

# Clients & Friends Memo

## Sanctions Watch: UK Authority Outlines Powers to Impose Strict Liability Civil Penalties

13 June 2022

### Summary

From 15 June 2022, the Office of Financial Sanctions Implementation (“OFSI”) has the power to issue monetary penalties for breaches of financial sanctions on a strict liability basis. The newly-published Guidance sets out how OFSI will apply these civil penalties. Release of the Guidance follows the implementation of the Economic Crime Act in March 2022, the legislation which grants OFSI such powers.

Following the Russian invasion of Ukraine on 24 February 2022, the U.S., the UK and the EU imposed wide-ranging sanctions targeting Russia’s largest banks and corporations, sovereign debt, foreign reserves, and some of its wealthiest and most powerful individuals. In the months following the invasion, the UK Government significantly extended existing financial sanctions against Russian legal entities and individuals who are listed on [OFSI’s Consolidated List](#). In addition, the UK also adopted financial sanctions which prohibit persons from dealing directly or indirectly with transferable securities or money-market instruments issued after 0:01 on 1 March 2022 by or on behalf of persons “connected” with Russia. There are also restrictions on extending loans and credit arrangements after 0:01 on 1 March 2022 to Russian legal entities and the government of Russia. These sanctions are summarised in our earlier memos: [Taking Stock: A Survey of the New Russia Sanctions Landscape](#) and [New Round of Russia Sanctions](#).<sup>1</sup>

The brutality of the Russian invasion and the wide-ranging nature of the sanctions imposed by the UK, the U.S. and the EU have already ensured that this issue is at the very top of the corporate agenda. The publication of the Guidance confirming OFSI’s powers to impose significant civil penalties on a strict liability basis should serve as a timely reminder for

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<sup>1</sup> See also: [Navigating the Latest on Russia Sanctions – A Perspective from European Real Estate Financing](#)

businesses across a range of sectors to ensure that their compliance framework is reliably able to identify and respond to sanctions risk.

### **Statutory Framework**

Due to powers conferred by the Policing and Crime Act 2017 (“the 2017 Act”), OFSI can respond to a potential breach of financial sanctions imposed by the UK Government in several ways, depending on the facts of the case. Various steps could be taken by the agency, including (i) issuing a warning, (ii) referring regulated professionals or bodies to their relevant professional body or regulator in order to improve their compliance with financial sanctions, (iii) publishing information pertaining to a breach even where no monetary penalty is imposed, if this is in the public interest, (iv) imposing a monetary penalty, and (v) referring the case to law enforcement agencies for criminal investigation and potential prosecution.

The 2017 Act contains powers for HM Treasury to impose monetary penalties for breaches of financial sanctions. The 2017 Act was subsequently amended by the Sanctions and Anti-Money Laundering Act (2018) (“SAMLA”).

On 15 March 2022, the long-awaited Economic Crime (Transparency and Enforcement) Act (“ECA 2022”) received Royal Assent. A key change included lowering the threshold for the imposition of a civil monetary penalty; under prior rules, a liability determination required a showing that a person must have “known, suspected or believed” that they were breaching sanctions prohibitions. Under ECA 2022, OFSI will be permitted to impose civil monetary penalties on a ‘strict liability’ basis, similar to the current approach in the United States. This lowering of the liability threshold has prompted OFSI to release guidance as to how it intends to implement its enhanced powers.

Some criticism had been levelled at the UK Government in respect of the new powers granted under the ECA 2022, chiefly the lack of strategy for funding the changes. Such discussion would not be expected to be outlined in the Guidance, and this question still remains unanswered. It should also be noted that the ECA 2022 is the start of a wider set of reforms strengthening the UK’s fight against economic crime – a second Economic Crime Bill is expected to be tabled in the summer of 2022.

### **What has changed under the Economic Crime Act and the new OFSI Guidance?**

#### *Strict liability and standard of proof*

Prior to the ECA 2022, OFSI must have been satisfied that on the balance of probabilities, i.e. more likely than not, the person knew or had reasonable cause to suspect that their conduct breached a financial sanction. Under the ECA 2022, OFSI may now impose the penalty on a strict liability basis, such that a person’s intent or knowledge is no longer relevant; the mere fact that sanctions were breached will be sufficient to establish liability. OFSI will still need to demonstrate that a breach of sanctions occurred on the balance of probabilities.

The pre-ECA 2022 standard had resulted in just 6 enforcements in 6 years. The agency is expected to ramp up enforcement levels, given that it has now been equipped with more effective tools to do so.

#### *Case assessment*

When seeking to establish whether there is a breach of a prohibition or a failure to comply with an obligation under sanctions regulations, OFSI will not be limited to only those breaches which occur within UK borders but any breach that has a UK nexus.

It will take several factors into account that will aggravate or mitigate a particular case. These can include:

1. Circumvention of sanctions

A person will usually commit an offence when they intentionally circumvent any of the prohibitions or enable or facilitate such contravention.

2. Value of the breach

The financial value of the transactions or resources involved in the breach in the overall assessment of the case. Even lower-value breaches may result in enforcement action if OFSI deems it appropriate.

3. Harm or risk of harm to the sanction regime's objectives

OFSI will make an assessment of the harm or the risk of harm done to the regime's objectives – the greater the harm, the more seriously the case will be regarded.

4. Knowledge of sanctions and compliance systems

The level of actual and expected knowledge of financial sanctions held by an individual or a company, considering the kind of work that they do and their exposure to financial sanctions risk.

5. Behaviour

Several broad categories of behaviour will be considered. Is the breach deliberate? Is there evidence of neglect or a failure to take reasonable care? Has there been a system and controls failure or an incorrect legal interpretation? Is the person unaware of their responsibilities? Or was there simply a mistake?

It is possible for a mistake to cause breach of financial sanction regulations. Even without the knowledge that the action would be a breach or provide any reasonable

cause to suspect this, the matter would still meet the legal standard to impose a monetary penalty.

6. Failure to apply for a licence; breach of licence terms

Monetary penalties may apply to breaches of licence conditions.

7. Professional facilitation

Facilitation of a financial sanctions breach is a form of circumvention. Those who act on behalf of or provide advice to others as part of their job may be considered professional facilitators.

8. Repeated, persistent or extended breaches

Repeated, persistent or extended breaches by the same person will be considered as an aggravating factor. Multiple breaches extended over time will be viewed as more serious collectively.

9. Reporting of breaches to OFSI

Breaches of financial sanctions must be reported to OFSI. Reporting obligations apply regardless of client confidentiality, but remain subject to legal professional privilege.

10. Voluntary disclosure, materially complete disclosure and good faith

Voluntary disclosure may be a mitigating factor when OFSI assess a particular case. It may also have an impact on subsequent decision-making with respect to monetary penalties. If multiple parties are involved in a breach, each party should make a voluntary disclosure.

11. Failure to provide information on financial sanction breaches

This can be a criminal offence in its own right. In some circumstances, OFSI can use statutory powers to require the provision of information although an offence is only committed where a person fails to produce information "without reasonable excuse."

12. Public interest

This will encompass issues such as the prudent use of public resources and fairness and consistency in applying the law.

### *Monetary penalty*

In order for OFSI to impose a monetary penalty, it must be satisfied that the monetary penalty threshold has been met, i.e. on the balance of probabilities, there has been a breach. In reaching this decision, OFSI will consider whether:

- the breach has involved funds or economic resources being made available to a designated person;
- the breach has involved a person dealing with the funds or economic resources of a designated person or entity in breach of an asset freeze;
- there is evidence of circumvention;
- a person has not complied with a requirement to provide information; and/or
- OFSI considers that a monetary penalty is appropriate and proportionate.

As discussed above, when assessing the level of monetary penalty, OFSI will consider voluntary disclosure as a mitigating factor.

In a case where the breach or failure relates to particular funds or economic resources and it is possible to estimate the value of the funds or economic resources, the permitted maximum is the greater of (a) £1,000,000 or (b) 50% of the estimated value of the funds or resources. From here, OFSI will consider reasonableness and proportionality, based on their view of the seriousness of the case.

### *“Naming and shaming”*

The ECA 2022 also gives OFSI the ability to publish the details of a sanctions breach, even where a financial penalty is not imposed. The Guidance states that the agency will look to do this when it considers that information about the breach contains “valuable compliance lessons for industry.” The details OFSI will publish for unpunished breaches will include its financial value, the identity of the party who committed the violation, as well as “other information required to give a true understanding of the case.”

### *Criminal liability*

The 2017 Act provides that a breach of financial sanctions may also be a criminal offence, punishable upon conviction by up to 7 years in prison. The failure to provide any information requested by OFSI, in addition to being considered an aggravating or mitigating factor, is also a criminal offence in its own right. Criminal enforcement is dealt with separately from the civil enforcement process described above.

*OFAC Enforcement Guidelines*

OFAC's new Guidance shares many similarities with OFAC's longstanding Economic Sanctions Enforcement Guidelines. For example, the OFAC Enforcement Guidelines include a number of "General Factors" used by the agency in determining its response to an apparent violation of U.S. sanctions. Similar to the OFSI factors, these include, among other things: (1) whether the conduct was wilful or reckless; (2) whether an individual or company was aware (or should have been aware) of the conduct; and (3) the economic benefit obtained by the sanctioned party and other "harm" to the relevant sanctions program. Other General Factors under OFAC's Enforcement Guidelines include: the commercial sophistication of the subject person and other "individual characteristics," the adequacy of a company's compliance program, the effectiveness of a company's remedial response, and the nature and extent of cooperation with OFAC's investigation. Like the OFSI factors, each OFAC General Factor may be either "mitigating" or "aggravating," and each factor informs OFAC's determination of whether an apparent violation was "egregious" or "non-egregious" in nature. This determination, together with the agency's determination as to whether the conduct was voluntarily self-disclosed, determines the applicable base civil monetary penalty.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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