Trade & Export Finance webinar

In Conversation: Regulatory and Governance Changes for Trade and Export Finance

Presentation by Mark Norris, Partner and
Jacqueline Cook, Of Counsel

29 June 2023

Sullivan
SULLIVAN & WORCESTER

Our conversation today will cover

- EU Foreign Subsidies Regulation
- Sanctions - Status of UK Russia sanctions
- Regulatory Capital for trade finance instruments
- AML developments
- Failure to prevent fraud
- Financial Services and Markets Bill and Brexit issues!
- Modern Slavery – A failure of governance?
- Economic Crime Levy
- USD LIBOR – 30 June 2023

© Sullivan & Worcester LLP

EU Foreign Subsidies Regulation – The “FSR”

- Regulation (EU) 2022/2560 - On Foreign Subsidies Distorting The Internal Market
- What is it?
- Grants the European Commission powers to address distortive effects of non-EU subsidies on the EU market
- Aim is to ensure a level playing field by considering the impact that foreign subsidies may have on competition in the EU

© Sullivan & Worcester LLP

EU Foreign Subsidies Regulation – The "FSR"

- FSR introduces three tools
  - Mandatory M&A notification for deals where the EU turnover of the target (for acquisitions), the joint venture or one of the merging parties (for mergers) is €500m or more and the companies involved have received at least €50m in combined financial contributions from non-EU countries
  - Mandatory notification for public procurement tenders where the estimated contract value is €250m or more and the bid involves financial contributions of at least €4m per non-EU country
  - General power to investigate all other market situations (including M&A and public tenders falling below the thresholds) where there may have been financial contributions from non-EU countries
- Companies with operations outside the EU will need to understand the extent of "financial contributions" they have received from non-EU countries

© Sullivan & Worcester LLP

Article 5 - Categories of foreign subsidies most likely to distort the internal market

- A foreign subsidy is most likely to distort the internal market where it falls under one of the following categories:
  - A foreign subsidy granted to an ailing undertaking
  - A foreign subsidy in the form of an unlimited guarantee for the debts or liabilities of the undertaking
  - An export financing measure that is not in line with the OECD Arrangement on officially supported export credits
  - a foreign subsidy directly facilitating a concentration
  - a foreign subsidy enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract

© Sullivan & Worcester LLP

UK Sanctions - Russia

- (The Russia (Sanctions) (EU Exit) (Amendment) (No.2) Regulations 2023 (SI 2023/665) in force 20 June 2023)
- **Original purpose**: to encourage Russia to cease actions which destabilise Ukraine or undermine or threaten the territorial integrity, sovereignty or independence of Ukraine.
- **An additional new purpose to UK sanctions**: promoting the payment of compensation by Russia for damage, loss or injury suffered by Ukraine on or after 24 February 2022 as a result of Russia's invasion of Ukraine.

Wider definition of non- government-controlled Ukraine expanded from Crimea and Donetsk to include Kherson, Luhansk and Zaporizhzhia to cover export of restricted goods, export of infrastructure-related goods, port directions and sanctions and investment and humanitarian exceptions.

© Sullivan & Worcester LLP

UK Sanctions – Russia (cont.)

Eyes on appeal pending in MUR Shipping BV v RTI on force majeure and sanctions

Tactics being employed to get around international sanctions

OFSI guidance – Maritime Services Ban and Oil Price Gap (June 2023)

- The Russia (Sanctions) (EU Exit) (Amendment) Regulations 2023 (SI 2023/440) in force 21 April 2023 and Reg 3 on 30 September 2023
  - Prohibiting import of iron or steel product processed in third country and originating in Russia
  - Prohibiting import of revenue generating goods consigned from, or originating in, Russia
  - Prohibiting ‘financial services or funds in connection with.. Import of processed iron or steel product’ or ‘revenue generating goods’
  - Defence – person ‘did not know and had no reasonable cause to suspect..’
- What about licences and exceptions? Belarus/Others
- Check UK Sanctions List and OFSI Consolidated List.

© Sullivan & Worcester LLP

Sullivan
SULLIVAN & WORCESTER

Regulatory capital for trade finance instruments - UK Capital Requirements Regulation

- Issue for trade finance – by increasing the credit conversion factor (CCF) the cost of capital for trade finance instruments will increase dramatically.
- EU has just abandoned plans to increase the CCF from 20% to 50% (27 June 2023)
- Catching performance bonds, standby letters of credit and certain technical guarantees etc
- UK: PRA still considering the proposals to increase the CCF under UK regulations.
- Lobbying – ITFA; London & International Insurance Brokers' Association and Lloyds Market Association on PRA Consultation Paper 16/22- recognise credit insurance as separate class of unfunded credit protection; risk weighting for trade finance instruments
- Financial Services and Markets Bill – onshored UK CRR will be repealed and reformed
- EU agreed in principle to amended CRR III in force 1 Jan 2025

© Sullivan & Worcester LLP

Sullivan
SULLIVAN & WORCESTER

AML – Anti-Money Laundering - developments

- Recap of high risk third countries in UK – updated 27 June 2023
  - Albania, Barbados, Burkina Faso, Cayman Islands, DPR Korea, Democratic Republic of the Congo, Gibraltar, Haiti, Iran, Jamaica, Jordan, Mali, Mozambique, Myanmar, Panama, Philippines, Senegal, South Sudan, Syria, Tanzania, Turkey, Uganda United Arab Emirates and Yemen. (UK list includes the two FATF lists) (SI 2023/704)
  - Cambodia and Morocco removed 27 June 2023. Additions to follow.
- FATF and EU have added South Africa and Nigeria but not yet on UK list.
- JMLSG - consultation to amend Part I to take account of amendments relating to discrepancy reporting. Ministerial approval to guidance 27 June 2023 (see revised Parts I and II)
- Trade finance guidance and red flags. (Sector 15, Part II Guidance) (2021)
- The Money Laundering and Terrorist Financing (Amendment) (No.2) Regulations 2022 in force 1 April 2023 – reporting discrepancy on Companies House records

© Sullivan & Worcester LLP

Governance - Failure to prevent fraud offence

- New “failure to prevent fraud” offence
- Aim - to hold organisations to account if they profit from fraud committed by “a person who is associated with the body”
- Under the new Section 198 offence an organisation will be liable where a specified fraud offence is committed by “a person who is associated with the body” for the organisation’s benefit and the organisation did not have reasonable fraud prevention procedures in place
- An organisation can receive an unlimited fine if convicted
- Once the Economic Crime and Corporate Transparency Bill has received Royal Assent the government will then publish guidance on reasonable fraud prevention procedures and the offence will then come into force

© Sullivan & Worcester LLP

Section 198 Failure to prevent fraud

- (1) A relevant body is guilty of an offence if, in a financial year of the body ("the year of the fraud offence"), a person who is associated with the body ("the associate") commits a fraud offence intending to benefit (whether directly or indirectly)—
  - (a) the relevant body, or
  - (b) any person to whom, or to whose subsidiary undertaking, the associate provides services on behalf of the relevant body

- (3) But the relevant body is not guilty of an offence under subsection (1)(b) if the body itself was, or was intended to be, a victim of the fraud offence.

© Sullivan & Worcester LLP

Section 198 Failure to prevent fraud

- *(4) It is a defence for the relevant body to prove that, at the time the fraud offence was committed—*
  - *(a) the body had in place such prevention procedures as it was* ***reasonable in all the circumstances*** *to expect the body to have in place, or*
  - *(b) it was* ***not reasonable in all the circumstances*** *to expect the body to have any prevention procedures in place.*
- Follows Criminal Finances Act failure to prevent tax evasion defence
- Bribery Act defence "… *adequate procedures* …"
- Can you just copy your existing policies?
- *(7) For the purposes of section 198 a person is associated with a relevant body if—*
  - *(a) the person is an employee, agent or subsidiary undertaking of the relevant body, or*
  - *(b) the person otherwise performs services for or on behalf of the body*

© Sullivan & Worcester LLP

Financial Services and Brexit issues!

- EU and UK sign MoU on Regulatory Cooperation on Financial Services - 27 June 2023
- Retained EU law (Revocation and Reform) Bill (awaiting Royal Assent) – EU legislation which will cease to have effect on 31 December 2023 (specific list of EU derived law)
- FSMB (now moving to Royal Assent possibly today!) – more relevant to trade finance and financial services. Different dates for reform topic by topic.
  - Revises and reforms UK onshored legislation into new legislation not based on EU rules. Some may be similar.
  - Final consideration of amendments by House of Lords 27 June. Royal Assent on the way.
    - Bail in (UK BRRD)
    - Capital requirements (UK CRR)

© Sullivan & Worcester LLP

Sullivan
SULLIVAN & WORCESTER

Governance - Modern Slavery – EU versus UK

- Legal Affairs Committee of the European Parliament has agreed new rules to integrate human rights and environmental impact into corporate governance
- Under the EU corporate sustainability due diligence firms would be obliged to identify and where necessary end/mitigate the negative impact of their activities on human rights (including modern slavery) and the environment
- New rules would catch EU and non-EU based companies which meet certain thresholds
- Non-compliant companies would be liable for damages
- MEPs want fines to be at least 5% of the net worldwide turnover and to ban non-compliant third-country companies from public procurement

© Sullivan & Worcester LLP

Governance - Modern Slavery - UK

- Under the MSA 2015 any organisation in any part of a group structure will be required to comply with the MSA and produce a modern slavery statement if they:
  - are a body corporate or a partnership wherever incorporated
  - carry on a business, or part of a business, in the UK
  - supply goods or services
  - have an annual turnover of £36m or more
- Concern that firms are deprioritising modern slavery and "turning a blind eye" to their responsibilities - Chartered Institute of Purchasing and Supply (CIPS)

© Sullivan & Worcester LLP

Governance - Modern Slavery UK - Concerns

- The Home Office has an online a modern slavery statement registry:

  "… to provide a platform for organisations to share the positive steps they have taken to tackle and prevent modern slavery …"

  "… All organisations are strongly encouraged to submit their most recently published statement on the registry to demonstrate that they have reported. …"
- Recent CIPS research showed only 29% of eligible businesses returned their statement
- Of those that were submitted nearly a quarter lacked basic information about the steps being taken to address modern slavery
- 23% failed to outline any measurable goals

© Sullivan & Worcester LLP

Economic Crime (Anti-Money Laundering) Levy

  - Medium sized if UK revenue between £10.2 million and £36 million;
  - Large sized if UK revenue between £36 million and £1 billion; and,
  - Very large if UK revenue above £1 billion.
  - Entities with less than £10.2 million UK revenue will be exempt. These are considered micro and small sized entities and do not have to register for ECL.
- When is it in force? In force 1 April 2022 meaning first payments are due in financial year from 1 April 2023 to 31 March 2024. Collected by FCA, Gambling Commission if entity within the anti-money laundering regulations or by HMRC for others
- What levy applies to entities subject to ML Regs
  - Medium - £10,000; Large - £36,000 ; Very large - £250,000

© Sullivan & Worcester LLP

Sullivan
SULLIVAN & WORCESTER

USD LIBOR deadline 30 June 2023

- End of publication of all tenors of USD LIBOR – 30 June 2023
- Synthetic USD LIBOR available till 30 September 2024

- Move to Term SOFR or SOFR compounded in arrears

- Trade finance recognised as a sector in need of a term rate. Providers of Term SOFR: CME Group Benchmark Administration Limited and ICE Benchmark Administration Limited. Accessed by licence through relevant portal.

- Legacy should be transitioned away from USD LIBOR if not already.
- Next step EURIBOR and other IBORs!

© Sullivan & Worcester LLP

Sullivan
SULLIVAN & WORCESTER

Next webinar

- Thursday 27 July….

  Have we made it to digital trade transactions?

© Sullivan & Worcester LLP

Sullivan
SULLIVAN & WORCESTER

Mark Norris

Partner

Mark's practice covers project and export credit finance, asset finance, structured trade and commodity finance, debt restructurings, acquisition finance and corporate advisory work.

He represents financial institutions, export credit agencies, corporates, boards, and national and supranational sovereign organizations in relation to finance transactions throughout Western, Central and Eastern Europe, Africa and the Middle East. Mark has extensive sector experience in infrastructure financing across Africa including off-grid power, healthcare and transportation. He also advises on ESG financings including hospitals, clean energy and transportation.

Advising on sustainability, governance and compliance matters, Mark has extensive experience counseling corporate boards in connection with bribery, corruption, modern slavery, criminal finance and sanctions issues. He also advises financial institutions on the UK's Capital Requirements Regulation and the EU's equivalent capital requirements regimes.

Recognized as a Leading Individual in The Legal 500 UK for Trade finance, he is noted as 'excelling' in structured export credit transactions and is praised for his 'commercial and user-friendly approach.' He was also recognized in the 2023 Edition of Best Lawyers, United Kingdom for his work in banking and finance law.

In May 2022, he was re-elected Deputy Chair of the British Exporters Association (BExA). He sits on BExA's Executive Committee as well as UK Finance's Export Finance and Trade Committee.

Sullivan & Worcester UK LLP
Tower 42
25 Old Broad Street
London EC2N 1HQ

T +44 (0)20 7448 1003
mnorris@sullivanlaw.com

© Sullivan & Worcester LLP

Jacqueline Cook

Of Counsel

Jacqueline has been in practice for over 30 years. She has experience in a variety of finance sectors including structured finance, trade finance, syndicated lending, aviation finance, leveraged and real estate finance, and general banking.

Regularly advising the market and clients on key issues including LIBOR and benchmark reform, the effect of Brexit and sanctions issues, Jacqueline is also keeping a keen eye on the Electronic Trade Documents Bill and legal developments around digital assets. She runs legal training and knowledge management for Sullivan's London office, often presenting at the firm's client webinars. In addition, she advises on regulatory issues, legal opinions and precedent drafting.

Jacqueline contributes to Sullivan's Talking Trade Finance Blog and has written Client Alerts on topics including aspects of digital trade finance, sanctions and LIBOR reform. In 2021, she assisted with the publication of a joint ITFA/Sullivan Guide on LIBOR transition.

Working closely with the firm's trade and export finance team in London, Jacqueline also acted as in-house editor and contributed to "A Practitioner's Guide to Trade and Commodity Finance," second edition, published in 2021 by Sweet & Maxwell, part of Thomson Reuters, which was updated and expanded to cover all areas of trade and commodity finance.

With an interest in law reform, Jacqueline led the Sullivan working group which submitted comments to the Law Commission on its consultation on Electronic Trade Documents and draft Bill; she has been involved with the Cape Town Convention Academic Project and developments on the Pretoria Protocol on protection of security interests and leases in cross border transactions involving mining, agricultural and construction (MAC) equipment; she has participated in sessions with the Secured Transactions Law Reform Project and the City of London Law Society (CLLS) on its Secured Transactions Code; and she has been an active member of the Finance Knowledge Lawyers' network for many years.

Jacqueline's passion is for Mary's Meals, the Scottish charity which combines the fight against hunger and poverty by providing daily meals in schools and nurseries for some of the world's poorest children bringing children back to education. She is a community ambassador and volunteer speaker www.marysmeals.org.uk"

Sullivan & Worcester UK LLP
Tower 42
25 Old Broad Street
London EC2N 1HQ

T +44 (0)20 7448 1011
F +44 (0)20 7900 3472
jcook@sullivanlaw.com

Awards & Recognition

Global Trade Review (GTR) “Best Export Finance Law Firm”, 2023
GTR named Sullivan “Best Export Finance Law Firm” at the GTR Leaders in Trade Awards, 2023

The Legal 500 UK, 2023
Sullivan ranked in Tier 1 for Trade Finance by *The Legal 500 UK, 2023* for the ninth year running
Partner Geoffrey Wynne is included as a Leading Individual for Trade Finance in the “Hall of Fame”
Partners Simon Cook and Mark Norris are recognised as Leading Individuals
Partner Sam Fowler-Holmes is recognised as a Next Generation Partner and Managing Associate Hannah Fearn as a Rising Star

Chambers UK, 2023
Chambers UK, 2023 ranked Sullivan for Commodities: Trade Finance (UK-wide)
Geoffrey Wynne and Simon Cook are both ranked in Tier 1, with Mark Norris included in Tier 3
Sam Fowler-Holmes is recognised as an “Up and Coming” lawyer

IFLR1000 Banking and Finance Guide, 2023 (32nd edition)
Sullivan recognised for Banking Lending - Lender Side, United Kingdom, in *IFLR1000’s Banking and Finance Guide, 2023*
Partner Geoffrey Wynne is ranked as a Leading Lawyer – Highly Regarded in the United Kingdom

The Best Lawyers in the United Kingdom®, 2024
Best Lawyers included all London partners — Marian Boyle, Simon Cook, Sam Fowler-Holmes, Mark Norris and Geoffrey Wynne — in the 2024 edition of *The Best Lawyers in the United Kingdom®*

Receivables Finance International (RFIx) Annual Awards, 2023 and 2022
Geoffrey Wynne named “Industry Ambassador of the Year” in 2023, and Hannah Fearn was named joint "Industry Ambassador of the Year" in 2022, at the Receivables Finance International (RFIx) Annual Awards

***Trade Finance Global* “Best Trade Finance Law Firm” 2022**
Sullivan named “Best Trade Finance Law Firm” 2022 by *Trade Finance Global* (in connection with BAFT) at its International Trade Awards, 2022

In 2022, 2021, 2020 and 2019, GTR recognised Sullivan
The firm was named “Best Trade or Supply Chain Finance Law Firm” at the 2022 *GTR* Leaders in Trade Awards, “Law Firm of the Year” in the category “Leaders in Trade for Innovation” at the 2021 *GTR* Leaders in Trade Awards and “Best Trade Finance Law Firm” at the GTR Leaders in Trade Awards in 2020 and 2019

2021 Lexology "Client Choice" award for Banking, United Kingdom
Geoffrey Wynne named a recipient of the *Lexology* “Client Choice” Award 2021 for Banking, United Kingdom

***Trade Finance Global* “Best Trade Finance Law Firm” 2019**
Sullivan named “Best Trade Finance Law Firm” 2019 by *Trade Finance Global* at its International Trade Finance Awards, 2019

© Sullivan & Worcester LLP

Boston
One Post Office Square
Boston, MA 02109
+1 (617) 338-2800

Washington, DC
1666 K Street, NW
Washington, DC 20006
+1 (202) 775-1200

London
Tower 42
25 Old Broad Street
London EC2N 1HQ
+44 (0)20 7448 1000

Tel Aviv
28 HaArba'a Street, HaArba'a Towers
North Tower, 35th Floor
Tel Aviv 6473925
+972 74 7580480

New York
1633 Broadway
New York, NY 10019
+1 (212) 660-3000

sullivanlaw.com

@sullivanlaw

What's Your Next?

Move forward with Sullivan

Sullivan
SULLIVAN & WORCESTER