

# Client Update

## UK Getting More Serious About Sanctions

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In an unmistakable sign that the UK intends to treat breaches of financial sanctions more seriously, the UK government has coupled the creation of a new sanctions agency, the Office of Financial Sanctions Implementation (“OFSI”), with a new draft law that would enhance punishments for breaches and, for the first time, create a civil punishment regime.

The Policing and Crime Bill 2016 (the “Bill”), currently before the UK’s House of Commons, seeks to bolster the government’s options to enforce breaches of sanctions, in part by creating powers akin to those wielded in the US by the Office of Financial Assets Control (“OFAC”) and the US Department of Justice (“DOJ”).

The Bill, which is likely to become law over the next year or two, proposes to make three significant changes:

- It would increase criminal penalties for breaching economic sanctions;
- It would create a new regime of civil penalties; and
- It would make deferred prosecution agreements available for sanctions violations.

This Bill, together with the newly created OFSI, discussed below, sends the clear message that the UK intends to become more serious about enforcing compliance with economic and trade sanctions.

### NEW PROVISIONS

#### Increased Criminal Penalties

Those who breach financial sanctions currently face up to two years’ imprisonment. The UK government considers that this maximum is out of step

with the available punishment for similar offences, such as terrorist financing under the Terrorist Asset Freezing etc. Act 2010. The Bill would therefore increase the maximum penalty for sanctions violations to seven years' imprisonment.

### **New Civil Penalty Regime**

Enhanced criminal penalties may have some deterrent effect, but such punishments still need proof to the criminal standard, which is difficult in the case of sanctions violations for prosecutors and regulators around the world. Indeed, part of the reason for the greater volume of sanctions enforcement in the US is that the US government (via OFAC, other federal supervisory agencies and the DOJ) is able to bring either criminal or civil charges against suspected violators.

Therefore, to aid increased enforcement, the Bill proposes new civil penalties and a new procedure for sanctions violations. The Bill provides that civil penalties should be sought over criminal penalties where the public interest mitigates against criminal proceedings because of the extent or circumstances of the breach. More detailed guidelines for when civil sanctions should be pursued in preference to criminal penalties may well be published, potentially on the same lines as previous guidelines published by the Attorney General directing prosecutors when to pursue Civil Recovery Orders rather than criminal prosecution.<sup>1</sup>

Under the proposed regime, the Treasury would be able to levy a fine against a person after finding, on the balance of probabilities, that the person has violated sanctions. Before a determination is made, however, the accused violator would need to be informed that the accused is facing a fine and must have the opportunity to make representations in defence. These are similar to the safeguards afforded those subject to Financial Conduct Authority enforcement proceedings.

A person who has been fined has the right to an in-person review by a government minister, ostensibly within the Treasury. The Bill appears to indicate that, if the minister upholds the first-instance decision, that will be a final decision: no provision is made therein for any court or tribunal. This means that a person who wishes to challenge the minister's decision will be left with the sole option of seeking judicial review, which has more onerous procedural

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<sup>1</sup> Guidance for prosecutors and investigators on their asset recovery powers under Section 2A of the Proceeds of Crime Act 2002.

requirements and fewer advantages to the claimant than other applications to the court. If the Bill passes in its current form, it is possible that the review process will be challenged as not affording persons suitable judicial redress.

The possible fines would be hefty as well: up to the greater of £1 million or 50% of the total value of the breach.

Ultimately, though, companies and individuals faced with allegations of sanctions violations will have to be wary of the possibility of both civil and criminal punishment.

### DEFERRED PROSECUTION AGREEMENTS

Where the public interest favours proceeding criminally, the Bill seeks to ease the way for prosecuting authorities by making deferred prosecution agreements (“DPAs”) available for sanctions violations. Currently, DPAs are available only for crimes of bribery, fraud and money laundering. Prosecutors and the courts use a complex calculus to determine whether a DPA or a criminal prosecution would be appropriate, including the weight of the offence and the subsequent cooperation by the offender, including self-reporting. So far, there has only been one completed DPA (in the Bribery Act context),<sup>2</sup> so it is early to draw lessons for the sanctions context.

Should the Bill progress, guidance likely will be issued on the use of DPAs for sanction violations.

### THE OFSI

As noted, the introduction of the Bill should be seen in the context of the creation of OFSI, which became operational on 31 March 2016. OFSI, like its US counterpart OFAC, sits within the Treasury. Trained by Chancellor of the Exchequer George Osborne last year, the new unit is charged with enhancing enforcement and improving businesses’ understanding of sanctions. To this end, it has already issued updated guidance on the UK sanctions regime which

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<sup>2</sup> “First UK DPA Starts to Answer Questions About Bribery Act Enforcement”, Debevoise & Plimpton LLP, 1 December 2015. Accessible from: [http://www.debevoise.com/~media/files/insights/publications/2015/12/20151201a\\_first\\_uk\\_dpa\\_starts\\_to\\_answer\\_questions\\_about\\_bribery\\_act\\_enforcement.pdf](http://www.debevoise.com/~media/files/insights/publications/2015/12/20151201a_first_uk_dpa_starts_to_answer_questions_about_bribery_act_enforcement.pdf)

includes practical examples of how OFSI expects businesses to approach sanctions issues.<sup>3</sup>

In terms of enhanced enforcement, at the announcement of its launch the Chancellor stated that OFSI would come in together with increased penalties for sanctions violations. The Bill has now laid the path for his forewarning to become law. The need for companies to conduct robust sanctions due diligence will now be greater than ever.

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Please do not hesitate to contact us with any questions.

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<sup>3</sup> Financial sanctions: guidance, OFSI, 4 April 2016. Accessible from: <https://www.gov.uk/government/publications/financial-sanctions-faqs>