HOUSE OF COMMONS LIBRARY

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The Sanctions and Anti-Money Laundering Bill 2017-19

By Ben Smith

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In brief

The Government announced in the Queen's Speech of June 2017 that it would repeal the *ECA 1972*, (ECA 1972) as part of the process of leaving the EU, and that complementary legislation would be introduced to allow a national sanctions policy.

The present Bill fulfils the second of those commitments. It establishes a national sanctions legal framework, and will also provide for updating the national anti-money laundering regime, much of which is also based on international collaboration.

The *European Union Withdrawal Bill 2017-19* ('the Withdrawal Bill') will copy existing EU-derived sanctions measures into UK law but they will be 'frozen.' The present bill allows names to be added and removed to this retained EU law and, most importantly, it provides a legal basis to impose new sanctions regimes.

Brexit

Most sanctions in the UK originate either in UN Security Council resolutions or with decisions in the EU. The anti-money laundering regime derives largely from standards set by the Financial Action Task Force. Both types of legislation often come to the UK in the form of EU law – EU decisions, directives and regulations – and are implemented with powers contained in the ECA 1972. This act is due to be repealed by the Withdrawal Bill, so a new legal base for imposing sanctions and updating the anti-money laundering regime in line with the recommendations of the FATF is needed. As with sanctions, the Withdrawal Bill will copy existing EU-derived anti-money laundering (AML) legislation into UK law but will not provide Ministers with the powers to implement new AML legislation.

There may be a transitional period during which the UK must continue to implement EU law in sanctions and AML. The transitional period will not, however, be as significant as in some policy areas because the Government has indicated that it aims to continue to coordinate with the EU even after the end of any transition.

Sanctions

Sanctions have become an increasingly important foreign policy tool in recent years.

Traditionally they have involved imposing trade and arms embargoes on specified countries. As it became clear that these sanctions hurt ordinary people but were often ineffective at changing the leadership's behaviour, new sorts of sanctions have been developed, targeting individuals or companies.

These targeted sanctions have been legally vulnerable, however, with both international and UK courts finding sometimes that sanctions designations have constituted miscarriages of justice or that the legal basis for imposing the sanctions was inadequate. These court decisions mean that getting the legal basis for sanctions right is particularly sensitive.

The UK has often been an influential voice in sanctions policy at the EU and UN levels, leading the move for strong sanctions against Russia over Ukraine and Crimea, for example.

Lists of United Nations sanctions, EU sanctions and UK sanctions are maintained. The UK implements some 34 sanctions regimes, around half of which result from legally-binging Security Council resolutions and half from 'autonomous' measures agreed with EU partners.

Anti-money laundering

Like sanctions, AML legislation is more effective if it is designed and implemented through international collaboration. The most important source of these internationally-agreed measures is the Financial Action Task Force (FATF), an inter-governmental body that promotes effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

AML legislation has evolved in response to events, spreading from general criminality to drug enforcement and, lately, terrorist activity. AML legislation has also gradually expanded to include more types of businesses and to impose increased the transparency requirements on transactions.

The UK's legal and regulatory regime has been based largely on four EU-wide money laundering directives that have been implemented by UK regulations. A fifth money laundering directive has been approved at EU level and is likely to come into force in stages in 2019.

Some but not all AML regulations are implemented using the *ECA 1972*; other primary legislation includes the *Proceeds of Crime Act 2002*.[1]

Present legal mechanisms for sanctions

The UN Security Council has the power to mandate member states to impose sanctions; sometimes the UK imposes sanctions that are not mandated by the UN, usually in conjunction with other EU member states.

Both UN-mandated sanctions and those agreed by the EU are usually applied by making Statutory Instruments (SIs or secondary legislation) using powers in the *ECA 1972*, although there is other primary legislation that empowers Ministers to make sanctions regulations, notably the *United Nations Act 1946* and the *Terrorist Asset-Freezing etc. Act 2010*. Sanctions decisions can be accompanied by Council regulations using Article 215 of the Treaty of the Functioning of the European Union. These are directly applicable, so no SI is necessary.

Most sanctions documents are submitted to the House of Commons European Scrutiny Committee before they are publicly available. In theory, the Government cannot endorse non-UN sanctions in the European Council until they have been approved by the Scrutiny Committee; in practice the committee is often overridden and sanctions are agreed before Scrutiny Committee approval.

Other UK primary legislation is involved in the imposition of sanctions, such as the *Immigration Act 1971* and the *Export Control Act 2002.*

Much of UK anti-money laundering law is derived from EU directives, as mentioned above. These are implemented by SI, using powers in the *ECA 1972*.

The House of Lords EU Committee found in 2017 that the EU mechanisms for imposing targeted sanctions had improved considerably, although there were still legal weaknesses, according to the committee, connected with redress and standard of proof. Another House of Lords Committee heard that an independent sanctions policy could lead to an increase in litigation against the UK, but that it would be an opportunity to improve the

[1] Legislation links in this paper lead to the law on legislation.gov.uk. The version found there may not reflect amendments to the law as there is sometimes a delay. Please read the note on the law's record to find out whether that is the case or whether the law is fully up to date.

licensing system, whereby exemptions are made to sanctions to allow humanitarian work in a sanctioned country, for example.

Consultation

In 2017, the government launched a public consultation on the proposed new legislation. Opinions were sought on the powers to be included in the Bill, whether terrorist activity should be specified in the Bill as being targeted by sanctions, evidence thresholds, the appeal process, licensing and enforcement. They also consulted on anti-money laundering.

A document setting out the response to the consultation was published in August 2017.

Presentation of the Bill and Second Reading

The Bill was presented in October 2017, along with explanatory notes and an impact assessment.

The Government said that the Bill would replicate existing powers to impose sanctions, but that it would give greater flexibility, allowing the UK to move quickly. Ministers also said that the UK would be free to establish a more effective licensing system, whereby NGOs are allowed to carry out humanitarian work in sanctioned countries, for example, and would be free to provide its own guidance on compliance to stakeholders.

Critics of the Bill said that it was far from a 'technical' exercise, that it gave Ministers sweeping powers to legislate by regulation without enough parliamentary scrutiny and that some human rights and other safeguards present in the EU system would be lost.

The House of Lords held the Second Reading debate, a general debate on the Bill, on 1 November. Peers questioned the scope of powers granted to Ministers in the Bill to legislate by Statutory Instrument, particularly about the Henry VIII Clauses that give powers to the Government to change primary legislation by issuing secondary legislation. Some were concerned that Ministers would be enabled to impose sanctions that were disproportionate, others worried that the mechanisms for appealing against designation were insufficient. Powers in the Bill for Ministers to create offences by secondary legislation were also criticised. A former Lord Chief Justice said: "This is a vast, great superstructure of secondary legislation being erected on virtually non-existent primary legislation."

Several Peers also wanted the Statutory Instruments to receive more parliamentary scrutiny before coming into force.

The licensing process, whereby NGOs can be allowed to carry out humanitarian work that would otherwise be banned, was also raised by several speakers.

Amendments in the Lords

After the general debate in during Second Reading, the Bill went through its Committee Stage, Report Stage and Third Reading, when individual clauses were discussed and amendments proposed, some of which were agreed. Several of the amendments were proposed by the Government, to rectify problems in the Bill that they accepted; some were proposed by opponents of the Bill and made changes that the Government did not welcome.

Lord Ahmad of Wimbledon, Minister at the Foreign and Commonwealth Office, addressed widespread concern about the "unconstrained" the powers in the Bill for Ministers to make secondary legislation. He proposed an amendment to limit Ministers' ability to make non-UN sanctions regulations only to cases where she or he considers:

- there are good reasons to do so and

- that the imposition of sanctions is a reasonable course of action.

Lord Collins of Highbury, for Labour, proposed an amendment to set out the purposes for which sanctions regulations could be made:

- resolving armed conflict and protecting civilians in conflict zones
- promoting compliance with international humanitarian and human rights law
- preventing the proliferation of weapons of mass destruction
- promoting democracy, human rights, the rule of law and good governance.

This amendment was passed on a division.

During the second day of the Lords Report Stage, a Government amendment clarified references in the Bill to a person named "for the purposes of" a UN Security Council Resolution.

The Government proposed an amendment to Clause 41, providing that a person cannot be liable for a civil monetary penalty through regulations established under Clause 41 when they have already been convicted of a criminal offence under the regulations in relation to the same act or omission.

During Report Stage Government amendments were agreed that made it clear that:

- businesses will be brought within the scope of anti-money laundering/counter-terrorist financing regulation under paragraph 3 of Schedule 2 only where their activities are particularly likely to be used for the purposes of money laundering, terrorist financing or other activities that threaten the integrity of the international financial system
- only businesses of this type can be required to carry out customer due diligence measures under paragraph 4 of the schedule, be supervised for the purposes of paragraph 7, or be registered for the purposes of paragraph 9
- any future criminal offences established under Clause 41 can be created only if regulations provide that such offences have either a mental element necessary for their commission or a defence to it, or both.

During Lords Third Reading, Lord Ahmad of Wimbledon moved an amendment requiring that regulations made under Clause 41 can only make provision which enables or facilitates the detection or investigation of money laundering or terrorist financing. (Peers had been worried that, as drafted, the Bill would give Ministers the power to weaken the AML regime.)

There was much debate in the Lords on the ability of foreign companies or individuals to buy houses and flats in the UK to hide the proceeds of corruption, facilitating the laundering of that money. The UK Government had previously undertaken to force disclosure of who owns that sort of property, publishing a register of beneficial ownership. During Third Reading a Government amendment was agreed that required Ministers to report regularly to Parliament on progress towards establishing a register of beneficial ownership of overseas entities owning property in the UK.

Some peers raised concerns about the power to create new criminal offences. Critics argued that criminal offences should only be created by Parliament. Lord Judge proposed an amendment to remove the power to create offences from Clause 41 (as originally presented to the Lords). The amendment was agreed to on a division. Government amendments were agreed to limit associated powers: removing the power to make

provision for unspecified evidentiary matters and setting out the maximum sentences associated with offences that could be created.

The Government promised that would propose amendments in the House of Commons to restrict the power present in the Bill to change the definition of terrorist financing.

Lord Ahmad moved an amendment requiring the Minister to inform the person promptly when they had been designated or had their designation varied or revoked. Another Government amendment required that if a person has made a request to have their designation under sanctions regulations reviewed, (a) the decision on any such request to be made as soon as reasonably practicable after the receipt by the appropriate Minister dealing with the request of the information needed for making the decision, and (b) the person who made the request to be informed of the decision and the reasons for it as soon as reasonably practicable after the decision is made. Sensitive information such as that related to national security can be excluded from the explanation, but the Minister may not give no explanation at all.

A government amendment added the word "procured" to Clause 2, to tighten up the ban on providing financial services to designated persons.

Transition and future coordination

Any transition period after formal withdrawal from the EU may mean that the UK must abide by EU law on sanctions and anti-money laundering, without any say on elaborating it. The *Sanctions and Anti-Money Laundering Bill* provides powers for the UK Government to implement that law, although it is not yet clear what mechanisms for consultation with the EU and scrutiny ion Parliament may be set up. It seems likely that some such mechanisms will be created, however.

In the future most observers hope that there will be close consultation with the EU on both sanctions and anti-money laundering legislation.

1. Introduction

The Government announced in the Queen's Speech in June 2017 that as part of the process of leaving the European Union, it would introduce a bill to repeal the *ECA 1972* (ECA 1972), and that complementary legislation wold be passed allowing new national sanctions policy:

> A bill will be introduced to repeal the European Communities Act and provide certainty for individuals and businesses. This will be complemented by legislation to ensure that the United Kingdom makes a success of Brexit, establishing new national policies on immigration, international sanctions, nuclear safeguards, agriculture, and fisheries.[2]

The *European Union Withdrawal Bill 2017-19* ('the Withdrawal Bill') received its second reading in the House of Commons on 11 September 2017, and would repeal the *ECA 1972*.

The present Bill fulfils the second of those commitments, to allow a national sanctions policy, and will also provide for updating the national anti-money laundering regime, which, like sanctions policy, is also based on international collaboration.

The Withdrawal Bill will copy existing EU-derived sanctions measures into UK law but they will be 'frozen.' The present bill allows names to be added and removed to this retained EU law and, most importantly, it provides a legal basis to impose new sanctions regimes. Likewise, the Withdrawal Bill will copy existing EU-derived AML law into UK law but it will not provide the legislative basis to create new AML law, something that the *Sanctions and Anti-Money Laundering Bill* will do.

1.1 Sanctions

Targeted sanctions

Traditional sanctions often meant imposing trade embargoes against target countries, aiming to change those countries' policies. This type of measure often hurt ordinary people more than the leadership of a target country; the average citizen in a target country could often be damaged twice: by the policies of the country's leadership and by the sanctions imposed by other countries to address those policies. The embargo against Saddam Hussein's Iraq is thought to have caused widespread suffering, which the Oil for Food programme sought to alleviate.

Modern sanctions regimes place much more emphasis on 'targeted' or 'smart' sanctions. These can be aimed at individuals and companies or other organisations, intending to put pressure on decision makers and those directly responsible for the targeted behaviour.

Legal vulnerability?

Sanctions targeted against individuals, however, place significant restrictions on a person's life: asset freezes and travel bans, for example, Courts including the UK Supreme Court, the European Court of Justice

[2] HC Deb 21 June 2017, c34

and the European Court of Human Rights have come to judgments in favour of the targets of sanctions from time to time.[3]

Various grounds for criticism of the application of sanctions have included inadequate legal basis for the sanction, insufficient information provided to the targeted person and insufficient access to judicial review.

In 2010, a UK Supreme Court judgment declared that Orders in Council used to implement UN Security Council requirements relating to the freezing of terrorist assets were invalid, because ministers had exceeded the powers contained in the *United Nations Act 1946*.[4] New legislation was quickly introduced to validate the sanctions measures.

Brexit uncertainty?

The UK's imminent departure from the EU made the present Bill necessary because most sanctions regimes imposed by the UK at present originate at either UN or EU level and are implemented by means of Council Decisions under the EU's Common Foreign and Security Policy and Regulations under Article 215 of the Treaty on the Functioning of the European Union.

The Withdrawal Bill will copy those sanctions and AML measures into UK law. Clause 7 of the Withdrawal Bill will allow ministers to correct deficiencies in those pieces of legislation, but neither the power to transpose EU-derived legislation into UK legislation nor the power to correct it would allow for the creation of new sanctions regimes or new AML legislation.

The Sanctions Bill will allow for the imposition of completely new law in both these areas. It will also provide, for a period of two years, for the substantial amendment of retained EU law, for example to add names to sanctions lists.

For some commentators, uncertainty about Brexit also made it difficult to draft the Bill. It is widely accepted that it will make sense for the UK to continue to coordinate sanctions policy (and some other security and foreign policy-related matters) with the EU after withdrawal but how that coordination will work is still not clear, leading some critics to say that the Bill has been drafted to give Ministers the maximum flexibility to legislate via regulation (see the section on the Lords Second Reading debate, below). A Parliamentary Question was also tabled in November 2017 on the fact that the public consultation on the Bill did not include a question on the future coordination of sanctions policy with the EU.[5] Stakeholders nevertheless separately made clear their opinion that international coordination will be crucial.[6]

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3 For an example, see Maya Lester, 'Strasbourg's Kadi? Al-Dumi v Switzerland', European Sanctions Blog, 6 July 2014

4 For more on this, see the Commons Briefing Papers *The Terrorist Asset-Freezing Etc. Bill 2010-11*, November 2010 and *Terrorist Asset-Freezing Etc Bill [HL] 2010-11: Committee Stage Report*, December 2010

5 HC Written question 11174, 6 November 2017

6 See for example *Impact of Brexit on the Future Application of UK Sanctions*, UK Finance, November 2017

It should be noted that, during the post-Brexit transitional period requested by the Government, it is expected the UK will remain bound by sanctions regimes adopted by the EU (although the Government would have lost its veto over Common Foreign and Security Policy measures when the UK ceases to be a formal Member State).

2. Foreign policy sanctions

Sanctions have become an increasingly important tool in foreign policy. Although their effectiveness is the subject of debate,[7] it seems likely that they will continue to be imposed by the United Nations and other international organisations such as the EU and the Organisation for Security Cooperation in Europe (OSCE). Even if they do not often result in a change of policy in the short term, they send a signal of disapproval, they express solidarity among the sanctioning countries, and provide policymakers with the opportunity to do something short of military action.

2.1 Sanctions and the UK

On the introduction of the *Sanctions and Anti-Money Laundering Bill* in the House of Lords, the Minister of State for Europe, Sir Alan Duncan, made a statement on sanctions:

> Sanctions are a vital part of our response to countries, organisations and individuals who threaten our security or undermine international law. We are taking sensible steps to make sure that we have legislation in place for when we leave the EU so our existing sanctions can continue and we have the freedom to take further action when necessary.
>
> As a Permanent Member of the UN Security Council the UK has long championed a rules-based international system and this will continue after we leave the EU. Sanctions are most effective when delivered by a coalition of countries acting together and we expect to continue working closely with our partners in the EU and the rest of the world to take decisive action when needed. This Bill will ensure we retain the powers we need to remain a responsible and reliable security partner.[8]

The UK has been an influential voice in negotiations over sanctions both on the UN Security Council and within the EU, for example: pressing for sanctions against Iran over its nuclear programme and against Russia over its actions in Ukraine.

The UK imposes a range of sanctions, including arms exports controls, against countries from Argentina to Zimbabwe. Information on these is available on such Government webpages as Current arms embargoes and other restrictions, Financial sanctions targets: list of all targets, and Current list of designated persons, terrorism and terrorist financing.

In the case of designation for terrorism reasons, many of the designated persons are those on the Consolidated United Nations Security Council Sanctions List.

Some sanctions are implemented by the EU rather than the UN. The EU maintains a Consolidated list of sanctions.

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7 For discussion of this debate, see the Commons Briefing Paper *Do sanctions work?,* June 2015

8 'New Sanctions Bill introduced in House of Lords', UK Government press release, 18 October 2017

The following UK sanctions regimes are a result of UN or EU decisions:

> Afghanistan, Belarus, Bosnia and Herzegovina, Burma, Burundi, Central African Republic, China, Democratic People's Republic of Korea (North Korea), Democratic Republic of Congo, Egypt, Eritrea, Iran, Iraq, Lebanon, Libya, Moldova, Republic of Guinea, Republic of Guinea-Bissau, Russia, Somalia, South Sudan, Sudan, Syria, Tunisia, Ukraine, Yemen and Zimbabwe.[9]

The UK implements some 34 sanctions regimes, around half of which result from legally binding Security Council resolutions and half from extra (so-called 'autonomous') measures agreed with partners in the European Union.[10]

9 HC Written question – 6330, 19 July 2017
10 HC Deb 19 July 2017, c925

3. Anti-Money Laundering (AML)

By Tim Edmonds, Business and Transport Section

3.1 Introduction

There have been many individual initiatives to control money laundering. The focus of the measures has shifted over time, often in response to events, from general criminality to drug enforcement and, lately, terrorist activity. Of necessity, money laundering legislation has an international aspect and the story of its development is largely one of an expanding and frequently revised body of law emanating from pan-national sources.

Pre-eminent among these is the Financial Action Task Force (FATF), an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. FATF sets standards and promotes effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

Initiatives from FATF have often been implemented in the UK following a series of money laundering directives (1-4) and then effected by UK Regulation.[11] Other parts of the UK's AML regime are derived from domestic legislation – often smaller parts of larger criminal law reform legislation.

3.2 UK Domestic legislation

In England and Wales, the *Criminal Justice Act 1988* (as amended by the *Criminal Justice Act 1993*) made it an offence to assist in the retention or use of the proceeds of serious criminal conduct. Similar provisions apply in Scotland and Northern Ireland and, for drug trafficking offences, under the *Drug Trafficking Act 1994*.

The *Terrorism Act 2000* (TA 2000) widened the definition of terrorist activity and provisions in Part 3 of the Act imposed duties relating to the disclosure of information about terrorist finance. These duties were replaced and expanded upon by first three parts of the *Anti-Terrorism, Crime and Security Act 2001*.

The *Proceeds of Crime Act 2002* (POCA), as amended by the *Serious Organised Crime and Police Act 2005*, enables the police and other law enforcement authorities to seize the proceeds of all crime, including terrorist crime. It brought together previous enactments and, together with the regulations made under it is the basis for most of the important, current, money laundering law.

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[11] For more detail see the Commons Briefing Paper *Money laundering law*, February 2018

3.3 EU legislation

There have been four AML directives, and a fifth was agreed in December 2017 and will take effect in stages from 2019.

The first Money Laundering Directive came into force on 1 April 1994. The main impact of the Directive was to require financial institutions to verify the identity of all customers opening business relations with them (and to keep records of their identification).

The second Money Laundering Directive was given effect by money laundering regulations made under POCA 2002. The main change brought about by the regulation was the extension of the legislation to a wider circle of financial and credit institutions, money services businesses, firms providing legal or accountancy services, casinos, estate agents, and some dealers in high value goods. The regulations came into force on 1 March 2004.[12]

The third Money Laundering Directive was derived from recommendations from FATF. It reproduced much of the second directive but was more detailed. In particular, it explicitly dealt with terrorist financing; provided new definitions for Politically Exposed Persons; introduced the requirement for Money Service Businesses, Trust, and Company Service Providers to be licensed or registered under a fit and proper test; enhanced the customer due diligence regime; encouraged a risk based approach and prohibited anonymous accounts. The new regulations were published in July 2007 as *The Money Laundering Regulations 2007* (SI 2007/2157). This was itself amended by Regulations in 2012,[13] and in 2015.[14]

The fourth Money Laundering Directive was agreed on June 2015. According to the EU Commission the most important changes resulting from the new international standards revolve around the move towards less prescriptive and a more risk-based set of rules. The fourth was aimed at putting the new approach into practice. It was introduced in the UK by the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017*.[15]

The fifth Money Laundering Directive was agreed in principle between the EU Member States and the European Parliament in December 2017. It will expand the requirement to perform anti-money laundering checks to new categories of businesses, like auctioneers, and increase transparency requirements for the beneficial ownership of both companies and, controversially, trusts.[16] The new Directive is expected to take effect in stages from 2019 onwards, and may have to be transposed in full by the UK during the post-Brexit transitional period.

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12 Statutory instruments 2003/3074 -3076
13 *Money Laundering (Amendment) Regulations 2012* (SI2012/2298)
14 *Money Laundering (Amendment) Regulations 2015* (SI2015/11)
15 SI 692/2017
16 European Scrutiny Committee, Twelfth Report HC 301-xii (2017-19), chapter 14 (31 January 2018).

4. Present legal mechanisms

4.1 International obligations

The UK and other members of the United Nations are legally bound to implement UN sanctions. Sometimes the UK imposes sanctions that are not mandated by UN Security Council resolutions – at present, usually in collaboration with EU partners.

At present, section 2 of the 1972 Act gives force in UK law to EU Common Foreign and Security Policy Decisions, as well as to other forms of EU law.[17] The UK has hitherto imposed sanctions in conjunction with its EU partners and most sanctions regimes have been created using powers in the 1972 Act.

Although there are some powers in other legislation, such as the *Terrorist Asset-Freezing etc. Act 2010*, when the 1972 Act is repealed, a new legal basis for sanctions will be needed.

The *Sanctions and Anti-Money Laundering Bill* would allow the government to update existing UN sanctions, impose new UN sanctions and to create autonomous UK sanctions regimes "in coordination with our allies and partners."[18] It would also allow anti-money laundering rules to be updated.

Although the Bill is designed largely to replace the powers that the 1972 Act provided, the Government aims to improve on the existing arrangements by using the "greater flexibility" provided by the new circumstances, for example to provide better guidance to UK businesses affected by sanctions and to improve the system for granting licences to prevent sanctions from disrupting humanitarian operations.[19]

Domestic legislation

The *United Nations Act 1946* provides ministers with the powers to implement UN Security Council-mandated sanctions. The UK Supreme Court,[20] however, ruled in 2010 that ministers' use of the UN Act 1946 for the imposition asset freezes on individuals exceeded the powers granted under that Act and risked infringing targeted individuals' rights under the European Convention on Human Rights. This led to the passage of the *Terrorist Asset Freezing etc. Act 2010,*[21] which gave Ministers clearer powers to freeze assets. The *Sanctions and Anti-Money Laundering Bill* would repeal a large art of the 2010 Act and replicate its powers.

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17 For more information see the Commons briefing paper *Withdrawal Bill*, 1 September 2017

18 *Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions*, Foreign and Commonwealth Office, HM Treasury, Department for International Trade, April 2017, Cm 9408

19 HC Deb 19 July 2017, c926-7

20 Ahmed v HM Treasury [2010] UKSC 2, 27 January 2010

21 For more information on that bill, see the Commons briefing paper *Terrorist Asset-Freezing Bill (HL) 2010-11*, 10 November 2010

4.2 Implementation of EU sanctions law

Particularly since the 2010 Supreme Court judgment, most UK sanctions are imposed using powers that flow from the *ECA 1972* (ECA).

Like other EU member states, the UK uses these powers to implement both sanctions agreed at the United Nations and those agreed at the EU level. The UK currently implements 34 sanctions regimes and about half of these result from Security Council resolutions,[22] while the other half are extra EU sanctions (or 'restrictive measures'), agreed by unanimity at a Common Foreign and Security Policy Council (CFSP) meeting, resulting in a Council decision.

EU CFSP decisions are binding, and can be enacted either by primary or secondary legislation in member states. Most EU sanctions Decisions are enacted by Statutory Instrument under Section 2(2) of the ECA, which confers authority on Ministers, Government departments or Her Majesty in Council to make subordinate legislation, with certain exceptions contained in Schedule 2 of the Act.

Because sanctions often involve a combination of the EU's foreign policy and trade competences, many EU restrictive measures are enacted by a combination of a decision and a regulation. Measures laid down in a binding CFSP Council Decision, such as arms embargoes or travel restrictions, are adopted by unanimity under Article 29 TEU and implemented directly by the Member States. Economic sanctions such as asset freezes and export bans require additional implementing legislation in the form of a Council regulation under Article 215 of the Treaty on the Functioning of the European Union – directly applicable and binding on individuals and companies in the EU – which sets out the detailed scope of the measures and the means of their implementation.[23]

Further legislation is needed despite the *Withdrawal Bill*, because that bill aims to retain existing EU-derived legislation and will preserve (or 'freeze') existing sanctions, rather than providing a mechanism to amend them or implement new ones.

Clause 8 of the Withdrawal Bill does empower ministers to make any regulation to prevent or remedy a breach of the UK's international obligations arising from withdrawal, but this would not provide a permanent legal basis for implementing sanctions.

House of Commons European Scrutiny Committee

At present, most proposed EU Council Decisions under the Common Foreign and Security Policy and Regulations under Article 215 TFEU — including sanctions — are submitted for scrutiny with the European Scrutiny Committee (ESC) before they are publicly available.[24] They are

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22 HC Deb 19 July 2017, c925

23 For more on EU withdrawal and EU decisions, including some examples of how sanctions have been implemented in practice, see the Commons Briefing Paper, *Legislating for Brexit: EU Decisions*, January 2018

24 Draft CFSP measures are not formally deposited, as this would require them to be published.

subject to the scrutiny reserve resolution, meaning that, in principle, the Government cannot endorse them within the Council before the Committee has considered their legal and political importance, and cleared them from scrutiny. This applies irrespective of whether the sanctions regime is entirely new, or the document makes amendments to existing sanctions.

However, a Minister may decide that for 'special reasons' agreement may be given to a proposal that has not cleared scrutiny.[25] As a result, it is not unusual for new Council Decisions on sanctions to be deposited by the Foreign and Commonwealth Office for scrutiny by the European Scrutiny Committee after their formal adoption and entry into force, especially where they target specific individuals and there is a perceived risk of asset flight. The scrutiny reserve resolution cannot force the Government to retroactively rescind its support for EU sanctions if they were adopted without prior parliamentary scrutiny, as there is no mechanism at EU-level to give effect to such a decision by a national parliament.

There is no distinction for the ESC between made-affirmative and draft affirmative procedure – the scrutiny reserve resolution applies irrespective of substance, unless the ESC has agreed that deposit of the instrument is not necessary. Overrides of the scrutiny procedure are frequent: the Government agrees to sanctions before the Committee has cleared them from scrutiny.[26]

There is no equivalent of the negative procedure for documents before the Scrutiny Committee, as sanctions that only transpose UN Security Council measures are typically exempt from scrutiny (at the Committee's discretion).

Travel bans

The UK's *Immigration Act 1971* contains provisions to make individuals 'excluded persons'; the present legal procedure for imposing international travel bans involves using section 8B of that Act to exclude a designated person.

The new legislation will ensure that sanctioned persons become 'excluded persons' under UK law.

Trade sanctions

The *Export Control Act 2002* provides powers to control exports, but usually those to destinations not subject to sanctions. In recent years, trade-related sanctions have usually used the powers in the ECA.

Other legislation

Powers exist in the *Anti-terrorism, Crime and Security Act 2001* to make asset-freezing Orders, and in the Counterterrorism Act 2008 to make directions to cease specified financial activity with a specified third party, sector or country.

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25 Cabinet Office guidance on scrutiny, p. 77.

26

These Acts set out strict criteria for their use; not all cases will comply with them, making them unsuited, particularly for wider sanctions regimes.

For trade sanctions, there are some existing powers to impose or implement trade measures (for example in the Export Control Act 2002) but they are not usually used for sanctions. In recent years, the UK has imposed trade sanctions which go beyond the powers set out in domestic legislation.

Overseas Territories

At present the Overseas Territories are covered by UK sanctions regimes, except for Bermuda, Gibraltar and the Crown Dependencies (the Isle of Man, Jersey and Guernsey), which legislate for themselves. It is Government policy to promote the adoption of UK sanctions regimes in all Overseas Territories and Crown Dependencies; this will continue after withdrawing from the EU.

Exemptions

Any legislation must provide for exemptions, or licences, to be made to restrictive measures. These can be, for example, to allow HM Treasury to designate a certain amount of money to be released to a person whose assets have been frozen, to cover essential expenses; or to allow military goods to enter a country for a UN peacekeeping force.

Evidence threshold

The Government proposes under each regime the power to designate persons where there is enough evidence to provide "reasonable grounds to suspect" that they meet the agreed criteria. This threshold has recently been endorsed by the UK Supreme Court and the EU General Court.

Counter-terrorist financing

The new legislation will contain powers to establish sanctions in support of counter-terrorist financing.

Money-laundering

At present, much anti-money laundering legislation is based on EU law, particularly the *Fourth Money Laundering Directive*,[27] dated May 2015, which came into force in the UK in June 2017, in the form of the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017*.[28] The Directive was accompanied by a Funds Transfer Regulation, directly applicable in the UK. The Fourth Money Laundering Directive was transposed using section 2(2) of the ECA 1972.

As noted, amendments to the Directive in the form of the Fifth Money Laundering Directive were agreed at EU-level in December 2017. It is likely that these will have to be implemented by the UK in the same way, as the changes are likely to take effect during the post-Brexit

27 Directive (EU) 2015/849 of the European Parliament and of the Council, of 20 May 2015
28 SI 692/2017

transitional period (during which EU law is expected to continue to apply).

4.3 Recent parliamentary inquiries into EU sanctions

Lords EU Committee report on the EU process

The House of Lords EU Committee looked at the European Union's legal mechanisms used to impose sanctions, reporting in February 2017.[29] Given that Government seeks to avoid any legal weaknesses of the EU regime in the *Sanctions and Anti-Money Laundering Bill*, the findings are relevant.

The Committee found that the listing procedure for targeted sanctions against individuals had improved considerably – something which was necessary, they said, given the number of times that EU sanctions listings had been struck down by the European Court of Justice.

Nevertheless, the committee thought that the practice of re-listing on amended evidence those individuals whose original listings had been struck down for lack of evidence led to a perception of injustice – that there was no effective legal redress for unfair listings.

The committee also concluded that the EU Council should codify its standard of proof for sanctions listings, to ensure transparency and consistency across member states; the procedure for EU courts considering confidential evidence should be improved and an EU Ombudsperson for sanctions should be appointed, along the lines of the UN Al-Qaeda Sanctions Ombudsperson.

When it came to Parliamentary scrutiny, the Lords EU Committee argued that all open-source evidence used to back a listing should be available to Parliament.

Lords External Relations Subcommittee inquiry

The House of Lords European Union Committee's subcommittee on external affairs held an evidence session on sanctions and Brexit on 20 July 2017, as part of an inquiry. The session concentrated on policy more than legal powers, but there was some discussion of topics relevant to the Bill.

Litigation

Maya Lester, a barrister, said that there would be a "huge increase in UK litigation" if the UK had its own sanctions policy:

> … the UK will suddenly have to make decisions about its own sanctions listing and sanctions design, which it has not done before, while also deciding which EU listings to implement and while continuing to operate the system of implementing the

[29] House of Lords European Union Committee, *The legality of EU Sanctions*, 11th Report of Session 2016–17, HL 102, 2 February 2017

> United Nations sanctions to deal with the inevitable huge increase in UK litigation that will result from UK decisions being made. [30]

Licensing

Ross Denton, a solicitor, called for the licensing system, whereby exceptions are made to sanctions, for humanitarian purposes among others, to be reformed and aligned with the export control regime:

> …one thing that we would like to see the Government do in respect of licensing sanctions - is to try to align that with the export control regime. Effectively if you are exporting a controlled item, whether goods, software or technology, you apply to the Government who have almost complete discretion over whether to give you that licence or not, and that is then subject to a review process. At the moment, the European Union licence regime is very heavily skewed towards individuals and individual designated persons. If you are a designated person or a family of designated persons, there are ways in which you can get licences to do things to get money. If you are a business, the licensing regime is completely unfit for purpose.[31]

Frequent updating of sanctions regimes

Tom Keatinge of the Royal United Services Institute also expected that a UK-only system would provide for more frequent updating of sanctions regimes:

> Whereas in the United States, sanctions maintenance—keeping them updated and moving against the target—is a matter of course, it seems that all we can do in the European Union is renew sanctions every six months without necessarily changing them to track the activity of those that were originally the subject of sanctions. So there is greater flexibility outside the European Union, but certainly less influence.[32]

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30 House of Lords Committee on the European Union, External Affairs Sub-Committee, Uncorrected oral evidence Brexit: sanctions policy, Thursday 20 July 2017 10am. Watch the meeting

31 House of Lords Committee on the European Union External Affairs Sub-Committee, Corrected oral evidence, Brexit: sanctions policy Thursday 20 July 2017, 11.05 am, Q4

32 House of Lords Committee on the European Union External Affairs Sub-Committee, Corrected oral evidence, Brexit: sanctions policy Thursday 20 July 2017, 11.05 am, Q10

5. Consultation

Three departments, Foreign Office, the Treasury, and the Department for International Trade, launched a joint consultation paper on 21 April 2017.[33] Officials also consulted representatives of the financial services, the legal profession, industry and other representative bodies, as well as representatives of international bodies.

The Government published the consultation response document on 2 August 2017.[34]

There were 35 written responses to the consultation. Information was also gathered at round table events and through informal consultations between officials and international partners.

5.1 Powers to be included in the Bill

This section sets out the ministerial powers taken in the bill, about which the Government was seeking views.

- Are there further powers that you think the UK Government needs at its disposal?

The Government will include powers within the new legislation to:

- allow the seizure of funds/assets from a sanctioned person to enable those funds/assets to be frozen.
- enable the Government to enforce sanctions against *maritime* vessels. This will include the ability to
  - stop and search vessels
  - seize vessels
  - control registry, leasing chartering, and ownership of vessels
  - control port entry of vessels
  - control supply of services and crew to vessels.
- enable the Government to enforce sanctions against *aircraft*. This will include the ability to
  - stop and search aircraft
  - impound aircraft
  - control registry, leasing, chartering and ownership of aircraft
  - control access to UK airspace and airports and the provision of services to aircraft. This power will also take

[33] *Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions*, Foreign and Commonwealth Office, HM Treasury, Department for International Trade, April 2017, Cm 9408

[34] *Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions: Government response*, Foreign and Commonwealth Office, HM Treasury, Department for International Trade, August 2017, Cm 9490

account of technological developments such as unmanned aerial vehicles

- ❖ enable the Government to make substantive amendments to existing regulations, revoke them and pass new ones, to enable:
    - o updates to the anti-money laundering and counterterrorist financing regime to address emerging risks after the UK leaves the EU and
    - o updates to the regulations when Financial Action Task Force updates its standards.
- ❖ provide the Government with the power to obtain and share information relating to sanctions.
- ❖ enable the Government to establish management schemes in relation to infrastructure subject to sanctions.

Consultation response

Most people thought the powers should be those set out in the consultation paper, although 38% of respondents thought extra powers would be useful. Interim sanctions, with a lower threshold of proof (reasonable grounds to suspect, perhaps) would be helpful for quick action.

The Government responded that 'reasonable grounds to suspect' on permanent sanctions was sufficient, and did not support for the idea of interim sanctions.

Other comments

Extraterritoriality

Some respondents thought that the concept of a 'UK nexus' was unclear. A UK nexus is a connection with the UK that would mean that the actions are subject to UK jurisdiction and liable to UK sanctions, for example if a UK company acts overseas or if a sterling transaction overseas clears through UK financial institutions.

The Government's response was that this piece of legislation would not change the reach of UK jurisdiction and that guidance would be provided.

Eligibility for Government contracts

Some respondents suggesting banning repeat sanctions-busters from bidding for Government contracts. The Government responded that the penalties set out in the *Police and Crime Act 2017* are sufficient and that selection procedures for contracts could weed out unsuitable applicants.

Overseas Territories

One respondent suggested that the legislation should cover all Overseas Territories and Crown Dependencies, for consistency.

The Government said it was in discussions with these territories to make sure that sanctions were applied.

One respondent suggested including a power to impose types of sanctions not yet foreseen.

The Government said that the legislation already provided some flexibility in this way.

The Government opposed the idea of a duty in the legislation to consider designating as 'terrorist' anyone who had been so designated by another international organisation or country.

5.2 Setting out targeted behaviour in the legislation

- Should the legislation capture domestic and international terrorist activity as a behaviour that the sanctions powers should target?

Consultation response

Terrorism set out in the Bill

Most respondents thought that the Bill should specify terrorism as something sanctions should target. Some respondents thought that the Bill needed to define terrorism, to which the Government replied that it would, but that the definition would be in line with definitions in other pieces of legislation. Some thought that the *Terrorist Asset Freezing Etc. Act 2010* provided enough powers to sanction terrorism, others that all anti-terrorist legislation should be consolidated. The Government did not consider consolidation to be the purpose of this Bill, and said that counter-terrorism powers in the Sanctions Bill would be useful.

Some respondents recommended a wider range of targets: those responsible for "activities such as slavery, human trafficking, religious persecution, poor working conditions, cyber crime, and drug-related crime."

The government's response was that sanctions were designed to tackle threats to national and international security, that these activities could pose such a threat, but that the legislation would not set out sanctionable actions, in order to maintain flexibility in imposing them.

5.3 Evidence threshold

- What are your views on the proposed threshold for individual designations?

A majority of respondents were happy with 'reasonable grounds to suspect' as the evidence threshold. Some thought it too low, however. Others thought it should be different in different circumstances – for example on review of a designation, where the threshold could be higher because, given more time, the authorities should have assembled stronger evidence. On the grounds of simplicity and consistency, the government rejected varying the threshold. And in order to maintain the ability to act quickly, the Government stuck to its 'reasonable grounds for suspicion' threshold.

5.4 Review

- Should the Government review non-UN sanctions regimes after a fixed period as well as in response to political developments?

The Government intends to set an annual review for non-UN sanctions, but would also have the ability to review designations in the light of political change; the same evidence threshold would be used.

Consultation response

89% of respondents said the government should conduct reviews of non-UN sanctions after a fixed period. (There would be no sense in reviewing UN sanctions as they are agreed at UN level and are a legal obligation on the UK.) Others thought that designations should be reviewed in the light of political developments.

5.5 Challenge ('appeal')

- What are your views on the proposed challenge mechanism?

Several respondents thought challenge should be through a full appeal process that, they argued, would match the existing EU challenge process. One thought judicial review would be good enough. Several respondents also thought that the requirement to bring new information to support a challenge was unfair.

The Government intends to establish the right to an administrative re-assessment at the time of designation or at any other time, if targeted individuals or entities bring forward new information. Otherwise, designated persons will be able to go to the High Court for a review conducted on the principles of judicial review.

Closed material

Respondents called for the use of secret intelligence material to be kept to a minimum along with the use of special advocates (lawyers who are security-vetted and represent designated persons in closed hearings).

The Government said that sometimes this is necessary but that such practice would be kept to a minimum, and unclassified explanations would always be provided.

Ombudsperson

The Government maintained that the review procedures set out above would be sufficient, without creating an Ombudsperson.

5.6 Licensing

- Are the proposed licensing powers for financial sanctions fit for purpose?

Licensing

A significant minority did not support the licensing provisions as set out in the consultation paper and thought that the Office for Financial Sanctions Implementation, part of HM Treasury, should have broader

powers to issue licences, following the EU's 2015 best practices document.

The Government responded that it was granting broad licensing powers to OFSI and that the framework would be an acceptable alternative to the EU's 2015 guidance. General licences will be provided for, for example to facilitate providing humanitarian aid in sanctioned regions. The bill would also provide for specific licensing – for example to allow individuals to pay for basic needs.

Guidance

Respondents called for high quality guidance, possibly consolidated with export control guidance. The Government undertook to provide it.

Reporting

There was concern that the reporting obligations suggested for the bill had broader application than at present, and respondents called for clarity. The Government responded that the obligation was no broader than under the EU guidance.

- Are the proposed licensing powers for trade sanctions fit for purpose?

The Government does not intend to impose disclosure obligations on listed or licensed entities. OFSI will review licensing decisions "on an ongoing basis", setting expiry dates for individual licences. Judicial review will continue to be the basis for challenging a licensing decision.

About half of respondents were happy with the licensing proposals. The Government intends to take a broad trade licensing power in the primary legislation, with more detail in each statutory instrument made under the legislation. It does not intend to provide a statutory right to appeal, as some respondents wanted.

5.7 Enforcement

- What are your views on the extent of the Government's proposed additional power to seize funds and assets in order to freeze them?

The penalties for financial crimes were reformed in the *Policing and Crime Act 2017*. The new legislation will restate the 2017 Police and Crime Act position on sentencing length and fines.

Consultation response

A majority of respondents supported the proposal to allow the Government to seize assets in order to be able to freeze them. The Government responded to questions as to why this power was needed by saying that it was not provided by existing legislation, as assets targeted for freezing have not necessarily been obtained illegally.

5.8 Liability

- What are your views on the design and extent of the proposed "no-claims Clause"?

The Government intends to create a provision (similar to that in the EU legislation) to provide that no liability for damages is incurred by a person applying UK sanctions to a sanctioned person in accordance with UK law.

UK sanctions legislation could include measures to prevent courts from awarding damages, except under special circumstances, to those who successfully challenge their designations, as is the case under EU law at present.

Response

There was widespread support at consultation for the provision limiting the liability of those implementing sanctions. The ability of targeted persons or entities that successfully challenge their designation to claim compensation will be limited, according to the Government, consistent with the provisions of the *Human Rights Act 1998*.

5.9 Money laundering and terrorist financing

The consultation paper set out the Government's intention to retain the Fourth Money Laundering Directive and elements of the Funds Transfer Regulation using section 2(2) of the *ECA 1972*. Once the ECA is repealed, the Government will need to replace the powers in it to be able to maintain the anti-money laundering and terrorist finance regime, so it set out in the consultation its intention to take these powers in the present Bill. There was no associated question in the consultation paper.

6. Commons debate on leaving the EU and sanctions, 19 July 2017

On 19 July the House of Commons debated the effect of leaving the EU on sanctions policy.[35]

International coordination

Helen Goodman asked how future sanctions would be coordinated with those of European partners, suggesting that coordination should be provided for explicitly:

> Surely the way we make decisions to initiate and review sanctions must be explicitly linked with the processes of our partners in the UN and the European Union.[36]

Delegated powers

Ms Goodman suggested that it was possible that the Bill would rely a lot on giving Ministers powers to make secondary legislation, rather than setting detail out in the primary legislation. She asked whether the regulations would be passed using the affirmative procedure, meaning that they would need to be approved by Parliament before they become law or within a specified period after they become law. Negative instruments do not require approval but come into force on a specified date, unless an objection is raised.[37]

The Minister for Europe and the Americas, Sir Alan Duncan, referred to "fast moving events" in the world of foreign policy, and warned that the affirmative procedure could delay regulations coming into force, allowing asset flight.

Reporting to Parliament

Helen Goodman hoped that the Government intended to set up periodic independent review of regimes, and report to Parliament:

> We would like the Government to publish an annual report on the implementation of the sanctions regime, and to give Parliament a role in periodic reviews of UK sanctions—for instance, by making the Government's annual report the subject of debates in both Houses—as well as a role in re-authorising ongoing sanctions on a yearly basis.[38]

Overseas Territories

Ms Goodman also asked what the UK Government would do to monitor the enforcement of sanctions in the Overseas Territories and Crown Dependencies,[39] and wondered whether it would be possible to put together the new sanctions framework by March 2019.

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35 HC Deb 19 July 2017, cc925-49
36 HC Deb 19 July 2017, c928
37 For more information see the House of Commons Background Paper: Statutory Instruments, December 2016
38 HC Deb c929
39 HC Deb 19 July 2017,

On the matter of Overseas Territories and Crown Dependencies Alan Duncan said:

> The UK has responsibility for the external relations and national security of overseas territories and Crown dependencies, and we will continue our policy of ensuring that the overseas territories and Crown dependencies apply international and UK imposed sanctions. My hon. Friend the Under-Secretary is chairing regular meetings with the overseas territories and Crown dependencies on how best to achieve this end. We will include a power in the Bill for the UK to continue to legislate directly where appropriate.[40]

Coordination with the Withdrawal Bill

Meg Hillier asked whether there would be coordination between the passage of the Withdrawal Bill through Parliament and the present Bill:

> How do the Government intend to timetable the repeal Bill and the future sanctions Bill, ensuring that they can work together and there is no contradiction? It would be crazy if we ended up legislating on two separate issues related to Europe, only to find that they do not work together.[41]

The Minister did not address this point in the debate. The Sanctions Bill does not mention the Withdrawal Bill except to share its definition of "retained direct EU legislation",[42] and to mention regulations that are "saved" by powers in the Withdrawal Bill. It seems that, unless the Withdrawal Bill were either amended so as to remove the power to retain or save EU-derived legislation or not passed at all, the Sanctions Bill would function as intended.[43]

Litigation

One Member raised legal risks, concerned that the UK might be an easier target for those who want to litigate against sanctions, compared with taking on the whole EU.

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40 HC Deb 19 Jul 2017, cc948-9
41 *Ibid*, c941-2
42 Clause 50: Interpretation (Clause number in the Bill as introduced to the Lords)
43 For more information on how the Withdrawal Bill creates 'retained' legislation, see the Commons Briefing Papers, *European Union (Withdrawal) Bill*, September 2017 and *The European Union (Withdrawal) Bill: Retained EU law*, November 2017

7. Presentation and Second Reading

The *Sanctions and Anti-Money Laundering Bill [HL] 2017-19* was presented in the House of Lords on 18 October 2017, with the Second Reading scheduled for 1 November. Explanatory notes were published separately, along with an Impact Assessment.

At the same time, the Foreign and Commonwealth Office sent a memorandum to the House of Lords Delegated Powers and Regulatory Reform Committee, a committee whose role it is to check the powers that a bill gives to Ministers and the level of parliamentary scrutiny of the use of those powers.

The House of Lords Library published a *Briefing for Lords Stages* on 26 October.

Costs

As set out in the Impact Assessment, the Government does not expect businesses to incur significant extra costs as a result of this Bill, arguing that the Bill would largely reproduce the existing system by replacing the powers in the *ECA 1972*, there should be little change for businesses, other than familiarising themselves with new guidance.

The Government proposes that the Bill would benefit business, because it would mean that all sanctions were imposed using powers in one Act, and new guidance would be published, making the system clearer and easier to follow.

Purpose of bill

The summary of the Bill says that its purpose is:

> … to make provision enabling sanctions to be imposed where appropriate for the purposes of compliance with United Nations obligations or other international obligations or for the purposes of furthering the prevention of terrorism or for the purposes of national security or international peace and security or for the purposes of furthering foreign policy objectives; to make provision for the purposes of the detection, investigation and prevention of money laundering and terrorist financing and for the purposes of implementing Standards published by the Financial Action Task Force relating to combating threats to the integrity of the international financial system; and for connected purposes.

7.1 Lords Second Reading debate

The Lords Second Reading lasted almost four hours. Peers raised questions about the scope of powers granted to Ministers in the Bill, who can be designated and what rights they have, parliamentary procedure for regulations made under the Bill, business compliance costs, coordination and licensing and Henry VIII Clauses that give powers to the Government to change primary legislation by using secondary legislation.

The former Lord Chief Justice, Lord Judge, said:

> This is a vast, great superstructure of secondary legislation being erected on virtually non-existent primary legislation. It is, in truth, a bonanza of regulations.[44]

Lord Judge particularly questioned the scope given in the Bill for ministers to create criminal offences by secondary legislation, and to legislate about evidence and defences in those regulations.

He finished his contribution by referring to the fact that the more serious regulations made under the Bill would require an affirmative resolution from Parliament:

> The affirmative resolution is there and it is wonderful—but when was serious scrutiny made under the affirmative resolution powers that led to a statutory instrument being abandoned, either here or in the other place? Yet our main function is to scrutinise legislation and point out to the Executive that in the end we, the legislature, are in charge. This Bill gives too much power to the Executive.[45]

Lord Pannick, a QC, said that at present, UK courts and the European Court of Justice would require a sanction to be proportional, while the Bill sets out a need for 'reasonable grounds to suspect' and for the minister concerned to decide that it is "appropriate" for sanctions to be applied. He asked for a reference to proportionality in the Bill.

Baroness Northover argued that the Government is introducing such extensive powers to make secondary legislation because of the rushed timetable and the uncertainty about the future relationship with the EU. Decisions about legal frameworks were consequently being 'pushed down the track', rather than being established in primary legislation, as should be the case.

Several peers raised concerns about the procedures for designated individuals and entities to challenge that designation, including those who are designated by the UN.

Peers questioned the Government about the costs for businesses complying with a sanctions regime. Lord Gold pointed out that it will be essential to coordinate of sanctions with EU member states and with the US if they are to be effective, but wondered whether the simpler process to be introduced by the present Bill would mean that UK sanctions were likely to be introduced more quickly, and argued that that would increase the cost to businesses of complying.[46]

Licensing procedures, often where NGOs are given licenses to deliver aid to conflict regions, were also a concern. Lord Collins of Highbury said that it is important for NGOs' licences to be open ended, and only modified after conversations with the NGO concerned.[47]

Lord Ahmad, winding up the debate, responded to worries about the powers granted to the Executive, saying:

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44 HL Deb 1 November 2017, c1400
45 HL Deb 1 November 2017, c1402
46 HL Deb 1 November 2017, c1410
47 HL Deb 1 November 2017, c1417

> […] let me assure all noble Lords that our intent here is not to take powers for the sake of the Executive; it is about ensuring that we have flexibility and sustainability in a sanctions regime.[48]

[48] HL Deb 1 November 2017, c1420

8. Lords Committee reports

Two influential House of Lords committees have considered the Bill since it was introduced and their findings have been mentioned several times during debates.

8.1 House of Lords Constitution Committee

The Lords Constitution Committee studied the Bill and published a report on 17 November.[49]

The Committee argued that the powers in the Bill for Ministers by secondary legislation to create new offences and amend existing legislation are inappropriate. They found that the power to create new forms of sanctions by regulation were constitutionally problematic.

The Committee also wanted Parliamentary scrutiny procedures to be adequate to balance the powers the Bill would give to Ministers.

As far as appeals and reviews are concerned, the Committee was concerned that the existing provisions of the Bill mean that a designated person would not know about the reasons for their designation until the case went to court, undermining their ability to prepare their defence and common law fairness principles. The Committee was particularly concerned about the power to create by secondary legislation criminal offences punishable by up to 10 years in prison.

The Committee's comments in detail are set out clause-by-clause, below.

8.2 Delegated Powers Committee

The House of Lords Delegated Powers and Regulatory Reform Committee reviewed the Bill and published their report, again on 17 November.[50] Like the Lords Constitution Committee, the Delegated Powers Committee expressed concerns about the powers that the bill would give to Ministers.

While accepting that a new legal mechanism is necessary for these purposes when the UK leaves the EU and that the mechanism would use delegated powers, the Committee argued:

> …we are also mindful of the fact that Clause 1, when read together with the other provisions of Part 1, confers exceptionally wide powers which are capable of being applied to a very wide range of persons, with a very wide discretion being given to Ministers to determine the persons against whom sanctions measures may be applied.[51]

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49 House of Lords Select Committee on the Constitution, *Sanctions and Anti-Money Laundering Bill [HL]*, 8th Report of Session 2017–19, HL Paper 39, 17 November 2017

50 Delegated Powers and Regulatory Reform Committee, *European Union (Approvals) Bill; Finance Bill; Northern Ireland Budget Bill; Sanctions and Anti-Money Laundering Bill [HL]*, 7th Report of Session 2017–19, HL Paper 38, 17 November 2017

51 *Ibid.*, p4

Further comments on individual clauses are set out below.

The Government sent its response to the Delegated Powers Committee on the 21 December, saying that the report had informed the debate in the Lords (see below).

9. The Bill clause by clause, commentaries, debates and amendments

This section breaks the Bill down into its parts, explaining the purpose of each, recording commentaries from the Delegated Powers Committee and the Constitution Committee and proposals to amend the various clauses and schedules during the House of Lords Committee and Report Stages and Third Reading.

Summary of amendments in the Lords

The main amendments made to the Bill in the Lords were:

- A Government amendment to limit Ministers' ability to make non-UN sanctions regulations only to cases where she or he considers:
  - there are good reasons to do so and
  - that the imposition of sanctions is a reasonable course of action.
- An Opposition amendment to set out the purposes for which sanctions regulations could be made:
  - resolving armed conflict and protecting civilians in conflict zones
  - promoting compliance with international humanitarian and human rights law
  - preventing the proliferation of weapons of mass destruction
  - promoting democracy, human rights, the rule of law and good governance.
- A Crossbencher's amendment removed the power to create offences in Clause 16
- A Government amendment clarified references in the Bill to a person named "for the purposes of" a UN Security Council Resolution
- Government proposed an amendment to Clause 41, providing that a person cannot be liable for a civil monetary penalty through regulations established under Clause 41 when they have already been convicted of a criminal offence under the regulations in relation to the same act or omission.
- During Report Stage Government amendments were agreed that made it clear that:
  - businesses will be brought within the scope of anti-money laundering/counter-terrorist financing regulation under paragraph 3 of Schedule 2 only where their activities are particularly likely to be used for the purposes of money laundering, terrorist financing or other activities that threaten the integrity of the international financial system

- only businesses of this type can be required to carry out customer due diligence measures under paragraph 4 of the schedule, be supervised for the purposes of paragraph 7, or be registered for the purposes of paragraph 9
- any future criminal offences established under Clause 41 can be created only if regulations provide that such offences have either a mental element necessary for their commission or a defence to it, or both.

- A Government amendment to Clause 43, (formerly Clause 41) required that regulations made under that clause can only make provision which enables or facilitates the detection or investigation of money laundering or terrorist financing. (Peers had been worried that, as drafted, the Bill would give Ministers the power to weaken the AML regime.)
- A Government amendment required Ministers to report regularly to Parliament on progress towards establishing a register of beneficial ownership of overseas entities owning property in the UK.
- Government amendments set out that
  - when a person has been designated or had their designation varied or revoked, the Minister must promptly inform the person.
  - if a person has made a request to have their designation under sanctions regulations reviewed,
    (a) the decision on any such request to be made as soon as reasonably practicable after the receipt by the appropriate Minister dealing with the request of the information needed for making the decision,
    (b) the person who made the request to be informed of the decision and the reasons for it as soon as reasonably practicable after the decision is made.

    Sensitive information such as that related to national security can be excluded from the explanation, but the Minister may not give no explanation at all.
- A government amendment added the word "procured" to Clause 2, to tighten up the ban on providing financial services to designated persons.

The Government promised that would propose amendments in the House of Commons to restrict the power present in the Bill to change the definition of terrorist financing.

10. Part 1: sanctions regulations.

10.1 Chapter 1: powers to make sanctions regulations

General power

Clause 1, Power to make sanctions regulations

This clause would give certain ministers the power to make regulations imposing sanctions. It defines who has these powers and sets out legitimate reasons for imposing sanctions, such as upholding international obligations or preventing terrorism in the UK. It also sets out what types of sanctions can be imposed and states that the Parliamentary procedure used to make these Regulations will vary depending on the types of sanctions concerned.

The **Government was defeated** on Division on Clause 1, when Peers added specific purposes for which sanctions regulations could be made, elaborating on the 'foreign policy of the UK' objective in the Bill as presented. (See below.)

Limiting the power to make sanctions regulations?

The House of Lords Delegated Powers and Regulatory Reform Committee wanted to circumscribe the power to make sanctions regulations for purposes other than compliance with international obligations:

> In our view, an appropriate Minister should only be allowed to make sanctions regulations for a purpose other than compliance with an international obligation, where there are compelling reasons for the Minister's belief that carrying out the purpose will achieve one of the objectives listed in Clause 1(2).[52]

The Delegated Powers Committee also argued that the affirmative procedure, giving Parliament a stronger role in scrutinising a regulation, should be used, even when the regulation is implementing a sanctions measure to comply with a UN Security Council resolution:

> Given the wide powers conferred by Clause 1, their intrusive nature and the extent to which they are liable to affect individual rights, we take the view that sanctions regulations should be subject to the affirmative procedure even where they are limited to securing compliance with a UN Security Council Resolution.[53]

Committee Stage

During the first day of the Lords Committee Stage, Lord Judge proposed Amendment 1 to Clause 1, to replace the phrase "considers that it is **appropriate** to make the regulations" with "considers that it is **necessary** to make the regulations". Lord Judge argued:

> If we are to allow powers such as these to be exercised by regulation, the exercise should always be both appropriate and necessary. If it is necessary, it will almost always be simultaneously

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52 House of Lords Delegated Powers and Regulatory Reform Committee 7th Report of 2017–19, *European Union (Approvals) Bill Finance Bill Northern Ireland Budget Bill Sanctions and Anti-Money Laundering Bill [HL]*, HL Paper 38, p4

53 House of Lords Delegated Powers and Regulatory Reform Committee 7th Report of 2017–19, *European Union (Approvals) Bill Finance Bill Northern Ireland Budget Bill Sanctions and Anti-Money Laundering Bill [HL]*, HL Paper 38, p5

> appropriate; however, if it is only appropriate, it will not always be necessary. Hence the amendment: by strengthening the language of a single word, we will impose a greater responsibility on the Minister—not our present Minister but the Minister to come and Ministers to follow for years yet—and he or she will be less likely to make an ill-judged, mistaken decision about the exercise of these extravagant powers, when simultaneously the opportunity to correct errors is significantly diminished.[54]

Lady Sheehan and Lady Northover proposed an amendment that would require there to be a "compelling" reason why sanctions are appropriate for the purposes set out under subsection (2), relating to non-UN sanctions. The first of these amendments was withdrawn and the second not moved.[55]

Lady Northover also proposed Amendment 2 to Clause 1: to leave out the phrase "further a foreign policy objective of the government of the United Kingdom". Lady Northover wondered whether, for example, a person could be sanctioned for opposing Government policy like the invasion of Iraq in 2003.

Baroness Sheehan spoke to Amendment 3 that would have added to the list of purposes for making regulations under Clause 1; human rights breaches, the prevention of acts contravening international law on armed conflict and the prevention of internal repression would be included, along with preventing the violation of sanctions regulations made under the Act.

Lord Collins of Highbury spoke to an Amendment 7 that would oblige Minister must set out how sanctions are consistent with the UK's objectives.

These amendments were withdrawn or not moved.[56]

Lord Collins moved an Amendment 8, which would require ministers to publish a humanitarian impact assessment along with sanctions regulations. Lady Northover spoke to Amendment 9 that would require consultation with stakeholders, such as NGOs trying to do humanitarian work in conflict areas or banks or businesses that supply services in sanctioned countries.

Lord Ahmad argued that the consultation requirement risked tipping off potential sanctions targets. The amendments were withdrawn or not moved.

At Lords Report Stage, first day, Lord Pannick moved Amendment 1, to remove "**it is appropriate**" and insert "**there is a reasonable need**" in Clause 1,[57] slightly different from the similar amendment proposed at Committee Stage.

Report Stage

54 HL Deb 21 November 2017, c106
55 HL Deb 21 November 2017, c112
56 HL Deb 21 November 2017, c125
57 HL Deb 15 January 2018, c439

Amendment 9, tabled by the Minister, Lord Ahmad of Wimbledon, which would set out that, apart from cases where the UK has a UN or other international obligation, the Minister can make regulations only where he considers:

Government amendment placing extra requirements on the power to made regulations

- there are good reasons to do so and
- that the imposition of sanctions is a reasonable course of action.

Amendment 9 would also require Ministers to report to Parliament on their reasoning behind sanctions decisions.

Lord Pannick said that Amendment 9 would impose welcome discipline on Ministers.

Lord Ahmad spoke to Amendment 9, hoping that it would obviate the need for the other amendments in the group proposing similar changes. Amendment 9, which added requirements to the power to make regulations for purposes set out in section 1(2), as mentioned above, was agreed.[58]

Lord Collins of Highbury spoke to Amendment 3, which would add the promotion of democracy, human rights, the rule of law and good governance to the purposes for which sanctions can be made (further detail below). He said that, when scrutinising decisions of the Executive, it was important to have definitions against which to judge the Government's actions. He also said that the addition of these purposes would not restrict the Government but would rather enable it.

Lord Ahmad said that the EU currently imposes sanctions for any of the purposes of its commons foreign and security policy, and that to change this, as proposed in Amendments 2, 3 and 5, would reduce the Government's flexibility. He added: "Specifically articulating some of the purposes of sanctions, but perhaps not all of them, risks creating confusion."[59]

Amendment 5 would add the purpose of preventing the violation of sanctions. Lord Ahmad said that there were adequate powers in the present Bill and in the *Policing and Crime Act 2017* for preventing the violation of sanctions.

Amendment 1 was withdrawn and Amendment 2 was not moved.

Lord Collins spoke to Amendment 3, which would add the purposes of:

Opposition amendment setting out in detail the principles of UK foreign policy

- resolving armed conflict and protecting civilians in conflict zones
- promoting compliance with international humanitarian and human rights law
- preventing the proliferation of weapons of mass destruction

58 HL Deb 15 January 2018, c451-2
59 HL Deb 15 January 2018, c443

- promoting democracy, human rights, the rule of law and good governance.[60]

He said that the amendment would set out the UK's principles in foreign policy: "in the new situation we will be in – and it is a new situation."[61] He called for a division and the Amendment was agreed.[62]

Lord Collins moved Amendment 8, which would require publication of humanitarian impact assessments to accompany sanctions regulations. He said that the amendment was responding to concerns expressed by NGOs about their ability to carry out humanitarian work.

Licensing

Lord Ahmad said that the Bill provides greater flexibility for licensing than the present EU regime does. He said that neither the EU nor other Western countries require a humanitarian impact assessment of the sort proposed in Amendment 8, and that the requirement could hamper the UK's ability to act quickly, but that the report the Government would lay before Parliament and the guidance accompanying the regulations would set out how humanitarian impact would be mitigated.

He doubted that Amendment 39, allowing mutual recognition of licences from other jurisdictions would work because of legal complications in enforcing them.

The Minister argued against Amendment 40, which would create a fast-track licensing process, because it might unduly relegate certain licence applications to a slower process. He disagreed with Amendment 41, requiring a consultation on a licensing framework, saying that the Government had already sought opinions on licensing in the consultation on the Bill.

The Minister argued that obliging Government departments that fund NGO humanitarian programmes to arrange for licence for the duration of those programmes, as would be required by Amendment 42, risked overlapping with the existing requirement for a licence to cover funded activities.

Rather than the written report on licences for humanitarian purposes proposed in Amendment 43, Lord Ahmad suggested that this information would be better supplied as part of the report to Parliament of the general annual review of sanctions regimes.

Financial sanctions

Clause 2 Financial sanctions

(Commons Clause 3)

Clause 2 describes financial sanctions that can be imposed, including asset freezes. It sets out what an asset freeze entails, including the limits on a designated person's ability to deal with their funds or economic resources. It would give the Government the power to prevent financial services being provided to or procured from designated persons. It also enables the Government to prevent funds and economic resources

60 HL Deb 15 January 2015, c440
61 HL Deb 15 January 2018, c445
62 HL Deb 15 January 2018, c446-8

being made available to prescribed persons and provides further detail on that prevention, and would give powers to place restrictions on entering into commercial relationships with prescribed persons (including designated persons).

The House of Lords Constitution Committee objected to the way the Bill gives powers to designate persons "connected with" a country:

Persons "connected with a country"

> We are concerned about the breadth of the power conferred on ministers by Clause 2, read with Clause 50(4), to impose financial sanctions on "persons connected with a prescribed country". The House may wish to consider whether it is appropriate for ministers to enjoy such a broad power, which is not confined to persons who have committed acts of misconduct or who have a personal responsibility for the policy of a repressive state or who have a particular status in that state.[63]

Committee Stage

In the Lords Committee Stage, Lord Judge moved Amendment 10, to leave out Clause 2, subparagraphs (ii) and (iii): "(ii) persons connected with a prescribed country, or (iii) a prescribed description of persons connected with a prescribed country". He also spoke to Amendments 11-17 and 81, which also related to the same subparagraphs (ii) and (iii). He argued that "connected" should be defined in primary legislation. Other Peers spoke to similar amendments in relation to the shipping and aircraft clauses.[64]

Lord Ahmad countered that the broad power here was necessary: in the past, the Government has had to:

> …impose sanctions on groups of persons—or in extreme cases, on all people—connected in a specified way with the prescribed country. This ensures that the sanctions measures are robust and effective.[65]

The Minister went on to say that these powers must remain if the Government is to live up to its international obligations.

Lord Judge's amendment was withdrawn. The others were not moved.

Baroness Sheehan moved an Amendment 15, to insert a specific power to close companies down that are in breach of sanctions. Lord Ahmad said that sanctions were meant to be temporary measures and closing companies down was permanent.[66]

Report Stage

During Lords Report Stage, day 1, Lord Pannick, moving Amendment 10, proposed to leave out subparagraph (ii) of Clause 2, giving Ministers the power to designate a person because of a connection to a certain country (as had also been proposed during Committee Stage).

Lord Pannick went on to say that Government Amendment 34 restricted the power to designate by description to certain circumstances, making

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63 House of Lords Constitution Committee 8th report of 2017-19, *Sanctions and Anti-Money Laundering Bill [HL]*, HL paper 39, 17 November 2017, p5
64 HL Deb 21 November 2018, c129
65 HL Deb 21 November 2017, c132
66 HL Deb 21 November 2017, c134

the power in subparagraph (iii) acceptable (so subparagraph (iii) was not mentioned in Amendment 10).

Lord Ahmad argued that the power to designate by connection to a country was constrained by the purposes for regulations set out in Clause 1.[67] He said that it would not be practical to define 'connection' in the primary legislation.

The Minister then mentioned Government Amendments 33, 34 and 35, acknowledged earlier by Lord Pannick, to limit the power to designate by description to certain circumstances.

Amendment 10 was withdrawn and Amendments 11 to 19 were not moved.

Lord Ahmad moved Government Amendments 23 and 24, to add "procured" after "received", tightening up the ban on funds, financial services and so on being made available to designated persons. The amendments were agreed without debate.[68]

Human rights

Designation "appropriate", "proportionate"?

Government Amendments 31, 36 and 58 would require Ministers to consider that a designation is appropriate, having regard to the purpose of the regulations and the likely significant effects of the designation on the person concerned. Lord Ahmad said that these amendments answered the concerns implied in another set of Opposition amendments, and were supported by Lords Pannick and Judge. Lord Ahmad said that the *European Convention on Human Rights* and the *Human Rights Act 1998* require proportionality where Convention rights are engaged, but the Bill does not include the word "proportionality", for fear that that could create a difficulty of interpretation. The amendments requiring 'appropriateness' with regard to the effects on the designated person were intended to ensure proportionality.

The Minister argued against Amendment 50, which would require the Government to publish guidance from the Crown Prosecution Service on when prosecutions of sanctions breaches are in the public interest. He said that extra guidance from the prosecution services would not be necessary.

Lord Lennie asked about the steps that a person could take to address the concerns that led to the designation. Lord Ahmad said that designated person could ask for an administrative reassessment of the designation or challenge it in the High Court.

Government Amendments 27 and 31-7 were agreed.[69]

Other types of sanction

Clause 3 Clause 4 Clause 5 Clause 6[70]

3, 4, 5 and 6 would provide powers to impose immigration sanctions (travel bans), trade embargoes, aircraft sanctions and shipping sanctions.

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67 HL Deb 15 January 2018, c457
68 HL Deb 15 January 2018, c474
69 HL Deb 15 January 2015, c478-80
70 Each of these clauses is one number higher in the Bill as introduced in the Commons

Clause 7: Other sanctions for the purposes of UN obligations

(Clause 8 in the Commons Bill)

Clause 7 gives ministers the power to impose other sorts of sanction not mentioned already if they are necessary to comply with UN obligations.

At Committee Stage, Baroness Northover moved Amendment 18 to Clause 5 that sought to exclude recognised refugees from the provisions of travel bans. Lord Ahmad said that it would be more effective to apply broad sanctions then to grant licences where activity was legitimate – to accept the amendment would provide a loophole in the law. The amendment was withdrawn.[71]

Designated persons

Clause 8: "Designated persons"

(Clause 9 in the Commons)

Clause 8 describes "designated persons", while Clause 9 explains what is meant by "designation power", including the fact that a minister may designate a person by name or a person who fits a certain description, and that different persons may be designated for different purposes within regulations.

Designation

Baroness Northover moved during the Lords Committee Stage debate that Clause 8 should not be part of the Bill, arguing that it was far too widely drawn and could lead to unintended consequences.[72] The amendment was withdrawn and Clause 8 was agreed.[73]

In the Lords Committee Stage debate, Lord Judge moved that the elements of Clause 9 and the whole of 11, which allow ministers to designate by description, should be deleted.[74] He argued that under EU law a name is needed, so why was the government extending the power with this Bill? Lord Judge referred again to the Lords Constitution Committee's report (see Clause 11, below).

Committee Stage

The Lords Constitution Committee was worried about the lack, in Clause 9, of a right for the designated person to know that they had been designated and why. The Bill requires disclosure only if the matter comes to court:

Informing a designated person of the reasons for their designation

> It is essential that the individual is informed of the reasons for the designation, and the evidence which is said to justify it, as soon as reasonably practicable after the designation has been made. Such requirements should be set out in the Bill. We recognise that in some cases sensitive security details will need to be withheld, but the individual ought to be told the essence of the case against him or her.
>
> This reflects principles that are well-established at common law. If individuals are not given adequate notice of the case against

71 HL Deb 21 November, c139
72 HL Deb 21 November 2018, c140
73 HL Deb 21 November 2017, c142
74 HL Deb 21 November 2018, c142

> them, the individual's meaningful participation in the review process is jeopardised.[75]

Committee Stage

Lord Lennie moved an amendment at Committee Stage to replace "may" with "must" in Clause 9, so that regulations containing a designation power **must** include provision for notification and publicity. Other amendments in this group aimed to require ministers to provide reasons for complying or otherwise with a request to be removed from the EU sanctions list, and other amendments intending to ensure that designated persons are notified and can see evidence against them as soon as possible.

Report Stage

Lord Pannick asked during Report Stage for an assurance from the Government that a designated person would always be informed of the essence of the reasons for their designation, even if the detail had to be withheld, for national security reasons, for example. Otherwise, he said that the Government amendments ensured that procedural fairness and proportionality were now written into the Bill.

Later, during the House of Lords Report Stage, Lord Ahmad moved Amendment 27 setting out that when a person has been designated or had their designation varied or revoked, the Minister must promptly inform the person. Regulations can set out how that should happen. This covered the changes proposed in a number of Opposition amendments. Government Amendments 32, 37 and 59 provided for explanations of the reasons to be given to designated persons in various parts of the Bill, he said, although those explanations might exclude sensitive material, although the amendment expressly prevented the Minister from providing no explanation. The amendment was agreed.

Clause 10: Designation of a person by name under a designation power

(Clause 11 in the Commons)

Clause 10 sets out the permissible grounds for designating a person, describes how regulations should set how the person is involved and may make provisions on the meaning of a person's indirect involvement in an activity set out in the regulations, for example by being associated with another person.

Proportionality

House of Lords Constitution Committee argued that proportionality should be written into the primary legislation, since it is the legal test applied by UK courts and the European Court of Justice:

> Clause 10 deals with powers that authorise the designation of named individuals. Such designation is permitted only when the minister considers it appropriate (with reference to the purpose of the regulations) to designate a person and when the minister has reasonable grounds to suspect that the person is an 'involved person' (e.g. because the person has been involved in an activity specified in the regulations). The current legal test applied by the UK courts and the Court of Justice in Luxembourg, in part by reference to the European Convention on Human Rights, is to ask

[75] House of Lords Select Committee on the Constitution 8th Report of Session 2017–19 *Sanctions and Anti-Money Laundering Bill [HL]*, HL Paper 39, 17 November 2017, p9

> whether designation is proportionate in all the circumstances, including the effect on the individual.
>
> At second reading, the Minister, Lord Ahmad of Wimbledon, said that "where human rights are affected, a minister will always need to comply with the European Convention on Human Rights and Strasbourg case law, and that will include an assessment of proportionality."
>
> We are grateful for the Minister's confirmation that an assessment of proportionality will be required when making a designation affecting an individual's human rights. We recommend that this important limitation on ministers' powers should be stated expressly on the face of the Bill.[76]

Committee Stage

During the Lords Committee Stage, Lord Judge moved Amendment 27 to insert "and proportionate" after "appropriate" in Clause 10. (See also the debate on Clause 2, above.)

The Minister pledged to reflect on the change and the amendment was withdrawn.

Clause 11: Designation of persons by description under a designation power

(Clause 12 in the Commons)

Clause 11 sets out some conditions that regulations would have to observe when designating a person by description, such as, for belonging to an organisation. In that case, the regulation would have to stipulate that the Minister has reasonable grounds to suspect that the organisation concerned is involved in the targeted activity.

Designation of a person by description

House of Lords Constitution Committee objected to the inclusion of a power to designate persons by description as set out in the Bill:

> We invite the House to consider whether, given the need for legal certainty, ministers should have the power to designate by description as well as by name. We further invite the House to consider whether, if ministers are to have the power to designate by description, the Bill should include additional safeguards. Such safeguards might, for instance, further limit the circumstances in which designation by description is permitted (e.g. by stipulating that the power must be used only when designation by name is impracticable).[77]

Committee Stage

During the Lords Committee Stage, the Minister, Lord Ahmad, set out the reasons why the Government thinks that designation by description is necessary:

- we will always seek to designate by name where we can and this power will be used very rarely
- when we use this power we will provide as much information as possible to assist institutions, such as banks and other businesses, to carry out their obligations under the sanctions

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76 House of Lords Constitution Committee 8th report of 2017-19, *Sanctions and Anti-Money Laundering Bill [HL]*, HL paper 39, 17 November 2017

77 House of Lords Constitution Committee 8th report of 2017-19, *Sanctions and Anti-Money Laundering Bill [HL]*, HL paper 39, 17 November 2017, p5

- it may sometimes be necessary to impose these types of sanctions to cover groups of persons where, as I have said, all the names of members are not known
- banks and businesses carry out their own customer assessments and are well placed to carry out their obligations under sanctions.[78]

Lord Patten suggested that the designation by description power might be a reserved power, to be used only in particular circumstances.

Clause 12: Persons named by or under UN Security Council Resolutions

Clause 12 deals with designating persons named in UN Security Council resolutions.

Peers did not raise many objections to the powers to designate UN-derived designations. Lady Northover moved Amendment 37 to delete subsection 3, which states that the designation may be expressed in any way and "may refer to the Resolution, or any other instrument, as varied or supplemented from time to time". She said that, like other parts of the Bill, it conferred excessively wide powers on ministers.[79]

Lord Ahmad said that UN lists change regularly, and the ability to refer to a UN list, without having to change regulations each time the UN list is amended, would be less bureaucratic and reduce the risk of mistakes.

Shipping

Clause 13: "specified ships"

Clause 13 would give ministers the power to specify ships and provides that the regulations would have to require reasonable grounds for suspicion, as with the designation of persons in Clause 11.

Licensing

Clause 14: Exceptions and licences

(Clause 15 in the Commons)

Clause 14 provides for exceptions to be allowed in the regulations (subsection 2 (a)). The Explanatory Notes give as an example allowing interest to accrue to an account even though the account remains frozen.

Subsection 2 (b) provides for licences that would permit persons to carry out activities that would otherwise be covered by the regulations. The Explanatory Notes give the example of a person receiving payments to meet essential needs.

Subsection 2 (c) allows regulations to include a provision that ministers can direct that provisions of a regulation can be subject to exceptions.

Subsection 3 provides details of what licences or ministerial directions should contain, for example that they may be temporary or permanent.

Other subsections provide that there may be exceptions to travel bans, when persons are designated as excluded under the *Immigration Act*

78 HL Deb 21 November 2017, c145
79 HL Deb 21 November 2017, c151

1971, and that exceptions may be made for the purposes of national security or for the prevention or detection of serious crime.

Fast-track licence applications

During the first day of the Lords Committee Stage, Baroness Northover proposed a change that would provide that regulations should set out an application procedure for exceptions or licences. Other amendments in the group sought to clarify policy on applying for an exception, and provide for a fast track application procedure.

Lord Ahmad agreed to meet NGOs before the next stage of the Bill. He said that procedure for applying for a licence would be set out in guidance, and that it would not be possible to establish one fast track procedure when the licensing arrangements in place are varied and complex. He also said that, with withdrawal from the EU fast approaching, "in that time we will need to design the replacement UK regimes" after the Bill had passed, and that there was no time for a consultation on an over-arching licensing policy.

Information

Clause 15: Information

(Commons Clause 16)

Powers of entry

Clause 15 provides for regulations to require information from certain persons and may confer entry and inspection powers.

Committee Stage

During the Lords Committee Stage first day, Baroness Northover proposed an amendment that would delete Clause 15 (1) (d) and (e). These confer powers of entry and powers to authorise or restrict the disclosure of information. Other amendments in this group aimed to protect legal professional privilege and to restrict the type of person that can be empowered to require information in relation to sanctions.

The Minister said that the powers to obtain information were necessary, and assured that the Bill does not empower Ministers to abuse legal professional privilege. He said that it was necessary for Ministers to delegate information-requiring powers; removing it would increase their workload unnecessarily and allowing bodies such as the Civil Aviation Authority to collect and use information helped the Government to collaborate with industry.

Amendment 43 was withdrawn and the others not moved.

Enforcement

Clause 16: Enforcement

(Commons Clause 17)

Clause 16 sets out that regulations may make enforcement provisions for the sanctions themselves or for conditions contained in licences or ministerial directions making exemptions. It includes the power for the regulations to create offences and to set out the powers and duties of the person who will enforce the regulation.

It sets maximum sentences and provides that other legislation may apply to offences created in regulations under the Act.

Creating criminal offences by regulation

The Lords Constitution Committee was concerned about the powers to create criminal offences in regulations:

> We are deeply concerned that the power in Clause 16 may be used to create an offence for which a sentence of imprisonment for up to 10 years may be imposed, and that rules on the evidence to demonstrate that the case is proved, and defences to such charges, are subject to ministerial regulation. We consider that such regulation-making powers are constitutionally unacceptable and should not remain part of the Bill.[80]

The Delegated Powers Committee also questioned this aspect of the Bill, although they accepted that the Bill would need to create offences by regulation. They argued, however, that such regulations should have stronger Parliamentary scrutiny:

> … given the very wide powers and the very high penalties which are capable of being set for criminal offences under the regulations, we consider that sanctions regulations which make provision for criminal offences should be subject to the affirmative procedure even if the negative procedure would otherwise apply to the regulations.[81]

Committee Stage

During the Lords Committee Stage first day, Baroness Northover proposed an amendment to delete sections in the Bill that provide for the creation of offences by regulation.

Lord Judge spoke to these amendments, saying that the provisions for the creation of offences by regulation are:

> …lamentable and should not disfigure our statute book. It used to be an invariable principle that criminal offences could be created only by statute. For example, we had a little history lesson earlier, going back to the reign of King Henry VIII, with his famous Henry VIII Clauses. Even his subservient Parliament did not give him power to create criminal offences without a statute. The principle has been broken over the years. It is open to the Minister to say that this sort of legislation has happened before and precedents have been set; he may very well do so. Bad precedents should be overruled, not least in this House."[82]

Lord Ahmad said that the provisions in the present Bill are similar to those in other legislation such as the *Export Control Act 2002*. He said that he was listening carefully to Peers' representations, but that the civil and criminal penalties set out were proportionate.

During Lords Committee Stage, there was also debate about Clause 16 in relation to the parliamentary procedure for regulations made under it. Amendments were grouped with amendments to Clause 45 (see below)

Report Stage

During the Lords Report Stage first day, Lord Judge returned to Clause 16, moving Amendment 45,[83] which would leave out paragraph (a), giving the power to Ministers to create offences by regulation.

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80 House of Lords Constitution Committee 8th report of 2017-19, *Sanctions and Anti-Money Laundering Bill [HL]*, HL paper 39, 17 November 2017, p5-6

81 House of Lords Delegated Powers and Regulatory Reform Committee 7th Report of 2017–19, *European Union (Approvals) Bill Finance Bill Northern Ireland Budget Bill Sanctions and Anti-Money Laundering Bill [HL]*, HL Paper 38, p6

82 HL Deb 21 November 2017, c160

83 HL Deb 15 January 2018, c480

Lord Pannick said that Government Amendment 46 would deal with criticism of the ministerial power to alter defences to charges and to address rules on evidence, but that the power to create offences by regulation remained.

Lord Ahmad said that the power to create offences for breaches of sanctions is in line with current practice when implementing EU legal acts and that it also allowed for other enforcement tools to be used, such as deferred prosecution agreements or serious crime prevention orders. He said that if Amendments 45 and 47 were passed, breaching sanctions would not be an offence:

> If they are passed, as existing criminal offences in EU retained law fall away when new UK regimes are introduced, we would be unable to replicate those offences in the new regimes.[84]

He sought to reassure the House by saying:

- Clause 16 would be used only to create offences within categories of offences that already exist in relation to sanctions. The powers would not could not be used to create any new terrorism offences other than those relating specifically to sanctions.
- A Minister could not use these powers in a way that was incompatible with the fundamental rights of people subject to UK jurisdiction; this would be contrary to Section 6 of the *Human Rights Act 1998*.
- The Government does not intend to create offences with maximum penalties higher than those currently set out in existing legislation.

The Minister went on to describe the effect of Government Amendment 46, mentioned above, that would remove the power to make provision for unspecified evidentiary matters.

Maximum sentences

He discussed Government Amendments 48 and 49, which set out maximum sentences associated with different prohibitions and requirements: two years for information and licence provisions and 10 years for sanctions violations, reflecting existing maximum sentences in primary legislation.

He said that the Government side has discussed with Lord Judge and others problems with the suggestion that an offence in the Bill could safely and coherently apply to a prohibition contained in sanctions regulations yet to be written.

Amendment 45 was passed on division.[85] Amendment 47 was passed on a question.

During the Lords Third Reading, Lord Judge pointed out that reference to the power to create new offences remained in Clause 17 (formerly Clause 16). In Clause 17(6) the provision that: "Regulations may provide that a particular offence which is … created by virtue of this section"

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84 HL Deb 15 January 2018, c486
85 HL Deb 15 January 2018, c490-1

remained, even though the power had been removed by the above amendment.[86]

Territorial application

Clause 17: Extra-territorial application

(Commons Clause 18)

Clause 17 sets out that the Act would apply to acts committed in the UK or those committed outside the UK by UK nationals. It also provides that the effect may be extended to bodies incorporated in:

(a) any of the Channel Islands;

(b) the Isle of Man;

(c) any of the British overseas territories.

Committee Stage

At the House of Lords Committee Stage debate, second day, Lord Lennie proposed that the optional nature of the clause should be amended.[87]

Lord Ahmad that the Bill reflects the differing constitutional status of Crown dependencies and overseas territories, with some legislating for themselves and the UK Government legislating for others through Orders in Council.

10.2 Chapter 2: review procedures

Clause 18: Power to vary or revoke designation made under regulations

Clause 18 would give ministers the power to vary or revoke a designation at any time and would require ministers to revoke the designation if the conditions for designation are not met.

During Lords Report Stage first day, the Minister, Lord Ahmad, moved Amendments 51 and 52, clarifying the wording of the power to vary or revoke designations. The amendments were passed on a question.

Clause 19: Right to request variation or revocation of designation

Clause 19 would give a designated person the right to request variation or revocation or their designation, although this would be limited to one request, unless new grounds are supplied.

Three-yearly review

Clause 20: Periodic review of certain designations

(Commons Clause 21)

Clause 20 sets out a period of three years after which certain designations must be reviewed.

Three-year review period too long?

Lord Ahmad maintained at Lords Second Reading that arrangements for review are reasonable, because a designated person has several options to challenge their designation.[88]

86 HL Deb 24 January 2018, c1027
87 HL Deb 29 November 2017, c690-1
88 HL Deb 1 November 2017, c1423

The Lords Constitution Committee set out its concerns about the three-year period after which a designation should be reviewed:

> We are not convinced that a three-year review period is acceptable, given the significant impact that such sanctions may have on the individual. We are concerned that Clause 19(2) precludes an individual from making a second or subsequent request for ministerial review "unless the grounds on which the further request is made are or include that there is a significant matter which has not previously been considered by the minister." In some cases the passage of time itself may warrant reconsidering an individual's designation. We invite the House to consider whether the Bill makes adequate provision for reviewing designations.[89]

Committee Stage

Lord Pannick sought during Lords Committee Stage to amend Clause 19 to oblige a Minister to consider a request for review "as soon as reasonably practicable."[90] The Minister Lord Ahmad agreed to consider the amendment, and it was withdrawn.

Lord Pannick also moved an amendment to reduce the standard review period to one year. Lord Pannick pointed out that under the EU system, periodic reviews take place at least every year. Lord Ahmad replied that the system proposed in the Bill is at least as strong as the EU system because the EU reviews are relatively "light-touch".[91] He went on to set out the layers of protection to the individual in the Bill:

> First, a designated person can request a reassessment of their designation whenever they so choose. Whenever that same person has new information to present in their defence or their circumstances change, they may request a further reassessment. The Government will consider such requests promptly. The closest equivalent process in the EU can take many months, as I am sure noble Lords are aware, due to the need for decisions and documents to be agreed unanimously by all 28 member states.
>
> Secondly, designated persons can challenge in court on judicial review principles.
>
> Thirdly, a Minister may instigate a reassessment at any time—for example, if new information becomes available to the Government, including revocation of a designation by one of our international partners. The decision to designate would not be made for an indefinite period. Rather, sanctions would be actively managed, and the Government would be under an obligation to revoke a designation if it no longer met the legal threshold.
>
> Fourthly, the Bill mandates a broader political review of each sanctions regime at least once a year. This will shine a spotlight on the overall dynamics in the same way as the EU's annual reviews and provide impetus for Ministers to use the power I have just mentioned to instigate a reassessment of designations that may no longer meet the threshold given the passage of time.[92]

The amendment was withdrawn.

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89 House of Lords Constitution Committee 8th report of 2017-19, *Sanctions and Anti-Money Laundering Bill [HL]*, HL paper 39, 17 November 2017, p7
90 HL Deb 29 November c694
91 HL Deb 29 November 2017, c698
92 HL Deb 29 November 2017, c698

Reducing review period from 3 years to 1

Lord Pannick then moved Amendment 54, which would reduce the obligatory review period on a designation from three years to one. He said, however, that he was content with the provisions giving the designated person a right to seek a review on new information and the obligation for Ministers to review and provide a written report on regulations every year, so he did not speak to the amendment.

Lord Ahmad said that procedural safeguards were at least as good as those within the EU regime, and that Amendment 55 would require a written report to Parliament, and that other amendments to the Bill, such as requiring a Minister to deal with a request for reassessment as soon as possible, strengthened its safeguards.

The amendment was withdrawn.

Clause 21: Right of UN-named person to request a review

(Commons Clause 22)

Under Clause 21, a similar right to request review would apply to a person designated by the UN, in which case the person can ask the minister to try to have the designation revoked by the UN. The House of Lords Constitution Committee worried that this Clause would water down a UN designated person's rights:

> The Bill changes the remedies available to persons listed in the UK in order to implement a UN sanctions designation. At present, under EU law a UN sanctions listing requires procedural safeguards, including supporting evidence and effective judicial review, and orders can be quashed by the European Court of Justice if they are not proportionate. Under the Bill, the individual would have only a right to request the secretary of state to use their best endeavours to take the matter up at the UN to remove the person's name. There is no provision for listings to be challenged; only a right to seek a court review of the minister's decision not to use best endeavours. **We recommend that the current safeguards for persons subject to a UN listing be maintained in the Bill, with a right of appeal to the courts.**[93]

Clause 22: Power to revoke specification of ship made under regulations

Clause 23: Right to request revocation of specification of ship

Clause 24: Periodic review where ships are specified

Clause 25: UN-designated ship: right to request review

Clauses 22-5 set out similar conditions for the review and revocation of designations of ships, while Clause 26 sets a standard review period of one year to verify that regulations are still appropriate for their purpose.

Clause 26: Review by appropriate Minister of regulations under section 1

(Commons Clause 27)

93 House of Lords Constitution Committee 8th report of 2017-19, *Sanctions and Anti-Money Laundering Bill [HL]*, HL paper 39, 17 November 2017, p8

Annual report to Parliament

Report Stage

During Committee Stage, Lord Collins of Highbury moved Amendment 58 to Clause 26, which would have obliged Ministers to report the results of the review to Parliament within six months, and spoke to another amendment that would set out the content of the review in more detail. The Minister agreed to consider the proposal and the amendment was withdrawn.

During Lords Report Stage first day, Lord Ahmad moved Amendment 55, to require Ministers to review sanctions regulations and lay a written report before Parliament.

The amendment was agreed on a question.

Clause 27: Procedure for requests and reviews

(Commons Clause 28)

The procedure for requests and reviews may be set out in regulations, according to Clause 27. (See note on Clause 19, above.)

Minister must give some response to requests for review as quickly as possible

Lord Ahmad moved Amendment 56 to Clause 27 during Lords Report Stage first day.[94] The amendment contains a requirement for the Minister to respond to requests for review as quickly as reasonably possible, as well as to requests by the designated person on reasons for designation. It allows for sensitive information to be excluded from that information, but does not allow a Minister not to give any reasons.

The amendment was agreed to on a question.

Lord Ahmad proposed a number of technical amendments after this, consequent to other Government amendments agreed by the House.

10.3 Chapter 3: temporary powers in relation to EU lists

Clause 28: Temporary powers in relation to EU sanctions lists

Clause 28 gives ministers the power to add and remove names from lists of sanctioned persons contained in EU legal instruments, allowing frozen sanctions to be amended. The power lasts for two years after the bill comes into force.

Clause 29: Directions under section 28 – further provision

Clause 29 applies similar conditions to the power to add a name to EU-derived lists as those relating to designations made with powers in Chapter 1,

Clause 30: Rights of person on EU sanctions list

Clause 30 gives persons so designated similar rights to those designated under chapter 1 powers, and Clause 31 gives similar rights to request that a minister try to remove the UN designation, reflecting the procedure in Clause 21.

94 HL Deb 15 January 2018, c495

10.4 Chapter 4: court reviews

Clause 32: Court review of decisions

(Commons Clause 33)

Clause 32 sets out that the appropriate person would be able to apply to the High Court or, in Scotland, the Court of Sessions for decisions on designations or ship specifications to be set aside. The courts should use the same procedure as that used in judicial review.

Judicial review

The Lords Constitution Committee was concerned about the fact that the bill precludes judicial review on certain original designations, although judicial review of the **conclusions** of a ministerial review would be allowed:

> While this makes the ouster of judicial review less objectionable, the Bill gives no timeframe for the determination of ministerial reviews. For example, Clause 19 provides only that "On a request under this section the minister must decide whether to vary or revoke the designation or to take no action with respect to it." While Clause 27 confers wide discretion on ministers to make regulations setting out the procedure to be followed in reviews under provisions such as Clause 19, it does not stipulate what sort of procedure should be followed. This means that there is no limit to the delay that could occur between a designation being made and a court hearing to challenge that designation. **The Bill should impose an obligation on the minister to conclude the review as soon as reasonably practicable.**[95]

The Government amendment to Clause 27 (see above) addressed the concerns about unlimited delay.

Committee Stage

During the Lords Committee Stage, Lord Pannick moved Amendment 62 to Clause 32 that would make clear that a court can conduct a judicial review of a designation pursuant to a listing by the UN and can set it aside.[96] He argued, referring to Clause 21, that justice required that a UK court could overturn a designation if it is based on a UN listing that the court accepted to be unfair. Lord Ahmad disagreed fundamentally with this amendment:

> If the UK were to unilaterally cease to implement a designation mandated by the United Nations, the UK would be acting in breach of its highest obligations under international law.[97]

The amendment was withdrawn.

Report Stage

At Lords Report Stage first day, Lord Pannick had another attempt at amending Clause 32. He moved Amendment 62, slightly different from his amendment at Committee Stage. It would provide that, if a court found that a UN-mandated designation was unlawful, it should make a report to that effect; that the Minister would then attempt to persuade the UN to remove the name from its list; failing that, the court would then have the power to set aside the designation. He said that conflict between a UN ruling and domestic courts would be extremely rare,

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95 House of Lords Constitution Committee 8th report of 2017-19, *Sanctions and Anti-Money Laundering Bill [HL]*, HL paper 39, 17 November 2017

96 HL Deb 29 November 2017, c702

97 HL Deb 29 November 2017, c705-6

adding that giving courts the power to quash designations would make the UN consider the lawfulness of its designations more carefully. Lord Pannick said that the European Court of Justice had quashed a UN-derived designation. For Lord Pannick, rule of law in the UK was paramount: "The rule of law in this country cannot be subcontracted to the political processes of the United Nations".[98]

Lord Faulks, for the Conservatives, disagreed, saying that he had changed his mind since Committee Stage:

> It is, of course, fundamentally important that we respect our treaty obligations, particularly Article 103 of the UN charter. What higher obligation could there be?[99]

Lord Mackay of Clashfern, also for the Conservatives, argued that a UK court that found a designation to be faulty could formally notify the Minister, without going so far as to quash the designation, and that this would reinforce the Minister's efforts to persuade to UN to change the designation.[100] He also said that he did know whether in practice the European Court of Justice had ever quashed an EU measure implementing UN designation.

Lord Collins of Highbury, for the Opposition, did not support the amendment, arguing that it would send the wrong signal to other countries about abiding by UN decisions:

> The Opposition are concerned about the signal we would send if we adopted the amendment of the noble Lord, Lord Pannick. I hear his comments about the United Nations but this Parliament must uphold international law and the supremacy of the United Nations. It should not undermine that. If we adopt the amendment, we would send the signal to other countries, which may flagrantly flout decisions of the United Nations, that we insist that they should.[101]

Lord Ahmad of Wimbledon said that EU member states are bound by UN Security Council decisions, even if the EU itself is not. He said that in the Kadi case, the UN had already delisted the individual before the European Court of Justice decision against the designation.[102]

Lord Pannick withdrew the amendment.

Clause 33: Court reviews: further provision

Clause 33 provides that the courts would not be able to award damages in the event of setting aside a decision, unless it could be shown that it involved negligence or bad faith. The Explanatory Notes point out that this approach is comparable with the current law on awards of damages in sanctions cases within the EU.

Clause 34: Rules of court

Clause 34 deals with closed procedures. The Clause would allow the Government to apply to for sensitive material to be disclosed only to

98 HL Deb 15 January 2018, c498
99 HL Deb 15 January 2018, c498
100 HL Deb 15 January 2018, c500
101 Hl Deb 15 January 2018, c500
102 HL Deb 15 January 2018, c502

special advocates and the court. Outside Scotland, the court rules of procedure for this type of hearing would be made by the Lord Chancellor. The rules would be approved by Parliament under the made affirmative procedure, meaning that they would take effect immediately but would cease to have effect if not approved by both Houses within 28 days of laying.

In Scotland, the Court of Session would be responsible for those rules.

10.5 Chapter 5: miscellaneous

Clause 35: Suspensions of prohibitions and requirements

(Commons Clause 36)

Suspending sanctions

Clause 35 gives ministers the power to suspend the provisions of sanctions regulations, and sets out that the period of suspension may be for the duration of the suspending regulation or the period during which a condition is met.

Committee Stage

During the Lords Committee Stage, Lord Collins of Highbury moved Amendment 63 to Clause 35 that would limit the suspension to 12 months.[103] Another amendment would require a suspension for more than three years to be approved by Parliament.

Lord Ahmad said that the government needed to be nimble in international negotiations, so the unhindered suspension power was needed.[104] He also argued that revocation of a designation brought only advantage to the person in question, so a higher degree of parliamentary scrutiny was not necessary. Another amendment sought to delete Clause 35 altogether.

Clause 36: Guidance about regulations under section 1

(Commons Clause 37)

Guidance on "owned" and "controlled"

Clause 36 stipulates that the guidance must accompany the sanctions regulation. It can include best practice for compliance, guidance on enforcement, and circumstances where the provisions do not apply.

Report Stage

During the House of Lords Report Stage first day, Baroness Northover moved Amendment 63 to Clause 36,[105] which would insert a requirement for the Minister to issue specific guidance when a regulation includes reference to a person "owned " or "controlled" by another person, pursuant to section 50(3). Lady Northover explained that banks are risk-averse and worry about helping NGOs when the restrictions in sanctions are not clear; and she said that clear guidance had never been issued in connection with sanctions against Syria, for example. She called for the tri-sector group (of Government, banks and NGOs) set up to investigate licensing to be more active and mentioned that none of its sub-groups had so far met.

103 HL Deb 29 November 2017. C706-7
104 HL Deb 29 November 2017, c709
105 HL Deb 15 January 2018, c504

She proceeded to appeal for the Government to look again at the issue of mutual recognition of licences.

Lord Ahmad said that the Government already publishes guidance on the meaning of "owned" and "controlled"; that duty being included in Clause 36. Spelling out an obligation to provide guidance on that aspect would prompt questions about why other aspects were not spelt out. He said that Amendment 64, which would broaden the guidance to areas such as the establishment of payment corridors. Such guidance, he said, was not a matter for the Government. He clarified that Clause 36 says that the Minister must, not may, issue guidance.

Baroness Northover replied to this last point to the effect that Clause 36 says that the Minister "must" issue guidance, but that the guidance "may" contain certain elements, which, she said, was not specific enough. She withdrew the amendment.

Clause 37: Protection for acts done for purposes of compliance

Clause 37 protects those complying in good faith with the provisions of sanctions regulations from civil proceedings, such as court action for damages.

Clause 38: Revocation and amendment of regulations under section 1

(Commons Clause 39)

Clause 38 sets out the condition that ministers may amend sanctions regulations only if the amended regulation would still be a sanctions regulation for the purpose set out in the original regulation.

Government to explain revocation of sanctions

Committee Stage

Lord Collins of Highbury moved Amendment 66 to Clause 38 during Lords Committee Stage to oblige ministers to publish an explanatory memorandum if using this Clause to revoke or substantially reduce the effect of regulations. Lord Collins explained that he wanted evidence that its policy objective had been furthered before relaxing the sanction.[106] Lord Ahmad replied that the Government would explain its reasoning when presenting the regulation. The amendment was withdrawn.

Report Stage

During the Lords Report Stage, Lord Ahmad moved Government Amendment 65 to Clause 38. He said that Amendments 65 and 68 build on the new restrictions on powers to make regulations for sanctions not in pursuit of UN or international obligations.[107] The amendments would apply the same conditions to amending regulations as to making them in the first instance.

Amendment 65 was agreed on a question.

Government Amendments 66 to 68 were agreed without debate.

106 HL Deb 29 November 2017, c714-5
107 HL Deb 15 January 2018, c508

Clause 39: Power to amend Part 1 so as to authorise additional sanctions

(Commons Clause 41)

Henry VIII power to change by regulation types of sanctions set out in the Bill

Clause 39 is a Henry VIII Clause that would give ministers the power to amend the Act's provisions on types of sanction, listed in Clause 1 (4), by means of a regulation.[108] If new types of sanction are devised, they may be added to the list that at present contains financial sanctions, immigration sanctions, trade sanctions and so on. It would not empower ministers to change the source of sanctions set out in 1(1): UN or other international obligations; nor would it mean that ministers can change the overall purpose of sanctions: national security, international peace and so on, as set out in 1(4).

Lords Constitution Committee considered Clause 39 inappropriate:

> We do not consider it appropriate for ministers to have powers as broad as those conferred by Clause 39. In particular, we consider it constitutionally inappropriate for ministers to have the power, by regulations, to create new forms of sanctions. Further, Clause 39 should be amended to make clear that the proviso at the end of Clause 39(2) (concerning the amendment of Clause 1(1) and (2)) applies to the power conferred by Clause 39(1) and (2).[109]

The Lords Delegated Powers Committee also objected to these powers, particularly since they would only be necessary for sanctions regimes that were not derived from UN Security Council resolutions:

> …we note that this power is unnecessary for enabling additional sanctions measures to be imposed for the purposes of complying with UN obligations since Clause 7 already has this effect.[110]

Committee Stage

Lord Pannick moved an amendment at Lords Committee Stage to delete Clause 39.[111] Lord Ahmad replied that the Government might need to apply new sorts of sanctions to comply with international obligations:

> …a recent example is the UN sanctions imposed in respect of North Korea. That resolution requires that UN member states do not grant work permits to North Koreans save where the UN agrees, in advance, on a case-by-case basis. Prior to the UN's putting in place that sanction, such a sanction did not exist. There may be times in the future when a currently unforeseen type of sanction would again be appropriate.[112]

Lord Pannick countered that such a situation would be provided for by Clause 7. Lord Ahmad agreed and clarified that Clause 39 would be used for sanctions other than those mandated by the UN. He mentioned the example of Crimea.

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[108] In its *Memorandum to the Delegated Powers and Regulatory Reform Committee*, the FCO says that such regulations will be subject to the draft-affirmative procedure, in line with that committee's earlier guidance.

[109] House of Lords Constitution Committee 8th report of 2017-19, *Sanctions and Anti-Money Laundering Bill [HL]*, HL paper 39, 17 November 2017

[110] Lords Delegated Powers Committee, p7

[111] HL Deb 29 November 2018, c716

[112] HL Deb 29 November 2017, c720

Report Stage

During the Lords Report Stage, Lord Ahmad moved Government Amendment 69 to Clause 39. He said that he had written to Peers setting out his response to points made in the Delegated Powers Committee's report,[113] and that Amendment 69 would further restrict the use of the power to create new types of sanction by stipulating that it may be used only where the UK is subject to an international obligation to put in place sanctions of that type.[114] Only new types of sanction developed by the international community could be imposed using this power. Government Amendment 70 makes clear that Clause 39 cannot be used to change the purposes of sanctions set out in Clauses 1 and 2.

Amendments 69 and 70 were agreed.

Clause 40: Power to make provision relating to certain appeals

(Commons Clause 42)

Appeals against immigration decisions

Clause 40 sets out that ministers would be able to make regulations to provide for appeals against immigration decisions to be dealt with under the provisions of the *Nationality, Immigration and Asylum Act 2002*. Such a regulation would clarify when immigration claims are dealt with by the procedures set out in the present Act and when they would be dealt with by the Home Secretary and the Tribunal.

The Explanatory Notes say that this ensures that questions that engage the UK's obligations under the European Convention on Human Rights the Refugee Convention will continue to be dealt with by those parts of government and the courts that are equipped to deal with them.

Committee Stage

At Lords Committee Stage, Lord Paddick moved an amendment to delete Clause 40. He said that the Government had undertaken to provide an illustrative draft Statutory Instrument in relation to the powers under Clause 40, to illustrate how decisions with immigration implications would be taken and how they could be challenged, but that this had not happened.[115] Lord Ahmad said that an illustrative statutory instrument was still being prepared, and went on to explain Clause 40, saying that "…as a starting point, we should seek to maintain the status quo," as far as immigration-related appeals were concerned.[116] Lord Falconer said that the illustrative draft SI should be produced in enough time for Peers to consider it before Report Stage. The Minister undertook to write to Peers with a date by which the draft would be available.

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113 The letter is published in the Lords Delegated Powers and Regulatory Reform Committee 10th Report of Session 2017–19, HL Paper 58, 21 December 2017, Annex

114 HL Deb 15 January 2018, c510-1

115 HL Deb 29 November, c722

116 HL Deb 29 November, c722-3

11. Part 2 – Anti-money laundering

Part 2 deals with anti-money laundering. Some Peers expressed concern during the House of Lords Committee Stage about the interaction between provisions in Part 2 and those in Part 3 (general provisions) and in the Schedules.

Power to make regulations

Clause 41: Money laundering and terrorist financing etc.

(Commons Clause 43)

Clause 41 would give ministers the power to make regulations for the detection, investigation or prevention of money laundering and terrorist finance and the implementation of Financial Action Task Force standards.[117] It defines money laundering and terrorist financing in relation to the provisions of the *Proceeds of Crime Act 2002* and various anti-terrorism statutes.

Power to change the anti-money laundering regime by regulation

The House of Lords Delegated Powers Committee objected to the powers set out in Clause 41:

> We take the view that the FCO has not provided sufficient justification for the delegation of powers by Clause 41, particularly having regard to their wide scope and the significance of the powers conferred. Accordingly we consider the delegation of powers by Clause 41 to be inappropriate.[118]

The Committee argued that primary legislation should be used to make changes to money laundering and terrorist legislation.

The Government was **defeated** on division on this clause; the Lords removed the power to create offences by regulation (see below).

Committee Stage

During the third day of the House of Lords Committee Stage, 6 December 2017, Lord Davidson of Glen Clova, for Labour, moved Amendments 68Za, b and c to Clause 41 that would have inserted the word 'improving', to ensure that Ministers did not use regulations to weaken the anti-money laundering regime.[119]

Baroness Bowles argued that the money laundering part of the Bill suffers even more from unconstrained ministerial powers than does the sanctions part, and that the fact that these powers were not constrained either by the EU treaties or the EU Charter of Fundamental rights made matters worse.

Baroness Bowles discussed other amendments to Clause 41. One (Amendment 68A) would have deleted Clause 41 and replaced it with the principle that changes to the money laundering regime should only be made with primary legislation. Another would have provided some

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117 For more on the FATF and money laundering, see the Commons Briefing Paper *Money laundering law*, June 2017

118 House of Lords Delegated Powers and regulatory Reform Committee, 7th report 2017-19, HL Paper 38, p9

119 HL Deb 6 December 2017, c1061

exemptions to that principle. Amendment 72A would have changed Clause 44(3) removing the potential to change, by regulation, the definitions of terrorist financing made in separate Acts of Parliament that did not envisage change by regulation; Baroness Bowles mentioned the *Terrorist Asset-Freezing etc Act 2010*, the *Terrorism Act 2000*, the *Anti-terrorism, Crime and Security Act 2001*, and the Al-Qaeda and ISIL regulations.[120]

Baroness Bowles argued that Clause 41, in conjunction with Schedule 2, allows for the creation of a whole new money-laundering framework without requiring guidance or safeguards.

Amendment 69A would protect the money laundering regime from amendment by Henry VIII clauses in the *Withdrawal Bill* and the *Legislative and Regulatory Reform Act 2006*.

Lord Ahmad said that Amendment 68A was unnecessary and would encumber the legislation, which needs to be capable of rapid change. About Amendment 69A he said that it would be necessary to make amendments consequential on the UK's withdrawal from the EU and that the amendment would remove the ability to make these necessary fixes.

Speaking to Amendment 69E, that would limit Ministers to making amendments to the money laundering regulations of 2017 to those implementing changes mandated by the Financial Action Task Force, (FATF) Lord Ahmad said that the UK's anti-money laundering regime was in some ways ahead of the requirements of the FATF and that the amendment would prevent that in future.

Baroness Bowles countered that there was nothing in the legislation saying that the regime could only be stronger than FATF standards rather than weaker.

The amendments were either withdrawn or not moved.

Register of beneficial ownership of overseas companies owning property in the UK

During Lords Committee Stage, Conservative Peer Lord Hodgson of Astley Abbotts spoke to Amendment 69, which would have required the Government to publish a register of the beneficial ownership of companies and other legal entities overseas owning UK properties.[121] A similar amendment had been tabled to the *Criminal Finances Bill 2016-17,* and Ministers indicated at the 2016 Anti-Corruption Summit that such a register was Government policy.

Lord Bates, Minister of State at the Department for International Development, said that the Department for Business, Energy and Industrial Strategy had consulted earlier in 2017 on the design and implementation of the register of overseas companies that own UK property. He said that the register presented complex problems and that the Government continued to work on it, arguing that it was right to allow the DBEIS to finish that work.[122]

120 HL Deb 6 December 2017, c1063
121 HL deb 6 December 2017, c1076
122 HL Deb 6 December 2017, c1084-5

Report Stage

During the second day of Lords Report Stage, Lord Faulks moved Amendment 75, to insert a new clause after Clause 41 requiring the Government to "create a public register of beneficial ownership information for companies and other legal entities registered outside of the UK that own or buy UK property, or bid for UK government contracts".[123] He said that reassuring words from the Government were no longer enough:

> Something more substantial is needed. It is a supreme irony that this country's adherence to the rule of law encourages criminals and fraudsters to invest here, when in their own countries there may be little or no respect for the rule of law. Are we to stand idly by and to act in effect like a handler of stolen goods?[124]

Progress reports to Parliament on the legislation implementing the register

Lord Ahmad promised that the Government would publish the draft Bill on a property register by the summer recess 2018 and that the introduction of the Bill to Parliament would be a priority for the second Session of the 2016-2021 Parliament, probably by summer 2019, meaning that the register would be operational by early 2021. The intention to meet deadlines for this work would be set out in a Written Ministerial Statement.[125] He also said that the Government intended to amend the present bill at Third Reading to require the Government to provide regular updates to Parliament on progress on the timetable that he had outlined.

Lord Faulks accepted the Government's commitment to take the matter further, and withdrew the amendment.

Third Reading

During Lords Third Reading, Lord Ahmad moved Amendment 3 to Clause 43 (formerly Clause 41), requiring that a report on the progress towards creating the register to be presented to Parliament.[126] The amendments was agreed.

Lord Naseby moved Amendment 4 to Amendment 3,[127] inserting the words "…that own or buy property in the United Kingdom", since Amendment 3 had simply said "a register of beneficial owners of overseas entities." Lord Naseby worried that which overseas entities was not specified. Lord Hodgson asked for the words "…or bid for UK Government contracts" to be added, too.

Lord Ahmad said that he would ask officials to look at the wording again. The amendment was withdrawn.

Corporate criminal offence of failing to prevent money laundering

Baroness Bowles moved Amendment 69B during the Lords Committee Stage, which would insert a new clause after Clause 41 introducing a new corporate criminal offence of failure to prevent money laundering.[128] Amendment 69C would require the Minister to ask the courts to investigate whether directors of a company are fit and proper, if it was found that proper procedures against money laundering were not in place. Another amendment would have introduced a public

123 HL Deb 17 January 2018, 705
124 HL Deb 17 January 2018, c707
125 HL Deb 17 January 2018, c708
126 HL Deb 24 January 2018, 1029
127 HL Deb 24 January, c1031
128 HL Deb 6 December 2017, c1087

consultation on further reform to the law on corporate criminal liability for failing to prevent money laundering, terrorist financing and offences which pose a threat to the integrity of the international financial system.

Peers mentioned the fact that UK banks that failed to prevent money laundering had been prosecuted in US and France rather than in the UK.

Lord Bates said that the Ministry of Justice is consulting on the possibility of creating corporate offence connected with the failure to prevent economic crime, and that the Government's anti-corruption strategy update was still in progress, and pointed out the overlap between these processes and the amendments seeking to create a corporate crime of failure to prevent money laundering. Lord Bates said that the Government would seek to provide a substantive update on the anti-corruption strategy in time for the House of Lords Report Stage of the present Bill.[129] Lord Bates also mentioned other new 'failure to prevent' offences and argued that it would be advisable to wait and see how these operated before creating more, while he also pointed out that failure to prevent money laundering is already an offence under the 2017 money laundering regulations, and that many people had gone to prison for it.

The amendments were withdrawn or not moved.

Report Stage

During Lords Report Stage, Baroness Bowles also spoke to Amendment 74 that would add a new clause after Clause 41, creating an offence of failure to prevent money laundering facilitation, an amendment elaborated in Committee.

Lord Ahmad then discussed Amendment 74, which would create a new corporate criminal offence of failure to prevent money laundering. He said that the Ministry of Justice had launched a consultation in 2017 on corporate offences for economic crime, and it would be sensible to await its outcome; the Government response to that consultation would be published soon. The Minister denied that there was a gap in the regulatory regime that this change would fill – senior managers were already strictly regulated and the Financial Conduct Authority can take action against them for any failures.

Transposing EU money laundering regulations - Committee Stage

Baroness Bowles moved a "very 'proby' probing amendment" during Committee Stage to insert a new clause after Clause 41, to provide that a Minister, for two years after the UK leaves the EU, might make regulations to transpose EU money laundering provisions into UK law. She described it as "a vehicle to discuss further what transposition from an EU directive means."[130] She said the point of the amendment was to ensure that "one should not lose the policy framework," because both with the present Bill and the Withdrawal Bill, much is left at the discretion of ministers to decide what is relevant and what is superfluous when retaining existing guidance and information. One of the paragraphs of the proposed new clause sets out, for example, that

[129] The *UK Anti-corruption Strategy 2017-22* was published on 11 December 2017
[130] HL Deb 6 December 2017, c1101

the European Commission's guidance and reports should be put into a UK-equivalent setting.

Lord Bates argued that Clause 7 of the Withdrawal Bill provides powers to Ministers to fix any deficiencies in retained EU law on withdrawal and that the powers proposed in Baroness Bowles's amendment belonged there rather than in the Sanctions Bill.

The amendment was withdrawn.

Registers of beneficial ownership in the Overseas Territories

Baroness Stern moved Amendment 69G during Committee Stage to add a new clause after Clause 41 to the effect that the Government would make sure that Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Montserrat and the Turks and Caicos Islands published a register of the beneficial ownership of companies registered in their jurisdiction.[131] Baroness Stern said that a similar amendment to the *Criminal Finances Bill* 2016-17 had been debated.

Lord Kinnoull argued that the UK should not legislate without at least consulting the Parliaments of the territories and getting their agreement to do so.

Lord Ahmad of Wimbledon said that it was only in exceptional circumstances that the UK Government had legislated for the Overseas Territories without their consent. He said that doing so could undermine their cooperation:

> Let me assure noble Lords that this does not mean we are content for no action to be taken in this space. It simply means that we wish to take action within the existing framework of friendly co-operation, building on the progress already made.[132]

He said that at present the FATF standards do not require countries to publish a beneficial ownership register, that the UK is ahead of other countries – if it did become the internationally-required standard, the Overseas Territories would have to comply. Overseas Territories had already agreed to collect this information and made it available to UK law enforcement agencies, which put them ahead of many other countries, the Minister said.

Baroness Stern withdrew the amendment.

Report Stage

During the second day of Lords Report Stage Peers returned to discussion of a register of beneficial ownership in the Overseas Territories.

Baroness Stern moved Amendment 73, similar to Amendment 69G moved at Committee Stage, which would insert a new Clause after Clause 41 requiring public registers of beneficial ownership of companies in the Overseas Territories. She said that there was one change in the amendment since Committee: it required registers to be made public not by January 2019 but by January 2020.[133] This change

131 HL Deb 6 December 2017, c1108
132 HL Deb 6 December 2017, c1117
133 HL Deb 17 January 2018, c686

came after discussion with the Minister, who said that 2019 was quite impractical.

Lord Leigh of Hurley argued that Section 9 of the *Criminal Finances Act 2017* requires the Government to prepare and lay before Parliament by July 2019 a report on the effectiveness of the Overseas Territories' and Crown Dependencies' registers and their exchange agreements with the UK. He said:

> To legislate now would be to pre-empt that report, which has already been legislated for and which would greatly inform your Lordships' House on the strengths and weaknesses that might require improvement.[134]

Lord Flight also argued against the amendment, quoting David Lewis, head of the FATF, and formerly of the UK National Crime Agency, who said that public registers do not improve law enforcement capabilities:

> "Incomplete, unverified, out of date information in a public register is not as useful as law enforcement agencies being able to access the right information at the point they need it".[135]

Baroness Kramer later returned to this point, saying that law enforcement authorities have said that they could not successfully track down money laundering crimes if they were not backed by public register arrangements.[136]

Lord Ahmad reiterated points made in Committee and said that the Government could not accept the amendment. Lady Stern put the amendment to division but it was not agreed.[137]

Oversight of foreign trust and company service providers

Committee Stage

Baroness Kramer moved an Amendment 69H during Committee Stage to insert a clause after Clause 41 ensuring that trust and company service providers that do not carry on business in the UK may not incorporate UK companies without oversight from an anti-money laundering supervisor.[138] The baroness said that this closed a loophole in existing legislation. Another amendment proposed that companies that do not have a UK bank account, hitherto difficult to track, should have to pay a fee to cover the due diligence of anti-money laundering authorities.

Companies House to check company register information

Amendment 69K proposed to give the authorities the power and the wherewithal to verify the public register of companies, again by inserting a new clause after Clause 41. Lord Naseby said that the amendment would give Companies House the power to check company registration information, and quoted from a Transparency International UK report that cited direct registration with Companies House as a significant problem.[139]

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134 HL Deb 17 January 2018, c692
135 HL Deb 17 January 2018, c692
136 HL Deb 17 January 2018, c699
137 HL Deb 17 January 2018, c703-5
138 HL Deb 6 December 2017, c1132
139 *Hiding in plain sight: How UK companies are used to launder corrupt wealth*, Transparency International UK, November 2017

Lord Bates said for the Government that the Office for Professional Body Anti-Money Laundering Supervision would soon be established and that it would cover trust or company service providers. The Minister said that it would be right to take account of its conclusions about the supervision of trust or company service providers before taking any further action. He also said that ensuring higher standards of supervision internationally would be the most effective way of solving the problem.

On the fee for those companies with no bank account, the Minister said that this would increase the reporting burden for many small businesses, who would be required to demonstrate they had a bank account.

Lord Bates said that to give Companies House the duty to verify company registration would entail a wholesale change in the way company registration in the UK works, since at present Companies House has no right to refuse to register a company. He said it would impose extra burdens on Companies House and on businesses.

Both Lord Naseby and Lady Kramer were disappointed that the Government was not proposing a solution to the perceived loophole in the money laundering regime.

Report Stage

During the second day of Lords Report Stage, Lord Naseby moved Amendment 76, a similar amendment, requiring Companies House to carry out anti-money laundering checks before a company could be registered.[140] Amendment 76 would have inserted a new clause after Clause 41.

Lord Ahmad said that the proposal would encumber the present process of company registration and that the UK's anti-money laundering regime would be evaluated by the FATF in March 2018; the report of that evaluation, due late 2018, would inform the future of the UK anti-money laundering regime. Amendment 76 was withdrawn.

Creating offences by regulation

Report Stage

During the second day of the House of Lords Report Stage, Lord Judge returned to the matter of creating offences through secondary legislation. He moved Amendment 71A to Clause 41, adding a provision to that clause to the effect that regulations under subsection (1) could not create new offences.

Lord Judge said that the Government's argument in favour of having this power in respect of sanctions was that without it, there would not be continuity of sanctions regimes on the UK's departure from the EU. This was a plausible argument, he said, but it did not exist in respect of the anti-money laundering regime. He argued that there were plenty of offences in other legislation and that no gap in criminal law that needed closing had been pointed out during debate and said: "I would have a recommendation to make if one had been identified—come back to Parliament—but there is none."[141]

140 HL Deb 17 January 2018, c712
141 HL Deb 17 January, c669

Lord Pannick said that the House would happily consider any Government amendment at Third Reading imposing some restrictions on this power.

Viscount Hailsham discussed the powers in Schedule 2, particularly paragraphs 15 and 18, which say that the regulations create criminal offences and deal with the defences that can be advanced as well as the evidentiary requirements. He described these powers as "very intrusive in criminal processes".[142]

Baroness Bowles of Berkhamsted then spoke to Amendment 72, relating to the concerns about paragraphs (a), (b) and (d); she understood that the Minister would make a statement during Third Reading on these concerns.

Lord Ahmad reiterated that precedent exists for the creation of offences in secondary legislation implementing EU directives, such as the *Money Laundering Regulations 2007.* He argued that taking away this power would weaken the anti-money laundering regime, and that HMRC, the British Bankers Association and the Crown Prosecution Service had all argued in favour of retaining the power in response to consultation.

Government wants to keep the power to create new offences

At the end of this part of the debate, Amendment 71A was agreed on division constituting a defeat for the Government.[143]

Lord Ahmad also spoke to Amendment 72, which would

(a) prevent regulations being made that are detrimental to the anti-money laundering (AML) regime,

(b) require proportionality,

(c) prevent the creation of new offences and

(d) restrict the power to change the definition of terrorist financing.

He said that the Government would table amendments during Third Reading to deal with (a) and (b) and would propose amendments in the House of Commons to restrict the power to change the definition of terrorist financing (d).[144] The amendment would restrict regulations under Clause 1 to those pursuant to compliance with UN or other international obligations or to the prevention of terrorism, or both.

Government undertakes to amend Clause 41 during Third Reading and in the Commons

Other amendments in this group addressed Schedule 2 (see that schedule, below).

Returning later in Report Stage to the theme of the creation of offences, Lord Ahmad said that the Government was putting forward amendments providing that any future criminal offences established under Clause 41 can be created only if regulations provide that such offences have either a mental element necessary for their commission or a defence to it, or both.[145]

142 HL Deb 17 January, c671
143 HL Deb 17 January, c683-5
144 HL Deb 17 January 2018, c676
145 HL Deb 17 January 2018, c680

The Minister spoke to one further Government amendment to Clause 41, providing that a person cannot be liable for a civil monetary penalty through regulations established under Clause 41 when they have already been convicted of a criminal offence under the regulations in relation to the same act or omission.

Lord Ahmad addressed concerns about whether a gap in existing data protection law could arise from the anticipated replacement of the *Data Protection Act 1998*.[146] He reassured the House that the *EU Withdrawal Bill* would preserve the new General Data Protection Regulation requirements and the *Money Laundering Regulations 2017* in UK law, and that would ensure that data protection requirements will be embedded in the UK's anti-money laundering regime.

Third Reading

During Lords Third Reading, Lord Ahmad of Wimbledon moved Amendment 1 to Clause 43, (formerly Clause 41) requiring that regulations made under that clause can only make provision which enables or facilitates the detection or investigation of money laundering or terrorist financing.[147] He also spoke to Government Amendments 2, 5, 6 and 7. He described Amendment 2 as technical.

During the Lords Third Reading, the Minister also proposed Amendment 5 (Amendment 6 in the Marshalled List) to Clause 43 (formerly Clause 41 in the original Bill), to limit the ability of regulations made under Clause 43 to requiring **only** relevant government departments, anti-money laundering supervisory authorities, and persons carrying on a relevant business to identify and assess risks relating to money laundering, terrorist financing or other threats to the integrity of the international financial system.[148]

Government Amendment 6 (7 in the Marshalled List) would specify that persons should only be required to adopt policies, controls and procedures appropriate to the size and nature of the relevant person's business.

Government Amendments 7 and 8 (8 and 9 in the Marshalled List) are technical amendments defining "relevant business".

See Schedule 2, below, for the Government amendment during Third Reading to that Schedule.

"Cascade of responsibility"

Lady Bowles, who had added her name to Amendment 1, said it would further define the detection or investigation of money laundering and terrorist financing purposes for which regulation may be made, meaning that the present rules cannot be undermined. She said that Amendment 6 (7 in the Marshalled List) (see below under Schedule 2), provides for the cascade of responsibility that she had called for in Committee.

146 For more information see: *Data Protection Bill [HL]: Briefing for Lords Stages*, October 2017 and *Brexit and data protection*, October 2017
147 HL Deb 24 January 2018, c1024
148 HL Deb 24 January 2018, c1025

12. Part 3 – General provisions

Part 3 contains general provisions.

Clause 42: Crown application

Clause 43: Saving for prerogative powers

Clauses 42 and 43 set out that the bill could make provisions binding on the Crown but not the Queen in a personal capacity. They would also prevent the Crown from being criminally liable, and protect Crown prerogative powers to exclude a person from the UK.

Clause 44: Regulations: general

(Commons Clause 47)

Power to amend devolved legislation

Clause 44 sets out some detail about the powers that the bill would give, for example that regulations can confer jurisdiction on any court or tribunal. It would also enable ministers to make supplemental, incidental, consequential, transitional or saving provisions repealing or otherwise amending existing legislation, including devolved legislation. The Explanatory Notes say that this is "not a standalone power but gives details of regulation-making powers in the Bill."[149]

The Lords Constitution Committee objected to the power to change devolved legislation:

> The Government said recently that a similar power "reflects well-established reciprocal arrangements" that enable Welsh or Scottish ministers to amend Acts of Parliament. However, these arrangements are not fully reciprocal, as Welsh and Scottish legislation can authorise devolved ministers to amend UK legislation only within devolved competence, whereas UK legislation can authorise UK ministers to amend enactments of the devolved legislatures in ways that would trespass upon devolved competence.
>
> The House may wish to consider whether the consent of the devolved legislatures should be required when this power is used to amend or repeal legislation enacted by them—as, for example, is the case for certain statutory instruments made under the Legislative and Regulatory Reform Act 2006 and the Public Bodies Act 2011.[150]

Committee Stage

During Committee Stage, Amendment 72 to Clause 44 was not moved, but Peers criticised the Henry VIII powers in the clause,[151] which they described as too broad. Lord Ahmad denied that the powers in this clause were unlimited, since it only provides for consequential amendments.[152] Lord Falconer of Thoroton asked whether the clause empowered Ministers to remove protections contained in other primary

149 Sanctions and Anti-Money Laundering Bill Explanatory Notes, para 122
150 House of Lords Constitution Committee 8th report of 2017-19, *Sanctions and Anti-Money Laundering Bill [HL]*, HL paper 39, 17 November 2017
151 HL Deb 29 November 2017, c707
152 HL Deb 29 November 2017, c710

legislation, such as the *Human Rights Act 1988*. The Minister undertook to write to the Peer.[153]

Report Stage

During Lords Report Stage, Lord Judge moved Amendment 98 to Clause 44 that would leave out paragraph (a) empowering ministers to amend, repeal or revoke legislation "whenever passed or made". Lord Judge described the power it contained as "monstrous".[154] Viscount Hailsham said that regulations made under this clause, with no possibility of amendment by Parliament, could make a wide range of changes to criminal law.

Lord Pannick said that the courts would take a restrictive approach to Henry VIII secondary legislation, quoting from a 1989 judgment from the then Master of the Rolls, Lord Donaldson:

> "Whether subject to the negative or affirmative resolution procedure, [subordinate legislation] is subject to much briefer, if any, examination by Parliament and cannot be amended. The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach".[155]

Defending the clause, Lord Ahmad said that the powers it contained were not unusual and that the Lords Delegated Powers Committee had not objected to them in its report. Addressing the courts' approach to this sort of delegated power, the Minister said that the Government welcomes and respects the scrutiny of the courts, and that the safeguard that they represent should be a reassurance to the House.

Lord Judge withdrew Amendment 98.

Clause 45: Parliamentary procedure for regulations

(Commons Clause 48)

Clause 45 sets out that regulations would be subject to one of three types of parliamentary procedure:

Made-affirmative procedure

- Non-UN sanctions regulations would pass by the made-affirmative procedure – they would come into force as soon as they were laid but would cease to be effective if they had not received parliamentary approval in the form of a resolution from each House within 28 days.

Draft affirmative procedure

- Other regulations subject to the draft-affirmative procedure, requiring parliamentary approval before coming into force, are those that would:

153 HL Deb 29 November 2017, c711
154 HL Deb 17 January 2018, c717
155 HL Deb 17 January 2018, c721

- repeal, revoke or amend any provision of primary legislation,
- authorise additional sanctions (under Clause 39),
- set out procedures to deal with immigration decisions (under Clause 40)
- make provision related to money laundering and terrorist financing (under Clause 41)

Negative procedure

- Any other regulations would be subject to the negative procedure, meaning that they are effective unless disapproved within 40 days by Parliament. UN-derived sanctions would be subject to this procedure.[156]

At present, the House of Commons European Scrutiny Committee performs a significant role in Parliament's scrutiny of sanctions decisions (see above under Present legal mechanisms for sanctions).

This layer of scrutiny, at least in its current form, will be lost on withdrawal from the EU, as the Commons will no longer be able to instruct the Government to abstain from a vote at EU level. There is likely to be some role for the Committee during a transitional period in respect of EU proposals that would be legally binding on the UK.

Negative procedure for UN-derived regulations

The Lords Delegated Powers Committee objected to the provisions of Clause 45(1). Under it, any regulation which contained UN-derived measures mixed with other measures would be passed by Parliament under the negative procedure. The Committee argued that this went against convention:

> The usual approach in legislation, where a statutory instrument includes both provisions subject to the negative procedure and those subject to the affirmative procedure, is to require the higher level of parliamentary scrutiny to apply. This ensures that it is not possible to reduce the level of scrutiny given to provisions made under delegated powers by combining them with other provisions subject to a lower level of scrutiny. We take the view that the same approach should be adopted here.[157]

The Lords Constitution Committee also argued that adequate parliamentary scrutiny was important to make the delegated powers in the Bill constitutionally acceptable.[158]

Committee Stage

During the House of Lords Committee Stage fourth day, 12 December 2017, Lord Collins of Highbury moved Amendment 73 to Clause 45,[159] with the effect of ensuring that none of the regulations would come into force until they had received a positive vote from Parliament.

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156 For more information on the passage of secondary legislation through Parliament, see the Commons Briefing Paper *Statutory Instruments*, 15 December 2015

157 Delegated Powers and Regulatory Reform Committee, *European Union (Approvals) Bill; Finance Bill; Northern Ireland Budget Bill; Sanctions and Anti-Money Laundering Bill [HL]*, 7th Report of Session 2017–19, HL Paper 38, 17 November 2017

158 House of Lords Constitution Committee 8th report of 2017-19, *Sanctions and Anti-Money Laundering Bill [HL]*, HL paper 39, 17 November 2017, p4

159 HL Deb 12 December 2017, c1498

Another amendment in the group sought to ensure that regulations under Clause 16 received the affirmative procedure. Clause 16 is the enforcement clause, which allows Ministers to create offences by secondary legislation; it was directly opposed by the Constitution Committee.[160]

Lord Ahmad of Wimbledon, for the Government, said that the draft affirmative procedure, whereby regulations do not come into effect until they have received affirmation from Parliament, would prevent the UK from imposing sanctions at the same time as its international partners and would give targets notice of the sanction, allowing them to move assets out of the UK or take other action to avoid the effects of the sanction. He also argued against Amendment 75, which would have specified the draft affirmative procedure for regulations revoking, suspending or amending sanctions, rather than the negative procedure specified in the Bill; again, flexibility and speed of reaction were his grounds for disagreeing.

On Clause 16 and the creation of offences, the Minister said that at present the UK creates offences to enforce UN and EU sanctions using regulations passed by the negative procedure. In the present Bill, he said:

> …we believe the correct approach is negative procedures for regulations containing UN sanctions and made-affirmative for UK-autonomous sanctions.
>
> The use of the draft affirmative procedure for UN sanctions regulations would mean that we would routinely breach our obligation to implement the relevant asset freezes "without delay".[161]

The amendment was withdrawn.

Super-affirmative procedure

Lord Collins then moved an Amendment 75B that would have left out paragraph (d) of Clause 45.[162] The amendment was grouped with others that would have imposed the super-affirmative parliamentary procedure for regulations made under Clause 41.[163]

Lord Ahmad of Wimbledon said that the draft affirmative procedure set out in the Bill was a high enough level of parliamentary scrutiny; higher, he argued, than the level typically allowed by previous Governments when making anti-money laundering regulations.

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160 House of Lords Constitution Committee 8th report of 2017-19, *Sanctions and Anti-Money Laundering Bill [HL]*, HL paper 39, 17 November 2017, p6

161 HL Deb 12 December 2017, c1502

162 HL Deb 12 December 2017, c1502

163 The super-affirmative procedure requires the Minister to have regard to representations, House of Commons and House of Lords resolutions, and Committee recommendations that are made within 60 days of laying, in order to decide whether to proceed with the order and, if so, whether to do so as presented or in an amended form. An order dealt with under this procedure must be expressly approved by both Houses of Parliament before it can be made. (Regulatory Reform Committee)

Although Lord Collins described the Minister's answer as disappointing, and promised to table further amendments to Clause 41 during Report Stage, he withdrew the amendment.

Devolved legislation again

Baroness Northover then moved an Amendment 76 to Clause 45 that would insert a requirement to obtain the consent of the devolved assemblies before repealing, revoking or amending devolved legislation.[164] Lady Northover accepted that, although the Sewel Convention means that the UK refrains from legislating in areas of devolved competence, this does not normally apply to UK subordinate legislation.[165] Nevertheless, she argued that the regulation-making powers were so significant that they required further checks.

Baroness Sheehan pointed out that the Constitution Committee had argued that if the government intended to consult with the devolved administrations over changes, that consultation could be written into the Bill.

Lord Ahmad argued that foreign policy and national security are reserved to Westminster and so is this Bill; the amendment would give the devolved administrations the right to veto UK legislation on foreign and security policy. He added that the devolved assemblies had not argued with this interpretation when consulted.

The amendment was withdrawn.

Consulting the devolved administrations

The Bill only confers regulatory powers on UK Government Ministers, not devolved authorities. This includes powers to amend devolved primary legislation, meaning that UK Government ministers' delegated legislation can be used to legislate in relation to devolved matters. The Government has not explained where in practice this is likely to happen.

Further debate is likely on what safeguards Parliament puts in place to respect the boundaries of the devolution settlement.

Imposing a requirement for devolved legislative or executive consent to any legislation that amends, for example, an Act of the Scottish Parliament could prevent UK Government ministers from ensuring that the UK complies with its international obligations.

Given the concerns raised by the Lords Constitution Committee, the Government may clarify further why in their view a consent provision would be inappropriate.

If consent provisions are inappropriate as giving the devolved administrations a veto, further debate is likely on whether a requirement to consult on an advisory basis the devolved executive or legislature should be included on the face of the Bill.[166]

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164 HL Deb 12 December 2017, c1508

165 For more information, see the Commons Briefing Paper *The "Sewel Convention"*, November 2005

166 For more information, see the Commons Briefing Paper *The European Union (Withdrawal) Bill: Devolution*, November 2017

Clause 46: Regulations under section 1: transitory provision

Clause 46 would provide for a slightly different procedure for regulations connected with the UK's withdrawal from the EU, for example where a UK sanctions regime is designed to replace an EU sanctions regime. In this case the regulation could come into force on a day specified by ministers in another regulation.

If these provisions are applied to any regulation that would be subject to the made-affirmative procedure, Parliament would have 60 rather than 28 days to approve the regulation before it ceases to have effect.

Clause 47: consequential amendments and repeals

(Commons Clause 50)

Clause 47 would repeal most of Part 1 of the *Terrorist Asset Freezing etc. Act 2010*. It would make consequential amendments and repeals set out in Schedule 3.

Repealing part of the *Terrorist Asset-Freezing Etc. BAct2010*

During the Lords Committee Stage fourth day, Baroness Bowles of Berkhamsted moved an Amendment 77 to Clause 47. The amendment would delete the parts of Clause 47 that revoke most of Part 1 of the *Terrorist Asset-freezing Etc. Act* 2010. Lady Bowles said that the present Bill replaces the powers in that Act with "a general power to do anything".[167] She said that the provisions for appeal and review in the 2010 Act should not be dispensed with, particularly since that Act was created because the previous legal regime had been struck down by the Supreme Court as oppressive.

Lord Ahmad said that the threshold for terrorist designations in the 2010 Act is high and that the powers had not been used since February 2015. He said that the nature of terrorist attacks had changed, becoming simpler and less planned.

Lady Bowles withdrew the amendment but said that the clause would probably be "revisited with considerable force on Report".[168]

Clause 48: Meaning of "funds", "economic resources" and "freeze"

Clause 49: Meaning of "financial services" and "financial products"

Clause 50: Interpretation

(Commons Clause 53)

Clause 50 sets out how certain words and phrases in the bill are to be interpreted, for example, that "the Security Council" means the Security Council of the United Nations, and sets out that regulations under Clause 1 would be able to set out further definitions of ownership of economic resources, for example.

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167 HL Deb 12 December 2017, c1511
168 HL Deb 12 December 2017, c1513

See the note on Clause 2, above, on the Lords Constitution Committee's concerns about designating persons who are "connected with" a country.

Report Stage

During the second day of the Lords Report Stage, Lord Ahmad moved Amendment 102 to Clause 50.[169] The amendment clarified references in this Bill to a person named "for the purposes of" a UN Security Council Resolution. The amendment was agreed without debate.

Clause 51: Extent

(Commons Clause 54)

Territorial extent

Clause 51 sets out the territorial extent of the Bill: that most of it would extend to whole of the United Kingdom, although there are references to certain Acts that do not apply to Scotland or Northern Ireland.

The Government would be empowered to make Orders in Council to extend the Bill's provisions in Part 1 and Part 3 and any regulations made under Part 1 to other territories,[170] amended or otherwise, namely:

- any of the Channel Islands
- the Isle of Man
- any of the British overseas territories.

That power includes the ability to extend the repeal of sections of the *Terrorist Asset-Freezing Act 2010* to the same territories.

Committee Stage

At Lords Committee Stage fourth day, Lord Collins of Highbury moved Amendment 82 to Clause 51 that would insert the Channel Islands, the Isle of Man and the British Overseas Territories into the main subsection setting out the extent of the Bill.[171] Other amendments in the group would require the Minister to report to Parliament on the effectiveness of the sanctions, anti-money laundering and terrorist finance legislation in the Crown Dependencies and Overseas Territories, and seek to improve their anti-money laundering legislation.

Lord Ahmad reminded Peers that the *Criminal Finances Act 2017* includes a provision for a statutory review of how its provisions have been implemented in Crown Dependencies and Overseas Territories.

Lord Collins withdrew the amendment.

Clause 52: Commencement

(Commons Clause 55)

Clause 52 deals with the commencement of the Bill. Clauses 42-46 and 48-53 would come into force as soon as the Bill received Royal Assent. The remaining Clauses would come into force on a day or days set out in regulations by the Foreign Secretary.

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169 HL Deb 17 January 2018, c724

170 For more on Orders in Council, see the Commons Briefing Paper *The role and powers of the Privy Council*, February 2016

171 HL Deb 12 December 2017, 1513

Transitional period

How this relates to any transition period is not clear in the Bill. EU legislation to implement agreements with partner countries which is made after exit day during the transition period could take effect in UK law through any legislation which implements the transition period.

The Government has announced it will bring forward a Withdrawal Agreement and Implementation Bill to provide the legislative basis for any transition period agreed as part of the withdrawal agreement. This Bill could enable any EU law made during this period to effect in UK law automatically, as it does currently through section 2(1) of the ECA, but for a time limited period. This suggests that the Sanctions Bill might not be brought into force until the end of transitional period.

Sunset clause

Committee Stage

During Committee Stage fourth day, Lord Collins of Highbury moved Amendment 85 to add a new 'sunset' clause after Clause 52, providing that the Act would expire after five years.[172] He said that while the Bill was necessary, there were many things that remained unknown about the post-Brexit future and the Bill, which would give the Executive many and broad powers, should be reviewed in the light of some years' experience outside the EU. Several Peers supported the amendment, although they hoped that a sunset clause would not be necessary because the sweeping powers they said it granted the Executive would be trimmed.

Lord Ahmad assured Peers that the Government was listening to their concerns but disagreed that a sunset clause was necessary.

The amendment was withdrawn.

13. Schedules

13.1 Schedule 1 – trade sanctions

Part 1 – Trade sanctions

Part 1 of Schedule 1 sets out the different sorts of trade sanctions.

Paragraph two defines the types of person to whom restrictions on exports might apply. There are three categories:

- designated persons
- persons connected with a prescribed country
- a prescribed description of persons connected with a prescribed country.

It also sets out that trade restrictions may be made on goods for the benefit of, or for use in, a prescribed country.

A definition of the "origin" of goods is set out in sub-paragraph 34(b).

Paragraph 4 includes the transfer of certain goods outside the UK as liable to be restricted in connection with similar persons. The

[172] HL Deb 12 December 2017, c1520

Explanatory Notes give as an example the brokering of military goods from outside the UK to a prescribed country.

Paragraph 5 includes the transfer of technology to similar persons or countries, including to a person in the UK where that technology might be used to benefit a prescribed country. An example is the transfer of military technology to a prescribed country, of to a person in the UK who might use it to benefit the prescribed country.

Paragraph 6 broadens the definition to include "making available" to prescribed persons etc., where that may not have been captured in earlier descriptions. "Making available" could include donation or disposal of goods and technology.

Paragraph 7 adds "acquisition" of goods or technology. "Acquisition" is defined in paragraph 34.

Paragraphs 8 and 9 add the acquisition or making available of land to prescribed persons etc.

Paragraph 10 adds prescribed activities connected with military activities, for example providing technical help connected with military activities in a prescribed country.

Paragraphs 11 to 14 add the provision and procurement of prescribed services in a prescribed country. This could be providing technical assistance to the export of military goods to a prescribed country.

Paragraph 15 sets out that restrictions on goods technology and services can be imposed by sanctions regulations in relation to designated ships.

Paragraph 16 sets out that regulations can impose restrictions on the movement of articles of cultural interest. For example, a regulation could prohibit the purchase of artefacts from a prescribed country.

Part 2 – Further provision

Part 2 of the schedules makes further provision about the powers contained in the Bill.

Paragraph 17 sets out how the regulations would be able to describe designated goods by reference to their use or who might use them, the industries they relate to or where they come from.

Paragraph 18 would provide for restrictions on trade and handling of goods, as set out in paragraphs 2 and 3, to stipulate a maximum allowed quantity.

Paragraph 18 and 19 would provide for technology and services to be described by the use to which they are put or the industries with which they are associated.

Paragraph 20 would allow regulations to refer to other lists, for example to the *Export Control Act 2002*.

Paragraph 21 would allow regulations to refer to annex to EU *Council Regulation (EC) 428/2009*, which lists dual-use items (things that might

have a military use) to be subject to export, transfer etc. controls as revised from time to time.[173]

Paragraph 22 would made a similar provision for references to UN lists as revised from time to time.

Paragraphs 23 and 24 would allow for regulations to include ships and aircraft among the goods that may not be brought to the UK or exported. Paragraph 26 would allow ships to be defined by reference to UN lists as amended from time to time.

Paragraph 27 would allow regulations to modify prison sentences for offences under the *Customs and Excise Management Act 1979*, to a maximum of 10 years.

Paragraph 28 and 29 protect the exchange of information for the purpose of scientific research, making information public or any information that is already public, unless the interference is necessary. Whether it is necessary is to be determined by the relevant minister, following certain considerations set out her.

Paragraphs 31 and 32 define the moving, acquiring etc. of goods and technology etc. as direct or indirect, and defines "exported" and "imported" in relation to the Isle of Man (which is part of a customs union with the UK, so transfer between the Isle of Man and the UK is not counted as "export" or "import").

Paragraph 33 says that if prohibited goods are imported to the Isle of Man, then transferred to the UK, they may be regarded as imported.

Paragraphs 34 to 36 define "acquired", "originate", "place", "ship", "technology" and some other terms.

Paragraph 37 includes financial services in "services".

13.2 Schedule 2 – Anti-money laundering and terrorist financing

Schedule 2 deals with money laundering and terrorist financing.

Paragraphs 1 to 17 define some of the things that regulations under Clause 41 could do.

These include:

- requiring risk assessments to be carried out, including setting out factors to be considered in these assessments
- requiring policies to be in place
- requiring certain steps to be taken in relation to customers
- setting out requirements about information provision, retention and disclosure, including keeping registers and records, particularly about ownership and control of assets

[173] For more on the export licensing regime, see the Commons Briefing Paper *The legal and regulatory framework for UK arms exports*, September 2017

- giving supervisory responsibilities to certain bodies, including powers and duties to collect information, give instructions, collaborate with other authorities, license activities;
- give supervisory bodies powers, including to:
  - investigate
  - impose charges and civil penalties and
  - publish statements of censure
- granting injunctions
- creating criminal offences
- making provision for reviews and appeals, and exemptions.

Report Stage

Baroness Bowles of Berkhamsted expressed concern in Amendment 76A to Schedule 2 during the second day of Lords Report Stage about the meaning of "without prejudice to the generality of section 41" at the beginning of the schedule. She said she expected a clarification of that from the Minister during Lords Third Reading.[174] Lord Ahmad of Wimbledon spoke to Amendment 76A on that day, saying that these words do not enable any Minister using this power to circumvent the clear limitations expressed in paragraphs 1 to 17 of the schedule.[175]

Requirements placed on businesses

Lord Ahmad also said during the second day of Lords Report Stage that the Government had tabled amendments to Schedule 2 confirming that businesses will be brought within the scope of anti-money laundering/counter-terrorist financing regulation under paragraph 3 of Schedule 2 **only** where their activities are particularly likely to be used for the purposes of money laundering, terrorist financing or other activities that threaten the integrity of the international financial system.

To address points made by the Lords Delegated Powers and Regulatory Reform Committee, further amendments were tabled making it clear that only businesses of this type can be required to carry out customer due diligence measures under paragraph 4 of the schedule, be supervised for the purposes of paragraph 7, or be registered for the purposes of paragraph 9.[176]

Paragraph 18 sets maximum penalties of two years in prison for conviction on indictment and three months on summary conviction.

Paragraph 19 would allow requirements to be imposed on UK persons even when outside the UK.

Paragraph 20 would provide for regulations under Clause 41 to revoke or amend the *Money Laundering Regulations 2017*

174 HL Deb 17 January 2018, c673
175 HL Deb 17 January 2018, c678
176 HL Deb 17 January 2018, c680

Paragraph 21 defines certain words and phrases in the Schedule.

Committee Stage

During the Lords Committee Stage third day, Baroness Bowles of Berkhamsted proposed that Schedule 2 should not stand part of the Bill.[177] She quoted Paragraph 4 of the schedule which runs: "Require prescribed persons to take prescribed measures in relation to their customers in prescribed circumstances", arguing that that wording was an example of how far too much remained undefined in the schedule, giving too many powers to Ministers to rewrite or revoke the money laundering regulations. She mentioned that the Delegated Powers Committee had criticised the powers available to the Government in Schedule 2, combined with Clause 41 (see above). She gave another example: Paragraph 2(1) of the schedule requires prescribed persons to identify money laundering, terrorist financing and other risks. Baroness Bowles said that the person remained undefined and their responsibilities unlimited in the legislation, arguing that the phrase had been lifted from the 2017 money laundering legislation but with significant limitations in the earlier legislation omitted. She also mentioned that the guidance that forms part of the regime under the 2017 regulations is not provided for in the Bill:

> …the cascade under the 2017 regulations starts with the Government making risk assessments, which feed in to supervisors, who refine or add their own sectoral information and then provide, under a duty, guidance to the entities they regulate. None of that is anywhere near being included in Schedule 2.[178]

The "cascade of responsibility"

Lord Ahmad of Wimbledon disagreed with the Lady Bowles, arguing that the approach taken in Schedule 2 is not so different to that in the existing legislation. When Baroness Kramer came back to the 'cascade' principle, Lord Ahmad accepted that Schedule 2 does not provide for the cascade of information, but said that Clause 41 would enable Ministers to update existing legislation that does provide for it.

During the second day of the Lords Report Stage, a range of technical amendments to Schedule 2 were agreed to, as laid out in Government Amendments 77 to 89, and Amendment 91 and Amendments 93 to 97.[179]

13.3 Schedule 3 – Consequential amendments

Schedule 3 deals with consequential amendments.

Part 1 – Amendments consequent on Part 1

Part 1 would make amendments consequent on part 1 of the Bill, giving powers to impose sanctions.

Paragraph 1 would amend section 8B of the *Immigration Act 1971* to make it possible to exclude persons from the UK in connection with this Bill

177 HL Deb 6 December 2017, c1141
178 HL Deb 6 December 2017, c1143
179 HL Deb 17 January 2018, c716

Paragraph 2 would amend the *Senior Courts Act 1981* to allow reviews and claims under Clause 32 of the present Bill.

Paragraph 3 would amend the ***Regulation of Investigatory Powers Act 2000*** to enable material obtained under powers in that Act to be used in court during legal challenges under Clause 32.

Paragraph 4 would amend the *Serious Organised Crime and Police Act 2005.*

Paragraph 5 would amend Schedule 1 of the *Serious Crime Act 2007* to allow serious crime prevention orders to be obtained with regard to sanctions offences.

Paragraph 6 would amend Schedule 17 of the *Crime and Courts Act 2013* by including a sanctions offence as an offence in relation to which a deferred prosecution agreement may be entered into.

Paragraph 7 would amend Schedule 3 of the *Investigatory Powers Act 2016* to enable material obtained using powers in that Act to be used in court proceedings relating to challenges to designations under the present Bill. .

Paragraph 8 would amend the *Policing and Crime Act 2017* so that civil monetary penalties made using powers in that Act would be able to be applied to financial sanctions made under the present Bill.

Paragraph 8(4) would delete sections 152 to 156 of the *Policing and Crime Act 2017*. The Explanatory notes give the following detail:

> These powers enable the government to make temporary provisions to implement UN financial sanctions without delay, so that there is no implementation gap between the UN agreeing these sanctions and the EU adopting them. Once the Bill is in force these powers will no longer be necessary, since the powers in this Bill will enable UN sanctions to be implemented by the UK directly.[180]

Part 2 – Amendments consequent on the repeal of part of the Terrorist Asset-Freezing etc Act

Part 2 makes amendments to existing legislation consequent on the repeal of Part 1 of the *Terrorist Asset-Freezing etc Act 2010*.

Paragraph 9 and 10 would make minor amendments to other legislation, including removing mentions of the amended Act, for example.

[180] Sanctions and Anti-Money Laundering Bill 2017, Explanatory notes,

14. Transition and future coordination

14.1 Transition

Sanctions are no different from other policy areas – the arrangements for transition are not yet entirely clear. Sanctions and anti-money laundering legislation in force at the time of withdrawal will be preserved using the powers in the Withdrawal Bill, but will be 'frozen', so names will be added or removed from those sanctions lists by powers in this Bill.

If the UK is required to implement all EU law during the transitional period, that will apply to sanctions and the UK could possibly implement all EU sanctions and money laundering legislation using the powers in the present Bill. The Government has indicated, however, that it will bring forward a Withdrawal Agreement and Implementation Bill to provide the legislative basis for any transition period agreed as part of the withdrawal agreement. This Bill could enable any EU law made during this period to effect in UK law automatically, as it does currently through section 2(1) of the ECA, but for a time limited period. Amendments to sanctions lists might then be made automatically too.

During the transitional period the UK is likely to be required to implement EU legislation without the right to change it. Within the context of the bill, this is in particular the fifth Money Laundering Directive (provisionally agreed in December 2017), and any EU sanctions decisions taken after the UK ceases to be a Member State. The UK's approval would no longer be needed for the EU to adopt new sanctions, but the Government would be under a legal obligation to enforce them.

As far as sanctions are concerned, there may be provision for formal consultations between the UK and the EU, as suggested in a paper released by the European Commission on 7 February 2018:

> Without prejudice to Article X+1(2), whenever there is a requirement for coordination, including on sanctions policy, or representation in international organisations or conferences, the United Kingdom may be consulted by the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, as the case may be, on a case-by-case basis.[181]

14.2 Future coordination

Before publishing the Bill, the Government accepted that international coordination, particularly with the EU, is important:

> Sanctions are most effective as a foreign policy tool when delivered by a number of countries simultaneously. We expect to continue working closely with the EU and international partners in

[181] Position paper "Transitional Arrangements in the Withdrawal Agreement", TF50 (2018) 30, 7 February 2018

> future on sanctions, including on licensing and other implementation-related issues.[182]

While all parties, including UK industry organisations,[183] the Government and the EU, accept that coordination will make sanctions more effective, it is not clear yet what arrangements will be put in place after the transition period, if any. Coordination may, in any cawse, not be completely straightforward, as suggested by Tom Keatinge of RUSI:

> As a result of Brexit, there is a very real chance that the UK will have to choose between following an EU position that may often be weaker than that advocated by the UK, or taking a more hawkish position that has the potential to damage UK economic interests.[184]

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182 *Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions - Government response*, FCO, Treasury and Department for International Trade, August 2017, Cm 9490,

183 See for example *Impact of Brexit on the Future Application of UK Sanctions*, Parliamentary briefing, UK Finance, November 2017

184 Tom Keatinge, "Brexit and Sanctions: Can the UK Lead From Behind?", Royal United Service Institute, commentary, 14 August 2017

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