

The Future Landscape of the UK Sanctions Regime

Skadden

07 / 11 / 22

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Elizabeth Robertson

Partner / London
44.20.7519.7115
elizabeth.robertson@skadden.com

Zahra Mashhood

Associate / London
44.20.7519.7119
zahra.mashhood@skadden.com

Jason Williamson

Associate / London
44.20.7519.7093
jason.williamson@skadden.com

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

40 Bank St., Canary Wharf
London, E14 5DS, UK
44.20.7519.7000

The UK has long implemented sanctions imposed by the United Nations and, before Brexit, the European Union (EU). Since the UK's departure from the EU, the UK government has sought to both preserve the policy objectives of pre-Brexit EU sanctions under English law and establish an independent, autonomous UK regime through the implementation of the Sanctions and Anti-Money Laundering Act 2018 (SAMLA) and European Union (Withdrawal Act) 2018. The UK's then-foreign secretary and later prime minister, Boris Johnson, linked the new regime to Britain's global foreign policy, where, in his words, the UK would "no longer be compelled to wait for consensus among 28 members of the EU" and would have the "freedom to decide on national sanctions as we see fit."

While the UK's sanctions regime post-Brexit has been quicker to react to global events than the EU's, particularly with respect to sanctions for human rights breaches, it has not been as well-resourced or proactive in enforcement as the US system. However, Russia's invasion of Ukraine operated as a catalyst for UK sanctions reforms, with changes fast-tracked through Parliament under the Economic Crime (Transparency and Enforcement) Act 2022 (ECA) in a mere 15 days from publication to royal assent on 15 March 2022. The changes include a new "urgent" designations procedure that came into force on 15 March 2022 and, since 15 June 2022, there has been strict liability for civil breaches of UK sanctions and the government has authority to name and shame companies that breach UK sanctions even where no formal action is taken against them.

In this article we consider the evolution of the UK sanctions regime, including changes introduced by the ECA, and the future challenges that corporates may face in seeking to comply with UK sanctions.¹

Evolution of the UK Sanctions Regime

SAMLA and the UK sanctions regime departed from EU regulations in a number of key ways, including through new powers to designate persons "by description" and by adopting a lower threshold for imposing sanctions than under EU law (the abolition of the "necessity" test under EU law so that the UK can impose sanctions where there are "reasonable grounds to suspect" that a person has been involved in a specified activity).

Further, unlike the EU regime, SAMLA required that regulations must include "ownership" and "control" definitions in relation to designated persons, which is designed to clarify how subsidiaries of a designated entity, or corporate entities in which a designated person had a particular interest, should be treated for UK sanctions purposes. SAMLA also provided that the Office of Financial Sanctions Implementation (OFSI) could issue general licenses (permission to take certain actions applicable generally, as opposed to a specific applicant), which had been available under US sanctions for some time and to a far lesser extent under the EU regime.

A key question commentators have grappled with since SAMLA came into force is the extent to which the act has resulted in a more independent and assertive sanctions regime in the UK. Prior to Russia's invasion of Ukraine, it was a mixed picture. For

¹ This client alert is for informational purposes only and does not constitute legal advice. Complex assessments often have to be made as to which sanctions regime applies in any given instance, given the multinational touch points of many entities and individuals. In that regard, given the complex and dynamic nature of these sanctions regimes, there may be developments not captured in this summary. Moreover, while the summary was accurate when written, it may become inaccurate over time given developments. For all of these reasons, you should consult with a qualified attorney before making any judgments relating to sanctions, as there are potentially severe consequences of failing to adhere fully to sanctions restrictions.

The Future Landscape of the UK Sanctions Regime

example, by mid-2021, the EU's sanctions relating to Belarus had designated 166 individuals and 15 entities, compared to around 100 individuals and 9 entities in the UK. However, the UK was quicker to impose Myanmar- and Russia-related sanctions than the EU throughout 2021 and made immediate use of new anti-corruption- and human rights-related sanctions regimes.

Indeed, the UK's Global Anti-Corruption Sanctions Regulations 2021 crystallised a key difference between the UK and EU's regimes: The regulations empowered the UK to impose travel bans and asset freezes on entities or individuals where there were reasonable grounds to suspect that the person was involved in serious corruption. The EU has not yet implemented similar corruption-focused sanctioning powers, which may signal the UK's readiness to take an autonomous approach that is more closely aligned with that of the US.

Nevertheless, since the UK's new sanctions regime came into force on 31 December 2020, [OFSI has issued just three fines](#) against three corporates in the fintech and energy spheres, amounting to roughly £50,000, £36,000 and £15,000, respectively. During the UK's transition period exiting the EU, a single fine was issued against a bank for £20.5 million in February 2020. In contrast, in the US, since January 2021, the Office of Foreign Assets Control (OFAC) [has taken at least 27 separate enforcement actions](#) against individuals and corporates, resulting in a total of approximately £27.4 million in civil penalties/settlements.

The ECA

The question a number of organisations are now considering is, to what extent changes introduced by the ECA will have a material impact on the effectiveness of UK sanctions and related enforcement. The ECA amends SAMLA in the following key ways:

1. Greater Flexibility

The ECA was intended to expedite the imposition of sanctions and to allow authorities to react quickly to developments. The UK government may now impose sanctions without having to determine whether there are "good reasons to pursue" their given purpose, or if sanctions are "a reasonable course of action for that purpose".²

The ECA also introduced an "urgent" designation procedure, whereby the UK can sanction individuals and entities if they have already been designated by another regime (*e.g.*, US, EU, Australian, or Canadian sanctions). The relevant government minister must determine that it is in the public interest to use the urgent procedure for a 56-day designation period (which may be further extended for up to 56 days, to a maximum of 112

days).³ Ultimately, the minister will need to comply with the test required under the standard procedure if an individual is to remain designated beyond 112 days, so the minister cannot rely on the urgent procedure indefinitely. The standard procedure test requires the minister to have reasonable grounds to suspect that the designated person is an "involved person" (*i.e.*, someone involved in a sanctioned activity).⁴

2. Strict Liability

Importantly, the ECA also amends the Policing and Crime Act 2017 to introduce a "strict liability test" for civil monetary penalties arising from sanctions breaches, which came into effect on 15 June 2022. This follows the position in the US, but diverges from the EU position. Previously, a person could only be liable for a sanctions breach if they "knew" or had "reasonable grounds to suspect" that their activity was in breach of sanctions laws. The ECA deletes this requirement, meaning a person's intent, knowledge or suspicion is irrelevant to whether OFSI can impose a civil penalty. The director of OFSI, Giles Thomson, clarified in [a recent blog post](#) that this change "does not mean that OFSI will impose a monetary penalty in every case we find there to be a breach of financial sanctions. OFSI imposes monetary penalties where it is appropriate, proportionate and in the public interest to do so."

3. Reporting Powers

The ECA introduces a new power enabling OFSI to publicly name and shame a person who it has found has breached sanctions, even where no other formal action has been taken against them. This adds a reputational risk to identifiable misconduct that, for any number of reasons, does not attract a fine. The Treasury need only be satisfied that "on the balance of probabilities" there was a breach. The extent to which this tool will be used is yet to be seen, having only come into force on 15 June 2022, although Thomson noted in his blog post that "publication will be considered on a case-by-case basis — including whether the case involves important compliance lessons for industry." This compares to more limited powers pre-ECA, which only allowed reporting on companies whose misconduct was definitively proven and penalised.

There is also a risk that this mechanism could have a negative impact on enforcement, because companies that fall outside the "relevant firms" mandatory reporting regime will have to weigh the risk of reputational exposure before deciding to self-report. That could lead to fewer voluntary self-reports, and therefore less enforcement. However, Thomson reiterated in his blog post that OFSI "continues to emphasise the importance of self-disclosure as a potential mitigating factor."

² Section 57(3) ECA

³ Section 58(3) ECA

⁴ *Ibid.*

The Future Landscape of the UK Sanctions Regime

4. Limiting Damages

The ECA limits the courts' power to award damages against the government for unjustified sanctions designations to cases where a decision was made in outright "bad faith"; negligence alone will not serve as a ground for damages. In addition, where the court grants damages on bad faith grounds, the amount must not exceed the sum specified in, or calculated in accordance with, regulations made by an appropriate minister. The narrowing of available challenge routes and the potential cap on damages could embolden UK agencies to be more proactive in enforcement.

Challenges Corporates Face Under the Revised UK Sanctions Regime

The changes introduced by the ECA and recent regulatory announcements signal that UK regulators are increasingly focused on compliance with sanctions, potential enforcement action for non-compliance, and the efficacy of organisations' systems, controls and policies related to sanctions. It is notable that the Financial Conduct Authority (FCA) has recently launched a new reporting platform that allows authorised firms and their employees to voluntarily report (including anonymously) breaches of sanctions, as well as weaknesses in their internal sanctions policies and procedures. The FCA also reminded firms that they should screen clients and transactions against the UK Sanctions List and the OFSI list of asset freeze targets, and that firms had a duty to report to OFSI if they knew or suspected a breach of financial sanctions. Similarly, transactions giving rise to concerns about sanctions evasion or money laundering may trigger a reporting obligation under the Proceeds of Crime Act 2002.

Against this backdrop and recent geopolitical events, there are a number of challenges that corporates will need to navigate when seeking to comply with UK sanctions.

Cooperation Among Regulators

The recent coordination between the US, UK, EU and other nations such as Canada, Australia and Japan in imposing sanctions in response to Russia's invasion of Ukraine is unprecedented and a concrete example of global regulatory cooperation, which is likely to continue as further action is taken against Russia. However, the response to the invasion has also led to certain divergences in the approach to sanctions, with some individuals and entities designated in one or more jurisdictions, but not others. While the degree of global cooperation has been positive, global corporates face the challenge of complying with differing sanctions requirements across multiple jurisdictions.

Exceptions and Licences

An additional challenge for corporates subject to the UK sanctions regime is its limited exceptions and licenses. OFSI's general guidance provides that certain grounds and ways of transacting or using sanctioned funds remain valid, *i.e.*, automatically exempted or likely to attract a license when one is applied for. Exceptions are generally of a thematic and geographic nature. For instance, where frozen assets are held in an account, the account may be credited in discharge of an obligation which arose before the person became designated.

Yet, despite OFSI's detailed guidance, in practice the general licenses issued by OFSI in the wake of the Ukraine crisis have been few. Those issued have typically included limited winding-down provisions but only with respect to certain designated entities. It is also worth noting that specific licences operate for set grounds such as basic needs and payment of legal fees for the benefit of the designated person, but do not generally cover broader provisions such as advisory work for designated persons. OFSI does not allow persons to apply for general licences, and therefore those that do not fit within one of the stringent specific licence grounds may face difficulty.

Ownership and Control

The UK's approach differs from the US and the EU's model regimes in another crucial respect. Where more than one designated person holds a stake or voting rights in a company, OFSI does not necessarily aggregate those holdings for sanctions purposes. Absent other factors, a company and its assets are only subject to sanctions if a single designated individual holds more than 50% of its shares or voting rights. But the OFSI general guidance indicates that it applies what amounts to a form of the "control" test. The guidance states that OFSI "would not simply aggregate different designated persons' holdings in a company, unless, for example, the shares or rights are subject to a joint arrangement between the designated parties or one party controls the rights of another".

SAMLA put the broader "control" test into legislation, in an effort to make its usage clearer (arguably more so than in the EU), and OFSI guidance has suggested that it will try to designate companies independently where the control threshold is fulfilled. Thus far, there are very few additional independent designations of companies likely to be "controlled" by designated persons. Further cases will provide greater clarity about how the test will operate in practice.

The Future Landscape of the UK Sanctions Regime

Designation by Description

Another area of potential challenge to the effectiveness of UK sanctions is the designation “by description” mechanism. Much like SAMLA, the ECA introduced an urgent procedure for designation “by description”. A description would have to be sufficiently precise to make the targeted group distinct and identifiable. This seems to be a core challenge associated with “designation by description”; the expected methodology and database behind this procedure are still developing. The uncertainty of this process and the removal of procedural safeguards (such as the right to request a review of civil penalties and the reasonable-belief threshold for sanctions) could lead to significant challenges for persons designated in this way.

Resourcing

Another key challenge to the effectiveness of UK sanctions — and enforcement action by UK agencies generally — is resourcing. Since OFSI was created in 2016, it has issued a total of seven fines worth approximately £21 million. The most recent was a penalty of £15,000 in May 2022. In stark contrast, in the US, OFAC has announced 92 fines since January 2017, together worth more than £1.5 billion. However, a recent UK government document said that OFSI would be roughly doubling its permanent staff numbers, and [OFSI stated recently](#) that it has around 70 employees, up from 38 reported in July 2021.

Guidance and FAQs

Both OFAC and the European Commission have published regular, detailed FAQs to clarify the scope of sanctions,⁵ whereas OFSI has not updated its [FAQs in its guidance](#) since 10 May 2018, despite updating both its Russia Guidance and its Enforcement and Monetary Penalties guidance. An additional challenge for individuals and corporates trying to obtain urgent guidance from OFSI relating to a particular transaction or matter

⁵ US Department of the Treasury, Office of Foreign Assets Control, [Frequently Asked Questions: Russian Harmful Foreign Activities Sanctions](#); European Commission, [Customs-related Matters: Frequently Asked Questions – As of 1 June 2022](#)

is response time: OFSI’s “aim” is to provide a response “within 2 weeks”. These aspects are likely due to resourcing challenges OFSI has faced in the wake of extensive sanctions being imposed against Russia.

Conclusion

The UK sanctions regime is no longer simply an echo of its US and EU counterparts. Recently, it has demonstrated that it is able to move more quickly in imposing new sanctions. However, there are significant challenges that global corporates must contend with, including the complexities of separate and distinct sanctions regimes. The burden for corporates is perhaps higher than it has ever been with respect to sanctions compliance, because it no longer suffices to rely on the broad presumption that the UK and EU regimes are aligned. Multinationals must now navigate differing requirements of not just the US, EU and UK, but also, in some cases, Australia, Canada and Japan. Corporates should ensure that their sanctions and due diligence procedures are robust enough to be able to tackle the new regimes.

On balance, and recognizing that the changes are recent, the UK’s sanctions toolkit has improved since the introduction of SAMLA and the ECA. Time will tell how effective the changes introduced by the ECA are but, taken together, these incremental steps suggest that UK sanctions will have more bite, and will induce greater compliance. Given recent geopolitical events, sanctions will inevitably be an area of increased focus for UK regulators and law enforcement. Planned changes to the UK economic crime framework, such as a second Economic Crime Bill, will support and strengthen the sanctions regime and are expected to grant the government additional powers to tackle illicit wealth and to embolden Companies House, which may lead to a data pool that is more useful and comprehensive for identifying sanctions targets.

Additional resourcing will be key for OFSI to address enforcement-related criticisms and the complexities of new sanctions. While new tools are undoubtedly beneficial, OFSI needs the manpower to wield them.

Trainee solicitor **Clara Rupf** assisted in the preparation of this article.