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Sanctions Enforcement – Recent Trends

Theresa May, UK Prime Minister, in a speech last month at the Munich Security Conference, reaffirmed the UK's commitment to sanctions post-Brexit, saying:

“We will look to carry over all EU sanctions at the time of our departure. And we will all be stronger if the UK and EU have the means to co-operate on sanctions now and potentially to develop them together in the future.”¹

The practical mechanism for the UK's post-Brexit sanctions regime is working its way through the UK Parliament in the form of the Sanctions and Anti-Money Laundering Bill (“the Bill”), which passed its second reading in the House of Commons at the end of February. The Bill is designed to be the mechanism through which the UK is able to fulfill its international obligations to implement UN sanctions, and to update and amend sanctions in the future. The UK Parliament Joint Committee on Human Rights published its report on the Bill on 28 February, in which it expressed some concern at the broad nature of the delegated powers given to Ministers to create sanctions regulations, the low threshold for designation decisions (which sees the threshold lowered from “reasonable grounds to believe” to “reasonable grounds to suspect”) and other limitations on due process. It noted that *“The UK's withdrawal from the EU should not result in lower safeguards and unjustified restrictions on rights to due process and remedies; indeed it offers an opportunity to ensure rights are properly protected.”²*

Last year also saw the implementation of two other important pieces of legislation concerning sanctions enforcement. The Policing and Crime Act 2017 (“the Act”), which came into force from 3 April 2017, strengthened the UK's sanctions enforcement powers by giving the Office of Financial Sanctions Implementation (“OFSI”), part of HM Treasury, new powers to impose financial penalties (the greater of £1 million or 50% of the value of the breach) for serious sanctions breaches, as an alternative to criminal prosecution. To do so, OFSI need only be satisfied, on the balance of probabilities, that there has been a breach or failure to comply with an obligation imposed by or under financial sanctions legislation, and that the person knew, or had reasonable cause to suspect, that they were in breach of the prohibition or had failed to comply with the obligation. OFSI will refer the most serious cases to the National Crime Agency (“NCA”) for criminal investigation. The Act also increases the maximum term of imprisonment for sanctions offences from two to seven years' imprisonment and adds financial sanctions to the list of offences for which a deferred prosecution agreement can be considered.

Secondly, the European Union Financial Sanctions (Amendment of Information Provisions) Regulations 2017 extends the current positive reporting obligations regarding breaches of financial sanctions on financial services firms to lawyers, accountants, tax advisers, casinos, estate agents and others. Before these regulations came into force on 8 August 2017, financial services firms had a positive reporting obligation to notify HM Treasury of any known or suspected breach of financial sanctions and failure to do so constituted a criminal offence. These regulations extend this reporting regime to professionals not previously caught, and contrast with AML obligations where there is an exception to the obligation to make a suspicious activity report if the information came from the client in privileged circumstances. Furthermore, the obligation on financial institutions to report to OFSI is in addition to, rather than by way of substitute for, AML reporting obligations that may exist under the Proceeds of Crime Act 2002 and/or under the Terrorism Act 2000.

¹ <https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018>

² <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/568/568.pdf>

In its guidance entitled “Monetary Penalties for Breaches of Financial Sanctions”,³ OFSI refers to the criminal offence of failure by relevant institutions to provide information as coming within the scope of OFSI’s powers to apply monetary penalties – and refers to the fact that if OFSI imposes a penalty for a so-called “information offence” it will use the process described within the guidance to determine the penalty. The “penalty threshold” is met, *inter alia*, by a failure by a relevant institution to provide information. Thereafter a determination as to the appropriate level of any such penalty is decided based on the “baseline penalty matrix”, in which voluntary disclosure is a mitigating factor (and may reduce the level of penalty that OFSI seeks to impose by up to 50%). This leads to what the guidance calls a “penalty recommendation”, following which representations may be made for OFSI to consider and a final decision is taken.

This power created by the Act to impose monetary penalties, together with the increase in criminal prosecutorial tools available, is yet another example of the UK seeking to emulate US enforcement efforts, in this case the successful US Office of Foreign Assets Control, which, in 2017, imposed fines of \$119 million on companies, including those headquartered in the EU, found to have breached US financial and trade sanctions.

Despite OFSI’s increased powers, it has yet to publicly penalise anyone; however, arguably its work has only just begun. In its blog, launched on 1 March 2018, OFSI explains that it has spent the last two years working with the business community on guidance, to ensure a proper understanding and awareness of sanctions. Its enforcement approach, it says, “aims to be coherent and appropriate”. Its guidance emphasises its desire to encourage strong compliance cultures within organisations.

Recent reports suggest that in 2017 alone, OFSI received reports of 133 contraventions of a total value of £1.4 bn, whilst not publicly penalising anyone – however, the first years of a new government body should not be taken as an indication that it will be ineffective moving forward. Indeed, evidence suggests that more reports are being made to OFSI by corporates when they discover a potential breach. This, together with growing political pressure to ramp up the enforcement of sanctions, suggests that we will, inevitably, soon see an upswing in both criminal and civil penalties imposed.

³ <https://www.gov.uk/government/publications/monetary-penalties-for-breaches-of-financial-sanctions>