

A gulf in understanding? Bridging the sanctions policy gap between industry and government



Typically, government sanctions agencies and the organisations they regulate maintain an adversarial relationship, each shying from sharing too much with the other, despite government efforts at outreach. In this article, Ian Bolton – who has the benefit of having worked both in the UK Foreign and Commonwealth Office, and at HSBC, on high-level sanctions matters, explores the problem through a UK-centric prism and suggests that better models of engagement will yield improved compliance and policy objectives.

The world of sanctions, as many readers will recognise, is becoming ever more complex, and there is growing divergence between many countries that play a leading role on sanctions – just look at different timings and content of sanctions on Belarus in 2020.¹ Given this, it is not surprising that the private sector is finding it increasingly difficult to safely navigate sanctions whilst doing business and seeking new opportunities. Compliance policies and teams are becoming a must-have for businesses that operate globally and/or source goods/services internationally. It is also not sufficient as a business to think solely as to where you source things from, but you must also consider the journey goods will go on. As sanctions become more complex, and operating within what is allowed by sanctions becomes more difficult, it is increasingly possible to question the effectiveness and implementation of such sanctions.

Sanctions are used by governments around the world and international organisations, such as the United Nations and European Union, as a foreign policy tool to effect behavioural change on those subjected to them.² Typically, they're used to signal, coerce, and constrain, to achieve a stated aim,³ such as EU sanctions on Venezuela putting pressure on the Venezuelan government to respect the rule of law, democracy, and human rights.⁴ Sanctions are often seen as the last diplomatic tool before potential armed intervention.

Given this, their effectiveness and implementation are vitally



important. However, in the majority of cases, it falls to the private sector to implement them and operate within what is allowed. Governments tend to then focus on the enforcement of sanctions and taking action on those breaching them. As a result, one would assume that governments work closely with the private sectors affected by sanctions to yield the best results for all concerned, however, this is commonly not the case.

Experiences vary from country to country, and with the specific sanctions measures under consideration, including relevant parties and industries, but there is a perceived 'them-and-us' culture between governments and the private sector, which can cause a gap in understanding, implementation, and enforcement.

This gap is not new: the 2015 article 'Sanctions that Sting', in the *Yale Journal on*

Regulation, stated that the US Office of Foreign Asset Control ('OFAC') had been at odds with those it regulates for a number of years.⁵ However, as the use of sanctions grows and becomes more complicated, it is becoming more marked and raising difficult questions for private sector organisations that are fully desirous of adhering to the regulations in force.

Why the gaps?

There are a number of reasons for the growing gap between the private sector and government. Critical amongst these are:

- the way in which governments interact with the private sector on sanctions implementation;
- the complications that often accompany sanctions in terms of how the laws are written and then interpreted; and finally
- the complex nature of international trade.

Looking at the financial sector in the UK as a particular example, the perceived 'them-and-us' viewpoint is especially true, where the relationship between the Office of Financial Sanctions Implementation ('OFSI') and the financial institutions it regulates, has, historically, appeared to many to be adversarial in nature. This hints at a mindset within OFSI of the sector needing to be kept in line, whilst within the industry itself, there is a feeling that approaching OFSI with queries should be a last resort. OFSI is right that a key component of its role within the UK government architecture is to enforce financial sanctions and take action against those breaching sanctions. However, in my experience, this means OFSI sees itself as a gatekeeper or shepherd, whilst the financial institutions are seen as wolves at the door. This impacts the

relationship that OFSI has with the financial institutions and vice versa.

Due in part to a lack of funding and resourcing, the opportunity for OFSI to engage with the industry it regulates is often limited, and it is slow to respond to queries. If and when it does respond, often it will avoid answering queries, or caveat its responses by saying that it is not offering legal advice, and therefore the opinions expressed should not be relied on. This means that often those working on sanctions within the financial sector, who have legitimate queries about complicated sanctions issues, do not raise these with the regulators/OFSI as there is limited value in doing so. This can lead to financial institutions later having to report breaches, which could have been avoided.

Indeed, where opportunities do exist, such as the monthly UK Finance⁶ Sanctions Panel, in my experience the engagement of Her Majesty's Government ('HMG') is reluctant, despite always attending, and often negative. I can remember from my own time in the UK Foreign Office that when the meetings would come around, the prospect of attending was greeted with grim resignation and lack of will to participate. And yet this should represent a leading example of how to bridge the gap between the private sector and governments.

Where there is a lack of open advice and engagement between a government department and the private sector it interacts with, this can often lead the private sector to feel that it is on its own, when it comes to interpreting complex sanctions laws and issues. This can include issues identifying ownership structures masked either by a lack of information or intentionally, for example the difficulties often raised around establishing ownership when considering if a company is caught by the US or EU 50% ownership rules.

In the UK, a recent example, which is still causing issues, is the ownership structure of the hotels that are listed as belonging to the UK-designated Libyan entity the Libyan Arab

African Investment Company ('LAAICO'). Due to a lack of information, it is very difficult to establish the full extent of the hotels owned by LAAICO and therefore which hotels may be subject to sanctions. OFSI tried in December 2019 to provide some clarity on this issue for the private sector in a blog,⁷ but this did little to clear up which hotels are considered designated and which are not. It has led to

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confusion within the financial sector as to what interactions customers can have with these hotels, and in fact many of the possible LAAICO-owned hotels can still be booked online.

Where sanctions originate from international bodies, often the complications seen in sanctions regulations can be further complicated by how different countries adopt these sanctions, interpret them and then subsequently implement and enforce them.

Within the UK government, as with other governments, there is often a lack of understanding of the ways in which the private sector operates. In particular, many in the UK government do not understand how financial institutions operate, the obligations that fall on them as a whole, rather than just within the sanctions domain, and the differing risk appetites institutions can have.

Commonly this leads to issues such as British diplomats not understanding why a UK bank may not want to support a British business working

in a particular environment. The clearest example of where expectations did not meet with the realities the industry face was in the wake of the successful completion of the Iran nuclear agreement, the Joint Comprehensive Plan of Action.

Following this, across 2015 and 2016 a number of engagement events were organised by the UK's Foreign Office to encourage the financial sector to re-engage with Iran. This included in May 2016 an address to British and European banks by then-US Secretary of State John Kerry, to encourage them to re-engage with Iran.⁸ I remember well the disappointment of many of us in the Foreign Office at the reluctance of the UK banks, and yet this highlights the lack of understanding of what banks re-engaging would face. Aside from changing government administrations taking different views on Iran activity, for banks engagement in a potentially risky market brings with it greater compliance requirements, staffing, and costs. All without a guarantee that the likes of OFSI or OFAC wouldn't punish banks for missteps when re-engaging.

The role of the private sector

It is not a one-sided issue, however, and the private sector must also seek to address a number of areas that reinforce the gap between the private sector and governments. Often the private sector does not want to engage with government departments on compliance-related issues due to some of the issues outlined above, which means that firms self-censor their work with governments and don't ask for the advice they need. It is also impossible to overlook the fact that even in largely compliant companies there can be a history of bad actors, which impacts the way governments will interact with different industries. For example, in 2012 when OFAC fined Standard Chartered for sanctions violations including with regards to Iran, it was in part due to a number of bad actors within the bank, rather than the bank as a whole.⁹ However, this not only damages the reputation of a bank being

found guilty and often results in large fines, but also destroys trust between governments and the private sector.

Trust can be rebuilt between firms that have previously violated sanctions and governments through ongoing improvements to compliance controls, a lack of further violations, and honest co-operation. In many ways the use of monitors by the US, as an example, presents an opportunity to rebuild this trust, despite this not being the primary role of the monitors. Therefore, there is an onus on private sector organisations being more open about activity and more inclined to seek government assistance before a violation occurs. One example of good practice lies, arguably, in the engagement carried out by US federal agents of the Office of Export Enforcement ('OEE'), the enforcement arm of the Bureau of Industry and Security, which is tasked with US export controls in a number of areas. Often OEE agents will visit firms where an export may have been attempted that contravenes export controls, to explain the issues, ensure future compliance with export controls and sanctions, and work with the organisation's compliance teams to prevent future violations, rather than default to prosecution.

Furthermore, industries can do more to engage with governments in a way that helps to educate government workers and enforcement agents in the nuances of their industries. In doing so, opportunities are presented to help governments understand the potentially complex nature of a sector's work, the compliance steps involved, and the costs. Whilst in the UK Foreign Office, I was invited to a one-day workshop by HSBC for HMG sanctions workers, which focused on HSBC's sanctions compliance structures, policies and practices. The event also looked at a number of practical case studies. Such events are rare but everyone who attended from HMG and HSBC came away having learnt something, and it was a fantastic opportunity to network, encouraging a two-way flow of communication.

Current joint working

Having looked cursorily at the causes of the gaps between the private sector and governments, it is important to examine some of the ways government and the private sector already work together.

A number of bodies in different jurisdictions around the world exist with the aim to bring together governments and the private sectors operating in their jurisdictions for engagement and co-operation on sanctions-related topics. In the UK, the government routinely looks to engage with the private sector through a range of specific industry events, and events on particular topics. Some of this engagement is formal and used to elicit specific industry responses on topics, such as the White Papers and the event organised by the UK government to facilitate understanding of the Sanctions and Anti-Money Laundering Act (2018) in 2017 and 2018.

Some of the engagement is less formal, such as Her Majesty's Treasury's ongoing engagement on proliferation finance, being facilitated in part by the Association of Certified Anti-Money Laundering Specialists. In this way, governments working with the private sector on particular topics, whether as part of sanctions framework or addressing other related issues, show good examples of how more can be achieved together. In Singapore, the Monetary Authority of Singapore has worked with financial institutions on proliferation finance, and the guidance they have issued.¹⁰

One of the more formal engagements in the UK is the aforementioned monthly UK Finance Sanctions Panel. Whilst this should be a great example of close working across the gap between the private sector and government, this is not the reality. In fact, often the financial sector can come away from these events more frustrated, such as the recent example from late 2020, where the UK government confirmed that there would be changes to the UK's designated lists at the end of the Brexit transition

period, but would not confirm what these changes would be prior to them going live. Whilst in many ways this is understandable, there seems to have been little creative thinking as to how the impact on business could be lessened, understanding of what this would mean for business, or exploration of potential ways around the classified and sensitive nature of such information.

Governments around the world often attend sanctions-related conference and speaking events where they present and

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possibly engage with the private sector. Unfortunately, often the government representative will only be present for their sessions, and/or can be perceived to not really want to engage openly on topics and debate issues. This limits the impact of such engagements, although they are always useful, but their impact could be significantly greater with a little adjustment. In fact, despite OFSI's engagement at many such events¹¹ including the monthly UK Finance Sanctions Panel and other ad-hoc engagement, the UK Parliament's Foreign Affairs Committee, as part of a 2019 report on the future of UK sanctions, specifically stated that a review should be completed as a matter of urgency to address 'how OFSI can improve its engagement with the private sector bodies on the front line of sanctions implementation.'¹²

Despite this, elsewhere in the UK government system,

some departments undertake very much more constructive industry engagement. For example, the Department for International Trade and Her Majesty's Revenue and Customs conduct on-site visits and inspections of companies. Whilst some visits are as part of ongoing investigations into potential sanctions violations, other visits form part of an ongoing dialogue and engagement to assist companies to understand their compliance obligations and how these can be met. This type of engagement has been highlighted by sections of the private sector, government and the UK parliament as something that can work well. This is not unique to the UK, and many governments around the world carry out similar visits. In carrying out such visits, governments have the ability to increase the private sector's understanding of sanctions issues, and the private sector should seize the opportunity to increase trust and openness with governments.

As well as engagement events, governments often issue guidance and advice publicly on particular sanctions-related topics to help with implementation and compliance. Unfortunately, such guidance can vary in value from topic to topic, by jurisdiction, and even which government department is issuing it. Sometimes this may be because a government department is worried about putting too much information into the public domain, and this then getting into the 'wrong' hands.

The reality is those wishing to circumvent sanctions will rarely rely on this type of information, and are likely already aware of how to do it. Therefore, the impact is on those wanting to understand how to be effective in compliance. A good example of the differing approaches can be seen in the OFAC guidance on maritime sanctions published 14 May 2020.¹³ This guidance was detailed, considered and clear, and followed significant engagement across the world by the US government with industry, academics and think tanks. OFSI tried to replicate this guidance for the UK

system,¹⁴ but the feeling of many in the maritime industry was that it did not reach the same level of detail, lacked the same clarity and was therefore less useful. That said, it should be seen as a start and broadly a success, especially when compared to guidance issued previously, and an example of the way forward for how OFSI and industry can work together.

Two other areas where governments and the private sector can be seen to work together are joint working groups and formal joint taskforces. On these areas the UK system excels. When the UK government recognised a difficulty in humanitarian aid getting to countries heavily targeted by international sanctions, they brought together the relevant UK government departments, with the financial services industry and the charity sector to work together in exploring solutions and creating dialogue. This has now been formalised in the Tri-Sector humanitarian working group, which meets quarterly and has a number of sub-groups.¹⁵ This has been recognised by a number of other governments and multilateral organisations such as the World Bank and the EU Commission as a ground-breaking enterprise.

Another example of bridging the gap does not apply specifically to sanctions, but rather to tackling money laundering and countering terrorist financing in the UK, with the Joint Money Laundering Intelligence Taskforce ('JMLIT'). The JMLIT brings together five UK law enforcement agencies, the Financial Conduct Authority, Cifas and over 40 financial institutions, with the aim of sharing, analysing and acting on information, both sensitive and non-sensitive, relating to money laundering and terrorist financing.¹⁶

It allows the government and financial sector in the UK to work together on sensitive issues at speed and in a rapidly changing environment.¹⁷ An example of JMLIT's successes is the response to the 2017 terrorist attacks on the Houses of Parliament and London Bridge. In both cases,

LINKS AND NOTES

- ¹ Emil Dall, 'Brexit has enabled us to act more swiftly on sanctions' | Comment | *The Times*
- ² Richard Nephew, 'The Art of Sanctions: A view from the Field' (Columbia University Press, 2018), pp.1-2.
- ³ Thomas J. Biersteker, Sue E. Eckert, and Marcos Tourinho, 'Thinking about United Nations Targeted Sanctions' in *Targeted Sanctions*, eds. Thomas J. Biersteker, Sue E. Eckert, and Marcos Tourinho (Cambridge University Press, 2016), p.21.
- ⁴ EUR-Lex – 32017R2063 – EN – EUR-Lex (europa.eu)
- ⁵ Marguerite Colson & Eric Van Nostrand, 'Sanctions that sting: Private Sector Solutions to the Paper Tiger Problem', *Yale Journal on Regulation*, Vol. 32, 2015, p.572.
- ⁶ UK Finance is the UK financial sectors representational body, which brings together and acts on behalf of financial institutions in the UK, often working with the UK government on issues.
- ⁷ Am I dealing with a sanctioned entity? – OFSI (blog.gov.uk)
- ⁸ Kerry to discuss Iran with European banks in London – banking source | Reuters
- ⁹ Standard Chartered CMP (federalreserve.gov), 10 December 2012.
- ¹⁰ Potential-Indicators-of-Proliferation-Financing.pdf (mas.gov.sg)
- ¹¹ On the following site OFSI made clear that in 2018 they spoke at over 100 events: About our services – Office of Financial Sanctions Implementation – GOV.UK (www.gov.uk)
- ¹² House of Commons Foreign Affairs Committee, 'Fragmented and incoherent: the UK's sanctions policy', 12 June 2019, HC1703, p.22.
- ¹³ 05142020_global_advisory_v1.pdf (treasury.gov)
- ¹⁴ OFSI_Guidance_-_Maritime_.pdf (publishing.service.gov.uk)
- ¹⁵ Page 3 of the Government Response to the Annual Report on the Operation of the Terrorism Acts in 2018 – CP 310 (publishing.service.gov.uk) explains the principles behind the Tri-sector Working Group engagement.
- ¹⁶ National Economic Crime Centre – National Crime Agency
- ¹⁷ 4 UK approach to public-private partnerships.pdf (thecommonwealth.org)
- ¹⁸ The Looming Risk of Terrorist Financing (internationalbanker.com)
- ¹⁹ An introduction from new OFSI director Giles Thomson – OFSI (blog.gov.uk)

JMLIT was able to assist rapidly in the investigations and identify financial activity related to them, allowing law enforcement agencies to identify further investigative strategies.¹⁸ Given this success, perhaps this could be adopted in a more specific sanctions environment, especially regarding designations.

Another area that shows a bridging of the gap is the increasing use by governments of private sector companies whose expertise is in the collection and analysis of open-source materials, which governments use to assist them in the enforcement of sanctions. Good examples of such partnerships and companies are in the US between Kharon and the US government, and in a number of countries, the use of Lloyds shipping intelligence and/or Windward's analysis to assist governments in the enforcement of sanctions, especially with regards to maritime issues.

However, more needs to be done to bring this all together as a whole-of-sanctions approach, and indeed more should be done so that there is proactive engagement between government and the private sector, with an acknowledgement that the private sector can be a strong partner for governments

in the implementation and enforcement of sanctions.

Going forward

In particular I believe that there are four clear options for improving future ways of government and private sector working together to improve the implementation and enforcement of sanctions:

1. **Changing mindsets in both industry and government** – by having a more positive relationship there will be significant benefits.
2. **Industry engagement in design, implementation, and enforcement of sanctions** – industry participation with overseas and international engagement, especially as industry can help governments understand the impacts of possible decisions.
3. **Creation of joint bodies to manage sensitive information, including designation targets** – using the example of JMLIT creative solutions should be found for better managing the process.
4. **Greater forums for genuine engagement and debate between all levels of government and the private sector** – both in terms of quantity, with more industries involved, and in terms of quality.

Conclusion

If the gap between the private sector and governments continues to widen then the 'implementation gap' between the desired impact and actual impact will grow, and the overall effectiveness of sanctions will decrease.

My own experience of moving from working on sanctions for the UK government to working on sanctions compliance within an international financial institution highlighted the often-adversarial attitudes government has to the private sector, as former colleagues and friends told me I was joining the 'dark side'. In my view, the reality is in fact quite the reverse. OFSI and the financial sector, just as governments and the private sector, should see themselves as partners in sanctions work, where to a significant degree the implementation of sanctions falls to the private sector whilst enforcement falls to government departments and agencies like OFSI and OFAC. In this way, if the two sides worked together it would improve implementation, understanding and, critically, ensure that enforcement targets the real criminals seeking to circumvent sanctions.

I'm not advocating that where the private sector, including the banks, breaches sanctions they

should escape punishment, but a recognition by government agencies that on the whole banks and financial institutions seek to operate within the law, and therefore sanctions regimes, would go a long way to restoring a fractured relationship, allowing for focus on the true bad actors, and highlighting cases of deliberate sanctions violations.

In a possible change of direction, the new OFSI Director has been clear in a blog¹⁹ earlier this year that a key priority for him and OFSI is to help stakeholders understand UK sanctions, and also work with industry and industry bodies to enhance OFSI's own understanding of compliance risks and trends. This change and opportunity should be welcomed and seized by both government and private sector.

It is important, therefore, that imaginative and creative thinking is applied to this subject and a change of mindset of those involved in the implementation and enforcement of sanctions is brought about, seeking greater co-operation. Not all of the possible solutions are complicated and simply doing easy things, such as increasing genuine dialogue and engagement, will bring significant improvements, but even if it only assists in creating a more co-operative environment this has to be worthwhile.

The often-used phrase in governments the world over for successful and effective government approaches on sanctions is 'a whole-of-government approach'. Why limit this to government and not look at creating a whole-of-system approach to sanctions? In this way, good actors within the private sector would work with governments to improve both implementation and the effectiveness of sanctions.

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