

How Hamas' Attack May Further Complicate Sanctions Risk

By **Jason Prince and Sophie Davis** (October 19, 2023, 6:06 PM EDT)

Hamas' terrorist attacks against Israel on Oct. 7 have generated attention on the economic sanctions currently imposed by the U.S., the European Union and the United Kingdom against Hamas, and the potential for additional sanctions against Hamas and others behind the attacks.

Untangling the sanctions that currently apply to Hamas, and the implications for the Palestinian people, is a complex exercise. Although sanctions are a key foreign policy tool for counterterrorism, Hamas' extensive authority within Gaza likely hinders Western governments' further direct sanctions options if they wish to avoid curtailing the flow of humanitarian assistance to Palestinians.

Nonetheless, we anticipate that the efforts of Western companies and other organizations to ensure sanctions compliance while operating within Gaza and the West Bank will become an even more challenging task.

Context

At the outset, it is key to differentiate between Hamas and the Palestinian Authority.

The PA, dominated by the Fatah party, administers the Palestinian semi-autonomous regions of the West Bank. Hamas is an armed Palestinian militant group, which has become Fatah's main rival.

The PA last held national elections in 2006, when Hamas won a majority of seats in the now-disbanded Palestinian Legislative Council and certain high-level PA positions. Fatah and Hamas failed to maintain a unity government, leading to violent clashes after which Hamas seized PA military and governmental institutions in Gaza in June 2007.

Now there is a political and territorial split between the PA and Hamas within the West Bank and Gaza, respectively. The Palestinian Constitutional Court dissolved the Palestinian Legislative Council in 2018 and there is currently no parliamentary oversight of the PA executive.

U.S. Sanctions

U.S. economic sanctions block the property and interests in property of any individual or entity listed



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on U.S. Department of the Treasury, Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List, and any entity that is owned 50% or more, directly or indirectly, individually or in the aggregate, by individuals or entities on the SDN list.

All transactions by U.S. persons, and all transactions within or transiting the U.S., that involve property or interests in property of blocked persons are prohibited unless the transaction is authorized by OFAC under a general or specific license, or is exempt.

The U.S. Department of State designated Hamas as a foreign terrorist organization on the SDN list in October 1997.[1] U.S. persons cannot knowingly provide "material support or resources" to an FTO.[2] Those who violate that prohibition are subject to criminal prosecution by the U.S. Department of Justice.

Moreover, OFAC's general and specific licenses do not excuse U.S. persons from complying with this criminal prohibition — a reality that prompts some financial institutions and other organizations to de-risk by refusing to participate in any transaction potentially involving an FTO, even if OFAC has authorized it.[3]

In October 2001, the State Department also designated Hamas as a specially designated global terrorist.[4] The U.S. government has designated numerous other individuals and entities linked to Hamas, including those denoted in SDN list entries with the tag of "[SDGT] (Linked To: HAMAS)."

OFAC has the authority to impose certain secondary sanctions on foreign financial institutions that knowingly conduct or facilitate any significant transaction on behalf of Hamas or another SDGT; specifically, OFAC can prohibit such foreign financial institutions from utilizing U.S. correspondent accounts or payable-through accounts.

In response to the 2006 PA elections, OFAC published in May 2006 a Federal Register determination that "HAMAS has a property interest in the transactions of the Palestinian Authority," meaning U.S. persons became prohibited from engaging in transactions with the PA unless authorized by OFAC.[5]

However, to minimize the impact of this determination on the Palestinian people, OFAC issued multiple general licenses authorizing a range of transactions involving the PA.[6] These general licenses are self-executing, meaning that persons who determine their activities fall within the scope of a general license may proceed without further assurance from OFAC.

These general licenses authorize — among other things — certain travel, employment, residence and personal maintenance activities to, from or within the jurisdiction of the PA; payment of taxes and incidental fees to the PA; the conclusion of ongoing contracts with the PA; transactions with certain entities under the control of the Palestinian president; and in-kind donations of medicine, medical devices and medical services to the PA Ministry of Health.

In 2007, OFAC published another Federal Register notice in which it highlighted "recent events in the West Bank and Gaza, including the appointment of Salam Fayyad as the new Prime Minister of the PA and other ministers not affiliated with HAMAS." [7]

Based on "foreign policy considerations" arising from these events, OFAC reiterated its determination that Hamas has a property interest in the transactions of the PA, but it essentially lifted the sanctions on the PA by issuing broad general licenses authorizing U.S. persons to engage in all otherwise prohibited transactions with the PA.[8]

Beyond these PA-focused general licenses, OFAC implemented U.N. Security Council Resolution 2664 by amending various sanctions programs in December 2022 to include four broad humanitarian assistance-related general licenses. These licenses cover:

- The official business of the U.S. government;
- The official business of the U.N. and certain other international organizations;
- Transactions incident to certain humanitarian and other activities by nongovernmental organizations; and
- The provision of food and other agricultural commodities, medicine, medical devices, replacement parts and components, or software updates for medical devices for personal, noncommercial use.

Based on these general licenses, U.S. persons are authorized to engage in a range of humanitarian-related activities in Gaza and the West Bank, including those that involve Hamas, provided that they are not knowingly transferring funds to Hamas or other blocked persons. For transactions that do not fall within the scope of a general license, OFAC has the discretion to issue specific licenses on a case-by-case basis.

To recap, absent a general or specific license, transactions with the following persons are prohibited: (1) the entity Hamas itself; (2) any entity owned, directly or indirectly, 50% or more by Hamas; (3) any individual or entity on the SDN list — e.g., with the "[SDGT] (Linked to: HAMAS)" tag; and (4) any individual or entity acting on behalf of Hamas in a particular transaction.

Transactions with individuals who may be adherents, sympathizers or self-professed members of Hamas are not covered by the sanctions against Hamas unless they are designated on the SDN list or acting in a particular transaction on behalf of Hamas. Furthermore, under U.S. sanctions, an entity controlled, rather than owned 50% or more, by Hamas is not automatically blocked by operation of law.

Although transactions with the PA are technically blocked due to OFAC's 2006 determination, OFAC has essentially lifted those sanctions by issuing general licenses that authorize all otherwise prohibited transactions with the PA. U.S. persons are also generally licensed to engage in certain activities — especially humanitarian assistance activities — in areas under Hamas control, e.g., Gaza, provided that they are not knowingly transferring funds to Hamas or other blocked persons.

That said, engaging in activities in Gaza and the West Bank remains perilous from a U.S. sanctions perspective due to the extensive role Hamas and other blocked persons play within certain organizations and institutions. Any person subject to U.S. jurisdiction should conduct careful case-by-case due diligence to gain sufficient comfort that its transactions with persons in these areas do not involve prohibited dealings with Hamas or other blocked persons.

EU and U.K. Sanctions

The EU has imposed asset freezing sanctions on Hamas since 2001. Initially, sanctions were only imposed on Hamas' military wing but, since 2003, sanctions have been broadened to cover Hamas — including "Hamas-Izz al-Din al-Qassem".^[9] Under its post-Brexit autonomous counter-terrorism

sanctions regime, the U.K. also imposes asset freezing sanctions on Hamas.[10]

EU and U.K. asset freezing sanctions prohibit persons subject to EU and U.K. jurisdiction, respectively, from dealing with the funds or economic resources of Hamas, and from directly or indirectly making funds or economic resources available to or for the benefit of Hamas. EU and U.K. sanctions attach not only to Hamas, but also to entities majority owned or controlled by Hamas.

Hamas is often referred to as being the de facto authority in the Gaza Strip. Such terminology can suggest that Hamas should be equated with all of the government agencies and operations in Gaza. As a matter of EU and U.K. administrative law, however, there is generally a distinction between a political party and administrative functions.

EU and U.K. sanctions targeting a political head of a government agency would therefore not mean that the entity in question would itself be de facto targeted. This would always have to be assessed on the facts. Given the extent of Hamas' authority within Gaza, there remains a risk that Hamas does in effect control certain Gaza governmental agencies for sanctions purposes.

This risk has been heightened — and muddled — from a U.K. sanctions perspective following the U.K. Court of Appeal's recent judgment in *Mints v. PJSC National Bank Trust*,[11] in which the court expressed its nonbinding view, in the context of the U.K.'s Russia sanctions regime, that a nonsanctioned bank was controlled by designated persons — President Vladimir Putin and the Central Bank governor — by virtue of their political office.

These comments go beyond how the U.K. government — and the EU — has typically regarded the ownership and control test, as evidenced by the U.K.'s Foreign, Commonwealth and Development Office releasing a statement saying that it "would look to designate a public body where possible when designating a public official if FCDO considered that the relevant official was exercising control over the public body." [12]

The FCDO is "exploring the options available to the U.K. government in clarifying the position further." The U.K.'s Office of Financial Sanctions Implementation has also issued a notice stating that it supports the FCDO statement.

Even if no control by Hamas over an entity can be established, there is a risk that making funds or economic resources available to a government entity or institution in Gaza could indirectly result in funds or economic resources flowing to Hamas in breach of sanctions.

Accordingly, EU and U.K. persons should take utmost care with any activities in Gaza to ensure that they do not breach sanctions, unless such activities are undertaken pursuant to a license — e.g., for humanitarian reasons.

With respect to executive agencies that act under the auspices of the PA in the West Bank, although Hamas won a majority of seats in the Palestinian Legislative Council, this is now disbanded, and the nonsanctioned PA executive undertakes government functions.

The EU and the U.K. differentiate the PA from Hamas, and we would not expect PA governmental entities to be subject to asset freezing sanctions, even in light of the *Mints* judgment. Nonetheless, careful diligence should be undertaken ahead of any dealings with the PA and its government ministries in order to gain sufficient comfort that it would not involve any direct or indirect dealings with Hamas.

Potential Future Actions

To date, the U.S., EU and U.K. have sought to strike a careful balance to ensure that, while targeting Hamas and its enablers, sanctions do not have disproportionate repercussions for the PA's governmental functions and the Palestinian people.

Although Western governments will likely explore further sanctions on Hamas, it is difficult to see how Hamas could be targeted more than it already is, without the potential for adverse humanitarian repercussions. That said, these governments could redouble their efforts to sanction Hamas-linked front companies and sanctions-evasion networks, as well as cryptocurrency actors that have reportedly facilitated the flow of resources to Hamas.

For instance, on Oct. 18, OFAC imposed sanctions on 10 key Hamas terrorist group members, operatives and financial facilitators — including a virtual currency exchange service provider and its owner — in Gaza, Sudan, Turkey, Algeria, Qatar and elsewhere.

Moreover, we may see enhanced scrutiny from regulators on businesses and charities operating in, and providing aid to, the region to ensure that this is being done in a sanctions-compliant manner.

For instance, the EU is the largest provider of humanitarian aid to the PA and, despite initial reports to the contrary, has reiterated that it will continue to provide such aid. The EU is nonetheless undertaking an urgent review of the EU's assistance for the Palestinian people to ensure that no EU funding indirectly enables any terrorist organization to carry out attacks against Israel.[13]

The attacks could also prompt the U.S., EU and U.K. to sanction additional groups and individuals they consider to be supporting Hamas, especially if this support is linked to the attacks. For instance, U.S. Treasury Secretary Janet Yellen has said that the U.S. could take steps to tighten sanctions on Iran.

Engaging in activities — including through the provision of humanitarian relief — in Gaza and the West Bank is already complex and risky from a sanctions perspective. Hamas' recent attacks are likely to ratchet this complexity up even further, amid wider geopolitical ramifications.

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[1] Hamas was designated pursuant to section 219 of the Immigration and Nationality Act (as amended). To implement the blocking sanctions on FTOs, OFAC administers the Foreign Terrorist Organizations Sanctions Regulations (the FTOSR, 31 C.F.R. Part 597).

[2] Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 18 U.S.C. § 2339B.

[3] See 31 C.F.R. § 597.101(c).

[4] Pursuant to Executive Order ("E.O.") 13224 (as amended), which is the E.O. that underpins OFAC's

Global Terrorism Sanctions Regulations (the GTSR, 31 C.F.R. Part 594).

[5] See 71 Fed. Reg. 27199 (May 10, 2006).

[6] See §§ 594.510–594.515 of the GTSR and §§ 597.506–597.511 of the FTOSR.

[7] See 72 Fed Reg. 61517 (Oct. 31, 2007).

[8] See 31 C.F.R. § 594.516; 31 C.F.R. § 597.512. Under these general licenses, the term "Palestinian Authority" is defined as "the Palestinian Authority government of Prime Minister Salam Fayyad and President Mahmoud Abbas, including all branches, ministries, offices, and agencies (independent or otherwise) thereof."

[9] Council Decision 2001/927/EC established a list directed against certain persons and entities with a view to combating terrorism. This included " Hamas-Izz al-Din al-Qassem." The name " Hamas-Izz al-Din al-Qassem," and subsequently "' Hamas', including ' Hamas-Izz al-Din al-Qassem,'" has remained on the lists annexed to subsequent acts.

[10] Such sanctions are made pursuant to the U.K.'s Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019.

[11] *Mints and others v, PJSC National Bank Trust and others* [2023] EWCA Civ 1132.

[12] See Foreign, Commonwealth & Development Office, Statement following the judgment in *Mints & others v PJSC National Bank Trust & another* (Oct. 16, 2023).

[13] See European Commission – Press Release, The European Commission announces an urgent review of its financial assistance for Palestine (Oct. 9, 2023).