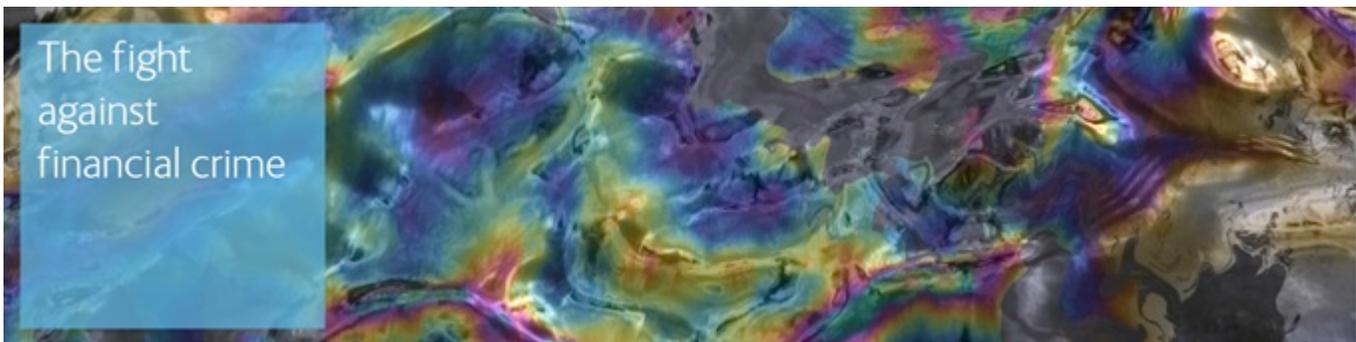


The fight against financial crime: sanctions

The rate of change in the law and its enforcement in financial crime has been dramatic and global in the past few years, resulting in a regulatory minefield for many businesses.

In this series of articles, we focus on different areas of financial crime, taking an incisive look at current regulation and what we can expect over the course of 2018. In this fifth edition we take a look at sanctions, including the UK's approach to sanctions post-Brexit and the growing divide between US and EU foreign policy.

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Contact	Stephen Gentle , Alexandra Webster , David Bridge



The current position

National sanctions regimes in Europe are largely derived from EU legislation. The EU implements financial sanctions imposed by the UN Security Council as well as its own autonomous measures. All of these sanctions are implemented through EU regulations, which mean they have direct legal effect in Member States. Each state makes local legislation to provide for the penalties for any breach of EU sanctions and for the provision and use of information relating to the operation of those sanctions.

The enforcement of those instruments in the UK is the responsibility of the Office of Financial Sanctions Implementation (OFSI), part of the Treasury. In the US, the Office of Foreign Assets Control (OFAC) administers and enforces economic and trade-based sanctions based on US foreign policy and national security goals. Many of the sanctions imposed are based on UN sanctions, but the US also acts autonomously in adopting sanctions measures.

In recent years the targets of the EU and US sanctions regimes have been broadly consistent, with similar measures being implemented in support of shared policy goals. However, in the Spring of 2018 we have seen a widening gulf appear between the positions taken by each of the two Western powerhouses, with the US using sanctions in support of an increasingly aggressive stance in respect of first Russia, and then Iran.

At the same time, the UK is taking steps to create its own regime for imposing, updating and lifting sanctions measures, to come into play after it leaves the EU. The Sanctions and Anti-Money Laundering Bill, now coming to the end of the legislative process, will replicate existing powers to impose sanctions for the purposes of compliance with UN or other international obligations. It will also grant the UK increased flexibility to introduce its own measures where a number of defined foreign policy purposes are met (including prevention of terrorism, promoting national and international peace and security, and in response to gross human rights violations).

Key issues to think about

On 08 May 2018 the US decided to withdraw from the Joint Comprehensive Plan of Action (JCPOA) which lifted sanctions measures directed at Iran's alleged nuclear programme. President Trump described the deal as a "horrible, one-sided deal that should never, ever have been made" and signed a presidential memorandum directing federal agencies to re-impose all sanctions lifted in connection with the JCPOA within 90 and 180 day wind-down periods. Under the terms of the agreement, Iran could stop implementing its own JCPOA obligations once the US re-imposes the sanctions. However, it may instead elect to continue implementing the agreement together with the other parties. Immediately after the US announced its intention to withdraw from the agreement, the UK, France and Germany issued a joint statement making clear their commitment to supporting the JCPOA. Russia and China have also indicated that they intend to remain in the JCPOA. For further information on the impact of the US withdrawal from the JCPOA, see our article.

One key area of concern is the re-introduction of secondary sanctions, which would apply to parties outside of the US that do business with Iran. Recent press reports suggest that the EU is applying pressure on Trump's administration to exempt EU companies from those measures and attempts to secure protection for EU businesses are likely to continue during the three to six month period before the US sanctions are re-instated. It has also been reported that the EU is exploring alternatives to US dollar financing of Iranian deals (including facilitating EU companies' investment in Iran through the European Investment Bank), and has started the process to activate legislation that would block the effect of US sanctions by prohibiting EU companies from complying with them, and stipulating that court judgments based on the measures have no effect in the EU. Other more serious options that may be considered include retaliatory sanctions, and a complaint to the World Trade Organisation.

Despite this, OFAC's status as the most active enforcer of sanctions breaches to date may be sufficient to deter many European businesses from continued investment in Iran. Total, the biggest foreign investor in Iran's energy sector since the sanctions were eased in 2016, has stated publicly that it will leave the market unless it receives a specific waiver for its project from Washington. Given the US objective of imposing maximum sanctions on Iran, it seems unlikely that such a waiver would be granted. Should other European entrants to the Iranian market (who include Renault and Airbus amongst their number) take a similar view it is very possible that business activity will return to pre-JCPOA levels, and that significant losses will be suffered by those first-movers into the Iranian market. Those companies may also find themselves in conflict with the EU blocking legislation.

If the EU is unable to extract concessions from US sanctions, this may present opportunities for non-EU companies in China and elsewhere in Asia to fill the void left by EU investors. The Chinese government has already stated its intention to protect and remain in the JCPOA. However, the long arm of the US economic power is not to be underestimated. Chinese technology giant, ZTE Corporation, has recently pleaded guilty to trading with Iran in breach of

US sanctions, and is looking at billions of dollars in fines to settle its violation.

What's next?

Once the UK has left the EU it will have greater flexibility to adopt measures introduced by non-EU countries like the US. However, it seems more likely that the UK will continue to take an approach that is consistent with the EU, with whom its foreign policy goals are currently more closely aligned, than moving closer to the US position or treading its own path. That being the case, UK businesses will have to continue to adapt to the increasingly challenging compliance environment caused by the growing divergence between the US and EU regimes. UK businesses are also likely soon to have to contend with increased domestic enforcement of sanctions breaches following an increase last year to the powers available to OFSI. The Policing and Crime Act 2017 increased the maximum criminal penalty to seven years' imprisonment and granted OFSI the power to impose new civil monetary penalties of up to the greater of (i) 50% of the value of the funds or resources involved (if quantifiable) or (ii) £1m.

The additional powers and flexibility afforded to the UK pursuant to the Sanctions and Anti-Money Laundering bill are therefore most likely to be used to ease tensions between measures introduced by the EU and adopted by the UK, and other Government objectives and initiatives. This may include the implementation of licences and exemptions to facilitate the delivery of humanitarian and development aid, and allow the adoption of policies (such as financial services policies) which would otherwise be hindered by sanctions law but which do not contradict the policy aims of the sanctions regime.

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