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SANCTIONS ENFORCEMENT A HIGH GOVERNMENT PRIORITY AT A TIME OF INCREASED RISK OF BREACHES

Sanctions are front page news resulting from the Russian invasion of Ukraine and the deluge of sanctions imposed globally since. At the same time, the hitherto relatively benign UK sanctions enforcement environment has changed with attendant risk for companies and individuals.

In the UK the primary gatekeeper for sanctions enforcement is the Office of Financial Sanctions Implementation (OFSI) set up several years ago as the UK equivalent to OFAC in the US.

While firms make herculean efforts to comply with the daily additions to the sanctions list and rules; the seismic shift in the sanctions environment and the pace of change means mistakes and breaches are possible.

Accordingly, in addition to using best efforts to comply with imposed sanctions we strongly recommend that firms review existing compliance programs and seek legal advice when dealing with suspected breaches in order to mitigate potential risks.

In certain circumstances there are reporting obligations in connection with breaches and a failure to report can carry criminal penalties. Importantly, in our experience the response to any mistake by a firm and individuals involved and the nature of any engagement with OFSI will likely have a significant impact on the consequences for them. These may range from no action being taken to large fines; or in worse case scenarios referral to criminal law enforcement and prosecution for firms and those individuals involved.

Enforcement combines with the increased risk of serious reputational damage if potential mistakes are mishandled.

Although there has been little enforcement by Office of Financial Sanctions Implementation (OFSI) with six enforcement actions by it to date since 2019 with penalties ranging from £5,000 to over £20 million, sanctions enforcement environment is now a high government priority.

Largely unnoticed but only days before the widely expected Russian invasion the UK government published details of its future enforcement approach in relation to sanctions. It almost certainly did so knowing change was afoot.

Simultaneously the new Economic Crime (Transparency and Enforcement) Act the subject of a fast track through Parliament with cross party support introduces new powers to the Treasury which is responsible for OFSI.

Under the new law the Treasury can impose a financial penalty if it is satisfied (on balance of probabilities) that a sanctions breach has occurred. Under the new law it is no longer necessary for the Treasury to show that firms have knowledge or a 'reasonable cause to suspect' sanctions are being breached. The new law also introduces the power for the Treasury to publicly name organisations that the Treasury considers, on balance of probabilities, have breached financial sanctions even if they do not receive a fine.

Material changes in the sanctions regime, public focus on the Russian invasion and sanctions as a route to applying pressure on Russia to end it; combined with the potentially draconian reputational and legal consequences (up to and including imprisonment) amount to a heady mix for firms and individuals at a time when commodities were already in short supply.

The UK enforcement regime

OFSI seeks to promote sanctions compliance and respond to non-compliance intervening to disrupt attempted breaches and have a case assessment process when considering potential breaches.

OFSI's response to a sanctions breach includes issuing a warning, referrals to professional bodies or regulators, the imposition of a financial penalty and referral of a case to law enforcement agencies for criminal investigation and potential prosecution.

OFSI will treat any suspected breach on its own merits and seek an outcome which is fair, proportionate and best enforces the purpose of the regime. In doing so, they may also seek legal advice and advice from law enforcement agencies. In common with general principles the severity of any breach and its value is factored in.

The starting point for any breach involving Russia is likely to be that it is severe.

OFSI will consider mitigating and aggravating factors. At one end of the spectrum, mitigating factors may result in no action being taken. At the other end aggravating factors can increase financial penalties or result in a referral to a law enforcement agency for investigation and potential prosecution.

An effective compliance program will be considered a mitigating factor, likewise if there has been a simple mistake. Aggravating factors will include a whole host of matters. For example it will include, the deliberate circumvention of sanctions, a high value breach(es), a lack of knowledge or understanding of the sanctions regime below the expected standard given the nature of the business, neglect or failure to take reasonable care, failure to apply for a licence or breach of a licence' terms, professional facilitation (which is viewed as circumvention), repeated, persistent or extended breaches, failure to provide information and/or a lack of candour.

Accordingly, how suspected breaches are dealt with and presented to OFSI or otherwise should respectively be carefully considered and drafted to avoid them being misconstrued when OFSI is assessing the enforcement approach. It will be important that firms are confident of the facts and circumstances of any breach before making decisions about the best approach to take requiring a review of what has happened. To maintain the confidentiality of any such review it is advisable that any such investigation in the facts and circumstances of a suspected breach is conducted by lawyers to maintain legal privilege.

In the meantime, in addition to the daily advisory around the impact of sanctions on specific transactions we recommend firms review existing compliance programs and document that they have done so to ensure that they are calibrated for the new sanctions environment. We would also recommend that firms review existing customers and their supply chain to ensure that no sanctioned entity remains.

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