Fountain Court

Quarterly Commercial Crime Newsletter:

COMMENTARY

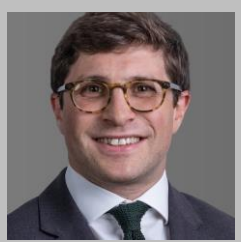
Sanctions, Asset Freezing & Legal Services: Navigating the UK Licensing Regime to Access Justice

DECEMBER 2022

AUTHORS

Robin Barclay KC
Silk Date: 2020
Read more

Robin Lööf
Call Date: 2009
Read more



Jacob Turner
Call Date: 2016
Read more

Background

One consequence of the conflict in Ukraine has been to require many lawyers, as well as other businesses, to engage with sanctions legislation for the first time. Instead of the usual role for legal professionals, of advising their clients as to legal rules and risks, in this instance many law firms and barristers have been required to consider their own position in order to avoid a sanctions breach. The exercise has been far from straightforward.[1]

The Basic Legal Framework

Until 31 December 2020 the UK's approach to financial sanctions was largely set at EU level. A new sanctions framework came into force from the beginning of 2021, under the Sanctions and Anti-Money Laundering Act 2018 ("**SAMLA**").[2] SAMLA domesticated the pre-exiting EU rules and designations but at the same time enabled the UK to create its own – potentially divergent – regime in the future. Specific sanctions regimes are created and often adapted by secondary legislation.

---

[1] The article is intended only as a high-level summary of the relevant principles under the UK sanctions regime and is not legal advice. The analysis and opinions set out in this article are those of the authors only.
[2] https://www.gov.uk/government/publications/sanctions-policy-after-31-december-2020/sanctions-policy-after-31-december-2020

There are two main categories of UK sanctions: thematic and geographic.[3] The former include for example, sanctions relating to chemical weapons,[4] global human rights,[5] and international counter-terrorism.[6] The latter relate to specific territories, in respect of which for various foreign policy or national security objectives, His Majesty's Government ("**HMG**") has decided to impose sanctions on individuals and entities. Under SAMLA HMG has a wide discretion to impose many types of sanctions, including trade and travel restrictions for designated goods and persons. The focus of this article is on financial sanctions, which freeze the assets of targeted persons and thereby severely restrict the ability of third parties to interact with them. This affects the financial services industry particularly hard, but financial sanctions are also the most likely to have an impact on the legal industry.

His Majesty's Treasury, and specifically the Office for Financial Sanctions Implementation ("**OFSI**") implements and enforces financial sanctions. OFSI is also tasked with seeking to ensure that sanctions legislation is properly understood, by providing public guidance.[7]

The Russia Sanctions Regime

UK sanctions relating to the Russian Federation are established under the Russia (Sanctions) (EU Exit) Regulations 2019 ("**Regulations**"). As with many other pieces of sanctions legislation made following Brexit, the Regulations were made under powers conferred on the Secretary of State under SAMLA.

Before February 2022, the ambit of the Regulations was reasonably limited. However, very shortly after the start of the large-scale military action on 24 February 2022, HMG (largely, though not entirely in coordination with the EU and the US) imposed financial sanctions on multiple individuals and businesses.[8]

Consistent with the shift in recent decades away from 'general' sanctions on an entire country, toward 'targeted' sanctions against specific individuals and entities thought to be associated with a particular regime or group, the parties sanctioned under the Regulations are individuals and entities. As of November 2022, more than 1,425 people and 118 entities had been sanctioned by the UK directly in connection with the Ukraine conflict.[9] The individuals sanctioned are said by the HMG to have a net worth of over £140 billiion. The individualised nature of these designations means that lawyers must consider carefully whether each existing and potential future client is subject to the sanctions regime.[10]

Acting for sanctioned individuals and entities

The asset freeze and legal services

Reg. 11 of the Regulations provides that where a "*designated person*" (i.e. one named on the relevant sanctions lists or owned or controlled by a named person, a

---

[3] https://www.gov.uk/government/collections/uk-sanctions-regimes-under-the-sanctions-act
[4] Chemical Weapons (Sanctions) (EU Exit) Regulations 2019.
[5] Global Human Rights Sanctions Regulations 2020.
[6] Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019.
[7] https://www.gov.uk/guidance/uk-sanctions.
[8] https://www.gov.uk/government/collections/uk-sanctions-following-russias-invasion-of-ukraine
[9] https://commonslibrary.parliament.uk/research-briefings/cbp-9481/
[10] In some circumstances, for example where a law firm would – absent sanctions – be required to transmit to or receive funds from a counterparty of their client (i.e. an opposing side in litigation), then it will be necessary to also consider whether that counterparty is subject to the sanctions regime. An example might be if the law firm has been holding funds in escrow, in respect of a property transaction, which are due to be paid to a counterparty. The remainder of this article uses the term 'client' to describe the party which may be subject to sanctions but it should be recalled that the same analysis might need to be applied to non-clients. It should also be noted that there are sanctions other than asset freezes, which may not be listed.

"**DP**") is subject to an asset freeze, a person must not deal with funds owned, held or controlled by a DP if the person knows, or has reasonable cause to suspect that they are dealing with such funds (reg.11(1)); and a person deals with funds if they use them or deal with them in any other way (reg. 11(4)). Regs. 12-15 of the Regulations provide that a person must not make available, directly or indirectly, funds and economic resources to or for the benefit of a DP, if the person knows, or has reasonable cause to suspect that they are making the funds or economic resources available to a DP.

The terms "*funds*" and "*economic resources*" are defined in SAMLA at s. 60. The definitions are very broad: "*(1) … "funds" means financial assets and benefits of every kind, including (but not limited to)— (a) cash, cheques, claims on money, drafts, money orders and other payment instruments; (b) deposits, balances on accounts, debts and debt obligations; … (e) credit, rights of set-off, guarantees, performance bonds and other financial commitments;…. (2) …"economic resources" means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services*." In a recent enforcement action illustrating the scope of this provision, OFSI interpreted "economic resources" to include publicity on the basis that it was intended to be used to increase sale revenues.[11]

Receiving payment from a DP in exchange for the provision of legal services is therefore prohibited by reg. 11 of the Regulations. OFSI guidance from August 2022 (the "**OFSI August Guidance**") states: "*In most cases, you can provide legal advice to or act for a designated person without an OFSI licence, however, you cannot receive any payment for that advice without first obtaining an OFSI licence*."[12]

Licence INT/2022/2252300 in respect of the provision of legal services to individuals designated under the Russia and Belarus sanctions regimes (the "**General Licence**"), which creates significant, and welcome, exceptions to the above regime.

In a blog post of 28 October 2022 accompanying the issue of the General Licence (the "**OFSI Blog Post**"), OFSI conceded that the General Licence had been issued because the previous regime had been difficult in practice to reconcile with OFSI's position of "*not prohibiting the provision of legal advice to a designated person under an asset freeze*", owing to the "*extraordinary number of new designations*" under the Regulations.

The General Licence is split into two parts: Part A, which addresses 'Legal Services Based on a Prior Obligation'; and Part B, which addresses 'Legal Services Not Based on a Prior Obligation'.[13] There are some material differences between the regimes.

Part A: Prior Obligation
Under Part A, payments may be received from, or made for or on behalf of, a DP if requirements are met which include the following:

a) The payment must be "*owed in accordance with an obligation which was entered into by the DP prior to the date of that DP's designation*" (Part A, para. 4). In a timely judgment of 4 November 2022, *VTB Commodities Trading DAC v JSC Antipinsky Refinery* [2022] EWHC 2795 (Comm) ("**Antipinksy Refinery**"), Mr Justice Foxton held at [33-34]: "*While matters are not as clear as they might be, the application of Part A would*

[11] OFSI Notice of Imposition of a Monetary Penalty against Hong Kong International Wine and Spirits Competition Ltd, 27 September 2022.
[12] OFSI August Guidance, p.33.
[13] The term 'Prior Obligation' is not defined explicitly in the General Licence. However, Part A para. 4 makes clear that the relevant payment (on the basis of a prior obligation) must be "owed in accordance with an obligation which was entered into by the DP prior to the date of that DP's designation", which matches the definition of prior obligations in the Regulations at sch. 5 para. 8.

appear to be determined by the date that the relevant engagement was entered into, rather than when the particular fee became payable… However, where a DP instructs new solicitors or counsel after designation, the professional fees of the new firm or counsel would not appear to fall within Part A."

b) The professional legal fees, together with any counsel's fees must not exceed £500,000 including VAT if applicable (Part A, para. 5) for the duration of the General Licence (i.e. until 28 April 2023).

As to the operation of the £500,000 cap, Part A para. 7 provides: *"If at any point either: 7.1. It is estimated that in any individual case the limits for the professional legal fees, Counsel's fees or Expenses set out above will be exceeded; or 7.2. In any individual case, the limits for the professional legal fees, Counsel's fees or Expenses set out above are in fact exceeded,* ***this licence will not apply to any further payment of any nature*** *in relation to the entirety of the Legal Services nor to any other act in relation to the provision of the Legal Services."* (emphasis supplied)

"Legal Services" is defined as meaning "*legal services provided to a DP, including legal advice and/or representation in court, whether provided within the UK or another jurisdiction, in relation to any matter*". The words "*in relation to any matter*" are somewhat ambiguous when viewed in isolation from the rest of the General Licence.

In *Antipinsky Refinery* Mr Justice Foxton held as follows at [31]: "*The application of the limits in cases in which the law firm or counsel undertake different, or separate but related, matters for the same client is unclear. The definition of Legal Services is 'legal services provided to a DP, including legal advice and/or representation, whether provided in the UK or another jurisdiction, in relation to any matter', with the definition of Legal Services feeding through to various provisions in the General Licence. However, the limits are expressed to apply to 'professional legal fees, together with any Counsel's fees … in total for the duration of the licence'. Certainly, work done pursuant to a single letter of engagement would appear to attract a single £500,000 limit*".

In our view, the better interpretation is that the £500,000 limit applies to each individual 'matter', as opposed to being a global cap on a DP's legal spending across all matters. As such, if a party is engaged in multiple simultaneous but separate pieces of litigation, arbitration and other matters on which legal advice is needed, then the £500,000 cap will apply separately to each.[14] Such a conclusion is supported by the references in Part A, para. 7 to the limits applying "*in any* ***individual*** *case*", as well as the OFSI Blog Post, which states: "*It's important to note that this cap applies to a designated person's total legal fees* ***per case*** *and the cap can be used separately by multiple legal firms involved in a case*" (emphasis added). We consider that the statement that "*the cap can be used separately by multiple legal firms involved in a case*" should be understood as meaning that each firm can separately charge up to the cap. This follows from the definition of "professional legal fees" as "fees charged by **a** legal advisor or **a** Law Firm for the provision of Legal Services" (our emphasis).

Part B: Legal Services not based on Prior Obligation

Under Part B, payments may be received from, or made for or on behalf of, a DP if requirements are met which include the following:

a) The professional legal fees, together with any counsel's fees must not exceed £500,000 including VAT if applicable in total for the duration of the General Licence (Part B, para. 4).

[14] We can envisage there being some difficulty in dividing between different matters (e.g. where the same events give rise to both litigation and parallel arbitration) but for present purposes are not aware that such issues arise.

One potential effect of Part B, para. 4 is that if the professional fees on a matter are anticipated in total to be (for example) £2 million, but less than £500,000 of that sum is expected to be incurred before 28 April 2023, then the General Licence can be used. However, as soon as that £500,000 cap hits, or the General Licence expires, paid work would need to cease;

b) Unlike prior obligations under Part A, the non-prior obligations under Part B are subject to additional fee rate caps for individual earners: for solicitors as set out in a table in Part B, para. 12 (with a top rate of £896 per hour), and for counsel at £1,500 per hour including VAT (Part B, paras. 7-8).

As to the operation of these fee rate caps, Part B para. 6 provides: *"If at any point either: 6.1. It is estimated that in any individual case the limits for the professional legal fees, Counsel's fees or Expenses set out above will be exceeded; or 6.2. In any individual case, the limits for professional legal fees, Counsel's fees or Expenses set out above are in fact exceeded, this licence will not apply to any further payment of any nature in relation to the entirety of the Legal Services nor to any other act in relation to the provision of the Legal Services."* Part B para. 9 provides: *"If at any point any one hourly rate, for either a Legal Adviser or Counsel exceeds the hourly rates set out in this licence, this licence will not apply to any further payment of any nature in relation to the entirety of the Legal Services nor to any other act in relation to the provision of the Legal Services."*

In *Antipinsky*, Mr Justice Foxton held as follows at [31] as to the £500,000 fee caps in Part A para. 7 and Part B para. 6: "*The effect of this provision would appear to be that in an 'individual case' in which it is anticipated the total of professional legal fees or counsel fees will exceed £500,000, or Expenses will exceed the Expenses limit, the General Licence will not apply at all (rather than simply not applying to any excess). The words 'any further payment' appear to be directed to payments after the point when it is estimated that the limits will be exceeded*."

On the basis of the above passage, the current law is that if the parties estimate at any time that professional legal fees or counsel fees will be in excess of £500,000 in fees (or £25,000 in expenses) before the end of April 2023, then the General Licence cannot be used at all. In our view, the better interpretation is that the effect of Part B para. 6 is that the £500,000 fee cap acts as a starting point for permitted fees in an individual case but once it is estimated that the cap will be exceeded (even if that is at the outset of the engagement), or is in fact exceeded, the General Licence does not permit "*any further payment*" in excess of the £500,000 cap. An interpretation to the contrary arguably undermines the primary purpose of Part B, namely to access justice by permitting the payment of professional legal fees, together with counsel's fees, on any individual case up to the level of £500,000. In any event, the General Licence is an improvement on the prior situation where a specific licence was always needed to be paid, access to justice notwithstanding.

Specific Licences

Although the General Licence will be a welcome development for many lawyers and DPs, there will clearly remain circumstances where it does not apply (for example where a matter's legal fees exceed £500,000 in the period of the General Licence) or where it would be inappropriate to use that licence (for example in some pieces of ongoing litigation it may not be feasible for lawyers to work up to a £500,000 cap and them immediately cease work – leaving the client unrepresented for the remainder of the litigation process, absent a stay).

Specific licences are issued by OFSI under reg. 64 of the Regulations and only for specified purposes set out in Part 1 of Schedule 5. These specified purposes include, so far as relevant: (i) prior

obligations of a DP, which arose before the date on which sanctions were imposed (Sch. 5 para. 8); and (ii) to enable to payment of reasonable professional fees for or expenses associated with legal services (Sch. 5 para. 3).

These grounds mirror Parts A and B of the General Licence: The 'prior obligations' ground for a licence can be invoked in respect of fees which were accrued by legal professionals before a sanctions decision, for which payment has not yet been made. The 'payment of reasonable professional fees for legal services' ground for a licence can be invoked in respect of fees to be incurred at any time after a sanctions designation.

OFSI retains discretion[15] to determine: (i) whether it is 'appropriate' to grant a specific licence at all; and (ii) if so, in respect of legal fees after a sanctions designation, to determine whether the legal fees sought are reasonable.
The fact that a client has agreed to pay such fees does not mean that they will be deemed 'reasonable'. To the contrary, the OFSI August Guidance provides: "*OFSI considers that the Supreme Court Cost Guides or the sums that could be expected to be recouped if costs were awarded, provide a useful starting point for assessing the reasonableness of legal fees and disbursements. If you are seeking fees of a level in excess of those, you need to demonstrate why those increased fees are reasonable in the given case.*"[16] The Supreme Court Cost Guides set various scales of rates for solicitors, based on factors including the geographic location of the fee earners. The highest rate (Band A, for London postcodes in 'The City') is £409 per hour.[17] As has been observed on many occasions, the rates typically charged by top fee earners at law firms across the UK is very often in excess of that figure – especially for high-value commercial matters.

In the circumstances, legal professionals should be aware that write-downs may well be applied by OFSI to fees accrued after a sanctions designation has been made. The OFSI August Guidance provides in this regard: "*In support of your application, you should: provide an estimate of the anticipated fees and/or fees that have already been incurred; provide a breakdown of how the fees will be charged and/or have been charged; and identify any disbursements, such as payments for counsel and/or expert witnesses*." It is possible that the fee rate caps applicable under Part B of the General Licence (which, it should be noted, are considerably more generous than the Supreme Court Costs Guidelines) may serve as a guide to OFSI's likely approach to specific licence requests.

The information required by OFSI in order to justify fees – both in terms of rates and with respect to specific items of expenditure – can be extremely granular. In recent months OFSI has responded to several law firms which have applied for licences in this regard by seeking further information as to the purported justification for particular expenses. In the context of complex litigation or other mandates, very careful thought will need to be given to the prospective costs budgeting exercise. Although OFSI has not specified any particular format for the presentation of such budgeting information, at least for adversarial matters it may be helpful to start with the 'Form Precedent H' used in costs management exercises under the CPR. Early indications from OFSI are that its assessment of 'reasonable' costs will be approached in a similar manner to a costs budgeting exercise.

---

[15] Albeit that such discretion – like all public law discretions – is not unbounded and may be subject to judicial review as well as the requirement under the Human Rights Act 1998 of interpretation which is compatible with the European Convention on Human Rights.
[16] OFSI August Guidance, p.33.
[17] https://www.supremecourt.uk/procedures/practice-direction-13.html

However, as regards legal fees incurred before a sanctions designation, legal professionals can apply under sch. 5 para. 8 rather than para. 3. Para. 8 allows for the satisfaction of prior obligations of a sanctioned person – crucially with no write down by OFSI for 'unreasonable' obligations. In the premises, it seems likely that the fees incurred before a sanctions designation can be insulated from the OFSI 'reasonableness' costs-taxing exercise described above.

Basis on which legal professionals can act for a sanctioned party absent a licence

Although it is uncontroversial that legal professionals must obtain a licence before they can receive payment from a sanctioned party, there is some debate as to whether a legal professional can provide legal services which are genuinely at risk pending a licence being granted (i.e. on the understanding the lawyer could only ever be paid if and to the extent that a licence is obtained).

OFSI have made clear that lawyers can act *pro bono* for sanctioned parties,[18] but lawyers will understandably be unwilling to maintain *pro bono* arrangements for any considerable amount of time. The question then arises: what can lawyers and sanctioned parties do to maintain the provision of legal services pending a licence decision from OFSI?

On any view, the fees for legal services rendered after a sanctions decision may be at risk for a number of reasons, including: (i) whether a licence will be granted at all (i.e. whether OFSI will deem it 'appropriate' pursuant to its general discretion under reg. 64(2)(a)); and (ii) if a licence is to be granted, when it will be granted, what level of legal fees will be allowed and what will be the starting date for such fees.

The risks in respect of (i) seem to be relatively low, at least in relation to litigation. OFSI is unlikely to refuse a licence for legal fees for representation in litigation or administrative proceedings outright given that it is basic principle of the rule of law in the UK that anyone and everyone should be entitled to obtain legal representation. Licensing for transactional activities are likely more at risk of outright refusals.

As to (ii), for some practitioners the lack of certainty over the timing of payment may present unacceptable risks in terms of cash flow, particularly for large mandates which have the possibility of using a major part of a firm or individual's resources over a long period of time. As to fee levels, there is no public data on the level of fees granted or reasons given for refusing fees. In any event each application will turn on its individual facts. As to the starting date for fees, there would seem to be relatively little risk that OFSI would refuse to licence fees incurred from the date on which a DP was sanctioned due to the reg. 64(1A)(b) providing that a licence may "*in particular*" authorise acts which would otherwise be prohibited for a particular period beginning with the date on which a DP was designated. All of these risks might be termed 'commercial risks', and whether or not to take them is essentially a financial question for practitioners based on their risk appetite.[19]

There is a further category of risk associated with acting for a sanctioned person: 'legal risks'. There is some disagreement among sanctions lawyers as to this latter type of risk. Unfortunately,

---

[18] See OFSI August Guidance, p.33: "*In most cases, you can provide legal advice to or act for a designated person without an OFSI licence, however, you cannot receive any payment for that advice without first obtaining an OFSI licence.*"

[19] In *R (Ezz) v HM Treasury* [2016] EWHC 1470, and [2017] EWCA Civ 2361 Cranston J rejected an application for judicial review of the reasonableness of OFSI in determining the rates of lawyers by reference to the Supreme Court Costs Office maximums. Permission to appeal was granted by the Court of Appeal but it appears that the case was resolved before the appeal was held.

the OFSI guidance on the matter is very unclear, and OFSI have declined to issue any kind of clarification.

One view is that provided that the fees for the legal services after a sanctions decision are genuinely 'at risk' then it is no breach of sanctions for such services to be provided for payment at some future point to be made if and only to the extent that a licence is granted.

Supporters of this view might point to a sentence in the OFSI August Guidance at p.33 which provides: "*You are strongly encouraged to apply for a licence in advance of providing substantive legal services in order for you to have certainty as to the fees that will be recoverable whilst the designated person remains listed*." In conjunction with reg. 64(1A) of the Regulations, this statement could be read as supporting the view that it is permissible for legal professionals to apply for a licence and then continue work whilst a licence is pending. However, it should be noted that the sentence in question does not say this explicitly. Indeed, another reading of the sentence is that a legal services provider should apply for a licence *and* then wait for such licence to be granted "*in order… to have certainty as to the fees that will be recoverable*".

Further support for the view that legal services may be provided 'on credit' pending a licence decision is provided in a judgment of Mr Justice Jack, sitting in the High Court, British Virgin Islands *AO Alfa-Bank v Kipford Ventures Ltd* BVIHC (COM) 2022/0007. In *Alfa-Bank* Mr Justice Jack considered directly the question of whether providing legal services on 'credit' was prohibited under regs. 11 to 15 of the Regulations. He concluded that the provision of legal services on credit was not prohibited, saying at para. 9: "*The provision of legal services and then billing for the services in the usual way does not amount in my judgment to the giving of credit within the meaning of section 60(1)(e) of SAMLA. As a matter of ordinary language, a provider of services who does work and then bills for it, is not advancing a credit to the client. This is so, whether or not the client subsequently pays for that work*."[20]

Other practitioners have expressed the view that the provision of legal services for which the payment is 'at risk' is prohibited.

In support of this more conservative view, the following factors tend to suggest that 'payment at risk' arrangements with sanctioned clients are impermissible: (i) The OFSI August Guidance on UK Financial Sanctions states as follows at s.6.4: "*Licences cannot be issued retrospectively. If you have carried out an act that required a licence, without having obtained one beforehand, you may have breached financial sanctions…*"; (ii) reg. 19 of the Regulations is 'anti-avoidance' provision: "*(1) A person must not intentionally participate in activities knowing that the object or effect of them is (whether directly or indirectly) — (a) to circumvent any of the prohibitions in regulations 11 to 18A, or (b) to enable or facilitate the contravention of any such prohibition. (2) A person who contravenes the prohibition in paragraph (1) commits an offence.*" On one interpretation, it might be said that an attempt to structure a lawyer's billing arrangements so as to allow for contingent fees to be incurred is an activity with the object or effect of circumventing the asset freeze.

Although the decision of Mr Justice Jack in

---

[20] It should be noted that the decision in *Alfa-Bank* was given in the context of (i) statutory rights to legal representation under the Constitution of the BVI; and (ii) an earlier decision of Mr Justice Jack in *VTB Bank v Taruta* [2022] ECSCJ No 85 in which Mr Justice Jack had refused a law firm's application for permission to come off the record of a client which had been sanctioned, and held that a legal practitioner acting on an existing retainer has a duty to apply for a licence. It is questionable whether either factor would apply in the UK Courts.

Alfa-Bank considered the same legislation as applies in the UK, it should be remembered that his decision is at most of merely persuasive value for UK courts. It might be argued, for example, that Mr Justice Jack fell into error in suggesting that an arrangement where a lawyer agrees to provide services conditional on a licence being granted, is not, as Mr Justice Jack seemed to suggest "*[t]he provision of legal services and then billing for the services in the usual way*", since there is no such conditionality in a usual billing arrangement. Moreover, it might be thought that providing any kind of deferred payment period (and especially an open-ended one pending the approval of OFSI of a licence) is well within the "*ordinary language*" meaning of the word "*credit*". That said, as the ordinary natural interpretation of reg. 64(1A) suggests clearly OFSI has the power to authorise acts which would otherwise be prohibited retrospectively under a licence, we think the conservative view unduly cautious.

Unsurprisingly, given the relatively short period of time which has elapsed between now and February 2022, there have been very few reported cases in which the question of how the Regulations apply to legal services have been considered.

The stakes are high for lawyers: unlike most circumstances where the downside risks of getting the answer 'wrong' are (short of negligence) largely on the client, in these sorts of sanctions exercises the risks are very much on the lawyers themselves – and a wrong answer could result in criminal penalties, fines, potentially a loss of insurance coverage, as well as professional regulatory consequences.

The issue is a very important one – both as a financial matter for the legal industry and for the rule of law in the UK. Indeed, the 'cab rank rule' for Barristers (set out in rules C26, C28 and C29 of the Bar Standards Board Code of Conduct) includes as follows, subject to limited exceptions: "*You must not withhold your services or permit your services to be withheld: (1) on the ground that the nature of the case is objectionable to you or to any section of the public; (2) on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to you or to any section of the public*;…".[21]

It should be remembered that it is not just the sanctioned persons who stand to suffer as a result of an inability to obtain legal services pending a licence being granted. In many cases, the sanctioned person will be the *defendant* in litigation. If a lack of a licence means that the sanctioned person is unable to obtain legal representation (especially in circumstances where it would be too late to obtain alternate representation – even assuming it was legal to do so), then any trial timetable may well be disrupted. Claimants in such cases might complain that 'justice delayed is justice denied'. Several major trials and applications due to commence in 2022 have been postponed for these reasons.

Conclusions

As OFSI appears to have recognised in the OFSI Blog Post explaining the purpose of the General Licence, the time it took to consider applications for specific licences was very important: the massive increase in the number of sanctions designations since the start of the war in Ukraine has led to a correspondingly massive increase in applications for licences from legal professionals with many licence applications pending for months.[22] It remains to be seen what difference the

[21] Bar Standards Board Code of Conduct, C28.

[22] In *Maroil Trading Inc and ors v Cally Shipholdins and ors* [2022] EWHC 1201 (Comm), Mr Justice Foxton accepted evidence that the delay as at around April 2022 was in the region of two months between a licence application and a decision from OFSI. Anecdotally, the time lag is now significantly greater and there is now likely to be a significant backlog of pending applications.

General Licence will make to such delays, but if the General Licence is at least partially successful in its objectives, it will reduce the administrative burden on OFSI, freeing OFSI to concentrate its resources on considering the remaining applications for specific licences in respect of matters where the legal fees will exceed £500,000.

At the same time as the partial liberalisation engendered by the General Licence, there may also be future moves in the UK and elsewhere to tighten restrictions on legal services. In an announcement of 10 October 2022, the UK Foreign Secretary James Cleverly MP announced the UK's intention to impose a ban on transactional legal advisory services for certain commercial activity.[23] That UK ban is (at the time of writing) yet to be brought into force.[24]

Any uncertainty as regards the ability to provide legal services in a lawful manner is unfortunate – for sanctioned parties who may be denied legal representation based on a misapprehension of the legislation, for claimants whose claims are delayed, for participants in the legal industry who may be faced with invidious dilemmas regarding whether to continue to act for clients pending a licence decision, and more widely in terms of the fundamental principle in the UK legal system that everyone should be entitled to representation.

The issue of the General Licence is a welcome development but difficult issues remain in cases where it cannot be used. Moreover, and as emphasised in *Antipinsky*, there are numerous areas of uncertainty arising from the wording of the General Licence which may militate against practitioners using it.

Further clarification from OFSI as to the parameters, and intentions behind, the GL would therefore be welcome. In the meantime lawyers will need to consider their position with great care.

---

[23] https://www.gov.uk/government/news/sanctions-in-response-to-putins-illegal-annexation-of-ukrainian-regions

[24] The EU has already acted; in a decision of 6 October 2022, the Council of the European Union supplemented Council Regulation (EU) No. 833/2014 by imposing a ban on the provision of certain services to organisations established in Russia, including transactional legal services.

ABOUT THE AUTHORS

Robin Barclay KC

Silk Date: 2020

Robin is a leading commercial Silk well-known for working on high-stake disputes and investigations involving significant corporate clients, senior professionals and high net worth individuals. He is one of the handful of silks appointed in both civil and criminal law, and his caseload features numerous matters crossing commercial, criminal and regulatory law. Robin is described by *The Legal 500* as having "A class act with the brain of a commercial silk and the court-craft of a criminal one."

Robin Lööf

Call Date: 2009

Robin is an experienced junior specialising in commercial crime and financial regulation. He primarily acts for companies and individuals facing criminal and/or regulatory investigations, particularly in relation to corruption, money laundering, sanctions violations, and market manipulation. Robin started his career at the criminal bar and then joined Debevoise & Plimpton's White Collar & Regulatory Defence Group. Clients have described Robin as "excellent", "extremely hard-working and clever", "diligent", and "a safe (and smooth) pair of hands."

Jacob Turner

Call Date: 2016

Jacob has advised individuals, corporates and sovereigns in a variety of commercial matters involving both litigation, arbitration and issues arising from the UK sanctions regime. He has acted as sole counsel in the High Court, an LCIA Arbitration and the Court of Appeal. He is described by *The Legal 500* as "an outstanding junior barrister. Extremely engaged, responsive and hard-working. Turns round work very quickly and always to a very high standard."