The Rt Hon. the Baroness Taylor of Bolton
Chairman Constitution Committee
House of Lords
London
SW1A 0PW

21 December 2017

Dear Winifred,

Sanctions and Anti-Money Laundering Bill [HL]

I am grateful to the Committee for its careful consideration of the Sanctions and Anti-Money Laundering Bill. The Committee’s analysis and recommendations have been very helpful in informing debates on the Bill in the House. I am writing to set out the Government’s position on each of the eleven recommendations.

Sanctions regulations

i. 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.

As set out in the Explanatory Notes to the Bill, the matters to which the provisions of the Bill relate are not within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly and no legislative consent motion is being sought in relation to any provision of the Bill. The Legislative
and Regulatory Reform Act 2006 and Public Bodies Act 2011, by contrast, required legislative consent because of their impact on devolved functions.

While the Bill does contain a power to make consequential amendments to devolved legislation, these amendments will be consequential upon provisions about sanctions, which are reserved to Westminster. The primary purpose of such measures will always be a reserved purpose. The devolution settlement already envisages that consequential amendments to devolved legislation made for a purpose that is reserved does not require the consent of the devolved legislatures. We will, however, work closely with the devolved authorities to ensure that sanctions are properly implemented and enforced throughout the UK.

ii. **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).**

We are continuing to reflect on these points, given the strength of feeling which both the Committee’s report and peers in the House made clear to me. However, we hope the Committee will appreciate that not having the ability to deploy new types of sanction swiftly, without the delay involved in passing new primary legislation (if a legislative slot can be obtained), could hinder our ability to coordinate sanctions with allies at times when UN action is not possible. The Government has sought to balance the twin demands of ensuring parliamentary scrutiny and ensuring rapid international responses by providing that the draft-affirmative procedure be used for regulations made using clause 39. However, as I indicated, we will continue to think in detail about this point, and will consider what further reassurance I can give to members at Report stage.

iii. **Given that the purpose of the Bill is to address the need for domestic powers to impose, amend and revoke sanctions after Brexit, it is important to ensure that there are sufficient safeguards and there is adequate parliamentary scrutiny to make the delegated powers constitutionally acceptable.**

I believe that the package of checks and balances in the Bill, as introduced to the House, will provide sufficient safeguards.

In cases where the UK has chosen to create a sanctions regime and the UN has not done so, the made-affirmative procedure will apply, ensuring that sanctions can be imposed swiftly to avoid asset flight, and that both Houses of Parliament must approve the sanctions in order for them to remain in place.

The Bill also provides for an annual review of each sanctions regime against the purpose it was put in place to achieve. This will involve looking at the current global picture and overall dynamics in the same way as the EU’s annual reviews, and will provide a trigger for Ministers to instigate a reassessment of designations that may no
longer meet the threshold given the passage of time. It provides for a broader triennial substantive review of all the designations under the regime.

The Bill provides a number of other in-built protections to ensure that the Government does not act unreasonably when imposing sanctions on individuals, including evidentiary thresholds and the right of designated persons to request a reassessment of Ministerial decisions and to challenge those decisions in court.

**Designation powers**

iv. **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.**

I have assured Noble Lords at both Second Reading and in Committee that where Convention are engaged, a Minister will need to comply with the European Convention on Human Rights and Strasbourg case law, and that will include an assessment of proportionality. I therefore do not consider it necessary to include the proportionality requirement on the face of the Bill. However I am continuing to consider the points made in the Committee’s report and at Committee stage, and will consider what further reassurance I can give members at Report stage.

v. **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).**

I acknowledge the arguments put forward in this area. I can assure the Committee that we will always seek to designate by name wherever possible. In exceptional cases, we may have a clear idea of the category of persons we wish to designate but may not be able to identify all of the individuals by name. Designating by description would then offer a way to prevent a well-defined category of people from using their funds and assets to support activities targeted by sanctions, such as terrorism. I am investigating whether there is more that we could do to define this power to better reflect the points that have been made, and will consider what further reassurance I can give to members at Report stage.

vi. **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.**
The purpose of this clause is to enable the Government to impose sectoral financial sanctions, for example to prevent formation of, or investment in, joint ventures with companies from North Korea. The UK already implements sectoral measures of this kind under UN and EU sanctions regimes. The removal of the ability to apply sanctions to persons connected with a particular country would leave us unable to comply with our international obligations and unable to act in concert with international partners.

It is a necessary but unfortunate consequence of sanctions that they have impact on people who are not personally involved in the activities that are being targeted. For example, citizens of North Korea who are not involved in nuclear proliferation will be affected by the restrictions on transfers of funds to North Korea, which apply to all transfers of funds to and from that country. However, this is necessary to ensure that sanctions have sufficient impact to achieve change in the behaviours they target.

I appreciate the points raised by the Committee and by members during the debate, and I have asked officials to examine what further reassurance can be given about how the power would be used.

Criminal offences

vii. 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.

I would like to be clear with the Committee: these types of offences already exist. People who breach financial, trade, immigration and transport-related sanctions can be convicted for those breaches in the criminal courts. The White Paper made clear that existing maximum sentences for breaches of trade and financial sanctions will not change and the Bill sets a cap of 10 years on maximum sentences.

The Government currently makes regulations under the negative procedure to create offences and penalties in UK law for breaches of the sanctions we implement now via EU law. The nature of these offences, including maximum sentences, is set out in primary legislation such as the Policing and Crime Act 2017 and the Export Control Act 2002. In addition, certain offences (and maximum penalties) are set down in Orders in Council made under the United Nations Act 1946 to implement some transport sanctions imposed at the UN level. These attract no Parliamentary procedure. Therefore these powers are supported by precedent.

Through the Bill we are creating an autonomous UK legal framework for imposing sanctions through regulations. The Committee will, I hope, appreciate the difficulties of putting all the details of all offences and penalties on the face of the Bill when the exact prohibitions and requirements for each sanctions regime would not be known until the regulations which create that regime are made. This point was accepted by the Delegated Powers and Reducing Regulation Committee in their report published
on 17 November 2017. I recognise the strength of feeling on this issue and have asked my officials to consider what further reassurance can be given about the use of the powers.

Oversight

Court reviews

viii. The Bill should impose an obligation on the minister to conclude the review as soon as reasonably practicable.

I agree that the Minister should do so. I can assure the Committee that the Government fully intends to act promptly in response to requests for reassessments. This will allow swift redress for designated persons when appropriate and will also have the advantage of keeping unnecessary pressure off the courts and potentially reducing costs to the taxpayer. While I do not think that express provision is necessary to achieve this, I will consider what further reassurance I can give to members at Report stage.

Remedies

ix. 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.

Here I differ in my opinion. As a member State of the UN, we are legally bound to implement decisions of the United Nations Security Council taken under Chapter VII of the Charter, as sanctions decisions are. If a person has been designated by the UN Security Council pursuant to a Chapter VII resolution, the UK is bound by international law to maintain sanctions against the person unless and until the designation is removed. As set out in Article 103 of the UN charter, these UN obligations take precedence over obligations under any other international agreement, such as those in the European Convention on Human Rights.

I recognise that in the Kadi case, the Court of Justice of the European Union annulled an EU designation that was based on a decision of the UN Security Council, although I note that Mr Kadi had been delisted by the UN by the time of the judgement of the Court. The UK has argued consistently that the Court should not have done so. While the EU is not a signatory to the UN charter and is therefore not bound by its terms, the UK is in a different position and as a permanent member of the Security Council our practice in this area attracts particular scrutiny.

The proposal we have made in the Bill represents a good faith effort to reconcile the UK’s legal obligation to uphold the UN designation with the need for proper access to the courts and an effective remedy in domestic law. A designated person can seek a delisting directly at the UN. They also have the right to challenge their designation in a UK court and the court can order the Minister to go back to the UN to exercise best endeavours to get the listing removed. This recognises that the UK cannot unilaterally remove an individual from sanctions at the UN level.

\[ Kadi \text{ II}, C 584/10 P, C 593/10 P \text{ and } C 595/10 P. \]
I do not agree that the provisions in the Bill would leave a person in the UK in a worse-off position than a person in another EU member state. All the other EU member states are also signatories to the UN Charter, and are bound by it. If there is no EU law in place to implement a UN designation, those countries would need urgently to take alternative steps, for example under their own domestic law, to remain in compliance with their UN obligations. The UK has done the same in the past – when, in 2010, the Supreme Court in the case of Ahmed ruled that an order putting UN counter-terrorist sanctions in place was ultra vires, we created domestic legislation, the Terrorist Asset-Freezing etc. Act 2010, to ensure that the UN sanctions remained in place.

Procedural fairness

x. 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 them, the individual’s meaningful participation in the review process is jeopardised.

I agree with this underlying principle, which was also raised at Second Reading and Committee. The Government already commits to these standards and, save in exceptional circumstances (e.g. where damage to national security would be caused), would be expected by the courts to meet them – and be held to account if it did not. The courts have already made several findings on the need for disclosure of reasons and evidence in relation to designations, which would continue to apply, and the Bill makes no effort to disturb these requirements.

The Government fully intends to inform all designated parties after their designation either directly in writing or, if we do not have an address for them, through the Government website. This notification would set out clearly a statement of reasons why they have been designated and the channels through which they can challenge their designation via a request for a reassessment of their designation and a legal challenge in the courts. In the event of a legal challenge, the Government would be obliged to disclose evidence in line with established case-law (AF No 3). Some material may not be suitable for disclosure for national security reasons. In these cases, the Closed Material Procedure detailed in clause 34 of the Bill would apply.

While I do not think that express provision is necessary to achieve this, I will consider what further reassurance I can give to members at Report stage.

Review provisions

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2 HM Treasury v Ahmed and others [2010] UKSC 2 at [38]
3 Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28.
xi. 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.

Clause 20 should be considered as part of a system of safeguards that the Government have built into this Bill which I believe will provide the right level of protection to designated persons.

First, a designated person can request a reassessment of their designation and a further reassessment at any time there is a significant matter that has not been previously considered. Secondly, designated persons can challenge in court on judicial review principles 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. Fourthly, the Bill mandates a broader political review of each sanctions regime at least once a year. Therefore the review mandated by Clause 20 is just one of a series of protections for designated persons.

It is worth noting that the only time a person will not have a right to request a reassessment, or launch a legal challenge, during this three year period is after they have requested a reassessment, the Minister has considered it and upheld the designation, that decision has been upheld by the court, 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.

The three-year timeline is in line with current Australian practice. The US, Canada and others do not have a legal requirement to carry out such reviews at all. While I accept that the EU reviews are more frequent, the process is relatively light-touch compared to the far-reaching, resource intensive exercise envisaged in Clause 20. In the event that one of our international partners delisted an individual or organisation who was also designated under UK sanctions, that would constitute important new information and would trigger a Ministerial reassessment of the UK designation.

Requiring a full review of all the evidence for each listing every year risks cutting across ongoing court challenges and adding further complexity to that litigation. It would hold the UK to a higher standard than our international partners and is, we believe, unnecessary given the wider procedural protections I have outlined.

I thank the Committee again for their thorough analysis of the Bill and constructive recommendations, which are in the finest traditions of the House. As set out above, the Government is still reflecting on a number of these recommendations and I look forward to further engagement with members of the Committee ahead of the Bill’s Report Stage.
I note that some of the issues raised by the Committee were also covered in the separate report on the Bill published by the Delegated Powers and Regulatory Reform Committee. Therefore I am copying this response to the Rt Hon the Lord Blencathra, Chair of that Committee.

LORD AHMAD OF WIMBLEDON
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