



Taxing Matters

The post Brexit UK sanctions landscape with Alex Haines

Alice Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at www.rpc.co.uk/taxingmatters.

Today we are joined by Alex Haines to take us through the post Brexit UK sanctions landscape, which sounds like a mouthful.

Alex is a Barrister at Outer Temple Chambers where not only does he have an impressive practice in international law, business crime and corruption and sanctions, he's also mastered the laws of three jurisdictions sufficiently to be qualified to practice in England & Wales, the Republic of Ireland and New York, as well as fluently speaking French and Spanish; he's another one of those people whose CV makes one feel lazy.

What's worse is that in addition to all of this, he's an avid rugby player and regularly plays for a social team' – obviously Covid permitting.

So, Alex welcome to Taxing Matters.

Alex Thank you, Alice.

Alice **So now that Brexit has happened, what has this done to the UK's sanctions framework legally speaking?**

Alex Only a few weeks ago on the night of Thursday 31 December 2020, the UK was no longer required to implement EU sanctions and the new UK sanctions framework officially came into force under the Sanctions and Anti-Money Laundering Act 2018 or 'SAML A' as we can call it.

Now interestingly SAML A was one of the first, if not the first Act, passed as a direct result of Brexit. It may be that it was an easy win to get that through Parliament, reflecting the desire of all political parties, and perhaps even the necessity for the UK as a whole, to secure its own framework governed by domestic as opposed to European or international legislation.

So, until Brexit, as far as the UK was concerned the sources of sanctions, the source of sanctions law even, were the UN and the EU. Now the UK did have a domestic sanction system but that's really confined to' – or was confined to' – terrorism legislation. So, we can leave that aside for the purposes of today.

So, when sanctions were imposed by the UN or the EU the UK acted on its international obligations by giving effect to those sanctions in UK law. UN sanctions were implemented by the EU and once implemented through EU regulation they took direct legal effect in the UK.

Now after Brexit, that change meant that there was a lacuna that the UK had to fill this legislative gap if you like and before we talk about SAML A it's worth briefly noting a recent pattern showing the direction of travel as far as the UK is concerned.

So, firstly the establishment of the Office of Financial Sanctions Implementation (OFSI) in 2016 and secondly the coming into force of the Policing and Crime Act 2017; now that lays out civil proceedings, monetary penalties, right to review as well as sentencing increases for criminal proceedings.

So with both these developments it highlights the advancement of the UK's ability to administer and regulate sanctions domestically and then we have the more important change the change that comes as a direct result of Brexit which is the coming into force, in full effect, of SAML A.

And in addition, of course, new regulations continue to be put in place for each regime.

Section 1 of SAML A gives effect to the very heart of the issue by empowering the Secretary of State and the Treasury to impose sanctions that ministers consider appropriate for the following purposes.

And there are a number of purposes listed. On one side we've got complying with international obligations, so such as the UN, and on the other side to achieve one of the following purposes and there's a list of purposes here, and I won't go through all of them, but as an example to further prevent terrorism, the interests of national security, further foreign policy objective of the UK Government and also interestingly the accountability one or be it deterrent to gross violations of human rights and also referred to as the 'Magnitsky' amendment.

So, the point here is that there is increased flexibility for the UK within SAMLA specifically Section 1 here listing the purposes for which a minister can impose sanctions.

So, sanctions that require some form of legal implementation fall into four broad categories.

Financial sanctions are restrictions that can limit the provision of certain financial services or restrict access to trade, financial markets and funds.

Asset freezes apply to named individuals or entities and bodies prohibiting or restricting transfer and access to funds, assets and other economic resources.

We also have trade sanctions which are measures imposing restrictions on import and export generally in relation to a State at the most extreme form just to give an example would be a comprehensive trade embargo amounting to a total blockade on trade. Trade sanctions usually prohibits specific activities, and a common example is an arms embargo, which is a sanction against the exports of weaponry and dual use items.

Lastly as an example of sanctions, we have travel bans that simply restrict the movements to or through the territory of the sanctioning State of identified individuals associates with a specific regime or group.

Alice

So that gives us a context for what the UK is doing, but how exactly has this changed things in practical terms?

Alex

When we talk about the EU on the one side and the UK on the other, it often presupposes a dichotomy that fails to reflect the reality of the relationship.

The UK, we must always remember, was a massive player in sanctions policy in the EU. We can't underestimate the UK's influence and the number of sanctions it was responsible for putting forward.

Now, I start with that because that helps us to understand that because the UK was at the forefront of sanctions when it was a member of the EU it is likely that it will continue to pursue the same policy, so in other words if the UK's policy doesn't change and it continues as it was before, the bottom line is there is unlikely to be a big change.

Now, I qualify that with the word 'big' because there will of course be some changes and these mostly appear in the UK's discretion which exists in the detail to do certain things it couldn't necessarily do before. So if anything else the UK has ensured that its powers relating to sanctions have increased.

Alice

And how is this going to change the way that the UK's sanctions regimes are going to operate and how exactly do you see this developing as we go forward?

Alex

Looking now at some of the changes between the EU sanctions framework and the new UK's framework.

Firstly asset freezes; they generally prohibit dealings in assets owned or controlled by designated persons. UK's new framework contains detailed definitions of the circumstances in which direct or indirect ownership and control exists. So, as far as asset freezes are concerned, there is now more clarity within the UK's framework than there was before. Now that doesn't mean of course it is completely clear, because there is still residual discretion and the word 'reasonable' appears in the regulation meaning that the certainty isn't quite as clear as one would expect but it is certainly progress compared to the 'grey area', if I can use that terminology, that existed before as far as the asset freezes are concerned.

Other examples include prohibitions, so some are more limited; designations' – so specifically the entities that are designated, the people that are designated' – there are differences; there are also changes within the legal framework itself and that relates to the designations and the delistings; and there is also a UK based or domestic administrative review process followed by judicial review mechanism sitting at the top.

Alice	So, what do you think about the changes that you've just mentioned? Are they good changes, bad changes, neutral changes?
Alex	<p>One example of a change that we can probably agree is bad, is UN designated individuals. Persons designated pursuant to UN sanctions were able to challenge, well, still are able to challenge within the EU framework; their challenge is through the EU general courts. But under SAMLA individual rights are reduced in so far as UN designated people are concerned and those on the UN list are deprived of the rights they enjoy under EU law.</p> <p>For example, the EU General Court can declare designations unlawful even when they originate from the security council decisions, but that is not an option under SAMLA, so there is no judicial review process of UN sanctions measures in the UK.</p> <p>So that's probably an example of a bad change, but that is of course limited to those designated under UN sanctions.</p> <p>There is a section under SAMLA, Section 25, that gives UN designated individuals the right to request that the appropriate minister I quote "use their best endeavours" to persuade the UN to remove them from the relevant UN instruments, but they don't have access to the administrative review and judicial review mechanism for UK designated individuals. So that is a concern.</p> <p>For everything else the framework laid out in detail in SAMLA' – so briefly chapter 2 deals with revocation, variation, ministerial review and designations made under regulations ' – and the first step is the administrative review' – and then chapter 4 of SAMLA deals with the court review of ministers' decisions. That process reflects a comprehensive system protecting due process rights. So there is a distinction between UN designated individuals and others.</p> <p>So, firstly, in reviewing the EU's list of designated persons, the UK has determined that some entries on that list do not meet the standard for designation under SAMLA.</p> <p>So, the result of that is that the UK published at the end of last year' – specifically OFSI published' – a list of individuals, 113 individuals and entities which are no longer subject to a UK asset freeze.</p> <p>So that is a good example of an immediate difference; a change between the previous framework and the new framework, resulting in a number of individuals and entities not being listed any more. The notice also listed 10 designated persons who remain subject to an asset freeze but under a different UK regime as compared to the EU listing.</p> <p>So, again, this highlights the importance of lawyers, corporates, compliance officers, whoever it is, to look at the different listings because this has complicated the starting point; here is the EU framework, there is the UK framework and although the UK's policy will continue, we think, to match the EU's policy with regard to sanctions in general, that does not mean that everything's going to be identical in so far as those lists are concerned.</p>
Alice	Do you think that the fact of being delisted as not meeting the requisite standards in the UK will have an impact on EU listings, will those come before the courts more regularly?
Alex	<p>The differences in standards, and again this goes back to what we were saying earlier about the detail really highlighting the changes between both frameworks, as opposed to there being big differences; at some stage I'm confident that EU courts are going to have to deal with some of those differences in the sense that we will see examples where a case would have fallen one way or the other depending on which regime's judicial system it was going through.</p> <p>So the example of the UK delistings because it does meet the SAMLA required level, if you like, may well be reflected in the EU in terms of a case before the general court but I don't think that's going to affect the EU's approach because the EU's not concerned with the language and the detail in SAMLA.</p> <p>Moreover, the UK's departure from the EU isn't going to strengthen the UK's influence within policy in the EU; at the highest nothing's going to change and then at the lowest, depending on how you look at it, the EU may drift slightly because of the UK's absence and that depends on a number of political and international relationship issues about who's really going to lead the charge in the UK's absence.</p>

Alice	So, you've just mentioned there the possibility of drifting and coming further apart' – obviously our listeners may be aware of blocking statutes. How did these come about?
Alex	<p>Generally speaking, a blocking statute shields companies in its jurisdiction against sanctions by prohibiting them from respecting sanctions and not recognising foreign court rulings enforcing them.</p> <p>So, the EU blocking statute which is short for 'Regulation EC2271/96 first adopted in November 1996 to protect EU business against the effects of the extraterritorial application of legislation adopted by a third country'.</p> <p>Now the context as I've mentioned was Cuba; in early '96 US congress enacted a law that strengthened the US embargo against Cuba. The Act extended the territorial application of the initial embargo which had been in place since the late 50s to apply to foreign companies trading with Cuba and the EU introduced the blocking statute in response to the US's extraterritorial sanctions legislation concerning Cuba but also Iran and Libya.</p> <p>So, the EU's argument, to put it crudely, was that the sanctions benefited US foreign policy interests at the expense of the sovereignty of EU member states. So, although this is all very legal it's impossible to distinguish from the political origins here, this is about sovereignty and about whether laws can apply beyond your territories.</p> <p>So that's the background to the blocking statute and the question was' – and it's been answered now, we can deal with this in a moment' – but the initial question was when the UK leaves the EU what happens in so far as the UK's concerned? And the answer is pretty simple, the UK has adopted it's own blocking statute so nothing much is going to change because the UK will continue to protect, in this case we're not talking about EU persons any more we're talking about UK persons, from the effects of US sanctions.</p> <p>Now there was an exception within the blocking statute about commercial considerations which would allow EU entities to comply with US sanctions, not because they want to comply with them but because they can show that it's in their commercial interest to do so, and the UK has also retained that aspect of it. So, in practice at the moment at least very little is looking to change as far as the differences between the EU blocking statute and the new UK system's concerned.</p> <p>What complicates this, and what may well lead to change, is the politics: it's the new US administration; it's where the UK wants to go, does it want to align itself closer to US policy – I'm not suggesting it does, other people have made that suggestion' – but all of that is really a political aspect that is separate from the regulations and the provisions within those that link to this UK blocking statute equivalent.</p>
Alice	And if you were going to put your political projection hat on, just for a second, what do you think is going to happen in so far as the reason for those blocking, in so far as whether or not the US will look to re-join the JCPOA?
Alex	<p>So the blocking statute is really only relevant, if we leave, we leave Cuba aside for now I mean there have been a couple of interesting cases, but really when we talk about this we're talking about Iran at the moment anyway that's really what most people are concerned about. And so if the US come back into the fold, then as far as Iran's concerned the blocking statute is no longer relevant. So that's the first question.</p> <p>Under the Trump administration that was of course never going to happen, because it was under the Trump administration that the US left in the first place. So, again we are looking at an international and domestic ever-changing legal landscape, but that is complicated by politics and four year terms and foreign policy.</p> <p>So, asking me to guess what the Biden administration is going to do I don't know, but given his past under Obama, I think there's a good chance that they will come back in, if I can put it like that. and if that happens all the concerns that companies in the UK and in Europe have about being between a rock and a hard place 'do we listen to EU legislation and risk financial meltdown because we're in breach of the US sanctions, or do we follow US sanctions and then we're at risk of being pursued in the domestic courts?' that issue becomes less relevant because of the JCPOA, if indeed that happens.</p>

Alice	Traditionally the US have taken an expansive approach to their jurisdiction and sanctions regimes, following on from your predictions, do you think that this will be adopted by the new regime?
Alex	<p>I think it is unlikely that we are going to see the UK go down the secondary sanction route for a couple of reasons. Firstly, it is committed to the EU position and the EU's policy of being against long arm statutes and that is not surprising of course, because what we were saying earlier, namely that the UK was really behind a lot of the policy and the drive.</p> <p>But the second reason and perhaps the better reason is really one of currency. The US has relied on the US dollar and the power of the dollar to extend its jurisdiction, whereas the UK is quite simply not in a position to do that, irrespective of whether its foreign policy would allow that in the first place.</p>
Alice	You've mentioned the conflicting sanctions regimes, where are businesses going to make sure that they are staying on the right side of their sanctions regimes?
Alex	<p>The situation is certainly more complicated now. Whereas before we had the EU, UN and US sanctions regimes, I mean, there are others but those are the ones we are worried about. If a business is based in the UK, it is now also concerned with the UK sanctions regime.</p> <p>Notwithstanding the fact that we are confident that the UK and EU regimes will follow each other to a certain extent, the changes, even if they are small. the differences are important enough to require a check of everything in order to do things properly.</p> <p>So insofar as sanctions lists and screening is concerned there are two lists available in the UK, the UK sanctions list and the OFSI consolidated list.</p> <p>The first one' – the UK sanction list' – contains all individuals and entities subject to any UK sanctions under SAMLA; so it includes asset freezes, arms embargos, travel ban; the OFSI consolidated list contains all individuals and entities subject to an asset freeze whether imposed under SAMLA or not. In other words, it also includes sanctions, I should say asset freezes under other legislation, in particular terrorist asset freezing orders imposed under the Anti-Terrorism Crime Security Act 2011.</p> <p>So there are two lists there and it is important to check both those lists for obvious reasons.</p> <p>Now aside from the lists I've just mentioned that include designated persons there are two other lists to check. The destination of money flows, important for obvious reasons; Iran is a good example of this, British Iranian businesses, so for example, businesses based in the UK that it exports goods to Iran and there is money flowing from those accounts.</p> <p>But on top of that check that goods and services can be provided to specific destinations, so to use the Iran example aside from the financial transactions, if it's a company that sells specific goods, can they be sold to Iran?</p> <p>On top of all of that there are the specific exceptions to check, so for example dual use, a category in its own right is insurance as well whether that is permitted, and all of that is present in the regulations that come under SAMLA.</p>
Alice	So, what do businesses need to be thinking about in terms of your top tips for coping with this change?
Alex	<p>Firstly, which regime? We talk about sanctions regimes often we are really talking about a sanctions framework. A sanctions regime is a specific regime in for example a country against a group of individuals so always go to the starting point, what regime may or may I not be in breach of. So, if you've got a clothing company and you're exporting goods to Iran for example or Libya, well then you can focus on these specific sanctions regimes.</p> <p>Secondly, guidance. There is lots of published guidance which is easier to read than some of the complicated legislation and regulation. Most of it is on the OFSI website. So, for example there is general guidance on UK financial sanctions and then there is more specific guidance, so guidance on the Russia financial and investment restrictions. There is also guidance for the charity sector. So, the starting point after reading the relevant provisions, understanding what regime you are in, look at these guidance papers because they are really useful in bringing different aspects together.</p> <p>And lastly check everything.</p>

One example of how useful this is, I was instructed recently to advise on an insurance matter as to whether or not the company, or the provider, might be in breach of sanctions. And on the face of it, it looked like a complicated question and it took me an hour because I applied what I have just said in terms of those three steps; I started reading the regulations and in it, black and white, there was a carveout exception as far as insurance is concerned.

So sometimes this apparently complicated and ever changing world is not necessarily as difficult as we may think, because each regime is self-contained and if you go through those motions and start reading the relevant provisions you might find the answer and if you don't, you will certainly be closer to what the actual issue is.

Alice

Well thank you very much Alex for taking us through the post Brexit sanctions landscape.

As ever a big thank you goes to our miracle working producer Mary Mitchell, Josh McDonald who does all the work pulling each episode together, our music is from musical genius Andrew Waterson and of course a big thank you to all of our listeners for joining us.

A full transcript of this episode together with our references can be found on our website at www.rpc.co.uk/taxingmatters and you can find Alex on his Chambers website at Outer Temple Chambers or LinkedIn; Alex Haines.

If you have any questions for Alex or for me or any topics you'd like us to cover in a future episode please do email us on taxingmatters@rpc.co.uk. We'd love to hear from you.

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