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UK sanctions post-Brexit
Some potholes and enforcement highlights

This note accompanies our recent webinar on UK sanctions – how do you comply and what are the key issues? To view the webinar, click here.

The UK now has in place more than 30 autonomous sanctions regimes, imposed under the Sanctions and Anti-Money Laundering Act 2018 ("**SAMLA**"). OFSI's position is that "*[w]hile these regulations are intended to deliver substantially the same policy effects as the existing regimes, you should not assume that they are identical*."

The UK, the EU and the US have consistently made clear that multilateral sanctions are the most effective. It is therefore particularly frustrating to see that, even when policies are aligned or in this case intended to be the same, businesses need to check another sanctions regime to ensure compliance. The impact assessments indicate that the new UK sanctions regulations will have "*no, or no significant, impact on the private or voluntary sector* ". OFSI refers to differences in drafting. But there are differences of substance. As is often the case in the sanctions world, the devil is in the detail. Businesses should not assume there are no relevant changes. They should not assume that any changes are minor. Policies and processes need to be updated. Compliance staff need to be aware of potential issues and be able to spot them. The UK and the EU have both said they intend to coordinate on sanctions but we have already seen divergence.

Differences in structure – some highlights

1. New lists:

a. There is now a UK sanctions list[1] (all designations, financial or otherwise – maintained by the FCDO) and a consolidated list of financial sanctions targets[2] (asset freeze targets – maintained by OFSI). As well as formatting, there are substantive changes to data, e.g. aliases, identifying info.

b. There is a separate list of persons named in relation to financial and investment restrictions[3] (Russia sectoral sanctions – maintained by OFSI). Be aware that sectoral sanctions targets are not included in OFSI's search tool[4].

2. Ownership and control:

a. UK asset freezes expressly include assets of an entity "*owned or controlled directly or indirectly*" by a designated person. A detailed definition is set out in the UK sanctions regulations, which should assist compliance, although there is a less well defined catch-all. This is a change to the rebuttable presumption set out in EU guidance.

b. OFSI has indicated that it will try to specifically list entities subject to asset freezes (NB the EU Court has previously indicated that not doing so is incompatible with the principles of legal certainty and of transparency[5]).

3. Scope:

a. UK sanctions apply where there is a "UK nexus" but they do have some extraterritorial application: they apply to conduct in the UK by anyone or conduct anywhere by a UK person. EU sanctions are similar. This is a particular issue for businesses with staff from different

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[1] https://www.gov.uk/government/publications/the-uk-sanctions-list
[2] https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets/consolidated-list-of-targets
[3] https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets/ukraine-list-of-persons-subject-to-restrictive-measures-in-view-of-russias-actions-destabilising-the-situation-in-ukraine
[4] https://sanctionssearch.ofsi.hmtreasury.gov.uk/
[5] Joined Cases T 246/08 and T 332/08 *Melli Bank Plc v Council*

jurisdictions, and will only get worse as UK sanctions inevitably diverge.

b. Issues of scope also need to be checked in each case, e.g. licensing grounds differ from UK to EU (see below), the exclusion from the Russia sectoral sanctions applies to UK subsidiaries in the UK sanctions and EU subsidiaries in the EU sanctions, the Blocking Regulation (see below) applies to the UK or EU as the case may be. International busineses and those dealing across borders will need to have regard to these differences in scope.

4. Financial services:

a. Some EU sanctions prohibit "*financing and financial assistance*". The equivalent in the UK sanctions is termed "*financial services*". However, the UK term is defined very broadly (s61(1) of SAMLA). In particular, it includes processing payments. This is different to the EU sanctions – see Case C-72/15 *Rosneft v HMT* (the UK was supported by Estonia and the European Commission in these proceedings; Germany and France argued for a narrower interpretation).

b. Similarly, OFSI considers that payment or settlement services are caught by the prohibition in the sectoral sanctions on granting or entering into any arrangement to grant relevant loans. See OFSI's Russia sanctions guidance: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892741/OFSI_-_Russia_guidance_-_June_2020.pdf. This is different to the European Commission guidance on the equivalent prohibition in the EU sectoral sanctions. (NB this guidance (both UK and EU) is non-binding and it is ultimately for the Courts to decide.)

5. Derogations:

a. The UK sanctions regulations include some new derogations (for non-UN designations only): national security/prevention of serious crime; and "*extraordinary situations*" (in addition to the existing "*extraordinary expenses*" licensing ground carried over from EU sanctions).

b. OFSI now has the power to issue general licences. These may respond to unforeseeable circumstances, technical implementation issues or where HMT decides that the purpose of the regime would be better served. Reporting obligations are likely to apply. It does not appear that the prescriptive licensing grounds apply to general licences, which would give OFSI significant flexibility. The US has issued a number of general licences (some commentators have questioned whether this is because of rushed or ill-thought-out sanctions). The only general licence OFSI has issued since the end of the Transition Period has been to authorise payment for services at Crimean sea ports (e.g. fees for vessels transiting the Kerch Strait). Several general licences were issued under the UK's counter-terrorism sanctions regime pre-Brexit (relating to the provision of insurance and the payment of legal fees by third parties). OFSI revoked all of these on 11 January 2021 and only replaced the general licence relating to legal aid. The other situations now require individual licences.

6. Blocking Regulation:

a. The EU Blocking Regulation has been retained in UK law and amended by The Protecting against the Effects of the Extraterritorial Application of Third Country Legislation (Amendment) (EU Exit) Regulations 2020. This limits the scope to the UK (and the EU Blocking Regulation now excludes the UK as a non-Member State).

b. The UK guidance[6] suggests a different emphasis on protecting – rather than punishing – UK businesses from the impact of US extraterritorial sanctions.

c. An additional change is that authorisations allowing compliance with US sanctions are public. On 5 February 2021, the Secretary of State for International Trade authorised Imperial Brands Plc to file a motion to

[6] https://www.gov.uk/guidance/protection-of-trading-interests-retained-blocking-regulation

dismiss proceedings in the US under the Helms-Burton Act in relation to the nationalisation of a cigarette company and factory in Cuba.[7]

7. UK Finance review:

For further detail, UK Finance has produced a review of all of the UK sanctions regulations: https://www.ukfinance.org.uk/policy-and-guidance/reports-publications/uk-sanctions-statutory-instruments-review (564 pages).

Divergence already

1. Designations:

a. The UK did not carry over anyone designated under the EU's misappropriation sanctions (Egypt, Tunisia, Ukraine) (notably, the EU has suffered a number of defeats in the EU Courts in relation to these sanctions and, on 12 March 2021, the EU revoked its Egypt sanctions regime because it had "*served its purpose*").

b. HMG estimated there may be 100 designations annually under the UK's global human rights sanctions regime (introduced in summer 2020 – see further below). NGOs have been invited to submit evidence in support of additional designations. There have been discussions in the UK Parliament regarding Navalny, China and extending sanctions to bribery and corruption.

c. Designation by description provoked a lot of debate during the passage of SAMLA. No such designation yet. It could cause significant compliance headaches.

d. For all the talk of coordination and multilateral sanctions, since 1 January 2021, the UK has designated: 4 Zimbabwean security officials on 1 February (not EU designated); 27 individuals in relation to the Belarus elections on 18 February (designated by the EU in December 2020 but not carried over at the end of the Transition Period); 5 individuals in relation to the military coup in Myanmar on 25 February (some of these and some others were designated by the US 2 weeks earlier, no designations yet by the EU); and 6 individuals on 15 March 2021 under the UK's sanctions against Syria (some of whom are US listed). On 2 March 2021, the EU designated 4 individuals in relation to Navalny's detention under its new global human rights sanctions (the first under this regime). The EU's sanctions were coordinated with the US. The UK has not made any designations under its global human rights sanctions in relation to Navalny's detention[8].

2. Global human rights sanctions:

a. Scope of the UK sanctions: right to life; right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; right to be free from slavery, not to be held in servitude or required to perform forced or compulsory labour. The UK Government has limited the regime to these rights because "*violations and abuses of these particular rights directly concern the physical and mental integrity of the person, and have a devastating and often irreversible impact on individuals, as well as on wider society";* the UK has also said that the sanctions regime is *"reflective of the human rights sanctions regimes of other international partners, including the US and Canada*". UK sanctions include those "*involved in*" the human rights abuses – this is very wide and includes: concealing evidence of abuse; providing financial services or making funds available to a person responsible for abuse; profiting financially or obtaining any other benefit from abuse; failing properly to investigate/prosecute abuse.

b. On the other hand, the EU's regime (introduced in December 2020) covers more human rights expressly and includes a catch-all. It also includes those providing "*financial, technical, or material support for or are otherwise involved … including by planning, directing, ordering, assisting,*

[7] https://www.legislation.gov.uk/uksi/2021/132/contents/made

[8] 6 individuals and an entity were designated in relation to Navalny's poisoning under the EU chemical weapons sanctions in October 2020, which the UK carried over at the end of the Transition Period

preparing, facilitating, or encouraging". There is therefore significant scope for divergence. The UK has said it will coordinate with international partners (but see above).

UK sanctions enforcement

1. The UK's Office of Financial Sanctions Implementation ("**OFSI**") was first established in 2016. It was given the power to investigate possible sanctions breaches and impose civil penalties in 2017 with the coming into force of Part 8 of the Policing and Crime Act 2017. OFSI's powers are set out in accompanying guidance, which appears to be taken in significant part from OFAC, its very much larger and much more generously funded transatlantic cousin.
2. The guidance sets out a host of mitigating and aggravating factors. Mitigating factors include voluntary self-reporting (which can see any penalty levied reduced by between 30% and 50%) and it seems close co-operation and vigorous remediation. Aggravating factors include circumvention, professional facilitation and repeated, persistent or extended breaches. See further below regarding recent updates to the guidance.
3. When the civil penalty regime was announced, many sanctions professionals were sceptical about OFSI's ability to undertake detailed investigations. Indeed, the first enforcement actions announced were extremely small relating to a breach with a value of £204 and relatively minor penalties. That all changed in 2020 when OFSI announced enforcement action against Standard Chartered Bank ("**SCB**") in relation to breaches of the Ukraine sovereignty sanctions regime and the imposition of an overall penalty of £20.47 million.

Facts of the SCB enforcement decision

4. In July 2014, the EU imposed restrictive measures against those responsible for actions which undermined or threatened to undermine the territorial integrity, sovereignty and independence of Ukraine. Those measures were intended to prevent certain Russian state-owned banks, companies and their non-EU subsidiaries from accessing the capital and loan markets within the EU.
5. Article 5(3) of the relevant regulations prevents any EU person from making loans or credit available to sanctioned entities, where those loans have a maturity exceeding 30 days. Article 5(3)(a) creates an exemption from the prohibition to permit loans or credit which have the specific and documented objective of financing permissible trade between the EU and any third country (the "**EU trade finance exemption"),** the intention being to protect legitimate EU trade. The EU trade finance exemption requires that the trade finance concerns goods coming in or out of the EU.
6. SCB made a series of 102 loans to Denizbank, which was at that time a Turkish subsidiary of Sberbank of Russia. Sberbank was itself a sanctioned entity and so the prohibitions also applied to Denizbank. OFSI assessed that while some of the loans were permitted under the EU trade finance exemption, 70 loans with an estimated transaction value of over £266 million did not have an EU nexus and did not therefore qualify for the EU trade finance exemption. 21 of these loans with an estimated transaction value of £97.4 million were issued between April 2017 and January 2018 and fell within OFSI's enforcement powers.
7. For the purposes of its guidelines, OFSI considered that these breaches were to be categorised as "most serious". OFSI assessed that SCB was aware of the sanctions regime and the need to take compliance steps and had initially ceased all trade finance business with Denizbank. However, SCB had then sought to introduce dispensations enabling such financing to continue where they considered that the EU trade finance exemption was applicable. OFSI assessed that these dispensations were not appropriately put in place or monitored resulting in loans being made which were not within the EU trade finance exemption and which were therefore in breach of sanctions.
8. However, SCB had self-reported to OFSI, carried out an internal investigation of the breaches, provided a detailed report and co-operated with OFSI's investigation. As a result of this, OFSI reduced its penalty by 30% in accordance with its published guidance.
9. SCB exercised its right to a Ministerial Review. The Minister upheld OFSI's decision to imposea penalty, however, he gave further consideration to the bank's investigative report and found that

it did not wilfully breach sanctions, had acted in good faith, had intended to comply with the restrictive measures, had fully co-operated with OFSI and had taken remedial steps following discovery of the breaches. In the circumstances, he held that OFSI should have given these factors more weight in its penalty recommendations. He therefore reduced the overall penalty payable by SCB to £20.47 million.

10. It is noteworthy that OFSI weighed in the balance SCB's decision to self-report when determining the quantum of the penalty to be imposed. It was OFSI's position at the time[9] that all companies have a positive duty to self-report (and such duty has clearly been imposed on the regulated sector for some time). It appears, however, that OFSI has taken a policy decision further to incentivise self-reporting by dangling the carrot of discounted penalties where firms do so.

Sanctions-enforcement post-Brexit

11. As a result of the SCB enforcement action, it is now clear that OFSI is developing a bite to match its bark.

12. Businesses are now having to adjust to a whole suite of new UK sanctions (in addition to the existing EU and US ones). It is unclear how OFSI is likely to approach inadvertent breaches while businesses get to grips with the recent big change. On the one hand, OFSI might well take the position that businesses have been aware of these changes for some time, they have been well publicised and OFSI engaged in an active programme of outreach in the months running up to the end of the transition period. Any breaches should therefore be on the businesses themselves. However, on the other hand, this is a period of quite tumultuous change for businesses and the stance which OFSI adopts might well be determined by the seriousness of the breach. If small and technical in nature, they may well be content to issue guidance, but if they determine the breach to be serious, they are likely to come down on the breaching business with the full force of their powers.

13. Following our webinar on 4 March, OFSI published new guidance which will take effect from 1 April 2021[10]. The changes in the new guidance are subtle but appear to reflect a more aggressive approach to enforcing sanctions going forward, building on the significant penalty imposed on SCB. Some indications as to what OFSI would "*normally*" or "*likely*" do have been removed (including the previous statement that

14. OFSI will not normally impose a penalty on any person who has already been prosecuted, which could raise some interesting issues, and the cases in which OFSI will generally exercise its discretion not to impose a penalty). This should give OFSI more flexibility and reflects the fact that each case needs to be viewed on its particular facts. The updated guidance now also makes clear that OFSI will consider the kind of work a person does and their exposure to financial sanctions risk in determining the level of action or expected knowledge of financial sanctions, and that multiple breaches extended over time will be viewed as being more serious collectively. The reference to a person simply falling below a high standard has also been removed and OFSI has arguably lowered the bar for "*most serious*" cases to include "*particularly poor, negligent or intentional conduct*", not just "*blatant flouting of the law*".

15. The guidance also makes clearer that OFSI values co-operation throughout an investigation, rather than simply at the initial stage of making a voluntary disclosure, and that OFSI expects disclosures to include "*all evidence relating to all the facts*" of a breach of sanctions (the current guidance states that disclosures should be "*materially complete on all relevant factors that evidence the facts*").

16. Some time periods have also been extended or clarified: representations to OFSI (which no

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[9] OFSI's position was that EU law obliges everyone to provide information on financial sanctions breaches to the national competent authority (OFSI in the UK). However, OFSI's current position is not clear. The relevant provision of EU law has not been carried across into the UK's autonomous sanctions regimes and OFSI has removed the previous statement from its guidance since the end of the Transition Period.

[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/968229/MP_guidance_April_2021.pdf

17. longer have to be in writing if there is a good reason for not doing so) following OFSI's initial letter stating that it intends to impose a penalty, OFSI's response to those representations and any request for a ministerial review of OFSI's decision notice can be made within 28 working days (up from 28 calendar days); a penalty should be paid within 28 working days (rather than a reasonable period of time); and target for a ministerial review is now 2 months (up from 28 calendar days). Extensions to the former time periods can be requested but the guidance suggests OFSI will take a tougher stance going forward.

18. Note also that the UK sanctions regulations provide much wider bases on which OFSI can disclose information to third parties. Post Brexit, these include (a) any of the purposes of the relevant sanctions regime; (b) compliance with an international obligation; and (c) "*facilitating the exercise by an authority outside the United Kingdom or by an international organisation of functions which correspond to functions under these Regulations".* This will presumably entitle OFSI to disclose information to OFAC in cases in which UK and US sanctions policies are aligned.

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