



## Export controls and sanctions: preparing for the impact of a no-deal Brexit

### Introduction

Following the recent third rejection of the Brexit withdrawal agreement in the UK Parliament, a no-deal Brexit remains firmly on the agenda. This alert sets out some of the main sanctions and export controls issues arising from a no-deal Brexit which are likely to impact upon companies operating in the UK and EU, and provides guidance on what companies can do to prepare for this eventuality.

### The status of EU law post no-deal Brexit

After a no-deal Brexit, the UK will be considered a 'third country' with respect to the EU. The European Union (Withdrawal) Act 2018, the central piece of Brexit legislation, provides that EU law would in effect be frozen at the date of the UK's exit from the EU, and would be incorporated into UK law. Changes to retained EU law would be decided by the UK Parliament over time, and passed as new UK legislation. Conversely, we note that in the event that a withdrawal agreement is passed substantially similar to that negotiated between the UK and EU, then the current EU export controls and sanctions rules would continue to apply during the relevant transitional period.

### Export controls

The UK becoming a third country from the EU would have a significant impact from an export controls perspective, and will require companies to take immediate action to ensure that their exports of goods, services and technology are licensed as appropriate. Companies should:

- Understand how exports from the UK into the EU and vice versa will be affected by new licensing requirements.
- Check whether exports of controlled items are currently made from the EU-27 under a licence granted by UK authorities, or from the UK under licence granted by EU-27 authorities.
- Consider establishing exporting entities in the UK for exports from the UK, and in the EU for exports from the EU.

UK legislation has been prepared to bring the changes into effect in the event of a no-deal Brexit. This includes the Trade etc. in Dual-Use Items and Firearms etc. (Amendment) (EU Exit) Regulations 2019<sup>[1]</sup> and the Export Control (Amendment) (EU Exit) Regulations 2019.<sup>[2]</sup>

### Control status of goods

In the immediate term, the UK would continue to apply the same product controls, through maintaining the UK Export Control Order 2008 and through incorporating EU Regulation 428/2009, which imposes controls on certain goods, software and technology which can have both civil and military applications (the "**Dual-Use Regulation**"), into UK law.

The UK will of course continue to participate in international regimes and arrangements which currently underpin EU export controls, such as the Wassenaar Arrangement - so it appears unlikely that there would be any major changes to the UK's export control lists after a no-deal Brexit.

Although progress has been slow, and the process has currently stalled, the European Commission

has proposed a range of measures to update the Dual-Use Regulation, including a new EU autonomous control category of cyber-surveillance items, and a new human rights end-use catch-all control. If these proposals pick up momentum under the new EU legislature, it is unclear whether the UK would seek to mirror such changes in its own export controls regime post-Brexit. However, the UK Government does have some concerns about the proposals - noting in its response to a recent report by the Committee on Arms Export Controls that, while the Government "[does] not disagree with the Commission's goals", there is a need "to ensure that all new controls are practical, implementable and clear".<sup>[3]</sup> As such, this is one area where EU and UK exports could materially diverge over time.

### **Export licence applications assessment criteria**

The UK would continue to assess export control licence applications against the Consolidated EU and National Arms Export Licensing Criteria.

### **Exports from the UK to EU**

Currently, the export of most items between EU countries does not require a licence (only certain record-keeping and paperwork requirements). Exceptions to this include military items, and particularly sensitive dual-use items listed in Annex IV of the Dual-Use Regulation, or exports from the UK to the EU-27 where the UK exporter knows that the items will be re-exported to outside the EU without further processing.

Once the UK becomes a third country from the EU, dual-use exports from the UK to the EU which would not previously have required a licence will now do so.

In order to ease the administrative burden on exporters, the UK Government has introduced an Open General Export Licence, covering the export of dual-use items from the UK to EU Member States (hereinafter referred to as the "EU-27 OGEL").<sup>[4]</sup> As an Open General Export Licence, the EU-27 OGEL is a pre-published document, which an exporter must register for online before using (via the Government's SPIRE licensing portal website<sup>[5]</sup>). In order to register via SPIRE, a company/individual must be resident or established in the UK, as well as having an entity incorporated in the UK. This requirement can be met through registering a branch with Companies House. There is some uncertainty as to whether simply having a UK VAT number may be sufficient to apply for a UK licence, or otherwise how exactly the entity applying for the licence needs to be established in the UK. Exporters can now register for the EU-27 OGEL (and are encouraged to do so), but the licence will only apply upon a no-deal Brexit.

The EU-27 OGEL permits export of all items in Annex I of the Dual-Use Regulation, other than the more sensitive items which are set out in Annex IV. These Annex IV items already require a licence for an export from one EU Member State to another, and therefore the position will not substantively change after a no-deal Brexit. The EU-27 OGEL also authorises exports of the same items to the Channel Islands.

The licence does not authorise export of items where there are certain WMD or military end-use concerns. Furthermore, the licence does not authorise exports where the exporter is aware that the final destination of the items is a third country outside the EU-27 and no processing or working is to be performed before the further export. However, this restriction is subject to a very helpful carve-out, authorising such exports if the "direct export to the final destination would be permitted under a retained general authorisation, an open general export licence, or an individual export licence granted by the Secretary of State to the exporter".

After an exporter has registered for the EU-27 OGEL, subject to the conditions in the licence (including in relation to export documentation and record keeping), it can be relied on without further authority.

### **Exports from the EU to the UK**

Corresponding with the above, exports from the EU to the UK which previously would not have required a licence will also be affected.

In order to address this disruption, the European Parliament and Council have voted to add the UK to the list of countries in Union General Export Authorisation No EU001 ("UGEA 001"), which facilitates exports of low-risk dual-use items from the EU to certain low risk jurisdictions (currently Australia, Canada, Japan, New Zealand, Norway, Switzerland (including Lichtenstein) and the US).<sup>[6]</sup>

Importantly, UGEA 001 permits exports of items listed in Annex I of the Dual-Use Regulation, but carves out the more sensitive items in Annex IV, and certain other specific items.

As a general rule, EU exporters relying on UGEA 001 must notify the competent authority of the Member State where they are established of their first use of licence, no later than 30 days after the date when the first export took place. However, some EU Member States may require pre-registration, and may impose other requirements.

Furthermore, notwithstanding the UK's addition to the list of countries in UGEA 001, the UK's position as a third country will mean that EU exporters must still consider military and WMD-related 'end-use' controls when exporting to the UK.

### **Exports from the UK/EU to the rest of the world**

At present, the UK benefits from a degree of flexibility in the EU export controls regime, whereby export licences issued by one Member State can be valid for exports from another Member State. After a no-deal Brexit, the UK would lose the benefit of this flexibility, and exporters will have to adjust as appropriate.

Existing UK export licences will no longer be valid for exports out of EU-27 Member States, and exporters will be required to obtain new licences from another Member State, as appropriate. Furthermore, exports from the UK which would previously have benefitted from a licence issued by another Member State will no longer do so.

The UK will also retain the existing EU General Export Authorisations in UK law (which will be referred to as "retained General Export Authorisations", or "rGEAs"). The rGEAs will apply only to exports from the UK. In addition to UGEA 001 (as discussed above), other EU General Export Authorisations which will be retained relate to the export of certain dual-use items to certain destinations (EU002); export after repair/replacement (EU003); temporary export for an exhibition or fair (EU004); telecommunications (EU005); and chemicals (EU006).

If a holder of an existing EU General Export Authorisation is registered to use the licence through the UK's licensing system, the UK Export Control Joint Unit has confirmed that there will be no need to re-register to use the corresponding rGEA after a no-deal Brexit, since existing registrations would be carried over.

However, if an EU GEA is not registered in the UK's licensing system, then it will no longer be valid in respect of exports from the UK, and a new rGEA must be applied for.

### **Military and trade controls**

The UK's controls on military items and trafficking and brokering (so-called 'trade controls') are implemented through the UK Export Control Order 2008, and do not derive from EU legislation (other than certain harmonised licensing provisions and the non-binding EU Common Military List). There would therefore be limited impact on the UK's military export and trade controls regimes in the event of a no-deal Brexit.

### **End-use controls**

The end-use 'catch all' controls relating to military and WMD end-use which currently derive from Article 4 of the Dual-Use Regulation would be retained in the UK, through the incorporation of the Dual-Use Regulation into UK law. However, as noted above, it is unclear whether the UK would later adopt any additional end-use controls which might (possibly) be agreed at EU level, such as the controversial proposals for an EU-wide human rights-related end use control.

### **Sanctions**

At present, the UK Government imposes sanctions (i) through being a member of the UN, (ii) through being a member of the EU, and (iii) on an autonomous basis (in more limited circumstances). However, the significant majority of the sanctions measures currently in force in the UK derive from the UK's membership of the EU, through EU Decisions and Regulations which currently have direct effect in the UK.

Upon a no-deal Brexit, sanctions legislation agreed at EU level will no longer automatically apply in the UK, and the UK will adopt and implement an autonomous sanctions regime (although the UK will continue to impose UN sanctions). While the impact of a no-deal Brexit may be less immediate from a sanctions compliance perspective than in respect of export controls (as discussed above), it will be crucial for companies to track the changes. Companies should:

- Monitor developments around the introduction of the UK regime so as to be ready when the changes come into place, including to the extent that the UK imposes sanctions restrictions which go beyond those agreed at EU level.
- Consider the impact of dealings in Russia and with Russian entities (or their subsidiaries) in particular, given the notable potential impacts in this area.

The primary legislation providing the legal framework for the UK's post-Brexit sanctions regime is the Sanctions and Anti-Money Laundering Act 2018 ("SAML 2018"). The UK has also commenced publication of statutory instruments for specific sanctions regimes post-Brexit, under the framework of SAML 2018. Major regimes for which UK sanctions legislation has already been published under SAML 2018 include Iran and Venezuela. However, statutory instruments have not yet been published for a number of jurisdictions. In cases where the new UK measures are not available as of the date of

leaving the EU, the UK will transfer existing EU sanctions regimes into UK law.

In addition to the transfer of EU sanctions regimes into UK law, the UK Foreign and Commonwealth Office ("FCO") has also stated that it is "conducting a thorough review of all existing EU sanctions designations" to assess whether the relevant evidential threshold in SAML 2018 is met. Where the FCO considers that EU designations do not meet the legal tests under SAML 2018, the designations will not be transferred.<sup>[7]</sup>

### UK sanctions policy post-Brexit

The UK has been a major force behind sanctions imposed at both EU and UN levels, and it appears likely that the UK will continue on broadly the same trajectory from a policy perspective.

It is unlikely that the UK will shift significantly away from the EU, for example towards a more comprehensive US-style approach. The UK recognises the benefits of a multilateral approach to sanctions, and is likely to continue to work closely with the UN and EU in relation to the imposition and enforcement of sanctions. While the FCO has emphasised the UK's "extensive coordination" with the US in respect of sanctions<sup>[8]</sup>, it appears unlikely that the UK will shift towards a full US-style approach.

However, there are a number of areas where the approach of the UK may diverge from that of the EU in important ways:

- **Sanctions against Russia:** The UK has not yet published a statutory instrument in respect of Russia, so it is unclear what the UK's autonomous regime will look like. Since the introduction of EU sanctions against Russia in 2014 (following Russia's annexation of Crimea and activity in Ukraine), the UK has been "at the forefront of efforts to maintain and strengthen the EU's sanctions against Russia"<sup>[9]</sup>, and has also played a leading role in developing the EU's chemical weapons sanctions regime, which was introduced in October 2018 following the Salisbury toxic nerve agent incident. However, there have nonetheless been criticisms of the UK's implementation of sanctions against Russia, including through the publication in May 2018 of "Moscow's Gold: Russian Corruption in the UK", a prominent report by the House of Commons Foreign Affairs Committee.<sup>[10]</sup> It is therefore possible that, absent the need for EU unanimity, the UK will adopt a more aggressive approach towards Russia post-Brexit.
- **Aggressive approach towards ownership and control:** In February 2019, the UK Office of Financial Sanctions Implementation ("OFSI") published a version of its general guidance which would take effect in the event of a no-deal scenario.<sup>[11]</sup> Amongst a number of important proposed changes in the guidance, OFSI intends to take a potentially more aggressive approach to assessment of when one entity is considered to be owned or controlled by another person. For example, the guidance includes a statement that the threshold will be met where it is "reasonable to expect that the person would be able to ensure the affairs of the entity are conducted in accordance with the person's wishes". Furthermore, OFSI also states that "the UK Government will look to designate owned or controlled entities/individuals in their own right where possible" - which is more aligned with the US approach than that of the EU.
- **Jurisdiction:** OFSI may seek to take a potentially broader approach in respect of establishing UK jurisdiction for sanctions purposes. OFSI's position is that clearing a transaction through the UK financial system creates UK jurisdiction for sanctions purposes, and it is likely that OFSI will maintain this stance following a no-deal Brexit. OFSI may potentially also take a more aggressive approach in respect of the activities of foreign subsidiaries of UK entities.
- **Licensing:** Under SAML 2018, the UK is likely to be more flexible in respect of sanctions licensing, as OFSI will not be restricted by the narrow licensing availability under EU sanctions legislation. However, it should be noted that any ability for UK licences to cover exports/provision of restricted services from EU Member States or the activities of EU Member State nationals (or vice versa) will likely fall away.

The UK will also incorporate the EU Blocking Regulation into UK law, and we are not aware of any indication that the UK Government will seek to amend or repeal this legislation.

### Russia sectoral sanctions post-Brexit

EU Regulation 833/2014 imposes sectoral sanctions against Russia, through restricting the ability of EU persons to deal in certain sectors of the Russian economy and with certain entities. The UK's departure from the EU and subsequent status as a third country will have a number of important implications for companies, including the points summarised below:

- Under Article 5 of the Regulation, EU persons are restricted from dealing in certain transferable securities/money market instruments of certain entities listed in Annexes of the Regulation, or otherwise providing new loans or credit with a maturity exceeding 30 days to these entities. These entities include the financial institutions Sberbank, VTB Bank, Gazprombank, Vnesheconombank (VEB), and Rosselkhozbank, as well as oil industry companies Rosneft, Gazpromneft and Transneft. Importantly, these prohibitions also apply to majority-owned subsidiaries established outside the EU, but do not apply to EU subsidiaries. Once the UK

becomes a third country from the EU, this EU exemption will cease to apply to subsidiaries of these entities established in the UK. The removal of this exemption is likely to have a significant impact on businesses.

- Under Article 5(3)(a) of the Regulation, there is an exemption to the prohibition on providing loans or credit with a maturity exceeding 30 days to any of the listed entities, where the financing is being provided for non-prohibited trade of goods either from the EU to a third country or vice versa (commonly referred to as the 'trade finance exemption'). Following a no-deal Brexit, financing in respect of exports from the UK or imports into the UK would no longer be covered by this exemption.
- In addition, where licences have been obtained under the Regulation for technical assistance and brokering services (such as in relation to oil and gas-related items as listed in Annex II of the Regulation), Member States' licensing authorities may take the position that a licence to an entity in that Member State will cover all EU nationals employed by that entity. However, in the event of a no-deal Brexit, this intra-EU legal basis would fall away, and licences issued in the UK would not cover the activities of nationals of EU-27 Member States (and vice versa).

## Conclusion

No-deal Brexit remains on the agenda, and poses significant disruption to companies from a sanctions and export controls perspective. Companies should be aware of and prepare for the changes resulting from the UK's shift in status from an EU Member State to a third country in respect of the EU.

[1] <http://www.legislation.gov.uk/ukdsi/2019/9780111182673/introduction>

[2] [http://www.legislation.gov.uk/ukxi/2019/137/pdfs/ukxi\\_20190137\\_en.pdf](http://www.legislation.gov.uk/ukxi/2019/137/pdfs/ukxi_20190137_en.pdf)

[3] <https://publications.parliament.uk/pa/cm201719/cmselect/cmquad/1789/1789.pdf>

[4] <https://www.gov.uk/government/publications/open-general-export-licence-export-of-dual-use-items-to-eu-member-states>

[5] <https://www.spire.trade.gov.uk/spire/fox/espire/LOGIN/login>

[6] The amendment was published in the Official Journal on 27 March 2019: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2019.085.01.0020.01.ENG&toc=OJ:L:2019:085:TOC>

[7] <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/global-britain-the-future-of-uk-sanctions-policy/written/94581.pdf>

[8] Ibid.

[9] Ibid.

[10] <https://publications.parliament.uk/pa/cm201719/cmselect/cmcaff/932/932.pdf>

[11] [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/775675/Post\\_EU\\_Exit\\_-\\_Financial\\_Sanctions\\_-\\_General\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775675/Post_EU_Exit_-_Financial_Sanctions_-_General_Guidance.pdf)

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