

# Sanctions Briefing:

## OFSI's Recent Developments in UK Sanctions

### Overview

Following the invasion of Ukraine, the UK along with international partners have sought to increase the severity and breadth of the sanctions applied for the infringement of Ukraine's territory. Along with allies such as the EU and US, the UK has strengthened its position and is continuously working with the private sector on making further improvements on the current UK sanctions regime.

On 6 September 2022, **Giles Thomson, Director of OFSI** in conversation with **Maya Lester QC of Brick Court Chambers** and **Michael O'Kane, Senior Partner at Peters & Peters** discussed OFSI's recent expansion and current priorities, covering:

- Strict liability for sanctions breaches
- Sanctions licensing processes and decisions
- Ownership and control of non-listed companies by designated persons
- Co-ordination with the National Crime Agency (NCA) and the Foreign, Commonwealth and Development Office (FCDO).

### OFSI's Responsibilities

OFSI are responsible for implementing and enforcing financial sanctions and are reaching out to the private sector and others that need to implement sanctions to offer guidance, advice and provide as much help in ensuring the industry understand their obligations and implement them effectively.

OFSI have a range of tools on the compliance side, to encourage and enforce compliance where necessary. They work extensively internationally with the US, EU and other counterparts to co-ordinate sanctions implementation and do significant amount of work to provide technical assistance in helping lower capacity countries to develop their sanctions framework. They also work closely with law enforcement and other regulators within the UK system on the compliance side. This is done through the consolidated list that OFSI is responsible for maintaining on everyone that is under financial sanctions which has got their email alert attached to it. They also produce a blog and have a website which is regularly updated.

**In terms of responsibility, we know OFSI are issuing licenses, guidance, enforcement and outreach. How are these responsibilities allocated within OFSI?**

Licensing is a huge part of what OFSI do, where they also administer licensing grounds written out into the financial sanctions legislation.

In terms of overall size of OFSI, there were about 45 people right before the Russia-Ukraine invasion, now they are increasing significantly to deal with the increasing work volumes and caseloads with the ambition of over doubling in size by the end of the financial year.

OFSI is divided into functions such as:

- Engagement;
- Outreach;
- Licensing;
- Enforcement
- Operations; and
- Governance.

The growing area is intelligence for which they are developing their ability and capability to use the broadest possible source of information to inform all aspects of their work. The key function is to ensure there is a lot of inter-working and no silos as any one issue can span onto multiple areas. Most of their licenses have a very heavy international flavour to them. For instance, working with other jurisdictions and multi-national businesses hence why it is difficult to isolate issues to purely one area.

## OFSI's Resources

**How is OFSI managing the resources now and is the doubling of size, investing heavily in recruitment also draining resources at a time where OFSI is trying to keep on top of everything coming through the door?**

It is a big challenge as for any organisation undergoing the increased level of work and change when dealing with a crisis, the huge volumes of work are undergoing a significant amount of change management. This is true also for those on the front line implementing financial sanctions in the private sector. The challenge has been to manage the combination and scale of the Russia sanctions which has been well beyond anything seen in any comparable sanctions regime. You can look at DPRK, Iran and other examples which do not come close to Russia with the scale of sanctions in place.

The pace of work especially in the first few months of the invasion with new designations every week, new expansion on the scope of prohibitions and the longest challenge has been the complexities of the sanctions linked to a much greater UK footprint or nexus than other sanction regimes. There are a lot of wealthy Russians in the UK, and it is the sanctions impacting UK businesses that are caught up with supply chains or other relations with Russian entities. In this context, this would be covered under complex corporate structures, and determining ownership and control; and interesting issues around conflicting policy objectives that emerge through the government as the consequences of sanctions.

It has been the combination of dealing with the scale, complexity, and the pace of the work. OFSI have had to staff up significantly through surge resourcing, which means moving people around Treasury but also being well supported by colleagues in the regulators and law enforcement bringing people in with the right experience and expertise to help. But the process now will be to move into this new expanded OFSI to deal with what is going to be a long-term impact of the Russia sanctions for a couple of different reasons which will take time to train people up, develop their ways of working and shifting OFSI's approach on improvements they wanted to make even before the Russia invasion.

The big priority now for OFSI is to deliver this change on ways of working and getting a grip on customer interaction and ensuring they are providing the best possible service with the caseload they have. There is a lot of backlog and over the autumn there are a lot of licensing caseload to work through by the compliance team and decide on as a main priority.

**Is there an expectation for OFSI to double in size in the medium to long term?**

The resources given to by treasury to double in size, is something the government will keep under review. No one knows what will happen with the Russia-Ukraine conflict, it would be surprising if the sanctions were unwound greatly in the near future. The assumption is that the bulk of these sanctions are here for the long term. They are not here just to directly influence what Russia is doing in Ukraine but also to degrade and deter future Russia aggression. The objective will remain in place with the current regime.

A lot of what has happened with Russia has turbo charged plans OFSI had before the invasion of Ukraine to expand OFSI and improve both the service they offer to stakeholders and for them to enforce sanctions. OFSI is quite young only being in place for five to six years and has been on a bit of a journey since then with much more they can put in place.

The sheer expansion in the use of sanctions, the impact they have had with Russia will potentially lead to a greater appetite and use of sanctions for other economic warfare leavers in the future. There are a lot of lessons to be learned from Russia, in a world where the cost of direct military intervention is very high with this being a massive testing ground on the sheer breadth and novel ways in the way OFSI have been working will have a lasting impact.

## Licenses

### **What is the current process for dealing with Licenses?**

There is a lot of information on OFSI's website. OFSI's advice is to submit a license request that is as comprehensive as possible. With all the information that is provided, it will slow down the process if bits are missing. Also, it is important to clearly state why a license is being applied for as there has been a surge of speculative licenses where applicants are unsure if it is caught by sanctions, which will not be a submission that is prioritised. The expectation is that a company that is seeking a license will establish or at least take their own view as to whether a particular transaction or activity is caught by sanctions. If their view is that it does, it would be helpful to then also be clear on what grounds the license is being applied under.

Once there is enough information, it will be prioritised which is being done quite ruthlessly at the moment given the sheer volume of applications. The primary basis on which OFSI are prioritising licenses is firstly, humanitarian grounds, providing vital assistance to the people of Ukraine or a basic need of human right of a designated person or entity. Similarly, sectoral issues where there is genuine crosscutting, impacting a number of businesses that sits part of the sector or economy that is having widespread impact or significantly impacting one or two companies in a particular area will get top priority.

OFSI are trying to process everything they can but inevitably given the volume of work and their need to upscale applications that do not get triaged are still in the system, which OFSI are aware of and will get to them but with a lower priority. OFSI have advised to bear with those who have not heard back, their case has not been forgotten. They just need to prioritise to deal with the most pressing cases first.

### **It is often difficult to engage with OFSI during a license request as the responses when received tend to be quite generic. Are there any plans in the way in which OFSI are communicating when it comes to license applications?**

OFSI are improving their day-to-day work on how they interact and engage with their customers and stakeholders. They have a system that is based on receiving a certain number of license applications, breach support, contacts through email or phone and this has more than quadrupled overnight. OFSI need to adapt to a system that can handle this high volume and set high service standards. This is ongoing work which they will have more to say about in the near future. At the moment, OFSI are getting back to people as quickly as possible and re-assuring people that their case is being dealt with. It is a work in progress,

but it is a definite plan to learn some of the lessons and build a new function for them to be able to work effectively in the future.

### **Is there a particular timeframe for the granting of a License application, whether it is urgent or not?**

At present, giving a timeline would be misleading. Each case is different, some have been turned around overnight due to their importance and people have worked through the night to get a general or specific license out in some cases. Some may take a lot longer as the information provided has been incorrect, incomplete, it is not a priority, or it needs a lot of complex analysis on ownership and control structures.

## **Ownership and Control**

**On the issue of ownership and control, targeted sanctions in the UK apply not only to people designated or listed but companies owned or controlled by them. Despite government guidance saying these entities would be listed on where they will be owned or controlled, happens very rarely. The onus is usually on legal advisors to take a view. It is now essential to have clarity and explore this issue as companies that are advising, dealing or working for or are in a contract with may be subject to sanctions. Mindful now of strict liability when it comes to monetary penalties for breach of sanctions, it is no longer about whether you have reasonable cause to suspect that you are dealing with a sanctioned entity.**

**The difficulty arising in the test is whether a company is controlled by a designated person, which is quite difficult to apply. Particularly one element of the control test in the Russia Regulations is whether it is reasonable to expect that a designated person would be able to achieve the result that the affairs of the company are conducted in accordance with its wishes.**

**The NCA and OFSI's Red Alert specifically says that if there is doubt about ownership and control issues or if there are some indicators of ownership and control, OFSI should be asked, and likewise the European Commission has made it very clear that this analysis is for the nation comparable to also form or give a view. There are quite a few high-profile cases where OFSI have taken a view sometimes remarkably quickly on whether a company is owned or controlled or not.**

**In the context of a license application, it has also often been the response that a license application is not needed, and the named entity is not controlled by a designated person. Alternatively, independently of a license application, OFSI have given a view on whether a company is controlled or not. The feedback so far has been that OFSI's approach to this has been inconsistent as views have been taken quite rapidly. This can be of enormous value to everyone and industry, however sometimes OFSI have asked for companies to also take on their own views.**

**For OFSI to say that it is not very helpful to receive a speculative license application but the very reason for these speculative license applications is where the guidance says to come to OFSI, especially when the test is so hard to apply. Does OFSI regard their function to identify which companies are sanctioned in the UK and which are not?**

This is one of the biggest and main issues that have come out of Russia sanctions for companies to have to deal with the huge amounts of complexity evolved in it. OFSI are evolving their approach as they go along.

Starting at the top with the Foreign Office, they have said that ideally where they want someone to be caught by financial sanctions, they will be designated in their own right so that there is clarity, which is ideal but not always possible for a number of reasons. As for OFSI's position, they are working with the Foreign Office to ensure that as far as possible they are upfront on who is designated.

OFSI are going to continue to have the ownership and control test in some form or another for good reason to ensure assets are not easily transferred into some other sort of ownership structure. It has been particularly challenging with Russia due to the frequent and very obscure and complex corporate structures involved in circumvention, evasion and avoidance techniques used. OFSI is constantly looking at how they can evolve their approach in the near future. However, they are never going to be in a position where they can provide from government absolute upfront clarity either through designation through an OFSI determination, partly because there are far too many potential cases. Secondly, the facts of any company structure can change very rapidly where they will not necessarily be the first to know about that. Thirdly, going back to the overall principal on why OFSI put the primary obligation on companies and others to determine whether or not they are dealing with a designated person as they frequently do not have access to all of that information, for example, the person dealing with that customer, who is doing their customer due diligence, onboarding etc or have the most detailed view and therefore not being in the best place to take a decision.

OFSI want to be able to provide more clarity either through upfront designations or through OFSI's guidance determinations and other ways. This will not be in all cases and not absolve reporting entities of their need to do it, but they do want to arrive on a more clear and consistent position. This is a big priority to build OFSI's capability to be able to make determinations and to support the private sector in doing that.

**If it is governments function to try and identify designated entities clearly then it is not out of the question that OFSI might decide as it has done in some cases. The oddity for quite a few people now is that it is very difficult to advise anyone because OFSI sometimes seems happy to take a view on an entity that is sanctioned which would be in line with its guidance.**

The default position is not going to change. It is ultimately for companies at the reporting entity to take a view as to whether they are dealing with a designated person or not. OFSI are not going to fundamentally upend the whole thrust of their approach. They do hope in the not-too-distant future to have a clearer framework to communicate about when and where OFSI will provide more clarity in taking a view and the process around that on when people may need to take a view themselves.

OFSI are trying to get better with their timing point of co-ordinating where they know and are aware of the significant ownership and control issue either designating the entity if they want them to be caught upfront or issuing a General License if they view them as being caught by sanctions to mitigate the impact for good reason. Alternatively, to take a view on whether they believe this company is caught. They will not change the fundamental premise, but they want to provide a clearer and more helpful framework and service from OFSI.

## Strict Liability

**What level of diligence is expected given the difficulties of applying the control test? One difficult issue which has caused a lot of differences within the legal community, is what the expectations would be if a company has done heightened due diligence and have still have not reached a view either way due to the nature of the control test? This is where OFSI can be very helpful. At this point a lot of companies request OFSI's view and that is where there is much frustration when OFSI come back with an answer for the company to decide, which puts them in a difficult situation.**

The strict liability test has been introduced to improve OFSI's ability to properly enforce financial sanctions. It is not a new concept; it operates in the US and UK when it comes to good sanctions but they are not looking to fundamentally changing their approach to enforcement but not also catch people out.

This new test is to get companies for breaches of financial sanctions. OFSI will put further guidance out on strict liability further down the line. The ambition will be to be able to say more just like OFAC do on what we view as the principles of a good compliance framework, systems, and effective due diligence.

It will always be bespoke to the company, the firm, the risk they have and the sector they work in. OFSI want to look at the breaches under the new test and will see what the firm knew, their compliance framework in place, did they have an effective system in operation, should they have been more aware of the risk. There are a lot of different factors to consider. OFSI will broadly segment cases where there are those who are wilfully complicit in trying to evade sanctions, which is the most serious category. Then there are others that may be described as wilfully negligent, who are actively connived into breaching sanctions by not doing proper checks, knowing that it exposes them to the risk of breaching sanctions. Another category is where someone has very good appropriate systems and controls in place and made their best effort however something may happen out of their reach and these will be the cases OFSI will be most understanding of and not take enforcement action on.

## Consistency of Approach

**There are quite a few issues that come up repeatedly where companies are left with the grapevine on whether they have seen this license or not. As OFSI are dealing with so many different people now, there are different answers to what can feel like the same question. This is an area where guidance on the general approach across the board in every case might not only be helpful but also speed up your licensing backlog. Would this be worth considering by OFSI?**

OFSI are happy to take this into consideration and look at, they have tried to do this previously and will see how to take this point further.

## Outreach

**OFSI have done a lot of outreach and interaction with some sectors, in particular the financial, insurance, banking sector and so on, sometimes via [UK Finance](#). However, there are issues raised in all sorts of sectors. Wouldn't it be helpful for OFSI to give guidance on X or carve out a general license on constructive suggestions? There is a general sense on where companies should go, is there someone listening? Is there a panel or forum one can put together to exchange these practical ideas?**

OFSI want to hear from those on the frontline and give the best view on what would make it easier. The primary route for these discussions at the cross cutting strategic level is the **Senior Financial Sanctions Implementation Group**, that is chaired by Giles Thomson and his counterpart at the Financial Conduct Authority, which meets every month having broad representation from the financial sector.

Individual people will have great ideas, but OFSI will never get round to them all. OFSI need to get a well-co-ordinated view of everybody, sector, or group of businesses via either trade bodies and/or representative bodies will be very helpful. On the NGO's and humanitarian side there is the **Trisector Group**.

**A Q&A document just like the EU will be hugely helpful for all industries, given the current complexities.**

OFSI are doing more of this. In their latest Russia guidance, a Q&A was part of that, similar to what the EU are now doing. On the back of feedback from implementing bodies, OFSI do update the guidance regularly. As well as this, OFSI are looking at what more they can do, like the OFAC model towards a useful innovation.

## Enforcement

**What are your enforcement priorities on the types of cases and culpability that has been described? There was a publication by OFSI<sup>1</sup> setting out reporting obligations and they seem to be extremely broad. If during business, OFSI find that an entity has been sanctioned. Is it realistic to expect that industry should be deluging OFSI with reports that persons are being designated when OFSI already know they have been designated because they are maintaining a consolidated list which sets it out? Is that going to give rise to liability in your view?**

**One thing of concern is the suggestion that now the criminal liability of those pre-sanctioned in relation to dealing with perfectly legitimately gained assets and lawfully obtained property owned by a Russian might be sanctioned. There is no guarantee that they will be sanctioned and perhaps they never will be sanctioned. However, there does seem to be a suggestion that professionals whether they are bankers, lawyers, or accountants, engaging with that person with those assets, could potentially face criminal liability for conspiracy to circumvent sanctions. Are there any comments from OFSI on the accuracy of this? If so whether this is going to have a huge chilling effect on any non-designated assets at all?**

### Reporting

The obligation to report Designated Persons is in the legislation. There is a bit more OFSI can do to provide guidance and clarity as to when they need to be reported, under what circumstances and what's a useful report, what is wanted and what is not within the constraints of what the registration requires.

### Red Alert

In terms of the NCA and OFSI red alert published on enablers of Russians sanctioned. OFSI and the NCA have identified issues on suspicious red flag indicators with people rapidly changing ownership structure or moving assets pre-designation. People will need to take a view on that themselves as to whether the designated person is caught at that point in time for financial sanctions. Nevertheless people should be alert or aware of customers as to whom they may want to be applying a higher level of due diligence. The red alert takes this into account and can be read in this context on putting the sector on alert on high risk factors to be looking out for and ways to mitigate risks around that.

### Enforcement

OFSI is not trying to move towards solely enforcement, there are a small percentage of cases that end up in any enforcement action. The vast majority of OFSI investigations result in no breach involved in the end. The issues are potentially very minor, or have been resolved with improvements that have been put in place, by a warning letter. A small number of penalty notices have been issued to date and OFSI do expect that number to increase with the volume of caseload and increased focus and prioritisation of resources they have.

OFSI also have an additional tool, where any breaches of sanctions after June 2022, OFSI have the power to not issue a penalty but to publish details to inform wider compliance in the sector. Most regulators and firms will say the same, where a lot of the value in enforcement action is in understanding what companies did wrong. The power of enforcement action is in the publication of notice that explains what went wrong which is why others in the sector take notice. This tool will both be useful for OFSI to enforcement but also to industry in understanding what they need to avoid.

---

<sup>1</sup> <https://ofsi.blog.gov.uk/2022/08/30/reporting-to-ofsi-what-do-i-need-to-do/>

OFSI's big priority is the Russia regime but they will not ignore other regimes, however Russia will be a top priority. Another priority is those wilfully breaching financial sanctions which will go to the NCA for criminal investigation. This is particularly the case where there is clear evidence where someone has deliberately set out to breach sanctions. In most serious cases, it may be appropriate for OFSI to impose civil monetary penalties.

Other cases that OFSI will take seriously, is where there is evidence that a blind eye has been wilfully turned or where complete failure of having proper systems and controls in place, with basic checks or awareness of risks. OFSI will never go into cases where all reasonable efforts have been taken, looking at proportionality and what is in the public interest to take forward as an enforcement case. This will be in particular those cases where acting would have the broadest possible benefit for compliance in the sector.

### Co-ordination and consistency

OFSI are doing huge deal more and have stepped up, conscious in the early days where there were time gaps between equivalent licenses that were issued to OFAC and inconsistencies. Whilst they cannot eliminate these inconsistencies due to different government taking different decisions with different legislation to work with. OFSI have tried improving co-ordination, particularly between the EU, US and the UK, OFSI are sanctioning the same entities and are allowing the same exemptions, licenses and so forth wherever possible. OFSI take the same interpretation on ownership and control and will talk to the EU and US counterparts to understand their position. OFSI have made a lot of improvements but there is more to be done and speak with their US counterparts almost daily. The benefit of the crises is that it has bought us all together as a group, which will certainly be maintained in the future.