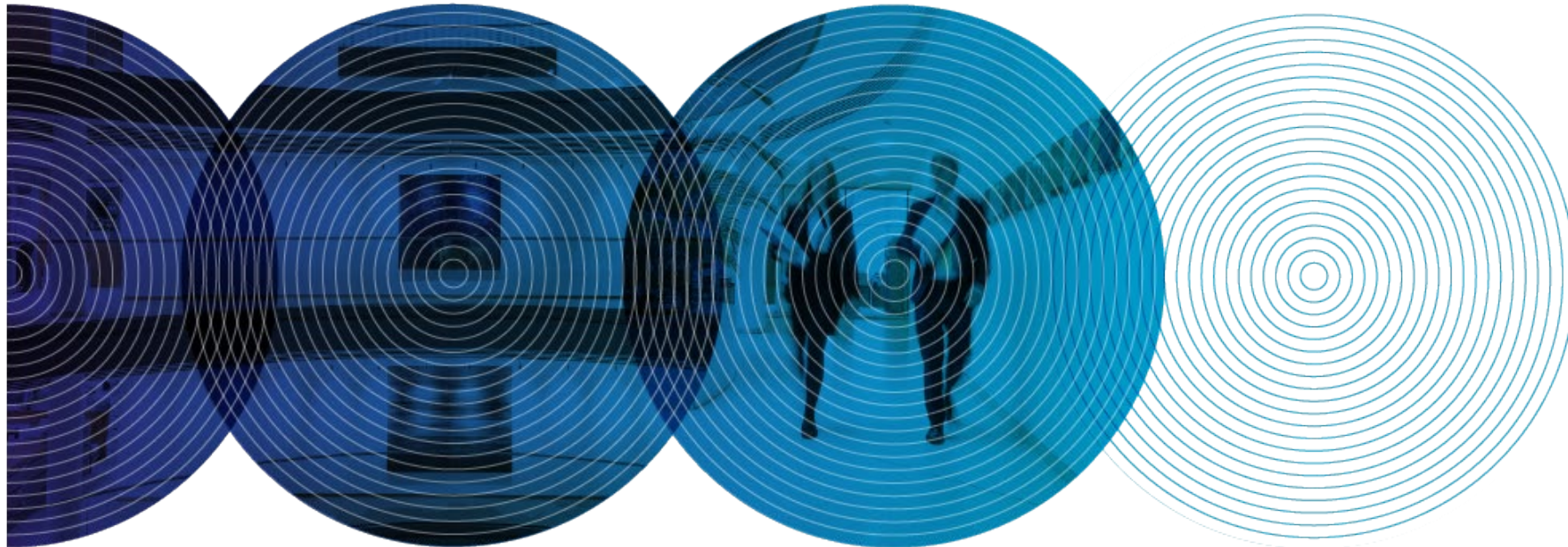

Sanctions, Liability and Managing Risk

Satellite Event – Dublin International Disputes Week

Friday, 9 June 2022 1pm – 2pm



MCCANN FITZGERALD



Speakers

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Overview of Ukrainian, EU, UK and US Sanctions

- Key features and developments in respect of the Ukrainian, EU, UK and US sanctions regimes
- While there are similarities, watch out for important differences between each sanctions regime, including:
 - How ownership and control is assessed for the purpose of asset freezing measures, (including aggregation)
 - New EU Guidance on firewalls regarding EU entities controlled by designated persons in the agricultural sector ;
 - Differences in designated persons under each regime;
 - Differences in safe harbour provisions;
 - Differences in liability and
 - Differences in approach by national competent and enforcement authorities, including across the EU.

The Ukrainian Perspective

- Subject to certain exceptions, Ukrainian sanctions are primarily in response to the Russian aggression since 2014 and, notably, to the large-scale invasion since 2022
- Individual sanctions (against corporate entities and natural persons) are passed by the National Security and Defence Council and approved by the Presidential Decree
- Sectoral sanctions – in addition to the above procedure – are additionally approved by the Resolution of the Parliament
- High Anti-Corruption Court approves confiscation of assets of the designated persons
- Some measures are within the competence of the Cabinet of Ministers (e.g. import embargo with respect to goods from Russia)
- Yermak-McFaul Expert Group is a thinktank on sanctions against Russia and Belarus
- Ukraine also maintains a very long “pre-sanction list”, as well as the list of “international sponsors of war”.

The EU Perspective

- Successive rounds of sanctions packages have been introduced since March 2022 as the war has escalated, building on existing measures first introduced in 2014. The last package of sanctions was adopted on 24 February 2023. The eleventh sanctions package is expected in the coming days.
- Regulation No. 269/2014 deals with asset freezes for designated persons. No definition of ownership and control – EU Guidance on ownership and control is unclear however note new EU Guidance on firewalls which sets out certain criteria re: permissible payments to certain EU entities controlled by designated persons.
- 833/2014 deals with restrictive measures concerning goods and services being imported and exported to Russia and certain parts of Ukraine.
- EU Regulations do not apply extra territorially, however important to consider whether sanctions apply in a cross jurisdictional context re: EU nationals and corporate groups operating outside and inside the EU where there is an EU nexus, such as doing business in the EU, making payments from an EU bank account, accepting goods in an EU port, or EU nationals facilitating payments which are in breach of sanctions.

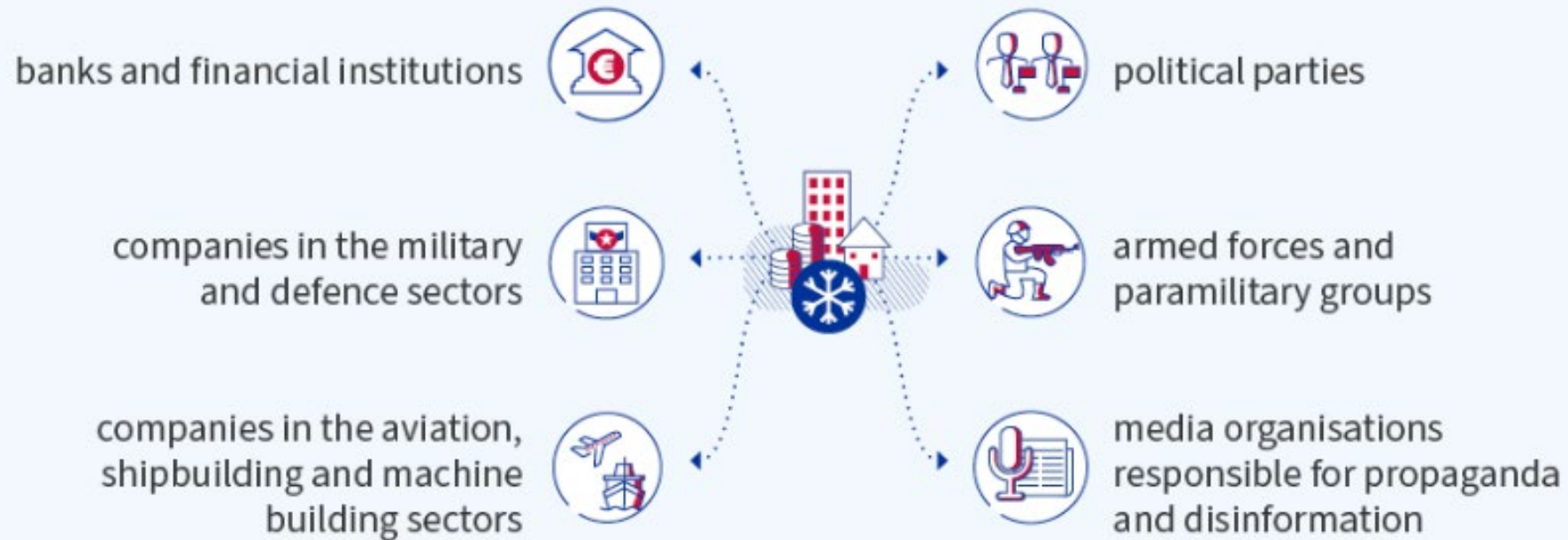
EU sanctions against individuals and entities

→ Assets freeze / travel ban against



EU sanctions against individuals and entities

→ Assets freeze against



EU economic sanctions

→ Finance



EU economic sanctions

→ Transport



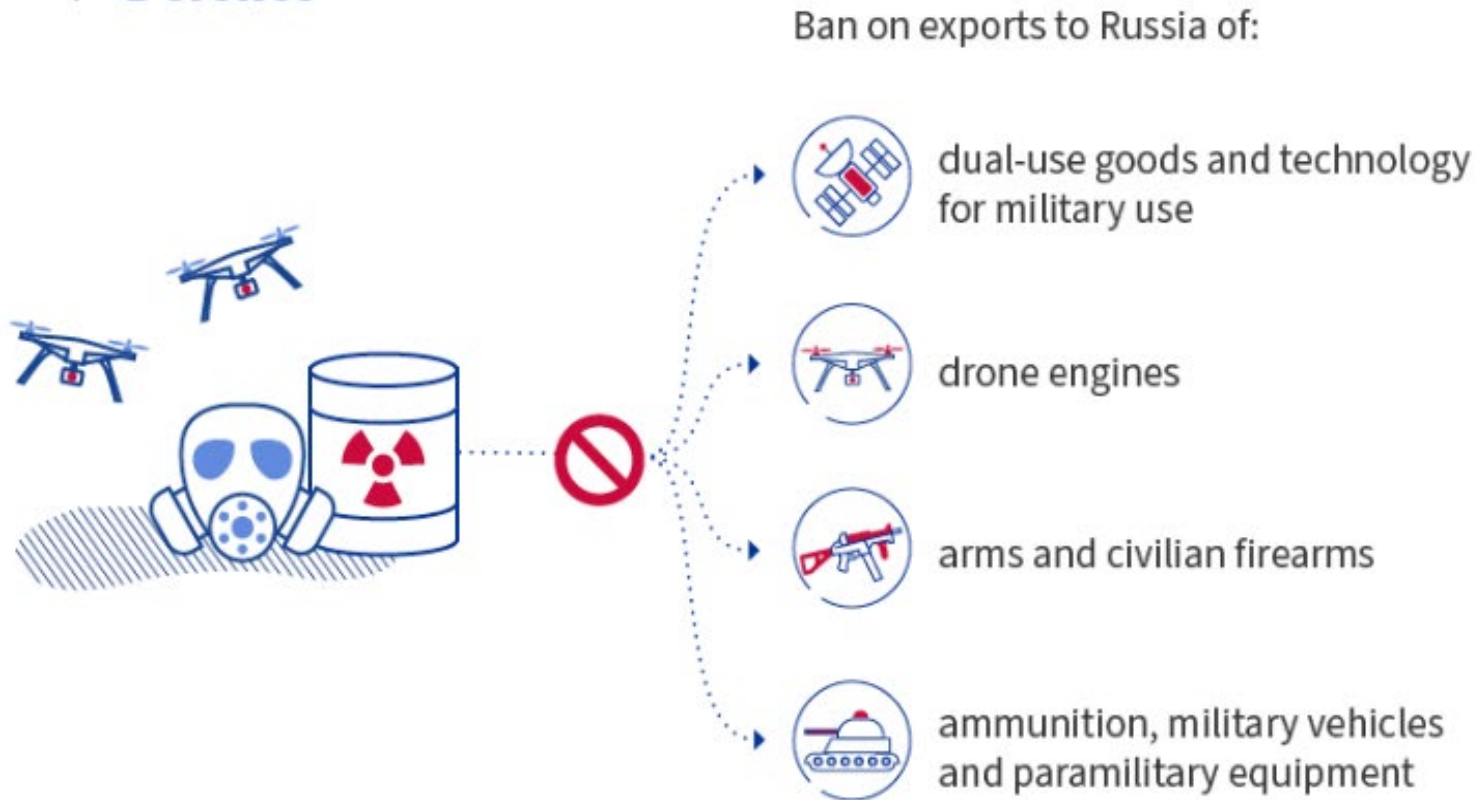
EU economic sanctions

→ Energy



EU economic sanctions

→ Defence



EU economic sanctions

→ Raw materials and other goods

Ban on exports to Russia of:



luxury goods



Ban on imports from Russia of:



steel, iron, cement and asphalt



wood, paper, synthetic
rubber and plastics



seafood, spirits, cigarettes
and cosmetics



gold, including jewellery

EU economic sanctions

→ Services



Ban to provide to Russia or Russian persons:



architectural and engineering services



IT consultancy and legal advisory services



advertising, market research and public opinion polling services

The UK perspective

- Trade Sanctions
- Ownership and Control “persons connected with Russia”
- Aggregation
- Licences – general and specific

The US perspective



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Trends in U.S. Sanctions Enforcement

Carrie A. Tandler
Kobre & Kim (New York)

Liability and Enforcement

- **EU**
 - Article 10(2) of Regulation (EU) No. 269/2014 is a safe harbour provision: “Actions by natural or legal persons, entities or bodies shall not give rise to any liability of any kind on their part if they did not know, and had no reasonable cause to suspect, that their actions would infringe the measures set out in this Regulation.” This is mirrored at Article 10 of the Regulation (EU) No. 833/2014.
 - The EU Russian Sanctions Regime is not prescriptive as to liability, and so each Member State can determine whether to impose civil or criminal liability for breaches.
 - Breaching EU Sanctions is now a criminal offence in 13 Member States for natural and 14 Member States for legal persons, including Ireland, where it is a strict liability offence both for a corporate entity and its officers. On 25 May 2023, the EU Commission issued a proposal that would make breaching EU sanctions against Russia an EU crime. This aims to unify all 27 Member States in an approach which imposes mandatory criminal liability.
- **UK**
 - *Celestial Aviation Services Limited v Unicredit Bank AG, London Branch* [2023] EWHC 1071 (Comm)
 - Application of Section 44 of the Sanctions and Anti-Money Laundering Act 2018 (Section 44).
 - Criminal Liability
- **Ukraine**
 - Ukraine is still to introduce the express criminal liability specifically for breach of sanctions. The bill is currently in the Parliament and envisages punishment – depending on a particular *corpus delicti* – between a fine and imprisonment for up to 15 years. While the bill has not been passed into law, respective actions may still be adjudged as a crime as per certain more general *corpus delicti*.
- **US**

3 Major Trends in U.S. Sanctions Enforcement

Focus on Sanctions Enforcement and Evasion

- DOJ's Task Force KleptoCapture
- Increased OFAC Activity

Increased International Coordination

- Russian Elites, Proxies and Oligarchs Task Force (REPO)
- Exchange of Personnel (e.g. OFAC-OFSI Enhanced Partnership)

Enhanced Communication with the Private Sector

- Unsealed Indictments
- Appeals to Partnership with Private Sector

2022 Takeaways

- Non-US Companies that utilise US financial services must comply with sanctions.
 - Examples of OFAC settlements with non-US companies:

The logo for Toll Holdings Limited, featuring the word "TOLL" in a bold, green, italicized sans-serif font.

Toll Holdings Limited
(Australia)

The logo for Sojitz, featuring a stylized blue starburst icon to the left of the word "sojitz" in a bold, black, lowercase sans-serif font.

Sojitz
(Hong Kong)

The logo for Danfoss, featuring the word "Danfoss" in a red, cursive script font.

Danfoss
(Netherlands)

Civil Liability and Contracts

- Sanctions may also have significant consequences for contractual relationships, as performance may be in breach of restrictive measures
- Sanctions clauses, force majeure, frustration or termination clauses should be considered
- Dispute resolution clauses, choice of law and jurisdiction clauses will need careful review
- Consider position of third parties e.g. financial institutions which may impact contract performance
- Significant complexities in international disputes/cross border transactions which may engage multiple sanctions regimes

Lending Facilities and Insurance

- Sanctions are not confined to particular financial products. Lenders and insurance providers will also have stringent obligations to comply with sanctions.
- For lenders, stringent due diligence must be carried out not only on the potential borrower but all parties to the transaction both directly and indirectly. Where there is potential for sanctions compliance to be at risk, undertakings in respect of how the loan proceeds are to be used and repaid are essential
- A mandatory prepayment clause can also be used to include prepayment in the case of a sanctions related event
- Insurers must also take great care to ensure a claimant and the proceeds resulting from a claim are not in breach of the restrictive measures
- Sanctions clauses will also protect from an onset of claims as cover is nullified once sanctions are present

Managing Risk

- Screening: All organizations in all sectors are obliged to comply with sanction screening requirements and to have robust controls in place
 - This screening involves vetting individuals, groups or companies against designated sanction lists and their alliances
 - Due diligence is key in managing sanctions related risk
- **Prevent the Risk**
 - **Detect the Risk**
 - **Respond to the Risk**

The Future

- Further sanctions
- Increased enforcement with a focus on anti-circumvention
- Increased co-operation between regulators
- Confiscation of assets?

Questions?

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