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UK SANCTIONS AGAINST RUSSIA PROVISION OF LEGAL SERVICES TO NON-UK PERSONS: AN ACTIVITY-FOCUSED PROHIBITION

The newly introduced UK sanctions against the provision of legal advisory services are surprisingly very different from the existing EU ban on legal services, in that they are not all-encompassing but rather activity-based and not restricted to services provided to Russian persons but instead apply to services provided to any non-UK person.¹ This latter difference makes the application of the UK prohibition more straightforward than the EU ban, which raises questions regarding non-Russian subsidiaries of Russian companies and Russian subsidiaries of EU entities. However, the discrepancies between the two regimes are bound to create difficulties for legal practitioners subject to both legal systems, and the UK's activity-based approach is likely to raise queries and issues in the application of the sanctions in practice, especially where licences may apply.

The Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023

On 29 June 2023, the UK introduced *The Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023*, which amended *The Russia (Sanctions) (EU Exit) Regulations 2019* and brought into force, from 30 June 2023, the ban on the provision of legal advisory services.

Pursuant to the new Regulation 54D, it is now prohibited to provide legal advisory services to non-UK persons, in relation to some specific activities which would be prohibited if they were taking place in the UK or carried out by a UK person.

The specific activities concerned are found in Regulations 11-18C of Part 3, Chapters 2-6 and Chapter 6B of Part 5 and Regulations 19 and 55. These include asset-freezes and financial sanctions, trade sanctions and circumvention provisions.

Some exceptions to the new legal services prohibition apply, namely:

- contentious work (the definition of legal advisory services excludes the representation, advice, preparation of documents or verification of documents undertaken as part of legal representation services provided in, or in anticipation of (i) any proceedings before administrative agencies, courts or other duly constituted official tribunals, or (ii) arbitral or mediation proceedings).
- legal services necessary for official purposes of diplomatic mission/consular post in Russia or for international organisations enjoying immunities under international law.
- legal advice regarding compliance with UK sanctions targeting Russia.
- pre-existing legal services contracts (until 29 September 2023 and subject to notification to the Secretary of State).

In addition to the above, the ban on legal services benefits from the same licensing exceptions as the activities in respect of which services are being provided. Therefore, if the underlying activity is permitted because it is authorised by a licence, the legal services provided with respect to this activity are also permitted.² It is also possible to apply for

¹ Regulation 54D *The Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023*.

² Discussed at an OFSI Seminar on the 18/07/23.

a licence to provide legal advisory services where a licensing ground would exist for the underlying activity if it was being performed by a UK person or within the UK.

UK vs EU legal services bans

As will be apparent from the above, the new UK prohibition on the provision of legal services is quite different from the EU prohibition, so that legal professionals who are subject to both jurisdictions cannot assume that compliance with one regime will automatically ensure compliance with the other. They will have to consider each regime fully and in light of the facts. Some key differences are identified below:

- The UK prohibition is focused on certain **activities** with respect to which legal services are provided, whereas the EU is focused on the **recipient** of these legal services. Indeed, the UK ban only applies with respect to certain activities, which are prohibited by UK sanctions if carried out in the UK or by a UK person, whereas the EU ban is all-encompassing (it applies with respect to any legal service provided, no matter the activity concerned).
- The EU ban is restricted to legal services provided to the government of Russia and companies established in Russia, whereas the UK ban applies to legal services provided to any non-UK person.
- The applicable exceptions are different. For example, under the UK regime, the definition of legal advisory services expressly excludes contentious work, whereas the express EU exceptions in this respect are much more limited. Only the legal services provided in connection with **legal** proceedings (arbitral proceedings are not included) and in which the **client is the Defendant** are expressly exempted, as well as legal services in connection with judicial, administrative or arbitral proceedings **in a Member State**, or the recognition or enforcement of a judgment or an arbitral award rendered in a Member State.³ The EU prohibitions are, however, subject to the general rights to exercise a right of defence in judicial proceedings, and to an effective legal remedy under Article 47 of the EU Charter of Fundamental Rights and Article 6 of the European Convention of Human Rights. Therefore, even though not expressly stated in the body of the Regulation, contentious matters may be permitted even if conducted outside of the EU⁴.
- The UK sanctions provide for a specific exception for the provision of sanctions advice, whereas the EU sanctions do not. The EU's reasoning is that Russian companies targeted by the prohibitions should not have to seek sanctions advice, as they would typically not be subject to EU sanctions (unless they carry out business within the EU).
- Lastly, as the UK sanctions on legal services are activity-based, a specific exception or licence that applies to a specific activity will also apply to the provision of legal services connected with that activity. There is no equivalent in the EU rules.

Application of licences to legal services

Some activities which are prohibited under UK sanctions may be permitted by general or specific licences. Insofar as the activity in relation to which the legal services are provided is permitted by a licence, the related legal services are also permitted.

However, some licences only apply to activities done in the UK or by a UK person. How these would apply to legal services provided in relation to the same activities, carried out outside the UK, by non-UK persons, is not clear.

Another issue is that some licences are subject to requirements such as registration or reporting, but non-UK persons, who are the recipients of the legal services, are not subject to the UK rules and thus need not register or comply with reporting obligations. In such circumstances, it is unclear whether legal services could be permitted despite the licensing requirements not being complied with by the non-UK person. Should the legal provider itself comply with the licence requirements on its own account in relation to the provision of the legal services?

This point could benefit from some guidance from the competent UK regulators.

In a recent webinar on 18 July, the UK Government indicated that a new general licence to authorise certain legal advisory services will soon be introduced. This may address the above issue or at least provide some useful guidance following the changes outlined above.

³ Council Regulation (EU) No 2022/1904 of 6 October 2022, [19].

⁴ The Swiss Parliament recently debated the Swiss equivalent of the EU prohibition on legal services outlined herein, raising the concern that the prohibition of the right to receive legal advice violates a fundamental right enshrined in the Swiss Constitution. The Federal Council is being asked to amend the Ukraine Regulation (SR 946.231.176.72), the issue being whether non-contentious advice should be protected, given contentious advice in proceedings remains permitted, as reported on 26 July 2023 in the Swiss *Neue Zürcher Zeitung* (NZZ).

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