

Trends in Trade Investigations

Thursday 24 September, 2.00 - 3.00 pm BST



Speakers



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01

**Recent
enforcement**

UK Sanctions Enforcement: Overview

- Increasing use of civil enforcement powers by OFSI, with imposition of higher financial penalties
- Expansive approach to interpretation of key EU sanctions provisions / concepts
- Companies exercising right of Ministerial review in respect of penalties
- Recent enforcement cases:



- Telia Carrier UK Limited (September 2019) – Fine of £146,341



- Standard Chartered Bank (February 2020) – Fine of £20.4 million



US Sanctions Enforcement: OFAC 2020 Enforcement Activity

➔ To date in **2020**, OFAC has settled **eleven** enforcement actions with an aggregate settlement value of **USD 12,330,812**

➔ No particular focus on a particular industry or sector

➔ Several actions settled this year demonstrate the **extraterritorial reach** of US direct sanctions

- Essentra FZE
- US citizen based on conduct outside the US

US Sanctions Enforcement: OEE 2020 Enforcement Activity

 To date in **2020**, OEE has brought **nine** enforcement actions, which were primarily against individuals

- Majority of actions brought against non-US persons

 Of note, Nordic Maritime, a non-US company, was ordered to pay **\$30 million** fine relating to shipment of items subject to the EAR to Iran (currently on remand for recalculation of penalty)

US Sanctions Enforcement: US Criminal Enforcement



Sanctions violations prosecuted along with other criminal violations

- Airbus (FCPA)
- IBK (AML)
- Huawei (bank fraud, trade secrets misappropriation, etc.)



US False Claims Act – FCA investigation based on representations in USG contracts relating to activities with sanctions targets



Criminal IEEPA violations area of DOJ focus

US Sanctions Enforcement: US Criminal Enforcement



Prominent North Korea-related investigations

- Mingzheng International Trading Limited
 - Alleged to act as front company to facilitate USD transactions on behalf of Foreign Trade Bank (FTB) – Chinese bank subpoenas
- FTB Employee Indictment
 - Unsealed in May 2020 - 33 individuals indicted; alleged to operate "covert" FTB branches in various jurisdictions, laundering approximately \$250 BN on behalf of FTB
- North Korea-focused advisories (Ballistic Missile Procurement; Illicit Shipping and Sanctions Evasion; Cyber Threats; Xinjiang Supply Chain Business Advisory)
- DOJ “China Initiative” has resulted in a focus on North Korea-related sanctions investigations involving Chinese companies

US Sanctions Enforcement: Challenges and Cooperation Agreements



Uptick in challenges to enforcement cases

- Epsilon Electronics
- ExxonMobil



Cooperation agreements

- OFAC/New York Department of Financial Services
- MOU between OFAC and Delaware DOJ – implications given Delaware as most prevalent jurisdiction for corporate registrations

02

**Enforcement
framework**

US and UK Enforcement: General Factors in Assessment of Gravity of Offence

Wilful or
reckless
violation
of law

Awareness
of conduct

Harm to
sanctions
programme
objectives

Nature of
breach

Compliance
programme

Remediation

Cooperation

Timing of
breach

Enforcement
action from
other
authorities

Deterrent
effect

US and UK Enforcement: Key Factors in Penalty Assessment



Common approach taken to assessment of penalty

- Gravity of case?
- Voluntary disclosure?

**VOLUNTARY
DISCLOSURE**

Yes

No

SERIOUSNESS

Serious /
Not egregious

Most serious /
Egregious

UK: Baseline penalty minus voluntary disclosure reduction of 50%

US: One-Half Transaction Value (capped at lesser of \$153,961 or one-half of the applicable statutory maximum per violation)

UK: Baseline penalty minus voluntary disclosure reduction of up to 30%

US: One-Half of Applicable Schedule Maximum

UK: No voluntary disclosure reduction

US: Applicable Schedule Amount (capped at lesser of \$307,922 or the applicable statutory maximum per violation)

UK: No voluntary disclosure reduction. Penalty likely to be higher than 'serious' cases

US: applicable statutory maximum

UK Perspective: Voluntary Disclosure

- General reporting requirement under EU / UK sanctions regimes, to "facilitate compliance" with the regulations
- Enhanced reporting obligation for financial institutions and other relevant businesses / professions
- OFSI's expectations around disclosure:
 - If multiple parties involved in breach, disclosure expected from each party
 - Prompt disclosure, "as soon as reasonable practicable after discovery of the breach"
 - Encouragement of initial 'placeholder' disclosures, pending further investigation
 - Disclosure must be "materially complete on all relevant factors that evidence the facts of a breach of financial sanctions"
- 99 reports of suspected breaches in 2018 to 2019 (reported value of £262 million)

US Perspective: Voluntary Self-Disclosure – OFAC Enforcement Guidelines



Under OFAC Enforcement Guidelines, parties who make voluntary disclosure generally receive **50% reduction** in calculation of base penalty amount



"[S]elf-initiated notification to OFAC . . . prior to or at the same time that OFAC . . . discovers the . . . violation or another substantially similar . . . violation"

- Disclosure of an apparent violation to another government agency may be considered a voluntary self-disclosure to OFAC



Disclosure must be comprehensive and accurate

US Perspective: Voluntary Self-Disclosure – DOJ Policy

➤ Applies to cases of **willful** economic sanctions and export controls violations (i.e., criminal)

➤ Affords presumption that reporting companies will be given **non-prosecution agreement**

- No fine, though company will be required to disgorge improper gains
- Where "**aggravating circumstances**" present, **no NPA, but 50% reduction in fine and avoidance of monitor**

➤ Full cooperation and remediation of conduct required

➤ Disclosure "within a reasonably prompt time" "prior to an imminent threat of disclosure or government investigation"

➤ Parallel disclosures ineligible for VSD credit

UK Perspective: Compliance Framework



OFSI expectations around risk-based approach to compliance:

- Expectation that more sophisticated companies will have better-developed compliance systems and processes
- Assessment of "actual or expected knowledge and the extent of relevant ways of complying"
- Emphasis on need to be aware of intentional obfuscation of sanctioned entities



Banks and financial institutions subject to specific financial crime compliance obligations

US Perspective: OFAC Compliance Framework – Published May 2019

➤ **Essential components** of a sanctions compliance program:

- Management Commitment
- Risk Assessment
- Internal Controls
- Testing and Auditing
- Training

➤ OFAC framework reflects **Baker McKenzie's Five Elements of Corporate Compliance**: (i) Leadership; (ii) Risk Assessment; (iii) Standards and Controls; (iv) Training and Communication; and (v) Oversight

➤ OFAC will consider whether a company had an **effective** sanctions compliance program in determining whether a violation was "egregious"

➤ OFAC **may incorporate** these components into settlement agreements

03

**Sources of
investigations**

Sources of Investigations: Banks and Financial Institutions



AML suspicious activity reporting



OFAC reporting – provides US government with information from "gatekeepers" regarding potential violations of sanctions and export controls requirements



OFSI mandatory disclosure requirements; frozen assets reporting

- As of September 2018, £11.9 billion of frozen funds reported to be held by UK businesses



Increasingly robust due diligence on business conducted by customers

Sources of Investigations: Other Entities

UK enhanced sanctions reporting requirements



Auditors



Estate agents



Tax advisers



Casinos



External
accountants



Trust or company
service providers



Dealers in precious
metals or stones



Independent legal
professionals

Auditors in particular have been subject to extensive recent criticism for failing to identify financial crime issues

The image features a white speech bubble on the left side, containing the word "Questions" in a bold, dark blue font. The background is a dark blue gradient with a glowing teal particle trail that curves across the bottom right. The overall aesthetic is clean and modern, suggesting a focus on inquiry or technology.

Questions

Agenda

Tuesday 29 September
2.00 - 3.00 pm BST

Product and Supply Chain Compliance: The Claims You Make

Chair: Graham Stuart, Partner, London | Jessica Mutton, Senior Associate, London | Aurella Smith-Anthony, Senior Associate, London | Adeel Haque, Associate, London

Wednesday 30 September
2.00 - 3.00 pm BST

The Claims You Make: Case Studies

Chair: Graham Stuart, Partner, London | Francesca Richmond, Partner, London | Aurella Smith-Anthony, Senior Associate, London | Adeel Haque, Associate, London

Thursday 1 October
2.00 - 3.30 pm BST

Trends in Environmental, Human Rights and Sustainability Claims and Supply Chain Due Diligence

Moderator: Jessica Mutton, Senior Associate, London | Moderator: Aurella Smith-Anthony, Senior Associate, London | Professor Robert McCorquodale of Brick Court Chambers | Susanne Stormer, Chief Sustainability Advisor, Vice President at Novo Nordisk | Graham Stuart, Partner, London

Friday 2 October
2.00 - 3.00 pm BST

New Frontiers in Product Liability and Regulation - AI, IoT and other emerging technologies

Chair: Kate Corby, Partner, London | Trevor Callaghan, Director, Milltown Partners | Raj Choudhary, Independent Legal Consultant seconded in-house with a Fortune 500 technology & product development company | Ben Allgrove, Partner, London | Erin Maus, Partner, Chicago | Joanne Redmond, Senior Associate, London

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