

Fried Frank International Trade and Investment *Alert*TM



UK launches Office of Financial Sanctions Implementation

On 31 March 2016, HM Treasury announced the launch of the Office of Financial Sanctions Implementation (OFSI).

The launch heralds a new rigour in terms of financial sanctions enforcement in the UK. Previously, this has been carried out by HM Treasury's Asset Freezing Unit. The new OFSI will continue to sit within the Treasury, but is likely to be conferred with a greater range of powers than its predecessor, notably the power to impose hefty penalties.

The UK has had a patchy history of enforcement for financial sanctions to date, focusing more on the enforcement of trade sanctions instead. These are overseen by a separate body, the Export Control Organisation (ECO), and the enforcement of trade sanctions has resulted in the prosecution and imprisonment of several individuals.¹ The launch of OFSI suggests a new focus on fines for companies breaching the rules too, and signals that the UK may move to the more aggressive American "OFAC" model, which has not shied away from levying hefty penalties, such as its \$9.8 billion settlement with BNP Paribas in 2014.

What powers does OFSI have?

As part of its tough new approach, the UK Government is in the process of introducing the new "*Policing and Crime Bill*" that will give OFSI the power to impose a range of new penalties for breaches of financial sanctions. Along with providing the Treasury with the powers to fine individuals (presumably carried out through OFSI), the measures also include an increase in the maximum custodial penalty possible. The new law still needs to be approved by Parliament before entering into force, but assuming it is, it will provide for a number of criminal and civil measures.

A key feature is the increase in the maximum custodial sentence to seven years. This is a significant increase from the current maximum sentence of two years, and brings the penalty for a breach of financial sanctions in the UK closer to that for trade sanctions, where the maximum is ten years, and into line with UK domestic asset freezing regimes.

¹ For example, UK businessman Gary Summerskill, was jailed for two and a half years in March 2014 for having exported £3 million worth of alloy valves that were subject to an export ban to Iran. Mr. Summerskill had been aware of the final destination of the equipment, but proceeded with three shipments to Iran via Hong Kong and Azerbaijan (in an attempt to conceal the final destination). Mr. Summerskill's company, Delta Pacific Manufacturing, was also fined £1.14 million.

OFSI will also have the power to impose large fines instead of pursuing a criminal penalty. The current bill envisages fines of up to £1M (\$1.44M) or 50% of the value of the funds or economic resources in question, whichever is the greater. The fines can be levied not only at the company committing the breach, but also at specific individuals who breached the prohibition, and individuals who knew or had reasonable cause to suspect that a person was in breach.

In addition, a fine can also be imposed on officers of the company (i.e. a director, a manager or similar official), where the breach occurred with their consent or connivance, or because of their negligence.

Before imposing a fine, the bill envisages that OFSI will inform the entity it suspects of being in breach, explaining the grounds for the fine and the amount. Consistent with UK public law requirements, the person suspected of breaching financial sanctions will be given the opportunity to make representations on their conduct, which must be considered by OFSI before a fine is then imposed. The decision to impose the fine can be appealed to a minister of the UK government (acting in person), who can maintain, amend or cancel the decision to impose the penalty. The bill also envisages that guidance will be produced on when and how these penalties are likely to be imposed going forward.

A point to note is that as this is a civil penalty, OFSI would only need to show a breach of financial sanctions on “the balance of probabilities,” rather than “beyond reasonable doubt,” to impose the fine.

The draft bill also provides for a number of other powers:

- the imposition of a court-imposed civil Serious Crime Prevention Order for breach of financial sanctions, which can contain targeted prohibitions that the court thinks appropriate to restrict a person or company from further involvement in crime (for example, travel restrictions and restrictions on who a person is allowed to associate with); and
- the ability to enter into Deferred Prosecution Agreements, which allow a company to avoid a criminal conviction in return for acknowledging its misconduct, by agreeing to issue a public statement of facts on its wrongdoing, as well as other conditions (for example, payment of a fine, or the appointment of an independent compliance monitor to report on the company's compliance policies).

Along with punitive measures, the draft bill also permits OFSI to introduce temporary measures aimed at giving early effect to UN sanctions. This is to address the fact that at present, UN sanctions can take some days to be adopted into EU law, creating a risk that assets are seized and removed from the jurisdiction by sanctioned persons during the timegap in enforcement.

What will OFSI be policing?

The use of financial sanctions has become a popular tool in the political repertoire. They are usually agreed to at the international level by the United Nations and by the European Union. Currently, there are 26 UK sanctions regimes in place against states and groups (such as ISIL and Al-Qaida). There are a total of 8,745 persons and entities currently on the UK's financial sanctions list, in part a reflection of the recent conflicts in Ukraine and the ongoing civil war in Syria. At the same time, UK and EU sanctions against Iran have eased, following the Joint Comprehensive Plan of Action on Iran's nuclear programme agreed to last year.

Financial sanctions generally consist of two prohibitions—a freeze on directly or indirectly making funds and economic resources available to, or for the benefit of, a sanctioned person (or entity), and restriction on dealing with their funds or economic resources without a license from the Treasury. In practice, this

can mean a ban on almost all trade with a sanctioned person without a license. If a license from the Treasury has been obtained, then it is usually also an offence to fail to comply with the terms of the license or to provide information when requested to do so.

What this means for you

The proposed measures do not change the substance of the financial sanctions regimes in place, with which companies are already required to comply. However, the launch of OFSI and the changes to the legislation suggest both a heightened focus on sanctions and more serious consequences for a breach.

Amongst OFSI's objectives is the task of ensuring that sanctions are "properly understood, implemented and enforced". This is likely to mean the publication of practical guidance for companies on how to avoid breaching the law when conducting business with sanctioned states. Companies should use this opportunity now to take stock of their current compliance policies and procedures to ensure that they are comfortable with the protection afforded by them against sanctions breaches, and that employees are aware of such policies and are actively implementing them in practice.

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