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Mind Your Own Businesses: UK Court Decision May Signal Pushback On Extraterritorial Enforcement of US Trade Laws

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Under a recent court decision, UK government agencies may be able to shield the names of British companies transacting in Iran, and thereby aid these companies in averting potential consequences of U.S. law.

On September 22, 2011, a British tribunal refused to force the UK government to disclose the names of British companies that had applied to sell goods with potential military uses to Iran. The court cited concerns that, if those applicants' names were made public, European banks could come under pressure to eliminate dealings with these businesses. Although the decision is, on its face, a purely administrative ruling on the UK Freedom of Information Act, it may be more notable for the fact that it signals the willingness of a foreign government to protect its country's businesses from the extraterritorial enforcement and effect of U.S. trade regulations.

In 2009, Bloomberg News (headquartered in New York) requested information on licenses granted by the UK Export Control Organization ("ECO") for UK companies to export to Iran "dual use" items, i.e., materials with both commercial and military uses. Bloomberg's request was granted and the ECO[1] appealed to the UK's Information Tribunal.

The ECO argued that many of the applicant businesses sought licenses only as a precaution. The ECO also asserted that applicants expected and required confidentiality due to legitimate concerns that U.S. Government pressure would make it impossible to find U.S. or European banks to partner with them.

This concern appears valid. In the past several years, in an effort to further isolate Iran, the U.S. government has increased the scope of sanctions against Iran (as previously discussed in this blog here). In particular, under the 2010 Comprehensive Iran Sanctions, Accountability and Divestment Act (also known as CISADA), the U.S. State Department is authorized to impose specific sanctions on non-U.S. companies involved in designated activities with respect to Iran. As of October 11, U.S. banks are now obligated – upon receiving a request from the U.S. Treasury Department – to seek information and report to the Treasury on certain non-U.S. banks' relationships in or with Iran.

While the United States long has prohibited U.S. companies and individuals from conducting most transactions with Iran, several recent enforcement actions have targeted large European banks with operations related to Iran and other sanctioned countries. As a result, UK and European banks have curtailed transactions with customers linked to Iran to avoid scrutiny (and penalties) from U.S. enforcement authorities.

In siding with the ECO, Judge Farrer of the Information Tribunal wrote that “UK banks, which depend on US licenses to maintain dollar trading, are said to have withdrawn banking facilities from customers known to trade with Iran.” Judge Farrer added that “[t]here is a significant public interest in protecting large and small firms, which trade lawfully and legitimately, from economic harm from a form of embargo imposed by banks, competitors, suppliers, clients and possibly foreign governments.”

Bloomberg News plans to appeal the tribunal’s decision. A representative of Bloomberg responded to the decision by noting that the public should know who is doing business with whom. He stated that he believed the public’s need to know this information outweighed claims, based on that banks will withdraw funding from companies.

We believe this UK Freedom of Information Act case could be the first of many skirmishes pitting the United States and its extraterritorial enforcement of its trade laws against the national sovereignty of the UK and otherwise-friendly countries. It is unquestionable that the U.S. government has expanded the reach of many of its international trade laws (such as those governing sanctions, exports, and anti-bribery). This case may represent the rest of the world beginning to push back.

Judge Farrer's comments are telling, revealing the tribunal's belief that the possibility of U.S. interference in UK business affairs was "disturbing." Farrer wrote, "the tribunal felt some concern at the prospect of a UK company, trading quite lawfully in terms of UK, EU, and international law, suffering possibly fatal commercial damage through the extraterritorial intervention of our closest ally." This decision points to the possibility that the US may face future resistance as it targets foreign companies—not just from the companies themselves—but from governments acting to protect their own countries' business.

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[1] In fact, the appeal was filed by the parent agency of ECO, the UK Department for Business, Innovation, and Skills. However, to avoid confusion with the U.S. Bureau of Industry and Security, which is involved in U.S. trade regulations and goes by the same acronym, BIS, we are referring to the appellant as the ECO or the UK Government.