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TRUMP ADMINISTRATION SANCTIONS TURKEY'S MILITARY PROCUREMENT AGENCY FOR 2017 PURCHASE OF RUSSIAN MISSILE SYSTEM

To Our Clients and Friends:

On December 14, 2020, the United States imposed sanctions on the Republic of Turkey's Presidency of Defense Industries ("SSB"), the country's defense procurement agency, and four senior officials at the agency, for knowingly engaging in a "significant transaction" with Rosoboronexport ("ROE"), Russia's main arms export entity, in procuring the S-400 surface-to-air missile system. These measures were a long-time coming—under Section 231 of the Countering America's Adversaries Through Sanctions Act ("CAATSA") of 2017, the President has been *required* to impose sanctions on any person determined to have knowingly "engage[d] in a significant transaction with a person that is part of, or operates for or on behalf of, the defense or intelligence sectors of the Government of the Russian Federation." This includes ROE, and Turkey's multi-billion dollar S-400 transaction with ROE has been public knowledge for at least three years. Indeed, in 2017, we forecasted that the deal would "test both the power of [Section 231]'s deterrence and potentially Congress's patience."

That the President only imposed the sanctions now demonstrates that despite Congress' increasing appetite for being involved in sanctions implementation—which has historically been the province of the Executive—the legislative branch has limited ability to push the Executive to impose sanctions even when requiring such measures by law. Moreover, it also demonstrates that, as we have discussed in prior updates, the President retains meaningful discretion when deciding whether to impose congressionally-mandated sanctions because all similar "mandatory" sanctions measures are triggered only after the Executive makes a "determination" of "significance." At least in the context of sanctions, "[t]he President shall impose . . ." turns out not to have the meaning in practice that Congress arguably thinks it means. Under CAATSA, the President needs to "determine" that a transaction was "significant"—two discretionary gating requirements that can be used to delay the imposition of measures if the Executive chooses. This flexibility was also used by the Obama Administration with respect to certain mandated Iran sanctions; and we fully expect the incoming Biden Administration to rely on a similar flexibility as it deems fit when calibrating its foreign policy.

Since the deal with ROE was announced, the United States has repeatedly pressured Turkey, a U.S. ally and member of the North Atlantic Treaty Organization ("NATO"), to abandon the plan—going so far as to remove Ankara from its F-35 stealth fighter development and training project—but had thus far refused to impose the Section 231 sanctions. The United States has not been so restrained with respect to China. In September 2018, the Trump Administration imposed Section 231 sanctions on a Chinese entity—the Equipment Development Department ("EDD")—for facilitating China's acquisition of the identical S-400 equipment. Despite U.S. efforts at deterrence with respect to Turkey, President Erdogan

proceeded with formally acquiring the S-400 system in July 2019 and reportedly began its testing in October 2020.

The Sanctions Imposed

The four SSB executives who have been sanctioned (“SSB Executives”)—Dr. Ismail Demir (President), Faruk Yigit (Vice President), Serhat Gencoglu (Head of Department of Air Defense and Space), and Mustafa Alper Deniz (Program Manager for Regional Air Defense Systems Directorate)—have been added to the Specially Designated Nationals and Blocked Persons List (“SDN List”) managed by the Treasury Department’s Office of Foreign Assets Control (“OFAC”). Any of their assets under U.S. jurisdiction are blocked and U.S. persons are prohibited from engaging in nearly any transaction with them—including as counterparties on contracts (see OFAC FAQ 400).

The sanctions imposed on SSB are more complex and are novel enough that OFAC was compelled to construct a new Non-SDN Menu-Based Sanctions (“NS-MBS”) List solely for SSB (and any subsequent entity subject to similar sanctions). The Administration chose to fully sanction China’s EDD and added the entity to the SDN List in September 2018—so the new list structure was not needed at that time.

Section 231 of CAATSA requires the imposition of at least five of the 12 “menu-based” sanctions described in Section 235. The five menu-based sanctions imposed on SSB are:

- Prohibition on granting U.S. export licenses and authorizations for any goods or technology transferred to SSB (**CAATSA Section 235(a)(2)**);
- Prohibition on loans or credits by U.S. financial institutions to SSB totaling more than \$10 million in any 12-month period (**CAATSA Section 235(a)(3)**);
- Prohibition on U.S. Export-Import Bank assistance for exports to SSB (**CAATSA Section 235(a)(1)**);
- Requirement for the United States to oppose loans benefitting SSB by international financial institutions (**CAATSA Section 235(a)(4)**); and
- Full blocking sanctions and visa restrictions (**CAATSA Section 235(a)(7), (8), (9), (11), and (12)**) on the SSB Executives.

While the designation of the four SSB Executives is impactful for them personally—and potentially for SSB to the extent any or all are directly involved in dealings—the most meaningful restriction for SSB itself is likely to be the prohibition on the granting of U.S. export licenses under Section 235(a)(2). Pursuant to this prohibition, the State Department’s Directorate of Defense Trade Controls (“DDTC”) and the Commerce Department’s Bureau of Industry and Security (“BIS”) announced that they will not approve any export license or authorization applications where SSB is a party to the transaction. However, even this restriction may be less than it seems. In our experience, SSB is rarely identified as a party to export licenses, which more typically identify a more specific Turkish Armed Forces component, companies owned by SSB, or joint ventures these companies might form with non-Turkish defense

contractors. Moreover, DDTC clarified that it will construe the prohibition to not include temporary import authorizations, existing export and re-export authorizations, and licenses involving subsidiaries of SSB—although any licenses submitted in relation with SSB subsidiaries will be “subject to a standard case-by-case review, including a foreign policy and national security review.” Furthermore, because many of the existing export authorizations have four- and ten-year terms, it may be many years before any change in DDTC or BIS treatment of SSB-associated licensing requests have a practical impact on SSB or the Turkish Armed Forces. Notwithstanding these facts, it is possible that the mere listing of SSB will prove impactful—and it is also possible that, if Turkey continues its activities, the regulations could become stricter and additional designations (including to the SDN List) could be imposed.

Conclusion and Implications

The sanctions imposed on SSB mark the first time that CAATSA measures have been imposed against a member of the NATO alliance. According to the [State Department](#), the Administration’s “actions are not intended to undermine the military capabilities or combat readiness of Turkey or any other U.S. ally or partner, but rather to impose costs on Russia in response to its wide range of malign activities.” That might explain why the menu-based sanctions chosen, while consequential, do not go so far as to add SSB to the SDN List. This was not the first time the Trump Administration sanctioned major Turkish actors. It is, however, a far more nuanced approach than that the Trump Administration took in October 2019 when it sanctioned the Turkish defense and natural resources ministries (and their ministers) in connection with Ankara’s military operations in Syria (see our [October 18, 2019 Client Update](#)). In that case, the entities and individuals were added to the SDN List—and then promptly de-listed a short time later following a ceasefire in Syria.

The SSB sanctions may have a longer life under the Biden Administration. Not only is the new administration likely to be more keen on imposing meaningful measures against Russia, but also Congress is seeking to tie the Executive’s hands further with respect to the CAATSA sanctions. On December 11, 2020, Congress passed the [National Defense Authorization Act for the Fiscal Year 2021](#) (“NDAA FY 2021”). Though President Trump has threatened to veto the bill, it has passed both Houses of Congress with a veto-proof majority. Section 1241 of NDAA FY 2021 requires the President to impose sanctions on persons involved in Turkey’s S-400 deal, under Section 231 of CAATSA, within 30 days. The bill further provides that the sanctions cannot be terminated without reliable assurances that Turkey no longer possesses and will not possess the S-400 “or a successor system” (a reference to an S-500 missile system Turkey and Russia have talked about since [May 2019](#)). This would require a public reversal of Turkey’s defense policies and acquisitions, which seems unlikely in the near term. As such, there may not be a colorable statutory basis to lift the sanctions. Indeed, rather than indicating a retreat from its S-400 purchase, immediately following the sanctions decision, the Turkish Ministry of Foreign Affairs issued a [statement](#) that Turkey “will retaliate in a manner and timing it deems appropriate” and urged the United States “to reconsider this unfair decision.” Considering Turkey’s status as a NATO ally and the presence of U.S. forces in Turkey, the Biden Administration will almost certainly face pressures in the early days to articulate its view of the bilateral relationship going forward.



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