

# Dealing with economic sanctions

Gerald O'Mahoney and Annika Coleman discuss certain complexities and issues that arise if a person happens to be the target of economic sanctions and provide some guidance for those who do.

The primary purpose of economic sanctions, be they issued by the Office of Foreign Asset Control (OFAC), part of the US Treasury, by the European Commission or other government authority, is to target:

- foreign countries and/or designated regimes;
- individuals who lend support to foreign regimes deemed to be unacceptable; and
- terrorists, international drug traffickers and war criminals, and their support structures.

Given the wide spectrum of a possible sanctions target and the nature of the sanctions imposed, their enforcement are intended to be, and often are, draconian in nature. And given the broad nature of the sanctions, they can cause severe economic and commercial damage to large sections of a population of a regime deemed to be acting beyond accepted political norms, such as Zimbabwe. It can be seen in the case of Zimbabwe that many are suffering due to the actions of the few.

## Financial sanctions in Zimbabwe

The political situation in Zimbabwe is dire despite recent changes. The new power sharing regime is not, at this stage, proving to be the first step to solving the country's deep rooted problems that it was hoped to be, and the currency has devalued so much that workers are choosing to be paid in US Dollars or with food parcels to survive. Although the Government of Zimbabwe is now asking for help from other nations, so far only Australia has been willing to assist with financial aid. Conversely, a desire to prevent corrupt government officials or corrupt persons working with them from profiting from the suffering of Zimbabweans has resulted in some nations implementing sanctions against those persons. The aim is that, by freezing the assets of those persons and companies believed to be adding to Zimbabwe's troubles through suspicious dealings, a transparency will be created which will prevent those persons, referred to as

'designated persons', from profiteering or assisting others to do so. Though the reasoning and the intention behind the sanctions are to be commended, the measures are having wide reaching consequences, some of which may not have been anticipated by the sanctioning countries.

## Commonalities between the sanctions Regimes

The various sanctions regimes have many points in common. For example, they all list designated persons or companies, usually without notice or warning. This is entirely understandable given the ability to transfer funds or move assets internationally in minutes in today's electronic world. Any forewarning would give targeted persons or companies the chance to make alternative arrangements, leaving sanctions ineffectual. Additionally, whilst sanctions are designed to make the designated person or organisation suffer, most allow for permission to be sought in order to pay every day bills or 'basic expenses'. Of course, depending on the reasons for appearing on the sanctions list, these every day bills might exceed food and utilities. The process for seeking such permission, as well as the nature of the permission actually granted, vary according to the relevant sanctions regime. The common purpose of sanctions is to freeze funds and economic resources belonging not only, for example, to Zimbabwe, but also to individual members of the government and persons associated with them who are thought to be aiding and abetting the regime. They also include prohibitions against banks, for example, from dealing with funds and economic resources belonging to designated persons and against making funds or economic resources available, whether directly or indirectly, to or for the benefit of designated persons.

## The US sanctions

OFAC first implemented sanctions relating to Zimbabwe in 2003 by way of Executive Order 13288 – Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe.

These sanctions apply to, inter alia, senior officials of the Government of Zimbabwe, for example Robert Mugabe and his wife Grace Mugabe. They also apply to persons or organisations controlled by the Government of Zimbabwe whether directly or indirectly, who have engaged in actions or policies which undermine Zimbabwe's democratic processes or institutions or who have engaged in human rights abuses relating to political repression and/or activities facilitating public corruption by senior officials of the Government of Zimbabwe.

The US sanctions freeze and prohibit the use or transfer of any assets held in the United States or indeed any transaction using the US dollar anywhere in the world. Following the controversy surrounding the flawed election process in Zimbabwe in 2008, the United States revised their sanctions in July 2008 (Executive Order 13469) and in November 2008 to add more designated persons and companies.

Breaching US sanctions can result in fines as high as US\$500,000 for an organisation, US\$250,000 for an individual (or twice the pecuniary gain received by breaching them, whichever is the greater). The fines apply per violation. Individuals may also be imprisoned for up to ten years. Knowingly making false statements or falsifying or concealing material facts is also a criminal offence; civil penalties of US\$11,000 per violation may also be imposed administratively.

OFAC penalties should not be underestimated – this year Lloyds TSB Bank plc were fined US\$350 million for breaching OFAC sanctions regime relating to Iran and Sudan. The fine was incurred even though the actions Lloyds took were outside the United States, in jurisdictions where the conduct was not unlawful. However their conduct caused prohibited transactions to occur within the United States and through US banks, resulting in the huge fine which is said to have cost Lloyds over US\$500 million. An application can be made to OFAC for a designated person to be removed from the OFAC sanctions list. OFAC prefer dealing with licensed attorneys rather than applicants

directly. Although there is no deadline to make such an application, delaying after the publication of the relevant sanctions list could have an adverse effect on such an application. The application to be removed from the OFAC list is often a cumbersome task, with OFAC seeking wide ranging information as part of the application. There is also no appeal process if the application is rejected. That said, because people have been successfully removed from the OFAC sanctions list, specialist legal advice should be sought immediately in the event sanctions are imposed.

## The EC sanctions

The European Community (EC) economic sanctions in relation to Zimbabwe have been in place since the early part of the century, and were most recently revised in 2004 by way of the Council Regulation (EC) No 314/2004 of 19 February 2004 concerning certain restrictive measures in respect of Zimbabwe.

Their list of designated persons, entities and bodies was updated this year by way of Commission Regulation (EC) No 77/2009 of 26 January 2009 amending Council Regulation (EC) No 314/2004. This brought the total number of designated persons to 203 individuals and 40 companies. The list broadly follows the US sanctions list of designated persons.

Much like the US sanctions, the EC sanctions freeze the assets of a listed person anywhere in the EC in a bid to prevent that person or entity from using them for the violations of human rights and freedom of opinions. There is, inter alia, 'a ban on technical assistance, financing and financial assistance related to military activities, a ban on export of equipment which might be used for internal repression, and the freezing on funds, financial assets and economic resources of members of the Government and of any natural or legal persons, entities or bodies associated with them.' The sanctions also include a travel ban which prohibits a designated person from entering or travelling between Member States of the EU, or on EU owned aircraft or vessels.

The application process to pay expenses (divided into legal, basic and extraordinary expenses) requires an application to the 'Competent Authority' (see Article 3 of the

2004 EC Regulation) of the relevant jurisdiction in which the asset is to be found. This can be a problematic when assets are located throughout the European Community; however because the various competent authorities do share information, obtaining permission for expenses in one jurisdiction when that same authority exists in another is often simpler than it might otherwise appear. In the United Kingdom, the competent authority is the asset freezing unit at Her Majesty's Treasury, who will require significant background information before any licence to pay expenses will be granted; this is a sensible process perhaps given the circumstances but time consuming for the individual sanctioned.

Removal from the EC sanctions list is complex and requires that an application be made to the European Court of First Instance (CFI) in Luxembourg within two months from the date of publication of the sanctions. The CFI has a number of complex procedures which must be followed, including the type font, size and length of the application, failing which the application may be rejected. This could result in not being able to lodge an application at all, although the CFI may afford the applicants a chance to rectify procedural errors. This is discretionary. The CFI also will not allow applicants to amend or add to their applications at all once lodged.

The preparation of the application should be begun as soon as practicable so that it is complete when lodged, with guidance from experienced legal advisers.

Importantly, persons and companies who are not listed in the sanctions list, but who hold assets of designated persons or companies, are affected by the EC sanctions in that they are under a duty of disclosure under Article 8 of the 2004 EC Regulations.

They are required to advise the relevant competent authority (again in the United Kingdom this is Her Majesty's Treasury) of any assets they hold belonging to designated persons or companies. For example, banks, utility companies and even store credit card companies who hold accounts for designated persons are required to disclose any information that would help facilitate the sanctions. This is, however, without prejudice to legal professional privilege, confidentiality and professional secrecy.

Persons and companies who feel they may be affected by this should seek advice concerning their compliance obligations.

This is essential as some Member States have already implemented criminal sanctions for persons in breach of the EC sanctions.

### **The UK regulations**

The EC sanctions also require each Member State to implement laws relating to the infringement of the EC sanctions, and in line with this, 24 April 2009 saw the Zimbabwe (financial sanctions) Regulations 2009 ('the UK Regulations') come into force in the United Kingdom.

The UK Regulations are broadly similar to the EC sanctions but contravention of the UK Regulations is a criminal offence, punishable by a term of imprisonment not exceeding three years and/or a fine depending on the seriousness of the crime. A person who participates knowingly or intentionally, directly or indirectly, in the circumvention of the prohibitions or who enables or facilitates the commission of an offence will also be guilty of an offence. The Regulations apply to anyone in the United Kingdom and to British citizens in the United Kingdom or abroad. They also apply to corporations and their officers.

A process is available to apply for a licence to pay for every day basic expenses, as is true for EC sanctions.

### **The Swiss sanctions**

In recent years there has been increasing pressure on Switzerland to implement updated sanctions given the propensity for the wealthy to keep safe much of their wealth in Switzerland. The Swiss sanctions against Zimbabwe came into force on 15 April 2009. As the EC sanctions closely follow the US sanctions, the Swiss sanctions closely follow the EC sanctions. Although there is the extra complication for English speaking lawyers of having to make an application in German, French or Italian, there exists a similar application process to be removed from the list as well as an application process to allow funds to be unfrozen to pay basic expenses. Again, anyone affected by the Swiss sanctions should seek specialist legal advice.

## **Practical considerations**

There is no doubt that certain designated persons deserve sanctions and that their inclusion in many circumstances is unquestionable (Robert Mugabe himself appears on the sanctions designations). However the sanctions net is spread wide and catches persons who might have sufficient cause to challenge their inclusion and be removed from the list. Often these people are unable to continue with normal life for months or even years from the time they are listed.

Even creditors of designated persons (including telephone companies, banks and utility companies) need to be aware that they may not receive payments due to them on time, or at all, and though there are limited steps that creditors can take in this regard, they will need to make arrangements accordingly.

Individuals who would normally receive benefits will not be entitled to access any such funds, and even those wealthier designated persons or bodies will struggle, given that the sanctions forbid anyone to confer a benefit on a designated person. Arguably, therefore, the wife of a designated individual is unable to lend him money, or even pay for his food, for fear of conferring such a benefit. While this may seem an extreme example, it is a measure of how stringently the sanctions are worded and enforced.

The inability to pay bills means that designated persons can face threats of debt collection or even legal action as a result of their failure to pay. The sanctions exclude liability on the part of the sanctioning entities unless funds were frozen out of negligence.

There is little to regulate the time in which a decision must be reached to challenge sanctions.

## **Conclusion**

Though it is possible to be removed from a sanctions list, for someone who might appear on all four of the sanctions lists referred to above, there are at least three separate applications that need to be made, all requiring different types of information. This can be a cumbersome task without proper guidance and overall strategy and co-ordination.

While removal will facilitate a return to a normal life, the damage done in the interim can be long lasting. The applications cannot be made or heard overnight, and while the application process is ongoing, obtaining even the permission to pay basic expenses can be cumbersome. The practical effects of the sanctions are that persons or businesses, which in many cases are wrongly listed, are unable to pay their staff and suppliers, who more often than not are merely innocent bystanders.

There are also multiple areas of concern for businesses holding assets of – or who have previously transacted with or offered services to – sanctioned individuals or companies. The complexities can, if not navigated effectively, result in criminal liability and multimillion dollar fines.

One of the main difficulties facing sanctioned individuals is that their imposition and removal involve political and legal processes. It is not possible to predict how things will change in the coming months or even years.

For example, the United States has stated that their sanctions will remain in place until a significant change is seen in the Zimbabwean political climate, a view which has also been adopted in Europe. There is nothing to indicate that such a change is achievable in the immediate future. However, if experience has shown us anything, it is that making applications on behalf of clients for removal from a sanctions list is a major undertaking that should be considered promptly if there is any hope of avoiding long lasting commercial, financial and reputational damage.