The Economic Crime (Transparency and Enforcement) Act 2022 ("ECA") – What You need to know

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The ECA, designed to make it easier and quicker to impose sanctions and identify and trace illicit wealth, received royal assent on 15 March 2022. The ECA introduces new provisions relating to:

- Sanctions;
- Unexplained Wealth Orders; and
- Registration of Overseas Entities.

In this first of a series of three notes which will cover the changes introduced by the ECA in all three of these areas, we are focusing on the key changes to the sanctions regime that we think businesses need to know about.

What has changed and why does it matter?

1. Changes to Enforcement Powers

Presently, a breach of sanctions legislation will expose a person to the risk of criminal and/or civil liability. A contravention of The Russia (Sanctions) (EU Exit) Regulations 2019, for instance, exposes a person to the risk of imprisonment of up to 7 years and an unlimited fine. It will be a defence for a person to say that they did not know and did not have reasonable cause to suspect that they were acting in contravention of a particular sanction. Notably, where the offence is committed by a company, an officer of that Company will bear criminal liability where the offence is committed with their consent or connivance or is attributable to their neglect. The ECA does not change the application of or defence to allegations of criminal wrongdoing.

What has changed, however, is the manner in which civil liability for a breach of sanctions is approached. The Office for Financial Sanctions Implementation (OFSI), the body which deals with sanctions enforcement, has the power to impose civil penalties of up to GBP1 million or 50% of the value of the breach, (whichever is higher) for a breach of sanctions regulations. Pursuant to s.146 PCA, OFSI could only impose a civil penalty on a person if it was satisfied, to the civil standard, that a person had breached sanctions regulations and that a person knew or had reasonable cause to suspect that their conduct breached a financial sanction or that they had failed to comply with any obligations imposed on them by sanctions regulations. The ECA removes, entirely, any requirement for a person to have known, suspected or believed that they have acted in breach of sanctions regulations. Under the terms of the ECA, OFSI may now impose a civil penalty on a person where it is satisfied, on the balance of probabilities that the person has breached sanctions regulations. S.146 PCA is, therefore, now a strict liability offence with the only scope for argument being as to whether or not a sanctions breach has occurred.

It is fair to say that, to date, OFSI's exercise of its power to impose civil penalties for sanctions breaches is used sporadically. These changes may signal a move towards more activity in this area which companies will need to guard against through ensuring their compliance functions are and remain fit for purpose, particularly where risks to the business may change over time.

2. Naming and Shaming

Under s.149 PCA, OFSI has the obligation to publish reports about the imposition of monetary penalties it imposes. It does this periodically via website updates. Now, however, s.56 ECA provides that OFSI may also publish reports where a monetary penalty has not been imposed but where it is satisfied, on the balance of probabilities, that a person has breached sanctions regulations.

This is an extraordinary development and one which will be of real concern to companies whose reputation and business relationships may be damaged as a result. It is difficult to reconcile this new power with principles of fairness (either substantive or procedural) and justice.

3. Streamlining the process of making sanctions regulations and 'urgent designations'

The ECA also makes it much easier and quicker for the UK to make sanctions regulations, removing the need for the UK to apply the 'additional requirements' previously imposed under section 2 of the Sanctions and Money Laundering Act 2018 ("SAMLA") when making sanctions regulations for any of the 'discretionary purposes' under section 1(2) of SAMLA. These purposes (many of which overlap) include, the prevention of terrorism, in the United Kingdom or elsewhere, the interests of national security, the interests of international peace and security or to contribute to multilateral efforts to prevent the spread and use of weapons and materials of mass destruction.

Previously, when making sanctions regulations for any of these purposes, the UK was required to consider whether there were good reasons to make regulations and whether the imposition of sanctions was a reasonable course of action. If satisfied that there were good reasons and that the sanctions were a reasonable course of action, the minister making the regulations was required to produce a report for Parliament explaining why that was the case. This is no longer a requirement and, ostensibly, will permit the UK to impose regulations for any of the purpose above without any safeguards or independent scrutiny.

In addition, section 58 of the ECA creates the ability of the UK to designate a person even if they do not meet the definition of an 'involved person' under UK law, if that person or entity has been designated by the US, EU, Australia or Canada and the UK considers that it is the public interest to do so. The use of this new 'urgent procedure' for sanctions designations led to the addition of around 370 individuals and entities to the Russian sanction list only a matter of hours after the ECA received royal assent.

Both of these significant modifications to the UK sanctions regime will undoubtedly increase the pace of new designations and the introduction of new regulations, making it even more vital that UK companies place sanctions compliance at the top of their priority list and ensure that they have a robust system in place when screening and monitoring new and existing business relationships.

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