

Financial Sanctions: the enforcement regimes which may apply to your company

Following President Trump's recent confirmation that U.S economic sanctions on Iran will be reinstated, Muireann Reedy looks at the penalties which can be imposed in various jurisdictions for non-compliance with financial sanctions regimes and notes that they can have extra-territorial reach.

What are financial sanctions?

Financial sanctions are legally binding measures that can be taken against individuals, entities or countries (the subject), the objective of which is to bring about a change of policy and/or behaviour by the subject. Financial sanctions can emanate from the European Union or the United Nations. In general, once a subject has been placed on one of these sanctions lists, there is a legal obligation not to transfer funds or to make funds or economic resources available, directly or indirectly, to the subject.

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The United States (the U.S) also has its own sanctioning regime. Irish companies operating in the U.S need to ensure that they do not fall foul of U.S sanctions. Otherwise they could find themselves subject to significant enforcement penalties under U.S law as considered further below.

Enforcement in Ireland

The Central Bank of Ireland (the Central Bank) is responsible for ensuring that regulated entities operating in the financial services sphere in Ireland comply with financial sanctions. Firms which are authorised by the Central Bank are required to monitor both the European Union Consolidated Financial Sanctions List and the Consolidated UN Security Council Sanctions List to ensure that financial services are not provided to a sanctioned subject.

Various Irish statutory instruments make it a criminal offence to breach specific financial sanctions.



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A regulated entity could also find itself subject to enforcement action by the Central Bank for weaknesses in its policies and procedures around financial sanctions screening. While several enforcement settlements to date have related to failures in anti-money laundering procedures, no settlements yet have specifically related to failures concerning a firm's financial sanctions screening process.

Enforcement in other jurisdictions

U.K

Since 1 April 2017, the U.K has been able to impose civil monetary penalties for breaches of financial sanctions. These powers are contained in Part 8 of the Policing and Crime Act 2017 (the 2017 Act). Previously financial sanctions breaches could only be pursued in the criminal courts and were therefore subject to a higher standard of proof. The 2017 Act also increased substantially the maximum criminal sentences which can be imposed for financial sanctions breaches. The Office of Financial Sanctions Implementation (OFSI), established in March 2016, is the authority responsible

for imposing civil monetary penalties for financial sanctions breaches on behalf of the U.K government. The U.K Government's website lists parties which are subject to financial sanctions. OFSI can impose penalties where it is satisfied that there has been a financial sanctions breach and the person knew or had reasonable cause to suspect that they failed to comply with the financial sanctions. It can impose penalties of up to stg£1 million or 50% of the total value of the breach (where it is possible to estimate the value of the breach) - whichever is higher. OFSI intends to publish details of all monetary penalties it imposes.

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Interestingly, OFSI has said that a breach does not have to occur within the U.K's borders in order for OFSI's authority to be engaged. However in order to come within OFSI's enforcement remit there has to be what OFSI refers to as a 'UK nexus'. OFSI has stated that a UK nexus may be caused by the actions of a local subsidiary of a UK company, or by transactions involving clearing services in the UK.

Similarly to the Central Bank, the Financial Conduct Authority (the FCA) can take enforcement action against a regulated entity if it believes that a firm's systems and controls do not mitigate against the risk of financial crime, including those that enable it to meet

financial sanctions obligations. In 2010 members of the Royal Bank of Scotland Group were fined stg£5.6 million by the FCA's predecessor (the Financial Services Authority) for failing to have adequate systems and controls in place to prevent financial sanctions breaches.

U.S

In the U.S, the Office of Foreign Assets Control (OFAC) administers economic sanctions programmes against countries and groups of individuals (U.S Sanctions). Like OFSI, it can impose civil monetary penalties on individuals and entities which breach U.S. Sanctions. The potential size of the penalty depends on the sanctioning regime which has been breached but can be extremely substantial. Unlike OFSI's regime, there is no requirement to show that a person knew they were breaching U.S Sanctions in order for them to be subject to an OFAC enforcement penalty – it is a strict liability standard.

Foreign entities operating in the U.S need to take care that they do not inadvertently fall foul of U.S Sanctions,

as they not only apply to all U.S incorporated companies and their foreign branches whenever activity takes place in the U.S, but can also be applied to any entity operating within the U.S i.e. whether they are incorporated in the U.S or not. The OFAC Sanctions Lists can be found on the U.S Department of the Treasury's website and should be regularly consulted by parties who do business in the U.S. Last year OFAC imposed over USD\$119 million in monetary penalties on 16 parties that entered into settlements with it and there have been several examples of it sanctioning non-U.S entities. For example in 2016 Barclays Bank plc paid in excess of US\$2.4 million in a settlement with OFAC in respect of 159 apparent violations of the Zimbabwe Sanctions Regulations. The impugned transactions were to or through financial institutions located in the U.S, including Barclays's New York branch. In 2013, Royal Bank of Scotland plc (RBS) paid more than US\$33million to OFAC to settle its potential liability for apparent breaches of U.S Sanctions.

According to OFAC, RBS engaged in payment practices between 2005 and 2009 that interfered with the implementation of U.S Sanctions by financial institutions in the U.S, including removing material references to U.S. sanctioned locations or persons from payment messages sent to U.S. financial institutions.

Comment

The EU and UN Financial Sanctions Lists are frequently updated so Irish firms must constantly monitor these to ensure they are not conducting transactions with prohibited parties. Conducting business with such a party could result in criminal prosecution. Irish companies should also be aware however that - by U.S law - they are required to comply with U.S Sanctions if they conduct business in the U.S or through financial institutions in the U.S, and of the potential penalties which OFAC can levy.

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