OTSI: New Trade Sanctions Enforcement Powers

30 September 2024

On 12 September 2024, the United Kingdom published the Trade, Aircraft and Shipping Sanctions (Civil Enforcement) Regulations 2024 (the "Regulations"). The Regulations will come into force on 10 October 2024 to give civil trade sanctions enforcement powers to the Department for Business and Trade (the "DBT") acting through the new UK Office of Trade Sanctions Implementation ("OTSI").

The Regulations are supported by the Trade, Aircraft and Shipping Sanctions, Civil Enforcement Guidance issued on 12 September 2024 by the Foreign, Commonwealth & Development Office, DBT, Department for Transport ("DfT") and OTSI (the "Guidance"), which provides further detail on the enforcement framework set out in the Regulations.

The Regulations introduce new civil enforcement powers for breaches of trade-, aircraft- and shipping-related sanctions. This brings trade sanctions in line with financial sanctions (where the Office of Financial Sanctions Implementation ("OFSI") has held the power to impose civil penalties since 2017) and changes the landscape of trade sanctions enforcement, which has previously been handled by HM Revenue & Customs ("HMRC").

New Enforcement Powers. Prior to the Regulations, HMRC was responsible for enforcement of trade sanctions. HMRC could investigate trade sanctions offences with one of two potential outcomes: a referral to criminal prosecution, or an offer to settle the matter through a compound penalty. The compound penalty process has historically been highly opaque, with little publicly available information on how fines are calculated and with any published penalties being anonymous. Further, to be in a position to impose a compound penalty, HMRC needed to be satisfied that a trade sanctions breach is made out to a criminal standard of evidence.

The Regulations have changed the UK sanctions enforcement landscape, splitting responsibility for breaches across five different entities (and creating an additional enforcement route for "transport" sanctions, which are quickly becoming a stand-alone type of restriction):

- OTSI: OTSI becomes responsible for civil enforcement of all trade sanctions offences (unless specifically excluded). OTSI will impose monetary penalties on corporate bodies, as well as their directors, managers, secretaries and similar officers. OTSI reserves a right to refer the case to the relevant law enforcement agencies (most likely, HMRC) for criminal investigation, which could result in a decision to refer a matter for potential prosecution.

- DfT: DfT will have civil enforcement powers similar to the powers of OTSI but with respect to aircraft- and shipping-related sanctions offences.

- HMRC: HMRC keeps its existing criminal enforcement powers and will refer to prosecution sufficiently grave offences of trade sanctions that it investigates upon OTSI's referral. HMRC remains fully responsible for the enforcement of trade sanctions that fall within its remit as a UK customs authority or that relate to strategic export controls, such as sanctions regarding military and dual-use goods and technology.

- HM Treasury and Ofcom: OTSI's civil enforcement powers do not cover areas where enforcement is already designated to His Majesty's Treasury ("HM Treasury") and Office of Communications ("Ofcom"). This includes financial sanctions, prohibitions on the maritime transportation of oil and petroleum products and the provision of internet services.

Strict Liability. UK trade sanctions typically include a complete defence where you can show that you did not know and had no reasonable cause to suspect that you were participating in activities prohibited by the relevant restrictions, something a party could rely on in any criminal investigation conducted by HMRC.

The Regulations now grant OTSI the power to impose civil penalties on a strict liability basis. This means that to impose a penalty, OTSI will effectively only need to prove that, on the balance of probabilities, as a factual matter, a breach of the relevant trade restrictions occurred (for example, a product targeted by export restrictions was in fact exported to a prohibited destination).

The Office of Financial Sanctions Implementation ("OFSI"), the financial sanctions enforcement arm of HM Treasury, has been applying the strict liability basis for enforcement of financial sanctions breaches since 2022. Thus, the liability standards for financial and trade sanctions enforcement are finally in alignment, both on the criminal and civil enforcement side.

Calculation of Fines. The maximum possible trade sanctions penalty that OTSI can impose is the greater of £1,000,000 or 50% of the established value of the breach. If the value is impossible to estimate, the permitted maximum is £1,000,000. This mirrors OFSI's civil penalties for financial sanctions breaches.

At this point, OTSI Guidance lacks details on the process behind calculation of monetary penalties. For comparison, OFSI has developed comprehensive guidance on assessing the severity of a breach and the conduct of an offender, and mitigating and aggravating factors for both, that determines the exact amount of the fine. For now, OTSI has only confirmed that it values voluntary disclosures and will take them into account while deciding on the penalty in each case.

Disclosure. OTSI may publish reports where a breach of trade sanctions regulations has occurred. This could be a separate penalty in a case where a fine is not justified, or a penalty additional to a fine. Under OFSI's equivalent process, OFSI has to date published relatively detailed descriptions of the grounds for each civil penalty imposed (and, in one case, publishing a determination of breach with no accompanying penalty).

This development should provide significantly more transparency on trade sanctions enforcement within the United Kingdom, as compared to HMRC's approach of only providing very high-level anonymised summaries to accompany its compound penalties.

Reporting Obligations. The Regulations have also for the first time created mandatory reporting obligations for known or suspected breaches of UK trade sanctions.

Financial and legal services providers, as well as money service businesses, must inform OTSI as soon as practicable if, through the course of carrying on their business, they know or have cause to suspect that a person has committed a breach of trade sanctions.

OTSI has also been granted a power to request information from any person if OTSI believes that the person may be able to provide such information (which, again, mirrors OFSI's powers in connection with financial sanctions breaches). Such a request may include a requirement to provide specified documents or documents of a specified description. If the requested documents are not in the recipient's possession or control, the recipient is required to take only steps that are reasonable to obtain such requested documents.

A failure to comply with the reporting obligation or responding to an information request, or providing incorrect or misleading information, is a criminal offence.

Licences. Trade sanctions licences remain within the power of the Export Control Joint Unit, which, like OTSI, is a part of the DBT. In this sense, unlike OFSI, OTSI appears to be a purely enforcement authority without the ability to issue general or individual licenses authorising otherwise prohibited conduct.

Key Takeaways. OTSI's new civil enforcement powers go a long way in filling the gap in the trade sanctions enforcement landscape and increasing the transparency of the trade sanctions enforcement process.

Establishing OTSI as a trade sanctions enforcement centre is reflective of an unprecedented growth of the trade sanctions and controls network in the last few years, especially with further escalation of Russia-related sanctions. It remains to be seen whether this development will result in a significant increase in the number of trade sanctions investigations and penalties.

At this stage, UK companies are encouraged to revisit their trade sanctions systems and control to ensure they can withstand the new level of scrutiny from OTSI.

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Please do not hesitate to contact us with any questions.

Alan Kartashkin
Partner, London
+44 20 7786 9096
+44 20 7786 9000
akartashkin@debevoise.com

Satish M. Kini
Partner, Washington, D.C.
+1 202 383 8190
smkini@debevoise.com

Karolos Seeger
Partner, London
+44 20 7786 9042
kseeger@debevoise.com

Konstantin Bureiko
International Counsel, London
+44 20 7786 5484
kbureiko@debevoise.com

Anastasia Magid
Associate, London
+44 20 7786 9081
ammagid@debevoise.com

Sophie Michalski
Associate, London
+44 20 7786 9060
smichalski@debevoise.com

Olivia Halderthay
Trainee Associate, London
+44 20 7786 5449
ohalderthay@debevoise.com