

New Era in UK Sanctions Enforcement: Introduction of Strict Liability Standard and OFSI Guidance Update

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On 15 June 2021, the UK Office of Financial Sanctions Implementation (OFSI) implemented important changes to its enforcement powers and updated its “Monetary Penalty” guidance.

In summary, OFSI has introduced three key changes:

- 1) OFSI will be able to impose civil monetary penalties on a strict civil liability basis for breaches of financial sanctions that are committed after 15 June 2022;
- 2) OFSI has the power to publicise details of financial sanctions breaches where a monetary penalty has not been imposed for breaches of financial sanctions that are committed after 15 June 2022; and
- 3) OFSI has introduced new flexibility in the review process for monetary penalties.

New Strict Liability Standard

The new strict civil liability standard means OFSI will have the power to impose a monetary penalty simply because an individual or entity has breached the financial sanctions regime. The previous requirement for OFSI to prove that a person had knowledge or reasonable cause to suspect that they

were in breach of financial sanctions will be removed.

Whilst OFSI will still bear the burden of proving that there was a breach of financial sanctions prohibitions, OFSI is only required to demonstrate this on the “balance of probabilities”, i.e. whether it is more likely than not that the breach occurred.

OFSI has stated that the change will strengthen its ability to take enforcement action against persons who fail to ensure that they are not dealing with sanctioned entities or adhere to their financial sanctions obligations. Moreover, it has stated it will not impose a monetary penalty in every case where it finds a breach of financial sanctions. Rather, it has stated it will impose monetary penalties where “*appropriate, proportionate and in the public interest*” to do so.

As a result of this new standard, inadvertent breaches could incur monetary penalties. However, it remains to be seen how much of a practical impact the lower standard will have. OFSI has derogated to itself a wide discretion in determining whether a monetary penalty will be imposed, potentially resulting in a lack of certainty and transparency. OFSI will continue to consider knowledge or reasonable suspicion of a breach, together with any other “aggravating factors”, when determining whether to impose a monetary penalty at all and the amount of any such penalty.

Publication Powers

OFSI’s new power to publicise details of financial sanctions breaches where a monetary penalty has not been imposed will include a summary of the case and the persons that committed the breach. OFSI has stated that this will help to raise awareness of financial sanctions, OFSI’s approach and implementation of them and to deter future non-compliance. OFSI has also stated that the power only applies where it finds a breach of financial sanctions, and publication will be considered on a case-by-case basis – including whether the case involves important compliance lessons for industry. OFSI will notify persons prior to publication to provide an opportunity to make representations.

Flexibility in the Review Process

The review process has been expanded to enable someone other than the Treasury Minister to undertake the review. In practice, this will be done by senior Treasury officials. This may be a response to the volume of potential sanctions breaches and to enable the review process to be resourced more efficiently. This change does not affect the ability of a person to further challenge OFSI’s monetary penalties at the Upper Tribunal.

Conclusion

The overall message is one of enforcement and deterrent. With the UK sanctions regime having been revised and emboldened since Russia’s invasion of Ukraine, OFSI is keen to ensure compliance with the regime and that breaches are enforced and, where appropriate, publicised. The overall impact of these changes remains to be seen (particularly given OFSI’s limited resources), but this may be the first wave of a raft of measures to try to ensure effective enforcement. Time will tell whether OFSI has the resources and appetite to bring meaningful sanctions enforcement cases, but these steps should make it somewhat easier from a legal and practical standpoint for OFSI to do so.

Furthermore, these updates more closely align the UK sanctions enforcement position with the existing, well-established enforcement practices which exist in the U.S. This alignment may be

leveraged by UK and U.S. enforcement agencies in cross-border, multilateral enforcement cooperation and initiatives.

Companies operating across borders with any activities that might be within scope for sanctions enforcement agencies may wish to review and update (or create and adopt if nothing is currently in place) economic sanctions compliance policies, procedures, and training, as these are the key tools for preventing, detecting, and mitigating potential violations.

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