The Policing and Crime Act 2017: Changes to the UK Financial Sanctions Regime

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The policing and crime bill received royal assent on 31 January 2017. The new Policing and Crime Act 2017 (the Act) introduces changes to a wide cross-section of the criminal justice system, including policing powers and licensing laws. Importantly, Part 8 of the Act introduces three major changes to the U.K. financial sanctions regime, which are intended to improve the enforcement of sanctions breaches and bolster the work of the newly established Office of Financial Sanctions Implementation (OFSI). (See our April 4, 2016, client alert "UK Establishes New HM Treasury Office to Implement Financial Sanctions.")

The Act amends existing law, increasing the maximum criminal penalty for breaching European Union (EU) financial sanctions from two to seven years for conviction on indictment, and from three to 12 months on summary conviction. This amendment is intended to align the maximum penalties for breaching sanctions based on an EU financial sanctions regulation, which were limited to a two-year custodial sentence, with the higher penalties contained in similar U.K. sanctions regimes such as Terrorist Asset-Freezing Act 2010 offences, which carry maximum sentences of seven years.

The Act also amends the Crime and Courts Act 2013 and the Serious Crime Act 2007 by including the breach of financial sanctions in the list of offences to which deferred prosecution agreements (DPAs) and serious crime prevention orders (SCPOs), respectively, apply. Accordingly, the DPA framework would allow companies to enter a court-approved agreement with HM Treasury to suspend criminal proceedings against the company for breaching financial sanctions if the company satisfies the conditions of the DPA. The amendments also empower the English courts to levy SCPOs, targeted restrictions, prohibitions or requirements on organisations and individuals, which can only be imposed for specific serious offences.

The most significant change introduced by the Act is the creation of new civil powers for HM Treasury, in practice through the OFSI, to impose monetary penalties on companies and individuals for breaching U.K., EU and United Nations financial sanctions. The maximum penalties HM Treasury can impose are considerable. Where the breach of sanctions does not relate to particular funds or economic resources, the maximum penalty is £1 million. However, where the breach relates to particular funds or economic resources, the maximum is either £1 million or, if it is greater, 50 percent of the estimated value of the funds or resources. A lower evidential burden to impose the new civil penalties now only requires that HM Treasury be satisfied that a person acted in breach of sanctions and knew or had reasonable cause to suspect they were in breach, on the balance of probabilities rather than the criminal standard of beyond reasonable doubt.

Pursuant to Section 147(3) of the Act and not the entity subject to the financial penalty, HM Treasury's decision to impose a penalty can only be reviewed by a government minister. If, once a review has taken place, the minister decides to uphold HM Treasury's decision to impose the penalty (either with the same penalty amount or with a substituted different amount), Section 147(6) provides for a right for the accused to appeal the review decision on any ground to the Upper Tribunal. On appeal, the Upper Tribunal may decide to quash the minister's decision. If it does so, it may also either quash HM Treasury's decision to impose the penalty or uphold the decision but substitute a different amount.

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HM Treasury is, no doubt, hoping to replicate the successful enforcement actions that the Office of Foreign Assets Control in the U.S. has brought. However, Part 8 of the Act is very limited in terms of guidance, and it is unclear on paper how the operation of the OFSI will fit logistically with the new powers in the Act. In light of the lower evidential burden to impose penalties and the potential size of these penalties, it is surprising that the Act does not provide greater detail on how the accused can formally interact with HM Treasury other than by submitting representations when invited to do so. There is also concern that HM Treasury will not publish detailed decisions in the way a court or tribunal would. This uncertainty is likely to be a battleground in the future.