PASSAGE OF NEW SANCTIONS LEGISLATION AND PUBLICATION OF UPDATED GUIDANCE

On 24 May 2018, it was announced that the Sanctions and Anti-Money Laundering Act (the "Act") had received Royal Assent. The Act is the first piece of UK primary legislation governing the post-Brexit legal position and will create a post-Brexit framework for the imposition and enforcement of sanctions and the replication of the pre-Brexit anti-money laundering ("AML") compliance regime.

The Act gives the government broad discretionary powers to impose a wide range of sanctions by way of secondary legislation, including asset freezes and other financial sanctions, travel bans and immigration restrictions, and trade restrictions affecting goods and services. The Act also provides for the creation of exceptions and licences in relation to such sanctions.

The powers conferred by the Act are very broad. On the one hand, this gives the UK government additional flexibility that is not present in the current EU sanctions regime. However, on the downside, there is greater scope for the UK regime to diverge from the EU in time, which could give rise to an increased compliance burden for many businesses.

In other sanctions developments, the Office of Financial Sanctions Implementation ("OFSI") has recently released updates to its monetary penalties guidance, and launched new sector-specific FAQs for importers and exporters, and a new form to comply with UK financial sanctions reporting requirements.

1. The Sanctions and Anti-Money Laundering Act 2018

Sanctions provisions – context

When the Sanctions and Anti-Money Laundering Bill (the "Bill") was introduced in 2017, the government expressly stated that it was not designed to bring about any substantive policy changes in respect of the current (EU)
sanctions regime (see our previous briefing on the Bill for further details). Foreign Secretary Boris Johnson's comments upon the Act's passing may be read as a slight departure from this position. Johnson said on 24 May:

"Thanks to this new law, once we have left the EU, we will have full control of our own sanctions policy again. That will give us the power to impose sanctions, including for human rights abuses.

Sanctions are a key foreign policy and national security tool for the UK, and the new legislation will allow the UK to act in line with our own priorities, as well as with our international partners.

It will also provide us with the power to amend and update anti-money laundering and counter-terrorist finance legislation, allowing the Government to keep pace with changing international standards and practices, and help to protect the UK from money laundering and terrorist financing."

The powers to impose sanctions for human rights abuses were an addition to the Bill as it progressed through Parliament, which gained support after the Salisbury poisoning incident.

As was the case with the Bill, it remains to be seen how the provisions in the Act will be implemented through secondary legislation, but we have highlighted below the key powers that will be available to the UK government to impose sanctions once the UK has left the EU and the current EU regime ceases to apply.

**Types of sanctions that may be imposed**

The Act introduces a new UK framework under which the UK government may impose sanctions, by passing secondary legislation.

These sanctions regulations may be imposed where they are deemed appropriate for the purposes of compliance with a UN obligation or any other international obligation, or for one of a series of listed purposes set out in section 1(2) (representing a significant increase in the purposes originally listed in the Bill):

- furthering the prevention of terrorism in the UK or elsewhere;
- in the interests of national security;
- in the interests of international peace and security;
- furthering a foreign policy objective of the UK government;
- promoting the resolution of armed conflicts or the protection of civilians in conflict zones;
- providing accountability for, or acting as a deterrent to gross violations of human rights, or otherwise promoting compliance with international human rights law or respect for human rights;
- promoting compliance with international humanitarian law;
- contributing to multilateral efforts to prevent the spread and use of weapons and materials of mass destruction; or
- promoting respect for democracy, the rule of law and good governance.

The Act provides significant flexibility as to the types of sanctions that can be imposed for such purposes, including the freezing of funds or economic resources, restrictions on the provision or procurement of financial services and investment restrictions. The Act contains certain definitions (including of "funds" and "economic resources" – these definitions are consistent with the way these terms are currently used in the context of EU financial sanctions) but also provides for secondary legislation to make provision as to the meaning of funds, economic resources or technology being "owned", "held" or "controlled" by a person and the meaning of a person "owning" or "controlling" another. It therefore remains to be seen whether these concepts will be interpreted in a manner consistent with the EU.

Schedule 1 of the Act deals with trade sanctions and provides that regulations may be made for various purposes, including (among others) preventing the import or export of certain goods, preventing goods, technology or land being made available to designated persons or persons connected with a particular country, or preventing particular services being provided or procured to, from or for the benefit of designated persons or persons connected with a particular country.
As mentioned in our briefing on the Bill, the Act also grants the government the power to impose "aircraft sanctions" and "shipping sanctions".

The Act also contains a "catch-all" power permitting the imposition of prohibitions or requirements not otherwise authorised by the Act but which it is deemed appropriate to impose for the purposes of compliance with a UN obligation. This would allow the UK government to adopt sanctions reflecting any novel sanctions developed by the UN which do not fall within existing categories of financial and trade sanctions.

**Designation power**

As provided for in the Bill, persons may only be designated by name where there are reasonable grounds to suspect that the person in question is or has been involved in sanctionable activity (as specified in the relevant sanctions regulations), is owned, controlled or acting on behalf or at the direction of a person who is or has been so involved, or is a member of or associated with such a person (as noted above, the concepts of ownership/control/"association" may be further defined in secondary legislation). The government must also consider that the designation of the person in question is appropriate, having regard to the purpose of the relevant sanctions regulations and the likely significant effects of designation on that person.

Designations may also be made by description but this power may not be exercised unless three conditions are met: (i) the description is such that a reasonable person would know whether a particular person falls within the description; (ii) it is not practicable to identify and designate by name all persons falling within that description; and (iii) the government consider the designation is appropriate and there are reasonable grounds to suspect that persons falling within that description are involved in sanctionable activity (or that the organisation in question is so involved, where the description refers to members of a particular organisation).

It remains to be seen how the power to designate by description will be used in practice. We note, however, that there is scope for this to significantly increase the compliance burden on UK companies who can no longer rely on screening their counterparties' names (and names of their beneficial owners, as appropriate) against a list of designated persons.

**Exemptions and licences**

The Act contains wide-ranging powers for sanctions regulations to contain exceptions and to provide for the issuance of applicable licences authorising conduct which would otherwise be prohibited. In this regard, the Foreign & Commonwealth Office has recently published a policy note on the approach that will be taken to exemptions and licensing.

The key elements of that paper are summarised in our recent blogpost. This is one area where the greater flexibility that the new UK regime will introduce (as opposed to the more rigid existing EU licensing grounds/approach) is likely to be welcome.

**Compliance**

Under the Act, sanctions regulations may require "persons of a prescribed description" to provide particular information to appropriate authorities and to create and retain certain registers and records. Sanctions regulations may also authorise "appropriate authorities" to require the production of certain documents and information. This would appear to leave open to the government the possibility of broadening the existing reporting regime (under which "relevant professionals" may commit an offence if they do not report suspected breaches or knowledge of designated persons to OFSI). As mentioned in our briefing on the Bill, the government's stated intention last year was to broaden this offence to all persons – it has not yet been confirmed how the relevant secondary legislation will approach "persons of a prescribed description" and what information requirements it will impose. This will be an important area for non-regulated companies to keep under review.

Section 43 of the Act provides that, where regulations are made, the Minister making the regulations must issue guidance about any prohibitions and requirements imposed. The guidance may include guidance about: (i) best practice for complying with the prohibitions and requirements; (ii) enforcement; and (iii) circumstances where the prohibitions and requirements do not apply.
Review and oversight
As will be clear from the above, the secondary legislation that can be imposed under the Act is potentially very wide-ranging. To counter this broad discretion without further parliamentary oversight, the Act contains various review and accountability provisions, including:

- a requirement for the relevant Minister to report to Parliament on the criminal offences contained in any sanctions regulations, explaining why the relevant prohibitions or requirements should be enforceable by criminal proceedings;
- a process by which designated persons may request a variation or revocation of their designation, ending in an application to the High Court;
- periodic review of certain designations;
- periodic review of sanctions regulations to ensure that they are still appropriate for the relevant purpose; and
- annual reporting to Parliament on the sanctions regulations made during the period.

Anti-money laundering provisions
The Act also includes wide-ranging powers allowing the passing of secondary legislation in relation to money laundering and terrorist financing, for the following purposes:

- enabling or facilitating the detection or investigation of money laundering, or preventing money laundering;
- enabling or facilitating the detection or investigation of terrorist financing or preventing terrorist financing; or
- the implementation of Financial Action Task Force standards.

As the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the "MLR 2017") are made under the European Communities Act 1972, this is a necessary step in order to ensure that the MLR 2017 can be replicated post-Brexit.

As such, the Act does not impose any new AML obligations on businesses but does give the government power to require "persons carrying on relevant business" to take steps such as: (i) identifying and assessing risks relating to money laundering, terrorist financing or other threats to the integrity of the international financial system, (ii) have policies, controls and procedures in place, and (iii) take prescribed measures in relation to their customers in prescribed circumstances. A full list of the matters that secondary legislation can cover is set out in Schedule 2 of the Act.

The Act also takes steps to address concerns about the transparency of ownership of overseas companies – something that has assumed increasing prominence over recent years due to terrorist activity in Europe and the information revealed in the Panama and Paradise Papers leaks. Section 50 of the Act requires the Secretary of State to publish periodic reports on the progress made towards putting in place a register of beneficial owners of overseas entities, although the concept of "overseas entities" and the details of what the register might contain are not further clarified. More concretely, section 51 requires the Secretary of State to provide "all reasonable assistance" to the governments of the British Overseas Territories to enable them to establish a publicly accessible register of the beneficial ownership of companies in their jurisdictions. A draft Order in Council is to be prepared no later than 31 December 2020 requiring the government of any British Overseas Territory that has not adopted such a register to do so – a proposal which has met with some controversy in a number of overseas territories who have implemented a non-public register.

Conclusions
As is clear from the above, the powers conferred by the Act are very broad. While this gives the UK government additional flexibility that is not necessarily present in the current EU sanctions regime, there is potentially greater scope for the UK regime to diverge from the EU, causing an increased compliance burden for many businesses.

Comfort may be taken from the Foreign Secretary's statement that: "While we are leaving the EU, we are not leaving Europe, and we will continue to have shared values, interests, and threats with our European and international partners. This makes continued foreign policy cooperation, including on sanctions, in all our interests."
but it will be necessary for UK companies to pay close attention to the precise terms of secondary legislation published under the Act, and any associated guidance, in order to ensure that they fully understand and comply with any new obligations going beyond those imposed at EU level.

2. Updates to monetary penalties guidance

OFSI's "Monetary penalties for breaches of financial sanctions – guidance" (the "Monetary Penalties Guidance") explains its powers to impose monetary penalties on individuals and organisations, details how it intends to use those powers and the right of appeal against such penalties. The Monetary Penalties Guidance was updated in May 2018 in relation to: (i) the impact of voluntary disclosure in the case assessment process (Chapter 3); and (ii) the right of appeal (Chapter 7).

Voluntary disclosure in case assessment

When assessing potential breaches of financial sanctions, OFSI states that it values "materially complete voluntary disclosure made in good faith". However, the updated Monetary Penalties Guidance now states that voluntary disclosure of a breach "may have real effect on any subsequent decision to impose a penalty", rather than the more definitive "will" used in the previous version.

The updated Monetary Penalties Guidance also provides an expanded definition of what constitutes a voluntary disclosure, specifically excluding disclosure of facts prompted or required by a separate legal or regulatory investigation. The guidance also expands on the exemption from disclosure for legally privileged material. Adding to the previous version of the document, it notes that most current regulations exempt legally privileged material from disclosure. It also clarifies that even if there is no explicit provision to that effect, OFSI considers legal privilege to be a reasonable excuse for not disclosing a document.

The final change to the voluntary disclosure section is the addition of a link to the new form which should be used to report suspected breaches (see below for details on the new form).

Right of appeal

As foreshadowed in the April 2017 version of the Monetary Penalties Guidance, OFSI has provided further details on the right of appeal. Amendments to the Upper Tribunal procedure rules have introduced a procedure for appealing financial sanctions monetary penalties cases. The guidance provides links to those rules, which detail the appeal procedure, including timeframes and subsequent stages of the appeal process.

3. Launch of FAQs for importers and exporters

On 11 May, OFSI launched its second sector-specific FAQ fact sheet, focusing on the impact of financial sanctions for businesses operating abroad (the first was aimed at charities) (the "Import/Export FAQs"). The Import/Export FAQs detail the differences between financial and trade sanctions, licencing requirements, how to determine if a business is subject to financial sanctions, and what to do if a breach is suspected.

The Import/Export FAQs provide an explanation of the different types of financial and trade sanctions and licences, and FAQs in the following sections:

- General questions about financial sanctions, including:
  - the factors to consider when importing or exporting from the UK, such as where goods or services are coming from and who is delivering them; and
  - what to do if in the case of suspected dealings with a designated person.

- Licensing requirements, including:
  - the difference between export control licences (issued for strategic goods) and OFSI licences (issued to permit financial transactions with a designated person); and
  - the grounds on which a licence may be granted to an exporter or importer and the timeframes for issue.

- Financial sanctions along the export chain, detailing:
checks required of other parties involved including vessels, airlines, road hauliers, banks, insurers, and export agents such as couriers and freight forwarders; and

applicability of financial sanctions to port fees, landing fees and bills of lading.

• Details on breaches and penalties, including:

  o what to do if a breach occurs, where breaches can occur, the potential imposition of financial sanctions by other countries, and risks of which exporters should be aware.

The fact sheet also includes a list of useful sources on financial sanctions of particular relevance for the importing/exporting sector.

4. New compliance reporting form

The OFSI have published a new compliance reporting form for individuals and organisations to:

• report a suspected designated person (Part B);
• provide information on frozen assets (Part C); and/or
• provide information on suspected or known breaches of financial sanctions (Part D)

The form is designed to facilitate compliance with the European Union Financial Sanctions (Amendment of Information Provisions) Regulations 2017 which expanded reporting obligations beyond financial institutions to "relevant businesses or professionals" (as to which, see our previous briefing). OFSI has also published a new blog post summarising the reporting obligations currently in force.
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