HOUSE OF LORDS

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One-off Inquiry
on

PLANS FOR NEW COURT RULES AND CONDUCT OF EU SANCTIONS

Evidence Session *Heard in Public* *Questions 1 – 12*

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4.05 pm

Witnesses: Rt Hon David Lidington MP, David Concar, Cathy Adams and Catherine Holmes

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Members present

Baroness Quin (Chairman)
Lord Anderson of Swansea
Lord Boswell of Aynho
Baroness Coussins
Lord Dykes
Viscount Eccles
Baroness Eccles of Moulton
Lord Elystan-Morgan
Lord Hodgson of Astley Abbotts
Baroness Liddell of Coatdyke
Lord Richard
Lord Stoneham of Droxford
Lord Tugendhat

Examination of Witnesses

Rt Hon David Lidington MP, Minister for Europe, **Cathy Adams**, Deputy Legal Director, Foreign and Commonwealth Office, **David Concar**, Head of International Organisations Department, and **Catherine Holmes**, Head of the Sanctions Section at the FCO

Q1 The Chairman: Minister, I welcome you to this session. I do not know whether this is the last time you have been pencilled in for a meeting with sub-committees of the House of Lords EU Select Committee, but you have two for the price of one today: Sub-Committee E and Sub-Committee C. As ever, we are pleased to see you. Perhaps I can also say that we are very grateful for all the times you have come to see us during this Parliament and for your willingness to engage with members of the sub-committees and indeed of the EU Select Committee.

We have a number of questions. The first ones rather fall within the remit of the work of Sub-Committee E, and the last few fall more into the remit of Sub-Committee C. You will appreciate that there is a lot of interest in both Committees on the subject under consideration.

I will remind you—I am sure you are extremely familiar with this—that the session is open to the public. A webcast of the session goes out live as an audio transmission and is subsequently accessible via the parliamentary website. A verbatim transcript is taken of the evidence, which again is put on to the parliamentary website. You will also get a copy of the transcript to check for accuracy, and we would obviously be grateful if you could advise us of

any corrections as quickly as possible. If you wish to clarify or amplify any points made during your evidence, or have any additional points to make, again you are welcome to submit those to us.

Perhaps you would like to introduce yourself and your colleagues for the record.

Rt Hon David Lidington MP: Thank you very much indeed. On my left is Cathy Adams, who is the deputy legal director at the Foreign and Commonwealth Office, and on my right is David Concar, who is head of the International Organisations Department, and Catherine Holmes, who is head of the Sanctions Section at the FCO.

Q2 The Chairman: Thank you very much. Perhaps we can go straight into the questions. I will start with the question on scrutiny. The Government, of course, submitted an Explanatory Memorandum to us in April last year, but we heard nothing else until December last year, when you warned that the member states were very close to agreeing the matter. We were wondering why the agreement by the member states and clearance by us became so urgent.

Rt Hon David Lidington MP: The answer lies very much in the pace at which events moved in Brussels. The Committee will recall that last year we had both the change in the Commission and the elections to the European Parliament. That caused something of a hiatus in the normal progress of business. As the old Commission started to wind down and pack up, the old Parliament Members were doing the same thing. Then obviously there was the time before the new Commission was in place, and when Members of the Parliament took office after election but then had to get down to sorting out committees, office holders and so on. While it is true that this dossier was much more the province of the Council and the court, there was a very definite sense last year, from about a month before the European Parliament elections, that the whole Brussels machine was if not on pause then working at a much slower pace than we are accustomed to. The outcome in any case was that the negotiations on the draft clause in Brussels moved pretty slowly from April right through to the autumn of last year, partly because we and a number of other member states had persuaded the Greek presidency that we needed more time to consider the rules, given their importance. Once this dossier ceased to be an objective for completion within the term of the Greek presidency, again a certain amount of impetus was lost. The Greeks would not give it the same priority as something they could hope to set their seal on by the end of June.

The Council working group went through the draft rules article by article, and that review was not completed until mid-October 2014. Then, of course, the court had to be involved, and it was very unclear whether the court would be willing to take on board the suggested amendments from member states. That only became clear when the court produced its own revised draft on 6 November. It was really at that point that there started to be a point in coming to the Committee and saying that these negotiations had now reached a new stage.

Once that draft came out in November, it became clear, too, that other member states had few concerns remaining. The Italian presidency was very keen indeed to secure agreement on this dossier within their six-month term. They, it is fair to say, had started relatively late because the new Commission and Parliament were being established, so they wanted to achieve as much within their time as they could. When it became clear that the presidency was going to move swiftly to adoption, we wrote to this Committee as soon as possible. Most member states were very keen to finalise a rule once it became clear from the General Court that it would not accept any further amendments. The court and member states wanted to have the new mechanism put into place because it would help in defending challenges against sanction listings which the whole of the Council felt were justified.

We continued to argue for substantive changes to Article 105. We had no difficulty with the other procedural changes that were being proposed. We signalled, too, that we retained a parliamentary scrutiny reserve on the package, but it is QMV dossier, so we were unable to prevent the rules being adopted.

Q3 Lord Anderson of Swansea: Minister, welcome. It might sound like an obituary, but you have personally been a model, compared with some of your colleagues, in the way you deal with the Committee. Obviously you have reservations; you have said that you will abstain in the Council when these rules are agreed, and you will issue a national statement setting out our opposition. Will we be on our own?

Rt Hon David Lidington MP: We have abstained in the Council. The General Affairs Council met on 10 February and considered these then. This was partly for scrutiny reasons, and I did not feel that it was right to override, given in particular that a qualified majority existed anyway, and given that we agreed with much of the substance of what was being proposed, but with reservations, on Article 105. Even had there been unanimity, I would have thought long and hard before actually blocking it at that point, given the mood and reluctance among my colleagues for further changes. But we did consider that the provisions in Article 105 were imperfect and that those flaws would mean that we would feel unable in

many circumstances to make use of the new closed material procedures. We thought that having a closed material procedure was a useful step forward in enabling the Council to protect key sanctions listings in a fashion which the court would find acceptable, but the abstention was designed to make it clear that the mechanism did not contain all the safeguards that we had been seeking in order to manage expectations about our ability to use the mechanism. Our particular concerns—

Lord Anderson of Swansea: Sorry, there was no question with respect to that. The question was: are we on our own?

Rt Hon David Lidington MP: We are on our own in abstaining, but there was no row about this. I made a brief statement at the General Affairs Council. Nobody challenged it, nobody objected to it, and it was accepted, partly for scrutiny reasons and partly because we had these concerns about the design of the proposal. A lot of other member states, of course, do not have the capacity to deploy confidential or secret information in support of sanctions listings. Therefore, some of our worries were worries that were not on the radar of some of our colleagues.

Lord Anderson of Swansea: But is it really a question of tactics? If you plead the case that we alone are setting out a statement of our position, it will go through, and we will again have shown that we are unilaterally on our own, that we are the asterisk country. Is it worth it?

Rt Hon David Lidington MP: I do not agree. It is worth it because it has been important to show that we are respecting parliamentary scrutiny, particularly that of the House of Lords Committee, but also because that abstention and the national statement provided a peg on which I could explain publicly to my colleagues the reservations that we continued to have. I have been in many Council meetings where one or other member state has registered an abstention on a particular dossier, either because of a problem with the substance or because of something to do with procedure, usually a parliamentary scrutiny reserve, and in my experience in EU circles it is accepted as being a perfectly proper way in which any member state can express reservations while at the same time signalling clearly that it is not trying to block agreement on the thing going ahead.

Lord Anderson of Swansea: So long as you do not make a regular practice of it?

Rt Hon David Lidington MP: If I invited Lord Anderson to look at the record, Chairman, he would see that we often find ourselves part of a qualified majority. Occasionally we abstain, occasionally we vote against. But I can honestly say that this was not an area of

enormous contention. It was not something that would cause us to sacrifice negotiating tactics in any other dossier.

Q4 Lord Richard: Coming to the workload of the court, this Committee has issued two reports highlighting the considerable workload problems facing the General Court. When the President of the General Court spoke to the Council, he highlighted the ever increasing workload of the court and explained that the new rules were designed to do three things: to introduce consistent procedural rules between the CJEU's three consistent courts; secondly, to provide solutions to procedural situations not covered by the current rules, such as there having been confidential material; and, thirdly, to draw a clearer distinction between the three classes of action dealt with by the GC. Do you think that these new rules will actually help to alleviate these problems?

Rt Hon David Lidington MP: I think they will help up to a point. The changes to Article 105 form a distinct category. As the Committee will know, the measure on closed material procedures is a response by the Council and the court to the Kadi judgments and the risk that we might find ourselves in a situation where we had conflicting obligations under international law through UN Security Council sanctions and European law as judged in a specific case by the European Court of Justice. But the other changes to the rules will help to some extent in providing greater efficiency and speeding up determination of cases before the court. Examples of that would be that the new rules allow straightforward intellectual property cases to be referred to a single judge rather than to a panel, and the language provisions for intellectual property cases are being streamlined as well. It is not a panacea but I think it will be helpful.

Lord Richard: But it is practical stuff.

Rt Hon David Lidington MP: It is practical stuff.

Q5 Lord Elystan-Morgan: Minister, I wonder if I could ask you what is happening in relation to member states' so far failed efforts to increase the court's judiciary. Is the United Kingdom setting its face completely against any possibility of adding to the number of full-time judges? Secondly, the reality of the situation, what is the backlog at the moment? Thirdly, what is that backlog likely to be in six months' time?

Rt Hon David Lidington MP: I may have to write to the Committee on Lord Elystan-Morgan's final point. If the Committee will forgive me for a slightly longer response, I have some recent information on this dossier that I am able to give today. The Committee knows that proposals to address the backlog have been under discussion since 2011. I think this

Committee, or one of the Lords Committees, has produced two reports on the subject during that time. Initially the proposals were to increase the number of judges by between nine and 12. Those proposals always floundered because there was no agreement among member states as to who would qualify for a judge or how those judges would be selected.

My answer to the first of Lord Elystan-Morgan's supplementary questions is: no, we have never objected to any increase in the size of the court. Indeed, I can remember sitting in a General Affairs Council during the Cypriot presidency and arguing that we should endorse a proposal to increase the size of the court relying on the principle of selection on merit. From memory, I qualified that at the time by saying that that was still not our preferred option. We have always tended to favour specialist tribunals as a way forward, but that proposal has not met with much support elsewhere. Of course, every time this came up at the Council we ran into problems with, broadly speaking, the big member states saying, "We have a limited number of judges. We must get one apiece", and the small member states saying, "No, that is not right. It must be on a rotational basis or something for everybody. We cannot just let the big boys have judicial appointments as of right". What is new is that a very recent proposal has come from the court to increase the number of General Court judges on a phased basis, so that by 2019 there would be two judges there from every member state. This would be partly paid for and facilitated by dissolving the specialist Civil Service Tribunal and moving its cases to the General Court. The presidency intends to start informal quadrilogue discussions involving the Council, the Parliament, the Commission and the court on a draft amendment to the statute of the General Court.

The Government's view is that we recognise the problem of the backlog, we accept that there is a growing risk of substantial damages because of the delay in bringing cases for decision, and I am certainly concerned about the impact of the backlog on business—it is in this country's interests that we have a court that is actually effective, particularly in matters such as trademark cases and supermarket cases, where the court is often our ally in delivering the policy outcomes we are seeking. I have to say that doubling the number of judges is not where we would have chosen to end up. I cannot pretend to be happy that that is the proposal that has now emerged. But the reality is that the decision of the amendment of the statute is by qualified majority voting. It is fair to say that there is something of a mood of war-weariness in the Council about this issue. Member states that had previously been aligned with us on ensuring that the selection of judges was on merit or on prioritising commitments to budget neutrality in any reform now seem ready to accept this most recent

proposal. What I am now seeking to do is to ensure, first, that we have proper time for Parliament to be consulted—and I am very aware that under the European Union Act 2011 there are constraints on what British Ministers are able to do on any amendment to the statute of the court pending a resolution from both Houses of Parliament. Equally, I am seeking to ensure that if this proposal is approved, costs are rigorously controlled and judicial quality is maintained, particularly through the Article 255 panel, and that the common-law tradition is appropriately represented in the three tranches of new judges who would be appointed.

Until last Friday, 27 February, all these discussions were based entirely on a letter from the President of the court. No formal legislative proposal had been produced. Within the past 24 hours we have had the first document from the institutions. I am intending to write as soon as I can to Lord Boswell and his counterpart in the Commons with greater detail, and will obviously make sure that the Committee is fully updated and given the opportunity to consider the proposal. I repeat: we are very aware of our responsibilities, not only under the normal scrutiny arrangements but under statute, to ensure that there is proper consultation of Parliament.

Lord Anderson of Swansea: I recall that when the Civil Service Tribunal was set up the argument was that this was in effect only industrial-tribunal quality work and that it was improper and not appropriate for great and serious judges to be dealing with such low-level work. Again, we apparently favour specialist tribunals such as this. Are we therefore likely to accept the merging of the Civil Service Tribunal into the General Court?

Rt Hon David Lidington MP: What we now have is a proposal from the President of the court to merge the Civil Service Tribunal back into the General Court. I would agree with the implicit message behind Lord Anderson's question that this is not a perfect outcome. I would rather that the court was reformed according to a different design, but we have a proposal that has come from the court itself, which other member states seem if not exactly content then willing to accept, albeit grudgingly in some cases, in order to settle a very long-running problem.

Lord Anderson of Swansea: But it is low-order stuff—industrial tribunals.

Rt Hon David Lidington MP: Yes, it is low-order stuff, but the President of the court has clearly come to the view that he would prefer that outcome than for this problem to go unresolved for longer.

Baroness Eccles of Moulton: Minister, if there are going to be two judges from each member state, that seems to be 56 judges. The fact of the matter is that if one looks at the size of population, which is very variable from the biggest to the smallest, the very small member states will perhaps find it more difficult to find more judges of real high quality than some of the bigger member states. Would there be any sort of wriggle room in that proposal at all? It does seem to be quite unbalanced.

Rt Hon David Lidington MP: I think my honest answer to Baroness Eccles is that if we or others were to come forward with the argument that the larger member states should be entitled to a bigger share of the new judges, and it should be any solution other than one judge each, we would then run into all the difficulties that we have had previously. On the basis of previous experience, I think you would find the smaller member states very rapidly forming a bloc to try to prevent that from happening. I do think that so far the Article 255 panel has proved a very effective check on judicial quality. Of course, we did have a situation about 12 months ago when a Czech nominee was proposed who fell foul of the panel and the nomination was withdrawn because the panel concluded that the nominee was not up to scratch. So far, from what I have seen in five years, the Article 255 panel has worked very well to maintain quality, but I completely accept that that challenge is there for some of the smaller jurisdictions.

Viscount Eccles: Lord Chairman, I think my question was answered in response to Lord Anderson's first question. The Minister said quite clearly that he thought that a mechanism was needed, and that is the answer to the question.

Q6 Lord Hodgson of Astley Abbotts: Of course, we had our issues with the Justice and Security Bill and closed court proceedings. What would be the Government's proposal to solve this problem? I think I read somewhere in the papers that there was a suggestion that we were quite keen on the special advocate procedure, but that was not acceptable to the other member states. Was that the only way forward that we had, or were there other suggestions and ideas?

Rt Hon David Lidington MP: The special advocate system is obviously one that we were familiar with. It is not one that other member states have used. It never really caught fire as a suggestion in the discussions at European level. In the end, it was not the absence of that which led us to abstain rather than support the reform. The particular concerns were over the limited provision in the draft rules for the originator of confidential material to withdraw it from proceedings at any stage. You were able to do it at the earliest stage, once the court

had ruled on whether to treat something as confidential or whether to show it to the defence; you could not withdraw it at any later stage, even if you became worried, for whatever reason, that you would prejudice important security interests if that information were made more widely available.

Secondly, there were not, in our view, sufficient security checking procedures—in fact, there were none—regarding draft orders or judgments. I am not for a moment suggesting that the court or its staff would deliberately set out to release information that might be helpful to terrorist groups, but it is in the nature of agency operations that sometimes a detail about working methods may inadvertently be revealed, even if the person releasing the information honestly believes that they are not doing any harm. It was the absence of that sort of safeguard that caused us worry.

The other point I made in my oral statement to the General Affairs Council was puzzlement that the scope of the closed material procedures was not being limited strictly to sanctions cases. The CMP device was being introduced precisely because of the Kadi judgments and yet there is nothing in the wording of Article 105 that restricts the use of closed material procedures to sanctions cases. We felt that there was a good case for ring-fencing this provision.

Lord Hodgson of Astley Abbotts: I am no lawyer, so I may have got this completely wrong, but I understood that you could withdraw material but you could not expect the court to take it into account in its determination thereafter.

Rt Hon David Lidington MP: Cathy, do you want to spell out the legal details?

Cathy Adams: Certainly. The provision of the procedure as adopted is that there is a two-week time limit from the point at which the court decides that the information is relevant and confidential and it will adopt certain procedures and have to disclose some of the information. There is a two-week period within which a decision has to be taken. The problem is that sometimes the situation may change and further information may come to light, so the sense was that right up to the last moment there needs to be the possibility of deciding that in fact the information is too sensitive to be disclosed—with the acceptance, of course, that if the information is withdrawn, it would not be relied upon; that is obviously the safeguard there. But it was that limitation in the time within which the decision to withdraw can be taken that concerned us.

The Chairman: Are there changes which the Government might still propose to try to make the situation acceptable so that you can share confidential information?

Rt Hon David Lidington MP: To be honest, Chairman, we are past that point in the negotiation. We got to the stage where everybody else felt that there was a balance with which they could live. Other member states that might be the originators of sensitive and confidential material will obviously have to make their own decisions about the extent to which they are prepared to make that available to the court in sanctions cases to uphold listings. We are of the view that the scheme that has been adopted is likely to put quite serious limits on our ability to do that. Having said that, we have for some time now been following a policy of trying to ground our sanctions listings on material that can be disclosed without these risks. I would not want the Committee to come away from this session thinking that our policy on sanctions is going to be holed below the waterline—very far from it. There has been a lot of work in the Foreign Office over the past two years on how to have a smarter sanctions regime. Kadi is just the most high-profile of a number of legal challenges in both the United Kingdom and the European courts. That has required the Government to think very hard about how to ensure that we are able to ground our sanctions on evidence that can be presented to the court without fear that it would impinge on the necessary secrecy of our agencies.

Of course, it would be wrong to think that when we are talking about confidential material we are talking only about material that might have an intelligence origin. Sanctions that have been imposed originally at UN level are quite likely to have been based on information contained in a confidential report from a UN-mandated group of experts. It is very possible that disclosure of that material in detail could lead to witness intimidation or damage international relations. Individuals, Governments or organisations might have given information in confidence to that UN group of experts, and the CMP provisions in Article 105 should help to ensure the secrecy and confidentiality of that UN information.

Q7 Lord Stoneham of Droxford: You are beginning to touch on the area that I was going to ask about. I will frame it in this way. In the UK we are being pressed time and again to toughen up the use of closed procedures. In this case, we are now closing it down, as it were, but you are saying to us that that will not undermine our foreign policy aim of having a stronger sanctions regime in the EU. Could you give us a bit more detail and reassurance, really, on where you think the Government's initiatives that you have just been mentioning will outweigh the disadvantages which in other circumstances we would want to deal with?

Rt Hon David Lidington MP: As I said before, I think the key to this is first of all trying to ensure that when we apply to designate somebody for sanctions purposes, we do so

wherever possible on the basis of open-source information that can be freely shared with the court and, for that matter, with the person or entity so designated. Even where confidential material is used in the context of Council discussions about designation, it is often possible, if that designation is challenged in the court, to have sufficient open-source information to be able to present a strong case to the court without having to divulge the confidential material that would have been part of the original application to the Council. Of course, it is not just us. Every member state will from time to time come forward with its particular proposals for sanctions designation.

We thought, particularly when Kadi II came out, that we could see the risk of a clash between our UN and EU obligations and that we had a responsibility to try to find a way forward. Nobody would relish a situation in which a Minister of this country would be under competing legal obligations—one under international law, one under European law. We engaged not only with other member states through the Council but with the court, because it was doing its own thinking under the leadership of a Finnish judge about a possible CMP arrangement. We shared our experience of closed material procedures, although obviously at the end of the day it was for the court to decide what it felt would be helpful and acceptable in the future.

Certainly the advice I have had so far is that we do not think that this system will fatally harm our sanctions policy, but it means that we must continue—and it is right to continue—with a policy of smart sanctions, of trying to make sure that they are grounded, whenever possible, in open-source evidence. We do not rule out submitting confidential material to the courts, but we will do that on a case-by-case basis, assessing in every instance the balance of risk between allowing information to become available that might be of help to our enemies and ensuring that a sanctions designation, which is an important tool of foreign policy, including security policy, can be properly upheld.

Lord Stoneham of Droxford: Despite your reservations about the system that is going to operate, you are basically saying that you might be prepared under certain safeguards—

Rt Hon David Lidington MP: Yes, if you look at it case by case, had the safeguards I talked about earlier been included, I think we would feel more confident about being able to use CMP more frequently at the European level. I am in no doubt that we and the European Union collectively are in a better position having this procedure under Article 105 than if we had no such procedure and we were trying to cope with the consequences of Kadi in another way.

Lord Stoneham of Droxford: Do you think that our example is such that we can pick and choose?

Rt Hon David Lidington MP: There is no compulsion on us to submit confidential information. A person who is sanctioned challenges that designation before the courts. Then it is the Council that is the defendant, if you like, not the member state, but of course the Council has to go to the originator of the information for permission to disclose that information to the court. It is at that point that we can decide on a case-by-case basis whether confidential information that we have hypothetically supplied in a particular case should or should not be disclosed.

Lord Stoneham of Droxford: If we can pick and choose, how do we know, if this is all covert information, that other colleagues in Europe are also not picking and choosing? Therefore, the people who are going to get caught are the people you get through open-source information—presumably the foolish ones who make mistakes—whereas the covert, professional operation that is breaking sanctions would be much more difficult to expose.

Rt Hon David Lidington MP: Again, as I said earlier, this is not just about covert information; things like the UN expert group reports fall into the confidential category. It is for other member state Governments to speak for themselves, but I go back to the point, first, that not every other member state by any means has the covert capacity that we have in this country. Secondly, all member states, in the wake of the increased number of legal challenges that we are facing, are trying very hard to make sure that wherever we can we deploy a case for designation that will stand up on the basis of disclosable material. It may be that confidential information is part of a package that persuades the Council but that the test the court sets can be met by publicly sourced material only, without reference to the confidential element.

Lord Stoneham of Droxford: Are you giving us an assurance that our approach will not undermine our foreign policy aims?

Rt Hon David Lidington MP: Our approach will not. The test is clearly going to be how the court itself acts in individual cases. I would argue that the outcome in Kadi was a blow to our ability to pursue an effect sanctions policy as a tool of wider foreign and security policy. CMP is part of adapting to that jurisprudential reality. I can never be certain exactly what judges are going to say when it comes to individual cases, but I do think, particularly given that the court itself has been involved in the work on CMP, that that suggests that having

this procedure will provide some additional protection for designations that would not otherwise be available.

Q8 Baroness Liddell of Coatdyke: This is really just an extension of Lord Stoneham's point. You set out some of the very serious issues around the need for confidentiality. Why then does it seem that the other 27 member states are not just enthusiastic about this but are actually in a hurry to implement it? What is the driver here?

Rt Hon David Lidington MP: The driver is that we have these legal challenges under way. The legal challenges are going to the Council, but there are 30 or more EU sanctions regimes involving different countries all around the world, so different member states will have different priorities when it comes to those. I do not know if Cathy or David have the figure for the number of challenges. If not, they will be happy to write to the Committee about that.

David Concar: There are more than 100 ongoing challenges. A lot of those are focused on the Iran regime, and the others are spread across a subset of 30 or so regimes that account for the totality of EU sanctions.

Baroness Liddell of Coatdyke: It just seems strange that you have a situation where one country, the United Kingdom, has these very serious concerns, particularly about UN-originated material, and we have other major allies who are likely to share those concerns. Why then would they appear to be in a rush?

Rt Hon David Lidington MP: It is not so much a rush, in the sense that these discussions have been going on within the Council and court for quite a long time. But there was a strong feeling that this needed to be dealt with. The presidency wanted to get this dossier completed. Most other member states have no domestic experience of CMP. Therefore, there was a feeling, perhaps, that this British issue was a bit outré. It was not something they were familiar with. Is there any reason why they should be? They did not feel it necessary to pause when we had a package that everybody, including us, felt was an improvement on the status quo. It was a QMV dossier. There was a clear qualified majority in favour of its adoption. Not just on this issue but on many others over the past five years, I have seen that when a qualified majority has been reached, you usually get an impetus towards getting agreement and trying to get business polished off—otherwise, what is the point of having a qualified majority rather than a consensus requirement?

Lord Stoneham of Droxford: Can I come back on a related point? You say that you may not be willing to share confidential information. Does that mean that there are people out there who you are not going to recommend for listing although you would like to?

Rt Hon David Lidington MP: No, it does not affect who we put forward for listing. We put forward people or entities for listing when we think there is sufficient evidence to justify that. The point is that if we then get to a challenge in the courts, at that point we say we may or may not allow this information to be disclosed. Let me take a step back. Lord Stoneham is right in this sense: we already give some consideration, as part of our sanctions policy, when we propose a person or entity to whether there is information that could be defended in court. If you have nothing that you can put before a British court or a European court, it is very difficult to be confident that those designations are going to be maintained.

That is one element in our thinking. We would also think: how big a risk is it to our policy, security or interests if this person or entity goes unsanctioned? So we make a judgment. We may not be by any means the only country that is putting forward information about a particular individual; the Council may have information from a number of different sources—member states, the United Nations or other third countries. The confidentiality test applies only when someone challenges their designation. At that point the Council, in preparing its defence, goes to the originators and says, "Are you happy for this to be disclosed?", and at that point we have to say yes or no. Please interrupt me, David, if I make a mistake or you want to add anything.

David Concar: No, that is fine.

Lord Stoneham of Droxford: I am not a lawyer, but this is all about the balance of the evidence, is it not?

Rt Hon David Lidington MP: Yes.

Lord Stoneham of Droxford: Clearly there will be people who you are not going to bother with if you cannot use the confidential information, and they will be left out?

Rt Hon David Lidington MP: But we have to bear that in mind already, because we face actions in the UK courts as well as the European courts.

Lord Stoneham of Droxford: In the UK we are always trying to push those boundaries back, but in this case we are going the other way.

Rt Hon David Lidington MP: No, in sanctions cases we always try very hard to find ways in which we can substantiate a designation on the basis of material that we are able to supply to the court if necessary. Without going into detail, I have seen individual sanctions

proposals where I have gone back to the officials and said that we need to have more that it will be possible to show to the courts by way of a defence. Similarly, when discussions take place on de-listing, we look at how firm the evidence is. Whether or not evidence can be disclosed openly, you have to have evidence that justifies a designation. The secondary distinction is between evidence that is open-source and evidence that is confidential.

Q9 Lord Anderson of Swansea: Minister, the culture of the Union is openness. I recall a similar debate when the CFSP was developing, when we were concerned that interpreters should be positively vetted and so on. Is this part of a general mistrust of the leakiness of the EU institutions?

Rt Hon David Lidington MP: I do not think it is a general mistrust of EU institutions; it is an awareness that sometimes the release of information on which sanctions designations are made could do harm to the operations of security and intelligence agencies, to the safety of people who might have given that information, or to international relations where a third Government have given information either to a member state or to the United Nations expert group on the basis of confidentiality. It is weighing up those different things that is the test here. It is one reason why we would have been happier had Article 105 been expressly restricted to sanctions cases, because that would have made it easier to rebut the case that Lord Anderson has placed before me.

Q10 Lord Tugendhat: Minister, I know that you and the FCO take the scrutiny procedure seriously. What was the overriding imperative that led you to relist the National Iranian Tanker Company and Mr Golparvar while we were still scrutinising them?

Rt Hon David Lidington MP: Yes, it was unfortunate that that happened. Before November 2014, the relistings had not been considered within the EU process due to other pressures on the Council, most obviously the Ukraine crisis, which had worsened in the months leading up to November. The other thing that was happening at the time, of course, was a very sensitive stage in the E3+3 negotiations on the Iranian nuclear programme, and that political consideration informed our thinking about the timing of our move to relist. There had been a key round of those talks in November last year and we delayed relisting in order to avoid clashing with and possibly prejudicing those negotiations. As the Committee knows, those negotiations led to a decision to extend the joint plan of action and for the negotiations to continue; they did not collapse. We had argued for a delay in relisting to avoid getting in the way of the E3+3 talks. After those talks had concluded, we were under significant pressure from other member states to agree the listings.

I sent the Explanatory Memorandum to the Committees on 15 December last year and agreed to the relistings on 12 February. Although I appreciate that there was a parliamentary recess during that time, there were two months for scrutiny procedures to take place. We believe that the relistings were justified on the basis of sound evidence that linked both Mr Golparvar and the NITC to the Iranian Government and that the relistings were consistent with the objectives of the sanctions regimes against Iran and the specifics of the legal criteria. If we had not been able to support the relistings—of course, they require consensus—the continuing delay would have harmed our relations with other member states. It might in particular have made some other member states that were very keen on these two relistings more reluctant to accept some of our proposals for designations, if not on the Iran dossier then on some of the other sanctions dossiers that are live.

Lord Tugendhat: Several questions arise from that. Subject to the Chairman's approval, my colleague Baroness Coussins may also want to ask something. Two things strike me in what you have said. As you know perfectly well, one of the things that concerned my Committee was that justice did not appear to be being done to the people who were involved in the relisting. What you have said rather suggests that the national Iranian oil company and Mr Golparvar—and I have no knowledge of the details of their cases—were not relisted on the merits or demerits of their position; they were relisted for reasons of haute politique, if I can put it that way. The British Government were having difficulties with other Governments and it was more convenient to relist them regardless of the merits of the case than anything else. I see your adviser nodding in disagreement.

Rt Hon David Lidington MP: I am far too polite to shake my head in disagreement with Lord Tugendhat, but I do disagree with him. It is true that the timing of our move on relisting was affected by political considerations—above all, the timing of the E3+3 talks—but our decision on the merits of relisting was to do with the quality of the evidence for relisting. We believe that those listings met and continue to meet the legal criteria and the objectives of the sanctions regime as approved and written into law. The harm to our relations with other member states was a risk not because we disagreed with the principle of relisting—we did not—but if I had said, "We will block relisting because I have to wait for parliamentary scrutiny to take place", that would have led to a considerable amount of impatience. I would have had a number of colleagues saying to me, "Look, they have had two months. It is time we took this decision. We have delayed at your request already because

of E3+3. How much longer?". I always regret it when I have to override, but I did feel in this case that it was in all the circumstances a justified decision.

Lord Tugendhat: I am not in a position to judge the merits or demerits of the company's case or Mr Golparvar's case, but as I said at the outset, my understanding has always been that the Foreign Office takes the scrutiny process seriously. You have just said that there were, in your view, very strong political reasons quite apart from the merits or demerits of these cases for the override, and so you overrode. In those circumstances, do you not think it might have been helpful—might have avoided misunderstanding and giving the impression that you do not take the scrutiny process very seriously—if you had been able to talk to me or the Chairman of this Select Committee about that to explain why you thought that what you were doing was justified?

Rt Hon David Lidington MP: I am always willing to learn from experience, and if that is a signal that the Committee would appreciate an update on this kind of circumstance in the future, I am happy to take that on board and see if we can develop that sort of contact. I would just add the reservation that when one looks at the annual override statistics, the majority are to do with sanctions. It was not the case with these relistings, but it is often the case with overrides on sanctions that a discussion takes place within the Council about individual names that is not resolved until quite close to the Council meeting—usually the Foreign Affairs Council meeting—that is set down to approve them. At that point we usually find ourselves in a situation where we have to choose between overriding and blocking agreement at that Council—putting it off for perhaps a month, with the risk of asset flight, particularly if the names leak out—and the sanctions regime being less effective for whatever period of time. It is obviously for the Committee to decide what it does, but I am certainly willing to look at ways to improve our communications. I do not know, but I just lay on the table the idea that, perhaps starting with sanctions measures only, there might be a process for fast-track scrutiny arrangements, particularly during parliamentary recesses, when the Brussels machine continues to operate even though Westminster does not.

Lord Tugendhat: Thank you for that. I think there are two issues at stake. One, if I can put this way, is the validity of the scrutiny process and the communications difficulties that have arisen. You have answered that and we will think about your reply. But having pressed on that point, I do not want you to think that the doubt that I and my Committee have had about whether natural justice is being done in relation to the way in which people are

relisted has been satisfactorily concluded. I think there is scope there for further serious inquiry.

Rt Hon David Lidington MP: The problem I would have would be in going into detail with a Committee in either House about the reasons for listing in an individual case, not least because a particular listing may well derive from a proposal by another member state and not the United Kingdom. It goes back to our earlier exchanges: the safeguard that the person being designated has is being able to challenge their designation in an independent court and to have access—Article 105 having been accepted—to the information on which that designation has been based.

Lord Boswell of Aynho: Minister, I very much appreciate the spirit in which you have made the offers that you have for re-examination of this, and I think they could extend both to the timing of any override or communication decisions and possibly to better ways in which we deal with the substance of the cases. On the other hand, you will appreciate that we cannot really carry out a scrutiny job—or we would not appear to be doing so—if we do not have access to the material that enables us to satisfy ourselves. That is one slight caveat. The second one, just for the record, is that we already have machinery for government Statements on overrides and I do not think that should be impaired because that is in the scrutiny resolution already. Having said that, we would certainly be pleased to examine that at perhaps greater length, possibly when we have done some more thinking ourselves. I just add the other point for the record because I am sure it would trouble you—indeed, it would trouble me—if it was felt to be derogatory of the Foreign Office in particular. But we of course realise that you are dealing with very fast-moving situations. Only this week in correspondence with Mr Scholar, looking at the overall pattern of overrides, as we do every six months, we acknowledge that a lot of this is bound to happen. We are anxious to sweat out the cases where it need not happen. I think we should respond to your offer like that. I will have a question in due course, if I may.

Q11 Baroness Coussins: I just wanted to return briefly to the question of confidentiality. Although this is intended as a general question, it might also help to illuminate the particular cases that Lord Tugendhat has just mentioned. Could you clarify whether the confidential status of the evidence to support sanctions listings and relistings is determined solely on the basis of the Council's classification and that no separate classification process is taking place in Whitehall? Or is there a case-by-case approach?

Rt Hon David Lidington MP: It depends who is supplying the information. If it is the United Kingdom supplying that information, we obviously hold that information in Whitehall with a classification under the UK Government system of classification. Other member states, I imagine, have their own domestic classification systems, which may or may not resemble ours. Once information, whether from us or anybody else, reaches the Council, it then becomes a Council document and is given a Council classification. It is the Council collectively that decides on the release of any such information. Once it becomes a Council document, it becomes the property of the Council, and all member states are bound by a duty of confidentiality regarding Council documents, unless those have been made publicly available.

Lord Tugendhat: I think we are getting near the end of this. I note the point you have just made, of which I was unaware, but it does seem to me that if we are not permitted to see the open-source information for a relisting, there is not much purpose in the scrutiny process. You have explained that there is a Council recommendation and that you are bound by that. That is what you say, and I accept that. But then it seems to me that we are wasting our time a bit going through this scrutiny, because we do not know what is happening and you are going to override it if you think that is right, and we are all just going through a performance in a way.

Rt Hon David Lidington MP: This might form part of the discussion that Lord Boswell referred to. Of course the other problem that we have with most sanctions designations as opposed to relistings is that the names are not released until the decision has actually been taken to stop those individuals or entities moving money or themselves away from an EU jurisdiction. I might just add, Chairman, and Lord Tugendhat might find this helpful, that we did actually say in the context of High Court proceedings brought by NITC and Mr Golparvar in early February this year that the UK did not propose the listings in those case; nor did the UK provide any information itself in support of those listings. That perhaps again indicates why, although I accept that a relisting is different from a first designation, I would have had great difficulty in being able to provide the Committee with information: because it was not our property to divulge.

Lord Tugendhat: It has been a very illuminating exchange.

Q12 Lord Boswell of Aynho*:* If I may, Minister, I will now ask you a question about the interaction of all this with the Charter of Fundamental Rights. You will know from the Explanatory Memoranda that that is something that we encourage you to report on.

Although it is not before the Committees this afternoon, as part of the sifting process I have just been looking at the latest batch of Ukraine-related sanctions. No doubt the Committees will hear about that in due course. I do not have the text in front of me, but my recollection, seeing your document this afternoon, was that it engaged on what might be termed methods of redress or relief for designated persons after the event. That could be the right to ask for open-source information, and of course the right to challenge it in court. That is after the event.

In relation to the designation process of individuals under EU sanctions, you have said in correspondence to me that no fundamental rights issues apply. On what basis can this be right when the General Court has annulled so many sanctions for a failure to demonstrate a sufficient evidential basis?

Rt Hon David Lidington MP: I completely accept that designating people involves issues of fundamental rights. We take the view that EU sanctions regimes incorporate due process precisely to ensure compliance with human rights standards and obligations. The key elements of that, in my view, are first that designated persons have an opportunity to make representations to the Council about their designation and to say, "Look, you've simply got it wrong here. It's a case of mistaken identity", or "No, I'm not participating in the activity that you've alleged I'm participating in". Those representations must be considered by the Council at the first stage.

Lord Boswell of Aynho*:* Just to clarify, that would be after the designation?

Rt Hon David Lidington MP: That would be immediately after the designation, but that opportunity is there. Those persons then also have access to a completely independent and impartial judicial system, both in member states and at EU level. The other safeguard is that of course all EU sanctions measures have a time limit on them, usually of 12 months, after which time they lapse automatically, unless there is an EU consensus for their continuation or revival. It is not as if somebody is sanctioned and it is like a life sentence; it has to be reviewed by the Council at regular intervals.

The Chairman: Thank you very much, Minister, for coming before us today. I echo the words of Lord Anderson in thanking you for engaging with the Committee in an informative, frank and open way. We are very grateful for that, and in that sense our personal good wishes go with you.

Rt Hon David Lidington MP: Thank you very much indeed.