Foreign & Commonwealth Office

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Minister of State

The Lord Boswell of Aynho
Chair
Select Committee on European Union
House of Lords
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6th April 2017

Dear Tim,

I am delighted to enclose Her Majesty's Government's response to the Justice Sub-Committee of the European Union Committee's report entitled "The legality of EU sanctions".

This report, and the Committee's ongoing interest in these issues, is an important part of ensuring that sanctions are being used responsibly as a tool of foreign policy, with due respect for the rights of those affected. The Government has considered carefully the conclusions and recommendations in the report, which I know have also attracted wider interest.

I am grateful to the Committee for its work in undertaking this inquiry and preparing this report.

Yours, as ever

Joyce

RT HON BARONESS ANELAY OF ST JOHNS DBE
Minister of State for the Commonwealth and the UN
Prime Minister's Special Representative for Preventing Sexual Violence in Conflict

THE LEGALITY OF EU SANCTIONS

The Government welcomes the inquiry by the Justice Sub-Committee of the European Union Committee into the legality of EU sanctions including the evidence session on 11 October 2016 and the report published on 2 February 2017.

This paper sets out HMG's response to the Committee's conclusions and recommendations, as contained in Chapter 5 of the report. The Committee's recommendations / questions are in bold and the Government's response is in plain text. Paragraph numbers refer to the Committee's report. The response to paragraphs 102 and 103 is combined.

1. **Where the Council has been unable to adduce evidence supporting the statement of reasons for a listing, we conclude that the EU courts have been right to annul the listing. (Paragraph 98)**

The Government accepts this conclusion. The Government has been seeking to improve the robustness of sanctions listings, with a particular emphasis on providing open-source evidence that can be laid before the European courts in the event of a challenge. The political rationale for EU sanctions and the evidence against listed persons is reviewed annually at least. The Government also reviews the evidence underpinning every proposal for new listings. We only agree a listing if we are satisfied that the evidence available is sufficient to meet the standard of proof applicable within the UK – reasonable grounds to suspect. We welcome the Committee's finding that the sanctions listing process has improved considerably. We will continue to seek further improvements in the way that sanctions are designed and applied.

2. **We recommend that the Council codify the standard of proof it applies to sanctions listings as soon as possible. This would provide transparency to the listing process as well as public assurance that the same standard of proof is applied by all Member States in the Council. The Council may wish to consider applying the test, which the UK applies in adopting sanctions listings, of reasonable grounds for suspicion. (Paragraph 102)**

The Government agrees on the importance of a consistent legal test. While there is no standard of proof set out in legislation, the UK is of the view that "reasonable grounds to suspect" is the appropriate test. The application of this threshold has recently been considered and endorsed by both the UK's Supreme Court in Youssef v Secretary of State for Foreign and Commonwealth Affairs [2016] UKSC and the EU General Court in Al-Ghabra v European Commission, Case T 248/13. In Al-Ghabra, the General Court recognised that having "reasonable grounds to suspect" is enough to permit the Council to apply a sanction, provided there is a "sufficiently solid factual basis" to do so, and provided that those grounds are supported by sufficient information or evidence.

3. **We recognise that the General Court has upheld the practice of re-listing individuals or companies on amended statements of reasons after the**

annulment of the original listing, but conclude that this practice gives rise to a perception of significant injustice, namely that there is no effective remedy against sanctions listings. Put in non-legal language, the judgment of the General Court is of no consequence because further sanctions are imposed before it comes into effect. The Council should bear this in mind when considering whether to re-list a targeted individual or company after the original listing has been annulled. (Paragraph 103)

4. **Were listings to be better substantiated in the first place, there would be less need for re-listing. A codified standard of proof would help to ensure that listings are better substantiated in the future. (Paragraph 104)**

The Government does not agree that the re-listing practice renders the judgment of the General Court inconsequential. In many cases, an annulment by the General Court, upheld by the Court of Justice, will result in the complete removal of sanctions against an individual or entity. The UK, and the rest of the Council, takes the decisions of the Court very seriously, and will not move to re-list without good reason.

In its judgment in the *National Iranian Tanker Company* case, the Court provided two circumstances where the Council might choose to re-list after an annulment: where new evidence could be relied upon to justify the re-listing of a target on the same grounds as in the original listing; and where new grounds for listing were used. The Government considers this to be the correct approach.

Rulings of the Court are based on the evidence available to the Council at the time of the decision to apply sanctions. Significant time might have passed since the Council decision and the evidence base may have changed. However, the Court may not consider this new information in its deliberations. The provision of a grace period before an annulment takes effect allows the Council to update its legal position, and thus prevent the potentially perverse outcome of an individual being de-listed despite there being new evidence to justify the continued imposition of sanctions against them. Practically, this may also involve some amendment to the Statement of Reasons to include reference to new evidence.

The other circumstance in which the Council might choose to re-list is where there is evidence of objectionable conduct but where the court has determined that this evidence does not align with the Statement of Reasons. Most EU sanctions legislation provides a variety of potential reasons for listing and only one of these reasons needs to be substantiated with evidence to permit the Council to impose sanctions. An annulment decision based on one of the reasons for listing does not mean that there are no other valid reasons for applying sanctions. The EU courts do not have the power to amend the Statement of Reasons to better reflect the available evidence. This power is reserved for the Council. The UK recognises that where the Council has corrected its technical error and reapplied a sanction the listed person may feel a sense of unfairness. However, we maintain that this mechanism is a necessary safeguard to prevent perverse outcomes, as outlined above.

The Government agrees on the importance of listings being properly substantiated. This is why we have placed such emphasis on gathering evidence that can be used in EU courts, even where there is sufficient classified evidence to justify a listing on its own. The Government also believes that the annual renewal of listing decisions plays a useful role in prompting Member States to review and update the evidence base, thus helping to reduce the frequency of re-listings. With regard to some particularly sensitive listings, evidence is updated even more frequently. There is growing evidence that these techniques are working, as we have seen a reduction in the number of challenges lost by the Council, and consequently a reduction in the number of post-annulment re-listings.

5. **It would be concerning if the closed-material procedure were not to be used, given the number of listings that have been annulled by the General Court because the Council has been unable to adduce confidential evidence in support of them. It is incumbent on the EU to ensure that it has sufficiently robust procedures to allow the EU courts to assess confidential evidence underpinning sanctions listings. Should the current closed material procedure not to be adequate to achieve this, the EU should consider an alternative approach. (Paragraph 26)**

The Government has expressed its reservations about the design of the new closed material procedures in the EU courts, both in correspondence with the Committee and in discussions with other Member States. Closed material procedures were introduced as a way to help the Council defend sanctions cases in light of the *Kadi II* judgment. However, in the Government's view, the rules lacked some of the necessary safeguards. In particular, the rules did not provide for the party providing the sensitive material to be able to withdraw material at any stage of the proceedings, and there is no provision for the security checking of judgments and orders to prevent accidental disclosure of information. These safeguards form an important part of the UK's domestic closed materiel procedure system.

The absence of these safeguards meant that the UK found itself unable to support the General Court's new Rules of Procedure, which otherwise included useful reforms. We have the same reservations about the complementary Rules of Procedure adopted subsequently for the Court of Justice. The EU's closed material procedure has yet to be used by any Member State. In the meantime we are focusing on expanding the use of open source evidence.

6. **Open-source material can be made available to Parliament. We call on the Government to revise its interpretation of Article 6(1) of the Council's Rules of Procedure, and in future to disclose the open-source information substantiating new sanctions listings to the scrutiny committees. (Paragraph 110)**

The Government takes good note of the opinion expressed by Mr Bishop on behalf of the Council Legal Service (CLS) in evidence to the Justice Sub-Committee that Article 6(1) of the Council Rules of Procedure does not prevent the release of the open-source information to Parliament for scrutiny. However, the Government retains strong reservations about providing this information as part of routine scrutiny procedures. Separately, the CLS has been clear that they share the Government's

opinion that details of which Member State proposed any given listing, and the correspondence in which evidence is cited, are covered by the obligation of professional secrecy in Article 6(1) of the Council's Rules of Procedure.

Open-source information is, by definition, available to the public. However, the production of useful evidence through the collation and analysis of open source information can require particular expertise and resources. From an intelligence perspective, a collection of evidence, even if gathered from open sources is a different product from the raw information in its original form. Indeed, intelligence produced through "open source" research must be assessed in the same way as intelligence gained through classified sources before the decision is taken to use it as evidence before the Court. Member States may want to protect the scope of their intelligence gathering and analysis. A unilateral decision by the UK to provide to Parliament these collections of evidence would risk being considered a breach of either the letter or the spirit of our obligation of professional secrecy, with unhelpful diplomatic consequences.

There have been instances where, when open source evidence has been disclosed to a sanctioned person or entity, that evidence has been doctored or removed. Making such evidence more widely available could result in potential sanctions targets being better equipped to cover their tracks or, worse, putting pressure on the authors of regular sources.

The Government recalls that sanctioned persons can, and do, seek redress through the EU and UK courts. During these court procedures, all parties have access to the information and the correspondence relied on to justify a sanctions listing. The courts are able to consider all the evidence and form a judgement about whether or not sanctions have been applied appropriately. The Government considers that this is the appropriate mechanism for upholding standards of due process.

In light of the above, the Government is unable to accept the Committee's call for the open-source evidence packages substantiating sanctions listings to be provided to the scrutiny Committees as a routine aspect of scrutiny. However, we strongly agree with the Committee on the importance of Parliamentary scrutiny of sanctions legislation and of finding the right balance between the practical requirements of using sanctions as a foreign policy tool and our duty to respect the rights of individuals. As we prepare to leave the EU, we need to ensure that we have the appropriate systems in place to continue to use sanctions effectively. We are currently considering how best to establish the necessary domestic legal powers, and look forward to discussing this further with the Committee.

7. **We call on the Council urgently to reduce the time taken to respond to correspondence from targeted individuals and companies. (Paragraph 113)**

We recognise the concern here and will continue to work with EU partners to encourage timely responses to correspondence.

8. **We recommend that the Council examines as a matter of urgency whether an expedited procedure could be put in place for responding to correspondence concerning mistaken identities. (Paragraph 114)**

The Government agrees with the Committee.

9. **We call upon both the Government and the Council to consider the appointment of a sanctions ombudsman, analogous to the UN Ombudsperson for the Al Qaida Sanctions Committee, or if such a consideration has previously been given to provide the arguments for and against it. (Paragraph 115)**

The Government understands the motive behind this recommendation but has doubts about whether it is appropriate in the EU context. The UN Al Qaida Ombudsperson was created in a specific set of circumstances. The material linking individuals to Al Qaida is particularly sensitive. Members of the UN Security Council were reluctant for this material to be shared widely and there was no UN judicial body equivalent to the EU courts to which listed persons could appeal for redress. The UN Al Qaida Ombudsperson was thus established as an independent reviewer of sensitive information able to challenge listings where the evidence is lacking.

In the EU context, the Courts already play a substantial role in maintaining standards of due process. The EU courts have made clear in Kadi II that they will expect to see the underlying evidence supporting at least one of the stated reasons for designating an individual or entity. This would mean they would expect to see the evidence that had been provided to the Ombudsperson, essentially nullifying the latter's role. The Government considers that reforms in the EU context should focus more on improving open source evidence gathering capacity and building appropriate safeguards into the close materiel procedure.

10. **The UK has contributed greatly to the substance and quality of improvements in the sanctions process over the last few years. It is, therefore, particularly important that the UK should remain able to align itself with EU sanctions post-Brexit. National legislation to achieve this must be put in place. (Paragraph 116)**

Sanctions will continue to be an important tool for the international community in efforts to tackle threats to peace and security and promote the rule of law. The UK will continue to play an active role in those efforts, including as a Permanent Member of the UN Security Council. We will continue to work closely with EU Member States, as well as with other like-minded partner countries, to ensure that sanctions are used effectively and responsibly.