

Sanctions Update: Strict Civil Liability Test for UK Financial Sanctions Breaches Enters Into Force

The UK's financial sanctions regulator has released new guidance in light of its additional powers to police sanctions breaches.

This Client Alert is published in the context of ongoing developments and should be read in conjunction with the Latham & Watkins Client Alerts published on [10 June](#), [13 May](#), [12 April](#), [11 March](#), [8 March](#), [1 March](#), and [25 February](#).

The [Economic Crime \(Transparency and Enforcement\) Act 2022](#) (ECA) is an important piece of legislation regulating the imposition of monetary penalties for breaches of UK financial sanctions. Although the ECA received royal assent on 15 March 2022, certain provisions are only now entering into force.

In particular, as of 15 June 2022, the ECA amends significant provisions of the Policing and Crime Act 2017 (PCA), which empowers the UK's Office for Financial Sanctions Implementation (OFSI) to impose monetary penalties for breaches of financial sanctions.

OFSI has released [updated guidance](#) concerning new powers and procedures arising from these changes. Per an [accompanying article](#) by OFSI Director Giles Thomson, the key changes are threefold:

1. OFSI has the power to impose civil fines for financial sanctions breaches on a strict liability basis.
2. OFSI may publish reports about persons it considers to have breached financial sanctions but whom it has chosen not to fine.
3. The review and appeal process has been updated such that:
 - a) fined persons no longer have the right to a minister-level review (instead, the review can be conducted by non-ministerial officials who were not involved in the original case assessment); and
 - b) persons who have only been the subject of published reports regarding financial sanctions breaches, but who have not been fined, do not necessarily have a right of review or appeal.

The New Strict Liability Approach

Previously, in order to impose a monetary penalty under s.146(1)(b) PCA, OFSI had to be satisfied that, on the balance of probabilities, a person “knew or had reasonable cause to suspect” that they were in breach of sanctions or had failed to comply with an obligation.

Through the application of s.54 ECA, as of 15 June 2022, the provision of the PCA containing that knowledge requirement is omitted and the following language is instead included: “[i]n determining [...] whether a person has breached a prohibition, or failed to comply with an obligation, imposed by or under financial sanctions legislation, any requirement imposed by or under that legislation for the person to have known, suspected or believed any matter is to be ignored”.

Director Thomson [notes](#) that the change “brings this aspect of UK financial sanctions legislation more in line with [...] the model used for US financial sanctions.” In the US, the Treasury Department’s Office of Foreign Assets Control (OFAC) has stated in an [advisory](#) that it “may impose civil penalties for sanctions violations based on strict liability, meaning that a person subject to US jurisdiction may be held civilly liable even if it did not know or have reason to know it was engaging in a transaction with a person that is prohibited under sanctions laws and regulations”. Similarly, Director Thomson considers the UK’s regulatory shift will strengthen OFSI’s ability to act against persons “that fail to ensure they are not dealing with sanctioned entities or adhere to their financial sanctions obligations”.

According to OFSI’s [guidance](#), whether a person “knew or suspected that their conduct amounted to a breach” has not become irrelevant: OFSI will consider this factor when assessing the severity of the breach and determining a “proportionate” response.

Neither the size nor nature of the monetary penalty that OFSI can impose has changed: the permitted maximum penalty remains £1 million or 50% of the value of the breach, whichever is higher. However, the ECA has provided OFSI with an additional power: in effect, the capacity to “name and shame” persons it considers have committed breaches but whom it has chosen not to fine.

Publication of Breaches of Financial Sanctions

OFSI [generally publishes reports](#) when it imposes civil monetary penalties. These reports include details of the penalty, compliance lessons, and a summary of facts, including the parties who committed the breach.

However, as of 15 June 2022, s.56 ECA provides OFSI with the power to publish such reports when “a monetary penalty has not been imposed” but OFSI is nevertheless “satisfied, on the balance of probabilities, that a person has breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation”.

Director Thomson describes this power as an “addition to our enforcement toolkit [that] will help to raise awareness of financial sanctions”. He writes that “[t]he power only applies where there is found to be a breach of financial sanctions, and publication will be considered on a case-by-case basis — including whether the case involves important compliance lessons for industry”.

He further states that “OFSI will notify persons prior to publication to provide an opportunity to make representations”. However, the [OFSI guidance](#) notes that the right to seek a review and, in certain circumstances, an appeal of OFSI’s decision “does not apply where a monetary penalty has not been imposed”.

Review Process

The PCA previously provided that a person on whom OFSI imposed a monetary penalty had the right to seek a personal review by a minister of Her Majesty's Treasury (HMT). However, following an amendment by s.55 ECA, OFSI's guidance explains that now "where a review is requested, such review will be undertaken by people not involved in the original case assessment". Director Thomson considers that this change "will allow HMT to more effectively manage the resourcing implications of this work."

[OFSI's guidance](#) has been updated to clarify that an appeal is permitted (by way of the Upper Tribunal) if the result of the review is "to uphold the decision to impose the monetary penalty and its amount, or to uphold the decision to impose the monetary penalty but to substitute a different amount".

Accordingly, it remains unclear what recourse exists if OFSI exercises one of its new powers and publishes the details of a breach without imposing a monetary penalty.

Takeaways

The amendments to the powers and procedures of the UK's sanctions regulator that apply from 15 June 2022 are significant. Principal among them are:

- the imposition of a strict liability standard for civil monetary penalties for financial sanctions breaches;
- the removal of the ministerial review requirement; and
- the power to publish reports of breaches without imposing a monetary penalty.

Given OFSI's ability to impose monetary penalties on a strict liability basis, it is important that businesses review and, if necessary, update their sanctions compliance procedures. For example, businesses may wish to implement denied party screening to ensure that they do not inadvertently deal with sanctioned persons. Such precautions are particularly important for businesses with a continued presence in, or which are continuing to trade with, Russia and Belarus — which involves significant risks of inadvertently breaching sanctions.

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