

OFSI & NCA RED ALERT – EVASION TYPOLOGIES

On 12 July 2022 the National Crime Agency (NCA) and HM Treasury's Office of Financial Sanctions Implementation (OFSI) issued a Red Alert on Financial Sanctions Evasion Typologies: Russian Elites and Enablers¹.

Enablers have previously been in the sights of UK law enforcement in relation to money laundering. This alert demonstrates that focus, rather than diminishing, is growing in scope with the inclusion of financial sanctions breaches.

Why now?

Unlike the US the UK has historically had a relatively benign sanctions environment with OFSI only issuing 7 monetary penalties since it was given those powers in 2017. However, the growing economic pressure applied to Russia as well as the unprecedented volume and speed of new sanctions implemented globally in the past three months has pushed this to the forefront, as this red alert and recent statements from OFSI indicate.

Giving evidence to the UK Treasury Select Committee on 22 June 2022 Giles Thompson, the Director of OFSI, stated that enforcement cases were increasingly becoming the priority and outlined the steps that OFSI is taking to address this by increasing staff numbers, including by bringing in experienced investigators from the Financial Conduct Authority (FCA) and HM Revenue and Customs (HMRC), and working with the NCA, whose Combatting Kleptocracy Cell has responsibility for criminal sanctions evasion and high-end money laundering by "corrupt elites" and their "key enablers", to upskill OFSI staff in financial investigation skills and intelligence handling.

Meanwhile the FCA, in a recent letter in response to a Treasury Committee inquiry², has also indicated that having given firms that they regulate a reasonable period to respond to sanctions they are now increasing their assessment work on the sanctions controls to pro-actively test compliance and where issues are identified will liaise with OFSI and other government partners as appropriate.

The alert, which was prepared with input from law enforcement and financial sector partners as part of the Joint Money Laundering Intelligence Taskforce (JMLIT), meets one of OFSI and the NCA's other aims, which is awareness raising and deterrence, by educating businesses about the methods and techniques used by Designated Persons (DPs) and their enablers and facilitators in order to evade financial sanctions. However, as with the FCA's "Dear CEO" letters, the alert can also potentially be used as a standard by which businesses' compliance with sanctions can be measured when considering enforcement action.

Who is the alert aimed at?

The alert is aimed at raising awareness amongst individuals or businesses who DPs may attempt to use to evade sanctions, for example, by the DP's assets being transferred or sold to trusted proxies, while in reality the DP maintains influence over the assets.

These 'enablers' are often trusted business associates, close contacts or even relatives of DPs but also include lawyers, accountants, investment advisors, wealth managers, payment processors, private equity, trust and company service providers, estate agents, auction houses, company directors, intermediaries/agents and private family offices.

By facilitating sanctions evasion enablers are not only exposing themselves to liability for the sanctions breach but may also have liability for money laundering offences due to the assets becoming the 'criminal property' once sanctions evasion has taken place.

¹ <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/605-necc-financial-sanctions-evasion-russian-elites-and-enablers/file>

² <https://committees.parliament.uk/publications/23023/documents/168751/default/>

It is important to note, particularly given the increased international cooperation around sanctions, that the money laundering offence could also be engaged where sanctions imposed by other jurisdictions, such as the EU or US, are breached even if there were no sanctions in place in the UK against the DP at the time.

Any enabling offences will be assessed based on the level of involvement ranging from unwittingly involved (e.g. where businesses were not aware of their obligations at all or do not have the right systems and controls in place), wilfully blind (e.g. where businesses should have known what they were doing, did not invest in the right systems and controls and/or did not prioritise sanctions compliance sufficiently), to criminally complicit (e.g. willingly setting out to either ignore or circumvent sanctions) at the highest.

Sanctions indicators (or red flags)

The alert includes 34 indicators to look out for when assessing whether there is an attempt at evasion of financial sanctions. While the indicators are not at face value evidence of a sanctions breach, they are potential red flags and essentially place an onus on businesses to demonstrate that, as part of their internal systems and controls for detecting sanctions breaches, they took the indicators into account when assessing customer or transaction risk.

Industry recommendations

In addition to the indicators the alert contains six industry recommendations in relation to spotting financial sanctions evasion which companies ought to take into account when assessing the overall business risks or individual customer risks. These recommendations are summarised below:

1. Arms-length transactions need to be documented and should not be taken at face value by firms. This is important when assessing indirect control a DP may exert over the entity.
2. Failure to undertake appropriate due diligence, for example wilful blindness in relation to source of funds or wealth checks, will be considered a red flag for complicity and both breach and/or circumvention offences.
3. Complex corporate structures and the commercial justification for them should be assessed carefully as part of enhanced due diligence for high-risk clients.
4. When assessing aggregation of ownership bear in mind that this can be complicated by the differing approaches to aggregation of ownership applied across EU, UK and US and more than one owner seeks to divest their shareholding.
5. Where firms are presented with documentation that purports to present a change in ownership by a company linked to a DP, it is important not only to conduct enhanced due diligence, but to follow up with the relevant competent authority (OFSI in the UK) to understand if firms have reason to believe that ownership has not been transferred appropriately.
6. In instances where companies have provided their own legal assessments regarding the transfer of ownership, firms should also carry out their own legal assessment in order to come to their own determination.

Call to arms

In addition to reminding businesses that they must report any frozen assets or a breach of sanctions to OFSI, the alert encourages businesses in the regulated sector (broadly those businesses subject to anti-money laundering regulation) to report any activity that they identify as a result of the alert to consider whether they ought to submit a suspicious activity report (SAR). It then goes further than that, inviting businesses to share information even if it would not meet the requirements for a SAR (i.e. knowing or suspecting a person is engaged in money laundering), reflecting a 'call to arms' approach.

If a business is considering making a report to the NCA outside of the SAR regime we strongly recommend that legal advice is sought before doing so to ensure that your business is protected from any potential litigation, for example in connection with any obligations of confidentiality.

Key takeaway

After a lengthy period of sanctions implementation across the globe, enforcement is now clearly at the top of the regulatory agenda and the current red alert robustly underscores this. Expect to see more enforcement activity in this space over the coming months and years and a more joined-up approach between regulatory bodies, law enforcement and the regulated private sector.

While the 'recommendations' form part of the non-statutory guidance on compliance, taken together with the lengthy list of indicators and emphasis on collaboration between enforcement agencies, it would not be an overstatement to say that these are the expected compliance standards going forward.

Burying heads in the sand or taking a reactive rather than proactive stance is not the best approach and could leave the door open to breaches occurring and potential enforcement action; seek legal advice if in doubt.

Our team at HFW have extensive experience advising on sanctions and liaising with OFSI.

For more information, please contact the author(s) of this alert

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