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UK Sanctions Post-Brexit

One of the many unanswered questions associated with the United Kingdom's departure from the European Union on 31 January 2020 is the future use of sanctions as part of the United Kingdom's foreign policy playbook. From the time of Brexit on 31 January 2020 until 31 December 2020, OFSI has confirmed that the United Kingdom will continue to apply all current EU sanctions. At the end of this period, the United Kingdom will be free to alter the extent to which the EU sanctions program is applicable in the United Kingdom. As discussed further below, while UK and EU officials have said they intend to coordinate as much as possible on sanctions policy, the UK government has provided some indication that it will use Brexit as an opportunity to carve its own path and potentially strengthen its sanctions regime. A related key question will be whether the United Kingdom will align itself to the United States' or the European Union's policy on Iran, or adopt its own position.

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The Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"), the cornerstone of the United Kingdom's new autonomous sanctions regime, gives the United Kingdom the power to diverge from EU sanctions in a number of critical ways. SAMLA will also provide a post-Brexit mechanism for the United Kingdom to satisfy its obligation to impose UN sanctions. During transition, UN and EU sanctions will continue to be implemented in the UK through EU law.

Application of Sanctions to Entities "Owned" and "Controlled" by Designated Persons

OFSI's post-Brexit guidance explicitly states that sanctions apply to entities that are owned or controlled, directly or indirectly, by a designated person and provides factors for consideration to determine designated persons' "control" of unlisted entities.

According to OFSI, its new guidance is not intended to represent a change from the UK's current practice. Indeed, the "control" factors reflect the position OFSI articulated in 2018, interpreting EU guidance. It is unclear therefore whether the control factors will result in any practical divergence with the European Union post-Brexit.

Designation by Description

SAMLA will allow for designation of sanctioned persons or entities not only by name, but also by description. In order to do so, the description must be "such that a reasonable person would know whether that person fell within it." SAMLA restricts use of such an approach to when "it is not practicable [] to identify and designate by name all the persons falling within that description at that time."¹ To date, no such designations have been made.

The UK Office of Financial Sanctions Implementation ("OFSI")² has not yet provided guidance, including in its December 2019 blog post "Am I dealing with a sanctioned entity?," on how a designation by description might appear when published. OFSI has also not yet clarified whether financial sanctions can also extend to persons that are "owned" or "controlled" by individuals and entities designated by description, as is the case for those designated by name. In its guidance issued on the eve of Brexit, OFSI states that it applies only to sanctions regimes which do not fall under SAMLA, perhaps indicating more clarifications to come on this.³

It remains to be seen the extent to which the United Kingdom will use this new power to designate by description and the utility of the descriptions for screening and compliance.

¹ SAMLA, Section 12. The practical utility of this power may be further reduced by the SAMLA requirement that the Minister takes "such steps as are reasonably practicable to inform the designated person."

² OFSI is part of HM Treasury with responsibility for issuing guidance, granting licenses and enforcing sanctions.

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/862451/OFSI_general_guide_to_Financial_Sanctions.pdf

Forthcoming U.S.-Style General Licenses

The existing EU and UK sanctions regimes have lacked a corollary to the U.S. concept of a “general license”, which allows for persons to undertake activity that would otherwise be prohibited if they meet certain conditions, without the need to apply for a specific license. SAMLA, however, will allow the United Kingdom to implement “general license”-style exemptions, a move described as “an improvement on current practice.”⁴ We do not yet have an indication which sanctions programs might include such a general license.

For persons subject to both UK and EU jurisdiction, a UK general license will not provide an exemption from the need to apply for a specific license in the relevant EU Member State(s), adding another layer of sanctions compliance complexity.

“Magnitsky-Style” Human Rights Sanctions

The UK Foreign Office has signaled it will utilize new SAMLA powers post-Brexit to implement “Magnitsky-style” designations of those suspected of human rights violations and corruption.⁵ The United States led the way in implementing human rights and corruption-related sanctions under the Magnitsky Act (named after Russian lawyer, Sergei Magnitsky, who died in prison after alleging fraud against local officials). Other countries have since followed suit, including Canada.

Although HM Treasury has exercised its power to autonomously designate terrorist individuals and groups under the Terrorist Asset Freezing Act 2010, the enhanced sanctions power afforded by SAMLA could mean that those subject to UK jurisdiction (see below) will need to work harder to ensure compliance, through screening and other means, with UK sanctions in addition to the EU sanctions program.

While the European Union has also announced plans to enact sanctions against human rights violations, the European Union has only launched preparatory work and is thus likely further from enacting such sanctions. EU efforts may also be slowed, compared to those in the United Kingdom post-Brexit, given the need for bloc-wide consensus.

Potential for More Aggressive UK Enforcement

While, historically, EU member states have only minimally enforced sanctions violations, the United Kingdom has provided indications of increased enforcement to come – imposing its first monetary penalties through the relatively newly established OFSI, and given high marks from FATF for its measures in promoting the global use of financial sanctions.⁶ Additionally, based on recent guidance, OFSI seems intent on continued enforcement activity, setting out a framework to define the UK nexus that could bring conduct outside the United Kingdom within the scope of OFSI enforcement.

For example, OFSI announced in post-Brexit guidance that it intends to apply sanctions restrictions to persons who “undertake activities within” UK territory –in addition to UK citizens, UK-registered entities, and those located within the United Kingdom. This means, for example, that companies incorporated outside of the United Kingdom could be subject to OFSI sanctions enforcement when selling products to UK customers. Additionally, in its 2017 guidance OFSI suggested that it could exercise jurisdiction over transactions using UK clearing services, actions taken overseas but directed from within the United Kingdom, and financial products or insurance bought on the UK markets but held or

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704057/Policy_Note_-_Exceptions_and_Licences.pdf (noting that the UK issues general licenses under UK counter-terrorism legislation, but has been unable to do so under EU sanctions legislation).

⁵ “UK to begin crackdown on human rights abusers,” *Financial Times*, 9 January 2020.

⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/838178/Annual_Review_2018-19_FINAL.pdf.

used overseas.⁷ OFSI noted its intentions to limit its jurisdiction, stating that it “will not artificially bring something within UK authority that does not naturally come under it.”

The United Kingdom is also laying the groundwork for enhancing potential cross-border cooperation in sanctions enforcement with its international partners. The autonomous UK sanctions regime will contain enhanced information sharing provisions allowing OFSI and other competent UK authorities to disclose information relevant to implementation and enforcement of economic sanctions to authorities outside the United Kingdom, including OFAC.

Given the enhancement to OFSI’s enforcement powers, UK nationals, UK-registered entities and anyone who conducts business in the United Kingdom should be aware of the increased potential for sanctions enforcement.

Emerging Divergence in Activity-Based EU and UK Sanctions Programs

In addition to list-based sanctions as described above, the EU also maintains prohibited categories of activity in specific countries or with specified persons, most notably the EU Russia-related sectoral sanctions regime. In anticipation of a “no-deal Brexit,” OFSI published autonomous UK sanctions regimes,⁸ including a UK corollary to EU sectoral sanctions on Russia. These autonomous regimes are expected to come into effect at the end of the transition period. According to OFSI’s latest guidance, “most sanctions regimes” laid out under SAMLA will not come in effect until 1 January 2021.⁹ Although the regimes are based on EU equivalents, there are some notable distinctions. Two of the most significant are:

- *Persons Exempt from Sectoral Sanctions*: Under the EU sectoral sanctions on Russia, EU persons are prohibited from providing “investment services” for, issuing credit for, or dealing with new bonds, equity and similar instruments issued by certain Russian banks, defense and energy companies. EU-based subsidiaries of listed entities are exempt from these restrictions.¹⁰ By contrast, the UK version exempts only UK-based subsidiaries. Thus, companies operating in the United Kingdom and European Union may need to seek authorization to deal with EU-incorporated subsidiaries of sectoral sanctions targets.
- *Expansion of Definition of “Financial Assistance”*: EU sectoral sanctions also prohibit sale or supply of and “financial assistance” related to certain goods with military purposes or end uses in deep water oil/Arctic oil exploration. The Court of Justice of the European Union recently held that “financial assistance” under the EU regulations does not include payment processing, despite EU Commission guidance to the contrary. Therefore, the UK autonomous version of these restrictions explicitly states that wherever the provision of financial services (we can assume an intentionally broader term than the European Union’s use of “financial assistance”) is prohibited, it includes providing payment and money transmission services.

Iran Program

No discussion of sanctions these days can be complete without mentioning Iran. Since its withdrawal from the Joint Comprehensive Plan of Action (“JCPOA”) in 2018, the United States has steadily introduced additional list-based designations and secondary sanctions (aimed to deter foreign companies and foreign financial institutions from conducting business in key sectors in Iran). The United Kingdom, alongside the European Union, has consistently sought to stick to the JCPOA and find mechanisms to facilitate trade with the country. However, with tensions mounting with the United States, Iran announced earlier this month that it would no longer observe its commitments under the JCPOA to limit its number of nuclear centrifuges. In response, the United Kingdom joined France and Germany to trigger a

⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708990/Monetary_Penalties_Guidance_web.pdf.

⁸ Available here: <https://www.gov.uk/government/collections/uk-sanctions-regimes-if-theres-no-brex-it-deal>.

⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/862451/OFSI_general_guide_to_Financial_Sanctions.pdf

¹⁰ Regulation 833/2014, Article 5.

dispute resolution mechanism under the JCPOA to evaluate whether Iran is in breach of its conditions. In a joint statement, the three countries “once again express [their] commitment to the JCPOA and [their] determination to work with all participants to preserve it.”¹¹

The JCPOA provides for the pre-deal sanctions to “snapback” into place if no resolution is reached. While the United Kingdom has historically aligned with the European Union with respect to Iran, Brexit will likely ultimately provide an opportunity for it to diverge in its approach with respect to Iran if desired.

¹¹ <https://www.gov.uk/government/news/e3-foreign-ministers-statement-on-the-jcpoa-14-january-2020>.