Foreign & Commonwealth Office

King Charles Street
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**Minister of State**

The Lord Pannick QC
House of Lords,
London
SW1A 0PW

09 November 2017

*Dear David,*

Thank you very much for your contribution to the Second Reading debate of the Sanctions and Anti-Money Laundering Bill. Your comments, as I knew they would be, were incisive and helpful.

**Threshold**

You highlighted that the current test for imposing sanctions is whether they are 'proportionate' and noted that the Bill instead says 'appropriate'. I hope I can reassure you that, as I alluded to in my closing speech, where relevant Convention rights are engaged, we consider that proportionality and the impact on the individual will be part of the decision making. Under section 6 of the Human Rights Act 1998, the appropriate Minister must act in compliance with those Convention rights as informed by the Strasbourg case law. We consider that this includes satisfying himself that the designation is proportionate.

**Designations by description**

You expressed concerns about the Government designating individuals by description rather than name. I would like to reassure you that designation by name is and will continue to be the standard procedure, and will account for the vast majority of designations.

However, providing for designation by description could be useful in certain situations, such as guarding against sanctions being circumvented by terrorist organisations that change their name, fracture into smaller groups, or merge into entities with new names.

It could assist in putting sectoral sanctions in place: such as by designating companies involved in a particular business or market sector that have a certain level of state ownership.

In relation to such organisations, and the targets of broader sectoral sanctions, we appreciate that additional burdens would be likely to be placed on businesses and banks but the difficulties would not be insurmountable and may be justified due to the risks posed by particular groups. Please be assured that in the rare cases when it is necessary to designate by description in this manner,

we will produce as much information about the designated groups as we can, to assist business and banks in meeting the compliance requirements that will be set out in the regulations.

It would also enable Ministers to refer to people on a list created by an international partner rather than naming each person on that list; this would involve less bureaucracy, by avoiding duplication of lists, and would therefore potentially reduce compliance costs for banks and businesses who operate across borders.

It is important to note that each person falling within the relevant description has the benefit of the same procedural safeguards that apply to named individuals, set out in Chapters 2 and 4 of the Bill.

**Persons connected with a specified country**

You asked why financial sanctions should be imposed on *"persons connected with a prescribed country"*. In our view, this is necessary to ensure that broad sectoral measures, which restrict market access to financial persons and markets, can be imposed across the board so they can have maximum impact. It can be used to ensure that financial sanctions have a wide-ranging impact across the whole economy of a prescribed country.

An example of this can be found in Article 17 of EU Regulations 2017/1509, which places restrictions on commercial activities with North Korean persons and bodies (such as the acquisition of ownership interests, the creation of joint ventures, or the provision of investment services) who are not listed in an Annex to the Regulations. Another example is the (currently suspended) restrictions on transfers of funds to and from Iran.

We are aware that these are broad restrictions, and that the potential exists for persons to be caught by them in circumstances that are less than ideal. For example a broad restriction on the transfer of funds to a prescribed country would also apply to NGOs transferring funds to that country that are intended for humanitarian use. We have built into the bill at clause 14 a broad power to provide exceptions and to issue licenses, which can be used to mitigate such circumstances (and, in the example given, allow the transfer of funds). We think that this preserves the existing balance that has been struck between the need for this type of sanction to have a broad and deep impact (in order to bring about a change in the behaviour that the sanctions are targeted against) and the need to ensure that people ae not caught by sanctions which are not directed at them.

**Procedural fairness**

You raised some concerns about procedural fairness both in the meeting we had and on the floor of the House. I want to again reassure you that in my opinion the Bill does provide significant procedural protections for designated persons.

As soon as an individual is designated, although the Bill does not explicitly say so, they will be informed of the reasons for their designation, sufficient to enable them to properly understand the rationale for the decision and to mount an effective challenge. The Bill does not make any provision to restrict the circumstances in which notice and reasons must be given, or to alter the burden of disclosure. We think that the existing case law shows that the courts will require the Government to ensure that reasons are offered to designated persons, and we expect this to remain the case. The Government will continue to comply with the standards laid down by the court, applying common law principles of fairness. We accordingly do not think that the Bill needs to make any explicit provision to that effect. It is worth noting that the Bill provides comprehensive reassessment, review and challenge mechanisms.

If a challenge is made in court, we have put in place measures to cater for those rare situations where sensitive information is used to underpin a designation through the use of the Closed Material Procedure. As you will be aware, this is a procedure which has been tested by the courts and found to be compatible with the rights of designated persons, as long as the irreducible minimum of the case against them is disclosed. We accept that this is the current state of the law and, as you can see, the Bill does not seek to make any changes to the existing disclosure burden on us in such cases.

The one thing we do not wish to do is to create the risk of asset flight in the case that designated persons are notified prior to designation, and we hope that you will agree that we have to strike a careful balance here.

Thank you for raising the issue about the timeframes involved in reassessments. We will of course need to think carefully about the detail of how the procedures in the Bill work in practice and have taken a power to set out procedural details in regulations as required. The reassessment process is there so a designated person can seek swift redress when wrongly designated, and the Government fully intends to react promptly to points that are put before it. A similar mechanism exists now in the EU context but the need for correspondence with designated persons to be agreed by all 28 Member States can slow down the process. The Government will of course be required to consider Convention rights when making any procedural regulations and to act in accordance with applicable Convention rights when taking any action to designate or review a designation; and as you indicate, the courts may ultimately be called on to ensure that process is fair.

**Reviews**

You noted the three year review period in clause 20. This clause ensures that designations are comprehensively re-examined at regular intervals. It is important to remember that a number of things can happen within that period. First, the designated person can request a reassessment and get the decision looked at again. Second, they can challenge it in court. Third, if new evidence arises or there is a new matter that has not been considered before, they can request a further reassessment. Fourth, the appropriate Minister can instigate a reassessment on his own initiative and is obliged to revoke the designation if the relevant conditions are no longer met. In light of the above, it is clear that the matter of designation is a live issue throughout the three year period.

We are aware that three years is a longer period than the EU currently uses. However, we do not feel that this will create any significant detrimental impact upon the rights of individuals. Even without the Minister's ability to re-open the question of designation on their own initiative at any time during the three year period, the designated individual will be able to challenge their designation within that period, on more than one occasion if their circumstances change. You noted that the passage of time might in itself be such a change of circumstance, and I accept that in some cases this may be true. If the passage of time does not alter or undermine those reasons, I do not see why there should be a need to revisit the designation, or how not doing so is an unlawful impact upon the rights of the designated person. I also note the separate requirement in clause 26 of the Bill for the Government to review its sanctions regulations at least once per year to ensure they remain appropriate for their purpose.

**Redress in relation to UN designations**

You asked about remedies available to persons designated by the UN, and the difference between the ability of the EU courts to quash a designation in EU law that gives effect to a UN designation, and the provisions of the Bill that only enable a UK court to direct the Secretary of State's best endeavours to convince the UN Security Council to quash the designation at UN level.

The simple fact of the matter is that the UK is a UN Charter member state and the EU is not. The UK is directly bound by these international law obligations and must implement the designations.

It follows that if a person is listed by the UN, we are under a binding duty in international law to implement that listing unless and until the UN has lifted it. These obligations under the UN Charter take precedence over other international obligations such as those contained in the European Convention of Human Rights. This is a point that the UK has made on a number of occasions to the Strasbourg Court, which has not disagreed with it.

The Bill recognises that the only sensible way to cut through this Gordian knot is for the matter be resolved at UN level. Notwithstanding these UN obligations, the Bill provides procedural safeguards for persons subject to UN designations which comply with the requirements of Articles 6 and 13.

**Delegated powers**

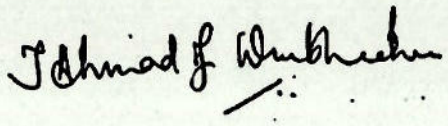
I hope that I can reassure you as to the extent of the power in clause 39. It is designed as a future proofing measure, simply to enable the UK to adopt new types of sanctions as and when they arise. For example, if it is decided in the future to designate aircraft in the same way that ships are currently designated, we will be able to do so. This clause enables the UK to do so outside of the UN context, which is provided for by clause 7, so our autonomous sanctions can keep up with our international partners. The clause has two important limitations. First, it cannot be used to alter the purposes for which sanctions are put in place. Second, it must be made using the draft affirmative procedure, so it cannot take effect without having been approved by a vote in this House and in another place.

I hope that this letter goes some way towards addressing your concerns, which you raised both in Second Reading and in your article published in The Times on Thursday 9 November. I would also like to highlight that the Government has written to the newly constituted Joint Committee on Human Rights, explaining in detail why the Government considers this Bill to be compatible with the ECHR. I hope that memorandum will also be of assistance to you.

I would be happy to meet with you again in advance of Committee, or offer a meeting with my officials, including lawyers, to discuss these issues in more detail.

I am copying this letter to both Lord Hope of Craighead and Lord Judge.

I am placing a copy of this letter in the Library of the House.



**LORD AHMAD OF WIMBLEDON**
Minister of State for the Commonwealth and the UN
Prime Minister's Special Representative for Preventing Sexual Violence in Conflict