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

BY JONATHAN HALL KC

Independent Reviewer of Terrorism Legislation

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EXECUTIVE SUMMARY

- The Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019, otherwise known as "CT2", are a necessary component of the UK's counter-terrorism sanctions regime.

- CT2 replaces various pre-Brexit regimes but at present operates on a legacy basis, meaning that all designated persons and entities were already designated before CT2 came into force.

- Potential future use could be against Extreme Right Wing Terrorists and/or to address terrorist personalities online.

- The standard of consideration and review by the Foreign, Commonwealth and Development Office has to date been high.

- There is uncertainty about the meaning of ownership and control in the context of humanitarian work in Gaza, which the government could address. Humanitarian organisations should not run the gauntlet of breaching sanctions against Hamas because they are obliged to make essential day-to-day payments to local authorities and electricity suppliers.

- Given the recent adoption of humanitarian exemptions for UN sanctions, the government now needs to consider creating humanitarian exemptions under CT2. On the balance between terrorist financing risk, and allowing agencies to deliver on humanitarian imperatives, the dial has shifted.

- The potential day-to-day impact of counter-terrorism sanctions on individuals who are present in the UK should not be understated, and the government may need to consider exit strategies in the event that a UK-based individual is designated.

1. INTRODUCTION

1.1. This is my second independent review carried out under the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"). The regime under consideration is contained in the **Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019**, referred to within government and in this report as "CT2".

1.2. The reviewer's remit is limited to a review of the operation of the asset freeze provisions[1], which were referred to me for review on 17 January 2023. The subject of this report is therefore **financial sanctions**, and not the trade sanctions and immigration measures that also apply to a person designated under CT2[2].

1.3. As I wrote in my 2022 report on the domestic Counter-Terrorism (Sanctions) (EU Exit) Regulations 2019, CT3 ('the CT3 Report')[3], 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.

1.4. Although it is argued that unilateral sanctions in general lack clear underpinning in international law[4], sanctions imposed by one state against another state are a well-established aspect of statecraft[5]. Sanctions imposed by a state against an individual or group are similarly embedded within modern practice. Unilateral targeted

[1] SAMLA, section 31.
[2] Under Parts 4 and 5.
[3] 'Review of the Operation of Counter Terrorism (Sanctions) (EU Exit) Regulations 2019' (HM Treasury, 15 December 2022).
[4] Subedia, S., *Unilateral Sanctions in International Law* (Hart, 2021); Bodganova, I., *Unilateral Sanctions in International Law and the Enforcement of Human Rights* (Brill, 2022).
[5] The Law Debenture Trust Corporation plc v Ukraine [2023] UKSC 11, Supreme Court.

sanctions are to be distinguished from sanctions imposed through collective action at the United Nations. The most important counter-terrorism sanctions at UN level are those imposed against individuals, groups, undertakings and entities under the UNSCR 1267 Islamic State and Al-Qaida regime[6].

1.5. UN Security Council Resolution 1373 (2001) 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. The International Counter-Terrorism Sanctions 2019 were made by the UK in response to that imperative[7].

1.6. In the CT3 report I detailed the genesis of the UK's autonomous sanctions regimes at the time of Brexit and carried out a detailed analysis of SAMLA (as amended by the Economic Crime (Transparency and Enforcement) Act 2022), the primary legislation under which all sanctions regimes are now made in the UK. I will not repeat that analysis here.

1.7. For the purposes of this report, I have spoken to officials at the Foreign, Commonwealth and Development Office and HM Treasury, attended meetings of the Tri-Sector Group, spoken to representatives of the UK Financial System and humanitarian agencies, and met with lawyers specialising in representing sanctioned individuals. I have also considered CT2 in the wider of context of terrorism legislation, which I have been reporting on since 2019 as Independent Reviewer of Terrorism Legislation.

[6] Note that Al Shabaab fall outside the scope of the UN's Islamic State and AQ regime, but fall within its Somalia regime (implemented in the UK under the Somalia (Sanctions) (EU Exit) Regulations 2020.
[7] See reg.4.

Scale and Role of International CT Sanctions 2019 (CT2)

1.8. Whereas only two individuals have ever been designated under CT3[8], a total of 44 individuals and entities are designated under CT2.

1.9. To date all are legacy designations inherited from the UK's pre-SAMLA regimes[9] and relate, in the main, to external threats to Europe other than those associated with Islamic State/Da'esh and Al-Qaida.

1.10. Since CT2 has a focus on persons who operate internationally[10], and comes with automatic exclusion from the UK, it may be rare that any that UK-based individuals or assets will be affected by the CT2's operation. Ensuring that funds from the UK or passing through the UK's large financial sector are free of terrorist taint is an important practical virtue. But the signal-sending aspect of sanctions, communicating the UK's solidarity with international partners in the struggle against terrorism, will sometimes be the dominant use case[11].

1.11. There is no inherent reason why further targets should be designated under CT2. Two factors may inhibit further designations:

- The current trend is for low sophistication attacks (knives, vehicles, etc.) requiring little financial support.
- Where financial sanctions are useful, the government is likely to promote them in a form that applies internationally. For the FCDO, this means that preference is given to supporting designation at a UN level (for example under

[8] Mohammed Fawaz Khaled, and on 18 April 2023, Nazem Ahmad, a suspected Hizballah financier with an extensive art business in the UK.
[9] Specifically, those designated under the Terrorist Asset-Freezing etc. Act 2010 (which included those designated under the EU's CP931 retime) and the Al-Qaida (Asset Freezing) Regulations 2011 (which implemented the EU's autonomous sanctions regime under EU Reg 2016/1686).
[10] Explanatory Notes, para 7.4.
[11] In context of Russia sanctions, the High Court has held that, "Especially in the foreign policy field signalling is a factor which a decision-maker could rationally take into account" (Dalston Projects Ltd and others v Transport Secretary [2023] EWHC 1885 (Admin), para 90, Sir Ross Cranston). In a different case it held, "To be effective sanctions need to send messages to the designated person, and others in a similar position, that the conduct in question is unacceptable" (Shidvler v Foreign Secretary [2023] EWHC 2121, at para 80, Garnham J.).

UNSCR 1267), rather than developing a case for designation solely under a UK regime[12], even though this has the effect of limiting rights of challenge[13].

1.12. Given FCDO officials' heavy diet of Russia-related work, this is unlikely to change in the short term.

1.13. That said, the future option of future designations under CT2 cannot be discounted, for example:

- In respect of individuals or groups who fall outside the UN sanctions regimes, such as Extreme Right Wing Terrorists.
- If UN consensus could not be achieved on adding new names to existing UN counter-terrorism regimes, for example if Russia or China, as permanent members of the Security Council, took an antagonistic position to any further UN designations.

1.14. A further use case relates to online counter-terrorism. Owing to the UK's democratic status and the procedural protections available under SAMLA, designation under CT2 is likely to be considered an acceptable benchmark for other international action such as digital takedown of associated terrorist content[14]. This could be particularly relevant where individuals[15] are concerned because, by contrast, the power to proscribe under the Terrorism Act 2000 only applies to organisations[16].

1.15. The value of UK assets frozen under CT2 is miniscule.

[12] Cf. Section 2(4) report to CT2 at para 2: "a collective approach to sanctions achieves the greatest impact".
[13] Under CT2, decisions on revocation are made by ministers subject to review by the High Court. Under UN regimes, revocation is a collective decision subject to lobbying and the role of the UN Ombudsperson for the UN 1267 list.
[14] As I wrote in *Terrorism Acts in 2021* at 12.53 et seq.
[15] Such as James Mason, the hugely influential neo-Nazi and author of 'Siege': *ibid* at 11.17.
[16] Section 3.

2. THE REGULATIONS

2.1. The International CT Sanctions 2019 (CT2) regime came into force on 31 December 2020 with the express intention of replacing earlier regimes, with substantially the same effect[17].

2.2. In contrast to CT3:

- They were made with a focus on persons who operate internationally[18].
- They provide for restrictions on travel to the UK and trade[19], as well as financial sanctions.

2.3. Minor changes aside[20], CT2 was substantially altered by the streamlining provisions introduced by the Economic Crime (Transparency and Enforcement) Act 2022 with effect from 15 March 2022. These added an urgency procedure and removed the criterion of "appropriateness" by requiring all sanctions regimes, including CT2, to be read as if they always contained these provisions[21].

2.4. A member of the public considering the text of CT2, perhaps on visiting the website 'legislation.gov.uk' hosted by the National Archives, will not know that these sanctions now operate quite differently from when they were first enacted.

2.5. I am pleased to report that the government has accepted the recommendation in my 2022 report that CT3 should be amended so that they expressly contain the designation criteria and other provisions established by the 2022 Act, for the sake of clarity[22]. I make the same **recommendation** with respect to CT2.

[17] Explanatory Memorandum, para 2.1.
[18] This purpose is not spelt out in the regulations themselves, and is only found in the Explanatory Memorandum at para 7.4.
[19] Part 4 provides for automatic exclusion under s8B Immigration Act 1971 and Part 5 contain trade sanctions.
[20] SI 2019/843 (reg.5); SI 2020/591 (reg.7); SI 2020/950 (reg7); SI 2022/819 (reg7).
[21] Section 61, 2022 Act.
[22] Letter, Baroness Penn, Treasury Lords Minister, 15.12.22.

General (Part 1: regulations 1 to 4)

2.6. In accordance with section 1(3) SAMLA, the purposes of CT2 are stated within the regulations. These are: compliance with the UK's obligations under UN Security Council Regulation 1373, and the prevention of terrorism in the UK or elsewhere otherwise than by compliance with the relevant UN obligations[23].

2.7. For reasons I am unable to fathom, 'national security'[24] is included as a purpose in CT3 but not in CT2, although for reasons given in the CT3 Report, this may not greatly matter[25].

2.8. As permitted by section 21 SAMLA, the prohibitions and requirements apply to conduct by any persons wholly or partly within the UK; and, extraterritorially, to conduct wholly or partly outside the UK by any "United Kingdom person"[26]. Person comprises persons corporate or unincorporate, including foreign companies[27]. "United Kingdom person" means a UK national or body incorporated or constituted under the law of any part of the UK[28].

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

2.9. The designation criteria are the same as for CT3. Chapter 4 of my CT3 Report contains a detailed examination of these criteria both before and after amendment by the Economic Crime (Transparency and Enforcement) Act 2022 including:

- Reasonable grounds to suspect.
- The meaning of 'involved person', and the manifold ways by which a person may be involved in terrorism.

[23] Reg.4.
[24] A concept that, whilst uncertain, has always included the notion of 'economic well-being': Scott, P.F., ''Economic Well-being' in National Security law and Practice', (2022) *King's Law Journal*.
[25] CT3 Report at 4.10-12.
[26] Reg.3.
[27] Interpretation Act 1978, Schedule 1. See further Archbold's Criminal Practice, 2023, at para 1-135 et seq.
[28] Section 21 SAMLA.

- Discretion to designate including consideration of impact on the designated person and family members.
- Urgency procedure.

2.10. There are further points to make.

2.11. Firstly, the government's acknowledged policy of taking account of the impact on designated individuals who are outside the UK when considering the discretion to designate[29] has real relevance to CT2. All the designated individuals under CT2 are outside the UK.

2.12. Secondly, the High Court has recently observed in respect of the equivalently worded Russia sanctions[30] that:

- Even though Ministers are no longer required to consider whether designation is "appropriate", the discretion stage is a substantial stage in the decision-making process; as the High Court put it, the inquiry does not cease as soon as the Minister has reasonable grounds to suspect that the entity at issue is an involved person[31].
- Where "involvement" is historic only there "may well" be an argument that designation would not be a reasonable exercise of discretion, although this would always be a question of fact and degree for the decision-maker[32]. (I would add that, almost by definition, evidence of involvement will always be evidence of *past* involvement to some degree).
- On the statutory threshold, the decision-maker must consider all the material or information known to him or ought to have been within his knowledge following reasonable enquiry[33].

[29] CT3 Report at 4.34 to 4.39.
[30] LLC Synesis v Secretary of State for Foreign, Commonwealth and Development Affairs [2023] EWHC 541 (Admin). This was the first challenge to the review of a designation under a SAMLA sanctions regime.
[31] Ibid, para 23, Jay J.
[32] Para 25.
[33] Para 73.

- The decision-maker is not limited to evidence that would be admitted in a court of law but may consider hearsay, allegations, multiple hearsay and intelligence; its weight is for the decision-maker to assess, although the court would usually expect at least some recognition has been given to its inherent quality[34].
- "Reasonable grounds to suspect" does not require a finding of fact but an assessment or evaluation of the available information and material, the drawing of inferences, and the acquisition in good faith of a state of mind once that exercise has been completed[35].

2.13. Thirdly, the urgent procedure brought in by the Economic Crime (Transparency and Enforcement) Act 2022 is far more likely to apply to CT2 than to CT3. This is because future CT sanctions with an international focus could well be imposed first in time by one of the United States, the EU, Australia or Canada[36], with the UK keen to mirror the designation in the UK for the purposes of international solidarity. In those circumstances, a designation under CT2 could be made urgently (for up to 56 days) without the Minister being initially satisfied that there were reasonable grounds to suspect involvement in terrorism: a decision by allies would be enough[37].

2.14. Fourthly, considering public debate concerning the possible proscription of Iran's Islamic Revolutionary Guard Corps (IRGC), it is worth noting that "terrorism" in CT2 has the same meaning as in the Terrorism Act 2000[38]. The current list of designated persons includes 6 IRGC officials together with the Iranian Ministry of Intelligence and Security's Directorate of Internal Security. This suggests that, despite the government's policy not to proscribe state entities as being concerned in terrorism under the Terrorism Act[39], the position is somewhat freer in the context of

[34] Ibid.
[35] Ibid.
[36] Or any further country specified for these purposes by an appropriate Minister: Section 11(2D)(e) SAMLA, as amended.
[37] Section 11(2B) SAMLA.
[38] Section 62(1).
[39] See further, Hall, J., 'Hidden Implications: Islamic Revolutionary Guard Corps and Terrorism Proscription' (January 2023).

counter-terrorism sanctions. What could sometimes be described as hostile state activity (such as arranging for the attempted assassination of the Saudi ambassador to the US in 2011[40]) therefore falls within scope.

2.15. It is likely that CT2's greater flexibility for accommodating state terrorism is due partly to international reciprocity and the carrying across of designations that were previously made under EU law. The Iranian Ministry of Intelligence and Security's Director of Internal Security appeared on the EU list to which the UK was formerly bound to give effect[41]. The use of sanctions against officials and state bodies is hallowed by long international practice. A tentative distinction can also be drawn between the policy objectives of proscription and designation. Proscription is directed at putting an end to an organisation, whereas sanctions are directed at changing behaviour[42].

Prohibitions (Part 3: regulations 10 to 16)

2.16. Regulations 11 to 15 impose prohibitions that may be contravened by any person within the United Kingdom or any "United Kingdom person" anywhere in the world. Regulation 16 prohibits circumvention.

2.17. All these prohibitions replicate the prohibitions in CT3, and their effect was covered in some detail in my CT3 Report[43].

2.18. As with CT3, the bite of the prohibitions is somewhat enlarged in two important senses[44]:

[40] Statement of reasons for Hamed Abdollahi.
[41] Common Position 931.
[42] Cf. CT2 section 2(4) statement: "Sanctions can be used to change behaviour; constrain damaging action; or send a signal of condemnation" (para 16).
[43] At 4.45 to 4.54.
[44] Neither of the provisions considered in this paragraph were found in TAFA. Under EU law, making funds available to a person owned or controlled by the designated person *might* count as making funds indirectly available to the designated person.

- the prohibition on dealing has been extended to cover funds or economic resources *belonging to* corporate entities which are owned held or controlled directly or indirectly by the designated person[45].

- The prohibitions on making funds or financial services or economic resources available have likewise been extended to include *making them available to* corporate entities who are owned held or controlled directly or indirectly by the designated person[46].

2.19. This *alter ego* effect, which appears in all SAMLA sanctions regimes, is the subject of detailed provision within CT2. Ownership or control may result primarily from shareholding or power to appoint directors[47] and there are special rules to capture the subtle and complex way in which individuals may exercise control over corporate entities[48].

2.20. More numinous is the **catch-all provision in reg.7(4)** which includes within the concept of ownership and control circumstances in which it is reasonable to expect that a 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 [the corporate entity's] affairs are conducted in accordance with" that person's wishes[49].

2.21. In 2023, OFSI refreshed its enforcement guidance and added detail on the level of due diligence the regulator would expect on the question of ownership and control[50], amounting to complex and time-consuming inquiries generally suited to large financial institutions. Understandably the context is commercial.

[45] Reg.11(7).
[46] Regs.12(4), 14(4).
[47] Reg.7(2).
[48] In the Schedule to CT2.
[49] Broadly corresponding to Article 1(6) of Council Regulation (EC) 2580/2001, in accordance with which TAFA and UK implementing regulations fell to be interpreted.
[50] 'OFSI enforcement and monetary penalties for breaches of financial sanctions', Guidance (March 2023), at paras 3.22 et seq.

2.22. Not addressed in OFSI's guidance is how 'ownership and control' applies, if at all, in *political* contexts: a point of some significance in the counter-terrorism context where terrorist organisations can, and do, assume political governance of overseas ministries and municipalities. Indeed, many terrorist groups expressly aspire to governance.

2.23. This has relevance to Hamas, the "militant Islamist movement"[51] designated under CT2 which has exercised control in Gaza since 2006. As explained further below, UK humanitarian agencies operating in Gaza who are obliged to pay taxes and utility bills to municipal authorities, may need to consider the applicability of the CT2 prohibitions. In principle, breaches could arise where monies are transferred to entities that Hamas owns or controls within the meaning of the regulations, unless some licence or exception applies. Similar considerations could arise in relation to the activities of Hezbollah (also designated under CT2) in Lebanon.

2.24. It seems doubtful that the concept of ownership and control is intended to apply automatically to ministries or municipal authorities or other state bodies that a designated person or group governs by virtue of political office.

- That was the tentative view of the High Court in relation to the Russia sanctions[52]. The Court considered that reg.7(4) was designed to sweep up complex trust structures rather than catch political arrangements.
- The type of control that a minister or elected official exercises with respect to a ministry or local authority – the ability to set its policies with a corresponding accountability for its activities – does not seem to correspond to the type of control with which CT2 are concerned, which is essentially the power to dispose of assets. In its guidance to the aid sector on EU sanctions, the European Commission refers to ownership and control where the designated

[51] According to the Explanatory Memorandum accompanying the recent proscription of the entirety of Hamas under the Terrorism Act (The Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No.3) Order 2021).
[52] PJSC National Bank Trust v Mints [2023] EWHC 118 (Comm), Cockerill J at 237 et seq.

person has the power to divert the funds to himself or herself, or use them for his or her benefit [53].

- Considering prohibitions against specific individuals, groups or movements to apply to entire ministries and local authorities appears inconsistent with the concept of 'targeted' sanctions to which the statutory guidance under CT2 refers[54].

2.25. Taking as a general starting point that sanctions against terrorist individuals or entities do not apply to ministries and local authorities is consistent with practice in the European Union[55]. It is less easy to draw general principles from the detailed guidance issued by the United States Office of Financial Asset Control, because of the significant use by the US government of General Licences and humanitarian exemptions, although there are aspects of its guidance which again suggest that sanctions against individuals or entities do not automatically bite on government bodies[56].

2.26. It is possible to envisage a situation in which political control does confer on the political head the power to dispose of assets: for example, if a terrorist group entered government and was given control of the country's defence budget, with full discretion over expenditure.

2.27. In such a scenario, the coherent response would be for the government to designate the ministry or authority as an "involved person" on the basis that the government entity itself supported or assisted persons engaged in terrorism[57]. The government has stated that it will look to designate owned or controlled entities "in their own right where possible"[58]. There is already precedent under CT2 for

[53] EU Commission Guidance Note on the Provision of Humanitarian Aid in Compliance with EU Restrictive Measures (sanctions) 30 June 2022 (2022) 4486 final.
[54] HM Treasury, Statutory Guidance on Counter-Terrorism sanctions (March 2019) at para 1.2.
[55] EU Commission Guidance Note, supra: "EU sanctions are targeted and the designation of an individual does not equate to designating the state branch that he or she represents pro tempore."
[56] OFAC, FAQs at paras 840 (Hong Kong sanctions), 993 (Afghanistan sanctions).
[57] Reg6(3)(j).
[58] OFSI, General Guidance on UK Financial Sanctions (August 2022) at para 4.1.

designating parts of governments[59]. The government frequently designates specific government entities under the Syria regime.

2.28. There may also be circumstances in which monies held by ministries or municipalities, although neither owned nor controlled by a terrorist group, are diverted through poor governance, in which case they might be provided "indirectly" to the sanctioned entity. But that is a different matter from ownership and control.

Exceptions and licences (Part 6: regulations 29 to 32)

2.29. CT2 provides a general power for the Treasury to grant licences: these can be adapted or turned on and off as circumstances evolve. Exceptions are contained in the regulations themselves and change to the exceptions requires further legislation and therefore Parliamentary oversight. The provisions in CT2 correspond exactly to those in CT3, and reference should therefore be made to my CT3 Report[60].

2.30. However, the continuation of CT2 in its current form requires some comment. This is because in February 2023 the government brought forward legislation to amend all its UN regimes[61], including those relating to Islamic State and Al-Qaida, to create a "humanitarian exception" of exceptional utility to humanitarian agencies who fear being caught up in sanctions breaches.

2.31. This humanitarian carve-out entirely disapplies any asset freeze prohibitions under UN or mixed regimes for persons carrying out activity which is necessary to ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs so long as:

A. those activities are carried out by a number of actors including the United Nations, its specialised agencies, and certain international and non-governmental

[59] The Directorate for Internal Security of the Iranian Ministry of Intelligence and Security is designated under CT2.
[60] CT3 Report at 4.55 to 4.59.
[61] The Sanctions (Humanitarian Exception) (Amendment) Regulations 2023, SI 2023/121.

organisations supporting UN humanitarian work, and Red Cross and Red Crescent organisations (ICRC, IFRC and National Red Cross and Red Crescent Societies).; and

B. the person in question believes that the activity is necessary and has no reasonable cause to suspect otherwise.

2.32. UN Security Council Resolution 2664 (2022) is the explanation for this change. In December 2022, having already adopted strong exceptions in response to the humanitarian crisis in Afghanistan the previous year[62], the UN decided to exclude humanitarian assistance and other activities that support basic human needs when carried out by the UN and other eligible actors from the remainder of its regimes. Notably this included (for a monitored period of 2 years) UNSCR 1267 sanctions in respect of Islamic State and Al-Qaida, the two organisations at the heart of global counter-terrorism anxiety.

2.33. UNSCR 2664 (2022) elicited a partial sigh of relief from humanitarian organisations: relief, because the burden of compliance, and well-documented risks of bank de-risking[63], were lifted for activities within its scope; partial relief only, because states were not required to implement humanitarian carve-outs in non-UN regimes. In particular, the UN did not make equivalent amendments to UN Security Council Regulation 1373 (2001), the resolution which contains the requirement on States to counteract terrorist financing after 9/11 and is one of the statutory purposes of CT2[64].

2.34. The government was therefore left with a free hand on its non-UN autonomous regimes including CT2, as to whether it would implement a humanitarian carve-out, or not.

[62] UNSCR 2615 (2021), implemented in the UK under the Afghanistan (Sanctions) (EU Exit) (Amendment) Regulations 2022.
[63] The government has acknowledged these risks in response to my Terrorism Acts in 2018 report, see for example HM Treasury, Home Office, 'National risk assessment of money laundering and terrorist financing' (December 2020), at paras 15.18-19; FCDO, Report on Annual Reviews 2021 (Jan 2022), Annex at para 11.
[64] See reg.4(1)(a).

2.35. At a general level, aid agencies and peace-building organisations experience touchpoints with sanctioned individuals and entities because they tend to operate in less stable parts of the world. Operating locally, humanitarian organisations or their local agents need to register with the appropriate national authorities, open bank accounts, employ staff, buy or rent office accommodation, hire advisers, obtain necessary permits and visas for work and internal travel, comply with rules on vehicle registration, and pay local and national taxes. In each of these circumstances, a sanctioned individual or entity could be involved: from operating a manned check-point in a remote part of the country, to being employed by or even heading a government ministry.

2.36. Recent prosecutorial guidance promulgated by the Director of Public Prosecutions recognises this, but also goes on to note that humanitarian, development and peacebuilding work delivered overseas can help reduce and prevent violent conflict and terrorism[65]. More negatively, there is no advantage in allowing UK sanctions to be portrayed as causing unnecessary suffering to civilian populations[66].

2.37. The US has already implemented General Licences across its autonomous sanctions regimes to cover humanitarian transactions. Its view is that whilst the risk of exploitation and diversion exists, the sector as a whole has greatly improved risk mitigation measures, noting that US-funded projects are required to implement certain due diligence and other measures for activities in "high-risk environments"[67].

2.38. The question is whether the UK government, a major sponsor of UNSCR 2664, is willing to match this approach, when it comes to its domestic counter-terrorism regimes. In their recent joint declaration ("the Atlantic Declaration" [2]), the UK and US governments referred to working closely together to protect humanitarian activity

[65] Guidance, 'Humanitarian, Development and Peacebuilding Work Overseas' (3.10.22).
[66] See e.g. Observations of UN Special Rapporteur on impact of unilateral sanctions on vulnerable groups (press release, 8.12.21).
[67] US Dept of Treasury, 'The Department of the Treasury's De-risking Strategy' (April 2023).

from unintended impacts of sanctions. Having noted the US approach to implementing exceptions, the UK committed to "take this further in its autonomous sanctions programs as appropriate"[68]. From the perspective of humanitarian organisations, alignment between the sanctions regimes of different countries is a valuable goal, and the UK could take a similar step.

2.39. Contact with officials across Whitehall reveals a push-me-pull-me policy conundrum in vigorous operation.

2.40. On the one hand, there is ambition to deploy the UK's greater legislative freedom (no longer being tied to the EU) to implement *wider* exceptions in its autonomous CT sanctions regimes: for example, by extending a humanitarian carve-out to *UK*-funded aid programmes and humanitarian activities such as peace-building[69]. A publicly available pre-Brexit policy note issued by the FCDO reflects this positive approach ("We plan to write exceptions into the regulations setting up the sanctions regimes where issues are foreseeable at the time of drafting, such as for the purpose of delivering humanitarian or development aid")[70].

2.41. On the other hand, Ministers tend to look for the lowest possible outcomes when it comes to aid diversion to terrorist groups. It is right not to be naïve about the risk that humanitarian aid can be diverted or even used as cover for terrorist funding, including by groups with external attack aspirations against the UK.

2.42. Moreover, counter-terrorism sanctions are viewed alongside policies relating to terrorist financing under the Terrorism Act 2000 (TACT). There may be nervousness that humanitarian exemptions to the UK's autonomous CT sanctions regimes would

[68] 'The Atlantic Declaration: A Framework For A Twenty-First Century U.S.-UK Economic Partnership' (June 2023).
[69] Cf the observations of FCDO Minister Lord Ahmed in Hansard (HL), Vol788 Col451 (15.1.2018) in debate on SAMLA.
[70] FCDO, Sanctions and Anti-Money Laundering Bill Policy note: Exceptions and Licences (undated), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704057/Policy_Note_-_Exceptions_and_Licences.pdf (last accessed, 22.5.23), at para 4.

imply a wider change of policy to the operation of TACT[71], or otherwise lead to what officials call 'policy dissonance'.

2.43. Creating exemptions within CT2 would require statutory amendment[72], although the UK could, like the US[73], implement a carve out by the issuing of humanitarian General Licences as it has done elsewhere[74]. Policy choices would also be required:

- Should the carve out be extended to UK-funded but not EU-funded humanitarian programmes?
- Would it embrace NGOs above a certain size (recognising that smaller charities may have less capacity for due diligence and be more likely subject to exploitation[75], but also may be capable of playing an important role in delivering humanitarian relief) or which have been approved in some way?
- How would it deal with the UK or EU-funded projects that are substantially delegated to local agents to deliver?
- Should the carve out expressly apply to peace-building activity or specialist organisations providing peace-building capabilities (as in the US[76]), or be limited to the provision of basic aid?
- Should the exemptions apply to all types of aid or be limited to categories (food not cash, or cash below a certain amount)?

2.44. But whilst there are legitimate points to consider concerning the read-across from sanctions to proscription, and points of detail in formulating amendments to legislation or General Licences, the bigger point is that the UN has implemented a humanitarian exemption which applies to Al Qaida and Islamic State, the most

[71] Leading to an expectation that permission will be granted more readily under sections 21ZA and 21ZB, considered in Terrorism Act in 3.67 et seq.
[72] By way of an amending order.
[73] US Treasury, press release (20.12.22).
[74] Under the Syria and Russia regimes.
[75] E.g. Charity Commission for England and Wales, Charity Inquiry: Al-Fatiha Global (30 March 2020).
[76] OFAC Guidance, 'Supplemental Guidance for the Provision of Humanitarian Assistance' (27.2.23) at para 5.

dangerous terrorist groups in the book, and the US has created a humanitarian carve-out across its autonomous regimes. On the balance between terrorist financing risk, and allowing agencies to deliver on humanitarian imperatives, the dial has shifted.

2.45. It is notable that UNSCR 2664 reposes a degree of trust in aid agencies who undertake UN and other programmes[77]. The UK, which supported the terms of UNSCR 2664, could repose similar trust in those aid bodies together with others that it chooses to fund. In 2022, the government referred to selecting partners for their strong safeguards to ensure that UK aid reached its intended beneficiaries, referring to enhanced due diligence assessments, annual audits, and field visits[78]. Without discounting the possibility of wider humanitarian exemptions, I therefore **recommend** that the government should consider establishing exemptions (by exception to the Regulations, or by General Licence) for humanitarian work by the bodies listed in UNSCR 2664 and those funded by the UK government.

2.46. It is to be hoped that decision-making does not run into the sand. I do not doubt the existence of departmental co-ordination between the Home Office (more security-minded, and charged with oversight of TACT), FCDO (security-minded but also directly concerned with the delivery of aid) and HM Treasury/OFSI (jointly responsible for countering terrorism financing and concerned with the integrity of the regimes they enforce). But there remains a real difficulty in identifying a well-developed cross-Whitehall policy position[79].

2.47. A unified position would almost certainly cut across individual departmental positions and interests. It might require the Home Office and Treasury to accept that

[77] UN programmes and funds, other entities and bodies; and specialised agencies and related organisations; international organisations; humanitarian organisations having observer status with the UN General Assembly and members of those humanitarian organisations; bilaterally or multilaterally funded NGOs participating in the UN Humanitarian Response Plans, Refugee Response Plans, other UN appeals, or humanitarian clusters coordinated by the UN Office for the Coordination of Humanitarian Affairs; any grantee subsidiary, or implementing partner of any previously mentioned organisation whilst acting as such; any other persons authorised by the Committee for the purposes of resolution 2664.
[78] Foreign Secretary written answer (11.1.22) to question UIN 94457.
[79] The Foreign Affairs Select Committee made much the same point in their 2019 Report, "Fragmented and incoherent: the UK's sanctions policy".

the UK's cherished international aid profile[80] is simply inconsistent with the current burden on humanitarian organisations; or require the FCDO to accept that the risk of funds being made available to a designated person is simply too high to take the foot off the regulatory pedal. Greater coherence on humanitarian exceptions or licences could also alleviate some of the difficulties of future decisions. If the UK wished to sanction a new terrorist individual or entity, coherent policy on exceptions or licences would mean less reason to fear collateral damage to humanitarian activity.

2.48. After 4 and a half years of analysing and debating this issue with officials and NGOs, my view is that this requires, at least:

- A common conceptual framework within government. There would be no point in the FCDO referring to a risk-based approach to aid diversion if the Home Office and OFSI had a no-risks approach. A common framework of enabling humanitarian aid, whilst seeking out and counteracting any evidence of *systemic* risk, might be one option. The reference in the government's recently reissued "For information note"[81], to the need to avoid "unnecessarily impeding legitimate humanitarian activities overseas" is a start.
- Recognition of shared risk within government. Because OFSI is responsible for implementation and enforcement, and the Home Office is responsible for homeland security, it is foreseeable that they will get the blame if humanitarian aid is made available for the benefit of terrorists. If exceptions are implemented to counter-terrorism sanctions, the FCDO needs to own some of the fallout when things go wrong, and aid intended for relieving hunger ends up in the pockets of terrorists.

[80] Integrated Review 2023, para 19(xiii), "The UK will work to reinvigorate its position as a global leader on international development…".
[81] Home Office, OFSI, Guidance, 'For information note: operating within counter-terrorism legislation counter-terrorism sanctions and export control' (updated 13.4.23).

2.49. In the meantime, I **recommend** that the Home Office and OFSI's For Information Note on operating within counter-terrorism legislation and sanctions is updated to refer to the DPP's prosecutorial guidance.

2.50. I also **recommend** that consideration should be given to amending OFSI's charity sector guidance to address the question of ownership and control of ministries and municipal authorities, including the starting point that political control does not amount to "ownership and control" within the meaning of CT2.

Information (Part 7: regulations 34 to 41)

2.51. The provisions are the same as in CT3[82]. The scope of the reporting obligation was extended by including crypto asset exchange providers and custodial wallet providers within the definition of "relevant firm" with effect from July 2022[83].

Enforcement (Part 8: regulations 42 to 46, and 49)

2.52. The provisions are the same as in CT3[84]. Refreshed enforcement guidance was issued by OFSI in March 2023.

[82] Ibid at paras 4.60 to 4.61.
[83] The Sanctions (EU Exit) (Miscellaneous Amendments) Regulations 2022, SI 2022/819.
[84] Ibid at paras 4.62 to 4.63.

3. DESIGNATIONS TO DATE

3.1. In my role as statutory Independent Reviewer, I am prohibited from reviewing any decisions to designate[85], and I must confine myself to describing the designations that have occurred (without reviewing their merits).

3.2. A total of 22 individuals and 22 entities are designated under CT2[86]. No designation activity has occurred since the expiry of the EU-Exit transition period on 31 December 2020.

3.3. For the individuals (22):

- Designations against members of Iran's Islamic Revolutionary Guard Corps are most numerous (6), followed by members of Hezbollah (5) and of Hamas (3).
- 5 individuals are linked to Islamist overseas travel or Islamic State propaganda. The remaining 3 are Khaled Sheikh Mohammed (Al Qaida), the killer of Theo Van Gogh (a member of the Hofstad Group), and a member of the PKK.
- 5 have been convicted overseas of a terrorism related offence.
- The vast majority (17) were previously included on an EU list[87].

3.4. Turning to the entities (22):

- Half (11) are Islamist terrorist groups.
- The other half are terrorist groups involved in nationalist or ethnic insurgencies, plus part of the Iranian intelligence apparatus.

[85] Section 31(13) SAMLA.
[86] By way of comparison, the current EU autonomous CT list (as at 22.5.23) comprised 13 individuals and 21 entities.
[87] CP931 or Regulation 2016/1686.

- A little over half (12) are proscribed under the Terrorism Act 2000[88].

3.5. No extreme right wing terrorist individuals or entities have been designated.

3.6. The lack of correspondence between designation (under CT2) and proscription (under TACT) is probably unremarkable, given the EU-centric nature of the inherited entity designations.

3.7. It will be seen that all the designations are fully public. Whereas two previous designations under TAFA were by letter ('A' and 'B'[89]), the government has not taken advantage of the restricted publicity facility under CT2 which is available for reasons of national security, international relations, crime prevention, or in the interests of justice[90]. Given that the designations were inherited from previous regimes and already in the public domain, this would have served little function. It remains to be seen whether the general rule identified by the Supreme Court in 2022[91], that a person who is suspected of crime, but not yet charged, has a reasonable expectation of privacy, could find its way into designation practice. But given third parties' need for due notice of sanctions, it is doubtful whether such an approach could be maintained in practice.

[88] They are: Abu Nidal, Al-Gama'aal-Islamiyya, Babbar Khalsa, ETA, Hamas, Hizballah, LTTE, Palestinian Islamic Jihad, PKK (also designated as TAK), DHKP-C, Popular Front for the Liberation of Palestine – General Command.
[89] Lord Anderson KC, 4th TAFA Report.
[90] Reg.8(7).
[91] Bloomberg LP v ZXC [2022] UKSC 5.

4. OPERATION OF THE SANCTIONS

Impact on Designated Persons and Generally

4.1. There are no individuals or entities designated under CT2 who are currently in the United Kingdom, and therefore no persons to whom OFSI's vice-like grip, requiring detailed accountability for minute expenditure within the UK, could apply. As famously described by the Supreme Court, financial sanctions can effectively reduce an individual to a prisoner of the state[92]. The degree of monitoring and control on UK-based individuals subject to basic needs licences is so tight that the impact of financial sanctions is comparable to some extent, in terms of degree, to the impact of Terrorism Prevention and Investigation Measures (TPIMs) which lie at the sharper end of terrorist risk countermeasures[93].

4.2. Even for individuals on the barest of means, their finances will be shaped by many forces: such as benefits accrued under supermarket loyalty cards, increases in national minimum wage, changes in direct debits by energy suppliers, and government cost of living payments. Accounting to OFSI under a licence allowing for basic living expenses will require constant attention to such matters, and always the obtaining and retaining of receipts.

4.3. But even for individuals outside the jurisdiction, the mere fact of UK-designation, unless welcomed as a badge of honour, or experienced within a non-Western state which has scant regard for UK interventions, could have harsh consequences for reputation, privacy, and relationships (financial and personal)[94].

4.4. There are no specific licences granted under CT2 – none has ever been applied for – but 3 general licences mean that certain activities for the benefit of persons sanctioned under CT2 may be lawfully pursued: insurance of UK property, payments

[92] Her Majesty's Treasury v Ahmed [2010] UKSC 2, para 60 (Lord Hope).
[93] Ibid, para 192 (Lord Brown, referring to control orders, the predecessors of TPIMs).
[94] The degree of impact may well be different for individuals who are concurrently sanctioned by their country of residence.

to gas and electricity companies by UK persons owning or renting properties in the UK, and legal aid agency payments to lawyers[95].

4.5. Unlike TPIMs[96] financial sanctions have no automatic expiry date, and perhaps even more so for this reason, the government may in future need to consider exit strategies for UK-based individuals who may be sanctioned under CT2:

- Even penal measures for terrorists, short of life imprisonment, are time-limited in some way, and those are imposed after proof to the criminal standard, whereas sanctions are imposed on the basis of reasonable suspicion.
- Sanctions are future-looking, and it is foreseeable that terrorist intent will change over time, whether through maturity, personal circumstances, or the deterrent impact of sanctions themselves.
- The resource-burden on monitoring sanctions is considerable.

4.6. The fact that a sanctioned individual himself is able to apply for revocation is not to my mind a complete answer. Applications may be adversarial in nature, rejecting the basis of suspected involvement, and invite refusal for that basis, and result in long and hard-fought litigation in which positions become entrenched. That may not serve the wider public interest.

4.7. An exit strategy for a sanctioned individual might involve taking advantage of the greater flexibility allowed for licences under CT2 (compared to UK measures implementing UN sanctions), and involve a progressive reduction in reporting frequency, an allowance of greater access to cash, the ability to shop at approved vendors (such as national supermarkets) without limitation, and the like.

4.8. Next, because financial sanctions bite on exchange of value, the spread of impact tends to go far wider than the designated person. Current or potential counterparties

[95] General Licences INT/2022/2009156, INT/2022/2300292 and INT/2020/G1.
[96] Which have a 5-year maximum, subject to new terrorism-related activity being committed.

such as banks, building societies, family members, large and small businesses, professionals, and the charitable sector, are all in scope. Indeed, sanctions have been described as a unique tool of coercive authority in that they are designed by governments but implemented by the private sector[97].

4.9. OFSI's list of monetary penalties imposed across all its sanctions regimes points to sanctions non-compliance by businesses in the following sectors: hospitality, energy, fintech, banking, telecommunications and financial services[98]. The extra-territorial effect of CT2 means that UK businesses operating overseas need to factor in CT2 compliance together with local sanctions regimes. Since 15 June 2022, OFSI has had the power to impose monetary penalties on a strict liability basis[99], meaning that the counter-terrorism impact of CT2 is potentially wider than the criminal prohibitions found in the Terrorism Acts, which at least require some mental element before any penalty can be imposed.

4.10. The principal standard set by financial sanctions is non-involvement with the finances of designated persons. Given the importance of the subject-matter (counter-terrorism), it is natural for regulators, such as the Solicitor's Regulatory Authority[100], Financial Conduct Authority[101], and the Charities Commission[102] to expressly adopt sanctions-compliance as baseline conduct, meaning that third parties may end up being accountable to a wider set of oversight bodies.

4.11. In view of the importance of CT sanctions compliance, none of this is inherently objectionable: the difficulty arises if regulators act inconsistently (with different understanding of the law from OFSI) or without coordination (giving rise, for example,

[97] 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.
[98] OFSI, Enforcement of financial sanction (last updated 27.9.22), https://www.gov.uk/government/collections/enforcement-of-financial-sanctions (last accessed 12.6.23).
[99] Following changes made by the Economic Crime Act 2022. OFSI's enforcement policy is contained in its March 2023 Enforcement Guidance, together with its monetary penalties guidance of June 2022.
[100] SRA, Sanctions questionnaire (28.4.23), https://www.sra.org.uk/sra/news/financial-sanctions-questions/ (last accessed 12.6.23).
[101] FCA handbook, Financial Crime Thematic Review, Section 8 (release 21, July 2022).
[102] Charities Commission, Guidance: Charities and terrorism (last updated 9.11.22), https://www.gov.uk/government/publications/charities-and-terrorism (last accessed 12.6.23).

to repeated demands for information). Sanctions offences also give rise to certain regulatory disqualification[103].

4.12. Every person holding or controlling funds or economic resources of a person designated under CT2 is required to report annually[104].

4.13. Finally, it is not unknown for counter-terrorism measures to be deployed by private individuals in defence or assertion of legal rights[105].

Impact on Humanitarian Organisations

4.14. Humanitarian, development and peace-building charitable organisations have reason to be familiar with CT2 because of the designation of Hamas, a terrorist organisation pledged to the destruction of Israel [106]. Since winning local elections in 2006, and then expelling the Palestinian political party Fatah in 2007, Hamas has been the governing authority in the Gaza Strip, one of the two Occupied Palestinian Territories[107].

4.15. Humanitarian organisations which operate within the Gaza Strip are likely to have financial dealing with entities such as municipal authorities, roads and vehicle authorities, or utility companies which are likely to have some degree of Hamas involvement[108]. This dealing could come in the form of direct aid (funds or economic

[103] Individuals convicted of sanctions offences cannot be registered as "small electronic money institutions" or "small payment institutions" under the governing regulations (see the Sanctions (EU Exit) (Consequential Provisions) (Amendment) Regulations 2020/1289.
[104] OFSI, Financial Sanctions Notice, Frozen Assets Reporting (2.9.22).
[105] In The Law Debenture Trust Corporation plc v Ukraine [2023] UKSC 11, a commercial case, the Supreme Court held that sanctions did not give rise to duress. It was reported that in 2017, a US advocacy group sued Christian Aid for providing "material support" to Palestinian terrorists (Guardian, 'Christian Aid claims it was subject to act of 'lawfare' by pro-Israel group', 2.3.23)
[106] Hamas is also, since November 2021, proscribed under the Terrorism Act 2000 (only its military wing was proscribed before that date).
[107] Similar points can be made in relation to Hizballah and certain municipalities in Lebanon.
[108] For example, GEDCO is the company responsible for electricity supply in the Gaza strip: 50% is owned by the non-Hamas Palestinian Authority based in Ramallah (West Bank); 50% is owned by various municipalities in the Gaza strip, most of which are governed by Hamas appointees. According to a paper published by the Abu Tor Economic Research Collaborative Ltd and the German Konrad-Adenauer-Stiftung e.V., its board had (at least in 2019) "a strong Hamas representation" (Nashashibi, K., Gal, Y., 'Gaza Electricity Reform and Restoration', January 2019). The EU is currently involved in an institutional assessment of the electricity sector in Gaza (GEDCO News, 16.4.23)

resources, for example to a school or clinic), meeting local tax obligations, payments for residency visas, or making utility payments.

4.16. This begs the question whether any transfer is directly or indirectly to a sanctioned entity, and therefore in breach of CT2. No licences have been sought by humanitarian organisations to allow payments to or for the benefit of Hamas.

4.17. This topic became more pointed in March 2023 when OFSI issued a letter to all charities with a possible operational footprint in the Gaza strip, referring to the designation of Hamas, and requiring recipients to provide precise details of any payments on account of local authority charges, taxes and utilities (including water supply, waste services, telephone or broadband payments) since the end of 2020[109]. The letter referred to the need to avoid payments to a designated organisation or to any entities owned or controlled by it, unless covered by a licence.

4.18. Whilst the letter did not make any positive assertions, a recipient would inevitably draw certain conclusions about the government's assessment of the situation in Gaza:

- That the government considers it *possible* that, applying the rules for ownership and control found in CT2[110], the Gazan entities (local authorities, tax authorities, utilities companies) which receive payments from charities are 'owned or controlled' by Hamas; alternatively,
- That the government considers it *possible* that payments to these Gazan entities, although not owned or controlled by them, might be diverted for the benefit of Hamas.

4.19. Since it is doubtful that any entity, charitable, private or governmental (including the UK government), could have other than a fleeting presence within Gaza unless it paid for water, waste, electricity and satisfied any tax obligations, this

[109] Reg. 36(6) and (7)(b)(i) of CT2.
[110] Reg.7.

information requirement must amount to a preliminary step in determining the *scale* of payments.

4.20. It could be said that if the government believes that Hamas owns or controls entities to which payments are being made, and that sanctions breaches may be being committed, it is in a better position to make this assessment than charities. In fairness, the letter was issued by OFSI, the sanctions implementation and enforcement arm of HM Treasury, which is unlikely to have any special insight into the politics of Gaza or the practicalities of delivering humanitarian aid there.

4.21. I have already referred in Chapter 2 to the absence of a developed cross-government position on humanitarian aid and sanctions. It would for example be open to the government to take the blanket view that some payments by donors and humanitarian agencies risk indirectly benefiting Hamas, but that the imperative of aid delivery justified these payments; and to issue a tailored general licence under CT2[111] to enable necessary and incidental payments within the Gaza Strip. The increasingly effective Tri-Sector Group (comprising the aid sector, government and financial institutions) is well-placed to assist the government in crafting the terms of any general licence[112].

4.22. The government is publicly committed to working with NGOs to support the people in Gaza[113]. It could be argued that the risk of diversion to designated persons is greatest where monies flow through smaller charitable organisations who are less able or inclined to conduct due diligence[114]; or via unconventional financial routes such hawala or cryptoassets. It would be counter-productive not to encourage the role of larger well-established charities, capable of carrying out proper checks, alerts to local risks, familiar with traditional banking routes.

[111] Reg.31.
[112] The sanctions response to Russia's invasion of Ukraine has meant that OFSI has become increasingly responsive in issuing General Licences.
[113] Hansard (HC) Vol704 Col425, 24.11.21, Minister for Security and Borders (Damien Hinds MP).
[114] Such as those that participated in aid convoys to Syria.

4.23. The alternative is something of a stand-off: the government could wait for aid agencies to seek a specific licence, but since that would amount to a concession by them that their operations fall within the scope of the prohibitions, this is unrealistic. Or the government could make it clear that humanitarian agencies should avoid payments all together.

4.24. It depends on what the government ultimately wants to achieve.

5. MINISTERIAL AND COURT REVIEWS

5.1. Two annual government reviews of the CT2 regulations were completed in March 2020[115] and October 2021[116]. I have seen the triennial review for the 44 designations under CT2 which was completed in March 2022, conducted to a highly professional standard, which led to some minor drafting changes to the list to take account of spelling errors, updated information, and minor changes of assessment. The process entailed a review panel, supported by advice from external counsel, based mainly on open source information together with some additional enquiries.

5.2. The duty to review the regime on an annual basis, and to review the individual designations triennially, was abolished by the Economic Crime (Transparency and Enforcement) Act 2022. The former duty was a mere formality in the context of a counter-terrorism sanctions regime. The abolition of the latter duty also has little if any impact. Given the nature of the designations – all overseas, no evidence of impact, none in correspondence with the government to secure licences, and mainly inherited from pre-Brexit regimes – the most that can be said is that removing the duty to carry out a proactive review removes an opportunity for spring-cleaning[117].

5.3. Subject to what I described in my CT3 Report as the government's 'watching brief'[118], individuals who disagree with their listing must rely on their right to request a ministerial review of their designation. No request has ever been made under CT2. Unless an error in the designation criteria comes to light, it is difficult to envisage the circumstances in which Ministers would agree to revocation of CT2 sanctions imposed on an overseas person on a discretionary basis, especially where the UK has designated as a show of international solidarity. Signal-sending may be a legitimate

[115] The Sanctions (EU Exit) (Miscellaneous Amendments) (No3) Regulations 2020, section 46 report, at para 24.
[116] FCDO, Report on Annual Reviews 2021, Annex at p40.
[117] Including, checking that individuals are still alive. One of the designated persons under CT3 has been removed from the equivalent EU list on the basis that the EU assesses he is dead.
[118] Para 3.52.

reason for designation[119], but it does then beg the question of what signal is sent by revocation.

5.4. Practice from other regimes suggests that sanctioned individuals sometimes contact the FCDO seeking to understand the basis of their designation. The FCDO cater for this non-statutory type of request for information by providing material on the basis of common law fairness. This could include the Sanctions Designation Form (SDF) and the Sanction Designation Form Evidence Pack (SDF(E)) together with submissions and emails forming part of the designation process.

5.5. A formal application for administrative review is made on a Sanctions Review Request Form. The FCDO has published general guidance on requesting a review of sanctions designations[120]. Policy and legal officials within FCDO then convene a case meeting and consider any updating information, leading to a submission to Ministers and ultimately a decision on the request. Where an individual is also designated by the EU, the FCDO could ask for a copy of the evidence pack relied on by the EU[121].

5.6. Were a request to be made for variation or revocation under CT2, and refused, the designated person would have a right of challenge in the High Court[122]. There have only been two completed High Court challenges under any regime to date (under the Belarus and Russian regime)[123]. Nothing in either judgment suggested that SAMLA would require any novel standard of review; and both confirmed that, as is conventional in matters of foreign policy (and counter-terrorism), considerable respect is to be accorded to decisions of the Foreign Secretary on whether to designate in the public interest.

[119] See footnote 11.
[120] FCDO, 'Guidance: How to request variation or revocation of a sanctions designation or review of a UN listing' (updated 2.2.23). OFSI has published a guide on how to request a review under CT3 (updated 25.5.23).
[121] As occurred in the review subsequently challenged in LLC Synesis v Foreign Secretary [2023] EWHC 541 (Admin).
[122] Section 38 SAMLA.
[123] LLC Synesis, supra; Shvidler v Foreign Secretary [2023] EWHC 2121.

5.7. It is possible (but not at all inevitable) that a CT2 designation will rely on sensitive information: provision is made for open and closed hearings under the relevant procedure rules[124].

5.8. Finally, the High Court has power to award damages on a review in connection with the designation decision, but, since amendments made by the Economic Crime (Transparency and Enforcement) Act 2022, it may only do so in cases of bad faith[125] and subject to a cap of £10,000 unless such a limitation would result in a breach of the designated person's human rights[126].

[124] Part 79.
[125] Section 39(2) SAMLA.
[126] The Sanctions (Damages Cap) Regulations 2022.

6. CONCLUSIONS AND RECOMMENDATIONS

Conclusions

6.1. The Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019, or CT2, provide the UK with an internationally-focussed autonomous sanctions regime, which enables the UK to fulfil its obligations under UN Security Council Resolution 1373.

6.2. To date, CT2 has operated entirely as a legacy regime, designating individuals and entities which were previously designated under pre-Brexit sanctions.

6.3. The pressure of Russian sanctions-related work, plus the desirability of promoting new designations at UN level, are potential reasons why there have been no new designations.

6.4. One possible future use of CT2 is with respect to Extreme Right Wing Terrorist individuals and entities, who cannot currently be designated under UN regimes, and/or to support online content moderation.

6.5. Despite the absence of new designations, there was diligent consideration of whether existing designations should be carried across post-Brexit, and thorough analysis of the basis for designations during the single triennial review (which is no longer a statutory requirement). There have been no ministerial reviews or court challenges to date under CT2.

6.6. Unlike CT3, CT2 is a factor for humanitarian organisations operating overseas (especially in the Occupied Palestinian Territory of Gaza, because of the designation of Hamas).

6.7. There is scope for the UK to go further in providing exemptions for humanitarian activity with CT2, especially for activity that is directly funded by the UK government and carried out by trusted partners.

6.8. There is also scope for the government to provide clear guidance on the meaning of 'ownership and control' in the context of political administrations.

6.9. Humanitarian organisations should not run the gauntlet of breaching sanctions because they are obliged to make essential day-to-day payments to local authorities and electricity suppliers. A failure to support established humanitarian organisations is likely to be counter-productive in the long run.

Recommendations

6.10. Recommendation 1: CT2 should be amended so it expressly contains the designation criteria and other provisions established by the 2022 Act.

6.11. Recommendation 2: the government should consider establishing exemptions (by exception to the Regulations, or by General Licence) for humanitarian work by the bodies listed in UNSCR 2664 and those funded by the UK government.

6.12. Recommendation 3: the Home Office and OFSI's For Information Note on operating within counter-terrorism legislation and sanctions should be updated to refer to the DPP's prosecutorial guidance.

6.13. Recommendation 4: consideration should be given to amending OFSI's charity sector guidance to address the question of ownership and control of ministries and municipal authorities, including the starting point that political control does not amount to "ownership and control" within the meaning of CT2.

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