Reg 54D pre-submitted questions

Thursday 6 July

Reg 54D member questions

1. Can clarity be provided on whether firms with branches in the EU or elsewhere can provide advice to their overseas counterparts regarding domestic/EU sanctions laws?

2. Please could Government confirm whether the restrictions are intended to apply to "in-house" lawyers?
   b. Can the term "legal advice" be defined, and can the term "client" be defined as it is currently unclear how this applies to in-house legal professionals. Can HMG provide some clarity?

3. Does reg 60DB(4) include contracts of employment entered into by Bank/Financial Institution in-house lawyers who advise on sanctions and/or Russian related activity.
   b. Unlike a law firm, in-house counsel are not the decision makers in a firm on what matters are brought to them for consideration (rather this is the business).

   If the first point is not taken, then the three month wind down should specifically be amended to include (or guidance be given to the same effect) that in-house lawyers benefit from this exception upon notification. If this exception does not apply equally to in-house counsel an irrational distinction arises between the "external" and "internal" legal professions.

4. What if legal advice is sought by a combination of UK and non-UK persons? Is that permitted, or can only the UK persons be provided with advice?

5. Can confirmation be given regarding the following questions for internationally operating financial institutions (listed and heavily regulated) providing Legal and Compliance advice internally (both to UK and non-UK persons)?
   a. Can you confirm if Regulation 54D captures advice given by Compliance Officers internally, within internationally operating financial institutions?
   b. Can you confirm if Regulation 54D captures advice given by in house Legal teams internally, within internationally operating financial institutions?

6. In Reg 54D and Schedule 3J, does “legal advisory services” and “legal advice” include:
   a. - advice given in relation to non-UK law (e.g. EU or US law)?
   b. - advice given by a non-lawyer (e.g. a compliance officer)?
   c. - advice given by an in-house lawyer to his/her internal client(s)? For example some of our clients have a centralised legal and compliance function in the UK for all their group companies, so sometimes their UK-based lawyers or compliance team advise a US group entity on US sanctions issues relevant to their activities

7. In relation to the licence criteria (listed in relation to Reg 54D), it is provided that a licence may be granted where “a licensing ground would apply to the activity in relation to which the legal advice is being given (the “relevant activity”) if the relevant activity was done by a UK person or taking place in the UK”. If the “relevant activity” done outside of the UK would in the UK would be a financial sanctions activity, this licensing would appear to require the applicant (and in turn DBT/ECJU) to assess whether or not a financial sanctions licensing ground (as per Sch 5) would apply, even though ordinarily this is something OFSI would assess. Is that correct?

8. Please confirm whether a US corporate lawyer may or may not give US transactional advice to a US client in relation to an activity which is compliant with US sanctions and no UK nexus if
   a. he/she happens to be in the UK at the time the advice is sought, and
   b. the activity would have been prohibited if done by a UK person/in the UK.
   c. Would it make any difference whether or not the US-qualified sanctions lawyer were a UK national?

9. In the context of (a) applying to DBT/ECJU for a licence under Reg 65, and/or notifying the Sec of State under Reg 60DB(4)(b), please confirm that neither the licence application process, nor the reporting obligation, will require the applicant to disclose privileged information to DBT/ECJU or the Secretary of State?

   With respect to the specific licensing grounds that have been issued, the ECJU guidance indicates that it would be helpful to provide details of the “recipient(s) of the services”. Client confidentiality and privilege prohibit lawyers/firms from disclosing information such as client names. In practice, if lawyers/law firms cannot share this information will licence applications be rejected?

10. The Regulation 60DB(3) exception covers legal advice as to whether an act or a proposed act complies with the Russia (Sanctions) (EU Exit) Regulations 2019. Is the exception also intended to cover OFSI and ECJU licensing applications sought under the Russia Regulations, advice on UK export controls compliance as there is overlap between these statutes and the Russia Regulations with respect to dual-use and military items, and anti-money laundering compliance advice related to potential breaches of the Russia Regulations, because it is not currently clear whether those areas are within scope of the exception.

11. Is it correct that reg 60DB(3) permits the provision of legal advice to any person, UK and non-UK, if its to advise on whether any act, transaction, payment or deal if proceeded with may or may not comply with the UK regs/sanctions?

12. Are the restrictions intended to restrict advice, even if the advice does not actually facilitate the underlying transaction, e.g., advice on legal permissibility (other than under the UK Russia sanctions)?

13. New OFSI licence: where a bank/external counsel are mandated to apply for a new specific OFSI licence, for an underlying financing transaction involving a UK sanctioned entity/ies (for example, processing a repayment of loans owed to by a designated Russian entity), should an additional DBT licence be sought first (for the purposes of Reg 54D) to allow for internal/external Legal and Compliance functions to advise on those transactions?

14. Existing OFSI licence: where a bank/external counsel are already working on a financing transaction for which a specific OFSI licence had already been granted (prior to Reg 54D coming into force), for an underlying transaction involving a UK sanctioned entity/ies, should an additional DBT licence be sought (for the purposes of Reg 54D) to allow for internal/external Legal and Compliance functions to advise on those transactions?

15. Is it correct that reg 60DB(3) permits the provision of legal advice to any person, UK and non-UK, if its to advise on whether any act, transaction, payment or deal if proceeded with may or may not comply with the UK regs/sanctions?

16. Is it implied that "legal advisory services" can only be provided by those that are professionally qualified as "lawyers"? Please can HMG clarify whether the intention was that such compliance individuals giving such advice be caught because it involves the "interpretation and application of the law"? If the answer to that is "no" because the individuals in question aren't qualified lawyers; does the answer change when qualified lawyers, working in a Compliance role (not as practising lawyers) provide such advice?
    a. What about paralegals, or legal executives? Are they covered?
    b. What about compliance professionals who are not legally qualified? We have a large Sanctions Compliance team, which is the first port of call for our businesses seeking to comply with sanctions. Their advice will be based on our Global Sanctions Policy, but this is (necessarily) based on the laws of the jurisdictions in which we operate. They will often explain the rationale for the decision with reference to the legislation. 99% of the time, these individuals are not lawyers. Please can HMG clarify whether the intention was that such compliance individuals giving such advice be caught because it involves the "interpretation and application of the law"?

    Understandably, the focus of the engagement meeting was on lawyers practising in law firms, but we wanted to put on record that a number of the points raised also apply to in-house lawyers and the organisations for which they practise. Specifically:
    the point re advising on other sanctions regimes. We occasionally advise EU colleagues in German-based Compliance team or the business on the requirements of EU law. This is now prohibited as the exemption is currently drafted.

17. Advice on compliance with the sanctions measures of friendly nations should be carved out (i.e. G7 or similar); such legal advice supports the international sanctions framework against Russia. For example, advising on a transaction subject to a licence by an EU member state (but which is not similarly licenced in UK) should not

be caught by the restriction. We are supportive of a GL for the purpose of allowing all such compliance related advice.

18. Clarity is needed on legal advice for a non-UK legal entity on the application of foreign sanctions where a specific licence has been granted in the UK for the Firm to conduct such activity. Such a licence does not mean it would be lawful for any other UK Person to undertake the same transactions, such that the notional transposition of the activity into the UK or to the hypothetical UK Person is divorced from authorisation for the UK legal entity to undertake their part of the transaction.

Reg 54D associate member questions

1. Are lawyers who are UK qualified or otherwise regulated in the UK (e.g. registered foreign lawyers or 'RFLs') but have no other UK nexus (i.e. non-UK nationals practicing out of, say, Singapore) subject to UK sanctions jurisdiction, and therefore have to comply with Reg54D? yes / no

2. Can lawyers also not assist with EU sanctions issues that are almost always looked at together with UK issues?

3. There is a major disconnect between how HMG press release describes this new measure and its actual effect. Is it intended that this new measure
   (a) "prevents UK lawyers from advising Russian companies in certain business deals" (as asserted by the press release) or
   (b) prohibits anyone in the UK or any UK person (whether or not a UK lawyer) providing any legal advice (other than UK sanctions advice and representation) to anyone in relation to activities that would be prohibited by UK sanctions if done in UK.

4. In Reg 54D, what does "in relation to or in connection with" mean? Does it:
   a. - mean "in order to facilitate or enable"? If not, does it make any difference whether or not the advice might facilitate or enable a relevant activity?
   b. - prohibit a UK person giving advice in connection with historic possible breaches of non-UK sanctions (e.g. in the context of an internal investigation that isn't confined to UK sanctions)

5. In Schedule 3J(b), would "advice given in anticipation of proceedings before administrative agencies" include advice given to a non-UK person in anticipation of:
   a. - proceedings outside the UK?
   b. - potentially needing to apply to a relevant sanctions authority (outside of UK) for a financial or trade sanctions licence

6. If a UK law firm sends to a non-UK client a composite sanctions advice (covering UK, EU and US analysis) in relation to a contemplated activity, does it follow that, if the UK conclusion is that the activity is prohibited or a 'relevant activity', then giving the EU and US advice is an offence?

7. In cases where urgent legal advice is required in relation to an activity, can HMG confirm that a person will not breach regulation 54D by providing legal advice during

the period from when a licence application is submitted until a substantive response to the application is received?

8. Has HMG considered whether this measure makes English law a more or a less attractive choice of law for international trade contracts between non-UK parties in the future?

9. Reg 60DB(4)(b) requires that every provision of legal advisory services to which Reg 54D applies must be notified to Sec of State. Please confirm in what format and to whom such notification should be made and sent.

10. Many international law firms have US or EU nationals working from their UK offices. Those individuals provide sanctions compliance advice solely on US/EU sanctions law (as applicable). The current statutory language appears to prohibit those persons from providing that advice as it does not fall within the exception in Regulation 60DB(3). This appears to be an unintended consequence of the wide drafting of the legislation. What would you suggest lawyers in that position do?

11. Many international law firms have dual national (e.g., US and UK national) lawyers who are only qualified in a non-UK jurisdiction and are working solely on non-UK sanctions compliance advice from an office outside the UK. The current statutory language appears to prohibit those persons from continuing their sanctions compliance advisory practice in their country of residence and legal qualification. This appears to be an unintended consequence of the breadth with which the legislation is drafted. What would you suggest lawyers in that position do?

12. The definition of “legal advisory services” carves out contentious work. Is that carve out intended to extend to contentious work in relation to any administrative agencies, courts or other duly constituted official tribunals, or arbitral/mediation proceedings or only before UK agencies, courts, tribunals, etc?

13. “Indirectly”: grateful for some additional guidance on how wide-reaching the scope of “indirectly” is. For example, as used in here: “54D(1) A person must not directly or indirectly provide legal advisory services…”

14. When determining whether or not something is “prohibited” in the UK can one take into account general licences or other licences/authorisations issued by UKG?
    a. E.g., if a non-UK entity is seeking legal advice on a matter which would prima facie be prohibited in the UK, but which a UK person could undertaking because of an applicable GL/licence/authorisation, can a UK person lawyer then advise the non-UK entity on that matter?

15. Will there be a general license enacted, exempting UK legal advisors from providing legal advisory services with respect to whether activities, transactions or dealings of Russian persons / entities are compliant with applicable sanctions laws?

16. Further guidance would be welcome on the licencing process, including on:

    a. The extent to which DBT/ECJU will involve, or have reference to, OFSI or OFSI practice in deciding whether to grant a trade sanctions licence for legal

services on the basis of grounds for a financial sanctions licence for the underlying conduct being advised on.

b. The extent to which licences may be granted for legal advice which would otherwise trip the pre-existing circumvention offences, and why DBT/ECJU is the proper recipient of such applications in circumstances where the underlying circumvention is of financial sanctions.

17. Please can you confirm that providing compliance advice in relation to EU and US sanctions is not prohibited. For example, assisting a client outside of the UK to apply for a licence in the EU or US (in order for the client to comply with those sanctions regimes, where UK sanctions do not apply) or advising as to whether activity (which would be prohibited if undertaken in the UK) is also prohibited under EU and US sanctions.

18. Please can you confirm whether providing contractual advice in relation to UK, EU and US sanctions is prohibited. For example, advising a client outside of the UK whether a proposed transaction would be contrary to its contractual undertakings/representations in an English law governed contract in circumstances where a UK sanctions risk has been identified (were UK sanctions jurisdiction to apply).

19. We have had sight of an email from the intellectual property regulator, IPReg, which states:
"On 30 June 2023, The Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023 came into force. This bans UK lawyers from providing 'legal advisory services' in non-contentious matters, to Russians." This is concerning as it does not seem to reflect the legislation and, as a regulator of legal services, they have a responsibility to understand how the law applies to those they regulate. We would ask the government to confirm whether the new ban "bans UK lawyers from providing 'legal advisory services' in non-contentious matters, to Russians." Which in our view, is not the case.
    b. How does this change the previous position?
    c. We would like to understand from the Government how this changes the previous position when all relevant activities are prohibited, and we have adopted the approach for some time that providing legal advisory services in relation to these activities would potentially amount to circumvention. Can they set out how this differs and what is now prohibited, that wasn't prohibited previously?

20. Compliance Advice: A client reaches out to the London office of a global law firm seeking advice regarding whether a proposed business arrangement complies with U.S., EU, and UK sanctions. The law firm will not know whether the arrangement complies with all or a subset of these sanctions unless and until it undertakes a thorough analysis of the proposed arrangement. If the global law firm accepts the instruction and it turns out that the proposed arrangement would be permissible under the U.S. and EU sanctions, but impermissible under the UK sanctions, then the London office (and any other UK persons working at the law firm) would not be able to advise on the U.S. and EU sanctions issues related to the proposed business arrangement, including whether the proposed arrangement complies with U.S. or EU sanctions. (And if the London office or the UK persons transferred the work to non-UK personnel, such referral potentially could constitute circumvention of the UK sanctions.) From a

practical perspective, this raises the question of whether the law firm would be required to complete the analysis before accepting the instruction. Such an approach would be unworkable for both clients and law firms.

21. Cross-Border Transaction: A U.S.-based company hires a UK law firm to represent it in connection with the acquisition of a French company. In the deal, the U.S.-based company will purchase all of the French company's issued shares from its shareholders. After several weeks/months of due diligence, the UK law firm learns that a 0.001% shareholder of the French company is a Russian national targeted by UK sanctions (but not U.S. or EU sanctions). The U.S.-based company and French company seek to move forward with the deal because they are not subject to UK sanctions. In this scenario, the UK law firm arguably could not assist the U.S.-based company because by doing so they would be "acting on behalf of a client, or providing advice on or in connection with, a commercial transaction" that would be prohibited if completed by a UK person. The UK law firm would not know that the potential deal would be violative of UK sanctions unless and until diligence was carried out.

22. Does the UK government intend that a UK person could not provide legal advisory services to wind down or cease activities that are counter to the UK sanctions

    Distinct from the wind down already in Regulation 60DB(4), if current, ongoing activities by a non-UK entity became prohibited under later tranches of UK sanctions laws (i.e. not in place as of 30th June 2023), and the decision was made by a company to terminate or amend that activity because of UK sanctions in order to comply with UK sanctions, there is currently no exception that would allow UK persons to provide legal advisory services where the object of their services is to support the termination or amendment of those now-prohibited activities. We request that the Government considers a broad exception that allows UK persons to provide legal advisory services (on any applicable law, not just UK laws) where their legal advisory services do not facilitate the continuation of a "relevant activity" (as defined in 54D) or enable circumvention of the UK sanctions. This is of critical importance for industry with in-house legal teams led largely from the UK -- without a UK person being able to provide that transactional legal advice to amend or terminate a contract to comply with UK sanctions, the likely consequence is that non-UK companies cannot exit contracts that are not compliant with UK sanctions, because they don't have access to the legal advice to help them exit.

    a. Example 1: A German company is currently conducting its activities in full compliance with UK sanctions laws. New UK sanctions are implemented in October 2023 that mean that the German company's activities would be prohibited under UK sanctions. After review of the UK sanctions, the decision is made that the German company should terminate those now-prohibited activities. In an in-house context, a UK transactional or finance lawyer may, for example, usually support in drafting documents to terminate the contractual agreement that the German company wishes to exit, or in advising on the application or implications of other UK or EU or German laws as a result of that termination.

    b. Example 2: A German company is currently conducting its activities in full compliance with UK sanctions laws. New UK financing sanctions are

implemented in October 2023 that mean that the German company's activities would be prohibited under UK sanctions in their current form, but the activities would be lawful under revised payment terms. After review of the UK sanctions, the decision is made that the German company must amend the payment terms to be in compliance with UK sanctions, or termination should occur. In an in-house context, a UK transactional or finance lawyer may, for example, usually support in drafting documents to amend the payment terms, as well as advising on the application or implications of other UK and EU and German laws as a result of this (e.g. possible legal reporting obligations or proceeds of crime implications in Germany).

In both examples above, the provision of this legal advice is to ensure compliance with the UK sanctions and to cease activities that are counter to UK sanctions. We request that the Government considers a broad exception that allows UK persons to provide legal advisory services (on any applicable law, not just UK laws) where their legal advisory services do not facilitate a breach of UK sanctions, were the act to be performed by a UK person or in the UK, and/or do not enable circumvention of the UK sanctions.

23. UK/EU lawyer giving advice on an EU entity's proposed shipment to Russia of medical goods (not subject to export restrictions by either the UK or EU). EU entity wants to make payment via a bank which is sanctioned by the UK but not by the EU. Would the UK Lawyer be obliged to write the ECJU and note that the products are medical - in theory - OFSI could grant a specific license allowing payment to a sanctioned bank? That, presumably, is the path that would have to be taken if the activity was subject to UK jurisdiction. Or would the UK lawyer have to go further, and get OFSI to confirm to the ECJU that OFSI would, in theory, grant such a specific license? And only after that would the ECJU issue its license?

24. We assume that legal advice to a non-UK client regarding, and implementing, steps to apply for licences (if necessary and as appropriate) under the Regulations from OFSI/ECJU is not prohibited. This appears to result from:
    a. the notion of "relevant activity" (Regulation 54D(2)), and/or
    b. the exceptions in Regulation 60DB(2)(compliance with UK statutory or regulatory obligations) and/or Regulation 60DB(3)(compliance with the Regulations), and/or
    c. Paragraph 8A(1)(b)(i)(representation before administrative agencies), as inserted into Schedule 3J.

25. International law firms operating in the UK routinely provide sanctions compliance legal advice to their international clients across a range of jurisdictions (most commonly UK, EU, US, Canada, Australia). This multi-jurisdictional advice typically is provided in a single memorandum to the client:

a. Should UK sanctions compliance advice now be provided in a separate memorandum in isolation?
b. If the advisory matter is opened by a lawyer at a UK incorporated LLP (with US/EU sanctions advice provided by lawyers in other offices of the firm in the US/EU, irrespective of whether established those offices are established as branches of the UK entity or affiliated partnerships established under the laws of a non-UK jurisdiction),

can such multi-jurisdictional advice continue to be provided to clients within the Regulation 60DB(3) exception if UK sanctions compliance advice is one element of the advice sought?

c. If the answer to b. is "no," can a UK incorporated LLP and its UK based lawyers legally refer the non-UK portions of the advice requested by the client to their US/EU offices/colleagues?
d. If a sanctions compliance advisory matter is opened by a non-UK national lawyer at a non-UK incorporated affiliate of a UK incorporated LLP that involves UK sanctions compliance advice alongside advice on compliance with the sanctions laws of other jurisdictions, can a UK-based lawyer contribute the UK portion of that sanctions compliance advice for inclusion in a combined memorandum to the client?

<u>Reg 54D Non-Members:</u>

1. Please could you confirm that our understanding of the following is correct:
   - we could notify the Secretary of State before or after an act is carried out, by the end of 29 September 2023, and in the interim we do not need to suspend legal advisory services that are being provided now, if any, prior to making a notification
   - the wind down period for the impacted services will be until 29 September 2023; after which restricted services can only be provided if authorised through an ECJU licence

2. To what extent the ban would impact, if at all, the following services which may be provided to our Russian subsidiaries (each incorporated under the laws of Russia):
   - review, approval and execution of intercompany contracts signed between a parent UK entity and its Russian subsidiaries in connections with the Russian subsidiaries' operations
   - intercompany legal advice provided with respect to IP-related payments or transactions, including (but not limited to) registrations, management and maintenance of patents in Russia
   - intercompany legal advice provided with respect to non-IP legal matters including (but not limited to) legal and regulatory matters relating to the relevant product; any competition law matters or any global acquisition or divestments that may include the Russian subsidiaries; legal advice provided to Operations, Human Resources, Vaccine and Rare Diseases business units, Corporate (including review of business cases, contracts, meetings of the Board of Directors, review / execution and notarisation of corporate documents in relation to Russian subsidiaries, approval of changes to Russian subsidiaries' board members or activities)
   - intercompany global best practices sharing and training on various areas of law / legal matters
   - intercompany training on the global legal tools
   - dealings and transactions with Russian external counsels on legal matters in relation to Russian subsidiaries' operations (including IP matters)
   - dealings and transactions with UK law firms and external counsels on legal matters pertaining to the applicability of UK sanctions and export controls with respect to the Russian subsidiaries' and their operations

   Relevant Activity. The definition of "relevant activity" needs to be clarified to make it clear that it excludes activities authorised pursuant to a licence.

“Relevant activity” is defined by reference to regulation 54D (2) and includes activities which “would-

(a) be prohibited under any of regulations 11 to 18C of Part 3 (Finance), Chapters 2 to 6 or Chapter 6B of Part 5 (Trade) if—
(i) the relevant activity was done by a United Kingdom person, or
(ii) the relevant activity was taking place in the United Kingdom, or
(b) contravene regulation 19 or 55 if—
(i) the relevant activity was done by a United Kingdom person, or
(ii) the relevant activity was taking place in the United Kingdom.”

It needs to be clarified that an activity which would be prohibited in accordance with the above provisions will not be so treated where the activity is authorised or otherwise permitted by a licence.

For example, the making available of restricted goods to a person connected with Russia or for use in Russia is prohibited by regulation 25 of The Russia (Sanctions) (EU Exit) Regulations 2020, subject to an exception or licence. However, the activity may fall within what is authorised under the General Trade Licence Russia Sanctions – Vessels and where the activity is within what is authorised, the activity should not fall within the definition of “relevant activity”. In this context, we note that this General Licence specifically states that it “authorises” certain activities and does not, as do some general licences, refer to acts which would otherwise breach the prohibitions, being exempt from the prohibitions. The same point may apply where a specific licence has been obtained.