



Law Society
of Scotland

Evidence from the Law Society of Scotland

EU External Affairs Sub-Committee Inquiry: Brexit:
Sanctions Policy

July 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the United Kingdom and Scottish Governments, Parliaments, wider stakeholders and our membership.

The Society's Policy Committee responded to the UK Government's Consultation: *The United Kingdom's future legal framework for imposing and implementing sanctions* (the Consultation) references to page numbers in this briefing are to this paper.

The Committee has the following comments to put forward for consideration.

General Comments

We agree that sanctions are an important foreign policy and national security tool and that the current sanctions regime will need revision when the UK withdraws from the EU. The EU sanctions have their legal base in EU legislation which is brought into effect into UK Law by the European Communities Act 1972 (ECA). When this legislation is repealed there will need to be in place domestic UK legislation which creates the capacity to preserve and update UN sanctions and to impose autonomous UK sanctions.

We recommend that sanctions legislation should be consolidated. There should be a "Sanctions Code" which would stretch across immigration, asset freezing, financial and trade restrictions, control in the transport sector and implementation and enforcement powers. In our view consolidation of the legislation would be extremely helpful and reduce some of the burden on legal and other advisers.

The guidance to the sanctions regime should also be consolidated and made available. There should be an official communications campaign to assist solicitors and other advisers in becoming familiar with the new UK sanctions regime. The Office of Financial Sanctions Implementation (OFSI) should also produce sector specific guidance covering the use of such issues as automated sanctions screening systems and legal professional privilege in the context of sanctions compliance.

What will OFSI envisage the supervisory requirements of regulators to be? Dependent on the response there may require to be amendments to the legislation under which those regulators albeit operate.

Specific Issues

1. Further powers for the UK Government

The proposed powers for the new sanctions legislation detailed in pages 14, 15 and 16 of the consultation appear to be appropriate. There is no additional power which we would suggest.

Regarding the adoption of financial sector restrictions which impact on the provision of advisory services it must be made clear the extent to which advisory services include legal services. The bill should be clear about the extent to which the provision of legal services is prohibited and the circumstances in which legal services provided to a designated person can be permitted.

We also have concerns about the maintenance of legal professional privilege/confidentiality which is central to the rule of law and which has been most recently recognised in the Investigatory Powers Act 2016.

In connection with the trade sector restrictions the bill must be clear about the extent to which it affects the provision of services provided over the internet and whether or not services provided over the internet are to be considered as “exports”.

2. Capturing domestic and international terrorist activity as a behaviour that the sanctions powers should target

We agree that sanctions should apply to domestic and international terrorist activity. We expect that notwithstanding the need to target terrorist activity, the statutory provisions will acknowledge respect for the rule of law. A clear definition of “terrorism” which will be captured by the legislation will be necessary. Consideration should be given to including those who may be suspected of human trafficking or child sexual exploitation.

3. The proposed threshold for individual designations

We agree that the proposed threshold of “reasonable grounds to suspect” applicable to individual designation seems appropriate.

4. Review of non-UN sanctions regimes after a fixed period as well as in response to political developments

We agree that the Government should subject non UN sanction regimes to an internal review. Reviews of individual designations or of the entire regime should occur regularly, to ensure that the basis of the sanction is still valid. They should occur at least annually and within 3 months of a change in political circumstances which might affect their applicability.

We agree that sanctioned persons should be able to ask the UK Government to reconsider a decision to designate them. We believe that any decision to continue listing should be accompanied by reasons and be subject to an internal review which should be independent of the original review panel.

5. The proposed challenge mechanism

The challenge before the Courts detailed in page 22 should not simply be limited to judicial review but should extend to the merits of the listing. We note that such cases may engage the use of sensitive material the disclosure of which would be damaging to national security, international relations or the public interest. We note the proposal to employ closed material procedure which has been used in other legislation such as the Counter-Terrorism Act 2008. The White Paper on page 23 identifies “special advocates” as “barristers in independent practice of the highest integrity, experience and ability, from civil and criminal practices. They are bound by the ethical standards of the Bar Council.”

We would like clarification that special advocates should be able to be drawn from the ranks of not only the Bar in England and Wales but also the Bar in Scotland and Northern Ireland and from suitably qualified solicitor advocates in all three jurisdictions.

6. Fitness for purpose of the proposed licensing powers for financial sanctions

We have considered the reporting obligations to promote compliance and seek clarity on the following points:-

- (a) Will the reporting obligations apply not only to solicitors but to Notaries Public? The Law Society of Scotland is the statutory regulator of solicitors and Notaries Public in Scotland. Many Scottish solicitors are also admitted as Notaries in Scotland. The situation is different in England and Wales and in Northern Ireland where the regulators are respectively the Faculty Office www.facultyoffice.org.uk and the Lord Chief Justice of Northern Ireland www.courtsni.gov.uk
- (b) The legislation should not impose a retrospective obligation to report to the Government knowledge or suspicion about a customer in the previous five years who may have been a sanctioned person or who may have committed an offence under the legislation. This retrospective provision could create difficulties with compliance.
- (c) There will need to be further consultation on regulatory changes going forward. Is it anticipated that the UK sanctions regime will change as there are developments in both UN and EU sanction regimes?

7. Fitness for purpose of the proposed licensing powers for trade sanctions

The proposed licensing powers for trade sanctions appear to be appropriate.

8. The Government’s proposed additional power to seize funds and assets in order to freeze them

This additional power to seize funds and assets in order to freeze them appears to be unrelated to the withdrawal of the UK from the EU. We reserve our position on this issue until we see the clauses in the bill. The Government should consult on the relevant draft clauses prior to introduction of the bill.

9. Our views on the design and extent of the proposed “no-claims clause”

We agree with the proposal in the consultation to mirror existing EU provisions which limit the ability to seek damages from persons simply because they are complying with sanctions. This is a sensible provision and should exclude liability for damages for any person complying with the sanctions legislation relating to either contractual, delictual or tortious liability. We also agree with the proposal to mirror existing EU law by providing that the Courts will not award damages to persons who successfully challenge their designations unless there are special circumstances that justify the award of compensation.



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