



HM Treasury

The process for imposing
monetary penalties for breaches
of financial sanctions:

Consultation response form

Name: [REDACTED]	
Organisation: [REDACTED]	
<input checked="" type="checkbox"/> Please tick if you are responding on behalf an organisation	
Name of organisation (if applicable) [REDACTED]	
Address: [REDACTED]	Telephone: [REDACTED]
Email: [REDACTED]	
<p>1. Do these introductory sections give you enough information to understand the scope of the law on monetary penalties? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>What else would be useful?</p> <p>Please note that [REDACTED] contributed to the response of the [REDACTED]. We fully support all of the observations made in that response, and do not repeat here matters set out in that response. This response raises just a small number of <i>additional</i> points which are likely to be particular pertinent to our clients given the uncertainties they have raised with us about this consultation.</p> <p>As to the introductory section, it would be important to provide clarity upfront on:</p> <ul style="list-style-type: none"> - Whether the imposition of a monetary penalty precludes the possibility of a criminal prosecution in the UK for the same set of facts (the <i>ne bis in idem</i> principle); - What happens where the set of facts engages more than one jurisdiction (the other potentially being either another EU Member State or a UK Overseas Territory)? In particular, does an enforcement action (whether a civil penalty or criminal enforcement) in the UK preclude the possibility of another EU Member State or Overseas Territory bringing criminal enforcement action for the same facts? - The status of a breach of financial sanctions as a criminal offence (notwithstanding the power to impose monetary penalties for breach even though only evidenced to a civil standard) (this is touched on in 2.4.2., but could be clearer). 	
<p>2. What are your views on OFSI's compliance and enforcement approach?</p> <p>The compliance approach, and OFSI's aim of "engaging with the private sector", "making it easier to comply" and "providing customers with guidance" is welcomed – although is perhaps not the primary focus of this consultation.</p>	

We do not agree with that the view expressed in 2.6, namely that "to provide more detail would help persons who intend to evade or circumvent sanctions"; rather more detail would seem to be part of enabling compliance by making it easier to comply (para 2.5.1).

3. Is there anything else you would expect a compliance model to tackle?

Yes No

(if yes please explain what below)

A separate paper elaborating on OFSI's proposed compliance and engagement approach would be useful. As well as round tables (see the response of the [REDACTED]), we would welcome an understanding of what other steps are envisaged by way of engagement.

One particular aspect on which clarity would be welcomed is how OFSI considers that persons (or their legal advisers) should proceed where there is an ambiguity in the law as drafted (and the fact that ambiguities exist has been explicitly recognised by the courts). The approach of OFSI to date (of not commenting on hypothetical scenarios and recommending persons to seek legal advice) is understandable but does not make it easier to comply in a situation where the law (or its application to a scenario) is simply unclear – leaving persons in the position where they have to decide for themselves, but conscious that if OFSI takes a different view, the person may find themselves the subject of enforcement despite a positive desire to comply. If there were a way by which OFSI could give some advanced indication of its likely response to certain scenarios, that would be of enormous value to those with good intentions but faced with ambiguous laws.

OFSI's view takes on a new relevance in the context of monetary penalties – previously OFSI did not have any power to impose a penalty based on its view, whereas now it does (albeit that OFSI's decision can be appealed).

4. Do you understand our proposed case assessment approach?

Yes No

(if no please explain why below)

- The definition of "reasonable cause to suspect" seems nonsensical – it refers to suspicion of "an event", whereas in the legislation, the test is "reasonable cause to suspect that the person was in breach of the prohibition". So the "suspicion" referred to in the legislation is not suspicion of an event, but rather suspicion that a (known) act constituted a breach of sanctions.
- The suggestion that indirect provision of resources may be "severe" is confusing. Later in the same para you note that "such indirect provision may still meet the standard for "reasonable cause to suspect". Taken together these statements appear to indicate that indirect provision only *may* meet the base threshold for a monetary penalty, but if it does, it is likely to be treated as a severe breach.
- In the same para, it is far from clear that a situation where a person could have discovered information but had not discovered it would meet the "*reasonable cause to suspect*" threshold – this would only be the case where some information which the person did have should have put them on enquiry.
- As a practical matter, the question of what constitutes common due diligence is one that many of our clients really wrestle with in all sorts of situation. Any clarity on OFSI's expectations as regards common or proportionate due diligence would be very much appreciated (whether in this Guidance or elsewhere). For example, does it vary according to industry, budget, whether there is a known connection to a sanctions target country, the funds available to the person/entity?

- Given that the law in this area is general, such that its application to specific facts is sometimes uncertain, there are some concerning observations. For example, in the behaviour section, incorrect legal interpretation is cited as a relevant type of behaviour which may lead to a breach (but less serious than a deliberate breach). However it is not clear that this would constitute a breach at all – would a person who actively believed (due to an incorrect interpretation of the law) that their action was not prohibited have had a reasonable cause to suspect that their actions were a breach? Similarly there is a reference to a “mistake” in the “professional facilitation” section.
- There is a risk that the “professional facilitation” section may be read as indicating that OFSI considers a breach as more serious if the offender was acting pursuant to (even bona fide) legal advice. We are sure that this is not intended, but could it be more clearly stated that this is not intended?
- Some points in 2.8 are not aggravating or mitigating factors – eg the para on licences at the end of p12.

5. What are your views on our proposed case assessment approach?

See the points in box 4 above and the points made in the response of the [REDACTED].

One additional point we would note is the danger of incorrectly paraphrasing legal tests in guidance. We have noted already the defects in the description of the “reasonable cause to suspect” test at 2.7.2. The same point is true of the description of circumvention, and the obligation to report sanctions breaches to OFSI, both in para 2.8.

6. Does this guidance give you enough information to help you understand how a penalty is calculated?

Yes No

(if no please explain why below)

In addition to the [REDACTED] response, please clarify:

- What factors (other than the statutory maximum) the caseworker will apply when assessing the “baseline penalty” level; and
- Whether there will be a review system within OFSI to ensure some common approach as to what is “reasonable and proportionate”?

7. OFSI will reduce the level of penalty if there is voluntary disclosure. What are your views on OFSI’s approach to this?

The need to incentivise voluntary disclosure is understood, but the guidance needs to address a number of concerns raised by [REDACTED]. We see no need for the serious/most serious distinction.

8. Is the process for imposing a penalty and making representations clear from this guidance?

Yes No

(if no please explain why below)

See response of [REDACTED]

9. Do you understand the guidance on seeking a Ministerial review?

Yes No

10. What are your views on the process for seeking a Ministerial review?

See response of [REDACTED]

11. Does this guidance clearly explain why and how OFSI will publish information on penalties imposed for breaches of financial sanctions regulations?

Yes No

What are your views on the level of information OFSI will publish?

See response of [REDACTED]

12. Considering the document as a whole, does this guidance help you clearly understand OFSI's approach to imposing monetary penalties?

No – for the reasons set out in the response of [REDACTED] and in this response.

Please e-mail this form to: OFSIConsultation@hmtreasury.gsi.gov.uk

Or post to OFSI Consultation, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ