COVINGTON

An Overview of Post-Brexit UK Export Controls and Economic Sanctions

February 1, 2021

International Trade

Following the United Kingdom's formal departure from the European Union regulatory regime on 31 December 2020, the UK now implements a unilateral export controls and economic sanctions framework. The post-Brexit UK trade controls regime is the product of a series of transitional statutory measures implemented by the UK Government, beginning in 2018 with the Sanctions and Anti-Money Laundering Act 2018 (which creates a general framework for implementing UK trade controls measures), and continuing up to the end of December 2020 with a series of final implementing regulations.

By and large, the post-Brexit UK trade controls have not shifted substantially from the pre-Brexit status quo. Both the UK and EU authorities have strived to avoid an outcome where Brexit could lead to immediate, new trade controls licensing requirements and prohibitions, and they largely have succeeded in that effort. There are, however, a number of notable changes to the UK and EU regulations that have now gone into effect as a consequence of the UK's withdrawal from the EU, which parties in the UK and EU should be cognizant of. This alert provides a practical overview of those issues.

Export Controls

Prior to Brexit, the UK export controls regulations—as with those of other EU Member States—constituted a patchwork of EU and national measures, with dual-use export controls governed by the EU Dual Use Regulation (EC Regulation No. 428/2009), military export controls largely governed under Member State legislation, and licensing and enforcement handled—both for dual-use and military controls—at the Member State level.

Consequently, the UK export controls enforcement process and the UK military export controls—set forth in the UK Export Control Order 2008—are essentially unaffected by Brexit. The principal areas of change are in relation to the Dual Use Regulation. In summary:

- **Status of the Dual Use Regulation in UK law.** The Dual Use Regulation has now been transposed into UK law as a "retained" EU regulation (together with many other EU regulations across a wide range of regulatory areas). Consequently, the core features of the Dual Use Regulation—including the Dual Use List (Annex I to the Regulation), definitions of key terms, and the regulation's licensing requirements and prohibitions—continue to apply in the UK, albeit as a function of national law.

- **Application of EU General Export Authorisations in UK law.** The Dual Use Regulation contains a number of general export authorisations ("GEAs"), permitting exports of dual-use items to specified jurisdictions for specified purposes. The UK Government has adopted those authorisations in UK law, through a series of "retained GEAs." Existing registrations for the EU authorisations in the UK online licensing system (SPIRE) will carry over to the retained GEAs—hence, UK exporters do not need to re-register for the retained GEAs if they have previously registered in the UK for their EU GEA equivalents.[1]

  Apart from the GEAs, UK had been one of the more active EU Member States in implementing national general export licences—known as OGELs—under the Dual Use Regulation. Those pre-Brexit OGELs have been carried over to the new UK regime, and there is no need for exporters to re-register for them. UK exporters should, however, confirm in the SPIRE system that their registrations have been updated, and there may be new registration numbers associated with the OGELs and/or retained GEAs.

- **Dual-use exports between the UK and EU.** The UK is now viewed, under the EU Dual Use Regulation, as a third-country for export controls purposes, and the same is true vice-versa. Consequently, dual-use items now require licensing for exports from the EU to the UK, and from the UK to the EU. The EU and UK authorities have, however, issued general licences that substantially close the gaps triggered by that change in status. In particular, the UK has issued a new open general export licence ("OGEL")[2] authorising the export of the vast majority of dual-use items to the EU that previously were eligible for licence-free exporting. Parties that wish to use the new OGEL must register for it within 30 days of its first use, and the OGEL contains a number of recordkeeping and associated documentation requirements that were not previously required for UK-EU exports.

  In return, the EU has amended EU General Export Authorisation EU001 in the Dual Use Regulation to include the UK as a permitted destination.[3] That amendment allows EU exporters who are registered for authorisation EU001 to export most dual use items to the UK (subject to complying with recordkeeping requirements and other conditions imposed under authorisation EU001).

  As was the case prior to Brexit, specific licences are required for exports between the UK and EU Member States of dual-use items set forth in Annex IV to the Dual-Use Regulation. The UK and EU regulations also now require licensing for UK-EU exports of a small number of additional dual-use categories, set forth in Annex IIg to the Dual-Use Regulation. (Annex IIg includes elements of dual-use classifications 0C001, 0C002, 0D001, 0E001,1A102,1C351, 1C353,1C354, 1C450,7E104,9A009, and 9A117.)

- **Dual-use exports to the Channel Islands**. Licences are also now required to export dual-use items from the UK to the Channel Islands. However, the same UK OGEL that covers dual-use exports to the EU, noted above, also encompasses exports to the Channel Islands.

---

[1] The retained GEAs can be viewed at the following link.
[2] The OGEL can be viewed at the following link.
[3] This amendment is set forth in EC Regulation No. 2020/2171.

- **Use of UK licences in EU and vice versa.** Prior to Brexit, it was possible to export dual-use items from the UK under export licences issued by other EU Member States, and likewise with regard to exports from other Member States under UK licences. That practice is no longer possible. Exporters who previously used UK licences in other Member States now must secure separate licences from the competent EU Member State authority, and likewise it is now required to obtain a UK licences for dual-use exports from the UK that previously may have been covered under licences issued by current EU Member States.
- **Enforcement.** Brexit has not affected the enforcement regime in the UK for dual-use violations, which will continue to be managed largely through HM Revenue & Customs under the UK Export Control Order and the Customs and Excise Management Act.

Economic Sanctions

Even prior to the end of the Brexit transition period on 31 December, the UK had begun to forge an independent economic sanctions policy in 2020—for example, by imposing unilateral human rights-related sanctions (under the so-called UK "Magnitsky" sanctions)[4], and moving more expeditiously than the EU in imposing sanctions in relation to Belarus. As a consequence of those measures, the UK list of persons designated for asset-freezing sanctions already contained significant differences from the EU consolidated financial sanctions list, prior to 31 December.[5]

More broadly, the UK essentially has adopted the pre-Brexit EU sanctions regime into UK law, through a series of individual "EU Exit" sanctions regulations. While intended to capture the core substance of the EU sanctions, the UK regulations contain a number of notable differences, including the following:

- **Jurisdictional reach.** The EU sanctions contain a common jurisdictional provision, which extends their scope to the worldwide conduct of EU persons and entities, to conduct of persons of any nationality within the territory of the EU (or aboard EU-flagged vessels), or to business activities by persons of any nationality occurring "in whole or in part" within the EU. The UK sanctions contain broadly similar jurisdictional provisions, but do not contain the "business in whole or in part" clause. Arguably, that renders the jurisdictional reach of the UK sanctions somewhat narrower than the EU, although it is unclear how significant that distinction will be for practical purposes—EU Member States have historically not been eager to use the "business in whole or in part" clause to pursue sanctions-related enforcement actions against non-EU parties.

[4] Our alert concerning the UK human rights sanctions can be viewed at the following link.
[5] The national UK sanctions list can be viewed at the following link.

- **Ownership and control.** Under the EU sanctions, there is a general—but rebuttable—presumption that a non-designated party will be subject to asset-freezing sanctions if that party is majority-owned, or otherwise controlled, by a person or entity specially designated for asset-freezing sanctions. The UK sanctions' ownership/control standard is framed in somewhat different terms, applying asset-freezing sanctions to non-listed entities if a designated person holds (directly or indirectly) a greater than 50% interest in that entity (through shares or voting rights, or the ability to appoint a majority of the board of directors of the entity), or if it otherwise is "reasonable, having regard to all the circumstances, to expect that" the sanctioned party would "be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs" of the non-designated entity "are conducted in accordance with" the designated party's wishes.
- **UK "brokering" standard.** Many EU sanctions regulations include prohibitions against "brokering services" in relation to restricted activities. Thus, for instance, under the EU-Russia sanctions it is prohibited to export certain types of oil/gas exploration and production goods to Russia without a licence, and it is also prohibited to provide "brokering services" in relation to the supply of those restricted items for use in Russia. Those "brokering" prohibitions have been carried over into the UK sanctions, although the UK regulations introduce a different definition of "brokering", to include:

  > *"any service to secure, or otherwise in relation to, an arrangement, including (but not limited to)— (a) the selection or introduction of persons as parties or potential parties to the arrangement, (b) the negotiation of the arrangement, (c) the facilitation of anything that enables the arrangement to be entered into, and (d) the provision of any assistance that in any way promotes or facilitates the arrangement[.]"*

  That standard provides more specific contours than the EU definition of "brokering"[6], and even departs in certain respects from brokering standards prevailing in the UK military export controls regime. Companies in the UK that have adopted sanctions-related policies concerning "brokering" based on the EU definition should reconsider those policies in light of the new UK standard.
- **"Financial assistance" vs. "financial services."** Various EU sanctions prohibitions include restrictions associated with the provision of "financial assistance". The EU sanctions do not, however, contain a definition of "financial assistance," and there has been some uncertainty over how broadly that term should be construed. The UK exit regulations use a different term – "financial services"—which the Sanctions and Money Laundering Act 2018 (section 61) defines broadly as "any service of a financial nature," and includes a non-exhaustive list of such services, noting in particular a variety of insurance and banking-related services.

  While noteworthy, this variation in the UK sanctions is unlikely to constitute a substantial practical departure from pre-existing UK sanctions norms, as the UK Government had previously interpreted the EU "financial assistance" standard relatively broadly.

---

[6] The EU sanctions "brokering" definition encompasses: "(i) the negotiation or arrangement of transactions for the purchase, sale or supply of goods and technology from a third country to any other third country, or (ii) the selling or buying of goods and technology that are located in third countries for their transfer to another third country[.]"

- **Russia sectoral sanctions exemptions.** Article 5 of European Council Regulation No. 833/2014 imposes loan and credit restrictions in relation to certain Russian sanctioned parties, and affiliates thereof. That prohibition is, however, subject to an exemption for transactions involving subsidiaries of those sanctioned parties that are established in the EU. That exemption will no longer apply, under the EU sanctions, with regard to subsidiaries of sanctioned parties in the UK. Likewise, while the UK-Russia sanctions regulation includes loan/credit restrictions that correspond to Article 5 of Regulation 833/2014, the UK exemption with regard to sanctioned party subsidiaries focuses only on UK-incorporated subsidiaries, and thus would not apply with regard to entities incorporated in the EU Member States.

  In a similar vein, Article 5 of Regulation 833/2014 contains exemptions for loans/credits intended to facilitate trading activity between the EU and any third country, and for loans/credits intended to meet liquidity or solvency needs of EU subsidiaries of designated parties. The UK-Russia sanctions regulation includes similar exemptions, but apply them with regard to activities having a UK rather than EU nexus (hence, the UK exemption for trading activity would not apply to exports between, for example, the EU and Russia).

- **Enabling or facilitating military activities.** The UK-Russia sanctions includes new prohibitions against "enabling" or "facilitating" military activities. That prohibition extends more broadly than previous military trade controls restrictions, as it does not focus on activities relating to the supply of military or dual-use goods, software, or technology, but also extends to conduct that "enables or facilitates the conduct of military activities carried on or proposed to be carried on by" the Russian military or military end-users.

- **Licensing procedures.** The EU sanctions regulations contain relatively few provisions allowing the EU Member States to issue licences permitting conduct that is otherwise prohibited under the regulations. The UK exit regulations include more flexible licensing standards, in this regard, although it is unclear how active the UK Government ultimately will be in issuing sanctions-related licences to individual applicants.

- **Enforcement**. The UK regime for enforcing sanctions violations is essentially unaffected by Brexit. The UK sanctions exit regulations incorporate pre-existing UK requirements for disclosing sanctions violations (which apply to certain categories of persons and entities[7]), and enforcement of violations of those regulations will be subject to pre-existing administrative enforcement mechanisms administered by HM Treasury, and to the UK criminal justice system for violations that involve criminal *mens rea*.[8]

[7] We discuss the UK requirements for disclosing sanctions violations in the alert at the following link.
[8] See the alert at the following link for a discussion of UK sanctions enforcement.

EU Blocking Statute - Application in UK

Similar to the approach taken with regard to the EU Dual Use Regulation, the UK has transposed the EU Blocking Statute (Council Regulation No. 2271/96) into UK law.[9] The Blocking Statute prohibits compliance with certain aspects of the U.S. sanctions relating to Cuba and Iran, and imposes associated reporting requirements. The Blocking Statute will continue to be administered in the UK—as was the case prior to Brexit—by the UK Department for International Trade, which recently issued guidance concerning the application of the Statute in the UK.

Special Considerations re Northern Ireland

Northern Ireland largely remains part of the EU export controls framework under the Northern Ireland Protocol (which implements various interim measures relating to imports and exports between Northern Ireland and the EU, and other border-related issues). As such, the pre-Brexit status quo remains in place with regard to dual-use exports between Northern Ireland and the EU (essentially, no licences are required in either direction, with the exception of Annex IV items).

Future Course of UK and EU Trade Controls

The UK's departure from the EU likely will have significant short- and long-term implications for both UK and EU sanctions. The UK now has freedom to implement sanctions in its discretion, without having to modulate its sanctions policy through the EU regulatory regime. That regime has been criticised in the past for its difficulty in implementing aggressive sanctions on a timely basis—sanctions measures at the EU level require unanimity among the various EU Member States, which can be difficult to achieve with regard to geopolitical issues (such as, for example, ongoing EU disputes with Russia and Turkey) where individual Member States hold substantially different positions. The "consensus" approach to EU sanctions has inevitably led to narrower EU sanctions programmes.

The UK has, as noted, already begun to implement unilateral sanctions, and it is expected that it will continue to do so. Nevertheless, it is likely that the UK and EU will coordinate on sanctions issues and seek to find common ground where possible. They will continue to share intelligence relevant to sanctions policy (such as information regarding potential sanctions targets) and cooperate in sanctions enforcement matters.

It is a more open question whether the UK will orient itself with other nations on sanctions matters, including in particular the United States. While it seems improbable that the UK will ever adopt aggressive, country-wide embargoes or "secondary" sanctions that are the hallmark of the U.S. sanctions regime, it is foreseeable that the UK will liaise more actively with the United States in sanctions-related matters in the future.

[9] We discuss the Blocking Statute in our alert at the following link.

With regard to export controls, it seems less likely that substantial differences in approach between the UK and EU will arise. The Dual Use Regulation is largely a product of international export controls frameworks—such as the Wassenaar Arrangement, the Nuclear Suppliers Group, the Chemical Weapons Convention, and the Australia Group—that the UK will continue to participate in. Nevertheless, European exporters should closely monitor developments in UK dual-use export controls, as it is possible that variations in the UK dual-use control list, definitions of key terms, or licensing policies could surface over time.

Our European trade controls team—which includes experts in both UK and EU export controls and economic sanctions law and policy—is well-placed to support clients in trade controls counselling, investigations, or enforcement matters. If you have questions concerning this client alert, please contact any the following members of our firm's European trade controls practice:

David Lorello	+44 20 7067 2012	dlorello@cov.com
Lisa Peets	+44 20 7067 2031	lpeets@cov.com
Thomas Reilly	+44 20 7067 2357	treilly@cov.com
Deirdre Lyons Le Croy	+44 20 7067 2058	dlyonslecroy@cov.com
Katharine Kinchlea	+44 20 7067 2303	kkinchlea@cov.com
Machteld van Egmond	+32 2 545 7528	mvanegmond@cov.com
Emanuel Ghebregergis	+49 69 768063 359	eghebregergis@cov.com