



STEPTOE OUTSIDE COUNSEL

Navigating sanctions divergence

Following the UK's departure from the EU and the end of the Brexit transition period there was much speculation about the practical impact the UK's autonomous sanctions regime would have on international companies' sanctions compliance efforts. As the second anniversary of this milestone approaches, the international sanctions response to Russia's invasion of Ukraine has brought this question into stark relief for many businesses given the unprecedented scope and scale of the financial and trade sanctions measures that have been implemented by the UK, EU and US, among others. For businesses operating across these jurisdictions there has been increasing evidence of divergence in approach across the sanctions landscape and an attendant increase in compliance complexity, notwithstanding significant efforts to coordinate sanctions measures.

As a threshold matter, some level of sanctions divergence ultimately is inevitable because the legislative language and architecture of the UK, EU, US (and other) sanctions regimes differs to reflect both local drafting conventions and, at times, policy-led decisions about how certain measures should be framed and implemented. For example, the UK has sought to control the provision of certain professional and business services

by UK parent companies to their Russian subsidiaries through specific licensing, whereas the EU and US have carved this activity out of comparable prohibitions through the use of exceptions. These distinctions can, and do, create additional compliance complexity for international companies depending on how intragroup services provision is structured.

The impact of divergence on the fundamental question of whether a company can do business with particular suppliers, customers and other business partners is also increasingly apparent following the significant expansion of UK, EU and US sanctions lists in 2022. While there has been significant coordination of Russia-related designations in 2022 there remain numerous examples of individuals and entities being designated in one jurisdiction and not others or across several jurisdictions but at different times. Additionally, while the US follows the 50% rule when assessing which entities are caught by asset-freeze/blocking sanctions, both the UK and EU apply variations on an ownership or control test. The picture can be further complicated by differing approaches to aggregation of designated person interests with the US and EU adopting aggregation, while the UK has not. In practice, these variations can cause differing conclusions on an entity's

sanctions status across jurisdictions, which can impact the ongoing viability of business relationships as well as the way in which relationships can be managed.

The trade sanctions/export controls measures imposed by the UK, EU and US on Russia target an unprecedented range of items. While coordinated, the measures are not completely aligned whether by item, activity targeted, or because of the varying jurisdictional reach of the prohibitions themselves. These discrepancies can prove disruptive to companies' international supply chains. When companies elect to suspend or terminate certain supplies, they also can create a heightened risk of disputes due to the potential for tension between sanctions compliance and contractual performance.

Even when sanctions measures are largely aligned, divergence in their implementation can increase the complexity of compliance for companies operating internationally. For example, the availability of UK or US general licences permitting certain transactions does not provide an exemption from the need to apply for a specific licence, if available, when the transaction also would trigger the jurisdiction of an EU Member State.

Many of these sanctions divergence pressure points have become acutely visible as a result of the broad-based package of sanctions measures imposed in relation to Russia's invasion of Ukraine, however, their impact is unlikely to be limited to any one sanctions regime. Successfully navigating this increasingly complex landscape requires companies operating internationally to:

- thoroughly understand the sanctions footprint of their organisation, value chain, products, business activities, and those with whom they deal;
- ensure that their compliance program and sanctions controls are proportionate, risk-based and tailored to their sanctions footprint and risk profile;
- adopt a holistic approach to the identification and mitigation of sanctions risks associated with specific transactions, business activities and counterparties by conducting due diligence and formulating risk mitigation measures that appropriately consider all applicable jurisdictions; and
- respond timely to the potential impact of sanctions developments and likely future changes on their sanctions risk profile and compliance controls. ■

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