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Sanctions Enforcement in England & Wales

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On 8 June 2022, and to coincide with the introduction of amendments to the Economic Crime (Transparency and Enforcement) Act 2022 ("**the Economic Crime Act**"), the UK's Office of Financial Sanctions Implementation ("**OFSI**") released updated guidance (and an accompanying blog post from its Director, Giles Thomson) concerning its enforcement of the monetary penalties regime for breaches of financial sanctions.

The two major amendments to the civil UK sanctions regime (which came into force on 15 June 2022) now mean that OFSI is:

- no longer required to demonstrate that a person had knowledge or reasonable cause to suspect they were in breach of a financial sanction in assessing whether to issue a monetary penalty. This strict civil liability test is now more in line with the US model used for financial sanctions; and

- able to publish details of financial sanctions breaches where a monetary penalty has not been imposed.

Traditionally there has been limited enforcement action (both criminal and civil) taken by UK enforcement authorities for breaches of sanctions.[1] It seems inevitable that the increased sanctions risks created by the UK's response to the Russian invasion of Ukraine combined with these legislative amendments will lead to more sanctions enforcement activity, civil penalties, and possibly criminal prosecutions. Here we examine the amended UK civil penalty regime and the prospects for UK sanctions enforcement activity (civil, regulatory, and criminal).

The UK Civil Enforcement Regime

In response to the Russian invasion of Ukraine, the UK parliament passed the Economic Crime Act, which introduced important new provisions to tackle the laundering of the proceeds of crime in the UK and enhanced the UK's sanction regime). Many of the provisions in the Economic Crime Act are not yet in force, but the UK government ensured that the provision allowing it to swiftly designate individuals and entities in an emergency procedure was brought into force immediately. As of 15 June 2022, the remaining sanctions provisions are now in force.

As part of leaving the EU, the UK established through the Sanctions and Anti-Money Laundering Act 2018 ("**SAMLA**") its own sanction framework, which allows it to make and enforce its own sanctions). SAMLA allows HM Treasury to impose regulations for a variety of UK foreign policy purposes. Following Russia's

[1] In 2017 and 2018, OFSI did not impose any civil monetary penalties. Between January 2019 and March 2020, it imposed four monetary penalties (Raphael Bank - £5,000, Travelex (UK) Ltd - £10,000, Telia Carrier UK Ltd - £146,341, Standard Chartered Bank - £20.47m). It imposed two penalties in 2021 (Transfer Go Ltd - £50,000 and its client Clear Junction Ltd - £36,393.45). On 16 June 2022, it imposed a £15,000 penalty on Tracerco Limited for violating Syrian sanctions.
https://www.gov.uk/government/collections/enforcement-of-financial-sanctions

annexation of Crimea in March 2014, the EU (along with the UK) adopted sanctions regulations targeted at relevant Russian individuals and key sectors of the Russian economy. After withdrawal from the EU, these regulations were carried into domestic law by the Russian (Sanctions) (EU Exit) Regulations 2019 (the "**Russian Regulations**"). The Russian Regulations give HM Treasury broad powers to designate persons responsible for the invasion (or who have obtained a benefit from or support the Russian government) and create obligations for those that may deal with designated persons, such as freezing assets and preventing funds from being made available. Breach of these provisions is a criminal offence. New regulations are regularly passed as new sanctions designations are announced.

OFSI is the authority responsible for implementing the UK's financial sanctions regime on behalf of HM Treasury. It is also responsible for enforcing the civil monetary penalty regime for breaches of financial sanctions - as an alternative to criminal prosecution for sanction breaches - created by the Policing and Crime Act 2017 ("**PCA 2017**"). While a financial sanction breach is an offence, OFSI does not have the power to criminally investigate or prosecute individuals or entities suspected of committing breaches of sanctions regulations. It refers all serious breaches to the National Crime Agency (the "**NCA**").

The PCA 2017 enables OFSI to impose monetary penalties for breaches of financial sanctions. Prior to 15 June 2022, before issuing a monetary penalty, pursuant to s.146 of PCA 2017, OFSI was required to be satisfied on the balance of probabilities that: (a) the person breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation; and (b) the person knew, or had reasonable cause to suspect, that the person was in breach of the prohibition or (as the case may be) had failed to comply with the obligation.[2]

The Economic Crime Act amended s.146 of the PCA 2017, which now provides that when applying s.146, OFSI is to ignore, and therefore no longer needs to be satisfied, that a person knew or had reasonable cause to suspect it was in breach of a sanction.

This amendment means that anyone whom OFSI determines to have breached a sanctions obligation can potentially be issued with a monetary penalty, regardless of whether the person knew or could reasonably have been expected to suspect such a breach. This amendment will mean that a breach arising from an innocent error or mistake may now meet the standard for a financial penalty.

How OFSI will practically apply the strict liability test remains to be seen. In a blog post accompanying the publication of the guidance,[3] the OFSI director said: *"This change will strengthen OFSI's ability to take appropriate enforcement action against persons that fail to ensure they are not dealing with sanctioned entities or adhere to their financial sanctions obligations. It does not mean that OFSI will impose a monetary penalty in every case we find there to be a breach of financial sanctions. OFSI imposes monetary penalties where it is appropriate, proportionate and in the public interest to do so, and this will continue to be the case from 15 June 2022."*

[2] s.146(1) The Policing and Crime Act 2017
[3] [3] Blog post from Giles Thomson, Director of OFSI 8 June 2022 - https://ofsi.blog.gov.uk/2022/06/08/new-enforcement-powers-a-message-from-giles-thomson-director-of-ofsi/

The OFSI framework for issuing a penalty

To accompany the new measures in the Economic Crime Act, OFSI published updated guidance which also came into force on 15 June 2022.[4] Sanctions breaches committed prior to 15 June 2022 will be dealt with under the prior guidance. OFSI stressed that the updated guidance *"does not represent a change to OFSI's overall enforcement approach and continues to emphasise the importance of self-disclosure as a potential mitigating factor."* What then is the approach that OFSI applies when it becomes aware of a sanctions breach? And when does it consider issuing a monetary penalty?

OFSI will first seek to establish whether there is a breach of a prohibition or a failure to comply with an obligation under sanctions regulations. If OFSI concludes that there is no breach, then the case will be closed.[5]

OFSI has the power to request information which may include information to establish funds or other economic resources owned, held, or controlled by or on behalf of a designated person, to monitor compliance or detect evasion of sanctions, or to obtain evidence concerning an alleged offence. It is an offence not to comply with a request to provide information, and OFSI will treat a failure to provide requested information as an aggravating factor for any penalty determination.

If a breach is found to have taken place, OFSI has various options at its disposal to remedy the breach, including (i) the issuing of a warning; (ii) a referral to a regulator/professional body; or (iii) publishing information pertaining to the breach if it is in the public interest to do so. In the most serious of matters, OFSI can also issue a monetary penalty or refer the matter to criminal law enforcement authorities for further investigation. In recent evidence provided to the Treasury Select Committee Inquiry on the effectiveness of Russian Sanctions (the "**Treasury Committee**"), Mr. Thompson said that only around 5% of the beaches are resolved through monetary penalty (a figure comparable with the US Office of Foreign Assets Control ("**OFAC**").

The guidance deals, at length, with how OFSI will decide on the level of the monetary penalty (where that outcome is in the public interest). OFSI heavily relies on self-reporting to police the regime, and all of the cases that have so far been resolved by monetary penalty have been self-reported. Consequently, OFSI heavily incentivizes co-operation and will apply a reduction of up to 50% of the amount of the monetary penalty in recognition of a "prompt and complete" voluntary disclosure, which is variable depending on the seriousness of the matter.[6]

Disclosure should be made *"as soon as reasonably practicable after discovery of the breach,"* but the guidance acknowledges that *"what this means will differ in each case."* Some time to investigate is permissible. In the Standard Chartered Bank case, OFSI accepted that it was reasonable for the bank to

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083297/15.06.22_OFSI_enforcement_guidance.pdf

[5] OFSI noted in its most recent annual review (2020-21) that *"many of the potential breaches reported to OFSI are deemed not to be breaches of financial sanctions after investigation."*

[6] In OFSI's monetary penalty notice against Transfer Go in June 2021, it stated that "*OFSI values voluntary disclosure and had TransferGo voluntarily disclosed these transactions it could have received a discount of 50% of the baseline penalty amount.*" In the Standard Chartered Bank case, OFSI held that since they assessed the case as "most serious" (and not "serious"), they would make a reduction of up to 30% for voluntary disclosure. Following ministerial review, it was held, amongst other things, that OFSI should have given more weight to SCB's co-operation.

report initially the existence of a potential breach and then to provide further information in stages during its internal investigation.

Before OFSI imposes a monetary penalty, it must notify the person in writing of its intention to do so, and it will explain: (i) the reasons for imposing the penalty and (ii) the penalty amount and how it has been calculated. OFSI allows for representations to be made about "any relevant matters," and if a person decides to make representations, OFSI will review the case assessment and monetary penalty level in light of the representations. OFSI has the option to: (i) reaffirm the decision to impose a penalty; (ii) amend the penalty amount; or (iii) or decide to not impose a penalty.

A unique feature of the civil sanctions regime allows the respondent to request a review of OFSI's decision by the government Minister (which is currently dealt with by the Economic Secretary to the Treasury). Following the review, the Minister has the option to: (i) impose the penalty and uphold the amount; (ii) impose the penalty but substitute the amount with a different value; or (iii) cancel the decision to impose the penalty. In two of the six penalties issued to date – Telia and Standard Chartered, the decision was upheld, but the penalty was significantly reduced following ministerial review. In the more recent cases of Clear Junction and Transfer Go, the Minister upheld both the decision and the amount of penalty. Once a person has sought ministerial review, they can appeal to the Upper Tribunal.

Enforcement by other UK authorities

Although two prosecutions were brought over ten years ago against individuals and companies for Iraqi sanctions breaches[7], since the creation of OFSI, no individuals or companies have been prosecuted for sanctions breaches. OFSI may refer sufficiently serious sanctions breaches to the NCA. A referral may be made in instances of serious and deliberate sanctions circumvention or repeated sanctions breaches, especially where OFSI has previously issued warnings to the individual or entity. In his evidence to the Treasury Committee, Mr. Thompson indicated that "*we do not see a lot of that* (sanction circumvention)" and would not be drawn on how many cases it had referred to the NCA.[8]

The criminal penalty for a sanctions breach was enhanced under the PCA 2017, and the maximum sentence for a breach was increased from two to seven years. In addition, companies which are alleged to have committed a sanctions offence may also now be able to resolve the allegations through a Deferred Prosecution Agreement ("**DPA**") where a DPA is deemed to be in the public interest.

Firms and individuals regulated by the Financial Conduct Authority ("**FCA**") can expect that their key risk around sanctions breaches will be enforcement by the FCA of its Principles for Business, rules, and relevant legislation. Firms have an obligation to implement systems and controls to mitigate the risk of financial crime, including those to enable firms to meet financial sanctions obligations. Firms are required to report any significant failure in their systems and controls to the FCA. They may also be required to disclose to the NCA any suspicions that another person has committed a money laundering offence (of which the sanctions breach may form the predicate offence) or obtain consent from the NCA to deal with property they suspect is criminal property.

[7] In 2009, Mabey & Johnson Ltd pleaded guilty to charges including "making funds available" in violation of Article 3 of the Iraq (United Nations Sanctions) Order 2000. Two ex-directors of the company were subsequently tried and convicted for their roles. In 2010, Scottish company Weir Group plc pleaded guilty to breaching sanctions in relation to Iraq through the payment of kickbacks in return for contracts from Saddam Hussein's government

[8] Oral evidence: Russia: effective economic sanctions on 22 June 2022 at The Treasury Committee, https://committees.parliament.uk/oralevidence/10468/html/

Sanctions controls (such as sanctions screening) have typically been rolled into anti-money laundering controls, including customer due diligence at the time of onboarding or as part of a specific transaction. Given the amendments to s.146 of the PCA 2017 and the significant increase in the number of sanctioned individuals and entities firms have to be alert to avoid dealing with (and the difficulties in assessing whether an entity is controlled by a sanctioned person), firms increasingly have to consider individual payments and the source of these payments, take appropriate steps to freeze funds, and appropriately notify OFSI of their dealings with designated persons.

To date, the FCA has not taken specific civil or criminal action against any regulated firm or individual for sanctions controls deficiencies. This is clearly different from the U.S., where European banks have received significant penalties from OFAC for facilitating sanction breaches. However, the FCA has gradually built up a portfolio of large fines issued against banks for failing to implement adequate AML controls and which included poor sanctions control, such as a fine of £6 million against Ghana International Bank in June 2022 and £102.2 million against Standard Chartered Bank in 2019 (which included a fine for failing to appropriately review due diligence despite red flags indicating the customer was linked to a sanctioned entity). In a recent letter to the Treasury Committee, the FCA detailed, amongst other things, how it was engaging with firms and law enforcement partners around implementation of sanctions controls.[9] Going forward, firms should expect an increase in supervisory scrutiny around sanctions controls and enforcement where deficiencies are identified, likely in conjunction with other law enforcement authorities.

The Future of Sanctions Enforcement in England & Wales

The removal of the fault element of s.146 PCA 2017 sees the UK sanctions enforcement regime moving towards a US strict liability model, and OFAC is clearly a model for OFSI both in terms of its enforcement outcomes and resourcing. Unlike OFAC, neither OFSI nor any other UK enforcement authority has a strong history of sanctions enforcement. So, is that about to change?

While the answer from OFSI seems not necessarily, Mr. Thompson indicated in his evidence to the Treasury Committee that OFSI is gearing up for a more rigorous sanctions enforcement regime and that there are currently a number of cases in the "pipeline."[10] While voluntary self-reports will remain the critical way that OFSI learns of breaches, it also plans to increase its intelligence function (working with other authorities) to develop a more sophisticated system to independently seek out and identify sanctions breaches.

Increased resourcing is imperative, and OFSI has increased its workforce to approximately 70 (up from 45 at the beginning of February 2022) with the view to reaching 100 by the end of April 2023.[11] However, it is doubtful that even this expansion will be sufficient to cope with the increasing number of licensing applications, onerous administration of dealing with asset freezes and the investigation of self-reports arising from the unprecedented sanctions measures implemented since February. So, whilst the amendments to the PCA 2017 may not result in a significant increase in the number and size of the monetary penalties issued, we anticipate that OFSI will increasingly publicly name companies, to make examples of sanction breaches, to raise awareness of the sanctions regime and to improve compliance levels. The threat of public identification will be a significant reputational risk for companies and firms.

[9] 4 July 2022 letter from FCA CEO to the Treasury Select Committee
https://committees.parliament.uk/publications/23023/documents/168751/default/
[10] *Ibid* at Q288
[11] *Ibid* at Q248

The risk of a breach and enforcement action should be taken seriously and increasingly reflected in the strength of a company's procedures and controls to ensure awareness of and compliance with sanctions laws. Global enforcement authorities are increasingly vocal about the place for sanctions control in compliance programmes.[12] Most recently the NCA and OFSI published a Red Alert on Financial sanctions Evasion typologies: Russian elites and enablers.[13] This is essential reading for anyone who may be engaged in structures ultimately owned by a designated persons (or entities they control) and particularly if engaged in a restructuring transaction that could credibly be alleged to allow a designated person to obtain funds or economic resources. The alert contains six compliance recommendations. Carrying out detailed due diligence remains the principal control to prevent breaches (or allegations of facilitating evasion) and means to mitigate any fine (in the event of an inadvertent breach). Given the value in self-reporting breaches both in the civil and criminal regimes, companies must be in a position to investigate breaches swiftly and disclose a suspected breach.

Companies and firms must be sufficiently resourced and well-equipped to prevent sanction breaches. Their employees must be encouraged to speak up and report any suspected breaches. Training, reporting channels, and whistleblowing policies are key elements to ensure that matters can be pro-actively dealt with by the company.

[12] On 16 June 2022, Deputy US Attorney General Lisa Monaco was reported at a conference in London as saying that sanctions control should "*be at the forefront*" of all corporate compliance programmes – and not just those of banks and financial institutions.
[13] 12 July 2022, Red Alert on Financial sanctions Evasion typologies: Russian elites and enablers

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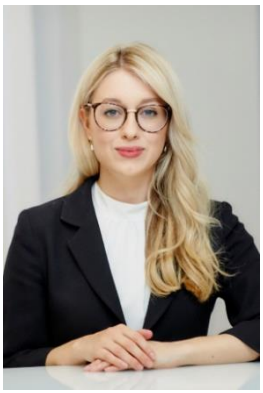

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