

OFAC's FINANCIAL SANCTION AGAINST COMMERZBANK

The Office of Foreign Asset Control (OFAC) of the United States Department of the Treasury recently reached a settlement with the German Commerzbank. The bank agreed to pay around USD 260.000.000 for its wilful and material violations of US financial sanctions laws. The violations concerned thousands of transactions through US financial institution by Commerzbank in relation to routing non-transparent payment messages for states, entities and individuals subject to the sanctions programs administered by OFAC. Along with this sanction, the amount imposed by OFAC on foreign financial institutions has exceeded more than a billion USD. Having said that, the tough enforcement regime run by OFAC raises several questions pertaining to extraterritorial application of US sanctions laws and conflict of laws between different jurisdictions.

The Office of Foreign Assets Control - as a part of US foreign policy and national security- administers and enforces economic and trade sanctions against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States. While OFAC acts primarily according to the national sanctions laws, many of its actions are based on the United Nations Security Council and other international mandates, are multilateral in scope, and involve close cooperation with other countries, as was the case with Commerzbank.

Commerzbank's alleged violations of US sanctions regulations- which took place in 2002 and continued until 2010- contain many transactions carried out in respect of designated Iranian, Sudanese, Burmese and Cuban banks and companies. The violations overall concerned removing, omitting, changing, obscuring or otherwise failing to provide adequately the details (such as the name or address of the aforementioned banks or companies) of various outgoing Society for Worldwide Interbank Financial Telecommunication (SWIFT) payments to or through the financial institutions located in

the United States (mainly and mostly the New York Commerzbank branch). OFAC also held that Commerzbank had not voluntarily self-disclosed the said breaches in accordance with OFAC's Economic Sanctions Enforcement Guidelines (31 C.F.R. part 501, app A.)

Considering that Commerzbank is German, the question arising in the first place is how come Commerzbank could fall under the jurisdiction of OFAC. The key issue at this point is to clarify whether OFAC exercised territorial or extraterritorial authority over Commerzbank. In international law, the notion of jurisdiction is primarily territorial. Only in exceptional situations, states' competence to take legislative, executive or judicial actions goes beyond national territories. It must be noted that since extraterritorial activities of states are very much likely to concern sovereignty of other countries, the consent of the latter is a prerequisite for such actions.

In the light of the above, OFAC's jurisdiction over Commerzbank seems territorial. The bank –by way of manual processing- was alleged to have routed non-transparent SWIFT payments and messages through the US financial institutions. What matters here is the link between the US and the acts leading to the violations. With respect to some of its other acts/laws involving an extraterritorial application, the US authorities are inclined to interpret the jurisdictional link very broadly or loosely. For example, in case of the application of the Foreign Corrupt Practices Act (FCPA), the US Department of Justice and the Securities and Exchange Commission construe an email sent or an electronic transfer made through the US as a sufficient basis for bringing non-resident foreign persons or entities under the US authority. The case was, however, different for Commerzbank. The bulk of violations of sanctions regulations were committed through the Commerzbank branch in New York. Hence, at least in so far as the settlement agreement reveals, OFAC had certain power to commence investigations and impose a penalty on the German Bank.

The controversial aspect of the settlement agreement between OFAC and Commerzbank arises out the former's ruling that Commerzbank did not voluntarily inform OFAC of the violations. That is to say, OFAC relied largely on external assistance

from foreign financial institutions, especially those in the European Union. If so, then it ought to be explored whether the way in which such information had been obtained was in conformity international law, particularly the inter-governmental agreements between the US and the EU. That being said, the settlement agreement includes no detail with regard to the collection of evidences.

The mode of cooperation between the US and allied government or regional organisations is also of importance in terms of the obligations incurred on financial institutions. Although governments agree on a mutual cooperation for national or international security purposes, their own domestic regulations may have different requirements or standards. As was exposed in the case of Commerzbank, whether and to what extent the German Bank could follow both the US and EU laws in harmony was obviously not a facile question. Therefore, the material differences between the US sanctions regulations and those of other countries or international organisations become very crucial for financial institutions operating globally. Such institutions (banks) must be aware of –and accordingly adopt and implement internal compliance programmes based on- not only their home state laws but also the tough US sanctions regulations along with a focus on the likely conflicts between them.