

# Soundings

## Sanctions: what does the post-Brexit landscape look like?

**In our March Soundings, we foreshadowed how the sanctions landscape might look post-Brexit. Now that the transition period has ended and the UK has left the EU with a deal in place, we take a look at the new sanctions framework which came into force at 11pm on 31st December, 2020.**

Following the UK's exit from the EU, the Sanctions and Anti-Money Laundering Act 2018 (the Sanctions Act) enables the UK to transition existing EU sanctions into UK law. Perhaps most importantly the Sanctions Act also allows the UK to implement, update or lift sanctions. The UK also has in place a raft of other specific and subordinate legislation, regulation and orders. These regulations and orders deal with the separate specific areas such as terrorism, finance, export control immigration and all other areas that are required to be addressed by sanctions.

### The Sanctions Act

Broadly speaking, under the Sanctions Act, the UK may impose the following types of sanctions measures:

- trade sanctions, including arms embargoes and other trade restrictions;
- financial sanctions, including asset freezes;
- immigration sanctions, known as travel bans; and
- aircraft and shipping sanctions, including de-registering or controlling the movement of aircraft and ships.

The Sanctions Act applies to the whole of the UK, including Northern Ireland. The prohibitions and requirements in the new legislation apply to conduct by UK persons. This includes anyone in the UK (including its territorial waters), UK nationals outside of the UK and bodies incorporated or constituted under the law of any part of the UK. It is government policy for UK sanctions measures to be given effect in the British Overseas Territories and Crown Dependencies to make sanctions as effective as possible.

### Change on the horizon?

As a member of the United Nations, the UK is required to implement sanctions imposed by the UN Security Council and will continue to implement all such sanctions without change. In relation to the EU, however, there is scope for divergence.

Prior to its exit from the EU, the UK implemented all sanctions imposed by the EU. The Sanctions Act not only aims to implement EU sanctions already in place but also allows the UK to broaden its powers. By the time of writing this almost all EU Sanctions are replicated under UK legislation, those that are not have been retained by the UK through the EU (Withdrawal) Act 2018.

The differences that may arise between EU Sanctions and UK sanctions are subtle and many will only emerge over time. The UK Sanctions regulations and orders operative beneath the Sanctions Act (often called subordinate legislation) are more detailed than comparable EU legislation and allow for divergence between UK and EU sanctions. This article cannot address those differences in detail, but the differences fall broadly in to the following camps:

### Geographical changes to licences granted by the UK

Licences can be granted by the UK government to allow trade with persons or organisations that are the subject of financial sanctions. These licences when previously granted by the UK were valid for activity within the EU. Following Brexit, such licences granted by the UK will be valid in the UK and will not be valid for activity within the jurisdiction of the EU. In certain circumstances licenses will be

required from the UK and either an EU Member State or another country to complete a contemplated activity.

#### Changes to designations

EU law utilises a 'necessity test' for the implementation of designations. This is a higher threshold than that found under the Sanctions Act. The difference in threshold may lead to the UK listing designations that may not meet the threshold under European law, leading to a divergence.

Under the Sanctions Act, persons or entities can be designated by description. The description must be "such that a reasonable person would know whether that person fell within it". This is not a feature of the EU sanctions regime. No such designations have yet been made, but it is anticipated that such designations could cause potential interpretation and enforcement problems.

Within the EU, challenges to designations can be made through the EU courts. Designations made in the UK under the Sanctions Act will be subject to challenge through Judicial Review within the UK courts. Challenging designation under UN sanctions will be limited under the Sanctions Act.; any such challenge being limited to a request to the Secretary of State to use their 'best endeavours' to remove a designation.

#### Russian sanctions

The UK's new Russian sanctions regime incorporates several notable points of divergence from the current EU regime that will add new complexity to sanctions compliance. These arise principally in relation to which persons/entities are exempt and, also, as a result of the UK's expanded definition of the term 'financial assistance'.

#### Treatment of sanctions target subsidiaries

The EU position restricts the provision of funds, directly or indirectly, to persons targeted by sanctions unless it can be determined on a case-by-case basis that the resources concerned will not be used by or be for the benefit of the listed person. The Sanctions Act and subordinate legislation remove this rebuttable presumption, leaving a broader definition. Making funds available indirectly to a sanctions target includes, in particular, making them available to a person who is owned or controlled directly or indirectly by the designated person, thereby catching subsidiaries under the same sanction.

#### Ownership or control

EU sanctions do not themselves contain "ownership" and "control" definitions. The Sanctions Act and subordinate legislation, by contrast, define clearly "ownership" and "control" and detail how such definitions should be interpreted.

In addition to EU sanctions, there may be overlap with other foreign policy that it is important to monitor, for example:

- ECOWAS restrictions (the Economic Community of West African States).
- Non country-specific export policies and restrictions. You need an export licence before you can export controlled goods, software, and technology from the UK to another country.

- Restrictions applying to terrorist organisations; measures against terrorist organisations in relation to financial and visa sanctions, and arms embargoes.
- Overlap between trade sanctions and strategic export controls.
- Other non-trade-related restrictions, such as immigration sanctions, financial sanctions.

The US and the EU have significantly different approaches to Iran and Cuba, for example, and parties should review any business activities related to those countries to ensure continuing compliance.

#### Practical action

Because of the potential for UK sanctions to be varied and in conflict with other international sanctions, it is more important than ever that measures such as reviewing processes, monitoring and sanctions-screening software are kept up-to-date. Sanctions clauses also continue to be of utmost importance in any contracts or charterparties.

The UK Office of Financial Sanctions Implementation (OFSI) has issued the clear warning that, while the new UK sanctions regulations are intended to deliver substantially the same policy effects as the existing regimes, it is important not to assume that they are identical.

Organisations need to pay attention to changes introduced in the UK that may conflict with sanctions regimes outside the UK. The UK government publish [a list](#) of which sanctions are in place at any given time and this is an excellent starting point. This list will be updated whenever a decision is made to vary, revoke or change a sanction provision.

OFSI provides a [consolidated list](#) of persons and organisations under financial sanctions, including those under the Sanctions Act and other UK legislation. It is important to note that the OFSI Consolidated List will no longer include EU designations. Additionally, the Consolidated List will only include those designations on the UK sanctions list that are financial in nature.

#### What does the future hold?

To date, the existing EU sanctions process has often been both politically driven by the UK and dependent on UK intelligence to inform the choice of targets. There have been suggestions that the departure of the UK from the EU sanctions system may result in the EU reducing the use of sanctions over time.

While the changes at present have not yielded any notable exceptions, the difference between UK and EU legislation will likely lead to divergence in the longer term through differing interpretation and application.

**If Members have any questions in relation to the above issues, they are invited to contact the Club for further information.**

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