

# UK Treasury Publishes First Post-Brexit UK Sanctions Regulations and Guidance

20 February 2019

On 31 January 2019, the UK's HM Treasury published the first set of regulations (the "Regulations") under the Sanctions and Anti-Money Laundering Act 2018 ("SAML").<sup>1</sup> The Regulations are due to come into force on "exit day"—29 March 2019 at 11.00pm— if the UK leaves the European Union without a deal. The UK Office of Financial Sanctions Implementation ("OFSI") has also published new guidance on post-Brexit financial sanctions, which should be read in tandem with the Regulations.<sup>2</sup> In many

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respects, the Regulations mirror sanctions measures currently in force in the UK under EU regulations and merely give them an independent statutory footing in the UK. But the Regulations do diverge from established EU sanctions practice in certain places and may require companies in the UK to change their sanctions compliance practices.

**Financial sanctions: ownership and control.** The most significant change in the Regulations relates to the treatment of entities owned or controlled by persons subject to asset freezes ("Designated Persons").

Under the Regulations, asset freezes will expressly apply to entities "*owned or controlled*" by Designated Persons. Whilst this is in line with OFSI's prior interpretation of the scope of EU asset freezes,<sup>3</sup> it is arguably more onerous than the position set out in the EU law and guidance. EU guidance states that funds or economic resources held by a non-designated entity with a separate legal personality are not covered by the asset freeze.<sup>4</sup> Rather, EU law has been interpreted by the EU Council to contain an "*indirect benefit presumption*", which is a *rebuttable* presumption that making funds or economic resources available to an entity owned or controlled by a Designated Person amounts to a sanctions breach.<sup>5</sup>

<sup>1</sup> The Iran (Sanctions) (Human Rights) (EU Exit) Regulations 2019, SI 2019/134; The Venezuela (Sanctions) (EU Exit) Regulations 2019, SI 2019/135; The Burma (Sanctions) (EU Exit) Regulations 2019, SI 2019/136.

<sup>2</sup> See OFSI's "Post EU Exit: Financial sanctions—General Guidance" dated February 2019.

<sup>3</sup> See Part 4 ("Ownership and Control") of OFSI's Financial Sanctions Guidance dated March 2018.

<sup>4</sup> See paragraph 35 of the EU Council's "Best Practices for the effective implementation of restrictive measures", EU Doc 10254/15, 14 December 2016 (the "EU Sanctions Guidance").

<sup>5</sup> See paragraph 66 to 68 of the EU Sanctions Guidance.

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Under the Regulations, what was previously a difference in interpretation between the UK and the EU will become a hard-edged legal distinction. After a no-deal Brexit, asset freezes in the UK would apply to persons majority-owned *or* controlled by Designated Persons even if they are not themselves designated. The Regulations create a new multi-factor test to determine when a Designated Person “controls” another entity, but at present there is considerable ambiguity as to when those criteria would be met. Importantly, the control test goes beyond the equivalent U.S. sanctions test known as the “50 Percent Rule”, which applies financial sanctions only to entities more than 50 percent owned by a person subject to U.S. asset freeze.

In preparation for a no-deal Brexit, companies subject to UK law would be well advised to ensure that their screening processes adequately capture entities owned or controlled by Designated Persons. To do so, however, companies would have to examine factors that go beyond share ownership.

**Other features of the regulations.** The Regulations transpose the existing EU sanctions restrictions relating to Iran, Burma, and Venezuela to UK law. Because the UK will no longer be bound by EU law, in doing so, the Regulations create stand-alone sanctions regimes that do not need to be read in line with EU legislation. The Regulations thus provide a glimpse into how the UK might structure its independent sanctions legislation in the future. Notable features include:

- A statement of the purposes of each sanctions regime.
- New criteria according to which the UK Government can add individuals or entities to the list of Designated Persons.
- Comprehensive definitions of trade restrictions, including brokering restrictions, which to date have been implemented via Export Control Orders.<sup>6</sup> The current Orders do not set out the substance of the restrictions but rather implement EU sanctions by reference to the content of the relevant EU regulation.
- More extensive licensing grounds, including for an “*extraordinary situation*”, which appears to be a catch-all that may be easier to use than equivalent licensing grounds in EU sanctions regulations. The Regulations also contain licensing grounds for “*humanitarian assistance activities*” and “*diplomatic missions*”, which should make it easier for charities to obtain licences in order to carry out humanitarian work in sanctioned countries.
- Broad reporting obligations, with no clarification on the scope of legal privilege.

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<sup>6</sup> See, e.g., The Export Control (Venezuela Sanctions) Order 2018.

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As the no-deal Brexit preparations continue, we will see how the existing EU capital markets restrictions on Russia will be transposed into UK law and whether the UK will depart from the EU approach. We continue to monitor developments in this area.

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Please do not hesitate to contact us with any questions.

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