

Themes and variations: the growth of non-geographically targeted sanctions and ensuing consequences



The use of thematic or 'smart' sanctions has been steadily growing in recent years, and while they have numerous advantages over the traditional 'country-based' sanctions regimes, they present a number of challenges of their own, both for policymakers, and the private sector, as **Ian Bolton** explores.

The term 'thematic sanctions', i.e., sanctions intended to address a non-geographically-specific issue, such as human rights, or corruption, has entered the compliance parlance with increasing frequency in the last few years. They are not a new tool, having been used against drug traffickers and Islamic terrorism in the 1990s. But their use has taken off exponentially, arguably since the adoption, ten years ago, of the Magnitsky Act by the US government, and the move away from traditional country-based sanctions now represents a global trend.

In theory, such tools mean that the countries using them can respond quickly and flexibly to fast-changing developments. As Ross Denton of law firm Ashurst told *FISC*, 'Thematic sanctions are very much in vogue, with the EU, UK and US tailoring "classic" sanctions to specific types of negative behaviour,' but there may be limits to their use and even drawbacks.

What are thematic sanctions?

Unlike traditional, country-based sanctions, thematic sanctions are targeted at issues which can be transnational in nature and by their use, and governments can create an umbrella architecture which allows for the designation of individuals and entities from around the world. This means, as Ross Denton points out, they can be designed to, '[A]llow regulators to deal with the bad activities and actors

that are beyond "traditional" rules. As an example, the UK Bribery Act has a clear jurisdictional basis, and the **Global Anti-Corruption Sanctions Regulations** allows the UK to act against certain persons and activities that lie outside that jurisdictional basis.'

When it comes to the specific measures found under a thematic regime, these tend to be focused on asset freezes and travel bans.

Current thematic sanctions regimes include, in the United States those aimed at human rights abuses and anti-corruption under the Global Magnitsky Act ('GLOMAG'); and those addressing terrorism; narcotics (including the trafficking of); transnational criminal organisations; cyber activities; and the sale of conflict diamonds.

The UK has adopted Magnitsky-style sanctions, and regimes addressing global anti-corruption, chemical weapons, terrorism, and cyber activities. EU regimes include global human rights abuses (Magnitsky-style sanctions), terrorism, chemical weapons and cyber activities. Meanwhile, Canada has had a 'Magnitsky-style' human rights abuse regime on its statute books since October 2018.¹ This act also covers anti-corruption.

Australia is the most recent country to adopt its first thematic sanctions regime, passing an amendment on 2 December 2021 to the

Australian Autonomous Sanctions Act (2011) which allows for the creation of thematic sanctions regimes, including the adoption of a 'Magnitsky-style' human rights abuse regime.

Pros and cons

There are a number of advantages of using such thematic sanctions, foremost of which is the targeted manner of the measures. This can be brought to life in the following: The UK government does not wish to place anti-corruption sanctions on South Africa, despite corruption being widespread in the country and the former president Jacob Zuma being on trial facing bribery allegations.² Instead, following the adoption on 26 April 2021 of the **Global Anti-Corruption Sanctions Regulations**, the UK listed the renowned Gupta brothers, who have significant interests in South Africa and were residents there until 2016, under this regime.³ In doing so the UK was able to avoid creating tensions with South Africa whilst still taking steps to address the issue. Using such targeted measures also decreases the risks of unintended consequences as a result of sanctions.

Such tools also allow for swift and agile responses that only last for as long as they need to. Robyn Brown, of UK law firm Eversheds Sutherland has written, 'Sanctions authorities have recognised the increased flexibility which purpose or issue-based sanctions regimes

provide.'⁴ This flexibility means amongst other benefits, authorities can add and remove listings simply and quickly, even though they may cut across a range of actors, in turn potentially based in numerous countries.

The possibility of a quick response has obvious advantages, including the prevention of asset-flight, and immediacy of impact. The flip side is that while the measures may target the 'bad actors', they leave activities such as exporting untouched, leaving the possibility that, say, a number of individuals responsible for violent suppression of peaceful demonstrations, are placed under travel bans and asset freezes, but the country in which the conflict is occurring continues to receive equipment used to oppressive ends.

But perhaps the biggest drawback to their use is that it becomes more difficult to argue that sanctions are not being used punitively. For example, under the accepted understanding that sanctions are used as a means of changing behaviour, it could be argued that the individuals who were sanctioned for their involvement in the chemical weapons attack on Sergei and Yulia Skripal in Salisbury, should by rights have the designation lifted because they are no longer involved in that activity.

If they remain sanctioned, it suggests the creation of a new norm – the use of thematic sanctions as a punishment, which in turn



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raises further questions around the legality of applying sanctions. After all, the targets of the designation have not been tried and found guilty by a jury or in a court room.

Further, in what circumstances would a thematic sanctions regime be lifted in its entirety? Given that, for example, terrorism is unlikely to ever be condoned, a thematic regime under which related acts are sanctioned is commensurately unlikely to ever be lifted. Whilst the targets under the regime may change, the fact that the regime itself will not be lifted is potentially problematic. Sanctions are not in themselves meant to be a permanent feature, and are not designed for longevity, nor will the use of sanctions alone tackle the root cause of the issues being targeted. The only way a thematic regime could be lifted is if the activity it corresponds to ceased in its entirety. If we accept thematic regimes are unlikely to be lifted this then raises a further question and potential drawback around how thematic sanctions regimes should be reviewed and kept current.

By contrast, country-based sanctions regimes are designed to be relatively timebound, and linked to a change in behaviour. This means that in principle, every country-based sanctions regime could be lifted.

Indeed, an integral aspect of the design and use of 'smart sanctions' regimes



is establishing the criteria by which the sanctions would be lifted. Richard Nephew, writing in the Art of Sanctions, says that sanctions are most effective when there is a clear objective which, once achieved, triggers the lifting of the sanctions. In non-country-based regimes, this concept is lost. Ergo, new standards for review and assessment need to be explored. Given the well documented difficulties in assessing the effectiveness of sanctions, it is hard to imagine that reviewing a thematic sanctions regime will be any easier.

What this means for businesses

On the surface, the trend towards thematic sanctions is not expected to have a huge compliance impact, given that, as Ross Denton says, they involve 'a series of additions to lists of bad actors', and that global screening service providers, will 'simply add these new names to new lists and they will be scooped up into regular due diligence processes'. Given that they are typically limited to asset freezes and travel bans, business should not unduly feel the burden. Horizon scanning, on the other hand, is made more

difficult, given that while the 'theme' of the sanctions may be clear, potential targets, being myriad, are also unpredictable.

Yet, while screening lists should 'catch' most potential transactions, businesses must be conscious of interactions with entities which may be 'owned' or 'controlled' by a designated person but who are not designated in their own right. But such regimes do affect the way companies carry out horizon scanning, and, in turn, how this is managed. Typically, when a country-based sanctions regime is being developed there will be a number of advance indicators as to potential targets, but regimes such as GLOMAG, et al, are already in existence and so using them to respond to an issue means literally just adding names to the designation lists, therefore there is little ability to horizon scan.

The current case of Kazakhstan allows us to get to the heart of the matter. Prior to the current unrest, most companies with a business interest in the country would regard it as having low sanctions risk. No sanctions have been imposed against Kazakh targets, and its government has been

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working hard to build a stronger relationship with the West, whilst maintaining close contacts with neighbours and former Soviet Union states, including Russia.

But the recent unrest, on the back of surging fuel prices and cost of living, and the resulting crackdown, would cause companies to review their exposure and look to understand the potential fallout. This should include understanding the potential for sanctions against those responsible for human rights abuses, government officials and their supporters.

Were a Western government or the European Union intending to create a Kazakhstan-specific sanctions regime there will likely be an indication in the press, followed by preparation of the necessary legal documents, before it became law, and there would be a period in which private sector actors (whether FIs, mining, or energy companies) could consider the risks and take steps to mitigate against them.

By contrast, a thematic sanctions regime, e.g., a ‘Magnitsky-style’ law, means that, provided there is sufficient evidence to do so, individuals can be quickly designated, preventing asset flight on the one hand, but also reducing businesses’ ability to take stock of developments. Almost overnight a company with business interests in Kazakhstan may now find itself having to manage significant sanctions risk.

Screening may prevent actual sanctions breaches, but will be of little help in managing sanctions risk, appetite, or exposure. Horizon scanning should focus on identifying potential risks long before they become actual risks. For



example, banks should seek to identify and understand who amongst their customers may be in position that could expose them to a risk of being a sanctions target. In this way, using both negative news screening and politically exposed persons (‘PEP’) screening, as well as potentially having dedicated policies for managing PEPs, may help mitigate risk. But it is also important that customer reviews are undertaken routinely, and where appropriate, supply chains fully understood from a sanctions risk perspective.

Businesses need also to understand that, because these sanctions regimes are global in nature, a country-based risk compliance model is of only limited value. A company could not, e.g., rely on a statement that says that a partner does not do business with sanctioned countries.

The future

During the COP26 climate change negotiations in

autumn 2021, the issue as to whether sanctions could be used as part of efforts on climate change was broached by a number of commentators and experts. In theory, a climate change sanctions regime, targeting individuals and entities responsible for illegal logging, destruction of rainforests, illegal fishing practices and mining/processing dirty fuel, etc, is feasible.

Governments have also discussed the possibility of sanctions targeting illegal migration and people smuggling networks. Arguably, there is a case for sanctions regime against the illegal wildlife trade, which could tackle poachers, wet markets and smuggling rings. It would not be hard to come up with other contenders.

But, how effective would such regimes be, compared with country-based sanctions? And how could their application be meaningfully reviewed? These, perhaps are questions for the not-too-distant future. [🔗](#)

Links and notes

¹ <https://laws-lois.justice.gc.ca/eng/acts/J-2.3/page-1.html>

² <https://www.bbc.co.uk/news/world-africa-57758540>

³ <https://www.gov.uk/government/speeches/global-anti-corruption-sanctions-regime-foreign-secretarys-statement-to-parliament-april-2021>

⁴ <https://www.ukfinance.org.uk/news-and-insight/blogs/thematic-sanctions-what-do-they-mean-sanctions-compliance>