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GLOBAL INVESTIGATIONS BULLETIN

September 2021

Sanctions Update: The Post-Brexit Regime

Recent News

Horizon Scanning

SANCTIONS AFTER BREXIT: WHAT'S NEW AND WHAT TO LOOK OUT FOR //

The UK's autonomous sanctions regime has been in force since 31 December 2020, following an end to the Brexit transitional period. This month's Bulletin covers the new sanctions regime, examining the new rules that apply, key differences with the EU regime, and whether the UK is now more closely aligned with the US from a policy perspective.

The post-Brexit picture so far

The new regime comprises statutory instruments made under the Sanctions and Money Laundering Act 2018 (SAML), the overarching Act enabling the Government to create and amend sanctions regulations. The substantive restrictions are laid out in 30 country-specific or thematic regulations. The Foreign, Commonwealth and Development Office continues to hold responsibility for making sanctions policy, whilst the Office of Financial Sanctions Implementation (OFSI), a unit of HM Treasury, oversees enforcement.

In addition to SAML, the Global Anti-Corruption Sanctions Regulations were introduced in April 2021. These permit the Government to take a more focused approach to serious corruption by imposing sanctions on individuals and "involved persons" engaged in corruption activities. Since its launch, the UK has sanctioned [27 individuals](#) under these regulations: 22 named in [April 2021](#) as having been involved in serious corruption cases in Russia, South Africa, South Sudan and Latin America, and five more individuals added in [July 2021](#) located in Equatorial Guinea, Zimbabwe, Venezuela and Iraq.

Whom does this affect?

The UK regime applies to all persons within UK territory, and to all "UK Persons" (defined as UK nationals and UK-incorporated entities), regardless of where they are located or where they conduct their activities. In addition, anyone conducting activities within the UK (whether or not they are a UK Person) must comply with the relevant UK sanctions; this connection to the UK is what OFSI refers to as

having a “UK nexus”. As such, many businesses with both UK and international operations are now required to comply with multiple sanctions regimes, necessitating a robust but flexible internal sanctions compliance framework, with mechanisms in place to ensure that changes in the law are incorporated.

Key differences between the UK and EU regimes

The UK regime differs from that of the EU in both substance and structure. Four of the key differences include:

- 1) Stricter asset freezing measures. Under the new regime, there is no longer a rebuttable presumption that asset freezing sanctions apply to assets of entities owned or controlled by a designated person. Asset freezes now automatically apply to any legal entity which is deemed to be “owned or controlled directly or indirectly” by a designated person, which requires additional searches to be performed to ensure all indirectly controlled accounts are frozen too. The UK’s asset freeze list is not identical to the EU’s, so this should be considered as well.
- 2) More restrictive sanctions on Russia. The exemption for EU based subsidiaries of designated entities no longer applies to UK-incorporated subsidiaries of designated entities. With respect to activities within Russia, the UK regime also has broader definitions of “brokering services” and of “financial assistance” and is therefore more restrictive.
- 3) Broader licencing regime. The UK licencing regime allows for authorities to issue “general” licences that allow parties to undertake activities that would otherwise be prohibited by sanctions legislation without the need for a specific licence, resulting in a broader and more flexible licencing regime. General licences were not typically available under the EU regime.
- 4) Broader designation process. The process for designation under SAML A differs to that of the EU. Not only does it allow for designation of persons by description, but the threshold for designation is lower, as it only requires that it be “appropriate” to designate a person, compared with the EU’s “necessity test”. It remains to be seen whether or not these changes will result in a higher number of designations in the UK.

Closer alignment with the US?

It has been suggested that the UK may use Brexit to diverge from the EU’s approach to sanctions and align more closely with the US. The enactment of the Global Human Rights Sanctions Regulations (2020) (GHR SR) on 6 July 2020, which target individuals and organisations for serious human right abuses and violations, is very similar to the US Magnitsky Act 2012 and was the UK’s first real divergence from the EU regime. Only a few months after enacting the GHR SR, the UK, in a coordinated response with Canada (and whilst the EU was slow to organise its own response), imposed sanctions against the President of Belarus and other senior members of the Belarusian Government. The UK also designated 20 Saudi nationals in connection with the unlawful killing of Jamal Khashoggi, and at the time of writing the EU has not followed suit. Conversely, in March 2021, the EU imposed sanctions on four Russian individuals for their roles in the arbitrary arrest, prosecution and sentencing of Alexei Navalny, but the UK did not impose similar sanctions (albeit one individual was already sanctioned under the GHR SR).

Looking ahead

Nine months into the new regime, it is still too early to determine with certainty how different the new regime will be from the pre-Brexit framework. The UK had previously taken a very active role in the EU's sanctions regime. When combined with the actions it has already taken this year, it is likely that the new regime will result in increased enforcement activity against individuals and corporates in the UK. This could also arise from the broader definitions in this regime compared to the EU regime, combined with more onerous due diligence requirements. OFSI has indicated that it intends to take a more aggressive and hands-on approach towards both sanctions breaches and sanctions enforcement more generally. It is clear, however, that businesses will need robust and flexible systems in place in order to ensure continued compliance with what is likely to be a stricter and more rigorous approach towards sanctions enforcement in the UK.

With thanks to Associate Jezah Khamisa for the above piece.

RECENT NEWS //

SFO roundup: Five face UK bribery trial over Bluu Solutions contracts; SFO must bolster management when confiscating criminal assets, Government report finds; court approves two DPAs over bribery offences

The Serious Fraud Office has charged five individuals under ss.1 and 2 of the Bribery Act 2010 and s. 328(1) of the Proceeds of Crime 2002 in relation to the suspected payment of bribes to win contracts in the UK construction sector. The SFO alleges that the former employees of Bluu Solutions, including two senior executives, paid hundreds of thousands of pounds in bribes to win contracts including an Ernst & Young office project. Rob Simms-Davies and Nigel Wilson face SFO charges that they paid £291,000 in bribes to Roger Dewhirst, who managed an office fit-out project for EY in Birmingham. The SFO opened its investigation into the case in February 2017. The regulator claims the money was used to induce Dewhirst to award contracts for Bluu and another linked company, Tetris Projects. [Read more on the SFO website.](#)

The SFO must strengthen its use of strategy documents to manage complex proceeds of crime cases, Government inspectors have reported. Her Majesty's Crown Prosecution Service Inspectorate (HMCPPI) released a [report](#) that examines both the SFO and the CPS's handling of proceeds of crime matters. Among the recommendations made in the report was that the SFO Proceeds of Crime Division should consider adopting a single strategy document for each suspect or defendant. The SFO was also praised for its work to recover the proceeds of crime, with cases "handled proactively and efficiently by dedicated and skilled staff". Lisa Osofsky, Director of the SFO, said the organisation "will work with partners at the CPS to take their helpful suggestions into consideration". [Read more on the SFO website](#) and read the Crown Prosecution Service response [here](#).

On 20 July, two UK-based companies entered into deferred prosecution agreements (DPAs) with the SFO, agreeing to pay approximately £2.5 million to settle allegations that they paid bribes to secure contracts worth millions of pounds. These are the 11th and 12th DPAs entered into in this jurisdiction.

The DPAs with the two companies were approved by Mrs Justice May in the High Court, who also imposed reporting restrictions on naming the companies involved. “These companies either actively participated in or failed to prevent the rolling use of bribes to unfairly win contracts,” SFO director Lisa Osofsky said after the decision. The charges relate to violations of sections 1 and 7 of the Bribery Act 2010. Both companies cooperated with the investigation and have agreed to assist the agency on related proceedings. Read more on the [SFO website](#).

FCA roundup: Annual Report and Accounts for 2020/21 published; Monzo under investigation for suspected money laundering failures; consultation on whether to streamline decision-making

The Financial Conduct Authority released its [Annual Report and Accounts](#) for 2020/21. Chair Charles Randall indicated that in this period, the FCA focused on pandemic-related priorities impacting consumers and protecting the most vulnerable, including: litigating the business interruption insurance test case; addressing unsustainable credit and unfair pricing matters; and ensuring essential financial services were not disrupted because of Brexit. Looking at investigations and enforcement activity generally, total fines issued during the 2020/21 period amounted to £189.8 million, down from £224 million reported in the prior period. The FCA brought more cases against firms and individuals appearing to carry out a regulated activity without authorisation, issuing 1,292 consumer alerts (an 80% increase from the [previous year](#)). The FCA initiated several prosecutions alleging insider dealing, investment fraud, and money laundering, as well as the first criminal prosecution under the 2007 Money Laundering Regulations against [National Westminster Bank Plc](#) in March 2021. On financial crime supervision, the FCA reiterated its commitment to strengthening its ability to supervise firms’ anti-money laundering controls. The FCA [reported](#) that it has fine-tuned its approach to overseeing institutions’ controls, and so “will be performing more in-depth assessments of higher-risk firms and a greater breadth of supervisory intervention across the rest,” using a “more data-led” approach “drawing on a range of information sources”. The report also references the “[Dear CEO](#)” letter from May 2021 - sent to all retail banking firms - which set out the actions the FCA expected firms to take based on common control failings that have been identified.

Online bank Monzo reported that it is under investigation by the FCA in the UK for suspected money laundering failures. The UK-based lender made the disclosure in its [annual report](#), stating: “In May 2021, the FCA notified us that it had started an investigation into our compliance with the Money Laundering Regulations 2017, potential breaches of some of the FCA Principles for Businesses and related FCA rules for anti-money laundering and financial crime systems and controls between 1 October 2018 to 30 April 2021”. Monzo stated that it is cooperating with the investigation into its civil and criminal liability, which is currently at an early stage.

The FCA is [consulting](#) on whether to streamline its decision-making and governance powers by moving some decision-making powers from the more independent, board-level Regulatory Decisions Committee (RDC) to senior members of the FCA’s authorisation, supervision and enforcement divisions. The FCA has proposed that the RDC should no longer be responsible for taking decisions relating to the issuance of statutory notices where the FCA is proposing to exercise its non-enforcement statutory powers. The FCA also proposes that decisions to bring civil or criminal proceedings should instead be made by the enforcement executive director through the FCA’s executive procedures, instead of these decisions being taken by the RDC. The intention behind these proposals is to ensure that the RDC will be solely

focused on contentious enforcement cases, and to empower senior staff within the FCA to take key decisions relating to its supervision and oversight responsibilities instead. If implemented, the proposals are likely to have a number of practical implications, including: the loss of some procedural benefits and safeguards; a lack of independence in the legal advice provided to the decision-maker; and more transparency of communication between FCA staff and the decision maker. The changes proposed by the FCA would not, however, affect most FCA enforcement cases. The RDC would remain the decision-maker for cases involving enforcement of the FCA's Principles for Businesses, the FCA's Code of Conduct and other rules in the FCA Handbook where the FCA is seeking a resolution involving a disciplinary sanction, such as a financial penalty or prohibition.

Law Commission closes consultation on corporate criminal liability, expecting to report to Government with Options Paper

The Law Commission's consultation on current laws around corporate criminal liability drew to a close on 31 August. The consultation followed a request from the Government in [November 2018](#) to draft an Options Paper, in which the Commission will analyse the effectiveness of the current law and where improvements might be made. The [project](#) has run as a cross-team collaboration between the Criminal Law Team and Common Law Team, and led by Professor Penney Lewis and Professor Sarah Green. The Commission aims to publish the Options Paper in late 2021.

Guernsey launches new financial crime investigations agency

Guernsey has created a new, independently led enforcement agency to investigate money laundering, economic crime, and recover the proceeds of unlawful conduct. The Economic and Financial Crime Bureau, led by director (and former SFO chief investigator) Kevin Davis, will have a full range of investigatory tools and legal remedies available. "The creation of the EFCB was an opportunity identified by the Committee to strengthen Guernsey's approach to tackling financial crime, and deal with the threats and risks faced by Guernsey as an international financial centre," Davis said in a statement. "In particular, the EFCB will improve Guernsey's effectiveness in tackling money laundering and help prepare the island for the MONEYVAL evaluation planned for 2023". Read the States of Guernsey press release [here](#).

Global money laundering enforcement efforts hold steady

Global regulators appear to be on track this year to match the US \$2.2 billion in fines levied in 2020 against banks and other financial institutions for money laundering compliance failures. Fines from January 2021 to June 2021 this year totalled US \$994 million. Coming amid a pandemic, with the associated difficulties for investigating and penalising wrongdoing, the figures for last year and this year seem to suggest that global enforcement has remained robust. This year's enforcement figures are accumulated from 17 fines imposed around the world, dominated by a US \$582 million fine issued to ABN Amro in the Netherlands for serious shortcomings in its money laundering prevention, along with a US \$290 million penalty issued by US regulators to Capital One for similar shortcomings. In total, US regulators have imposed penalties of US \$404 million this year. In the UK, the FCA this year has issued only one money laundering fine of £250,000 (US \$350,000) against Sapien Capital, for failings in its financial crime controls. See more in Lexis and Finextra.

OFSI fines Fintech company over Russia sanctions breaches

On 5 August, the Office of Financial Sanctions Implementation (OFSI) announced a £50,000 monetary penalty against TransferGo Limited for multiple breaches of the Ukraine (European Union Financial Sanctions) (No. 2) Regulations 2014. According to the [OFSI penalty report](#), the penalty relates to 16 transactions where TransferGo issued instructions to make payments to accounts held by the Russian National Commercial Bank. The transactions in question were carried out between March 2018 and December 2019 and amounted to £7,760. TransferGo did not produce a Voluntary Disclosure in this case; rather, some of the disclosed transactions were disclosed in response to information requests issued by the OFSI. TransferGo fully cooperated with the OFSI investigation. TransferGo subsequently exercised its right to a ministerial review, which the Economic Secretary to the Treasury carried out personally, upholding OFSI's decisions as to both the imposition of the penalty and its amount. The case marks the first time that a company has failed to reduce a proposed OFSI penalty following a ministerial review.

High Court applies boundaries of litigation privilege to investigations report

In July, the Commercial Court issued [judgment](#) in *Qatar v Banque Havilland SA* [2021] EWHC 2172, reminding practitioners of the strict requirements for litigation privilege to apply to investigation reports. The case involved allegations brought by Qatar regarding a report prepared by financial advisor PricewaterhouseCoopers (PwC). Qatar claimed that the defendant bank was involved in a conspiracy to damage the Qatari economy by manipulating its market to put pressure on the Qatari Central Bank's pegged QAR to USD exchange rate, and the market in USD-denominated debt instruments issued by Qatar. The High Court granted an application by the state for the defendant bank to disclose PwC's investigation report (and associated documents), originally withheld from disclosure on the grounds of litigation privilege. The decision does not establish new principles relating to litigation privilege, but is noteworthy as it underlines the difficulties caused by the dominant purpose test in establishing a claim for litigation privilege where documents were arguably produced for a number of purposes, including to deal with enquiries from regulators, rather than solely for the purpose of anticipated litigation.

Irish Government announces new agency for white collar crime

The Irish Government announced that it has drawn up laws to create a new Corporate Enforcement Authority (CEA) to investigate white collar crime. Leo Varadkar, Ireland's Tánaiste (Deputy Prime Minister) and Minister for Enterprise, Trade and Employment, said the Companies (Corporate Enforcement Authority) Bill 2021 will be introduced into the country's legislature, the Houses of the Oireachtas, next month. In anticipation of the new authority, the budget of the Office of the Director of Corporate Enforcement had been increased by around €1 million and the Minister's department had given the green light to hire an additional 14 staff members. Robert Troy, Ireland's Minister for Trade Promotion, Digital and Company Regulation, said he hoped the bill would be enacted in Autumn 2021, paving the way for the creation of the new agency in 2022. Read more on the [Department of Enterprise, Trade and Employment website](#).

Treasury says UK anti-money laundering regime faces in-depth review to prevent misuse; MPs question Government's commitment to UK economic crime plan

On 22 July 2021, HM Treasury published a [Call for Evidence: Review of the UK's AML/CFT regulatory and supervisory regime \(CFE\)](#). Action 33 Economic Crime Plan 2019-22, published in 2019, committed HM Treasury to a comprehensive review of the [Money Laundering Regulations 2017 \(MLR 2017\)](#) and the [Oversight of Professional Body Anti-Money Laundering and Counter Terrorist Financing Supervision Regulations 2017 \(SI 2017/1301\)](#) (OPBAS Regulations). The CFE seeks views from industry, law enforcement, supervisors and the broader public and civil society on the systemic effectiveness of the regimes and how they contribute to the overarching objective of countering economic crime, and on the specific application and effectiveness of particular elements of the regimes. The CFE covers three themes: the overall effectiveness of the regimes and their extent; whether key elements of the current regulations are operating as intended; and the structure of the supervisory regime including the work of OPBAS to improve effectiveness and consistency of PBS supervision. The CFE does not aim to recommend significant changes to the operation of the Proceeds of Crime Act 2002 or other legislation, but states “the Home Office also intend to consult shortly on a package of legislative proposals related to economic crime”. HM Treasury has also published a [consultation document](#) on potential amendments to the MLR 2017. The deadline for responses for both is 14 October 2021. A final report setting out the findings of the review and options for reform will be published by 26 June 2022.

Premises in Germany, the Netherlands, Slovakia, Bulgaria and Hungary searched for EPPO investigation into cross-border VAT fraud

On 4 August, the European Public Prosecutor's Office (EPPO) announced that premises across the EU were being searched in connection with its investigation into cross-border VAT fraud estimated at more than €14 million. Marcus Paintinger, a European Delegated Prosecutor in Munich, said: “Without the EPPO, setting up this operation would have taken months. [Instead] it was a matter of weeks”. The European Commission has [called](#) the “fully independent” EPPO the “first supranational prosecution service”. Launched on 1 June, the EPPO aims to “protect the EU taxpayer's money” and “investigate and prosecute crimes like money laundering, corruption and cross-border VAT fraud”. It “steps in to strengthen the protection of the budget of the EU” and will “observe the implementation of NextGenerationEU with an eagle eye” to ensure that the €750 billion in loans and grants reach the EU's economy and citizens. Read more on the [EPPO website](#).

FRC enforcement staffing grows significantly

The Financial Reporting Council has significantly bolstered its enforcement division over the past year to speed up investigations. The FRC reported in its annual [Enforcement Review report](#) (published 29 July) that its enforcement team has grown by 44% to 52 people over the latest financial year, including 20 lawyers and 21 forensic accountants. The FRC had also opened 16 new investigations in the past year and has 49 ongoing enforcement enquiries. Fines levied over the past year totalled £16.4 million (an increase of £5.1 million over the prior year). Read more on the [FRC website](#).

European Commission announces package of AML/CFT proposals

The European Commission has presented a package of legislative proposals to strengthen the EU's anti-money laundering and counter-terrorist financing (AML/CFT) rules, including a proposal for the

creation of a new EU authority to fight money laundering. The aim of the package is to improve the detection of suspicious transactions and activities, and to close loopholes used by criminals to launder illicit proceeds or finance terrorist activities through the financial system. The package includes four legislative proposals, including a proposal to establish a new Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA). This central authority would coordinate national authorities to ensure the private sector correctly and consistently applies EU rules, and a new regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, which would establish a single rulebook for AML/CFT. Read more about the legislative proposals on the [European Commission website](#).

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Look out for:

15 September: NatWest Bank court hearing due to take place at Westminster Magistrates' Court at 14:00.

14 October: Deadline for responses to HM Treasury Call for Evidence: Review of the UK's AML/CFT regulatory and supervisory regime (CFE). Responses may be submitted via the postal or email address available [here](#).