

Even in cases where a Section 311 designation has not been applied by US authorities, the mere scope of US enforcement in extra-territorial terms is breathtaking, and highly worrying for major commercial actors in the current globalised economy. Financial institutions, in particular, have been on the receiving end of eye-watering fines issued by the US for activities which have breached US sanctions laws. In 2014, for example, in the largest fine of its kind to date, BNP Paribas was fined a massive \$8.9bn for breach of US sanctions – making the previous, yet unrelated, \$1.4bn Global Settlement of 2003¹¹ on ten of the world’s largest banks pale into insignificance by comparison. Yet BNP Paribas’ pleas that they had broken no French nor EU laws fell on deaf ears, as did the-then comment by the French Central Bank’s Christian Noyer¹²:

“...We have indeed verified that all the transactions were in line with EU and French rules, regulations and directives...”

To give an effective representation of the size of this fine, BNP Paribas, at the time, was the 5th largest bank in the world, and \$8.9bn was of the order of its entire annual net income for 2013, or some \$11.3bn – which makes the \$8.9bn fine an astonishingly high figure.

All too often the breach goes to the substance of the offence, not the jurisdiction nor the currency in which the offence or illicit activity was undertaken. Neither Banco Delta Asia, nor Lebanese Canadian Bank, for example, were based in the US – nor was the US a principal market for them. In both cases their illicit activities related to direct involvement with rogue actors and activities already designated by the US, in the former case North Korea’s US dollar counterfeiting regime, and in the latter, the funding of terrorist activities in support of Hezbollah. In the case of Banco Delta Asia, the Section 311 designation sparked off a devastating ripple effect as major clients pulled out with immediate effect – not wishing to incur the wrath of US enforcement agencies or risk being cut off from the US financial system, US dollar transactions, and so on. When governments with economies of global proportions, major corporate and individual entities pull out of a financial institution on a large scale, causing a quasi “run” on a bank – the results can be disastrous.

¹¹ <http://www.finra.org/industry/2003-global-settlement>

¹² F. Coppola, ‘BNP Paribas: Sanctions, Fines And Politics’, *Forbes* (31 May 2014) - <https://www.forbes.com/sites/francescoppola/2014/05/31/bnp-paribas-sanctions-fines-and-politics/>

From a European perspective, the penny started to drop on the scope of US enforcement with the double whammy of enforcements which affected two major banks with global reach and strong UK ties – namely HSBC and Standard Chartered Bank in 2012. HSBC, a major global bank, was fined a record \$1.9bn for money laundering and sanctions violations, which included its financial dealings with Iran¹³. Standard Chartered Bank was found out by the US to have been “wire-stripping” in a way that was deemed to be questionable by the US – as this involved removing pertinent information which would otherwise clearly identify transactions with Iranian entities¹⁴.

At the time, the new US government was re-focused into taking a hard line on Iran, having previously preferred to go down the more diplomatic route – in contrast to the former Bush government¹⁵ – after the Obama Administration uncovered a secret Iranian nuclear facility in Qom, much to the dismay of the US and the European Union, who took tough measures to restrict Iran. Congress ratified the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA). CISADA was passed unanimously in Congress, with a vote of 408-8 in favour in the House of Representatives, and 99-0 in favour in the Senate in June 2010 – and signed off by President Obama in July 2010¹⁶. CISADA was later bolstered by the Defense Authorization Acts of 2012 and 2013. More importantly, the ripple effect went far deeper, with third-country banks and companies doing business with Iran being forced to curtail their business with Iran, or risk losing US market access altogether¹⁷.

For its part, the European Union cut off Belgium-based SWIFT access for sanctioned Iranian banks, and measures were taken to halt Iranian oil imports by July 2012¹⁸. The European Union designated entities which were involved with Iran, Japan cut its Iranian oil imports substantially by 2012, India prohibited Indian firms from the Asian Clearing Union (ACU), which was an exporter of Iranian oil – where India had previously been Iran’s largest trading partner¹⁹.

The ripple effect on Iran was disastrous, and swift – yet, crucially, it must be noted that for the Iranian leadership and hierarchy (military, business, political) in

¹³ J. Zarate, ‘Treasury’s War’, *PublicAffairs* (2013), p. 349

¹⁴ J. Zarate, ‘Treasury’s War’, *PublicAffairs* (2013), p. 348

¹⁵ J. Zarate, ‘Treasury’s War’, *PublicAffairs* (2013), p. 328

¹⁶ E. Ferrari, ‘Tightening the Grip: What the New U.S. Sanctions Against Iran Mean for You’, *PAAIA* (29 July 2010)

¹⁷ J. Zarate, ‘Treasury’s War’, *PublicAffairs* (2013), p. 339

¹⁸ J. Zarate, ‘Treasury’s War’, *PublicAffairs* (2013), p. 338

¹⁹ J. Zarate, ‘Treasury’s War’, *PublicAffairs* (2013), p. 339

the country, which possesses high quality petro-energy resources which do not need major refining, the proceeds and margins of the Iranian oil & gas industry would always be sufficient, even in the event of a massive global embargo. With sanctions policies sometimes crippling to companies, commercial entities – there is always a crucial catch. In decimating the potential revenue flows into a nation state under sanctions, it is almost always those on the ground who suffer – the young, the vulnerable – often the lifeblood of emerging economies such as young entrepreneurs. Tragically for them, the policies of 2012 saw the Iranian rial drop 80% by the summer of 2012²⁰, the amount of Iranian gasoline imports fell by 75%, and the currency reserves of Iran’s central bank allegedly fell by some \$110bn²¹.

Other rogue state actors have been designated by the US, with serious consequences. In an unprecedented move²², \$32bn of Libya’s assets were frozen by the US in February 2011, as US Treasury officials aimed to prevent Muammar el-Qaddafi from paying to fight rebels who were seeking to overthrow his regime. The United Kingdom seized over \$19bn in Libyan assets, a further \$416m seized in Switzerland, and \$1.8bn frozen by Austria. To give an idea of the size of assets frozen, the entire Libyan economy amounted to some \$62bn as per 2009, and a total of over \$53bn in Libyan assets – equating to over 85% of the approximate size of Libya’s economy – were seized in 2011²³. The US Treasury ended up freezing some \$37bn of Libyan assets, which was the largest asset freeze under any individual country sanctions program at the time²⁴.

Commerzbank AG agreed to pay \$1.45 billion over U.S. sanctions against countries including Iran in 2015. In October 2018, Standard Chartered was allegedly looking at a potential penalty of around \$1.5bn from U.S. authorities for violating US sanctions on Iran²⁵, according to those familiar with the matter. After the \$340m fine paid by Standard Chartered in 2012, a constant investigation was undertaken by US authorities after the bank agreed to a

²⁰ J. Zarate, ‘Treasury’s War’, *PublicAffairs* (2013), p. 340

²¹ J. Zarate, ‘Treasury’s War’, *PublicAffairs* (2013), p. 340

²² R. O’Harrow Jr., J.V. Grimaldi, B. Dennis, ‘Sanctions in 72 hours: How the U.S. pulled off a major freeze of Libyan assets’, *Washington Post* (March 23, 2011) https://www.washingtonpost.com/investigations/sanctions-in-72-hours-how-the-us-pulled-off-a-major-freeze-of-libyan-assets/2011/03/11/ABBckxJB_story.html?utm_term=.551f47f2d8b8

²³ ‘U.S. Freezes \$32 Billion in Gaddafi Bank Accounts; U.K. Adds \$19 Billion’, *ALLGOV* (May 5 2011) - <http://www.allgov.com/news/us-and-the-world/us-freezes-32-billion-in-gaddafi-bank-accounts-uk-adds-19-billion?news=842612>

²⁴ J. Zarate, ‘Treasury’s War’, *PublicAffairs* (2013), p. 344ff

²⁵ <https://www.bloomberg.com/news/articles/2018-10-01/stanchart-said-to-brace-for-new-iran-fine-of-about-1-5-billion>

Deferred Prosecution Agreement (DPA), which was extended in 2014. This was intended to establish any historical breaches of US sanctions against Iran by Standard Chartered, and an indication of the severity of such breaches on day-to-day business of non-US financial institutions when caught up in a sanctions breach. This fine was then confirmed in April 2019 as Standard Chartered was hit with a penalty of \$1.1bn²⁶ for “apparent violations” of US sanctions on Myanmar, Zimbabwe, Cuba, Sudan, Syria, and Iran, between 2009 and 2014. It was fined £102m (or \$133m²⁷) by the UK’s Financial Conduct Authority (FCA), and \$947m to US enforcement agencies, for violating the US International Emergency Economic Powers Act (IEEPA) and New York state laws as it processed \$240m in transactions for Iranians.

The US enforcement agencies who levied penalties including the Department of Justice, were as follows: U.S. Department of the Treasury’s Office of Foreign Assets Control, the Board of Governors of the Federal Reserve System and the New York State Department of Financial Services²⁸. Standard Chartered’s operations in the UAE were found particularly wanting, which was unsurprising as this is a weakness in that particular jurisdiction, with little knowledge of US sanctions on the ground a known issue. New York State Department of Financial Services commented that compliance in the UAE at Standard Chartered was: “woefully inadequate. Compliance staff were poorly trained and unconcerned with U.S. sanctions regulations.”

More recently, the Section 311 designation on ABLV Bank in Latvia²⁹ – the very homeland of the contemporaneous European Commission Financial Services Commissioner, Vladis Dombrovskis, who has oversight of the money laundering and sanctions area that ABLV Bank fell foul of. Indeed, in 2018 major Danish lender Danske Bank, along with leading Nordic banking competitor Nordea, were investigated for having conducted business of allegedly, up to some \$234bn in the case of Danske Bank, and \$405m in the case of Nordea. With heightened

²⁶ K. Makortoff, ‘Standard Chartered fined \$1.1bn for money-laundering and sanctions breaches’, *Guardian* (9 April 2019) - <https://www.theguardian.com/business/2019/apr/09/standard-chartered-fined-money-laundering-sanctions-breaches>

²⁷ S. Reisinger, ‘Standard Chartered Bank Hit With \$1B in Penalties, Two-Year Extension of DOJ Scrutiny’, *Corporate Counsel* (9 April 2019) - <https://www.law.com/corpcounsel/2019/04/09/standard-chartered-bank-hit-with-1b-in-penalties-two-year-extension-of-doj-scrutiny/>

²⁸ S. Reisinger, ‘Standard Chartered Bank Hit With \$1B in Penalties, Two-Year Extension of DOJ Scrutiny’, *Corporate Counsel* (9 April 2019) - <https://www.law.com/corpcounsel/2019/04/09/standard-chartered-bank-hit-with-1b-in-penalties-two-year-extension-of-doj-scrutiny/>

²⁹ <https://www.moneylaunderingwatchblog.com/2018/02/fincen-imposes-section-311-fifth-special-measure-on-latvian-bank-ablv/>

US sanctions on Russia, oligarchs and rogue actors from Eastern Europe where corruption and human rights offences have been targeted, and ongoing investigations by US authorities on Nordic banks, there could well have been US sanctions breaches. Crucially, the Magnitsky Act of 2012 and related US sanctions program, which targets human rights abuses in particular (a Global Magnitsky Act and sanctions program was brought in by the US in 2017 as well) was passed by US Congress after the lawyer of Hermitage Capital, Sergey Magnitsky, was allegedly murdered whilst in custody in Russia.

Further sanctions programs such as Countering America's Adversaries Through Sanctions Act of 2017 (CAATSA)³⁰, which was brought in by US Congress, would make the position for Nordic banks who have been trading with known rogue actors from Russia extremely difficult, leading them to face substantial potential fines, as the US money laundering and sanctions regime is extremely tough when illicit transactions come to light, and the US has several targeted sanctions programs on Russia. Furthermore, "apparent violations" of the US IEEPA are sufficient, as was the case for Standard Chartered in its \$1.1bn fine in April 2019 for financial institutions and commercial entities to move quickly to accept US settlement terms to avoid being cut out of the US financial system altogether. With the mere threat of exclusion more than compelling for firms to wish to settle cases and show a willingness to comply with US sanctions programs and money laundering standards on operational and reputational grounds alone.

It further emerged towards the end of March 2019 that New York Department of Financial Services was investigating Danske Bank, Nordea and SEB,³¹ in a further indication of US scrutiny of Nordic banks in the emerging Baltic money laundering – and, highly likely, given the proximity to known rogue actors in Eastern Europe, sufficient ties to illicit transactions from a US perspective (where the burden of proof is far lower than in Europe, and discovery methods far more intrusive) to warrant a fully-blown sanctions breach and money laundering investigation, US-style.

Given recent heightened enforcement by US enforcement agencies on Société Générale, fined \$1.4bn for US sanctions breaches at the end of 2018, and

³⁰ Public Law 115-44, - <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx>

³¹ <https://www.bloomberg.com/news/articles/2019-03-28/danske-scandal-widens-as-new-york-is-said-to-press-nordea-seb>

looking at the size of potential illicit transactions affecting the likes of Danske Bank (at, maximum, over \$200bn if all the alleged transactions are deemed, in US sanctions terms, to have been sufficiently dubious) – and given their highly sophisticated investigative techniques and the enhanced powers accorded by the USA PATRIOT Act, which are far more intrusive than European legislation will allow, the Baltic money laundering scandal is likely to run and run, with major fines highly likely from the US. Given the level of illicit transactions and mere “apparent violations” of the IEEPA in the April 2019 Standard Chartered settlement for \$240m of illicit transactions, the sums alleged for the Nordic banks are far higher and the ensuing settlements could be extremely high. Notwithstanding, of course, the possibility that the US has the power to deem some financial institutions in the Nordics as “...of prime money laundering concern” under Section 311 of the USA PATRIOT Act.

The CEO of Hermitage Capital, Bill Browder, a former US citizen who changed his citizenship to the UK and successfully lobbied Congress to include the Magnitsky Sanctions regime, raised actions in defiance of alleged illicit transactions by Danske Bank, Nordea, and Swedbank³², who he claims had allegedly allowed their global networks to be compromised and facilitated by known (Russian and other Eastern European) designated individuals and entities. It is alleged that Danske Bank allowed its tiny Estonian branch to facilitate huge levels of transactions between 2011 and 2015. A further Nordic bank, Swedbank, was implicated in 2019, and, like Danske Bank, lost its CEO and Chairman in the ensuing media furore, with the mere mention of an illicit transaction scandal causing major issues for the listed companies concerned, both reputationally and in terms of share price hits of anywhere between 30-50%.

This particular episode is telling in many respects, as it involves formerly well-regarded jurisdictions in the Nordic region in terms of their AML/CTF programmes and overall transparency, but is a reflection of the way that commercial entities can become exposed to US sanctions purview on a third-country basis. In 2018 Bill Browder called for a Section 311 to be designated on both Danske Bank and Nordea – a veritable existential threat on two of the most significant banks in the region. The sums involved – if proven correct – could, for Danske Bank, well exceed the \$190bn of illicit transactions conducted by BNP Paribas prior to their \$8.9bn fine in 2014.

³² <https://www.reuters.com/article/us-europe-moneylaundering-swedbank-browd/investor-browder-files-swedbank-money-laundering-complaint-in-latvia-idUSKCN1RT0PM>

One common theme appears to have been widespread naivety by European and other geographies in the face of US extra-territorial sanctions measures. This has its roots in an almost obsessive “Neo-Westphalian” approach to the rule of law, which has beset many experienced legal practitioners in the face of a foreign legal challenge by the US, and has frequently proved utterly misguided and illusory. The “Neo-Westphalian” premise – very roughly translated as: “...When in Rome, do as the Romans do...” is that, theoretically, non-US headquartered institutions cannot be penalised by US enforcement actors, who do not have jurisdiction over other nation states, or those commercial entities which are notionally headquartered in those jurisdictions and ultimately subject to their laws.

This entirely ignores the fact that major superpowers, for centuries and millennia, have contrived to impose their own legal parameters on perceived rogue behaviour. And in the modern, globalised economy, the current superpower with the reach to do so is the US. It also denies the very existence of the “War on Terror” proclaimed by US President Bush in the immediate aftermath of 9/11 – and supported by its global allies – where all attempts would be made to stifle and thwart terrorist (-funded) actions in an effort to ensure that the monstrous events of 9/11 would never be repeated. A deliberate attack on civilians in a non-war theatre scenario is as provocative a gesture as can be imagined.

For this context to have been conveniently overlooked by non-US parties, governments, commercial entities – in their continued engagement with foreign, non-US-designated “rogue” actors – beggars belief. Particularly as the EU and the UN have frequently engaged in trying to stifle the activities of known rogue elements around the world.

After the Global Financial Crisis of 2008 in particular, banks have been on the receiving end of much of the sanctions and money laundering/terrorist financing objectives of major enforcement agencies. Not least because it has been established for some time that if you cut off the means of funding terrorist and illicit activities, they should diminish – and banks are naturally the commercial entities which facilitate the funding of the vast majority of transactions.

We have witnessed an era of trade spats with the US Trump Administration leading the way with its hardline trade stance towards major competitors such as China and the European Union. Consequently, it could be argued that the riposte by the EU of taking major US and other global corporations such as Apple,

Google, Amazon and Facebook to task over alleged under-payment of tax in EU jurisdictions, could spark some danger for EU-based banks under investigation by US enforcement agencies, particularly the Nordic banks caught up in the 2018 Baltic money laundering scandal.

As was so clear when BNP Paribas was fined in 2014, and as has been the case for so many European banks in recent years, ignorance of US anti-money laundering and sanctions regimes is no defence, and purporting to follow local, EU directives as being more than adequate in global terms is extremely naive – ergo the lack of uniformity in the way that the US sanctions and money laundering regime operates internationally, and the sheer size of penalties versus the rest of the world. The Standard Chartered fine of \$1.1bn by the US in April 2019 and the apparent lack of US sanctions nous amongst its UAE staff make this another geography which looks to be prone to issues going forward when faced with a global sanctions and money laundering program as robust and effective as the US.