer. It is also prohibited to participate in transactions involving indirect payments from Iranian banks, such as those made through one or more intermediaries.

- the processing of a transfer of funds from a designated person to a relevant person that is pursuant or related to an underlying business relationship between the designated person and the relevant person.

Relevant persons should be aware that no offence is committed and no civil penalty can be imposed if all reasonable steps are taken and all due diligence exercised to ensure that the requirements of the Direction are complied with. So if, having taken such steps and exercised such due diligence, relevant persons do not know or have reasonable cause to suspect that their participation in a transaction is prohibited by the Direction (e.g. they are an intermediary and do not have sufficient information to determine whether funds they have received have been received from, or are ultimately to be transferred to, an Iranian bank), a civil penalty cannot be imposed and no offence is committed if there is nevertheless a breach of the requirements.

6.3 How does the Direction affect existing financial sanctions in place against Iran?

Existing financial sanctions against Iran in force in the United Kingdom must continue to be complied with. The Direction does not alter the requirements to comply with other measures. However, the Direction goes further than existing sanctions as it prohibits activities that are permitted (in some cases, subject to certain requirements) under those sanctions. The existing sanctions measures are those contained in the EU Regulation on restrictive measures against Iran.

6.4 How does the Direction affect the EU ban on insurance and reinsurance for Iranian entities?

Article 35 of the EU Regulation prohibits the provision of insurance or reinsurance to:

- Iran or its government, and its public bodies, corporations and agencies;
- an Iranian person, entity or body other than a natural person; or
- a natural person or a legal person, entity or body when acting on behalf or at the direction of a legal person, entity or body referred to under the first two bullet points above.

However, art.35 contains certain exemptions where insurance or reinsurance may continue to be provided. The Direction goes further than the requirement in the EU Regulation in certain respects. For example, it prohibits any payment in relation to a contract of insurance that would otherwise be permitted under an exemption in art.35, if that payment involves an Iranian bank. Article 35 contains an exemption to the insurance ban in circumstances where insurance is provided to natural Iranian persons acting in their private capacity (and not on behalf, of at the direction, of a legal Iranian person, entity or body or the government of Iran). Such insurance may require payments of premium or claims between a UK bank and an Iranian bank, which would be prohibited under the Direction. The Treasury has therefore issued a general licence allowing transactions relating to insurance or reinsurance that are exempt under art.35. The licence contains certain conditions.

It should also be noted that the Direction prohibits UK insurers from entering into or continuing in business relationships with Iranian banks, and this has the effect of prohibiting the provision of insurance to such banks. The general licence, however, allows UK insurers to provide insurance to Iranian banks in circumstances where that provision is exempted under the terms of the exemptions in art.35.

6.5 General licences

The Treasury has issued six general licences, which authorise all relevant persons to participate in certain transactions or business relationships which the Treasury believe it is appropriate to exempt from the effects of the Direction. They cover transactions or business relationships with Iranian banks which are connected to the following:

- General Licence 1: Humanitarian activities, medicine, foodstuffs where the related transfers are under €40,000.

- General Licence 2: Personal remittances between individuals where the transfers are under €40,000 and the transactions are not in the course of a business.
- General Licence 3: Provision of insurance which is exempt under the EU Regulation (asset-freezing exemptions).
- General Licence 4: relevant persons holding accounts in the name of asset frozen banks; activities which would otherwise be exempt under art.29 of the EU Regulation; and activities of UK credit and financial institutions which are currently licensed under the asset-freezing regime.
- General Licence 5: relevant persons holding accounts in the name of designated persons.
- General Licence 6: completion of payments to or from designated persons which were in progress at the time of the Direction coming into force.

General licence categories	What is permitted under this licence?
GL1: Humanitarian activities, medicine, foodstuffs	This licence allows relevant persons to continue with existing transactions, or enter into new transactions, with designated persons which involve the transfer of funds of under €40,000 to or from designated persons, where those transfers are for or related to humanitarian activities or purposes, including the export of medical equipment or foodstuffs and the provision of healthcare. Relevant persons are still required under art.30 of the EU Regulation to report the transaction to HM Treasury if it involves a transfer of above €10,000. Any such transactions involving transfers which are of €40,000 or more can only take place under individual licence, for which application must be made to the Treasury. The general licence does not permit any payment of funds to any person or entity subject to an asset freeze under EU sanctions. An individual licence disapplying the asset-freezing prohibitions is required for such a payment to be made.
GL2: Personal remittances	This licence allows relevant persons to enter into transactions which involve the transfer of funds of under €40,000 to or from designated persons, where those payments are personal remittances (i.e. payments between persons acting in a non-commercial, private capacity, the payments not being made in the course of a business). Examples of personal remittances include payments provided between family members for living expenses. Customers in the United Kingdom who make or receive such payments will need to notify their bank that their payment is a personal remittance.

General licence categories	What is permitted under this licence?
GL2: Personal remittances	Any such transactions involving transfers which are for €40,000 or more can only take place under individual licence, for which application must be made to the Treasury. Relevant persons are still required under art.30 of the EU Regulation to report any transaction of more than €10,000 to HM Treasury. This licence does not permit any payment of funds to any person or entity subject to an asset freeze under EU sanctions. An individual licence disapplying the asset-freezing prohibitions is required for such a payment to be made.
GL3: Provision of insurance to Iranian persons, entities or bodies which is exempt under the EU Regulation	This licence allows relevant persons to continue with existing transactions, or enter into new transactions, which involve the transfer of funds to or from designated persons in relation to the provision of insurance which is permitted under art.35 of the EU Regulation. Permitted insurance includes insurance for Iranian individuals acting in their private capacity, such as health or travel insurance, and third party or compulsory insurance for Iranian companies incorporated in an EU Member State. If any transfers of funds in connection with such permitted insurance provision are subject to art.30 of the EU Regulation, the applicable notification/ authorisation requirements must be complied with. The general licence also permits UK insurers to continue a business relationship with an Iranian bank where that relationship comprises the provision of insurance cover to Iranian banks which is exempt under art.35 of the EU Regulation.
GL4: holding of asset-frozen Iranian banks' accounts; activities which would otherwise be exempt under art.20 of the EU Regulation (asset-freezing exemptions); and activities of UK credit and financial institutions which are currently licensed under the asset-freezing regime	This licence allows relevant persons: (a) to continue to hold such persons' frozen accounts; (b) to enter into transactions to the extent required to credit funds to those accounts under art.29 (exemptions for crediting of frozen accounts) of the EU Regulation; and (c) to continue in business relationships and engage in transactions with asset-frozen Iranian banks in the United Kingdom only to the extent necessary to perform those activities that they are currently separately licensed under the asset-freezing regime to engage in (e.g. dealing with the funds of an asset-frozen Iranian bank under the terms of a routine payments licence or a correspondent banking licence).

General licence categories	What is permitted under this licence?
GL4: holding of asset-frozen Iranian banks' accounts; activities which would otherwise be exempt under art.20 of the EU Regulation (asset-freezing exemptions); and activities of UK credit and financial institutions which are currently licensed under the asset-freezing regime	Relevant persons are required to report the transaction to HM Treasury only where there is a requirement to do so under art.29 or under the relevant licence.
GL5: relevant persons holding accounts in the name of designated persons	This licence allows relevant persons to continue with existing business relationships with Iranian banks to the extent that relevant persons can continue to hold such persons' accounts. Relevant persons are required to report details of any such accounts to HM Treasury as soon as reasonably practicable, and in any event within 14 days. Specific licences may subsequently be issued to permit the balance of the account to be transferred, and the account closed.

6.6 How does the Direction affect exporters doing business with Iran?

The Direction requires relevant persons to cease transactions and business relationships with designated persons. Exporters are unlikely to be relevant persons, unless they are also operating as a financial or credit institution in the United Kingdom. So the Direction is not intended to serve as a trade ban with Iranian companies, even though the UK government does not encourage such trade. Exporters will no longer be able to use UK credit or financial institutions to make or receive payments to or from Iranian banks, unless the Treasury has licensed the transaction. Nor will they be able to use financial services from a UK credit or financial institution if providing those services involves the UK credit or financial institution in a business relationship with an Iranian bank. For example, the Direction prohibits a UK bank from entering into a new letter of credit arrangement with an Iranian bank.

Any person affected by the Direction can apply for a licence exempting a transaction or business relationship from the requirements. Licence applications can be made by exporters, as well as relevant persons.

6.7 Supervision and penalties

For the purposes of the Direction, the supervisory authorities are:

- the Financial Services Authority ("FSA") for credit institutions that are authorised persons and financial institutions (except Money Service Businesses that are not authorised persons and consumer credit financial institutions);
- the Office of Fair Trading ("OFT") for consumer credit financial institutions;
- HMRC for Money Service Businesses that are not authorised persons;
- the Department of Enterprise, Trade and Investment Northern Ireland for credit unions in Northern Ireland (until such time as this is transferred to the FSA; HM Treasury will publicise the transfer).

6.8 Interaction with existing Proceeds of Crime Act 2002 ("POCA") and Terrorism Act 2000 ("TACT") requirements

There is no "tipping off" offence in relation to compliance with the requirements of the Direction. The Direction and its requirements are made public and relevant persons may inform their customers of why

they are taking the requisite action to cease transactions and business relationships. Similarly, there is no issue of "consent" in relation to compliance with the requirement of the Direction. Relevant persons should not seek consent before ceasing transactions and business relationships. If relevant persons want to seek exemption from the requirements of the Direction for specific activities they must apply to the Treasury for a licence, as set out above. Persons are advised not to submit a Suspicious Activity Report upon cessation of a business relationship or when undertaking any activity for which a licence has been obtained, unless they have a separate suspicion related to the activity beyond it being subject to the Direction.

If a transaction or business relationship subject to the requirements of the Direction is also simultaneously the subject of an existing law enforcement action, such as a production order or an account monitoring order, the relevant person should cease business and consider liaising with the appropriate authority applying that action as regards the need to apply to the Treasury for a licence.

6.9 Offences

It is an offence not to comply with the requirement of the Direction—see para.30 of Sch.7 to the 2008 Act. A person may be penalised for failure to comply by either a civil penalty issued by a supervisory authority, or a criminal prosecution. However, a person cannot be made liable to a civil penalty and be prosecuted for the same failure.

It is an offence for a relevant person intentionally to participate in activities knowing that the object or effect of them is (whether directly or indirectly) to circumvent the requirements of the Direction. A person may be penalised for circumvention by either a civil penalty issued by a supervisory authority, or a criminal prosecution. However, a person cannot be made liable to a civil penalty and be prosecuted for the same circumvention.

As under the Money Laundering Regulations 2007, in deciding whether to impose a penalty, or whether a firm has committed an offence, a supervisory authority or a court must consider whether the person followed any relevant guidance available at the time.

A supervisor may impose a penalty of such amount as it considers appropriate. A court may impose a prison term of up to two years and/or a fine.

A failure to comply with the conditions of any licence that the Treasury may issue is subject to the above civil penalties. There is no criminal sanction for such non-compliance.

However, a person commits an offence if they obtain a licence under false pretences or using false information. In relation to such an offence, a court may impose a prison term of up to two years and/or a fine.

No penalty may be imposed, nor will an offence be committed if the person took all reasonable steps and exercised all due diligence to ensure that the requirements of the Direction would be complied with.

If an offence committed by a body corporate, a partnership, or an unincorporated association is shown to have been committed with the connivance of an officer or partner of that business, or to be attributable to any neglect on the part of any such officer or partner, the officer as well as the business is guilty of an offence and liable to be proceeded against accordingly. "Officer" and "Partner" have the meanings set out in Sch.7 to the 2008 Act.

An offence may be committed by UK persons by conduct wholly or partly outside of the United Kingdom. However, UK nationals working for persons abroad not subject to the Direction (e.g. non-UK institutions and subsidiaries of UK institutions) are not subject to the requirements. Non-UK companies are only subject to the requirements of the Direction for activities within the United Kingdom.

7 Conclusion

Dealing with nations who are subject to EU sanctions and export controls is not for the faint hearted. Aside from the myriad of complex legal issues which must be overcome, the commercial challenges often present considerable barriers. That said, significant rewards exist for those who devote the time and energy to transacting in a legitimate manner. Perhaps the greatest benefit lies in the ability to be in the "driving seat" to develop lucrative opportunities once the restrictions ease away. In many cases, history demonstrates they do.

Annex

Iranian sanctions—internal checklist for XYZ Limited ("XYZ")

XYZ takes its obligations to comply with applicable sanctions regimes concerning exports to Iran very seriously. This checklist summarises the various matters to be checked whenever we are involved in exports of goods to Iran. This checklist should be completed for every export to Iran with which we are concerned. Should you have any questions or queries when completing this list please contact the General Counsel or a Director.

Question 1—The United States

1(a)	Are the goods (or *part* of the components in the goods) manufactured or originating in the United States? If "yes", go to Question 1(b). If "no", go to Question 2(a).	Yes/No
1(b)	Are the goods (or *part* of the components in the goods) which are manufactured or originating in the United States, held in inventory outside the United States and not intended for a specific destination at the time of their export from the United States? If "yes", go to Question 2(a). If "no", go to Question 1(c).	Yes/No
1(c)	Does the value of the components of US origin/manufacture comprise less than 10 per cent of the value of the goods? If "yes", go to Question 2(a). If "no", do not proceed.	Yes/No

Question 2—The goods to be exported to Iran

2(a)	Are the goods to be shipped to Iran subject to restrictions or prohibitions under the Regulation? You may refer to the General Counsel in order to check this. If "yes", go to Question 2(b). If "no", go to Question 2(d).	Yes/No
2(b)	Is the contract a pre-existing contract (i.e. the Regulation allows the export to take place if the contract was executed prior to the Regulation coming into force)? If "yes", make a notification to the ECO before continuing with the order and go to Question 2(c). If "no", do not proceed.	Yes/No
2(c)	Are the goods being physically exported from the United Kingdom? If "yes", go to Question 2(d). If "no", go to Question 2(e).	Yes/No
2(d)	Have you (or a third party) successfully obtained an "NLR" or an export licence from ECO? If "yes", go to Question 2(e). If "no", then you must obtain this and then go to Question 2(e).	Yes/No
2(e)	If the goods are being physically exported from a country other than the United Kingdom, have you checked whether any licence is required from BIS or from the country of export and, if so, has such a licence been obtained? If "yes", go to Question 2(f). If "no", you must obtain this and then go to Question 2(f).	Yes/No
2(f)	If you are not manufacturing the goods yourselves, have you obtained a standard certification from the manufacturer confirming the goods are not subject to EU, UN (or other applicable local) sanctions. If "yes", go to Question 3(a). If "no", you must obtain this and then go to Question 3(a).	Yes/No

Question 3—Your customer and any agent/middleman ("Customer")

3(a)	Is your Customer listed in Annex VIII or IX of the Regulation? If "yes", do not proceed. If "no", go to Question 3(b).	Yes/No
3(b)	Is your Customer listed in the Iran list? If "yes", then be aware that your execution of the order *may* be refused and go to Question 3(c). If "no", go to Question 3(c).	Yes/No
3(c)	Have you contacted ECO via the Iran End User service or via a Ratings Requests and received confirmation that you are permitted to export to the Customer? If "yes", then go to Question 4(a). If "no", then you must obtain this and go to Question 4(a).	Yes/No

Question 4—Banks

4(a)	Have you informed your Iranian customer that you must not receive payment from a person or entity listed on Annex VIII or IX of the Regulation? If "yes", go to Question 4(b). If "no", please do so and go to Question 4(b).	Yes/No
4(b)	Does any letter of credit or other form of payment involve a person or entity listed on Annex VIII or IX of the Regulation? If "yes", then go to Question 4(c) and do not proceed without seeking further advice. If "no", go to Question 5(a).	Yes/No
4(c)	Was the letter of credit opened or payment instruction made by a bank prior to that bank being listed on Annex VII or VIII? If "yes", then you *may* be able to apply for a licence for payment to be released to you and proceed. If "no", do not proceed unless alternative payment arrangements are organised. Go to Question 5(a).	Yes/No

Question 5—Paying and receiving monies from Iran

5(a)	Are you paying monies to or receiving monies from an "Iranian person, entity or body", as defined in the Regulation, which is €10,000 or more? If "yes", then ensure HM Treasury or its equivalent in the EU is notified and/or authorisation is obtained and then go to Question 5(b).	Yes/No
5(b)	Does the payment involve a UK bank whether directly or indirectly at any stage? If "yes", do not proceed. If "no", go to 6(a).	Yes/No

Question 6—Insurance and contractual protection

6(a)	Have you checked that any insurance cover in relation to the export is valid and not in breach of the Regulation given the goods are being exported to Iran? If "yes", go to Question 6(b). If "no", please check and upon receipt of confirmation that insurance cover is valid, go to Question 6(b).	Yes/No
6(b)	Do you have a clause in any sales or purchase contract (this may be difficult to achieve with respect to a pro forma invoice to Iran) stating that should the contract result in you being in breach of sanctions laws applicable to you then you reserve the right immediately to terminate the contract without any liability to the other party? If "yes", you may proceed. If "no", endeavour to insert such a clause in the contract and then proceed.	Yes/No

ISSUE 101: Reading Between the Lines: clarifying the FSA's wider expectations of Significant Influence Function holders on appointment and beyond

Author: Nathan Willmott, Berwin Leighton Paisner

Coverage:

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2. Governance and risk management lessons gleaned from the financial crisis
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5. Appointment of new SIFs—ensuring a smooth approval process
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