

# Soundings

## Exxon Mobil challenges OFAC

A court in Texas recently overturned a \$2 million penalty imposed by OFAC against Exxon Mobil for alleged violations of US sanctions (*Exxon Mobil Corp. v. Mnuchin*, No. 3:17-CV-1930-B, 2019 WL 7370430 (N.D. Tex. Dec. 31, 2019)). The court held that OFAC contravened the due process clause of the Fifth Amendment, which requires that individuals or entities are given fair notice of conduct that is forbidden or required, in failing to give Exxon Mobil fair prior notice that its conduct contravened sanctions.

### Background

The penalty was imposed in July, 2017 after Exxon Mobil entered into contracts with Rosneft, a Russian oil company, who are incidentally now subject to separate sanctions. The contracts were signed on behalf of Rosneft by Igor Sechin, Rosneft's President and the Chairman of its Management Board.

At the time, Mr Sechin was listed as a Specially Designated National ("SDN") under Executive Order ("EO") 13661, issued on 16th March, 2014. Persons designated under EO 13661 had their property blocked and US persons were prohibited from receiving "funds, goods, or services" from them.

## The court agreed with Exxon Mobil that OFAC did not provide fair notice that, in the context of Ukraine Regulations, the mere signing of contracts by a SDN on behalf of a non-SDN company was prohibited.

OFAC considered Mr Sechin's signing of the contracts as providing services to Exxon Mobil, which was prohibited under EO 13661 and Ukraine-related Sanctions Regulations (31 C.F.R. part 589) ("Ukraine Regulations"). Exxon Mobil maintained that it was not interacting with Mr Sechin in his personal capacity but only as an official representative of Rosneft, which it said did not fall foul of the prohibition on dealing with SDNs. OFAC did not accept this argument. Exxon Mobil therefore brought proceedings in the US District Court for the Northern District of Texas to challenge the penalty.

### Judgment

In practice, the due process clause in the US Constitution requires that "ascertainable certainty" be given as to the meaning of regulations imposed by a Government agency.

The court agreed with Exxon Mobil that OFAC did not provide fair notice that, in the context of the Ukraine Regulations, the mere signing of contracts by a SDN on behalf of a non-SDN company was prohibited. The court held that the Ukraine Regulations do not provide fair notice of their interpretation, in particular what amounts to "receipt" of services and do not "fairly address" whether a US entity receives a service from a SDN when that SDN performs a service enabling the US person to contract with a non-blocked entity".

The court rejected OFAC's reliance on informal guidance issued within their FAQs as clarifying any ambiguity, namely FAQ 285 which was issued in the context of Burma-related sanctions. FAQ 285 stated that US persons should exercise caution in dealings with a non-designated entity to ensure that they are not entering into contracts signed by a SDN. OFAC did not replicate this FAQ in the context of Russia/Ukraine-related sanctions until after Exxon Mobil's alleged violation. The court found this supported the conclusion that the Ukraine Regulations were unclear and did not provide fair notice at the time of the alleged violation. The court

held that informal guidance, for example, the OFAC FAQs, in the context of one sanctions regime does not constitute guidance for the purpose of another sanctions regime.

The court also dismissed OFAC's reliance on policy statements made by US officials at the time such sanctions are issued, such as the White House press releases, which "do not create ascertainable certainty [as to what] conduct would be prohibited".

OFAC had argued that Exxon Mobil should have sought guidance from OFAC. However, the court considered the burden of providing fair notice rests on the regulators, not the regulated.

### Conclusion

Since neither the text of the Ukraine Regulations nor public statements made by OFAC or other parts of the executive branch clearly addressed what constitutes "receipt" of services, the court concluded that there was no "ascertainable certainty" as to the meaning of the relevant prohibition. OFAC's penalty notice consequently violated the due process clause of the Fifth Amendment by depriving Exxon Mobil of fair notice.

This decision is unlikely to affect the numerous sanctions regulations for which OFAC have issued thorough guidance and documentation. Indeed, this decision may well encourage OFAC to publish more informal guidance across its various sanctions programs to avoid any repetition of the difficulties encountered in this instance.

If in doubt as to the interpretation or application of any US sanctions, advice should be sought from qualified practitioners.

**Please contact the Managers for further advice in relation to any of the issues discussed above.**

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