Client Alert | International Trade / White Collar/Investigations

Sanctions after Brexit – the first UK sanctions regimes

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With Brexit looming, the UK's autonomous sanctions policy is slowly taking shape. This month saw the publication of regulations setting out the post-Brexit UK sanctions regimes for Iran, Burma and Venezuela, which will come into force in the event of a 'no deal' Brexit. However, the more difficult aspects of the UK's post-Brexit sanctions regimes are still to be determined.

Currently, many of the UK's sanctions regimes implement sanctions agreed by the EU, within a legal framework largely derived from EU sources. When the UK leaves the EU, it will need to translate its current sanctions regimes into autonomous UK sanctions. The new regulations[1] (the "**Regulations**") are the first examples of these post-Brexit sanctions regimes, building on the framework set out in the Sanctions and Anti-Money Laundering Act 2018 ("**SAMLA**") and updated draft guidance from the Office of Financial Sanctions Implementation ("**OFSI**")[2].

The UK's stated policy is to remain aligned with EU sanctions, and the Regulations are intended to have substantially the same effect as the existing EU-derived sanctions regimes that they would replace in the event of a 'no deal' Brexit. However, the Regulations include a number of differences in their technical implementation. Businesses will need to be aware of these changes, which – together with changing political considerations after Brexit – could lead to divergence between the EU and UK sanctions regimes. We look at some of these changes below, along with one change – to reporting obligations – that has not yet materialised. We also take a broader look at the UK's approach to sanctions, and how it is likely to be affected by Brexit.

Changes under the Regulations

Ownership and control under the asset freeze

Almost all EU and UK sanctions programmes involve an asset freeze, which prohibits dealings with funds or economic resources owned, held or controlled by designated persons, or making available funds or economic resources to, or for the benefit of, designated persons.

The asset freeze provisions in the Regulations reflect those in the existing regimes, and enable asset freezing measures to apply to entities that are directly or indirectly 'owned or controlled' by a designated person. However, the definition of 'ownership or control' in the Regulations is not precisely the same as the definition

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[1] The Iran (Sanctions) (Human Rights) (EU Exit) Regulations 2019, The Venezuela (Sanctions) (EU Exit) Regulations 2019 and The Burma (Sanctions) (EU Exit) Regulations 2019.

[2] The updated draft guidance is available here, but note that it will only come into force if and when the Regulations come into force, i.e. in the event of a 'no deal' Brexit.

set out in the EU regimes and associated guidance, and the Regulations' definition includes much more detail, such as a detailed explanation of when someone will be considered to hold shares or voting rights 'indirectly'.

It is unclear how likely this is to lead to differences in practice between the EU and UK regimes. However, the level of detail should help businesses to more easily identify whether entities are caught by asset freezing measures, and the prospect of greater clarity should be welcomed.

General licences

A general licence allows multiple parties to carry out specified activities (otherwise prohibited by sanctions) without having to obtain a specific licence. The EU sanctions regimes do not provide for general licences, but the UK government indicated in 2018 that its post-Brexit approach to sanctions would involve wider use of such licences[3] (perhaps inspired by the US, where such licences are commonly used). This is reflected in the Regulations, which provide for the issuing of general licences. OFSI's draft guidance indicates that such licences are likely to be used in relation to unforeseeable circumstances in order to support the UK government's policy priorities – for example, where otherwise prohibited financial activity is required to facilitate the provision of aid in response to a humanitarian crisis.

It is hoped that OFSI would expand the use of general licences over time to cover common situations that did not threaten the purpose of the relevant sanctions. This would allow UK sanctions regimes to be more flexible than was possible under the EU regimes, and would reduce the burden on OFSI and on businesses that would otherwise have to apply for individual licences.

New licensing grounds for asset freezing

The Regulations also include new licensing grounds for asset freezing, one of which permits OFSI to issue a licence to "*enable anything to be done to deal with an extraordinary situation*". OFSI's draft guidance indicates that this will cover situations that are extraordinary in nature but do not necessarily involve a designated person incurring an expense (which would be covered under the pre-existing 'extraordinary expenses' ground) – for example, funds being released to support disaster relief or provide aid in extraordinary situations. This ground cannot be used where other grounds are more suitable or to avoid the clear limitations of other grounds, but its potential breadth offers further flexibility for the new UK regimes.

Interestingly, another new ground – to "*enable anything to be done in connection with the performance of any humanitarian assistance activity*" – is included in the Iran Regulations only. Its inclusion there is unsurprising, given the UK and EU's concerns around the impact of re-imposed US sanctions on humanitarian supplies to Iran following the US's withdrawal from the Iranian nuclear deal. However, it is unclear why the ground is not included in the other Regulations, particularly given the current situation in Venezuela.

Information sharing

The Regulations expand the bases for disclosure of information by the Secretary of State, Treasury and HMRC to third parties, including for the purpose of "*facilitating the exercise by an authority outside the United Kingdom or by an international organisation of functions which correspond to functions under these Regulations*". The Regulations also specifically permit disclosure to "*any other regulatory body (whether or not in the United Kingdom)*", expanding on the equivalent previous wording that referred to regulatory bodies "*including those of Member States*". This is likely to be primarily intended to enable disclosure of information to OFAC where the UK's sanctions policy aligns with that of the US.

Reporting obligations

UK sanctions reporting requirements currently only apply to certain 'relevant' professions and businesses (including legal professionals, estate agents and financial institutions), in contrast to EU reporting requirements to facilitate compliance, which cover all natural and legal persons. Failing to comply with the UK sanctions reporting requirements is a criminal offence. The UK government signalled last year that it planned to extend the UK requirements to reflect the EU position on covered persons[4], and SAMLA included a provision to enable sanctions regulations to include such reporting requirements.

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3 See paragraph 4 of the May 2018 policy note on exceptions and licences under SAMLA.

4 As set out in our June 2018 alert, *Sanctions after Brexit – why UK businesses will face a greater compliance burden*.

However, the Regulations do not include any such reporting requirements following the EU scope of covered persons, and instead maintain the standard UK position of applying such requirements only to specified 'relevant firms' in particular sectors. OFSI's post-Brexit guidance similarly focuses solely on these limited reporting requirements, and makes no reference to the possibility of broader scope requirements arising.

The reason for this is unclear, but it is possible that the government plans to extend the reporting requirements in the Regulations at a later date by way of supplementary regulations, as provided for in SAMLA. This would avoid newly covered businesses (of which there would potentially be a very large number) becoming subject to the reporting requirements, and having to put appropriate reporting measures in place, at the same time as dealing with the effects of a 'no deal' Brexit.

UK / EU alignment against US sanctions on Iran

Following the US's withdrawal from the Joint Comprehensive Plan of Action ("**JCPOA**") and re-imposition of extraterritorial sanctions on Iran, the EU responded by updating Council Regulation (EC) No. 2271/96 (the "**Blocking Regulation**") in an effort to reduce the impact on Iran[5]. The updated Blocking Regulation forbids EU natural and legal persons from complying with the re-imposed US sanctions to the extent they are listed in the Blocking Regulation and apply extraterritorially, unless exceptionally authorised to do so by the European Commission.

Despite Brexit, the UK is not only standing with the EU on this issue, but is taking a leading role in European efforts to preserve the JCPOA. The UK has implemented the updated Blocking Regulation by updating existing law, making it a criminal offence for UK nationals and entities to comply with the reintroduced US sanctions[6]. The Blocking Regulation itself will be incorporated into domestic UK law on Brexit by virtue of section 3 of the European Union (Withdrawal) Act 2018 (albeit various amendments will be needed to make it UK-specific), and the UK government has confirmed that it intends to uphold the policy intent of the Blocking Regulation post-Brexit[7]. In addition, the UK – together with France and Germany – has established a special purpose vehicle, the Instrument in Support of Trade Exchanges (INSTEX), to facilitate trade between European businesses and Iran, although further steps are needed before it becomes operational[8].

These measures should not be taken as indicating that the UK will move in lockstep with the EU on all sanctions issues post-Brexit – there will undoubtedly be instances where the UK lines up with the US (e.g. on Russia, as covered below) or charts a separate path. However, the UK's close alignment with the EU on this issue reflects a fundamental point – whether you are imposing or opposing sanctions, coordination increases effectiveness. London's prevalence as a financial centre will give UK sanctions greater influence, but the UK will need to win the support of the EU, US or other major players if its post-Brexit sanctions are to have maximum impact.

Other regulations still in the pipeline

Regulations for most post-Brexit sanctions regimes are still to come, although the UK government has acknowledged that it will not be possible to prepare regulations for all regimes before exit day[9]. Perhaps the most interesting will be those for Russia. Although the EU has now imposed asset freezes and travel bans on four Russian intelligence officers following the Salisbury poisonings, the UK has made clear that it intends to go further, and we are likely to see the first use of SAMLA's 'Magnitsky clause' to impose sanctions for 'gross violations of human rights'. In doing so, the UK would be following in the footsteps of the US, which has

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5 As set out in our August 2018 alert, *United States re-imposes certain Iran-related sanctions after 90-day wind-down period; EU responds with updated EU Blocking Regulation*.

6 Specifically, the Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996 (the "**1996 Order**") made it a criminal offence to breach the Blocking Regulation. The Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) (Amendment) Order 2018 (the "**2018 Order**") updated the 1996 Order, extending the offence to cover conduct within the scope of the updated Blocking Regulation.

7 See paragraph 7.5 of the explanatory memorandum to the 2018 Order, available here.

8 As set out in our February 2019 alert, *UK, France, Germany create INSTEX SPV to support trade with Iran*.

9 See paragraph 42 of the Foreign and Commonwealth Office's written evidence to the Foreign Affairs Select Committee, available here.

previously imposed asset freezes and visa bans on Russian officials under the Magnitsky Act, and which has introduced broad additional sanctions on Russia post-Salisbury.

Conclusion

The Regulations show that, in the event of a 'no deal' Brexit, the UK's new sanctions regimes would include material changes. Businesses would need to pay attention to avoid being caught out by reliance on their understanding of the old regimes, particularly as OFSI appears to be willing to act on even minor breaches – last month it imposed its first monetary penalty (of £5,000) for a breach of financial sanctions regulations, which involved a sum of only £200[10].

More broadly, the UK's alignment with the EU on Iran, and the expected alignment with the US on Russia, demonstrate both the existence and the limits of the UK's independence on sanctions post-Brexit. Brexit (and SAMLA) will give the UK the freedom to take the same 'transatlantic' approach to sanctions as it has often done for foreign policy, aligning itself with the US or the EU as it sees fit. However, the UK will no longer have the same ability to influence EU sanctions, and if it acts alone – without the support of the US or EU – it may well find that its sanctions lack force. In theory, Brexit means the UK will be free to go its own way on sanctions. In practice, that freedom will be limited.

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[10] See the penalty notice here.