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CLIENT MEMORANDUM

# The New Civil Standard of Liability for UK Sanctions Breaches

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## 1. Introduction

On January 31, 2017 the Policing and Crime Act 2017 (the "Act") received Royal Assent. The Act reflects the UK government's intention to incorporate aspects of U.S. sanctions enforcement, which allows the U.S. Office of Foreign Asset Control to swiftly impose substantial financial penalties without recourse to the criminal courts.[1]

When the relevant Part of the Act comes into force, which we understand will be in April 2017, Her Majesty's Treasury ("HMT") will have the authority to find individuals and corporates liable for sanctions breaches if it is satisfied on a "balance of probabilities" (the evidential test in civil proceedings) that the breach has occurred. Once HMT has made such a finding, it can impose a substantial financial penalty.

The civil evidential test will make it easier for HMT to be satisfied that a sanctions breach has occurred; as in the past, any breach would have required a criminal prosecution to the much higher criminal evidential standard, "beyond reasonable doubt." In addition, HMT is not required to prove the breach in court; it will, in this respect, be prosecutor judge and jury. The more serious cases will be referred for criminal prosecution to the National Crime Agency ("NCA"). We believe that

[1] HM Treasury, Budget 2015, 18 March 2015, p.33 (https://www.gov.uk/government/publications/budget-2015-documents)

the new evidential test and the ability of HMT to decide cases itself will result in a significant increase in sanctions enforcement by HMT.

For those cases which are pursued by a criminal prosecutor, there will now be a lead agency responsible for prosecutions. The Draft Guidance, which will become final in April 2017, states that the NCA will be the lead agency responsible for determining how a potential criminal breach will be dealt with. Previously, sanctions breaches have been investigated and prosecuted by either the Serious Fraud Office ("SFO") or Her Majesty's Revenue & Customs (or its predecessors).

It is of note that the last UK corporate criminal prosecution for sanctions breaches occurred in 2009 and 2010 when two corporate entities, Mabey & Johnson Ltd and the Weir Group Plc (both cases in which one of the authors was involved), pleaded guilty to breaching UN sanctions as they applied to the Iraq oil-for-food programme. Further, in 2011 two individuals pleaded guilty to breaching UN sanctions as they related to Iraq.

We suspect that the lack of regular enforcement action in the UK is due in part to the fact that many potential sanctions breaches have not met the SFOs' criteria for taking on cases. For other breaches the relevant agencies may have had difficulty establishing sufficient evidence to meet the criminal evidential test as set out in the Code for Crown Prosecutors. We believe that the NCA taking the lead for criminal sanctions enforcement will result in more criminal enforcement. The NCA shares intelligence information with other enforcement agencies such as the SFO and is responsible for dealing with Suspicious Activity Reports filed pursuant to the Proceeds of Crime Act 2002. Putting the NCA in charge of criminal sanctions enforcement will, we suspect, lead to a more "joined-up" approach to sanctions, anti-money laundering and anti-bribery and corruption enforcement.

**2. Summary of Key New Provisions**

a. The civil test for liability can now be applied to sanctions breaches. Whether or not the evidential test is met will be determined by HMT.

b. The penalties for criminal sanctions breaches have increased.

c. The NCA will take the lead on whether or not a breach of the relevant legislation should be prosecuted.

d. A financial sanctions breach will be one of the offences to which a Deferred Prosecution Agreement can be applied.

e. Financial sanctions offences will be offences to which a Serious Crime Prevention Order ("SCPO") can be applied. This in effect could result in the imposition of a monitor or, in more serious cases, orders to prohibit the company from conducting types of business which may have a high sanctions risk.

f. HMT can implement a UN Security Council Resolution on a temporary basis until its implementation through EU legislation.

### 3. The Civil Standard

As stated above HMT, through the Office of Financial Sanctions Implementation ("OFSI"), has the power[2] to impose a monetary penalty if it is satisfied, on the balance of probabilities, that (a) the person has breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation, and (b) the person knew, or had reasonable cause to suspect, that the person was in breach of the prohibition or had failed to comply with the obligation. Therefore, HMT can impose a financial penalty if it finds, on the balance of probabilities, that an individual breached a prohibition or failed to comply with an obligation when he had reasonable grounds to suspect that he was doing so. This is a low evidential threshold.

The decision to impose a penalty rests with HMT. Appeal of the imposition of the penalty is first to a Minister of the Crown and then by appeal to the Upper Tribunal, which is part of the UK's High Court. The High Court typically deals with civil litigation.

### 4. Imposing a Civil Penalty

The Guidance to be published in April 2017 will set out how HMT will decide whether or not to apply a monetary penalty and what factors will be taken into account. The Draft Guidance provides examples of aggravating and mitigating features that will help HMT determine whether or not a financial penalty should be applied or whether the matter should be referred to the NCA for criminal investigation and prosecution. We have set out a number of those features below:

a. Circumvention – deliberately arranging or structuring affairs to avoid triggering financial sanctions – is aggravating.

b. The monetary value and risk of damage to the sanctions regime's objectives will be assessed.

c. The indirect provision of resources in breach of a prohibition that “common” due diligence or KYC processes could have discovered, can be considered serious and aggravating.

d. Knowledge and compliance standards in the sector – HMT will take account of the sector in which the breach occurred and judge the breach in that context. However, the Draft Guidance states that "*we wish to encourage strong compliance cultures and will not seek to punish companies that simply fall below a high standard if that is the only distinguishing factor in a case.*"

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[2] Section 131 of the 2017 Act.

e. The behavior of the individuals involved will be taken into account: was the breach deliberate or a failure to take reasonable care, was there a systems and control failure, or a misinterpretation of the law.

f. Facilitation by those providing professional advice to others will be regarded as serious and aggravating.

g. HMT considers that voluntary reporting of a financial sanctions breach will be a mitigating factor and will reduce the penalty, whereas failure to report will be an aggravating feature. Reporting must be timely but the Draft Guidance states "*it is reasonable for you to take some time to assess the nature and extent of the breach, but this should not delay an effective response to the breach.*"

HMT will also consider whether it is in the public interest to take particular enforcement action.

When the breach has been committed by corporate bodies or incorporated associations, and the breach can be attributed to an officer of that entity, HMT may impose a monetary penalty upon the individual and the body or association. The penalty can be imposed on any officer of the body who consented to or took part in any conduct resulting in a breach of financial sanctions or whose neglect caused a breach of financial sanctions.

The Act sets out the permitted maximum for a monetary penalty at the greater of either £1,000,000 or 50% of the estimated value of the funds or economic resources to which the breach or failure relates.

**5. Criminal Penalties**

Part 8 of the Act increases the maximum term of imprisonment for offences created by UK statutory instruments that implement European financial sanctions. As a result, offences relating to EU financial sanctions will now be punishable with a maximum term of imprisonment of seven years for indictable offences and six months for offences tried summarily. This is an increase from the current maximum prison sentence of two years.

**6. Deferred Prosecution Agreements**

Breaches of financial sanctions are now included in the list of offences in respect of which a Deferred Prosecution Agreement can be entered into.

**7. Serious Crime Prevention Orders**

A breach of financial sanctions has also been included in the list of offences in respect of which an SCPO can be made under the Serious Crime Act 2007. The Serious Crime Act 2007 allows a High Court judge to impose an SCPO on an individual or corporate entity if he or it has been involved in a serious crime. There is no requirement for the person or entity to have been convicted of a qualifying offence, only for the person or entity to have acted in such a way as to facilitate the commission of a serious offence (whether or not such an offence was committed), such as a breach of sanctions.

An SCPO could therefore be imposed on an entity that has assisted another person or entity to breach financial sanctions, even if there has been no offence committed. The terms of an SCPO could prohibit an entity from trading in a particular sector or with particular customers. The government has suggested that SCPOs may be used in cases where entities or individuals not subject to Financial Conduct Authority oversight require additional supervision to ensure that they continue to conduct their affairs in accordance with the law. We suspect this would result in the appointment of a monitor, in the same way that companies with compliance failures in the anti-corruption arena have had monitors applied.

### 8. Temporary Implementation of UN Security Council Resolutions

There has been a concern that during the time it takes for the EU to implement new UN financial sanctions regimes, the UK may be exposed to “asset flight” from UN listed persons and placed in breach of its international obligations. The Act provides HMT with the power to create a temporary financial sanctions regime implementing a UN mandated financial sanctions regime, without waiting for the EU to implement the same. The temporary measures will cease upon the EU implementation of the UN Security Council Resolution or, if earlier, after the end of a maximum period of 30 days starting from the adoption of the UN resolution.

### 9. Looking Ahead

HMT's new powers provide it with a greater number of options when considering how to deal with sanctions breaches. We anticipate an increased number of enforcement actions by HMT, as it will be able to levy significant financial penalties without needing to prove its case to a criminal standard.

When the relevant sections of the Act come into force, corporates that discover a sanctions breach will have to carefully consider how they deal with the matter as regards the enforcement authorities, given the new civil standard required to prove a breach and the financial incentives for "self-reporting." In addition, the government has provided corporates with an incentive to self-report potential criminal financial breaches by including such breaches in the list of offences which qualify for a Deferred Prosecution Agreement.

A further update will be published once the Guidance has been issued.

If you have any questions regarding this memorandum, please contact Peter Burrell (+44 20 3580 4702, pburrell@willkie.com), Paul Feldberg (+44 203 580 4734, pfeldberg@willkie.com) or the Willkie attorney with whom you regularly work.

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