RE: REVIEW OF BALANCE OF COMPETENCES BETWEEN THE UK AND EU – SANCTIONS

NOTE

---

1. I understand from the email of 22 February that the Government is currently reviewing the balance of competences between the UK and the EU in relation to sanctions. You noted in particular the following four issues upon which you are focussing:

    - How effective is the EU in establishing and implementing sanctions? What, if anything, should it do differently? Are there any gaps in competences that should be addressed (e.g. 'orphaned' sanctions that can't be implemented)?

    - What are the comparative advantages/disadvantages of working through the EU in the application and implementation of sanctions, rather than the UK working independently?

    - Would a different division of EU and Member State competence in relation to sanctions produce more effective policy and delivery? If so, how and why? What would the implications be for the UK (e.g. in terms of international trade, our power to influence within the EU)?

    - How might the UK national interest be served by action on sanctions being taken at a different level (e.g. regional, national, UN, OECD, G20) either in addition or as an alternative to action at EU level?

2. The following observations draw upon from experience dealing with EU law and public law/regulatory matters generally and in particular with EU sanctions regimes covering a range of matters including: sanctions against the regime in Burma/Myanmar; sanctions against Zimbabwe; sanctions against nuclear proliferation; and sanctions against suspected terrorists. I have acted for the UK

in a number of sanctions cases before the EU Courts including: C-584/10P *Kadi II;* C-545/09 *Bank Melli Iran*; T-121/09 *Al Shanfari*; and C- 376/10P *Tay Za.* In addition, I have advised other parties in relation to EU sanctions regimes as well as dealing with terrorism related matters in domestic law (for example, both as a special advocate in control order and deportation cases and also for Government and Government agencies, in particular in the Guantanamo Bay damages litigation).

3. My first observation about issues of balance of competence in sanctions is that it is well accepted that in order to be effective sanctions must be widely adopted and complied with. This is all the more important in a world with interconnected international financial systems. For one state to adopt sanctions freezing assets or preventing travel may well prove to be ineffective in materially disrupting either the activities an undesirable third country regime or those of suspected terrorists. Certainly, it would appear to put far less pressure on a regime or suspected terrorist if one a single state is acting. On the other hand, where concerted action is taken across the whole of the EU the likelihood of practical disruption is greater and the political signal both to those targeted and to other states across the world is stronger than sanctions which are instigated by a single state.

4. The second observation it one of practicality, where it is the EU which takes the initiative to put in place relevant sanctions regulations (or decisions), it becomes relatively straightforward for individual Member States to "roll out" the sanctions in domestic law. Where it falls to individual Member States to take their own initiative to do so, the prospect of more inertia, delay and incomplete implementation would seem to be much heightened. The EU centralised system for identifying what steps should be taken and against which persons, organisations or states, would seem to assist to reduce the political and legislative "transaction costs" of sanctions.

5. Indeed, taking these broad points together, it might be said that if the EU did not exist to enable sanctions to be rolled out across the EU Member States, it would be desirable to invent a mechanism to do that in any event. The infrastructure of

the EU provides the mechanism which it would otherwise seem desirable to invent.

6. Of course, where mandatory sanctions are set at an EU level, the UK does not have a discretion *not* to implement the sanctions. It might be suggested that this "loss" of discretion is a detriment to the UK. However, my experience has been that the UK has been in the vanguard of seeking sanctions to be imposed and has not had concerns as to whether to implement sanctions. Indeed, by its interventions in EU court proceedings the UK has shown itself understandably keen for such sanctions to be maintained. Given the processes for the imposition of sanctions which exist through arrangements for CFSP and otherwise under the EU Treaties, the likelihood that the UK will be faced with an obligation to impose sanctions to which it objects seems remote. Where the UK has concerns about a listing it makes those concerns known through relevant channels.

7. In relation to those sanctions regimes which involve the EU implementing UN sanctions measures, the UK tends to play a particularly prominent role given, in particular, its permanent membership of the UN Security Council. Indeed, it is the only Member State which has intervened and then specifically appealed the decision of the Court of First Instance in *Kadi II* concerning the proper implementation of UN mandated sanctions at an EU level. In the course of its interventions in the *Kadi* litigation, the UK has repeatedly emphasised the importance of EU wide sanctions imposition both for reasons of effectiveness and practicality.

8. Having been on the end of both winning and losing interventions in the EU courts in relation to sanctions matters, I am very conscious that the EU court procedure may adversely affect the EU sanctions outcome desired by the UK. I very much doubt, however, that such interventions should be seen as a reason why the UK should want to move away from EU level sanctions. First, as part of a community based on the rule of law, the institutions and Member States of the EU must- and do - recognise that there will be occasions where particular curial conclusions are not what they wanted. That is the nature of adjudication by courts. Second, those cases that have been lost have tended to be concerned with

fair procedures and rights being afforded to defendants. Those are values close to the heart of the common law and it would be wrong to treat the EU courts as simply following some radical agenda. The Government is well familiar with similar concerns being articulated by domestic courts.

9. In this context, it is perhaps worth noting a paradox which arises both in relation to both domestic and EU sanctions: the problems of evidential disclosure and fairness of procedure appear to have become more acute as sanctions have become more specific and targeted. Plainly where sanctions can be effective without causing collateral adverse effects to individuals or communities whose activities they are not intended to affect, that is highly desirable. The move to targeted sanctions is therefore desirable. However, as the targets become clearer, broad assessments of foreign policy become less material as a means of justifying the measures in question. Thus it is that the attempt to focus and do less damage which, perhaps perversely, creates greater problems of implementation. That is not, of course, to suggest that painting sanctions with a broader brush would be preferable, it is simply to note one of the consequences of more specific legal scrutiny.

10. In the context of particular EU judicial proceedings I should also note that the EU institutions have shown real willingness to discuss positions and lines to take with the UK. In most instances that willingness to discuss has ensured both consistent and effective representation. In one or two cases, the representation was mediocre and even poor. However, that reflects upon the quality of advocates rather than any inherent failing in the system of court procedure.

11. Turning to certain of the other more specific points raised in the questions:

    a. Whilst I consider that the EU mechanisms for establishing and implementing sanctions appear both effective and desirable, the practical impact of such measures does in the end depend upon the

consciousness and diligence of Member States.[1] I am not in a position to comment on whether there are real doubts about the practical application of measures by individual states.

b. In terms of rendering the process of sanctions measures adoption more effective, one key point which can be drawn from the EU court proceedings in which I have been involved is that making available as much material as possible as to why a particular person or organisation is listed is of particular importance.[2] This undoubtedly assists in resisting challenges to the fairness of the listing procedure.

c. Quite apart from the benefits to the fairness of any procedures to those affected by listing, ensuring as much material as possible is available to those responsible for EU listings is highly desirable. I am aware of occasions where the evidential basis for particular listings appeared flawed or very weak (a company that no longer existed, for example). That suggested to me that the exchange of information and evidence between Member States and the EU institutions could have been improved.

d. I do recognise that a real difficulty may arise if sensitive, potentially intelligence related, material is used as the basis for a particular listing. The current procedural arrangements do not admit of the use of such materials in practice.[3]

e. The final question raised pertains to the level at which sanctions are adopted. As I hope is clear from the above, I can see real benefits to sanctions being adopted at an EU level. However, it is also to be noted

[1] This is quite apart from the question highlighted by the Independent Reviewer of Terrorism Legislation David Anderson QC that the actual assets frozen by the UK (at least in relation to terrorism sanctions) appears very small (see, for example, Written Ministerial Statement at Annex 3 to his December 2012 report).

[2] I note, of course, that pending the outcome of the pending appeal in *Kadi II*, the importance and relevance of the provision of evidence at a UN level is a matter which remains unresolved. I think it can be said with confidence, however, that challenges to UN based sanctions measures are less likely to succeed where the UN sanctions committee has made available substantial evidence.

[3] I note that concerns about the openness of procedures have, of course, been recognised in the UK's own arrangements for the use of sensitive materials particularly in litigation.

that mandatory sanctions measures adopted by the UN have much wider legal impact (albeit that they may then be implemented through the EU processes). There must, therefore, be a desirability to sanctions measures being adopted at the level where their greatest impact may be felt. However, there are two obvious qualifications to such a position: first, the political feasibility of such measures may be much lower at an international rather than an EU level. Second, as has been clear from the saga of the *Kadi* litigation, the absence of a court based review process and the limitations of the evidence provided to those made subject to sanctions have caused concerns in courts in the EU and the UK. To the extent that targeted sanctions continue to be developed and imposed at a UN level, there would be good reason further to develop the UN procedures.

12. Finally, I should note what I perceive to be the view EU level sanctions as seen by non-EU states. It appears to me from my involvement in various cases that non-EU states are concerned that the EU should act on a concerted basis to ensure sanctions are properly and effectively implemented. Those outside the EU concerned with the maintenance of international peace and security perceive that the adoption and implementation of sanctions by the EU is not only a matter of real practical force but also a very significant political signal. The idea that more sanctions arrangements should be dealt with at a purely domestic level would, I imagine, be a cause of real disappointment if not consternation to such other states.

13. I am conscious I have not sought to answer in detail each of the questions posed and that a number of the points made above are general and do not deal with the specifics of particular cases or difficulties which have arisen. I would, of course, be happy to provide further material if that would be of assistance and, equally, would be happy to arrange to discuss matters if that would be more convenient. I can be most easily contacted at chambers.

Daniel Beard QC
Monckton Chambers

3 March 2013