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HM Treasury

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

Consultation response form

Name:
Organisation:
☑ Please tick if you are responding on behalf an organisation
Name of organisation (if applicable)
Address: Email: Telephone:

1. Do these introductory sections give you enough information to understand the scope of the law on monetary penalties? ☑ Yes ☐ No

   What else would be useful?

The introductory section generally provides a useful overview. We set out below some specific comments by reference to their paragraph number.

Paragraph 2.4.1, second bullet point – It would be useful to understand why OFSI construes the prohibitions it enforces widely. In particular, we would suggest examples are given of how and when it will construe a prohibition widely to give more certainty.

Paragraph 2.4.3 – It would be useful to also outline here the scope of EU sanctions, for example by setting out who they apply to, e.g. EU nationals, companies, flagged vessels.

2. What are your views on OFSI's compliance and enforcement approach?

We consider the four stage approach to be a sensible way of dealing with the different types of problem within this area. We think it may, however, be useful to place greater emphasis on educating parties about sanctions issues – please see our comments in answer no. 3 in this regard.

Additionally, the suggested approach does not appear to take into account the *mens rea* element of a sanctions breach – for example by considering whether it was committed inadvertently/accidentally, or was pre-planned. Neither does the approach consider the significance of the breach – some breaches may result in "no harm" because no economic benefit is actually provided to the sanctioned party. To ensure appropriate treatment of cases of different severity we think this should be part of the compliance model.

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

☑ Yes ☐ No

(if yes please explain what below)

There may be merit in introducing an additional element to the model, which could be called "educate", or alternatively expanding this aspect of the "enable" stage. We note that the "enable" stage already encompasses providing guidance and alerts, but we think there could be value in placing more emphasis on this part, and expanding it. For example OFSI could publish answers to submitted questions, alongside sector specific materials and alerts, and provide training materials online, as well as running training events.

4. Do you understand our proposed case assessment approach?

☑ Yes ☐ No

(if no please explain why below)

We understand the proposed approach. We set out some suggested improvements in our answer to question 5 below.

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

In general the approach is sensible and appropriate. As a general point, it would be useful if OFSI could clarify whether, if a case is criminally prosecuted, OFSI will seek to impose a monetary penalty (or any other kind of penalty e.g. send enforcement correspondence)? If OFSI's policy is not to impose a penalty where there is a criminal prosecution, would the unsuccessful outcome of a criminal prosecution mean OFSI would revisit its decision to not impose a monetary penalty?

We have set out some specific concerns below, by reference to their relevant paragraph number.

Paragraph 2.6.1 - we think there could be greater detail provided about how OFSI will determine which of the four categories of response to a breach a particular case falls within. We note the statement in paragraph 2.6 that to provide further details would assist those intending to breach sanctions. It would, nevertheless, be helpful to at least have a clear statement that the types of responses are set out in increasing order of seriousness, along with some very general indications of seriousness i.e. the size of the breach and the intent of the person in breach.

Paragraph 2.7.5 – more details should be provided about OFSI's information sharing powers here, or at least reference which legislation they exist under, so as to provide greater transparency as to how and who with OFSI may potentially provide information to.

Paragraph 2.8, heading "Professional facilitation" – given that OFSI view professional facilitation as an aggravating factor, it would be very useful to have examples of what may constitute unlawful facilitation by professionals, and on the other hand examples of professional advice which would not amount to unlawful professional facilitation. There is little guidance provided in this section as it currently stands and will be an understandable area of concern for professional advisers working in this area. It therefore is important that as much direction is provided as possible, to ensure correct practices are adopted.

Paragraph 2.8, heading "Reporting of breaches to OFSI", sub-heading "Voluntary disclosure" - it strikes us as

potentially harsh that disclosure can be made by only one party where other parties were actively part of the disclosure process. We think this section should clarified so that it is clear that parties can disclose jointly, and that even where only one party discloses to OFSI, any party actively involved in preparing the disclosure should get the benefit of being treated as having voluntarily disclosed themselves.

Paragraph 2.8, heading "Reporting of breaches to OFSI", sub-heading "Timeliness of disclosure" - it would be useful to acknowledge that the quicker a breach is reported after discovery, the necessarily less detailed the disclosure will be than if a longer period was taken to gather information for the report. We think it would be useful if there was some flexibility to provide further information to follow up a less-detailed initial disclosure, where that initial disclosure was made very shortly after a breach was discovered.

Paragraph 2.8, the second bullet point under heading "Public interest, strategic priority and future compliance effect" – where a case is novel or contentious, it is unclear to us how imposing a financial penalty will allow this to be "tested" in the public interest. In particular, we would note that the OFSI financial penalty decision process is not subject to any independent or public scrutiny unless and until a case reaches the Upper Tribunal (please see our comments in answer to Question 8 in relation to the structure of this process). A party with a good case may well decide not to bring an appeal to the Upper Tribunal for a number of reasons, not least because of the costs and time involved. Therefore we do not think such cases can be said to be "tested" by the mere imposition of a penalty.

Paragraph 2.8, the final bullet point under heading "Public interest, strategic priority and future compliance effect" – OFSI should not take into account the strategic priority that the government places on a particular sanctions regime as an aggravating or mitigating factor. In our view a breach of Regime A and Regime B in identical circumstances should meet with the same response from OFSI. To do otherwise undermines the importance of the UK's sanctions regime as a whole by suggesting some sanctions regimes are more important than others. It also weakens the goal of creating a culture of compliance: all sanctions should be seen as necessary to comply with. There are also concerns from the perspective of the rule of law if political considerations can decide a person's punishment: that will lead to unpredictability and inconsistency.

Paragraph 2.8, general point – it would be useful to introduce a headed section on "Good faith reliance on UK government or independent legal advice" or similar. This would provide for a mitigating factor where a party has sought the advice of the Treasury, and/or independent legal advice, which it has relied on in good faith, only for those actions later to be found in breach. We recognise that OFSI may consider it necessary for a party to have written evidence of such advice to be able to rely on it as a factor.

Paragraph 2.8, general point – repeat infringements should be listed as an aggravating factor. Where there have been repeated infringements this strongly suggests either deliberate attempts to evade the rules, or at the very least a reckless disregard for the rules. It is entirely fair such cases should be treated more harshly. It also seems to us to be a relevant factor in deciding whether to refer a case to the NCA (as referenced in paragraph 2.7.13), and as such should always be considered.

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 general we think this guidance is helpful and is sufficient. We set out some specific comments below by reference to their paragraph number.

Paragraph 2.11.2 – we think the reference at the end that states Paragraph 2.10.18 should be 2.11.18.

Paragraph 2.11.3 – is OFSI able to confirm whether a number of (small) related breaches will have their values aggregated as part of OFSI's valuation of the breach?

Paragraph 2.11.6 – we have two points:

a) Firstly, it may be useful to have some very simple worked examples of what a reasonable and

proportionate penalty would be in each case – this would help create benchmarks and certainty.

b) It would be useful to have some indication of how a breach will be valued. For example it could be valued from the perspective of the person in breach, or alternatively the person who benefitted from the breach. We assume that in line with the US Treasury's approach it will be from the perspective of the person who benefitted from the breach (in that it will not take into account the (often small) profit made by the person in breach). If the US approach is adopted here, it would be useful to have clarification of whether this will it be the market value of the thing provided in breach, or the value of the thing provided to the sanctioned party. We note there can often be a large disparity between the two. For example, a shipment of oil with a market value of USD1,000,000 may be provided to a sanctioned party in breach of sanctions. However, its value to the sanctioned party may be much higher because of the difficulties they face in getting access to such products.

Paragraph 2.11.7 – OFSI should define "serious" and "most serious". It would be particularly useful if this was done by reference to the aggravating and mitigating factors set out in Paragraph 2.8.

Paragraph 2.11.7 – there should be the possibility of "the first through the door" obtaining immunity from any fines, and (as far as it is within OFSI's power) prosecution, and prosecution of its employees in appropriate cases. This reflects the approach adopted by the Competition and Markets Authority in cartel cases. It has succeeded in destabilizing schemes to breach cartel regulations by creating a very strong incentive for one party to disclose their conduct to the regulator first. We think this would work well in the context of reporting breaches of sanctions too, and be a useful trigger for investigations OFSI may not have otherwise started.

Paragraph 2.11.10 – In line with our comments on Paragraph 2.8, we think there should be some flexibility afforded to someone who has made a voluntary disclosure within a very short time of discovering the breach if they then do not feel comfortable affirming it is materially complete. They may not unreasonably expect further material information to come to light, despite their best efforts due to the speed with which they have made the initial disclosure. It is a positive thing where disclosure is made as quickly as possible to OFSI, and there should be some latitude afforded to those who do so regarding the affirmation.

Paragraph 2.11.13 – in line with our comments in answer to Question 5, it would be useful if OFSI clarified our understanding that in the case of a breach, either the NCA brings a criminal prosecution, or OFSI applies a monetary penalty.

Paragraph 2.11.18 – we note the first bullet point states there is discretion where the penalty would have no meaningful effect because it is too low to deter or provide restitution. We would suggest that this should not be a relevant factor. Even where a penalty is low, there is still great deterrence value flowing from the fact the breach will be publicized and cause reputational harm. Additionally, it is our understanding from paragraph 2.16 that the funds from any fines go to central government and do not directly fund OFSI. On this basis, we do not see why "restitution" should be a relevant factor.

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

In our view this is the correct approach to encourage voluntary disclosure. As to the precise level of discount offer, this appears to be less generous than the model adopted in the US. Additionally, as noted in our comment on Paragraph 2.11.7 above, we consider complete immunity from any penalty may be appropriate as part of a "first through the door" policy to disclosure.

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

☑ Yes ☐ No

(if no please explain why below)

In general, we think the process is clear (subject to our comments on specific paragraphs below). We, however, have strong reservations about the overall structure of the process. It is inappropriate for the regulator to decide whether a party is in breach, and if so set the fine. In our view, there are three stages distinct stages involved in

reaching the decision to impose a monetary penalty on a party:
a) gathering the evidence there has potentially been a breach;
b) analysing the evidence to decide if there has in fact been a breach; and,
c) if there has been a breach, deciding what level of monetary penalty to impose.

The latter two processes are clearly judicial-type functions, and as such should be done by a separate body to OFSI (which will rightly be responsible for stage (a)). We think this should be done by way of a quasi-judicial body conducting stage (b) - deciding if there has been a breach on the evidence presented by OFSI, and stage (c) - if so, what penalty to impose. We would note that ss. 132(1) and (2), whilst empowering "the Treasury" to impose a penalty and decide the amount, do not specify that OFSI itself should do this. Furthermore there is nothing to prevent the Treasury from setting up a quasi-judicial panel to exercise the powers provided to it in s. 132. We would recommend that this panel has experienced independent lawyers on it, with knowledge of the sanctions legislation and the relevant legal and evidential tests. If it was felt useful, the membership of the panel could be supplemented by non-OFSI Treasury employees. Each case could be reviewed by a two person panel, of one lawyer and one non-OFSI Treasury employee. This will ensure the proper separation of evidence gathering/presenting, and making determinations based upon that evidence. As the proposed structure currently stands, OFSI will inevitably be minded to find there has been a breach – to do otherwise would call into question the utility of the work done in gathering the evidence, and cause embarrassment to colleagues. Without the proposed changes, there is a permanent risk of parties seeking judicial review of OFSI's financial penalty decisions due to procedural shortcomings. Having a fairer process is therefore in the interests of both OFSI and persons a financial penalty is imposed on.

Whilst we note that appeal of an OFSI decision to the Upper Tribunal is provided for, this is only after a Treasury Minister has reviewed the decision. We have reservations about the fairness of the Ministerial review, which we deal with in our response to Questions 9 and 10 below. Furthermore, this is too late a stage to involve an independent assessor in the process. Firstly, parties will be forced to incur the cost of instructing lawyers to review the case if they wish to appeal to the Upper Tribunal. Secondly, there will be significant delay and inconvenience between appealing to the Upper Tribunal and getting their final, independent decision. Thirdly, if an independent, legally-qualified assessor is involved from the start it should greatly reduce the scope for misapplications of the key legal tests, and should also mean the evidence presented by OFSI is tested properly. Put simply, preventing incorrect decisions is better than attempting to cure them by way of appeal to the Upper Tribunal.

Paragraph 2.12.1 – we consider that a notice of an intention to impose a monetary penalty should always be given in writing, rather than "normally".

Paragraph 2.12.4 –OFSI, in explaining how it calculated the penalty amount, should do so by making reference to any criteria in their guidance that is relevant to the particular case, rather than simply whether voluntary disclosure was made.

Paragraph 2.12.12 –The person OFSI is considering imposing a penalty on should have 28 calendar days from receipt of the OFSI's initial letter, rather than the date of the letter, to make written representations.

Paragraph 2.12.12 – it would be useful to clarify exactly when a penalty becomes finalised (and therefore payable) if a representation is made by the person.

Paragraph 2.12.13 – It would be useful if OFSI could clarify if, after receipt of written representations, they would change the proposed penalty amount upwards.

Paragraph 2.12.15 – it would be useful to clarify the payment timetable where OFSI writes with its final assessment, and the person does not seek to review it. Based on the procedure set out in paragraph 2.12.12 we think it would be logical for the penalty amount to become finalised and payable 28 days from the date of the final assessment.

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

☑ Yes ☐ No

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

In general we think the process does not give enough opportunity for the party seeking the review to present its case on an equal footing to OFSI. We set out below some suggested improvements by reference to the paragraph number.

As a further general comment, we be grateful for OFSI's clarification whether it has considered the provision of legal aid to non-UK individual or entities which OFSI decides to impose a financial penalty on? This will be relevant both to whether that party decides to seek a Ministerial review, and especially whether to appeal to the Upper Tribunal.

Paragraph 2.12.17 – we think it would be useful if the letter informing the person of OFSI's final decision contained a notice of the deadline for them to seek a review, and the address to send their representations to.

Paragraph 2.12.20 – we understand that generally new material should not be introduced at this stage. It is not, however, clear what a party should do where new and important material does become available that was not available at a previous stage (such as when they were making representations). Additionally, we would query what a party should do where it particularly wishes to address or highlight part of OFSI's decision which they think was erroneous (for example on a point of law) and make representations on that point as part of the Ministerial review. The procedure as described in the guidance seems to operate as a checking process, rather than an opportunity to adduce any submissions/evidence. Whilst we appreciate the Treasury will want to minimise the administrative burden on the Minister, we think there should be some wording to make clear in exceptional cases such evidence or further submissions can be made.

Paragraph 2.12.22 –there is an inevitable risk that if the Minister only views the OFSI report they will receive a partial view of the case. In our view it would be better if the Minister was required to view the original material in the case, rather than "may" as currently in the guidance. Furthermore, disclosure of the OFSI report should be made to the person at the start of Ministerial review, to allow them to comment on any factual inaccuracies (in relation to which see our comments on Paragraph 2.12.20 above).

Paragraph 2.12.22 – no criteria are provided for what is likely to lead to a successful Ministerial review. It is vital that parties should know in advance by what standards the Ministerial review will proceed rather than a vague general discretion. It will also be difficult for professional advisers to properly advise parties whether to seek a Ministerial review (and if they should present any new material) without some concrete criteria.

Paragraph 2.12.23 –it would be useful to clarify whether the 28 calendar days begins running from when a person requests a review, or after they receive some kind of acknowledgement of their request. We note such an acknowledgement is not mentioned in the guidance – it should be mandatory for OFSI to acknowledge the request for a review.

Paragraph 2.14.1 – where a procedural mistake has been made, OFSI should always have to inform the person. We do not think the penalty needs to automatically be cancelled, but OFSI should when informing the person be required to provide reasons as to why it does not consider the procedural mistake has had any substantive effect.

Paragraph 2.16 – it would be useful to clarify that where a party has sought a Ministerial review, the 28 calendar days to pay runs from the date of the letter informing the person of the Minister's decision to maintain the imposition of the penalty. Otherwise it could be argued the 28 calendar days begins running from OFSI's initial decision to impose a penalty. On our understanding retrospective reimbursement on a successful Ministerial review by the applicant is not intended, but we would be grateful for your clarification.

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?

In general we think the guidance is clear. We set out below some suggested improvements by reference to the

paragraph number.

Paragraphs 2.17.1 and 2.17.2 – we think it would be useful if OFSI always published details of the monetary penalty imposed, rather than "normally".

Paragraph 2.17.2, second bullet point – we think it would be useful in cases where there was voluntary disclosure to note in the summary the level of discount that was given as a result of it. This will better publicize the benefits of voluntary disclosure.

Paragraph 2.17.4 – we understand OFSI's concerns regarding not wishing to provide a level of detail that runs the risk of educating people as to how to break sanctions. Where, however, a novel technique has been used, we see potential value in providing a brief outline to demonstrate both that OFSI is aware of such techniques, and help professional advisers such as lawyers and banks (who may be unwittingly used to help facilitate such techniques) to spot and prevent them.

Paragraph 2.17.5 – we think OFSI should wait for at least 28 days after any monetary penalty becomes payable before publishing the summary, assuming it will not be payable until the Ministerial review is concluded – please see our comments in response to Questions 8 and 10 in this regard. As the guidance currently stands a monetary penalty could be issued and publicized, only for a Ministerial review to later cancel the decision to issue a penalty, which presumably would then require some kind of notice of retraction. Whilst we appreciate even a decision that is reviewed by the Minister could be appealed to the Upper Tribunal, we think publicizing after this point strikes the right balance between waiting for a decision to be final, and publishing promptly upon a decision being made.

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

On the whole, and as outlined above, we consider this guidance does give a good understanding of OFSI's approach to imposing monetary penalties. We do, however, have serious reservations about the process for reaching a determination on whether to impose a financial penalty. We have also outlined above a number of specific areas by reference to the relevant paragraph number which we think should be clarified or changed.

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