



HOUSE OF LORDS

Select Committee on the Constitution

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8th Report of Session 2017–19

# **Sanctions and Anti- Money Laundering Bill [HL]**

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The current staff of the committee are Matt Korris (Clerk), Nadine McNally (Policy Analyst) and Hadia Garwell (Committee Assistant). Professor Stephen Tierney and Professor Mark Elliott are the legal advisers to the Committee.

### *Contact details*

All correspondence should be addressed to the Constitution Committee, Committee Office, House of Lords, London SW1A 0PW. Telephone 020 7219 5960. Email [constitution@parliament.uk](mailto:constitution@parliament.uk)

# Sanctions and Anti-Money Laundering Bill [HL]

## CHAPTER 1: INTRODUCTION

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1. The Sanctions and Anti-Money Laundering Bill [HL] was introduced in the House of Lords on 18 October 2017. It received its second reading on 1 November and is expected to begin its committee stage on 21 November. It is one of several Brexit-related Bills announced in the Queen's Speech earlier this year.
2. At present, many of the sanctions regimes in which the United Kingdom participates operate at EU level. The European Communities Act 1972 (ECA) is the legal basis for the domestic implementation and operation of such sanctions regimes. UK ministers also have authority to implement sanctions regimes that are independent of the EU, including under the Terrorist Asset-Freezing etc. Act 2010 and, in relation to sanctions imposed pursuant to United Nations Security Council resolutions, the United Nations Act 1946. Meanwhile, much of the law applicable in the UK concerning money laundering and terrorist financing derives from EU law, which in turn tends to reflect international standards drawn up by the Financial Action Task Force.
3. The Sanctions and Anti-Money Laundering Bill is intended to provide a new, long-term legal basis for ministers to make secondary legislation concerning sanctions, money laundering and terrorist financing. This will enable the UK to comply with relevant international obligations, but is not limited to facilitating such compliance.

## CHAPTER 2: DELEGATED POWERS

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### Sanctions regulations

4. The Bill envisages the use of delegated, or ministerial, powers at two levels: the legislative level (in terms of making regulations) and the administrative level (in terms of making decisions in individual cases using powers conferred by regulations made under the Bill). Taken in combination, these ministerial powers are significant; their use is liable to have a substantial impact on the lives of those affected. The Supreme Court drew attention to this when, in *HM Treasury v Ahmed*,<sup>1</sup> it struck down regulations that had purportedly been made under the United Nations Act 1946 for the purpose of freezing the assets of certain suspected terrorists.
5. Clause 1 creates a new statutory power authorising ministers to make ‘sanctions regulations’. The power is triggered when a minister considers it appropriate to make regulations for one or more of the following purposes: complying with UN or other international obligations; furthering the prevention of terrorism; pursuing the interests of national security or of international peace and security; and furthering a UK Government foreign policy objective.
6. Clause 1 is a Henry VIII power. This is a consequence of clause 44(2), which provides that clause 1 regulations may make “supplemental, incidental, consequential, transitional or saving provision,” including “provision amending, repealing or revoking enactments (whenever passed or made)”; this includes enactments of the devolved legislatures. (An equivalent provision is made in respect of money laundering regulations made under clause 41.) The Bill imposes no requirement to consult devolved institutions before this power is exercised so as to amend devolved legislation. We noted a comparable issue in the Space Industry Bill<sup>2</sup> and the Wales Bill 2016–17.<sup>3</sup> If it is the Government’s intention that it would, in practice, liaise with the devolved administrations prior to the exercise of this power, such a requirement could be written into the Bill.
7. The Government said recently that a similar power “reflects well-established reciprocal arrangements” that enable Welsh or Scottish ministers to amend Acts of Parliament.<sup>4</sup> However, these arrangements are not fully reciprocal, as Welsh and Scottish legislation can authorise devolved ministers to amend UK legislation only within devolved competence, whereas UK legislation can authorise UK ministers to amend enactments of the devolved legislatures in ways that would trespass upon devolved competence. **The House may wish to consider whether the consent of the devolved legislatures should be required when this power is used to amend or repeal legislation enacted by them—as, for example, is the case for certain statutory instruments made under the Legislative and Regulatory Reform Act 2006 and the Public Bodies Act 2011.**

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1 *HM Treasury v Ahmed* [2010] UKSC 2

2 Constitution Committee, *Space Industry Bill [HL]* (2nd Report, Session 2017–19, HL Paper 18), para 8

3 Constitution Committee, *Wales Bill* (5th Report, Session 2016–17, HL Paper 59), para 88

4 Letter from Lord Bourne of Aberystwyth to the Chairman, 6 November 2017: <http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny%2017-19/Government-response-to-the-Telecoms-Infrastructure-Bill-061117.pdf>

8. A number of different types of sanctions regulations can be made under clause 1. They are enumerated in clauses 2–7:
- ‘Financial sanctions’ (clause 2) can, among other things, freeze funds and economic resources, and prevent the provision of financial services.<sup>5</sup>
  - ‘Immigration sanctions’ (clause 3) can provide for designated persons to be ‘excluded persons’ for the purposes of the Immigration Act 1971.
  - ‘Trade sanctions’ (clause 4) can impose prohibitions or requirements for a broad range of purposes set out in schedule 2, paragraphs 2–17. This includes the creation of criminal offences, authorising supervisory authorities to impose civil penalties and conferring investigatory powers.
  - ‘Aircraft sanctions’ (clause 5) can be used for purposes including detaining disqualified aircraft and ensuring that such aircraft do not leave or overfly the UK.
  - ‘Shipping sanctions’ (clause 6) can be used for purposes analogous to those for which ‘aircraft sanctions’ can be made.
  - Clause 7 allows the clause 1 regulation-making power to be used to impose other sanctions that the minister considers appropriate for the purpose of compliance with UN obligations, although such sanctions fall outside clauses 2–6.
9. Clause 14 confers significant additional regulation-making and other powers on ministers to, in effect, selectively apply sanctions regimes provided for by regulations made under clause 1. The effect of clause 14 is to extend the regulation-making power conferred by clause 1 in three ways, by enabling ministers to: (i) create exceptions to requirements or prohibitions set out in clause 1 regulations; (ii) create a licensing regime so as to make lawful activities that would otherwise be unlawful under clause 1 regulations; and (iii) provide for requirements in clause 1 regulations to be subject to such exceptions as are directed by ministers. A related power is conferred by clause 35, which enables ministers to make ‘suspending regulations’ which suspend requirements or prohibitions contained in clause 1 regulations.
10. Clause 39(1) enables Part 1 of the Bill (which is concerned with sanctions) to be amended by regulations “so as to authorise regulations under section 1 to impose prohibitions or requirements of kinds additional to those for the time being authorised by Chapter 1.” Clause 39(2) goes on—“without prejudice” to the generality of clause 39(1)—to authorise the making of regulations that amend the definition of “sanctions regulations” in clause 1(4). This means that new types of sanctions regulations can be added to those specified in the Bill. This is a significant power, which would enable new forms of sanctions to be established by ministers without the need for new primary legislation. Clause 39(2) stipulates that it is not to be taken to authorise additions or amendments to the overarching purposes for which sanctions regulations can be made (as set out in clause 1(1) and (2)). However, it is not clear that this restriction applies to regulations made under clause 39(1) (as distinct from regulations made under clause 39(2)).

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<sup>5</sup> Terms such as ‘funds’, ‘economic resources’, ‘financial services’ and ‘freeze’ are defined in broad terms elsewhere in the Bill ([Sanctions and Anti-Money Laundering Bill](#) [HL] clauses 48–49 [HL Bill 69] (2017–19)).

11. **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).**
12. The Bill therefore confers substantial delegated powers. In practice, a delegated powers model is inevitable, given the practical difficulties that would arise if Parliament had to legislate to create and amend individual sanctions regimes. Indeed, sanctions are currently implemented by secondary legislation as a result of the ECA. However, **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.**

### Designation powers

13. The effect of clauses 2–7 is that regulations imposing sanctions will often apply to ‘designated persons’. For this purpose, ‘persons’ can be natural or legal, and the definition extends to associations and combinations of persons. Clause 9 authorises ministers to include ‘designation powers’ in regulations made under clause 1, and provides that such regulations need not require a person whose designation is contemplated to be warned of that fact.
14. Clause 10 deals with powers that authorise the designation of named individuals. Such designation is permitted only when the minister considers it appropriate (with reference to the purpose of the regulations) to designate a person and when the minister has reasonable grounds to suspect that the person is an ‘involved person’ (e.g. because the person has been involved in an activity specified in the regulations). The current legal test applied by the UK courts and the Court of Justice in Luxembourg, in part by reference to the European Convention on Human Rights, is to ask whether designation is proportionate in all the circumstances, including the effect on the individual. At second reading, the Minister, Lord Ahmad of Wimbledon, said that “where human rights are affected, a minister will always need to comply with the European Convention on Human Rights and Strasbourg case law, and that will include an assessment of proportionality.”<sup>6</sup> **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.**
15. Clause 11 allows for the designation of persons by description as opposed to by name. This is a change from sanctions currently in operation under the ECA, as EU law requires the naming of persons or entities subject to sanctions. Otherwise there is the risk of uncertainty for the persons concerned and for those who have to apply the sanctions—in particular banks required to freeze the assets of individuals. Clause 11 raises constitutional concerns, given that legal certainty is a central to the rule of law. Lord Ahmad of Wimbledon said at second reading that “Designation of persons by description is necessary to deal with members of proscribed terrorist organisations who, for example,

conceal their identities. We will also provide as much detail as we can so that businesses and banks can carry on their business.”<sup>7</sup>

16. **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).**
17. Clause 2(1) allows for financial sanctions to be imposed on persons “connected with a prescribed country”, with clause 50(4) giving the minister power to make regulations specifying the relevant connection. Lord Ahmad of Wimbledon explained:
 

“This is necessary to ensure that broad sectoral measures can be imposed which restrict general access to financial persons and markets. There are other elements within this and exemptions that may be applied, so I will write to the noble Lord and place the letter in the Library as well.”<sup>8</sup>
18. **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.**

### Criminal offences

19. Clause 16 concerns the enforcement of sanctions. It allows the clause 1 regulation-making power to be used to provide for the enforcement of relevant requirements and prohibitions. This extends to creating criminal offences punishable by up to 10 years’ imprisonment. The regulations may also make provision “dealing with matters relating to those offences, including defences and evidentiary matters.”<sup>9</sup> Clause 41 provides a similar power in respect of money laundering, with a maximum penalty of two years’ imprisonment.
20. We have recommended previously that delegated legislation should not be used to create new criminal offences.<sup>10</sup> The Delegated Powers and Regulatory Reform Committee said in 2014 that “Where the ingredients of a criminal offence are to be set by delegated legislation, the Committee would expect a compelling justification.”<sup>11</sup>
21. **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**

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7 *Ibid.*

8 *Ibid.*

9 [Sanctions and Anti-Money Laundering Bill](#) [HL], clause 16(3)

10 See, for example, Constitution Committee, [Co-operative and Community Benefit Societies and Credit Unions Bill](#) (19th Report, Session 2008–09, HL Paper 158); Constitution Committee, [Deregulation Bill](#) (4th Report, Session 2014–15, HL Paper 38)

11 Delegated Powers and Regulatory Reform Committee, [Special Report: Quality of Delegated Powers Memoranda](#) (7th Report, Session 2014–15, HL Paper 39), para 38

**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.**

## CHAPTER 3: OVERSIGHT

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### Court reviews

22. Clauses 32–34 deal with ‘court reviews’ of decisions taken under the Bill or under regulations made under the Bill. A distinction is drawn between two categories of decisions:
- (1) Most decisions are subject to a statutory judicial review procedure that is similar, but not identical, to the normal judicial review procedure.<sup>12</sup> The statutory procedure is intended to be exclusive: decisions that are subject to the statutory procedure “may not be questioned by way of proceedings for [normal] judicial review.”<sup>13</sup>
  - (2) Some decisions are not subject to the statutory procedure,<sup>14</sup> but nor may they “be questioned by way of proceedings for [normal] judicial review.”<sup>15</sup> Such decisions are thus, at least on the face of it, excluded from any form of judicial review.
23. The first category, which contains most decisions taken under the Bill or under regulations made under the Bill, attracts the statutory review procedure set out in clauses 32–33. This is similar to normal judicial review: clause 32(4) provides, “In determining whether the decision should be set aside, the court must apply the principles applicable on an application for judicial review.”<sup>16</sup> However, there are a number of important caveats:
- In normal judicial review proceedings, the rules on ‘standing’ are relatively generous, meaning that it is sometimes possible for someone other than the person affected by a decision to seek judicial review. This reflects the view that the courts’ role in judicial review cases is not simply to see that justice is done to wronged individuals, but extends to upholding the rule of law and standards of good governance. However, the Bill provides that, in relation to decisions concerning such matters as the designation of individuals, only a narrow range of people can seek statutory review.<sup>17</sup> Within that range are the named individual and, when designation is by description rather than by naming individuals, someone of the specified description.
  - Restrictions apply to remedies under the statutory procedure. In particular, there are certain limitations on the court’s capacity to award damages.<sup>18</sup>
  - Special rules of court apply to the statutory review procedure.<sup>19</sup> In particular, the Bill adopts (with slight modification) the procedural model that applies to ‘financial restrictions proceedings’ under sections 66–68 of the Counter-Terrorism Act 2008. This means, among other things, that sensitive material may be disclosed to ‘special advocates’ as opposed to the individual litigant and his or her legal representatives.

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12 [Sanctions and Anti-Money Laundering Bill](#) [HL], clause 32(1)

13 *Ibid.*, clause 33(5)

14 *Ibid.*, clause 32(1)(d)

15 *Ibid.*, clause 33(5)

16 *Ibid.*, clause 32(4)

17 *Ibid.*, clause 32(3)

18 *Ibid.*, clause 33

19 *Ibid.*, clause 34

The litigant and his or her legal representatives can be excluded from the proceedings when such sensitive material is considered. This is a substantial departure from the general principles of open justice, albeit a departure already sanctioned by the Counter-Terrorism Act 2008 and, in other contexts, by other legislation.

24. The second category of decisions appears to be invulnerable to any judicial review, whether in its statutory or regular form. This category consists of decisions to make or vary designation orders and equivalent decisions concerning the specification of ships.
25. On the face of it, the attempt to oust judicial review of such decisions raises fundamental constitutional concerns. However, the position is ameliorated by the facts that the ouster bites only on decisions in relation to which the individual has the right to request a ministerial review, and that ministerial decisions made on review (as distinct from original ministerial decisions) can be challenged via statutory judicial review. The effect, therefore, is to shield the original decision from judicial review and to require the individual to seek ministerial review as a first step to challenging the designation. If the designation remains following ministerial review, then statutory judicial review becomes possible.
26. While this makes the ouster of judicial review less objectionable, the Bill gives no timeframe for the determination of ministerial reviews. For example, clause 19 provides only that “On a request under this section the minister must decide whether to vary or revoke the designation or to take no action with respect to it.”<sup>20</sup> While clause 27 confers wide discretion on ministers to make regulations setting out the procedure to be followed in reviews under provisions such as clause 19, it does not stipulate what sort of procedure should be followed. This means that there is no limit to the delay that could occur between a designation being made and a court hearing to challenge that designation. **The Bill should impose an obligation on the minister to conclude the review as soon as reasonably practicable.**

### Remedies and procedural fairness

27. The Bill changes the remedies available to persons listed in the UK in order to implement a UN sanctions designation. At present, under EU law a UN sanctions listing requires procedural safeguards, including supporting evidence and effective judicial review, and orders can be quashed by the European Court of Justice if they are not proportionate. Under the Bill, the individual would have only a right to request the secretary of state to use their best endeavours to take the matter up at the UN to remove the person’s name.<sup>21</sup> There is no provision for listings to be challenged; only a right to seek a court review of the minister’s decision not to use best endeavours.<sup>22</sup> **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.**
28. The Bill allows for sanctions to be imposed on an individual without them being informed beforehand. This is understandable, as otherwise the individual may, for example, hide or dispose of relevant assets. However, the

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<sup>20</sup> *Ibid.*, clause 19(3)

<sup>21</sup> *Ibid.*, clause 21(2)–(4)

<sup>22</sup> *Ibid.*, clause 32(1)(c)

Bill does not provide any right for the individual to be told that sanctions have been applied against them or on what grounds. This undermines procedural fairness and denies the individual a fair opportunity to challenge the listing. The Bill requires disclosure only if a case comes to court.<sup>23</sup> The subjects of a designation order are prohibited from taking the matter to court until after they have sought a review by the minister and received a decision on that review. An individual cannot make effective representations on such a review unless they are told the case against them.

29. **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.**

#### Review provisions

30. The Bill makes provision for the periodic review of certain sanctions designations.<sup>24</sup> These require the minister to consider any designation of a person every three years. Under the current EU system designations are reviewed every 6–12 months.
31. Lord Ahmad of Wimbledon set out at second reading the opportunities for reviewing sanctions designations:
- “First, the designated person can request a review and have the decision looked at again; secondly, they can challenge in court; thirdly, if new evidence arises or there is a new matter that has not been considered, they can request a further review; fourthly, the appropriate minister can instigate a review on their own initiative in response to changing events; and fifthly, the appropriate minister can bring the deadline forward and complete the review before the end of the three-year period. Given all this, and that the matter of designation is clearly a live matter throughout the period, we do not consider the period to be excessive.”<sup>25</sup>
32. **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.**

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23 *Ibid.*, clause 34(1)

24 *Ibid.*, clause 20

25 HL Deb, 1 November 2017, [col 1423](#)