25 April 2018

The Rt Hon Harriet Harman QC MP
Chair, Joint Committee on Human Rights
House of Commons,
London SW1A 0AA

Dear Harriet,

I am grateful to the Joint Committee on Human Rights for its third report of this session, on the Sanctions and Anti-Money Laundering Bill.

We have read the report very carefully, including the areas where the Committee noted our analysis. The report also contained a number of recommendations for further action which I will respond to below.

I welcome the Committee’s acknowledgement that it is not an easy task to balance the potential effect of sanctions on individuals, and matters such as national security and international relations. I think the Bill offers the right balance; it allows the Government to conduct foreign policy and national security objectives, whilst ensuring that there are appropriate safeguards and high levels of Parliamentary scrutiny. The Government recognises that sanctions can impose restrictive measures on individuals and is committed to ensuring that sanctions are as targeted as possible, are lifted as soon as they have achieved their purposes, and that any unintended consequences are minimised.

We note that during Second Reading debate in the Commons, consideration was given to the inclusion of a “Magnitsky clause” which would enable sanctions regulations to be made for the purpose of preventing or responding to “gross human rights abuse or violations.” We support the intention behind a “Magnitsky” amendment. We welcome the provisions in the Bill that allow for the imposition of sanctions to deal with all forms of human rights abuses. We consider it should be a strong presumption that the names of those sanctioned by refusal of entry to the UK, together with the reasons for this, should be made public. We urge Ministers to give reassurance on this point. Similarly, we consider that that use of the exclusions in clause 11 (9) and 12(9) should be the exception and not the norm. (Paragraph 18)

I recognise the depth of feeling on the inclusion of a ‘Magnitsky clause’ (relating to gross human rights abuses) in this Bill. At the Committee stage of the Bill’s passage
in the House of Commons, I made a genuine offer to work closely with Honourable Members on all sides of the House to establish the maximum possible consensus before Report stage. I am pleased to say that I have been able to build on that work and this week I have tabled Government amendments to insert a further purpose in the Bill explicitly enabling the powers to be used in respect of "gross human rights abuses or violations".

I should note that the intention is that all persons who are subject to sanctions are named and that those names are contained on a consolidated list published by the Government on its website. This would apply to those designated for gross human rights abuses as well as those designated for any other purposes.

I agree with the Committee that the use of the exclusions in clause 11(9) and 12(9) should be the exception and not the norm, but the Government must have the ability to be flexible here when required.

We do not consider that the Government has been sufficiently clear in setting out its reasons for reducing the threshold for making designation decisions from "reasonable grounds to believe" to "reasonable grounds to suspect". We would be grateful if the Government could set out in more detail why it is necessary to use the lower international standard as opposed to the higher standard that is currently applied to domestic terrorist-related sanctions. Colleagues may wish to probe this matter further in the course of their legislative scrutiny. (Paragraph 32)

I am grateful to the Committee for highlighting this important issue. I would like to reassure the Committee that I do recognise and understand their concerns about differences between this test ("reasonable grounds to suspect") and the tests that have previously been used in older legislation dealing specifically with domestic counter-terrorism financial sanctions (reasonable belief). There is a delicate balance to be struck between the rights of those subject to sanctions, and the very clear public interest in being able to establish targeted and effective sanctions, especially in the field of counter-terrorism. I am happy to explain why we have decided to use a test of "reasonable grounds to suspect".

First, it is important to note that "reasonable grounds to suspect" is the test the UK currently adopts in relation to all sanctions at the UN and EU (including counter-terrorism sanctions). This point was underlined in the House of Lord’s EU Committee’s 11th report of the 2016-17 Session, "The Legality of EU Sanctions", where the Committee recommended the codification of the standard used at the EU level. Therefore the Bill reflects a continuation of current practice in relation to such sanctions.

In addition, maintaining the threshold that we currently use when considering designations at the UN and EU will facilitate alignment with our international partners where our political objectives converge. As noted in the EU Committee’s 8th Report of Session 2017–19, "Brexit: sanctions policy", the most effective sanctions regimes are designed and applied alongside international partners.
Second, it is important to remember that (as the Committee has noted) the application of this threshold was considered and endorsed by the Supreme Court in the Youssef case\(^1\) in 2016. It was also considered by the EU General Court in the case of Mohammed Al-Ghabra\(^2\), where the court indicated that this threshold can meet the requirement for a listing to have a "sufficiently solid factual basis" (the standard applied by the EU courts), provided that the grounds are supported by sufficient information or evidence (the suspicion must be based on grounds substantiated by evidence or information). The use of this threshold is accordingly a perfectly lawful and reasonable course of action, given that it has been considered and accepted by both UK and EU courts.

Third, the Committee will be aware of how the threat from terrorism has changed even in the short time since Terrorist Asset Freezing etc. Act 2010 (TAFA) was passed. Therefore it is important that we have the right tools for countering this threat. Aligning the threshold in relation to domestic counter-terrorism sanctions with that relating to other sanctions designations will improve the coherence and clarity of our sanctions framework as a whole. It will allow the Government to impose sanctions based on similar levels of evidence as our international partners. This will enable us to use sanctions as a flexible and effective tool to counter terrorism. As such, whilst I recognise that this means a change to the standard in the Bill for sanctions previously imposed under TAFA, this would bring the standard for the imposition of such sanctions in line with all other sanctions that would be imposed under the Bill, noting that these other sanctions will make up the vast majority of all sanctions that we intend to bring into force using the new framework.

This is not a new or a surprising policy. Both the Government White Paper, published in April 2017, and in the consultation response dated August 2017, proposed that the Bill would align the threshold for domestic counter-terrorism sanctions to the "reasonable grounds to suspect" threshold for other counter-terrorism and country sanctions.

Fourth, it is important to recognise the context in which this change takes place. The Bill also sets out robust procedures to enable individuals to challenge their designations. It ensures that they must be promptly informed of the reasons for their designation. It provides access to quick redress from a Minister by way of an administrative review. It also provides access to the Court for a challenge against any Ministerial decision on review. Finally, it includes an annual review of the regime, to ensure that the sanctions regime as a whole is still an appropriate way to address the issue it is aimed at, and a full review of every single designation at least once every three years. Taken together, these are a powerful set of protections for those who might be subject to designation.

I recognise that a fine balance must be struck between keeping our citizens safe – a priority for any Government is the security of their citizens – and protecting the fundamental rights of individuals. While the threshold for designating individuals in respect of domestic counter-terrorism asset freezes would be changed by the Bill, it will ensure that the Government can continue to impose sanctions in line with

\(^1\) Youssef v Secretary of State for Foreign and Commonwealth Affairs [2016] AC 1457  
\(^2\) Al-Ghabra v Commission, T-248/13
international partners going forward, and gives a designated person access to robust protections and procedural safeguards that are in line with international best practice. For the reasons I have given above, I believe that the Bill strikes the right balance.

We recommend that clause 21 is amended to require annual reviews of designation decisions. (See Appendix 1). (Paragraph 38)

We recognise that the UK is bound by international law to implement UN listings. However, where there is scope within the domestic system to strengthen due process rights, this should be done. Regular periodic review of designations is essential for ensuring that decisions remain justified, necessary, and proportionate and do not interfere with rights for longer than required. (Paragraph 47)

I accept that the EU currently carries out regular annual reviews of designations. However, it is important to remember that these EU reviews are relatively light touch. They are not a good comparison to the system which we have provided for in the Bill.

When the EU reviews a designation, designated persons are invited by the Council to present new information and Member States are able to make observations – but they are under no obligation to engage. Any subsequent review will not go further than dealing with those observations. It follows that the annual EU designation is not subject to the same thorough review as envisaged by the Bill.

The UK triennial review of designations (in clause 21) would replace this EU light touch review with a comprehensive re-examination of each and every designation. This would act as a backstop to any of the other opportunities for review to ensure that designations are properly re-examined at an appropriate interval, and at least once every three years, rather than left indeterminately (for example, neither the US nor Canada have a requirement for any periodic review). The new UK regime will provide deeper scrutiny and assessment of designations than what the EU undertakes now.

It is also important to place the UK triennial review in its proper context. During this period, there are a number of other ways a review can be initiated. First, a designated person can request a reassessment of their designation and a further reassessment at any time if there is a significant matter that has not been previously considered. Secondly, designated persons can challenge their designation in court on judicial review principles (and we have made additional points as to the extent of that review below) if they are not happy with the outcome of any reassessment. Thirdly, a Minister may instigate a reassessment at any time – for example, if new information becomes available to the Government. In the event that one of our international partners delisted an individual or organisation who was also designated under UK sanctions, that would constitute new information and would likely trigger a Ministerial reassessment of the UK designation.

It is worth noting that the only time a person will not have a right under the Bill to challenge their designation, during this three year period, is if all matters have already been considered and there is no new significant matter to take into account. In such circumstances, I am not convinced that there is any need for a further reassessment or challenge.
In addition, there is an administrative reassessment procedure included in the Bill (in clause 20). This is designed, in particular, to mitigate against the risk of mistaken identity, and offers designated persons a route to quick redress without the need to go through the courts, by challenging their listing directly with the Government, which must respond as soon as reasonably practicable.

The comprehensive triennial review of each designation will be a burdensome process. A comprehensive review of an existing designation and its supporting evidence takes at a minimum one full working day. With approximately 1000 existing EU listings, each set of reviews will therefore take a team of four full time staff at a minimum more than a year to complete.

As such, I remain of the view that a triennial, comprehensive and detailed review of each and every UK designation, when taken with the administrative and judicial safeguards contained in the Bill, including reviews following requests for reconsideration, administrative reassessment, annual reporting to Parliament, and judicial scrutiny, is the appropriate timeframe to ensure that decisions remain robust and do not interfere with rights for longer than required. I am also of the view that this package of safeguards will constitute at least as good a set of protections as we have now in the EU, if not better.

In our view, it is undesirable to leave any room for uncertainty as to the courts' jurisdiction. In cases involving severe interferences with the fundamental rights of individuals, they should have a full right of appeal. We therefore recommend that clause 33(4) is amended to provide for a full right of appeal for designated persons. (See Appendix 1). (Paragraph 54)

I am well aware that the Court has taken a robust view in the past of the examination of decision-making in these types of cases—for example, the decision of the Court of Appeal in the case of MB, which the Minister of State for the Commonwealth and the UN referred to in his letter of 15 January 2018. I am also aware of the case of GG, which the Committee cited in their report. Both of these cases demonstrate that the Court will identify and apply the appropriate level of scrutiny on a case by case basis. The Bill does nothing to disapply or limit the principles applied by the Court in these cases.

I anticipate that a Court will continue to adopt this flexible approach, and will apply this type of anxious scrutiny as a matter of course regarding challenges to sanctions designations.

I do not consider that there is sufficient difference between a court examining such decisions on the principles of judicial review with anxious scrutiny, and a court examining such decisions as part of a full appeal, to give rise to any concerns about an inadequate standard of review. Certainly I have every confidence that UK courts will continue to hold the Government to account to the highest standard. I accordingly do not see any need to amend the Bill.

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3 Secretary of State for the Home Department v MB [2006] EWCA Civ 1140
We are mindful of the risk that a culture of prohibitive damages could prevent the ability of the Government to use sanctions as a useful tool to seek to combat horrific human rights abuses in third countries. However, we also underline the importance of compliance with the right to an effective remedy, as protected by Article 13 of the Convention. It would not be helpful for Parliament to pass a Sanctions Bill that was then subject to successful (and costly) judicial challenge before the UK Courts or the Strasbourg Court for failure to adequately provide for effective remedy under Article 13 of the Convention. Colleagues may wish to test the Government's thinking on this matter further in the course of their legislative scrutiny. We therefore propose a probing amendment to clause 34(2) dealing with the right to an effective remedy. This may establish why the Government does not appear concerned that, as drafted, the Bill would seem to be vulnerable to challenge as non-compliant with Article 13 of the Convention. (Paragraph 60)

In drafting this clause, we have had due regard to Articles 13 and 41 of the European Convention on Human Rights, and the way it has been applied by the Strasbourg court, as well as by UK and EU courts.

We note that the general position under Article 13 is that a person whose Convention rights have been breached should be placed in the position that they would have been had the breach not occurred. In the case of a successful challenge to a designation, the person's designation will be revoked (or in the case of designations deriving from a resolution of the UN Security Council, which the UK cannot unilaterally revoke, the Minister will be bound to use best endeavours to seek to remove them from the UN list). We accept that a person may suffer a pecuniary loss as a result of designation, and the Bill does not close the door to a further remedy in such cases.

As the Committee has noted, any award of damages under section 8 of the Human Rights Act 1998 is discretionary. The Committee also notes that section 8 requires the court to have regard to Article 41, which states that a remedy should only be awarded where such a remedy is 'necessary'. Our starting point was to look at the situations where an award might be 'necessary'.

This is to be ascertained in the context of all of the circumstances of the case, including not just the case itself (and any pecuniary loss suffered by a designated person) but the overall context of the case\(^4\), which would include the legitimate aims of the sanctions and the harm to them should the appropriate Minister be constrained in using designation powers.

The Committee has said that the suggestion in Wainwright\(^5\), which it has summarised as restricting awards to cases of intentional breaches only, was disagreed with in Clayton and Tomlinson. However, we note that the Bill does not restrict the court to only award damages for intentional breaches. It also enables the court to award damages for negligent behaviour. The question we sought to answer is in which cases such an award is 'necessary'.

\(^4\) Al Skeini v United Kingdom, (2011) 53 EHRR 553
\(^5\) Wainwright v Home Office [2003] UKHL 53
The case law set out in our original memorandum to the Committee on the Bill showed why we chose to restrict the circumstances in which a remedy could be awarded to those of decisions made in bad faith, or made negligently. This is in line with the case law in Wainwright and Infinis\(^6\), as well as Lord Woolf's comments cited with approval by the Law Commission.

We do not think that the Bill as drafted removes the ability of a court to award damages in cases where it is necessary to do so. Rather, it focuses the court's discretion on those areas where the courts have recognised an award may be necessary. It is then for the court to exercise its own discretion in the context of any particular case.

The Committee has noted that there is a possibility that there could be other areas where an award was 'necessary' that were not covered by the Bill as drafted. However, our analysis of the case law did not uncover any such areas.

We have also looked at the approach of the EU courts to remedies in sanctions cases. They have previously confounded the award of compensation to cases where there are "sufficiently serious" breaches of law. The only such case we are aware of in relation to sanctions is the case of Safa Nicu\(^7\), which gives an example of such a breach as where the designating body had "manifestly and gravely disregarded the limits set out on its discretion". We consider that this is directly analogous to the use of a designation in bad faith, or where designation arises through negligence. In the absence of bad faith or negligence, we did not see that the designating body could be said to have manifestly or gravely disregarded the limits on their powers.

We hope that this analysis provides some reassurance to the Committee.

**In order to ensure compliance with Article 6, the standard of disclosure should be sufficient to ensure persons challenging their designation are given sufficient information to enable them to refute, as far as possible, the case against them. We expect that Ministers, when giving a "statement of reasons" as required by clauses 11(8) and 12(8), will adhere to this standard. (Paragraph 62)**

In the case of AF (No 3)\(^8\) the Court ruled that that, even where a closed material procedure was used, individuals had to be given sufficient information about the allegations against them to be able to give effective instructions to the special advocate in respect of the case against them. This test has subsequently been applied in appropriate cases by the courts. I am happy to confirm that the Government intends to provide sufficient to information to designated persons, in accordance with the relevant provisions of the Bill, to enable them to refute, as far as possible, the case against them.

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\(^6\) *R (Infinis plc) v Gas and Electricity Markets Authority* [2011] EWHC 1873 (Admin)

\(^7\) Safa Nicu Sephan Co, C-45/15 P, 30/05/17

\(^8\) Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28
In addition to the limitations placed on the courts, the Bill has removed existing independent oversight arrangements in relation to terrorist-related sanctions. We see no reason for the removal of this oversight function and invite the Government to provide this. Pending any such explanation we recommend that the powers of review currently vested in the Independent Reviewer are retained and set out clearly on the face of the Bill. (See amendment in Appendix 1). (Paragraph 65)

I accept this point and will implement the Committee's recommendation. This week I have tabled Government amendments to the Bill to replicate the IRTL's remit to cover the future UK autonomous counter-terrorism sanctions made under the powers in the Bill, to replace those currently in Part 1 of TAFA.

We recommend that the publication of the guidance regarding licensing and exemptions is expedited. (Paragraph 68)

The Government is required under clause 38 of the Bill to provide guidance on the requirements of regulations made under the Bill. The Economic Secretary to the Treasury, John Glen MP, wrote to the Public Bill Committee on the Bill on 5 March confirming the government will publish guidance before the sanctions regulations enter into force to allow business a chance to familiarise themselves with the new framework.

We will continue to engage with stakeholders, where necessary, to ensure that guidance covers areas of concern. Government departments currently provide a range of guidance to sectors affected by sanctions implementation. For example, OFSI recently issued updated guidance to the charity sector on a range of issues following consultation with stakeholders. Similarly, next week I intend to publish a policy note on exceptions and licences under the new framework that will give stakeholders more details of the Government's thinking on this area.

We will also continue to work with the NGO sector to address their particular concerns. For example, Lord Ahmad of Wimbledon met with representatives of the NGO sector in December 2017 and on 8 March 2018 he responded to the NGO Sanctions and Counter-Terrorist Working Group position paper on the Bill which was published on 21 December 2017.

I thank the Committee again for their thorough analysis of the Bill and constructive recommendations. I am copying this response to the Lord Ahmad of Wimbledon, Minister of State for the Commonwealth and the UN, who led this Bill through the House of Lords, and John Glen MP, the Economic Secretary to the Treasury, who has been leading on some of the clauses during the Bill’s passage through the House of Commons.

RT HON SIR ALAN DUNCAN MP