

Selling Aircraft to Iran: Are Clear Skies or Turbulence Ahead for Exporters

Article By:

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Introduction

The announcement of the Joint Comprehensive Plan of Action (JCPOA) has caused enthusiasm in the aviation sector for the envisaged lifting of sanctions against Iran.

But the JCPOA's phased lifting of sanctions against Iran under the JCPOA misinterpreted by market participants having the desire to engage into business with Iran. The complexity of Iran sanctions, combined with aggressive extraterritorial enforcement by sanctioning governments including the United States, warrants caution during the next JCPOA phases.

Importantly, broad sanctions relief under the JCPOA will only become effective after International Atomic Energy Agency has certified that Iran has implemented the nuclear-related measures it has committed to. That day, referred to as "Implementation Day, is expected to occur in mid-2016. Most EU and U.S. sanctions against Iran remain in place at this stage.

This timeline has led to widespread uncertainty for aviation sector companies interested in doing business with Iran. Below we comment on some of the main questions being raised in practice, from the perspective of both the EU and the U.S. sanctions.

This document will lead you through some of the key things you need to think about in relation to Sanctions on Iran.

I am a non-U.S. company. Can I sell a 10-year-old Airbus A340 with Rolls Royce engines to an Iranian airline?

EU Sanctions:

If you are an EU company, the EU Iran sanctions prohibit the sale or supply of controlled goods to Iran. "Controlled goods" include, among others, items as listed in the EU Dual-use legislation. There is no general exemption for civil aviation.

A civil aircraft is not specifically listed as a controlled good or dual-use item. Nevertheless, components or technologies contained in the A340 (e.g. an inertial navigation system) may be

regarded as dual-use items. Under certain circumstances (which are determined on a case-by-case basis), the presence of controlled technology or components may cause the entire aircraft to be controlled. In those cases, the sale for use in Iran is prohibited.

Even where the entire aircraft is not considered controlled, the sale would nevertheless be prohibited in the following circumstances:

- where the end-user in Iran is listed as a prohibited party under the EU Iran sanctions; or
- where the exporter has been informed by the authorities of an EU Member State that the aircraft may be intended for a military end-use or for use in connection with weapons of mass destruction; or
- where national legislation prohibits the export. For example, UK national legislation prohibits the export to Iran of aircraft and certain listed components, equipment, and technology.

U.S. Sanctions:

This is currently prohibited if the aircraft contains greater than 10% U.S.-origin content, or if the end-user of the aircraft is an entity specifically listed on U.S. sanctions lists.

- U.S. regulations prohibit the export or reexport to Iran without a license of any U.S.-origin item, and of any non-U.S. item containing greater than the designated “de minimis” 10% U.S.-origin content by value.
- In a May 2015 case involving Al-Naser Airlines, Sky Blue Bird Aviation, and Mahan Airlines, the U.S. Treasury announced that eight A340-600 aircraft Al-Naser had sold to Iran constituted “blockable” interests, subject to U.S. sanctions. As a result of the case, Al-Naser and other parties were added to Treasury’s Specially Designated Nationals list, which brings the full force of U.S. sanctions to bear against those parties.
- Press reports have speculated that even though the aircraft and its engines are European-made, they may contain greater than de minimis U.S. content.

Even if the aircraft do not have U.S. content, the U.S. Department of Treasury has the authority to impose new sanctions directly on a non-U.S. party supplying goods to listed sanctions targets. (This is known as a “secondary” sanction). In the Al Naser case, the aircraft were destined for use by Mahan airlines, which itself was listed as a sanctions target in 2011 for providing financial, material and technological support to Iran’s Islamic Revolutionary Guard Corps-Qods Force (“IRGC”). Hence there may have been legal authority to list Al-Naser and the other parties regardless of the origin of the aircraft, because those parties were supplying Mahan.

Can I sell used parts for an A340 to an Iranian airline?

EU Sanctions:

Under the EU sanctions, you are permitted to sell used parts for an A340 to an Iranian airline, unless the following conditions apply:

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- the parts fall under the scope of military or controlled goods set out in the EU Iran sanctions; or,
 - the parts are sold to a listed party or to a party owned or controlled by a listed party.

As an example, take the hypothetical situation that you are an EU based company involved in the sale of used windshield wipers for civil aircraft. The windshield wipers for civil aircraft are not considered “controlled goods” under the EU Iran sanctions. Where the Iranian end-user buying the windshield wipers is not listed and not owned or controlled by a listed party, the sale of the windshield wipers is permitted.

U.S. Sanctions:

- If the aircraft have greater than 10% U.S. content, providing parts or services for them is prohibited without a license.
- Nevertheless, U.S. policy permits licensed exports on a case-by-case basis to “insure the safety of civil aviation and safe operation of U.S.-origin commercial passenger aircraft.”
- For example, Boeing and GE reported in April that they have obtained licenses from the U.S. Department of Treasury to export certain aircraft parts to Iran. The same licensing regime is available for non-U.S. entities to apply.

Note that even if the parts and planes were not of U.S. origin, if the owner or end-user is the IRGC or another listed entity, you may be subject to the secondary sanctions problem outlined in question 1 above.

Do the sanctions apply to an airline based outside the EU and outside the United States, that does not fly to the EU or the United States, has no offices in those places, and has no shareholders from those places?

EU Sanctions:

The EU sanctions do not apply where the airline meets the following conditions:

- does not fall under the jurisdiction of an EU Member State; and
- is not incorporated or constituted under the law of an EU Member State; and
- does not perform any business in whole or in part within the EU; and
- does not fly within the territory (or pass through airspace) of the EU.

U.S. Sanctions:

If the airline is directly involved in activities subject to U.S. sanctions (such as flights for the Iran Revolutionary Guard Corps), the airline is subject to being listed as an SDN. An entity listed on the

SDN List is denied access to U.S.-origin goods, U.S. capital markets and financing, and its principals and officers may be subject to further penalties, such as denial of U.S. visas or even arrest in the United States.

If the airline is not involved in directly sanctionable activities, but merely flies routes to Iran, its aircraft (if greater than 10% U.S. origin) are nonetheless be subject to U.S. export controls. U.S. law contains exemptions authorizing U.S.-origin aircraft to be used for normal passenger operations.

- The exemptions permit use of U.S.-origin craft even on Iranian routes, so long as there is no transfer of operational control to sanctioned persons.

By contrast, a wet lease to a sanctioned entity would result in an unlawful export, such as in the case of Egyptair's lease of two Boeing 737s to Sudan Airways, which resulted in an assessment of \$140,000 in fines from the U.S. government announced November 24, 2015.

I am broker in France. Can I broker the sale of an aircraft to the airline described in question 3 above?

EU Sanctions:

The current EU sanctions do not permit any person inside the territory of the EU to broker the sale of an aircraft destined for end-use in Iran where the aircraft can be regarded as being controlled under the EU Iran sanctions or subject to prohibitions as explained above under Question 1.

It is permitted where it is established that the concerned end-user airline is not Iranian and there are no indications that the aircraft is destined for end-use by an Iranian person in Iran. We do note that the EU Iran sanctions do not give rise to liability of any kind on the part of a person who did not know, and had no reasonable cause to suspect, that its actions would infringe the prohibitions as set out under the EU Iran sanctions.

U.S. Sanctions:

- U.S. law prohibits brokering any transaction that would be prohibited if conducted directly.
- Thus acting as a broker in any sale or lease transaction described as a violation of U.S. law in the questions above would itself be a violation, if conducted without a U.S. export license.

I am a non-U.S. company. May I sign an LOI or MOU to provide U.S.-origin aircraft or parts to an Iranian party in the future, conditioned on the lifting of sanctions under the JCPOA?

EU and U.S. Sanctions:

The answer to this question will be extremely fact-dependent. Seek competent EU and U.S. sanctions counsel before proceeding.

Paul Briggs and Brian Mulier also contributed to this article.

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