PUBLIC CONSULATION ON THE UNITED KINGDOM'S FUTURE LEGAL FRAMEWORK FOR IMPOSING AND IMPLEMENTING SANCTIONS

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A. Summary

1. This submission addresses the questions raised in the White Paper issued as part of the Public Consultation on the United Kingdom's future legal framework for imposing and implementing sanctions (21 April 2017) (the "Sanctions White Paper"). The submission has been prepared by Brian Kennelly QC, Jason Pobjoy and Tim Otty QC.[1] The views set out in the submission represent our personal views, and not the views of Blackstone Chambers.

2. The submission addresses, in turn, the nine consultation questions set out in the White Paper. In summary, we are of the view that Brexit provides the UK with a unique opportunity to improve the legal framework for imposing and implementing sanctions, with better-reasoned decisions, more effective asset freezes, greater engagement with listed persons and more rigorous judicial scrutiny. The Government should resist the temptation to make the new sanctions framework even less transparent and fair than the current EU system.[2]

3. All communications about this submission should be sent to briankennelly@blackstonechambers.com and jasonpobjoy@blackstonechambers.com.

[1] Tim Otty QC, Brian Kennelly QC and Jason Pobjoy are recognised as leading sanctions lawyers in the EU. They have acted for over 30 designed persons and entities before the General Court and Court of Justice, as well as before the domestic courts of England and Wales. They also regularly advise banks and corporates on a wide range of compliance issues relating to the EU, US and domestic sanctions. They have particular experience with the sanctions regimes for Iran, Egypt, Syria, Ukraine, Russia, Tunisia and Zimbabwe. Brian Kennelly QC has also advised HM Treasury on sanctions matters.

[2] As to some of the problems with the current system, see House of Lords, European Union Committee, 11th Report of Session 2016-17, The legality of EU sanctions, 2 February 2017, HL Paper 102 (the "HL Sanctions Report").

B. Question 1: Are there further powers that you think the UK Government needs at its disposal

4. The Government's current powers in relation to sanctions are in summary as follows:

(1) EU sanctions: section 2 of the European Communities Act 1972 (the "ECA") provides a broad power for the implementation of EU measures, which are themselves made under the widely-drawn powers in Articles 21 and 29 TEU. These include counter-terrorism measures, measures to discourage the actions of certain States (e.g. Russia), specific trade sanctions and measures to freeze assets belonging to former rulers and their associates at the request of new regimes which the EU wishes to support. In view of the wide power in s.2, the UK seeks to use this route to implement UNSCRs where possible.[3]

(2) Non-EU counter-terrorism financial sanctions: the Terrorist Asset Freezing etc. Act 2010 (the "TAFA") and the United Nations Act 1946 (the "UN Act") provide powers for the Government to implement sanctions agreed through UNSCRs (TAFA was introduced following the judgment of the Supreme Court in *HM Treasury v Ahmed* [2010] 2 AC 534 ("*Ahmed*") which found that the power in the UN Act could not be used to impose asset freezes). Powers exist under s.4 of the Anti-terrorism, Crime and Security Act 2001 to make freezing Orders, and in the Counter-Terrorism Act 2008, sch. 7 to make directions to cease specified financial activity with a specified third party, sector or country.

(3) Non-EU trade sanctions: the Export Control Act 2002 provides powers to impose controls on exports to non-sanctioned destinations.

(4) UN and EU travel bans: where the UN or EU impose an international travel ban on a non-European Economic Area (the "EEA") national, the provisions in s.8B of the Immigration Act 1971 take effect. This means, unless the exemptions to the provision apply, the individual becomes an "*excluded person*" within the meaning of s.8B(4) and under s.8B(1) they must be refused leave to enter or remain in the UK and any leave subsequently given is invalid; under s.8B(2) any leave the person holds is automatically cancelled; under s.8B(3) any exemption from

[3] Sanctions White Paper, p. 10.

immigration control, provided by s.8 of the Immigration Act 1971, no longer applies so long as they are an excluded person.

5. The Sanctions White Paper refers to the UK's current approach to sanctions as "*working in a multilateral framework and meeting our international obligations*" (p. 9). There is nothing in the Sanctions White Paper to suggest that this broad approach is going to change. This is to be welcomed since purely unilateral action by the UK is unlikely to secure the objectives of such sanctions, e.g. "*to coerce a change in behaviour, to constrain behaviour by limiting access to resources, or to communicate a clear political message*" (Sanctions White Paper, p. 6).

6. The Government's concern is that the main power which it uses to carry out its sanctions policy, s. 2 of the ECA, will be lost on Brexit. That is plainly right. For this reason, it will be necessary for the Government to obtain new powers in order to be able to "*impose autonomous UK sanctions in coordination with* [its] *allies and partners*" (Sanctions White Paper, p. 7).

7. The Government has proposed the adoption of primary and secondary legislation. We agree that this will be necessary, as it would be impractical to adopt primary legislation to implement each new sanctions measure. It would also give rise to insufficient flexibility for de-listing individuals and entities.

8. In addition to over-arching provisions relating to the processes which will apply when sanctions are created, such as provisions for review, challenges and enforcement, the primary legislation should also set out in clear terms the legal bases upon which sanctions may be imposed (i.e. the overarching purposes for which sanctions can be used (see Sanctions White Paper, p. 18)). It is important that these purposes are not stated in vague, or overly broad, terms. In light of its potential breadth, and human rights context, any primary legislation should be the subject of consultation to ensure that the overarching legal framework is fit for purpose, and compliant with the UK's obligations under the European Convention on Human Rights.

9. As regards jurisdiction and territorial effect, in light of the criminal penalties that will attach to sanctions, it is important that the jurisdictional reach of domestic sanctions regimes is set out in clear terms in the primary legislation.

10. The Sanctions White Paper contains a reference to the use of "*information-sharing powers to pass details to relevant authorities*" where the UK comes across breaches of financial sanctions in other jurisdictions (p. 16; see too at p. 36). Any primary legislation should set out the scope of any such powers, and stipulate who the information may be shared with, what information may be shared, and in what circumstances such information-sharing will be appropriate.

11. Finally, the Sanctions White Paper states that "[t]*he UK also has responsibility for the foreign policy and national security of Overseas Territories and Crown Dependencies and we will continue our policy of promoting their adherence to sanctions that the Government adopts*" (p. 16). In this respect, Brexit will remove (or at least reduce) the existing ambiguity regarding the role of EU law in interpreting sanctions measures in such territories and dependencies. Such sanction measures are not made under the ECA and the territories and dependencies are outside the territory of the EU. Nevertheless, in replicating EU provisions for these territories and dependencies and in referring to the UK's obligations under EU law in that context, some interpretive ambiguity was created.

C. Question 2: Should the legislation capture domestic and international terrorist activity as a behaviour that the sanctions powers should target?

12. As the Government has identified in the Sanctions White Paper, there is already a legal framework in place for sanctioning both domestic and international terrorist activity in the UK (see §4(2) above). The Sanctions White Papers states, however, that "*the strict criteria in these powers that must be satisfied to use these powers make them unsuitable for implementing wider sanctions regimes*" (p. 12). No further explanation has been provided as to why "*the strict criteria*" is inappropriate for sanctioning domestic and international terrorist activity. If further powers are going to be included in primary legislation, it will be important for the Government to explain, and consult on, why the current powers are inadequate, and what additional powers are envisaged.

D. Question 3: What are your views on the proposed threshold for individual designation?

13. The Government proposes (Sanctions White Paper, p. 18) that it should have the power to designate persons where there is enough evidence to suggest "*reasonable grounds to suspect*" that they meet the agreed criteria. The Sanctions White Paper states that "*the application of this threshold has recently been considered and endorsed by both the UK's Supreme Court* [*R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1457 ("*Youssef*")] *and the EU General Court* [*Al-Ghabra* Case T-248/13 ("*Al-Ghabra*")]. *In its judgment, the EU General Court acknowledged that "reasonable grounds to suspect" can meet the requirement for a listing to have a "sufficiently solid factual basis" (a standard applied by the EU Courts), provided that those grounds are supported by sufficient information or evidence*": p. 18.

14. As present, s. 2(1) of TAFA provides that the Treasury may designate a person if "*(a) they reasonably believe – (i) that the person is or has been involved in terrorist activity, (ii) that the person is owned or controlled directly or indirectly by a person within sub-paragraph (i), or (iii) that the person is acting on behalf of or at the direction of a person within sub-paragraph (i), and (b) they consider that it is necessary for purposes connected with protecting members of the public from terrorism that financial restrictions should be applied in relation to the person*" (emphasis added).

15. The Terrorism Orders that preceded TAFA used a reasonable suspicion test, which proved controversial in *Ahmed*: see the First Report of the Independent Reviewer of Terrorism Legislation (15 December 2011), §§3.17-3.25.

16. In *Ahmed*, the Terrorism Orders were imposed under s.1(1) of the UN Act which permitted the making of such orders as "*appears…necessary or expedient for enabling* [UNSCRs] *to be effectively applied*". The Treasury adopted a "*reasonable suspicion*" test in imposing the asset freezes under the relevant UNSCRs. The majority of the Supreme Court found that by introducing the "*reasonable suspicion*" test, the Treasury had exceeded its powers under s.1(1) of the UN Act: Lord Hope at §58. The key point appeared to be that the relevant UNSCR provided no indication as to the evidential test to apply.

17. The Supreme Court considered the *Ahmed* case in *Youssef*. *Youssef* concerned a challenge to the Minister's decision to place the applicant's name on the UN list of Al-Qaida members. The Minister did so, in the exercise of the prerogative, on the grounds of a reasonable suspicion that the applicant met the criteria for such designation. The Supreme Court found that there was sufficient evidential support in the relevant UN process for a test of reasonable suspicion. The key reasoning is set out in Lord Carnwath's judgment at §50:

> "*The position of a decision-maker trying to assess risk in advance is very different from that of a decision-maker trying to determine whether someone has actually done something wrong. Risk cannot simply be assessed on a balance of probabilities. It involves a question of degree. The Court of Appeal were right to attach weight to the notes to the FATF* [Financial Action Task Force (an international body)] *Special Recommendation which referred to the "preventative" purpose of designation, and the requirement to freeze terrorist-related funds based on "reasonable grounds, or a reasonable basis, to suspect or believe" that they could be used to finance terrorist activity. This is similar in substance to the language used by the* [UN] *Ombudsperson in her Fifth Report dated 31 January 2013, where she rejected a test based on probability, and proposed the standard "whether there is sufficient information to provide a reasonable and credible basis for the listing". She saw this as one which recognised "a lower threshold appropriate to preventative measures", while setting a "sufficient level of protection for the rights of individuals". As a member of the 1267 committee, the Secretary of State was not only entitled, but would be expected, to apply the same approach as the committee as a whole*".

18. In *Al-Ghabra*, the challenge concerned a designation in Regulation 881/2002 which imposed sanctions on Al-Qaida members identified by the UN Sanctions Committee. Following the *Kadi* litigation,[4] the EU cannot adopt such UN decisions automatically, but must apply its own independent judgment to the adoption of the measures. In the relevant EU decision, the Commission (at §9) adopted the test formulated in the Interpretative Note to the FATF Special Recommendation III on Terrorist Financing, namely that "*the designation* [of an individual on the list at issue] [should be] *supported by reasonable grounds, or a reasonable basis, to suspect or believe that the* [individual] *is a terrorist, one who finances terrorism or a terrorist organisation*".

19. The applicant contended before the General Court that the standard of proof ("*reasonable grounds ... to suspect or believe*") was incorrect, since the Court of Justice required in *Kadi II* a "*sufficiently solid factual basis*" for a designation. The applicant relied on the fact (§108) that the UK had itself abandoned the test of "*reasonable grounds*

[4] *Yassin Abdullah Kadi v Commission*, C-584/10 P, EU:C:2013:518.

for suspicion" in favour of the more stringent test of "*reasonable grounds for believing*" when adopting the Terrorism Prevention and Investigation Measures Act 2011 ("TPIM") (and, it might have been added, TAFA).

20. The General Court found at §113 that "*the Commission did not err in referring … to the operational test formulated by the FATF* ... [that] *the freezing of his funds should be based 'on reasonable grounds, or a reasonable basis, to suspect or believe that such funds or other assets could be used to finance terrorist activity', since that standard of proof is consistent with the criteria established by the Court of Justice in its judgment* [in] *Kadi II*…".

21. The General Court recognised "[a]*dmittedly, that test is not entirely unambiguous, in so far as 'suspect' and 'believe' are distinct mental steps giving rise to different degrees of conviction*" (§114). The General Court held, however, that in *Kadi II* "*the Court validated the application of the less exacting of those two possible standards of proof, namely that of suspicion, when examining whether a particular ground used against the listed person was well founded*". The General Court held at §116 that "*in order for suspicions of involvement in terrorist activities to be legitimately relied on vis-à-vis an individual, information or evidence must be produced to support those suspicions, which is a matter that must be assessed on a case-by-case basis*". Accordingly, held the General Court at §117, "*the requirement for a 'sufficiently solid factual basis' … may be met by the application of the 'reasonable grounds for suspicion' test, provided that those grounds are supported by sufficient information or evidence*".

22. The General Court dismissed the change in TPIM as irrelevant and noted at §118 that the English Court of Appeal in *Youssef* had also upheld the "*reasonable grounds for suspicion*" test (which judgment was subsequently upheld by the Supreme Court, as noted above).

23. The Sanctions White Paper proposes to rely on this case-law to lower the current standard for the imposition of both terrorism-related and non-terrorism-related asset freezes (which, in the case of the former, may involve repealing and replacing s.2 of TAFA). Our primary position is that it is inappropriate to lower the current standard for both types of asset-freezing measure. The standard in TAFA was recently considered and adopted by Parliament and there is no evidence of a need to change it. The lack of a justification for a lower standard appears to be *a fortiori* in non-terrorist

related asset freezes where different considerations apply. In these cases there is certainly not the need for the urgent, preventative measures cited in *Al-Ghabra* and *Youssef.* Contrary to the suggestion in the Sanctions White Paper, it is not clear that the General Court has applied a light-touch "*reasonable suspicion*" test to non-terrorism related asset-freezes. This is particularly clear where the Council relies on information provided by third countries.

24. The Council is not required to systematically and on its own initiative conduct its own investigations where it already has information provided by the authorities of a Member State or third country, but this does not provide the Council with the ability to simply "*rubber-stamp*" what it is told by a Member State or third country.[5]

25. The following principles can be derived from the non-terrorism related case-law of the General Court:

(1) The Council must be able to show that the statement of reasons for listing the applicant is "*substantiated by sufficiently specific and concrete evidence*". the "*judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, are substantiated by sufficiently specific and concrete evidence*": *Rotenberg v Council*, T-720/14, EU:T:2016:689, at §70 (emphasis added).

(2) The Council must "*examine carefully and impartially the evidence that had been sent to it by the* [third country] *authorities … in the light, in particular, of the comments and any exculpatory evidence submitted by the applicant*": *Al Matri v Council*, T-545/13, EU:T:2016:376 ("*Al Matri v Council*") at §58.

(3) In examining the evidence, the Council must assess, in particular, "*whether it is necessary to investigate further, in particular to seek the disclosure of additional evidence from the* [third country*] authorities if it transpires that the evidence already supplied is insufficient*": *Al Matri v Council* at §68.

[5] Advocate General Sharpston in her Opinion delivered on 26 February 2015 in *Council v Bank Mellat*, C-176/13 P and *Council v Bank Saderat Iran*, C-200/13 P, EU:C:2015:134 ("*Bank Mellat AG Opinion*"), §152.

(4) The key factor in assessing whether or not further investigations are required is any exculpatory evidence submitted by the designated individual or entity. As the General Court stated in Al Matri v Council, "*when availing themselves of the opportunity which the persons concerned must be given to submit their comments on the reasons which the Council intends to use to maintain their names in the annexes to the contested acts, those persons may submit such information, or even exculpatory evidence, which would require the Council to investigate further*" (at §68) (emphasis added). Hence, "*while it is not for the Council to take the place of the [third country] judicial authorities in assessing whether the judicial investigations … are well founded, it is not inconceivable that, in the light, in particular, of the applicant's observations, the Council might be obliged to seek clarification from those … authorities with regard to the material on which those investigations are based*" (*id*).

(5) The point was repeated by the General Court in Yanukovych v Council, T-348/14, EU:T:2016:508: "[W]*here an applicant produces evidence capable of demonstrating that what he is accused of is manifestly false or distorted, it will be the duty of the Council to verify the information submitted to it and to request, where necessary, additional information or evidence*" (at §113).

26. The above principles should be reflected in any standard of proof adopted in respect of non-terrorism related asset freezes.

27. There is a related point which is the standard of proof that will apply during any review of the initial decision to designate (i.e., at the re-designation stage, or at any stage where a review is requested (see §§28-31 below)). Different considerations will necessarily apply at this stage because the Government will have had more time to apply the requisite standard of review and there is no risk of dissipation of assets. As noted in the Bank Mellat AG Opinion, "*it may sometimes (although not always) be necessary to take an initial decision rapidly on the basis of information provided by a Member State, which cannot materially be verified by the Council as a body in the time available*" (§151). However, "*such considerations cannot absolve the Council from its duty of careful and impartial examination when re-examining that initial decision with a view to confirmation. Adequate evidence must therefore be available to the Council at that time*" (§152) (emphasis added).

E. Question 4: Should the Government review non-UN sanctions regimes after a fixed period as well as in response to political developments

28. The answer to this question must be yes. This must follow from the very serious consequences of sanctions measures. As the European Courts have emphasised, "[s]*uch measures are particularly draconian for those who are subject to them*"[6]; persons "*designated in this way are effectively 'prisoners' of the State*"[7]; and "*the effect of the freeze on both them and their families can be devastating*".[8]

29. In our view, there should be (a) time-limited designations, with mandatory review after a defined period of time (in the EU context, this is typically 12 months); (b) proactive review in response to political or legal developments; and (c) review in response to the provision of any observations by the designated individual or entity.

30. As to (c), useful guidance can be taken from the Council's policies in respect of requests for de-listing. The process for making a request to the Council to de-list a designated individual is set out in the Council's "*EU Best Practices for the effective implementation of restrictive measures*" (14 December 2016) at §§18-19:

> "*18. A transparent and effective de-listing procedure is essential to the credibility and legitimacy of restrictive measures. Such a procedure could also improve the quality of listing decisions. De-listing could be appropriate in various cases, including evidence of mistaken listing, a relevant subsequent change in facts, emergence of further evidence, death of a listed person or the liquidation of a listed entity. Essentially de-listing is appropriate wherever the criteria for listing are no longer met.*
>
> *19. When considering a request for de-listing* [footnote 5: For procedural details on de-listing requests with regard to EU autonomous measures see the Guidelines, Annex I, paragraphs 19 and 20], *all relevant information should be taken into account. Apart from submission of requests for de-listing, a regular review, as provided for in the relevant legal act, involving all Member States, shall take place in order to examine whether there remain grounds for keeping a person or entity on the list.*"

[6] Yassin Abdullah Kadi v Commission, T-85/09, EU:T:2010:418, §149.
[7] *Id.*
[8] *Id.*

31. The Guidelines cited in §19 (at footnote 5) are the "*Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*". The Guidelines provide (at §§18-20):

> "*Processing requests for de-listings*
>
> *18. Individual requests for de-listing should be processed, as soon as they arrive, in accordance with the applicable legal instrument and EU Best Practices for the effective implementation of restrictive measures.*
>
> *19. The General Secretariat of the Council will act as a mailbox for de-listing requests. Any observations or reconsideration of a listing, with supporting documentation, are to be forwarded in writing to the Council of the European Union in accordance with the review process foreseen in the relevant sanctions regime and as explained in the accompanying notice published in the OJ or notification letter where the address is available.*
>
> *20. When the Council Secretariat receives such requests, it will forward them to the competent regional working party for consideration on the basis of a preliminary analysis prepared by the EEAS and the Council Legal Service. The legal, technical and horizontal aspects of the requests for de-listing and the EU reply will be discussed in the RELEX working party.*"

F. Question 5: What are your views on the proposed challenge mechanism?

32. There are two issues here. First, there must be internal administration review mechanisms in place that will allow a designated individual or entity to challenge their designation. Secondly, there must be access to judicial proceedings in order to challenge the lawfulness of the sanctions.

33. As to internal administrative review, the Sanctions White Paper states that designated individuals and entities will be able to request "*an internal review*", and that the Government proposes to adopt a similar approach to the EU Council in reconsidering a question (p. 21).

34. The availability of an internal review process is very important. Individuals and entities should only be required to resort to judicial proceedings as a last resort. In order for any internal review to be effective, the Government must afford due process guarantees, including those rights guaranteed under Article 6 of the European Convention on Human Rights.

35. The following principles can be derived from the case-law of the European Courts:

(1) The relevant institution must inform the person or entity concerned not only of the grounds and reasons for including it in restrictive measures, but also the evidence adduced against them to justify the restrictive measures.[9] In the case of an original designation, there may be good reasons for not providing this information prior to designation, however it should be provided shortly thereafter. In cases involving re-designation the grounds for inclusion and supporting evidence must be provided to the person or entity concerned prior to re-designation. The reason for this is straightforward. As recognised by the Advocate General in *French Republic v People's Mohaedin Organization of Iran* (emphasis added):

> "[T]*he case-law provides that, where a decision to freeze funds is taken for the first time, such a decision must, by its very nature, be able to benefit from a surprise effect and be able to be applied immediately. It cannot, therefore, be the subject-matter of notification before it is implemented. The position is different in the case of a subsequent decision to freeze the same funds. There, the element of surprise is no longer relevant. Such a decision must be preceded by the possibility of a further hearing and, where appropriate, communication of new evidence.*"[10]

(2) The individual or entity must be afforded the opportunity effectively to make known their view on the grounds for designation and on the evidence relied on by the Council in taking its decision to designate that person or entity.[11] In a re-designation case the Council is required to ensure that the individual or entity is afforded a proper opportunity to make known their views on the grounds advanced against it *prior to* re-designation and, where such representations are made, the Council is under an obligation "*to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those comments and any*

[9] This is consistent with the position under UK domestic law. In *Bank Mellat v HM Treasury* [2016] 1 WLR 1187, the Treasury had argued that there was no minimum disclosure requirement (the "*irreducible minimum*" referred to in *AF (No. 3)* [2010] 2 AC 269) where neither personal liberty nor an equally fundamental interest was at stake. The Court of Appeal held that restrictions on the freedom to do business could be as serious for a bank as restrictions on personal liberty for an individual. The Court of Appeal held that for asset-freezing measures, there was no doubt that the *AF (No. 3)* standard would apply. Even sanctions which fell short of asset freezes but which involved sufficiently serious restrictions on the bank's freedom of action and a sufficiently serious impact on its banking business would require *AF (No. 3)* disclosure.

[10] *French Republic v People's Mohaedin Organization of Iran*, C-27/09 P, EU:C:2011:482, §100 (emphasis added). This reasoning was largely affirmed by the Court of Justice: *French Republic v People's Mohaedin Organization of Iran*, C-27-09 P, EU:C:2011:853, §§59-76.

[11] *Manufacturing Support & Procurement Kala Naft v Council*, T-509/10, EU:T:2012:201, §85.

exculpatory evidence provided with those comments".[12] This is a fundamental procedural requirement to ensure that there remain grounds for the imposition of the sanction on the entity concerned.

(3) The case-law therefore makes clear that in the case of a re-designation, the Council must ensure that an entity that may be the subject of re-designation is afforded a proper opportunity to make known its views on the grounds advanced against it *prior to re-designation* and, where such representations are made, the Council is under an obligation to carefully and impartially examine whether, in light of the representations made, that the reasons for re-designation remain well-founded.

36. The internal review process currently adopted by the Council is not fit for purpose, and not an appropriate model for the Government. As the House of Lords European Union Committee found in its recent report, "[a]*lthough the Council responds to correspondence from listed individuals, companies, and their legal representatives, the evidence suggests that its responses are both slow and often do not engage with the substance of the concern being raised*": HL Sanctions Report §112. This is consistent with our experience. The Council rarely engages with applicants in this process. It normally acknowledges receipt of observations and transmits the non-secret evidence upon which it proposes to rely. The Council very rarely answers the particular points raised in the applicant's correspondence and even then limits itself to very brief rejections. The evidence of the actual decision-making disclosed after the sanctions have been adopted normally contains no sign of consideration of the exculpatory material.

37. If the Government's intention is to provide the same rights that designated persons have (at least in form) under EU law, one would expect the domestic authorities to do a better job.

38. As to judicial review, we welcome the commitment made in the Sanctions White Paper that "*new legislation will provide a mechanism for sanctioned persons to challenge their UK listings before the Courts*", and that this mechanism will be "*sufficiently robust to protect the rights of a sanctioned person and will allow them to make any necessary arguments*" (at p.

[12] *Commission and others v Kadi*, Joined Cases C-58/10 P, C-593/10 P, C-595/10 P, EU:C:2013:518 ("*Kadi II*"), §§111-114.

21). In our view, that mechanism should be way of judicial review in the Administrative Court. We do not consider that it is necessary to allow for a more intrusive appeal "*on the merits*". In our view, domestic judicial review is sufficiently flexible to accommodate the requirements of Article 6 of the European Convention on Human Rights: see *T-Mobile (UK) Ltd v Office of Communications* [2009] 1 WLR 1565 *per* Jacob LJ at §29. However, anything less than that would raise serious concerns.

39. We also welcome the commitment to "*always seek to sanction an individual or entity on the basis of open-source evidence which can be disclosed to the listed person in the event of a legal challenge*" (p. 22). The imposition of such far-reaching measures (see §28 above) on the basis of closed material should be avoided. The Special Advocate procedure is a controversial procedure as the Special Advocate does not represent the applicant, and the applicant is not his or her client. The Special Advocate is unable to take instructions from the applicant directly and in any event his ability to take instructions is constrained by the fact that the applicant cannot be told the content of the sensitive material.

G. Question 6: Are the proposed licensing powers for financial sanctions fit for purpose?

40. We welcome the Government's commitment to ensure that the licensing regime is compliant with the European Convention on Human Rights, and to take steps to "*enhance the system where there are opportunities to improve its efficiency and flexibility*" (p. 25). Based on our experience, there is a clear need for greater flexibility in licensing arrangements.

41. The Sanctions White Paper envisages (a) replicating the existing grounds for licences in the EU sanctions; and (b) potential further derogations, appropriate to the aims of the relevant sanctions regime. As to (b), the Sanctions White Paper states that "[i]*n appropriate circumstances a Minister may also be able to authorise a general licence*" (p. 26). This is significant. OFSI is currently bound (where EU sanctions are in issue) to grant licences under the exhaustive list in the EU regulations only. There is no general power to grant a licence in any other circumstance. This has caused problems for OFSI in novel situations which the EU failed to contemplate. The addition of a general power to be exercised in exceptional circumstances would be a welcome addition.

42. We agree that challenges to licensing decisions should continue to be by way of judicial review (Sanctions White Paper, p. 27).

43. Finally, we note that "[t]*he new sanctions powers will include reporting obligations on anyone who becomes aware of or suspects a breach of financial sanctions. They will be required to report to the Government if they know or suspect that a current customer, or any customer in the previous five years, is a sanctioned person, or has committed an offence under the legislation. This will replicate and clarify the current reporting duties under EU law*": Sanctions White Paper: p. 21 (emphasis added).

44. Here, the Government has an opportunity to remedy an inconsistency between reporting obligations under EU law and domestic sanctions regulations (only breaches of the latter attract a criminal penalty).

45. Under most EU sanctions instruments there is a duty on everyone with its personal and territorial scope to "*…supply immediately any information which would facilitate compliance with this Regulation, such as accounts and amounts frozen … to the competent authority in the Member State where they are resident or located … and shall transmit such information, either directly or through the Member States, to the Commission.*" Such information must be volunteered.

46. By contrast, in most UK sanctions regulations, the duty to volunteer information appears to apply to a "*relevant institution*" only. This is distinguished from the duty to provide information and documents when requested by OFSI (which applies to any person). A "*relevant institution*" is defined in the UK regulations to mean (essentially) a financial institution such as a bank or "*an undertaking which by way of business operates a currency exchange office, transmits money (or any representations of monetary value) by any means or cashes cheques which are made payable to customers*" (emphasis added).

H. Question 7: Are the proposed licensing powers for trade sanctions fit for purpose?

47. We have no comments on the proposed licensing powers for trade sanctions.

I. Question 8: What are your views on the extent of the Government's proposed additional power to seize funds and assets in order to freeze them

48. The Sanctions White Paper contains a brief reference to the inclusion of a power within the new legislation "*that allows law enforcement to seize funds/assets from a sanctioned person to enable those funds/assets to be frozen*" (p. 30). The Government already has seizure powers under the Proceeds of Crime Act 2002 and the Finance Act 2017. If further powers are going to be included in primary legislation, it will be important for the Government to explain, and consult on, why the current powers are inadequate, and what additional powers are envisaged.

J. Question 9: What are your views on the design and extent of the proposed "no claims clause"?

49. We agree with the proposed inclusion of a "*no-claims*" clause to ensure that no liability for damages is incurred simply by a person applying UK sanctions to a sanctioned person in accordance with UK law (Sanctions White Paper, p. 35). As to damages, we consider that it is important that damages are available for an unlawful listing. This may be addressed under the Human Rights Act 1998.

23 June 2017