

# Impact of Brexit on UK and EU Sanctions Frameworks

Contributing Partners

**Ryan D. Junck** / London

**Elizabeth Robertson** / London

European Counsel

**Michael Albrecht** / Munich

Associates

**Vanessa K. McGoldrick** / London

**Margot Sèvre** / Paris



This article is from Skadden's **2021 Insights**.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West  
New York, NY 10001  
212.735.3000

The U.K. adopted an autonomous financial sanctions regime when it exited the European Union on December 31, 2020. The U.K. and EU have both stated that they intend to coordinate post-Brexit sanctions policy as much as possible; with the U.K. historically having been active in shaping EU sanctions policy, we expect it to continue to take a proactive approach under its own regime. The EU, meanwhile, will likely keep a close eye on U.K. actions while also striving for a more robust, uniform enforcement of sanctions across its member states.

Prior to Brexit, the U.K.'s sanctions regime came from the EU, through EU regulations that had direct effect over member states. Now, the U.K. can adopt its own independent sanctions policy, and it has enacted the Sanctions and Anti-Money Laundering Act 2018 (the Sanctions Act) to address how U.K. financial sanctions will operate post-Brexit. The Sanctions Act serves two functions: (1) it enables sanctions to continue uninterrupted by Brexit; and (2) it gives the U.K. government the authority to implement its own sanctions regime.

The first stand-alone U.K. sanctions regime implemented through the Sanctions Act was introduced under the Global Human Rights Sanctions Regulations and came into effect on July 6, 2020. The regulation is intended to deter, and hold people accountable for, activities carried out by or on behalf of a state that amount to serious human rights violations. The EU's equivalent regulation took longer to come into effect, on December 7, 2020, due to the need for member state consensus.

As January 1, 2021, drew closer, the U.K. continued to issue guidance addressing the post-Brexit framework. For example, on November 20, 2020, the sanctions unit of the U.K. Foreign, Commonwealth and Development Office (FCDO) issued guidance covering licenses (which provide permission to act in a way that would otherwise breach sanctions) and sanctions lists (a directory of individuals and entities upon which economic and/or

legal restrictions have been imposed). In particular, (1) only licenses granted by the U.K. will be valid in the U.K., and U.K. licenses will not be recognized by the EU in respect of EU sanctions; and (2) the U.K. sanctions list will cover all sanctions made under the Sanctions Act, while the consolidated list of financial sanctions targets from the Office of Financial Sanctions Implementation (OFSI) within Her Majesty's Treasury (HMT) covers all financial sanctions designations. As a result, organizations should make sure they are checking the correct list — some may need to check both — in order to ensure they are compliant with all applicable sanctions regimes.

Also in November 2020, the U.K. published guidance on the legislation enacting U.K. measures similar to the EU Blocking Regulation. The purported effect of the legislation is to "protect UK persons from the extraterritorial effect" of certain laws, including U.S. sanctions on Iran and Cuba. Most recently, in a blog post, OFSI referred to the FCDO's preparations for transition, including the 30 new financial sanctions regulations it has prepared. OFSI stated that although the U.K. regulations are intended to create largely the same policy effects — namely, preserving peace and safeguarding the EU's values, interests and security — as existing EU regimes, they are not identical, and particular care should be taken when assessing whether activities are now compliant with U.K. sanctions.

Post-Brexit, the FCDO is responsible for the U.K.'s international sanctions policy, including all international sanctions regimes and designations. The FCDO will coordinate with OFSI to implement and enforce the U.K.'s financial sanctions on behalf of HMT. The FCDO will publish all listings on the U.K. Sanctions List, which will be in addition to any asset freezes or other types of financial restrictions recorded on OFSI's consolidated list.

From the EU sanctions perspective, Brexit may have serious practical implications. The EU loses not only a determined sanctions advocate but also a well-versed diplomatic corps able to create the consensus needed among member states for the issuance of new sanctions regimes. Consensus can sometimes be difficult to generate due to the number of member states that may be affected economically in different ways. The U.K. has also been a prolific source of intelligence on which the European Council has relied to adopt sanctions that it imposes on specific parties with little collateral damage to other economic actors in the sanctioned party's country and with minimal harm to the EU's domestic economy. It remains to be seen how the EU will fill the void the U.K. left behind. France and Germany are obvious candidates due to the resources available to them, though others such as the Netherlands have played a more active role recently, with a growing enforcement appetite.

### Tighter Sanctions Enforcement in the UK and EU?

Historically, EU member states have not actively enforced compliance with EU sanctions laws, possibly due to the lack of an enforcement authority at the EU level, with penalties being set by individual member states, although the U.K. has taken the lead

in enforcement since the creation of OFSI in 2016. Post-Brexit, OFSI has indicated that it intends to strike a more aggressive posture against those that breach sanctions. A recent example of OFSI's growing appetite for enforcement is the £20.47 million civil monetary penalty it imposed against Standard Chartered Bank in February 2020 for multiple breaches of EU sanctions against Russia.

OSFI's recent guidance also suggests a more assertive approach to the application and enforcement of sanctions. The guidance outlines a broader jurisdictional scope, meaning that sanctions will apply not only to U.K. citizens but also to U.K.-registered entities and those located within the U.K., as well as persons who "undertake activities" within U.K. territories.

From the EU perspective, it is unclear which member state, if any, will take the lead on investigating and enforcing EU sanctions. Again, Germany and France are possible candidates. Although Germany has not been as active as the U.K. (and still lacks a designated sanctions enforcement authority like OFSI), German courts have made public an increasing number of criminal court proceedings relating to EU sanctions, including those against Russia, Iran, Somalia and the counterterrorism sanctions regime. However, all of these proceedings relate to individuals, and investigations against companies continue to be rare. This may change in the near future if Germany adopts its Corporate Sanctions Act. If passed by the German Parliament, which is likely, the act will require enforcement authorities to initiate investigations against a company whenever the authorities become aware of a potential breach of sanctions by company employees.

While a driving force in EU sanctions policy, France has little sanctions-related case law. To date, its financial regulators have issued only administrative penalties against regulated entities for failing to maintain adequate sanctions-related compliance frameworks. Although it seems unlikely that French sanctions-related investigations will intensify in the near future, French parliamentary reports on the extraterritoriality of U.S. law have increased recently. A June 2019 French report known as the Gauvain report suggests that an EU version of the U.S. Office of Foreign Assets Control (OFAC) could be created to oversee the enforcement by member states of EU sanctions regimes and be a credible counterpart to U.S. authorities in sanctions matters involving a U.S. and EU nexus.

A recent study by the EU Directorate-General for External Policies highlighted the challenges associated with the creation of an "EU OFAC," *i.e.*, the equivalent of the U.S. OFAC sanctions authority, however, there are indications that EU institutions are nonetheless working to address the lack of consistency and clout in sanctions enforcement by EU member states. As with financial sanctions, the European Council's dual-use regulation for export controls is enforced by national authorities at the member state level, with close (and sometimes identical) links to the authorities that enforce sanctions. The proposed regulation, which was presented on November 10, 2020, provides an "enforcement coordination mechanism" designed to support the exchange of information among member states and the European Commission regarding infringements and enforcement measures. Such a mechanism could serve as a first step toward stricter enforcement, and it is possible the EU will continue to follow this approach with future sanctions regulations.