REPORT OF THE INDEPENDENT REVIEWER OF TERRORISM LEGISLATION ON THE OPERATION OF THE COUNTER TERRORISM (SANCTIONS) (EU EXIT) REGULATIONS 2019

BY JONATHAN HALL KC
Independent Reviewer of Terrorism Legislation

Presented to Parliament pursuant to Section 31 of the Sanctions and Anti-Money Laundering Act 2018

December 2022

This publication is available at: www.gov.uk/official-documents.

Any enquiries regarding this publication should be sent to us at public.enquiries@hmtreasury.gov.uk

1. INTRODUCTION

1.1. Financial sanctions are powerful and instantaneous measures imposed by Ministers with wide-reaching consequences. Unlike freezing orders:

- Sanctions are made by the executive rather than a court.
- It is unnecessary to show a risk of dissipation.
- Sanctions freeze all the assets of the designated person subject only to certain exceptions and the grant of licences.

1.2. This report is the product of the first independent review of any sanctions regime made by HM Treasury under the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"). A sanctions "regime" is a set of sanctions measures put in place for a particular set of purposes. The regime subject to this report was established by the **Counter-Terrorism (Sanctions) (EU Exit) Regulations 2019 ("the CT Sanctions 2019")**, sometimes referred to by the official shorthand "CT3".

1.3. The type of financial sanctions covered in this report are targeted sanctions – that is, sanctions directed at identifiable individuals or entities based on their suspected involvement in terrorism.

1.4. A counter-terrorism sanctions regime is not optional. UN Security Council Regulation 1373 requires states to freeze the funds, financial assets and economic resources of terrorists and associated entities; and to prohibit all those within their jurisdiction from making funds, financial assets, economic resources and financial services available to terrorists and associated entities[1]. The CT Sanctions 2019 are made in compliance with this objective by enabling the UK to impose its own 'autonomous' financial sanctions.

[1] Resolution 1373(2001), paragraph 1; for discussion on the limitations of UNSCR 1373 see Lord Anderson QC, First Report on the Operation of TAFA (December 2011) at 3.5 to 3.6.

1.5. The CT Sanctions 2019 are a direct replacement of Part 1 of the repealed Terrorist Asset-Freezing Etc. Act 2010 ("TAFA"), and are intended to enable financial designations for counter-terrorism purposes of persons, groups or entities with a clear domestic nexus. They are ***domestic counter-terrorism sanctions***, to be distinguished from international CT sanctions made under the Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019 ("the International CT Sanctions 2019", known internally as "CT2"), or in compliance with targeted UN CT sanctions against ISIL and Al-Qaida[2].

Review

1.6. The origin of independent review in the terrorist sanctions field is found in TAFA[3], modelled on the requirements for independent review of the Terrorism Acts 2000 and 2006. The rationale for independent review is that counter-terrorism sanctions are exceptional and extra-judicial measures, capable of having profound impact upon the lives of individuals, including British citizens, based on sensitive intelligence and a relationship between government departments and the intelligence agencies that is comparatively closed to Parliamentary scrutiny. I must consider the operation of the asset-freeze provisions that have been referred to me rather than the validity or legitimacy of any individual designations made under CT Sanctions 2019 [4].

1.7. I was appointed as Independent Reviewer of Terrorism Legislation in May 2019 and on 26 January 2021 I was appointed to review the entirety of the CT Sanctions 2019[5].

1.8. During his term as Independent Reviewer of TAFA, Lord Anderson QC produced 4 reports[6], which I have used as far as possible as a template for this review. But unlike

[2] Under the ISIL (Da'esh) and Al-Qaida (United Nations Sanctions)(EU Exit) Regulations 2019.
[3] Section 31 TAFA.
[4] Section 31(13) SAMLA.
[5] By section 31(2) SAMLA. In the case of the CT Sanctions 2019, HM Treasury has referred the entirety of the regulations.
[6] Lord Anderson QC, First TAFA report (2011), Second TAFA report (2012), Third TAFA report (2013), Fourth TAFA report (2015).

the TAFA regime, the CT Sanctions 2019 are not free-standing primary legislation. Rather, they are ***secondary legislation***, or regulations, made under SAMLA which is now the enabling act for *all* the principal sanctions regimes in the UK.

1.9. Because SAMLA defines minimum standards and procedures that apply to the CT Sanctions 2019, I consider SAMLA in some detail. These standards and procedures were significantly altered by the Economic Crime (Transparency and Enforcement) Act 2022 ('the Economic Crime Act 2022'), passed as emergency legislation following Russia's invasion of Ukraine, and designed to streamline the process of creating regimes and making designations.

1.10. The amendments came into force on 15 March 2022. My review straddled the period before and after the making of these legislative changes.

1.11. At a later stage I will conduct a review of such asset-freeze provisions of the International CT Sanctions 2019 as may be referred to me[7].

1.12. I have held detailed discussions with officials from the Treasury and Foreign, Commonwealth and Development Office ('FCDO'), and had discussions and correspondence with NGOs, academics, legal practitioners, and the financial sector. I have been provided with all the documents I required.

Sanctions Machinery

1.13. The Office of Financial Sanctions Implementation ("OFSI"), established in 2016, is the division of HM Treasury whose officials are responsible for the ***implementation and enforcement*** of all UK financial sanctions; and for advising Treasury Ministers on designations made under the CT Sanctions 2019. This includes supervising the financial activity of UK-based suspected terrorists subject to financial sanctions.

[7] I was appointed by the Foreign Secretary as independent reviewer under section 31(1) SAMLA on 2 March 2022.

1.14. OFSI is also responsible for issuing ***statutory guidance*** for the CT Sanctions 2019[8]. Reflecting the importance attached to notification of sanctions, OFSI has an impressive web presence[9], with links to OFSI's "Consolidated List" which specifies all individuals and entities subject to UK financial sanctions.

1.15. The ***identification*** of domestic CT sanctions targets is, in practice, only done in co-ordination with "sponsoring departments" such as the Home Office or FCDO, and in consultation with the police and other agencies (including the intelligence agencies). For these bodies, designations under the CT Sanctions 2019 are seen as one of the number of counter-terrorism 'tools in the toolkit', to be selected on a tactical basis.

1.16. Sanctions ***policy*** as a whole is owned by the FCDO, which also has direct responsibility for the two international CT sanctions regimes[10], as well as the mass of geographic and thematic non-CT sanctions regimes that now exist. The FCDO publishes the separate "UK Sanctions List": a comprehensive list of persons designated and ships specified under SAMLA sanctions regimes, including both financial and non-financial measures[11].

Scale and Role of domestic CT Sanctions

1.17. The role played by the domestic CT sanctions is minuscule in the context of prohibitions across the UK financial system which include:

- sanctions made under SAMLA to comply with United Nations obligations directed against specific individuals and entities (for example, the ISIL (Da'esh)

[8] As required by section 43 SAMLA.
[9] https://www.gov.uk/government/organisations/office-of-financial-sanctions-implementation.
[10] ISIL (Da'esh) and Al-Qaida (United Nations Sanctions) (EU Exit) Regulations 2019 and the Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019.
[11] The UK Sanctions List underwent some revision in February 2022 and is now produced in multiple formats, with the intention of bringing it into line with international standards and improving its effectiveness for sanctions screening by financial institutions.

and Al-Qaida (United Nations Sanctions) (EU Exit) Regulations 2019[12]) or countries (for example, the Democratic People's Republic of Korea (Sanctions) (EU Exit) Regulations 2019).

- UK autonomous geographic sanctions regimes under SAMLA, such as Belarus (see the Republic of Belarus (Sanctions) (EU Exit) Regulations 2019).
- UK autonomous thematic sanctions regimes under SAMLA addressing issues such as serious violations of human rights[13] or chemical weapons[14].
- prohibitions under different UK statutory regimes such as those relating to terrorist groups proscribed under the Terrorism Act 2000 or individuals subject to Terrorism Prevention and Investigation Measures.

1.18. According to figures published by the Treasury in October 2021[15], the total value of all frozen funds in the UK is £12.2 billion, made up principally of funds frozen under the Libyan sanctions regime (£11.528 billion), then those frozen under the regimes of Iran (nuclear proliferation: £461 million), Syria (£158 million), Russia (activities regarding Ukrainian sovereignty £44.5 million), North Korea (£3 million) and 'others' (£5.2 million). These figures do not include the impact of sanctions imposed following Russia's invasion of Ukraine in early 2022.

1.19. By contrast, the total value of funds frozen under the three counter-terrorism regimes (the CT Sanctions 2019, the International CT Sanctions 2019 and the ISIL (Da'esh) and Al-Qaida Regulations) is £108,000[16].

1.20. This report is structured as follows:

- Chapter 2 ('The Brexit Watershed') briefly explains the impact of EU Exit on the UK's sanctions architecture.

[12] Some of which may have been initiated by the UK. For example, the UK was responsible for proposing the addition of Anjem Choudary to the UN ISIL and AQ Sanctions List in October 2018.
[13] The Global Human Rights Sanctions Regulations 2020, the so-called Magnitsky sanctions.
[14] The Chemical Weapons (Sanctions) (EU Exit) Regulations 2019.
[15] OFSI Annual review, April 2020 to March 2021, HM Treasury, at page 6.
[16] HMG, Transparency Report, Disruptive Powers 2020 (March 2022).

- Chapters 3 (‘SAMLA’) and 4 (‘the CT Sanctions 2019’) examine the legal framework, before and after the amendments made by the Economic Crime Act 2022.
- Chapters 5 (‘Designations to date’), 6 (‘Ministerial Reviews’), 7 (‘Exceptions and Licences’), 8 (‘Operation of the Prohibitions and Requirements’) and 9 (‘Court Reviews’) consider how the legal framework has operated in practice.
- Chapter 10 contains Conclusions and Recommendations.

2. BREXIT WATERSHED

Before Brexit

2.1. Prior to 31 December 2020, when the Transition Period following EU Exit came to an end, the UK's CT sanctions regime incorporated three aspects:

a. Standalone UK sanctions, carried out through TAFA, the Anti-Terrorism Crime and Security Act 2001 and the Counter-Terrorism Act 2008[17];

b. Implementation of targeted UN sanctions under the auspices of EU law. EU Regulation 881/2002 gave effect to UN sanctions required under the UN ISIL and AQ Sanctions List[18], and was enforced in the UK by the Al-Qaida (Asset Freezing) Regulations 2011.

c. Implementation of separate targeted EU sanctions:
   - Sanctions made under EU Regulation 2580/2001 (also referred to as "Common Position 931") were implemented through TAFA[19];
   - Sanctions made under EU Regulation 2016/1686 (by which the EU created a separate and autonomous regime for listing individuals, entities or bodies associated with ISIL and AQ[20]), were implemented through the Al-Qaida (Asset Freezing) Regulations 2011[21].

[17] The Anti-Terrorism Crime and Security Act 2001 enables sanctions to be made where governments or non-UK residents have harmed or risk causing harm to the UK economy or the life or property of UK nationals or residents. Rarely used, sanctions were made under the 2001 Act against Andrey Lugovoy and Dmitri Kovtun who are assessed to have carried out the Salisbury chemical weapon attack (and who are now designated under the Global Human Rights Regulations). The Counter-Terrorism Act 2008 enables the Treasury to give directions to any or all persons operating in the financial section that certain measures should be taken in relation to particular countries based on risks to the UK's national interests. To date the only measures imposed have concerned nuclear proliferation in Iran.
[18] The list is governed by UNSCR 2368.
[19] Following the 9/11 attacks, Common Position 2001/931/CFSP was adopted by the EU Council in order to prevent the financing of terrorist acts. This resulted in a list of individuals groups and entities whose finances were frozen within the EU under EU Regulation 2580/2001.
[20] Under Council Decision (CFSP) 2016/1693.
[21] As amended by SI 2016/937

2.2. In summary, UK CT sanctions were authorised by a mixture of primary legislation (TAFA, for domestic sanctions), primary legislation read conformably with EU law (TAFA implementing EU Regulation 2580/2001, for some EU sanctions), and secondary legislation under the European Communities Act 1972 (Al-Qaida (Asset Freezing) Regulations 2011, for UN and EU ISIL and AQ sanctions).

2.3. TAFA was repealed on 31 December 2020. The final quarterly report to Parliament[22] showed that, at its demise, there was £9,000 frozen through standalone UK sanctions under TAFA[23].

After Brexit

2.4. Brexit has changed the UK sanctions landscape in two fundamental ways.

2.5. Firstly, following the end of the Transition Period, the UK is ***no longer bound by the subject matter*** of EU sanctions legislation. If the EU chooses to sanction an individual or entity, the UK has a choice whether to replicate that sanction or not. The UK must continue to implement UN sanctions; CT UN sanctions are implemented principally through the ISIL (Da'esh) and Al-Qaida (United Nations Sanctions) (EU Exit) Regulations 2019.

2.6. Secondly, EU law ***no longer provides a vehicle*** for the UK to fulfil its UN sanctions obligations[24].

[22] Quarterly report to Parliament: 1 October 2020 to 31 December 2020 (19 March 2021).
[23] With £24,000 frozen in 3 accounts under "Common Position 931" EU sanctions under TAFA, and £75,000 in 38 accounts under the UN's ISIL-AQ regime.
[24] Subject to retained EU law after the Transition Period. The direct implementation of UN sanctions avoids some of the timing issues that had cropped up, where the EU delayed its implementation leading to a delay on the part of the UK as well. This was ultimately addressed by the Policing and Crime Act 2017 which enabled asset freezes appearing on the UN list, which had not yet appeared in the EU list, to be treated as implemented in the UK.

2.7. The impact of these changes is reflected in the transition from TAFA to the CT Sanctions 2019. Whereas TAFA enabled the UK to comply with EU sanctions obligations as well as to impose its own autonomous sanctions, the CT Sanctions 2019 are solely concerned with those individual designations that the UK chooses to impose. It is also reflected in a greater role for the FCDO in connection with sanctions which used to be made under EU law.

3. SAMLA

3.1. As a legislative instrument, the ***Sanctions and Anti-Money Laundering Act 2018*** provides a technically coherent framework for international and autonomous sanctions. It contrasts favourably with the earlier patchwork of instruments and reliance on EU law.

3.2. The key point about SAMLA is that it does not contain any powers to impose sanctions. What SAMLA does is to enable Ministers to create sanctions regimes which operate by way of secondary legislation (regulations). It is those sanctions regimes that allow Ministers to impose sanctions on designated persons.

3.3. It follows that the power to designate, the obligations that arise, and the criminal penalties that may apply, are all contained in secondary rather than primary legislation. But SAMLA does not perform a merely back-office function:

- SAMLA establishes controls on the ***types and purposes*** of sanctions regimes that may lawfully be made.
- SAMLA hardwires ***minimum criteria*** into every sanctions regime.
- SAMLA provides overarching ***safeguards***, including administrative and judicial review, which apply to sanctions regimes.

3.4. it is therefore impossible to understand the operation of the CT Sanctions 2019 without first considering the way that SAMLA itself shapes the making and operation of financial counter-terrorism sanctions.

3.5. Sitting below the regulations is the guidance that must be issued whenever a sanctions regime is created[25]. Such guidance (and other, non-statutory guidance)

[25] Section 43.

combines neutral non-technical explanation of the legislation with an insight into government priorities. As such it plays a central role in the real-world impact of sanction regimes.

Regulation-Making Power

3.6. Chapter 1 of Part 1 of SAMLA[26] creates the power to establish sanctions regimes by regulation. In particular, section 1 confers a power on the Secretary of State or Treasury to make, revoke and amend regulations for the making of sanctions of various types (such as financial or trade)[27], including the creation of criminal offences by regulation and the conferring of jurisdiction on courts or tribunals[28].

3.7. There are three permitted purposes for which sanctions may be made[29]: (i) for the purposes of compliance with a UN obligation (ii) for the purposes of compliance with any other international obligation, defined as an obligation of the United Kingdom created by or arising under any international agreement[30] and (iii) for a discretionary purpose which meets one of a number of defined objectives, such as furthering the prevention of terrorism in the United Kingdom or elsewhere or operating in the interests of national security. In practice the discretionary purpose and the defined objective may be identical[31].

[26] Supplemented by Chapter 5 of Part 1, and Part 3. (Part 2 provides powers to create anti-money laundering and terrorist financing regulations and contains provisions relating to registers of beneficial owners of overseas entities and beneficial owners of companies registered in British Overseas Territories which are not relevant to this Report.)
[27] The types are listed in sections 3-8.
[28] Section 1 read with section 54.
[29] Section 1(1).
[30] Section 1(8).
[31] The discretionary purposes specified in the CT Regulations (preventing terrorism in the UK and the interests of national security) are identical with the defined objectives of those regulations. Contrast the Cyber (Sanctions) (EU Exit) Regulations 2020 where the purpose is "to further the prevention of relevant cyber activity" (regulation 4(1)) but the defined objectives are to further interests of UK national security; the interests of international peace and security; further foreign policy objectives of the government; and promote respect for democracy, the rule of law and good governance (Report under section 2(4) accompanying the 2020 Regulations).

3.8. Sanctions regimes may permit targeting of persons either by name (which could be the name of an individual or an entity[32]) or by description, where, in essence, it is not practicable to identify and designate by name all the members of a recognisable category of individuals[33]. The latter power is not used in the CT Sanctions 2019.

3.9. Parliament's role in considering new sanctions regimes is retrospective, and its nature depends on whether a UN sanctions obligation is being implemented:

- Where regulations implement UN sanctions obligations (including the UK's general obligations under UN Security Council Resolution 1373) they come into force on the date specified in the regulations but are ***subject to annulment*** by a resolution of either House of Parliament (also known as the negative resolution procedure)[34].

- Where regulations do not implement UN sanctions obligations they come into force immediately on being made[35], but ***if not approved*** by a resolution of each House of Parliament within 28 days they cease to have effect[36] (known as the affirmative resolution procedure). This also applies to regulations which implement a non-UN international obligation.

3.10. As ***originally*** enacted, for a regime with a discretionary purpose the appropriate Minister had to lay a **section 2 report** before Parliament at the same time of laying the regulations. That report had to explain for each discretionary purpose why the Minister considered that the purpose would satisfy one of the defined objectives; that there were good reasons for that purpose; and why the imposition of sanctions was a reasonable course of action for that purpose. In similar vein, amendments to discretionary regulations had to be accompanied by a section 46

[32] Section 9(5) SAMLA contains a wide definition of 'person'.
[33] Section 12.
[34] Section 55(6). This therefore applies to both the CT Sanctions 2019 and the International CT Sanctions 2019.
[35] A number of regulations were made before the end of the transition period, and came into force when it ended.
[36] Section 55(3).

report. A section 2 report was duly laid in connection with the making of the CT Sanctions 2019.

3.11. However, from 15 March 2022 the duty to lay section 2 and section 46 reports was ***abolished*** for any future regulations, or any amendments to existing regulations[37]. In practice these reports were lengthy, duplicative, and something of an unnecessary formality.

3.12. The relevant Minister must issue ***guidance***: this may include guidance about best practice, on enforcement, and the "circumstances where the prohibitions and requirements do not apply"[38].

Criteria for Designation

3.13. Other than for persons named on (obligatory) UN sanctions lists[39], sanctions regimes must provide that sanctions cannot be imposed unless certain criteria are met[40].

3.14. ***Prior to 15 March 2022***, the statutory preconditions for designating by name, also referred to elsewhere as the 'required conditions'[41], were,

(a) that the Minister had ***reasonable grounds to suspect*** that the target was an ***involved person*** and

(b) that the Minister considered that the designation of that person was ***appropriate*** having regard to

(i) the purpose of the regulations and

(ii) the likely significant impact on that person.

[37] Sections 57 and 63 Economic Crime Act 2022.
[38] Section 43 SAMLA.
[39] Section 13.
[40] Sections 11, 12. Prior to amendment, it was at least arguable that regulations could be made with more demanding criteria than those contained in SAMLA. In light of section 61 of the Economic Crime Act 2022, which disapplies safeguards in existing regimes, this argument is more difficult to mount.
[41] Section 22(3).

3.15. ***After 15 March 2022***[42]:

- Under the standard procedure, the Minister must have ***reasonable grounds to suspect*** that the target is an ***involved person***[43]
- Alternatively, under a novel urgent procedure, the Minister may designate on the basis of an existing **designation under the law of the United States, the European Union, Australia or Canada** (with scope to specify the law of other countries in regulations in due course) and the Minister considers that it is in the public interest to use the urgent procedure.
- The urgent procedure allows such mirror sanctions to be imposed reactively, but after 112 days the designation can only be maintained if the reasonable grounds to suspect threshold is met[44], a recognition that it would be unfair to maintain mirror sanctions which might have been made based on information or evidence that fell below UK standards[45].
- The criterion of appropriateness has been abolished for all sanctions designations.

Reasonable Grounds to Suspect

3.16. Under TAFA the threshold for final sanctions was reasonable belief[46], and that remains the standard for sanctions under Part 2 of the Anti-terrorism, Crime and Security Act 2001 and Schedule 7 to the Counter-terrorism Act 2008, and for the imposition of Terrorism Prevention and Investigation Measures[47]. The setting of a lower standard of proof in all sanctions regulations made under SAMLA therefore represents a departure.

[42] Following amendments made by the Economic Crime Act 2022 section 58.
[43] Section 11(2A) SAMLA.
[44] Section 11(2B)-(F).
[45] Cf. Supplementary Human Rights Memorandum to Economic Crime Act 2022 (7 March 2022), para 10.
[46] TAFA sections 2 and 6.
[47] The government recently sought to lower the threshold for TPIMs from balance of probabilities to reasonable suspicion during the passage of the Counter-Terrorism and Sentencing Bill 2020, but Parliament eventually settled on "reasonable belief".

3.17. During the passage of the Bill, the government justified the move to a lower threshold because it would "improve the coherence and clarity of [the UK's] sanctions framework as a whole" and lead to greater consistency with UN and EU regimes which already operate at or about that standard[48].

- Reference was made to two decisions of the Supreme Court and one of the EU General Court, to the effect that the threshold of reasonable grounds to suspect was both reasonable and consistent with UN and EU standards[49], although, as Professor Clive Walker QC has noted[50], it was open to the United Kingdom to take a lead in requiring higher standards.
- Perhaps more pertinently, the government drew attention[51] to observations by the Supreme Court that (a) there was a distinction between determining the "risk in advance" that assets would be used to finance terrorist activity, and determining whether an individual had actually done something wrong where (b) information available to a decision-maker may be of "variable quality and fragmentary nature".

3.18. This suggests that the lowering of the threshold was an attempt to bring the statutory language closer to the realities of decision-making in this field.

Involved Person

[48] Letter, Lord Ahmad of Wimbledon (Minister of State) to Rt Hon Harriet Harman QC, Chair of Joint Committee on Human Rights (15 January 2018). At an earlier pre-legislative stage the government had also stated that the lower threshold of proof provided "agility" and allowed flexibility to advance UK foreign policy although these explanations appear to have fallen away: government response to Consultation on the United Kingdom's future legal framework for imposing and implementing sanctions, Cm 9490 (August 2017).

[49] Written evidence from the Foreign and Commonwealth Office and HM Treasury (SAB0005), 6 November 2017, with reference to: *R (*Youssef*) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1457; *HM Treasury v Ahmed and others* [2010] UKSC 2; Al-Ghabra v Commission, T-248/13.

[50] Whilst the reasonable suspicion test "will not ruffle international feathers", international standards tend to offer lowest common denominators and states are not obliged to adopt such standards for autonomous systems: written evidence 7 December 2017.

[51] Written evidence (SAB005), supra.

3.19. All sanctions regimes must provide that an involved person means a person who:

(a) is or has been involved in an activity specified in the regulations,

(b) is owned or controlled directly or indirectly by a person who is or has been so involved,

(c) is acting on behalf of or at the direction of a person who is or has been so involved, or

(d) is a member of, or associated with, a person who is or has been so involved[52].

3.20. An activity may not be specified unless doing so is appropriate having regard to the purposes of the regulations in question[53]. In the CT Sanctions 2019, whose purpose is the prevention of terrorism and the interests of national security, the specified activity is terrorist activity.

3.21. It is left to each sanctions regime to specify what "owned or controlled directly or indirectly by" another person, or being "associated with" another person, mean for the purposes of that regime[54]. I therefore consider this further in Chapter 4.

Appropriateness (before 15 March 2022)

3.22. Under TAFA, designation had to be "necessary". During its short lifetime, the criterion of "appropriateness" implied a somewhat less onerous requirement than necessity[55].

3.23. The change was said to allow for designation in a wider range of situations, including where the UK wished to support an ally, where foreign policy objectives

[52] Section 11(3).
[53] Section 11(4).
[54] Section 11(6).
[55] An amendment was moved to substitute "necessary" for appropriate (Hansard (HL), Vol 787, Col 107 (21 November 2017) but was ultimately withdrawn.

were changing rapidly, or where the sanction could not be said to be a last resort.[56] In such cases it might not be possible to show that a sanction was necessary, although caselaw suggests that necessity is a comparatively broad criterion in the context of addressing threats to national security[57].

3.24. As a result of government amendments during the passage of the Bill[58], appropriateness was extended to encompass consideration of the purposes of the sanctions regime and the likely significant effects[59] on the person to be designated. The obligation to have regard to these factors was said by Ministers to ensure that they would exercise their designation powers only to the extent that it was proportionate to do so[60]. Significant effects were to be judged "as they appear to the Minister to be on the basis of the information that the Minister has" [61].

After 15 March 2022

3.25. The removal of the obligation to consider "appropriateness" may have more procedural than substantive impact.

- Because consideration of appropriateness is no longer part of the formal decision-making process for Ministers, it is no longer necessary (a) for officials

[56] FCDO Minister Lord Ahmad of Wimbledon in Hansard (HL), Vol 787, Col 107 (21 November 2017). Lord Anderson QC suggested in 1st TAFA Report at 10.3 that the necessity test might be more difficult to satisfy where the individual was in prison or abroad.
[57] Beghal v DPP [2015] UKSC 49, per Lords Neuberger and Dyson at para 76.
[58] Report Stage HL Vol 788 Col 476 (15 January 2018).
[59] No definition is given in SAMLA (or in the CT Sanctions 2019) for what is meant by "likely" or "significant". The word "significant" presents few difficulties: it excludes all but the trivial effects of sanctions. The word "likely" is capable of a range of meanings from "it's on the cards" to "it's more probable than not" to "excluding only what would fairly be described as highly unlikely" (R v Sheppard [1980] 3 All ER 899, Lord Diplock), through something that "may" or "may well" occur or of which there is a "real prospect" (Dunning v Board of Governors of the United Liverpool Hospitals [1973] 2 All ER 454) to a "real possibility" (Re H (Minors) [1996] 1 AC 563.). In this context, the meaning "more likely than not" sets the bar too high – "realistic possibility" is a better fit.
[60] The government explained its thinking by reference to the obligation to consider proportionality when interfering with fundamental rights protected by the European Convention on Human Rights, Col 476, Lord Ahmad of Wimbledon. Lord Pannick agreed that the amendments imported the "essence of proportionality", ibid., Col 477.
[61] Section 11(2)(b)(ii).

to identify the pool of information that the Minister "has"[62] or (b) for the Minister to make a specific assessment about "likely significant effects" of the designation (which would amount to both a factual enquiry and a consideration of what "likely significant effects" actually means).

- However, it is still necessary for the Minister to decide whether to exercise their discretion in favour of designation and the Minister is required to have regard to the purposes of the statutory regime when deciding whether to exercise their discretion in favour of designation[63].
- Moreover, the Minister must still act compatibly with human rights[64]. I consider this further in Chapter 4 in the context of the CT Sanctions 2019.

Exceptions and licences

3.26. Section 15 enables exceptions and licences to operate under sanctions regulations:

- The regulations may themselves contain an exception to a prohibition or obligation.
- The regulations may permit Ministers to grant licences to enable conduct that would otherwise be prohibited.
- The regulations may allow Ministers to create ad hoc exceptions by direction.

3.27. The Explanatory Notes to SAMLA give examples of common exceptions: to allow interest to accrue on, and payments to be credited by financial institutions to frozen accounts, so long as the increased amounts are also frozen, or to enable the export of equipment used by peacekeeping missions[65]. Exceptions may also be made for the purposes of national security or the prevention or detection of crime[66].

[62] Although common sense and principle suggest that "having" information, in the context of a government department, is not confined to information held physically within that department.
[63] Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997.
[64] Supplementary Human Rights Memorandum to Economic Crime Act 2022 (7 March 2022), para 14.
[65] Para 64.
[66] Section 15(6).

3.28. Three observations may be made here about licences.

3.29. Firstly, it is important to remember that the actual licensing power is contained in the individual regulations not SAMLA. This point is sometimes overlooked by OFSI in its own guidance[67]. So, although SAMLA is commendably broad as to the circumstances in which regulations may enable licences to be granted (for example, general[68] or specific, for any purposes specified, for indefinite or defined duration[69]), the key question is what if any the limitations have been imposed in the individual regime on the purposes for which licences may be granted (known as 'licensing grounds').

3.30. Secondly, and relatedly, where sanctions regimes are made to fulfil an UN obligation to designate a named person , the approach of the government has been that the licensing grounds, if any, must in consequence of the UK's international obligations mirror the grounds, if any, specified by the relevant UN Security Council Resolution[70].

3.31. Thirdly, conversely, where sanctions regimes are autonomous (albeit fulfilling a general obligation to freeze the funds of terrorists under UNSCR 1373), there is no legal reason to limit the availability of licensing grounds. Indeed, neither the CT Regulations 2019 nor International CT Regulations 2019 limit the grounds for which licences may be granted.

---

[67] OFSI, Reasonableness in licencing blog (30 June 2021), erroneously states that SAMLA provides OFSI with the power to grant licences.
[68] The use of general licences had been limited under EU law.
[69] Section 15(3).
[70] With the result that the Afghanistan (Sanctions) (EU Exit) Regulations 2020 implementing UNSCR 2255 did not provide a humanitarian licensing ground because one is not provided in UNSCR 2255 (although there is now a humanitarian exemption since January 2022 following UNSCR 2615 and the Afghanistan (Sanctions) (EU Exit) (Amendment) Regulations 2022). The argument here is that a state which sanctioned a UN listed individual, but provided for licences not authorised by the UN, would be sanctioning incompletely. It may be that the United States takes a different approach to the availability of humanitarian licences: see US Treasury, OFAC General Licences 14 and 15 (issued 24 September 2021). The question of whether UN regimes should expressly enable humanitarian relief, or do so impliedly, is controversial: King, K., Modirzadeh, N.K., Lewis, D.A., 'Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action', Harvard Law School Program on International Law and Armed Conflict Counterterrorism and Humanitarian Engagement Project (2016). A useful survey on the relationship between UN and UK sanctions is by Martin, G., Enderby Smith, C., Global Investigations Review (13 July 2021).

Enforcement

3.32. Chapter 1 of SAMLA provides that sanctions regimes may require the provision of information by individuals[71], and, significantly, authorise the creation of criminal offences[72], including with an extraterritorial remit[73].

Creation of Criminal Offences by Regulation

3.33. One of the most controversial aspects of SAMLA during its legislative passage was that it permitted the creation of criminal offences, carrying penalties on indictment of up to 10 years' imprisonment, by secondary legislation[74]. Severe criminal liability was to be established by Ministerial decision, subject only to retrospective Parliamentary oversight in the form of debate on the non-amendable regulation establishing the sanctions regime (and its criminal penalties) in question[75].

3.34. The government's response to criticism of this offence-making power was to introduce a requirement[76] that its exercise should be followed by a "section 18 report", to be laid before Parliament at the same time as the regulations to be considered, containing the Minister's explanation of why criminal measures were appropriate and justifying the maximum terms of imprisonment selected by way of penalty. The intended aim was said to be to enable Parliament to be better informed about the use of these powers and to be able properly to hold the Minister to account[77].

[71] Section 16.
[72] Section 17.
[73] Section 21.
[74] Section 17(5(a)).
[75] The measures were described by the former Lord Chief Justice, Lord Judge, as Henry VIII clauses: Vol 787 Col 160 (HL), 21 November 2017. Before SAMLA, criminal liability for *some* breaches of the sanctions were found in regulations (ISIL and AQ Regulations 2011/2742), and the rest in TAFA.
[76] Now in section 18.
[77] Lord Ahmad of Wimbledon, Vol 791 Col 910 (HL), 21 May 2018.

3.35. But because criminal penalties are not introduced by way of separate regulations, it remains the case that Parliament's remedy, if dissatisfied with criminalisation or maximum penalty when the regulations are laid before it, is to bring down the entire regime. In any event, the duty to file a section 18 report was ***abolished*** during the streamlining exercise under the Economic Crime Act 2022[78].

Extra-territorial effect of prohibitions etc

3.36. Welcome clarity is given to the extra-territorial effect of sanctions by identifying the conduct which may be subject to prohibitions or requirements[79]. That conduct is conduct in the United Kingdom or in the territorial sea by any person and conduct elsewhere, but in respect of conduct elsewhere, only where that conduct is carried out by a "United Kingdom person", meaning a UK national or body incorporated or constituted under the law of any part of the UK[80].

Penalties

3.37. Under the Policing and Crime Act 2017, OFSI is permitted to impose monetary penalties for sanctions breaches as an alternative to prosecution[81]. Amendments in the Economic Crime Act 2022 transform the issue of breach to one of strict liability since, in determining whether a person has breached a prohibition or failed to comply with an obligation, "any requirement imposed by or under that legislation for the person to have known, suspected or believed any matter is to be ignored"[82].

3.38. In principle this exposes the general population to monetary penalties for ignorant involvement in the financial affairs of designated persons. Members of the public do not have any cause to look at sanctions lists. The intention of this change,

[78] Section 63.
[79] Section 21 (which does not apply to ship-related sanctions). TAFA merely specified the extra-territorial extent of offences (by section 33).
[80] Section 21(2).
[81] Para 8 Schedule 3 SAMLA.
[82] Section 54 inserting subsection (1A) into section 146 of the 2016 Act.

which does not appear to have been the subject to any debate, is no doubt to make OFSI's job easier in imposing financial penalties in deserving cases. This puts attention firmly on the exercise of OFSI's discretion and therefore on its enforcement guidance.

3.39. Where a criminal investigation is appropriate, in general the National Crime Agency is responsible for conducting the investigation, and the Crown Prosecution for any resulting prosecution[83].

Scrutiny

Reasons

3.40. SAMLA requires that any sanctions regime must include provision for the giving of reasons to a person once designated[84], other than where designation is in compliance with a UN obligation. As well as being essential to mounting an effective challenge[85], the giving of reasons is an aspect of procedural fairness without which the immense executive power of sanctions would be unjust, by paying insufficient respect to their rights as affected individuals[86].

3.41. All sanctions regimes require the Minister to take such steps as are reasonably practicable to notify the designated person of their designation[87] and, importantly, to include in that notification a **statement of reasons** defined as:

[83] NCA, UKFIU, 'SARs in action' (Issue 15, March 2022) at page 8. In the case of an investigation into the breach of a CT designation, CT police are likely to take primacy in the investigation.
[84] Section 11(7).
[85] Cf. R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531 at p565G-H, per Lord Mustill.
[86] Cf. R (Osborn) v Parole Board [2013] UKSC 61 at para 68, per Lord Reed.
[87] Or any variation or revocation of that designation: section 10(3). The mechanisms for giving notice are contained in the individual regimes.

"…a brief statement of the matters that the Minister knows[88], or has reasonable grounds to suspect, in relation to that person which have led the Minister to make the designation"[89].

3.42. Different information must be provided when the urgent procedure is used – namely, the fact that the urgent procedure has been deployed, the relevant foreign sanction, and an explanation of why the Minister has concluded that it is in the public interest to use the urgent procedure.

3.43. Matters may be excluded from the statement of reasons on grounds of national security or international relations, for reasons connected with the prevention or detection of serious crime and in the interests of justice[90] but not to the extent that no statement of reasons is given at all[91]. There is no requirement to provide advance notification of intention to designate[92].

3.44. A number of observations may be made about this aspect of the statutory scheme:

(i) The requirement to include a statement of reasons is an improvement on TAFA, which contained no equivalent duty.

(ii) Information sensitivity does not excuse the Minister from providing a statement of reasons at all, and however brief a statement of reasons must indicate the matters that in fact led the Minister to make the designation decision.

(iii) The obligation to provide a statement of reasons in all cases, plus its statutory definition as a brief statement of <u>the</u> matters that have led to the designation decision, appears to exclude the possibility of a designation relying on a

[88] The reference to "knows" is curious firstly, because the permitted evidential threshold is "reasonable grounds to suspect" and secondly because knowledge is an unusual state of mind in the context of assessing involvement in terrorism.
[89] Section 11(8).
[90] Section 11(9).
[91] Ibid.
[92] Section 10(5).

matter or matters which are entirely suppressed from the statement of reasons on grounds of national security etc. This would appear to rule out, for example, providing a statement of reasons that only named a person as a member of X terrorist organisation, where the Minister also relied on his membership of Y terrorist organisation.

(iv) It may be that given the requirement of brevity, there is little need to exercise the power to suppress details on grounds of national security etc. By their very nature, brief reasons will not require reference to details which might betray sources.

(v) The test for excluding matters in the interests of national security etc. is "…where the Minister considers that they should be excluded". This apparently broad formulation is not an open licence for withholding information. Matters that "should" (not "could") be excluded are those which, if disclosed, objectively risk damage to one of the important public interests listed.

Before 15 March 2022: Periodic Reviews

3.45. As originally enacted, Chapter 2 of Part 1 established periodic duties to review both individual designations (and ship specifications) of a certain type and the sanctions regimes themselves.

3.46. Financial or immigration designations had to be reviewed at a minimum every three years from the making of the relevant sanctions regime[93]. This required the Minister to consider not just whether the designation should be maintained or revoked, but also whether it should be varied[94] in a "comprehensive re-examination" of each designation[95].

[93] Section 24.
[94] Section 24(2)(b).
[95] Letter, Lord Ahmad of Wimbledon to the Rt Hon Harriet Harman QC MP, dated 15 January 2018.

3.47. In practice - because the timing of the review was measured from the date on which the sanctions regime came into being - this created a major bunching effect as numerous designations came up for review at the same time.

3.48. Separately, each sanctions regime had to be reviewed annually[96]. This was a new duty which did not exist under TAFA and required the Minister to consider, in summary, its fitness for purpose. The importance of this type of periodic review was most apparent where the regime targets a particular country, say Burundi[97], where the rationale for sanctions may change over time. In thematic contexts, such as counter-terrorism, the question of whether it is right to have some form of sanctions regime was only ever likely to receive one answer.

After 15 March 2022: no periodic reviews

3.49. The triennial duty to review individual designations (and ship specifications) was abolished by the Economic Crime Act 2022 reforms[98].

- The trajectory for individual reviews has therefore gone from annually (TAFA) to triennially (SAMLA) to none (SAMLA as amended).
- The position is now aligned with proscription under the Terrorism Act 2000, where there has never been a duty of periodic review despite informed and influential views to the contrary[99].

3.50. This gives rise to the risk of an ossified list containing out of date designations. It remains to be seen whether the continuing credibility of the list, and the burden on third parties who consult the list, is addressed by some form of voluntary ministerial "spring-cleaning". Importantly, Ministers are at all times subject to the ***cornerstone duty*** under section 22(3) SAMLA which provides that,

[96] Section 30.
[97] The Burundi (Sanctions) (EU Exit) Regulations 2019.
[98] Section 62(1) omitted section 24 SAMLA in its entirety.
[99] In particular, the views of the Proscribed Organisations Appeal Commission, and Lord Anderson QC in his Terrorism Acts in 2016 Report: see Terrorism Acts in 2018 at 3.49 et seq.

"If at any time the Minister considers the required conditions are not met in respect of a relevant designation, the Minister must revoke the designation".

3.51. The obligation to revoke may arises irrespective of whether the Minister is engaged in a formal review process.

3.52. Whilst this falls short of requiring perpetual active review, it constitutes something of a 'watching brief' should information become available with the result that there are no longer reasonable grounds to suspect that the designated person is an involved person or that the person should for some other reason no longer be designated. Section 22 contains a general power to vary or revoke a designation.

3.53. Familiarity with the debates concerning review of proscription of terrorist organisations under the Terrorism Act 2000 could suggest that the absence of periodic review might lead to no review at all – after all, officials would argue, why spend the time and resources compiling information and making assessments where the continuing designation is uncontentious. However:

- What I have described as the cornerstone duty ("If at any time" etc) does not appear in the Terrorism Act 2000.
- The government recognised at the time of the Economic Crime Act 2022 amendments that "…it is important that designations are kept under review"[100].
- Counter-terrorism sanctions are very often directed at specific individuals and have immediate impact, whereas the impact on individuals of proscribing a terrorist organisation is usually less direct.

3.54. It is also correct that designated individuals have the right to request a ministerial review at any time[101]. However, in practice they may lack the opportunity to do so (for example if they are in prison overseas) or the means to instruct solicitors (which may sometimes be reasonably necessary).

[100] Supplementary Human Rights Memorandum (7 March 2022).
[101] Section 23(1).

3.55. The annual review of sanctions regimes has also gone[102]. Whilst this is unlikely to have a material impact on *whether* the UK maintains one or more CT Sanctions regimes, it removes the obligation to consider potential improvements, for example those suggested by the Independent Reviewer, on a periodic basis. It is therefore desirable, and I **recommend**, that the Treasury emulates the practice of the Home Secretary of providing a substantive response to the report of independent reviewer either at the same time as, or subsequent to, the laying the report before Parliament in accordance with section 31 SAMLA.

Requested Reviews

3.56. A designated person is entitled to request a Ministerial review of their designation with a view, ***in non-UN cases***, to its variation or revocation[103].

3.57. A review can only be requested by the designated person himself[104], not by a person such as a family member who, whilst affected by the designation, is not the named target of the sanction.

3.58. Separate regulations specify how the right to request a review is to be exercised[105]. The Minister must make their decision "as soon as reasonably practicable after receiving the information needed for making the decision" and may ask for further information from the person making the request[106].

- The absence of a timeframe contrasts unfavourably with the process that applies to applications to de-proscribe organisations that have been banned

[102] Section 30 was omitted by section 62(1) in its entirety.
[103] Section 23.
[104] Section 23(1).
[105] The Sanctions Review Procedure (EU Exit) Regulations 2018.
[106] Regulations 6, 7.

under the Terrorism Act 2000: under that Act, the Secretary of State is to make a decision on any application within a period of 90 days of its receipt[107].

- This difference has significance because, under TAFA, an individual could appeal a designation decision without first having to request a review[108]. Under SAMLA the individual can only appeal after a review has taken place[109].

3.59. For persons who are designated in compliance with ***a UN obligation***, the right is to request a review with the objective of asking the Secretary of State to use their best endeavours to secure that the person's name is removed from the relevant UN list[110]. This reflects the United Kingdom's view, supported by recent High Court authority[111], that the Secretary of State has no right to revoke designations of person who have been designated by UN Security Council Regulation.

3.60. The FCDO has published guidance on how to request a ministerial review[112].

Court Reviews

3.61. Chapter 4 of Part 1 provides for High Court (or in Scotland, Court of Session) review of decisions taken by the appropriate Minister following a request from the designated person, or following the three-yearly review (now abolished), and for review of other decisions such as a refusal to grant a licence[113]. Court proceedings are governed by procedure rules[114] made under powers that apply to financial restriction proceedings[115].

[107] The Proscribed Organisations (Applications for Deproscription etc.) Regulations 2006, reg7.
[108] Section 26.
[109] Section 38(1).
[110] Section 25(2).
[111] R (on the application of Hany Youssef) v Secretary of State for Foreign, Commonwealth and Development Affairs and HM Treasury [2021] EWHC 3188 (Admin).
[112] 'How to request variation or revocation of a sanctions designation or review of a UN listing' (updated 8 July 2021).
[113] Section 38(1)(d).
[114] CPR Part 79.
[115] Section 40, applying section 66 to 68 of the Counter-Terrorism 2008 Act.

3.62. The function of the Court, in non-UN cases, is to consider whether the decision following the request should be set aside, applying judicial review principles[116]. The effect is to focus the Court's attention on the outcome of the review as opposed to the original designation decision.

3.63. In UN cases the Court's power is to set aside the Minister's decision not to use their best endeavours to secure that the person's name is removed from the relevant UN list and, in an appropriate case, to require the Minister to do so[117]. In this way the Court can direct the government to harness its diplomatic channel in service of individual rights. The Court has no power over the UN designation itself.

- The right to obtain a ruling from the Court, whose outcome and reasoning must, subject to countervailing reasons of public interest, be published[118], adds an important layer of legality to a UN process that has always been difficult to challenge[119].
- It remains to be seen whether this compensates in whole or in part for the loss of the opportunity to challenge the listing before the European Court of Justice which had power to quash the EU Regulation on which the UK listing was previously based[120].
- In R (on the application of Hany Youssef) v Secretary of State for Foreign, Commonwealth and Development Affairs and HM Treasury [2021] EWHC

[116] Section 38(1), (4).
[117] Section 38(5).
[118] CPR Part 79.28.
[119] The difficulties of individual challenge to UN designation are summarised by Professor Clive Walker QC in submissions on the Bill, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/legislative-scrutiny-sanctions-and-antimoney-laundering-bill/written/75200.pdf, at para 2.4. Since 2009 an independent and impartial UN Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions List has been able to review requests for UN de-listing from individuals and groups. In a letter to the President of the Security Council dated 16 December 2021 (S/2021/1062), the outgoing Ombudsperson spelt out limitations to the effectiveness of his role
[120] The European Court of Justice has taken the view that individuals subject to EU designations implementing UN obligations may challenge their EU designations on the basis of fundamental EU legal principles (Cases C-402/05P and C-415/05P, Kadi and Al Bakarat, Grand Chamber, 3 September 2008.). Where Member States complied with their UN obligations through an implementing EU listing, the quashing of that EU listing begged the question of how Member States could continue to comply with their UN obligations.

3188 (Admin) the High Court held that SAMLA expressly limited a designated person's common law right of access to the courts, and therefore permitted the implementation of a UN listing through a domestic measure which could not be quashed in judicial proceedings[121]. It was held that the process of reviewing the decision of the Minister not to use their best endeavours to set aside a UN listing "comfortably" met the requirements under the ECHR of a remedy against arbitrariness, even though the court had no power to quash the implementing domestic measure[122].

3.64. Finally, limitations are applied to the recovery of damages from the High Court in connection with wrongful designation. Originally limited to cases of negligence or bad faith[123], the Economic Crime Act 2022 further limited recovery of damages[124]:

- To cases of bad faith only;
- And, prospectively, to capping, by regulations made by the same Minister who may subsequently be found to have acted in bad faith.

3.65. In a Supplementary Human Rights Memorandum, the FCDO observed, carefully, that there is "an argument" that removal of a designation is a sufficient means of putting the person in the position they would have been if the designation had not occurred and that there is no inherent right to compensation under Article 1 of Protocol 1 for "controls of use" [125]. In the absence of ECtHR caselaw on the topic, the government also concluded that confining damages to cases of bad faith would not be contrary to Article 13 ECHR[126]. The government will also have taken comfort from the historically low level of damages awarded as recompense for human rights

[121] At para 61, distinguishing the position under the United Nations Act 1946 considered by the Supreme Court in HM Treasury v Ahmed and others; R (on the application of Youssef) v HM Treasury [2010] UKSC 2.
[122] At paras 89, 91 to 92.
[123] Section 39(2).
[124] Section 64(1) Economic Crime Act.
[125] Memorandum 7 March 2022 at para 21.
[126] Ibid, para 22. Article 13 is not a Convention right for the purposes of the Human Rights Act 1998 and the government here appears to be anticipating a complaint to the ECtHR.

violations[127] in the event that the High Court concluded that limiting damages in this way was contrary to the ECHR.

3.66. It is eminently clear that limiting damages in this way would speed the process of sanctions against Russian and Belorussian oligarchs whose litigiousness and wealth might otherwise dull Ministers' appetite for designations, or at the very least require lengthy prior legal analysis on potential liability.

3.67. However, the limitation has an impact for all sanctions regimes, including the CT Sanctions 2019.

- The government recognises that limiting remedies in this way could be relevant to the proportionality of the designation itself where human rights are engaged[128].
- In a case where sanctions cause significant and immediate financial damage, it is questionable whether the ability to request a review, with a response "as soon as reasonably practicable"[129], followed by the right to apply to the High Court is a sufficient safeguard if damages are only available *ex post facto* in the rarest circumstances.

[127] R (Greenfield) v Secretary of State for the Home Department [2005] 1 WLR 673.
[128] Supplementary Memorandum at para 21.
[129] Sanctions Review Procedure Regulations, supra.

4. CT SANCTIONS 2019

4.1. The ***Counter-Terrorism (Sanctions) (EU Exit) Regulations 2019*** were intended to replace Part 1 of TAFA, with substantially the same effect, and ensure that the UK fulfils its international obligations under UNSCR 1373[130]. They are purely financial sanctions, and may be categorised as thematic, meaning that they may be used to target a particular type of activity wherever and whoever commits it, rather than targeting a particular group, country, or sector.

4.2. As counter-terrorism sanctions, their purpose is, according to the section 2 report, to change behaviour; constrain designated persons' ability to carry out certain actions; or send a signal of condemnation; and they should be seen as part of the broader range of counter-terrorism tools[131]. This final point is a signal that, far from being automatic, CT sanctions are regarded as a tactic to be deployed where it adds something to the UK's response to terrorism. One would not, for example, expect CT sanctions which merely duplicated the effect of financial measures imposed under a TPIM[132].

4.3. The particular purpose of the CT Sanctions 2019 is to designate persons, groups or entities with a "clear UK nexus" meaning for example that the target:

- resides in the UK,
- is likely to return to the UK,
- holds economic resources in the UK,

and also, less specifically, where the designation is "in the interests of UK national security in a counter-terror context where UN financial sanctions are not available or

[130] Explanatory Note to CT Sanctions 2019. For a precise comparison between the old and new regimes, there are several good publications including UK Finance's 'UK Sanctions Statutory Instruments Review' (available online).
[131] The Counter-Terrorism (Sanctions) (EU Exit) Regulations 2019 Report under section 2(4) of the Sanctions and Anti-Money Laundering Act 2018, at para 8.
[132] Terrorism Prevention and Investigation Act 2011.

deemed an appropriate tool to utilise"[133]. There is in fact nothing in the CT Sanctions 2019 that expressly or impliedly restricts designation to targets with a UK-nexus.

4.4. As required by section 43 SAMLA, the government has published statutory guidance on the regime[134]. The most that can be said is that it provides a short non-technical summary of the regulations and invites the reader to consider this alongside OFSI's more detailed guidance.

4.5. One of the effects of the Economic Crime Act 2022 was to amend the effect – from 15 March 2022 – of all existing sanctions regulations, including the CT Sanctions 2019. From this date they would "***have effect***, and for the purposes of anything done on or after the day on which this Act is passed are deemed to have ***always had effect as if***" they contained the new streamlined approach discussed in Chapter 3[135].

4.6. To make doubly sure, existing regulations now have effect as if they did not contain any requirement to consider "appropriateness" when making designations[136].

4.7. It follows that:

- For the first three years of their existence (from 14 March 2019) including over one year since they came fully into force (31 December 2020) the CT Sanctions 2019 operated in their original form.
- They operated in this original form when the first (and only) individual was designated under the regime, and for the first (and last) annual review of the regime, and for the first (and last) triennial review of the designation.
- From 15 March 2022 the CT Sanctions 2019 operate as if they contain, and had always contained, the changes made by the Economic Crime Act 2022.

[133] Ibid., at para 7.3.
[134] FCDO and OFSI, Counter-Terrorism sanctions: guidance (20 March 2019).
[135] Section 61(1).
[136] Section 61(3).

4.8. One of the consequences of this mode of amendment is that any person looking up the CT Sanctions 2019 online (for example, legislation.gov.uk) will find the original version, but will not immediately know that the regime has been substantially amended. For the sake of general transparency in public legislation, as well as to spare lawyers, NGOs, researchers and other interested members of the public from error, I **recommend** that the CT Sanctions 2019 should be themselves amended to reflect these changes.

General (Part 1: regulations 1 to 4)

4.9. In accordance with section 1(3) SAMLA, the purposes of the CT Sanctions 2019 are stated within the regulations. These are: compliance with the UK's obligations under UN Security Council Regulation 1373, the prevention of terrorism in the UK or elsewhere otherwise than by compliance with the relevant UN obligations; and the interests of national security[137].

4.10. No national security purpose was to be found in TAFA. The interests of national security include of course the prevention of terrorism, but if they extend beyond that, this begs the pertinent question what the interests of national security amount to.

- In accordance with long-standing practice, national security and the interests of national security are not defined in SAMLA or elsewhere in UK legislation.
- Various interpretations have been given, summarised recently as, at the most general level, "the well-being of the State"[138]. This is plainly too wide an interpretation to apply in the context of the CT Sanctions 2019.
- In practice, national security can be given practically different interpretations by different authorities within the United Kingdom: for

[137] Regulation 4.
[138] National Security Law Procedure and Practice (eds. Ward, R., Jones, R.) Oxford, 2021 at para 1.34.

example, particular meaning is given to "national security" in Northern Ireland[139].

4.11. The most coherent approach is to read the interests of national security in the context of the purpose of preventing terrorism[140], and to conclude that the interests of national security were specified to ensure that sanctions are available in the widest range of counter-terrorism scenarios.

4.12. Any broader reading of the interests of national security could result in adverse measures being imposed on dangerously vague grounds. Although in principle the interests of national security would permit the sanctioning of individuals involved in state-sponsored terrorism, the government does not consider this to be terrorism at all[141] and has other sanctions mechanisms for this purpose[142].

4.13. As permitted by section 21 SAMLA, the prohibitions and requirements apply:

- To conduct by persons wholly or partly within the UK. Person includes a body of persons corporate or unincorporate which includes companies incorporated in a foreign jurisdiction[143].
- To conduct wholly or partly outside the UK committed by any "United Kingdom person"[144] defined (by section 21 SAMLA) as a UK national or body incorporated or constituted under the law of any part of the UK.

[139] Terrorism Acts in 2019 at 9.23 to 9.28.
[140] This accords with the reference in the Explanatory Note, supra, to UK national security "in a counter-terror context" (at para 7.3).
[141] Terrorism Acts in 2018 at 2.2, ft.2.
[142] Anti-Terrorism Crime and Security Act 2001.
[143] Interpretation Act 1978, Schedule 1. See further Archbold, 2022, at para 1-135 et seq. Under reg 3(7) the extraterritorial provisions are without prejudice to a relevant prohibition or requirement applying to conduct (by any person) in the UK. The suggestion (Menkes, M., UK Extraterritorial Financial Sanctions: 'Too Much, Too Little, Too Late?', EJIL: Talk! (July 17, 2018)) that such sanctions would not apply to foreign companies with a presence in the UK (but not incorporated here) is incorrect. For major foreign corporations with a presence in the UK there will any event be major reputational and regulatory considerations for breaches of UK sanctions.
[144] Reg.3.

Designation of persons (Part 2: regulations 5 to 9, Schedule)

4.14. The option provided by SAMLA to permit designation by description[145] is not taken up in the CT Sanctions 2019. In any event, the power to designate a "person" includes, by reference to section 9(5) SAMLA[146], a body of persons corporate or unincorporate as well as any organisation or any association or combination of persons[147].

Reasonable grounds to suspect

4.15. The application of the ***reasonable grounds to suspect threshold*** in the CT Sanctions 2019 is novel when compared to TAFA. Reasonable grounds to suspect is traditionally associated with interim measures such as arrest pending fuller investigation of the facts, and was the threshold under TAFA for interim, but not final, sanctions[148].

4.16. "*Suspicion*" is of course a lower threshold than "*belief*". As the Court of Appeal has observed:

> "Belief is a state of mind by which a person thinks that X is the case. Suspicion is a state of mind by which the person in question thinks that X may be the case."[149]

4.17. Moreover:

[145] Section 12.
[146] Section 11 Interpretation Act 1978 provides that, unless the contrary intention appears, expressions used in subordinate legislation have the same meaning as they bear in the enabling Act.
[147] Cf. section 121 Terrorism Act 2000 which defines organisation as including "any association or combination of persons".
[148] Compare sections 2(1) and 6(1) TAFA.
[149] A and others v Secretary of State for the Home Department [2004] EWCA Civ, [2005] 1 WLR 414, per Laws LJ at para 229.

- The requirement of "reasonable grounds" imports a standard of objectivity. It is not sufficient for the appropriate Minister to suspect something: there must exist objectively reasonable grounds for suspecting it.
- Where the view is that there are, at best, no more than reasonable grounds to suspect that the person is involved in terrorism, officials must be careful to ensure that the threshold is objectively met. Lord Anderson QC's recommendation of a 'devil's advocate' approach is particularly worthwhile in this context[150]. In principle, this could lead Treasury officials to ask the intelligence agencies for fuller explanation of any assessments provided by them.
- The strength of the grounds (whether there merely exist reasonable grounds to suspect, or something more) may be relevant to whether the impact on the designated person and third parties is "worth the candle".

Involved person

4.18. The meaning of ***"involved person"*** turns on involvement in terrorist activity. Involvement is given a remarkably expansive definition[151].

4.19. Involvement comprises "being so involved in whatever way and wherever" with a non-exhaustive list of examples which go beyond involvement in terrorist activity as commonly understood. It includes:

- involvement in the abduction, enslavement, forced marriage or rape or sexual violence against persons outside the UK or EU on behalf of, or in the name of a person who is involved in terrorism. This could catch the facilitators of the inhumane treatment of Yazidi women by members of Da'esh/ Islamic State, including traffickers whose motives are purely mercenary.

[150] DAQC 4th TAFA report at 3.5 and 6.7.
[151] Reg 6(2), (3). It is wider, for example, that the definition of involvement in terrorism-related activity for the purposes of TPIMs and wider than under TAFA.

- Involvement in assisting the contravention or circumvention of any asset-freeze prohibitions in the CT Sanctions 2019 or equivalent overseas provision[152]. Again, this could encompass individuals, such as unscrupulous lawyers or accountants, whose motives for involvement are financial only.

4.20. Involvement may be direct or indirect. By way of example the effect of Regulation 6[153] is that X may be designated if X supports Y, where Y is a person known by X to be facilitating terrorism by Z. The less direct a person's involvement in terrorism, the less justifiable designation may be.

4.21. As permitted by SAMLA, involvement under the CT Sanctions 2019 may also be purely historic ("is or has been involved"[154]).

- Historic involvement was also sufficient under the previous regime, TAFA. However, as Lord Anderson QC pointed out in his first statutory review[155], the practical importance of that was diminished by the necessity test which implied the need for some future threat.
- It remains to be seen whether designations under the CT Sanctions 2019 (which do not need to be 'necessary' or even, after 15 March 2022, 'appropriate') are imposed on persons who do not present some future threat to the UK, but for some other reason – for example, purely to signal the UK's disapproval of their past terrorist conduct or with a view to deterring others.
- Certainly, the more historic the evidence of involvement in the terrorism, the harder it will be to conclude that that individual presents a personal threat to UK interests[156].

[152] Reg 6(3)(i).
[153] See 6(3)(c) taken together with (3)(h).
[154] Reg 6(2).
[155] At 3.20(c).
[156] In proscription cases under the Terrorism Act, the general approach of the Home Secretary in establishing that a person is (currently) involved in terrorism is to rely on evidence that is no more than 18 months old: Arumugam and others v Secretary of State for the Home Department, Appeal No: PC/04/2019, 21 October 2020, at para 29.

Connected persons

4.22. The scope of potential designation is extended by regulation 6(2) to include within the definition of "involved person" a range of ***connected persons***. This enables sanctions to be applied directly against agents of and corporate entities owned or controlled by the involved person. Regulation 7, and the Schedule, contain special rules as to the meaning of "owned or controlled directly or indirectly" in the context of corporations.

4.23. There are three observations to make about this power to designate connected persons.

4.24. Firstly, the power necessarily extends to persons who are not necessarily involved in terrorism at all, even under the expansive definition already referred to. Whilst such an extension is in principle justified, otherwise the economic lives of involved persons could be carried on through alter egos, this type of designation calls for particularly careful consideration.

4.25. Secondly, the low evidential threshold increases the risk of error: in determining whether there are reasonable grounds to suspect that a person is owned or controlled directly or indirectly by a person involved in terrorism activity, there is scope for wrong inferences from potentially incomplete information.

4.26. Thirdly, the power, when exercised properly, does however enable the Treasury to provide welcome clarity to third parties, by designating an entity that is owned or controlled by the designated person. There is a significant difference, in terms of compliance costs, between a bank identifying company X as a designated entity on the Consolidated List, and trying to determine whether company Y (which is not designated) is indirectly controlled by designated individual Z. The government

has publicly committed to designating owned or controlled entities in their own right "where possible"[157].

Urgent Procedure (from 15 March 2022)

4.27. Although the CT Sanctions 2019 must now be read as if they contain an urgent procedure, it appears unlikely that it will be used. The urgent procedure depends upon a designation (or its equivalent[158]) having already been imposed by one of the United States, the EU, Australia or Canada. This is relevant to the operation of the International CT Sanctions 2019, rather than to designations made solely on the UK's own initiative.

Discretion generally

4.28. Assuming the statutory criteria are satisfied, the Minister has a discretion whether to designate a person. That discretion must be exercised consistently with the purposes of the regulations which are (a) compliance with UNSCR 1373 (b) the purposes of preventing terrorism otherwise than by compliance with UNSCR 1373 and/or (c) the interests of national security[159].

4.29. It is true that the purpose of preventing terrorism need not relate to future terrorism committed by the designated person [160]. It remains to be seen whether enhancing general national security cooperation might be the dominant purpose of a designation[161] rather than for the purpose of limiting the risk posed by that particular individual. This raises the ethical question of whether (or to what extent) it

[157] OFSI, General Guidance (December 2020), page 17.
[158] Section 11(2F) SAMLA, as inserted by the Economic Crime Act 2022, refers to a provision that corresponds, or is similar, to the type of sanction or sanctions in UK regulations or is made for purposes corresponding or similar to any purpose in UK sanctions regulations.
[159] Regulation 4.
[160] Reg 4(2)(a) refers to the prevention of terrorism generally, not the prevention of terrorism by that person.
[161] By comparison, Lord Anderson QC drew attention to the possibility that proscription under the Terrorism Act 2000 may sometimes be used just to further United Kingdom foreign policy goals by pleasing other governments: First Report at para 6.26.

is justified to instrumentalise one individual in order to change the behaviour of another person or government.

4.30. Other purposes such as the pursuit of foreign policy objectives unrelated to terrorism and national security will no doubt come into play at the discretion stage. For example, there may be cases where designation would otherwise be desirable, but to do so would offend an ally or interfere with regional priorities.

4.31. The extent of the territorial and extraterritorial "bite" of sanctions is also a relevant factor. Prohibitions or requirements imposed by a sanctions regime have limited extra-territorial impact: they apply to conduct in the United Kingdom or in the territorial sea by any person but only to conduct elsewhere if the person is a United Kingdom national or, in the case of a company, incorporated or constituted under United Kingdom law.

4.32. This is not to say that designation of a non-UK national based overseas and with no known assets in the United Kingdom can have no operational significance.

- A designation can deprive the person of access to the UK financial system in future and could as Lord Anderson QC pointed out in his first review of TAFA[162], lead financial institutions to run checks on the person concerned, which sometimes has the effect of flushing out previously unknown accounts and thus shedding additional light on terrorist networks.
- Moreover, if the individual returned to the UK and could not be removed to their country of nationality (for example, because of risk on return or weak diplomatic relations) the individual's obligation to account to the Treasury for all expenditure would provide some information about their behaviour following return.

Impact

[162] Para 2.12.

4.33. As originally made, the Treasury was required to consider the likely significant impact of the designation on that person under the heading of "appropriateness" as a formal part of sanctions making. That obligation applied wherever the person was in the world.

4.34. Following the abolition of "appropriateness" by the Economic Crime Act 2022, the Treasury is nonetheless constrained by its duty to act compatibly with incorporated ECHR rights under the Human Rights Act 1998.

4.35. The rights most likely to be interfered with are those protected by Article 8 (private and family life) and Article 1 Protocol 1 (property). Disproportionate interference with one of these would render the sanction unlawful. Proportionality has been authoritatively summarised[163] as requiring the decision in question to:

i. Have a sufficiently important objective.
ii. Be rationally connected to accomplishing that objective.
iii. Have no reasonable less intrusive alternative.
iv. Strike a fair balance between individual rights and public interests.

4.36. Sanctions are not fleeting or gentle impositions. They have been characterised in the Supreme Court as making designated individuals "…effectively prisoners of the state" whose "freedom of movement is severely restricted without access to funds or other economic resources" with an impact on them, and their families, that "can be devastating"; and establishing restrictions of day to day living which are comparable with, and potentially more severe, than control orders[164].

- For designated persons with substantial business in the United Kingdom the consequences of designation will be extremely serious and possibly irreversible[165].

[163] Bank Mellat v HM Treasury (No 2) [2013] UKSC 39 at para 20, Lord Sumption.
[164] Her Majesty's Treasury v Ahmed [2010] UKSC 2, para 60 (Lord Hope), 192 (Lord Brown).
[165] Bank Mellat v Her Majesty's Treasury [2013] UKSC 38, paras 5, 6.

- As Lord Anderson QC reported in his review of TAFA, although asset-freezing is merely preventative in its *intent*, there are cases in which it may well seem punitive in its *effects*. He cited the Court of Appeal's description of freezing orders as "a targeted assault by the state on an individual's privacy, reputation and property"[166].

4.37. Considerations under the Human Rights Act 1998 only apply where the person in question is within the UK's jurisdiction for ECHR purposes. There are very limited circumstances where this is true for a person who is physically outside the United Kingdom, which may not always be clear at the point of designation[167].

4.38. Nevertheless the mere fact of being sanctioned by the United Kingdom could have severe effects on an individual with an increased risk adverse attention from overseas authorities. Sanctions could potentially increase the possibility of arrest and detention or ill-treatment. On the current state of the law[168] the circumstances in which the Treasury will be obliged to consider impact on ***persons outside the UK as a question of human rights law*** will rarely if ever arise.

4.39. However, I can report that Ministers intend as a matter of policy to take account of impact on designated individuals who are located outside the UK. This means that Ministers will consider whether a designation is proportionate without distinguishing between designated persons within and outside the UK's jurisdiction for ECHR purposes.

4.40. Following the Economic Crime Act 2022 amendments, the Minister is no longer required to consider impact "on the basis of the information that the Minister has"[169] – an uncertain phrase in the context of information held across different government departments. But the position remains that the Treasury, like any public body, has a

[166] See the judgment of the Court of Appeal in Secretary of State for the Foreign and Commonwealth Office v Maftah and Khaled [2011] EWCA Civ 350, para 26.
[167] For example where an individual is known to harbour an intention to return to the UK by irregular means.
[168] S1, T1, U1, V1 v Secretary of State for the Home Department [2016] EWCA Civ 560 at paras 90-91 applying Al-Skeini v United Kingdom [2011] 53 EHRR 18.
[169] Reg 6(b)(ii).

duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the 'Tameside' duty[170]. It requires only such steps as are reasonable and it could entail consideration of information held by sponsoring departments such as MI5.

4.41. Aside from the impact on the designated person, the Treasury will be aware when exercising its reasonable discretion that sanctions can have a wider impact:

- It may be readily apparent that family members will be affected.
- More generally, sanctions ensnare ordinary day to day commercial transactions in potential criminal liability, drawing financial organisations, professionals and commercial counterparties into the net, and imposing compliance costs on any person or entity who may come across frozen funds. The impact of sanctions on humanitarian aid and peacebuilding activities in parts of the world damaged by conflict are well testified[171].

4.42. The final point on impact is whether the Minister may have regard to the possibility that those effects will be mitigated by exceptions that may apply or licences that may be granted. In the section 2 Report to the CT Sanctions 2019, the Treasury states that:

> "The Regulations also provide for financial sanctions to be subject to an exceptions and licensing framework. The exceptions and licensing provisions support the reasonableness of imposing sanctions on designated persons, as they can act to mitigate any possible negative or counter-productive impacts."

[170] Deriving from Lord Diplock's speech in Secretary of State for Education and Science v Tameside MBC [1977] AC 1014. The effect of the principle, and its susceptibility to court challenge, were summarised by the Haddon-Cave J. in the Richard III burial case: R (on the application of the Plantagenet Alliance) v Secretary of State for Justice and others [2014] EWHC 1662 Admin.

[171] UN, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan (21 July 2020).

4.43. However, whilst it is appropriate to take account of any exceptions that would *automatically* apply on designation, as well as to any general licences that have already been granted under the regime, the Treasury may need to exercise caution when taking account of the possibility that the designated person will be able to apply for a licence:

- Firstly, designated individuals may face practical hurdles to completing the formalities necessary to obtain a licence, such as access to legal assistance or evidence in support.
- Secondly, even if a licence were eventually granted, there will always be a time gap between the sanctions having effect and the granting of that licence. OFSI guidance notes that the process of considering a licence often involves a dialogue as further information is sought by OFSI, and states that OFSI "aim to engage with the substance of the completed application within 4 weeks" whilst stressing that this does not mean that a decision will be reached within that period[172].

4.44. Designations, and any variation or revocation, must be published generally unless one of the restricted publicity grounds exist such as youth, national security or the interest of justice[173]. Where individuals are notified on a confidential basis, it is an offence to disclose the information punishable by up to 2 years' imprisonment and an unlimited fine[174].

Prohibitions (Part 3: regulations 10 to 16)

4.45. Regulations 11 to 15 impose criminal prohibitions which may be contravened by any person within the United Kingdom or any "United Kingdom person" anywhere in the world.

[172] OFSI, Introduction to licencing blog, supra.
[173] Reg 8.
[174] Regs 9, 28.

4.46. It is convenient to group the prohibitions into three.

(a) **Dealing in a designated person's funds or economic resources.**

It is an offence (including by the designated person himself) to deal in funds or economic resources knowing or having reasonable cause to suspect that they are owned, held or controlled by a designated person[175].

The reasonable cause to suspect threshold imports a requirement of due diligence: it is not sufficient to form a judgment based purely on information immediately to hand.

As is common with other asset control regimes[176], funds or economic resources are owned, held or controlled if the designated person has any legal or equitable interest in them[177].

Funds or economic resources also fall into scope if they are owned, or controlled by an entity that is itself owned or controlled directly or indirectly by the designated person[178]. These entities may be, but are not necessarily, the subject of designation in their own right.

"Funds", "economic resources" and "financial services" (see below) are all defined in SAMLA[179], considered by OFSI to be wide enough to capture crypto assets[180].

(b) **Making resources available to a designated person.**

[175] Reg 11.
[176] Such as the Proceeds of Crime Act 2002.
[177] Reg 11(6)(a).
[178] Reg 11(7).
[179] Sections 60, 61
[180] OFSI, General Guidance (December 2020), page 15. See also, OFSI, Financial Conduct Authority, Bank of England, 'Joint Statement from UK Financial Regulatory Authorities on Sanctions and the Crypto asset Sector' (11 March 2022).

It is an offence to make funds or financial services[181] or economic resources[182] available directly or indirectly to a designated person knowing or having reasonable cause to suspect that they are being made available in this way.

Making available includes making available to any person owned or controlled by the designated person[183].

Economic resources are only captured if the offender has knowledge, or reasonable grounds to suspect, that the designated person would be likely to exchange them for funds, goods or services[184].

(c) **Making resources available to a third person for the benefit of a designated person.**

It is an offence to make funds or financial services[185] or economic resources[186] available to any person for the benefit of a designated person knowing or having reasonable cause to suspect that they are being made available in this way.

This prohibition has obvious impact on family members because it is apt to capture third party gifts or support given to the spouse, parent, or child of a designated person.

By way of mitigation, it only applies if the designated person is able to obtain a "significant financial benefit"[187], and does not apply at all where benefits are paid to a person who is not a designated person even though a designated family

[181] Reg 12. Financial services are not subject to the ISIL (Da'esh) and Al-Qaida (United Nations Sanctions) (EU Exit) Regulations 2019.
[182] Reg 14.
[183] Reg 12(4), 14(4).
[184] Reg 14(1)(b).
[185] Reg 13.
[186] Reg 15.
[187] Reg 13(4).

member may benefit from that payment[188]. Commenting on the equivalent provision in TAFA, Lord Anderson QC observed that uncertainties about vague criteria such as this are apt to create anxieties about whether a particular transaction would amount to a criminal offence[189].

4.47. As a catchall, it is an offence intentionally (but not recklessly) to carry out activities designed to circumvent these prohibitions[190].

Ownership and Control

4.48. The CT Sanctions 2019 provide improved clarity[191] on the effect of share ownership and appointment rights[192], but the vexed issue of ownership and control – requiring commercial counterparties to make difficult evaluative decisions – remains. Such decisions are likely to be particularly difficult if encountered in the context of a designated person who deploys the type of sprawling multi-jurisdictional trust-based structure often favoured by the very wealthy.

4.49. Chapter 4 of OFSI's General Guidance[193] includes a gloss on the second condition in Regulation 7 which applies where it is reasonable,

> "…having regard to all the circumstances, to expect that [the designated person] would (if [he] chose to) be able, in most cases or in significant respects, by whatever means and, whether directly or indirectly, to achieve the result that affairs of [the entity] are conducted in accordance with [the designated person's] wishes".

[188] Exception made by Reg 17(7).
[189] First TAFA Report, at 7.26(f).
[190] Reg 16.
[191] Under EU sanctions and EU law, holding 50% or more of the shares was a key criterion but not determinative.
[192] Reg 7(2) and the Schedule.
[193] 22 March 2022.

4.50. According to the Guidance, this is interpreted as an expectation "...that the person would be able to ensure the affairs of the entity are conducted in accordance with the person's wishes" with reference being made in the examples to a right to exercise "dominant influence". [194]

4.51. The effect of this gloss is:

- to suggest, by use of the word "ensure", that the necessary control cannot be haphazard, fleeting, or fragile.
- to soften the impact of the qualifier, "in most cases or in significant respects". In effect, it is not sufficient that the designated person is able to carry out its wishes through the entity in a small but more than *de minimis* number of respects: it must be said that the "the affairs" of the entity are conducted in accordance with his wishes. Mere influence is insufficient.

4.52. Whilst it would not be credible for OFSI to bring enforcement action against a person who followed this guidance to the letter, the precise legal impact of this guidance remains to be determined: it does not purport to be statutory guidance issued by the Minister under section 43 SAMLA[195] and unlike a Code of Practice it does not enjoy the endorsement of Parliament.

4.53. Not covered by the Guidance, but now sadly topical is the position of government entities controlled by sanctioned individuals. The Taleban takeover of Afghan government departments raises the question, pertinent to aid agencies, banks, and commercial entities, of whether a Ministry may be controlled directly or indirectly by the individual appointed as political head.

[194] Ibid., page 17.
[195] The statutory guidance provided by the Treasury Minister under section 43 SAMLA is Counter-Terrorism sanction: guidance (published 20 March 2019).

4.54. The position of Afghanistan is subject to the separate Afghanistan (Sanctions) (EU Exit) Regulations 2020, which I do not review. It is theoretically possible that a person designated under the CT Sanctions 2019 could achieve a position of governmental influence somewhere in the world, but it is extremely unlikely that the CT Sanctions 2019 will have any impact on humanitarian aid or peace-building activity.

Exceptions and licences (Part 4: regulations 17 to 20)

4.55. Regulation 17 contains specific ***exceptions*** to the prohibitions in regulations 11 to 15. These include the payment of interest on a frozen account[196] and the payment of a social security benefit to a family member.[197]

4.56. The exception in regulation 17(1) and (2) provides that regulation 11 is not contravened by an independent person transferring to another person a legal or equitable interest in funds or economic resources where immediately before the transfer the interest is held by that person and is not held jointly with the designated person. This exception appears to be directed at allowing the disposal of fractional interests in frozen assets, where the interest to be disposed of is held entirely independently of the designated person. This mitigates the impact of the prohibition in Regulation 11 by which an entire asset is frozen if a designated person has an interest in it[198].

4.57. Regulation 18 contains an exception to all prohibitions in Part 3, where a responsible officer[199] has deemed that the relevant act would be in the interests of national security, or the prevention or detection of serious crime in the UK or elsewhere. No equivalent was found in TAFA[200].

[196] Regulation 17(4).
[197] Regulation 17(7).
[198] Reg 11(6).
[199] Defined as a person in the service of the Crown or holding office under the Crown, acting in the course of that person's duty.
[200] Cf. Section 7 Intelligence Services Act 1994.

Granting Licences

4.58. There are no specified licencing grounds under the CT Sanctions 2019 and the Treasury's power to grant licences therefore enjoys the full flexibility permitted by SAMLA: for any purpose, general or specific, defined term or unlimited. The prohibitions do not apply to anything done under the authority of such a licence[201].

4.59. Regulation 17A[202] provides, in effect, for the recognition of licences issued by the Channel Islands, the Isle of Man, or a British Overseas territory, in respect of conduct in those places.

Information (Part 5: regulations 21 to 27)

4.60. There are four categories of reporting obligations under the CT Sanctions 2019, breach of which amounts to a summary offence carrying a maximum of 6 months imprisonment or a fine[203]:

- Firstly, proactive reporting obligations applicable to financial, legal, real property, trust and related entities[204]. 'Relevant firms' must inform the Treasury as soon as practicable if they know or have reasonable cause to suspect in the course of carrying out their business that a person is a designated person or that a person has committed an offence under the regime.
- Secondly, responsive reporting obligations imposed on the designated person[205]. The Treasury may impose such obligations only where it is believed

[201] Reg 19(1).
[202] Added by way of amendment to the CT Sanctions 2019 by the Sanctions (EU Exit)(Miscellaneous Amendments)(No.3) Regulations 2020.
[203] Reg 25.
[204] Regs 21 to 22.
[205] Reg 23(1), (2).

that it is necessary for the purposes of monitoring compliance or detecting evasion[206].

- Thirdly, responsive reporting obligations imposed on a person acting under a licence[207].
- Fourthly, responsive reporting obligations imposed on any person, for the purposes of establishing the assets of a designated person, monitoring compliance and detecting evasion, and where the Treasury reasonably believes that the person may be able to provide the information[208].

4.61. The fourth category enables the Treasury to issue what might be described as an annual return obligation: requiring all persons (including "United Kingdom persons" outside the UK[209]) who own hold or control a designated person's assets to report on their detail. In practice, the Treasury has issued an annual return obligation by way of a general notice covering all SAMLA regimes[210], although the notice erroneously suggests that the source of the Treasury's power to require information is SAMLA. This is material because under OFSI's General Guidance, it should specify the legislative basis for the request[211]. The source of the power to request is in fact under each of the individual sanctions regimes.

Enforcement (Part 6: regulations 28 to 33)

4.62. Although SAMLA permits penalties up to 10 years' imprisonment, the severest punishment available under the CT Sanctions 2019, consistent with the position under TAFA, is 7 years' imprisonment which applies to any breach of the prohibitions in Part 3 or, notably, to the provision of false information to obtain a licence and to failure to comply with a condition of a licence[212]. The licencing false information

[206] Reg 23(4).
[207] Reg 23(5).
[208] Reg 23(6)(7).
[209] Reg 3(5)(6) and as defined by Reg 1 and section 21 SAMLA. Under section 20(5) the equivalent power under TAFA was limited to persons in or resident in the United Kingdom.
[210] Financial Sanctions Notice, Frozen Assets Reporting (2021), 6 September 2021.
[211] (December 2020), para 5.6.
[212] Reg 28(1).

offence can be committed recklessly and without any need for dishonesty[213] whilst there is no *express* requirement that a person who fails to comply with a licence is aware that they are doing so[214].

4.63. Breaches of confidentiality are punishable by up to 2 years' imprisonment whilst breaches of the information reporting requirements are only punishable summarily[215]. Standard liability exists for officers who consent or connive in offences by a body corporate, or to whose negligence the offence is attributable[216].

[213] Reg 20(1).
[214] Reg 20(2).
[215] Reg 28(2), (3).
[216] Reg 29.

5. DESIGNATIONS TO DATE

5.1. At the time of TAFA's repeal, only one individual was still designated on a purely domestic basis (that is, not designated to implement a UN or EU sanction listing). That individual was Mohammed Fawaz Khaled, a Syrian national who was previously resident in the UK.

5.2. Mr Khaled was subsequently designated under the CT Sanctions 2019 on 31 December 2020, and is currently the only person designated under this regime.

5.3. The statement of reasons given for Mr Khaled's designation under the CT Sanctions 2019 was as follows:

"Khaled is assessed to have left the UK and travelled to Syria to engage in Islamist extremist activists on behalf of ISIL. It is assessed that Khaled may continue to be involved in terrorist activity. There are reasonable grounds to suspect that Khaled is an involved person as defined by the CT3 and that the designation is appropriate."

5.4. The corresponding entry on the Consolidated List was subject to a minor amendment to reflect the fact that he had previously been designated under TAFA (from May 2013)[217].

5.5. I am expressly prohibited under SAMLA from reviewing the decision to designate Mr Khaled[218].

5.6. In his fourth TAFA report, Lord Anderson QC observed the steep decline in the number of Treasury designations from 162 at the start of 2008 to 33 in September 2014[219] caused by:

[217] OFSI, Financial sanctions notice (21 January 2021).
[218] Section 31(13) provides that any review I undertake of the CT Sanctions 2019 "…may not include a review of any decisions to designate…".
[219] At 2.12 to 2.14.

- the policy that persons who were already subject to UN or EU asset freezes should not be subject to TAFA designation save where this was necessary to support the asset freeze.
- the lapsing of designations against serving terrorist prisoners on the basis that the necessity test was no longer satisfied.

5.7. Because many of the 33 designated individuals and entities are now subject to the International CT Sanctions 2019, it is not a fair comparison to make between the numbers designated under TAFA and the single individual designated under the CT Sanctions 2019. However, it is legitimate to consider why domestic CT sanctions are not more widely used.

5.8. From my discussions with Treasury officials (which took place before the streamlining amendments made by the Economic Crime Act 2022) there seem to be two key factors at work.

5.9. Firstly, there is currently less tactical requirement for domestic CT sanctions as a response to terrorist risk. This may be because other measures such as criminal investigation and prosecution, or TPIMs, or cash seizure and forfeiture, are sufficient.

5.10. Secondly, it may also reflect the growth of self-initiating terrorists[220] and the current predominance of low sophistication attacks which require little funding, and perhaps the adaptability of terrorist groups to financial restrictions[221].

5.11. Domestic CT sanctions have not, as yet, been used against any right wing terrorists or terrorist groups, nor against individuals who run or fund websites or platforms which facilitate or encourage terrorism.

[220] Reimer, S., Redhead, M., 'A new normal: Countering the financing of self-activating terrorism in Europe' (RUSI, 2021).
[221] Keatinge, T., Danner, K., 'Assessing Innovation in Terrorist Financing' (2021) 44 Studies in Conflict and Terrorism 455.

6. MINISTERIAL REVIEWS IN PRACTICE

6.1. Following the Economic Crime Act 2022 amendments, the Minister has no statutory duty to review either the regime or any individual designation on a periodic basis. However, both types of review were in fact carried out prior to the amendments and on the basis of unamended CT Sanctions 2019 criteria. No review of his designation was sought by Mr Khaled.

Review of Regime

6.2. The annual review of the CT Sanctions 2019 was presented in a 5-page public statement by the Economic Secretary to the Treasury dated 13 January 2022. The Minister's conclusion that a domestic CT sanctions regime remains necessary was unsurprising; similarly unsurprising given the sparseness of domestic CT sanctions activity, the absence of any court cases, review, controversy, or other attention, was his conclusion that the CT Sanctions 2019 should be retained in their current form.

Review of individual designation

6.3. The three yearly review of Mr Khaled's designation took place in early 2022 and led to the upholding of the designation.

6.4. I attended the principal meeting between officials at which Khaled's continuing designation was discussed prior to making a submission to the Minister. The substance was a detailed recommendation to that effect. I noted that a FCDO official also in attendance was designated as a "challenge champion".

- I observed that Treasury officials and the challenge champion were willing to probe the information contained in the recommendation, and further information was provided.
- Consideration was given to the potential impact on the designated person's family.

- Consideration was also given to whether any other lesser measure, falling short of designation, might be sufficient to achieve the purposes of preventing terrorism or safeguarding national security.
- Attention was correctly given to the latest date at which the designated person was suspected to be involved in terrorism.
- Officials recognised the need to avoid blurring the distinction between the impact on the designated person, on the one hand, and the justification for the designation, on the other. Justification does not involve discounting impact, but recognising impact whilst concluding that it may (or may not) be outweighed by the interests of preventing terrorism.

6.5. A Financial Sanctions Notice was subsequently issued on 11 March 2022 maintaining the designation with a minor amendment to the statement of reasons:

- In place of the assessment that "Khaled may continue to be involved in terrorist activity" it is assessed that "Khaled has been involved in terrorist activity, and would likely seek to provide financial support to ISIL were his designation to lapse". This is an improvement on the original language because it more clearly identifies the assessed threat that the designation appears to meet.
- The second 'that' in the final sentence was removed in the published statement of reasons on the UK Sanctions List for grammatical reasons[222].

6.6. The process did not require or entail any attempt to contact Mr Khaled beforehand. Nor did the Treasury seek to inform him of the outcome of the review since the duty to inform only arises where a designation is made, varied or revoked[223].

[222] The approach correctly applied by the Minister was to consider whether designation was appropriate; the additional 'that' in the original statement of reasons could erroneously imply that the approach was to consider whether there were reasonable grounds to suspect that designation was appropriate.
[223] Regulation 8(1).

7. EXCEPTIONS AND LICENCES IN PRACTICE

Exceptions

7.1. It is impossible to judge the sufficiency of the exceptions in the CT Sanctions 2019 because of their (very) limited use to date. For an individual with family in the UK, one of the most important exceptions, first established under TAFA[224], may be that benefits paid to family members are not caught[225].

Specific Licences

7.2. Again it is impossible to evaluate the Treasury's approach to specific licences under the CT Sanctions 2019. As noted in Chapter 4, the power to grant a licence is not limited to specific grounds. According to OFSI's General Guidance, typical grounds for issuing licences are basic needs, fees for the provision of legal expenses, routine maintenance of frozen funds and economic resources, extraordinary expenses, pre-existing judicial decisions, humanitarian assistance, diplomatic missions, extraordinary situations (such as disaster relief), and prior obligations[226]. There is bespoke, but fairly brief, licensing policy that applies to counter-terrorism sanctions[227].

7.3. Were a licence to be sought for legal fees, there is no express limitation within the CT Sanctions 2019 that those fees should be "reasonable". Other regimes have a specific licencing ground of reasonable professional legal fees and OFSI has published detailed guidance on what it interprets reasonableness to mean in this context[228]. It would be open to OFSI to grant a licence under the CT Sanctions 2019 which specified reasonableness in those terms, but this would be as an exercise of discretion.

[224] Lord Anderson QC, 1st TAFA Report at 7.1-2.
[225] Reg 17(7).
[226] OFSI, UK financial sanctions: general guidance (December 2020), para 6.5.
[227] HM Treasury and OFSI, Counter-Terrorism Licencing Policy (last updated 21 May 2021).
[228] OFSI, Reasonableness in licencing blog, supra.

7.4. Lord Anderson QC recorded the government's approach to licence applications by designated persons under TAFA as follows:

- As a starting presumption all reasonable requests for licences should be capable of being approved, with sufficient controls regarding reporting etc.
- There should be no punitive intent.
- The objective was not to restrict individuals to basic expenses, or to a particular level of income, but to issue licences where this can be done without giving rise to terrorist financing risks[229].

7.5. Guidance under TAFA specified that the overall objective of the licencing system in terrorist asset freezing cases was "to strike an appropriate balance between minimising the risk of diversion of funds to terrorism and meeting the human rights of designated persons and other third parties"[230], which implies some tolerance for risk. This statement is replicated in current OFSI guidance but coupled to the further observation that the Treasury only grants licences where the activities or transactions "can proceed without giving rise to any risk of terrorist finance" (emphasis added)[231]. The stated objectives are, reasonably enough, to minimise access to large amounts of cash, and ensure that there is an audit trail to allow monitoring of terrorist finance risks and compliance[232].

7.6. Whilst a very robust approach is understandable where transactions by or on behalf of the designated person are concerned, the position ought to be more nuanced where applications for licences are made by unconnected third parties. It remains to be seen whether the government will incline, in granting or withholding licences to tolerate the risk that some financial resources will be diverted to designated

[229] Lord Anderson QC, 1st TAFA Report at 7.13.
[230] OFSI, Licencing in terrorism cases (undated), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/511692/Terrorism_licensing_policy_revised.pdf.
[231] HMT and OFSI, Counter-Terrorism Licencing Policy (last updated 21 May 2021). Further guidance is contained in OFSI's Introduction to licencing blog (19 April 2021).
[232] Ibid.

individuals. The Treasury has reasonably concluded that there is no significant humanitarian impact as a result of the CT Sanctions 2019[233].

7.7. OFSI's General Guidance covers the process of applying for a specific licence. There is no reason to doubt that designated persons will find the process of applying for licences[234] let alone mounting a legal challenge[235], cumbersome and sometimes slow. One of the most potent aspects of life under sanctions for the designated person is the obligation to account in minute detail for every item of daily expenditure, apt to generate resentment both at its nuisance value, and at the degree of official intrusiveness[236].

General licences

7.8. The benefit of general licences is that they apply to all persons and no prior permission (and generally speaking, only prior notification) is required before undertaking a transaction covered by the general licence.

7.9. There is presently one general licence which applies to all three counter-terrorism regimes (CT Sanctions 2019, International CT Sanctions 2019 and the Al-Qaida regime[237]) and which permits legal aid payments to solicitors representing a designated person[238].

7.10. The Treasury revoked and chose not to replicate TAFA general licences authorising the provision of insurance and the payment of legal fees by third parties on the basis that applications would be assessed on a case-by-case basis in future[239]. It is to be noted that, unlike the ISIL (Da'esh) and Al-Qaida (United Nations Sanctions)

[233] Treasury, Annual Review of CT Sanctions 2019 (2021), supra.
[234] 4th TAFA Report at 4.5 to 4.6.
[235] 1st TAFA Report at 7.17.
[236] 1st TAFA Report at 7.15.
[237] The Al-Qaida (United Nations Sanctions) (EU Exit) Regulations 2019.
[238] General Licence, INT/2020/G1 (11 January 2021, subsequently amended to remove a reporting requirement).
[239] OPSI, Annual Review 2020-2021, at page 8.

(EU Exit) Regulations 2019, the CT Sanctions 2019 prohibit making financial services available to a designated person; this includes providing insurance. An even earlier general licence, again not replicated, covered the payment of sums to a prison governor for the use of a designated person while in prison[240].

7.11. OFSI has stated that it will not accept an application for a general licence[241].

[240] 1st TAFA Report at 7.7.
[241] General Guidance (December 2020), para 6.8. General licences will usually be considered in response to unforeseen circumstances and will be issued under such conditions as HMT considers are appropriate.

8. OPERATION OF THE PROHIBITIONS AND REQUIREMENTS

Impact on Designated Persons

8.1. For those based abroad with no significant assets in the UK, it is unlikely that the prohibitions and requirements contained in CT Sanctions 2019 will have any material impact upon them. Experience from the operation of the TAFA regime suggests that their impact will be minimal for those who are prison in the UK, but that they will impose a heavy impact on those at liberty.

8.2. I am unaware of any impact on family members.

Impact on Banks and Commercial Entities

8.3. It has been rightly said that the private sector – both non-profit and profit-making enterprises – is critical to understanding how sanctions work and how best to calibrate sanctions to meet foreign policy aims. This is because sanctions are a unique tool of coercive authority in that they are designed by the government but principally implemented by the private sector[242].

8.4. The financial sector has a highly active relationship with OFSI though UK Finance[243] which enables a dialogue between banks (and others) and the government on points of detail such as the format of the sanctions list – an important consideration for automated searching for designated individuals – and wider thematic issues.

[242] Testimony of Adam M. Smith, former senior OFAC official, before the United States Senate Committee on Banking, Housing, and Urban Affairs "Afghanistan's Future: Assessing the National Security, Humanitarian, and Economic Implications of the Taliban Takeover", October 5, 2021.
[243] Formed in 2017 by a merger of the British Bankers' Association and others financial representative bodies.

8.5. In his First and Fourth TAFA Reports, Lord Anderson QC made a number of observations about the impact on banks of complying with sanctions generally[244]. I have undertaken my own limited enquiries with the financial sector as to whether those observations still hold true today. The outcome of this exercise elicited the following:

(a) The financial sector continues to operate highly elaborate control structures because of what is perceived as the huge reputational and regulatory risk of being seen to assist in the financing of terrorism. It remains the case that if a bank was associated with a domestic act of terrorism it would have severe consequences. Banks are therefore particularly sensitive about CT sanctions and terrorist financing.

(b) It is easier for banks to deal with named individuals than named entities, and easier to deal with named individuals or entities than spotting patterns of transactions that may indicate terrorist financing at work.

(c) Where there are complex structures involved, significant work is required to identify ownership and control. Banks therefore welcome designation of "connected persons". There is uncertainty about how far banks can legally share information so that the identified assets of a designated person are not simply moved to another bank which has to undertake inquiries afresh.

(d) Because of the way automation works, changing the format of the sanctions list by the addition or removal of punctuation (as happened when SAMLA first came into effect) can have the effect of appearing to add new individuals and entitles to the list. This can result in additional work being done, or false positives being generated, for individuals or entities who have merely been carried over from one list to another. Certain designations increase the risk of false positives – for

[244] As well as sanctions made by the UK, there are sanctions made by the European Union, by the United States and by other countries with which UK businesses, charities and individuals must comply in relation to activities in relevant jurisdictions. To complicate matters, compliance by UK persons with US sanctions concerning Iran and Cuba may in certain circumstances be illegal under the UK's 'Protection of Trading Interests Legislation' (comprised of the retained Blocking Regulation (Council regulation (EC) 2271/96) and Implementing Regulation (Commission Implementing Regulation (EU) 2018/1101), and the Protecting against the Effects of the Extraterritorial Application of Third Country Legislation (Amendment) (EU Exit) Regulations 2020).

example, the listing of a hypothetical terrorist group called "NG1" could flag customers with postcodes in Nottingham.

(e) The greater the uncertainty about a customer's proximity to a designated entity (or proscribed organisation under the Terrorism Act 2000), the greater the likelihood that the bank will close an account – the process known as "de-risking". A case in 2013[245] concerned a major bank's attempt to withdraw services from Dahabshiil, a remittance business mainly dealing with value transfers to Somalia (the case was subsequently settled following the additional government support for anti-money laundering and anti-terrorist financing controls in the sector[246]). Banks fear increased compliance costs of monitoring accounts that make the banking relationship financially unviable. It is recognised that the consequences of losing access to banking services can be catastrophic for individuals.

(f) Although the relationship between UK Finance and OFSI is good, individual banks have (perhaps inevitably) an appetite for greater responsiveness on the part of OFSI – both in terms of speedy response to reports of suspected breaches, and greater transparency about the value (or otherwise) of voluntary disclosures.

8.6. As Lord Anderson QC observed, banks are in effect an enforcement arm of the Treasury when it comes to asset freezing. The Treasury is a public authority, whose responsibilities include ensuring that its asset-freezing decisions intrude no further than is necessary into the private lives of those who are affected by them[247]. This includes working with banks to ensure that they, and their customers, can continue to operate consistent with their sanctions obligations.

8.7. Although the CT Sanctions 2019 do not (at least at present) have any impact on humanitarian relief, the work of the Tri-Sector Group (which I have described elsewhere[248]) is an example of the government correctly working with banks and

[245] Dahabshiil Transfer Services Limited v Barclays Bank Plc [2013] EWHC 3379 (Ch).
[246] Economist Intelligence, 'Barclays Bank strikes deal on Somali remittance services' (28 April 2014).
[247] 2nd TAFA report at 5.8.
[248] TA in 2020 report, at 3.49 et seq.

others, to allow properly informed and less uncertain decision-making, rather than leaving matters to less well-informed and cautious market forces[249].

Guidance and other published materials

8.8. The impact of sanctions is necessarily mediated through government guidance which can, if well drafted, alleviate some of the uncertainties felt by third parties. From my interactions with the financial sector, guidance is valued when it is timely and illustrated by practical examples.

8.9. In practice, the government draws a distinction between statutory guidance issued by the maker of the regulations, or guidance on requesting a review, and guidance on sanctions *implementation*. This results in some sanctions guidance issued by FCDO alone or in combination with another department[250]; and other sanctions guidance issued by OFSI/HMT alone or in combination with another department[251].

8.10. A comparison can be drawn with OFAC, the Office of Foreign Assets Control which administers and enforces US sanctions and holds the pen on most US sanctions guidance.

8.11. Although relevant government departments are consulted on cross-cutting issues, there is a need to ensure that guidance is authoritative, clear, and consistent with existing guidance. In my annual report on terrorism legislation, I draw attention to aspects of the Charity Sector Guidance issued by OFSI in November 2021 and

[249] "Unfortunately, uncertainty is anathema to the private sector – it leads to paralysis and de-risking by private actors even if the policy of the United States would prefer a more nuanced, engaged approach. The increasing reflex to de-risk by the global banking community (and increasingly other private actors) means that without clarity many key players – for reasons of their own internal policies and fiduciary obligations – will stay on the sidelines even with respect to humanitarian assistance": Adam M. Smith testimony, supra.

[250] FCDO and OFSI, 'Counter-terrorism sanctions: guidance' (statutory guidance on the CT Sanctions 2019) (20 March 2019); FCDO, 'How to request variation or revocation of a sanctions designation or review of a UN listing' (8 July 2021); FCDO and Department for Transport 'How to request a review of the designation or specification of a ship'(31 December 2020).

[251] OFSI, 'General guidance for financial sanctions' (December 2020); HM Treasury and OFSI, 'Counter-terrorism licencing policy' (21 May 2021); OFSI, 'Charity sector guidance' (1 November 2021). Home Office and OFSI, 'For information note: operating within counter-terrorism legislation, counter-terrorism sanctions and export control' (11 October 2021).

concluded that there may have been insufficient appreciation across Whitehall of the impact of its precise wording[252]. No doubt as the UK becomes more experienced at running its own fully autonomous sanctions regime, modes of joint working will mature.

Enforcement

8.12. There has been no enforcement activity in connection with the CT Sanctions 2019.

8.13. OFSI's General Guidance contains a chapter on compliance[253].

8.14. As noted in Chapter 3, OFSI's power to impose monetary penalties for breaches of financial sanctions under the Policing and Crime Act 2017 was extended by amendments made by the Economic Crime Act 2022: so far as monetary penalties are concerned, breaches of sanction are now crimes of strict liability. Guidance on monetary penalties was updated in January 2022, shortly before this change[254].

8.15. OFSI has published a table of enforcement action[255] since 2019 which shows that fines have been imposed in connection with the following regimes: Egypt, Syria, and Russia.

[252] Terrorism Acts in 2020 at 3.45 – 3.47.
[253] 'General Guidance' (December 2020) at Chapter 7.
[254] OFSI, 'Monetary penalties for breaches of financial sanctions' (January 2022).
[255] OFSI, 'Collection: enforcement of financial sanctions' (last updated 21 February 2022).

9. COURT REVIEWS IN PRACTICE

9.1. There have been no court reviews of any designations under the CT Sanctions 2019 to date[256].

[256] I refer to the judgment in R (on the application of Hany Youssef) v Secretary of State for Foreign, Commonwealth and Development Affairs and HM Treasury [2021] EWHC 3188 (Admin) in Chapter 3.

10. CONCLUSIONS AND RECOMMENDATIONS

Conclusions

10.1. The CT Sanctions 2019 provide a coherent basis for financial sanctions with a UK nexus.

10.2. So far the only person designated is an individual who was first designated under TAFA in 2013. The triennial review (which was an obligation prior to 15 March 2022) was thorough and effective.

10.3. Despite the addition of a 'national security' purpose, it was unlikely that the CT Sanctions 2019 would operate very differently from TAFA when first made.

10.4. However, it remains to be seen whether greater use is made of the regime after the Economic Crime Act amendments which loosen the statutory criteria for designation.

10.5. If further use is made of the CT Sanctions 2019, it will be necessary to consider in particular how the Treasury considers impact on persons outside the UK, the effectiveness of licencing as a mitigation of unnecessary impact, and the extent to which the Treasury keeps the designation under review.

10.6. The CT Sanctions 2019, which is publicly available on the government website, no longer set out the true designation criteria which are now to be found in the Economic Crime Act 2022.

Recommendations

10.7. Recommendation 1: the Treasury should publish a substantive response to the report of the independent reviewer, either at the same time as or subsequent to that report being laid before Parliament under section 31 SAMLA.

10.8. Recommendation 2: the CT Sanctions 2019 should be amended so that they expressly contain the designation criteria and other provisions established for existing sanctions regimes by Chapter 2 of Part 3 of the Economic Crime Act 2022.

HM Treasury contacts

This document can be downloaded from www.gov.uk

If you require this information in an alternative format or have general enquiries about HM Treasury and its work, contact:

Correspondence Team
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Tel: 020 7270 5000

Email: public.enquiries@hmtreasury.gov.uk