

OFSI Publishes Updated Enforcement and Penalty Guidance

June 13, 2022

On 8 June 2022, the United Kingdom's Office of Financial Sanctions Implementation ("OFSI") announced that its new strict liability enforcement standard and updated accompanying guidance would take effect on 15 June 2022.¹ On 9 June 2022, the corresponding legislation was enacted, confirming that the new strict liability enforcement standard would come into force, and clarifying that it would not apply to breaches of sanctions that occurred before 15 June 2022.²

As outlined below, the guidance reflects key measures in the Economic Crime (Transparency and Enforcement) Act 2022 (the "Economic Crime Act"),³ including:

- the new strict liability test for imposing civil monetary penalties;
- changes to the review of monetary penalties; and
- a new ability for OFSI to publish details of breaches where it has not imposed a monetary penalty.

Strict Liability Basis for Civil Monetary Penalties. The updates to OFSI's enforcement and other powers were included in the Economic Crime Act, which was fast-tracked in March by Parliament in response to the war in Ukraine.

Previously, when imposing a civil penalty, OFSI was required to prove that the relevant person had knowledge or reasonable cause to suspect that they were breaching financial sanctions. As of 15 June 2022, this requirement will be removed and OFSI will simply be required to prove that there was a breach of financial sanctions by the relevant person. This change reflects the U.S. financial sanctions model of strict liability and will make it

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1081195/OFSI_Enforcement_guidance_June_2022.pdf.

² <https://www.legislation.gov.uk/ukxi/2022/638/made>

³ Debevoise Update, "UK Economic Crime Act Strengthens Anti-Money Laundering and Sanctions Framework" (16 March 2022), available at <https://www.debevoise.com/insights/publications/2022/03/uk-economic-crime-act-strengthens>.

significantly easier for OFSI to impose monetary penalties on companies and individuals who breach sanctions, including for inadvertent violations. There is no change to the criminal test for breaching financial sanctions.

Despite this change, Giles Thomson, Director of OFSI, has reiterated in a blog post accompanying the guidance that OFSI will not necessarily impose a monetary penalty in every case that involves a breach of financial sanctions. Rather, it will impose monetary penalties where it is “appropriate, proportionate, and in the public interest to do so”.⁴ Mr Thomson emphasised the importance of self-disclosure as a mitigating factor, as well as whether the person committing the breach knew or suspected that their conduct amounted to a breach of financial sanctions. This position is reflected in the new guidance, which states that OFSI can take into account a number of factors when assessing what action to take, including whether the person committing the breach knew or suspected that their conduct amounted to a breach of financial sanctions. However, OFSI has not ruled out bringing enforcement action for unintentional breaches. The new guidance notes:

“It is possible for a mistake to cause a breach of financial sanctions regulations, for example making funds available to a designated person. 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 for HM Treasury to impose a monetary penalty”.⁵

Changes to the Review of Monetary Penalties. In addition to strengthening OFSI’s enforcement powers, the Economic Crime Act has amended the process for challenging monetary penalties. Review requests made after 15 June 2022 by those who have been found to have breached financial sanctions may now be considered by senior officials in the Treasury as well as the economic secretary to the Treasury. Previously, the minister was required personally to review all challenges. The right to obtain a review has not changed in substance, and an OFSI monetary penalty can still be further challenged in the Upper Tribunal. Mr Thomson notes that this change “will allow [the Treasury] to more effectively manage the resourcing implications of this work”.⁶ Some have been critical of the fact that ministers, rather than the courts, have the power to reduce UK sanctions penalties: this change cements the position by expanding non-judicial involvement.

⁴ <https://ofsi.blog.gov.uk/2022/06/08/new-enforcement-powers-a-message-from-giles-thomson-director-of-ofsi/>.

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1081195/OFSI_Enforcement_guidance_June_2022.pdf.

⁶ <https://ofsi.blog.gov.uk/2022/06/08/new-enforcement-powers-a-message-from-giles-thomson-director-of-ofsi/>.

Power to Publicise Details of Financial Sanctions Breaches. Finally, OFSI can now publicise details of financial sanctions breaches committed after 15 June 2022 where it has not imposed a monetary penalty. These will include a summary of the case, the financial value and information on who committed the breach. Publication will be considered on a case-by-case basis, and is intended to deter future non-compliance, raise awareness of financial sanctions, and provide compliance lessons for the industry. OFSI will notify persons involved in a case prior to publication and give them the opportunity to make representations.

This power to publicise details of financial sanctions breaches increases the reputational risk for firms, even in circumstances where the company has not had any penalty imposed in relation to a sanctions breach. However, the publication of such information should also provide insight into OFSI's decision-making process, including their conclusions as to what conduct constitutes a breach of sanctions. Given the general lack of guidance from OFSI on this to date, this will likely become an important source of interpretative guidance around UK sanctions.

Effect on Business. The updated enforcement and penalty guidance and statements from Mr Thomson do not introduce a change to the general approach: that businesses should ensure that they operate reasonable and proportionate sanctions systems and controls. The guidance emphasises the importance of corporations having compliance systems appropriate for their industry sector. It seems clear that OFSI will still take a reasonable and proportionate approach in situations where an unintentional sanctions breach occurs.

The shift to strict liability for civil monetary penalties reflects the U.S. approach and simultaneously shifts the United Kingdom's approach away from the EU position, as the European Union still retains a general defence stating that an individual or corporation cannot be liable for EU sanctions breaches where there was no knowledge of or reasonable cause to suspect a breach.

* * *

Please do not hesitate to contact us with any questions.

NEW YORK



Jane Shvets
jshvets@debevoise.com

WASHINGTON, D.C.



Satish M. Kini
smkini@debevoise.com

LONDON



Karolos Seeger
kseeger@debevoise.com



Konstantin Bureiko
kbureiko@debevoise.com



Aisling Cowell
acowell@debevoise.com