The Law Society

Parliamentary brief

Sanctions and Anti-Money Laundering Bill

Committee Stage
House of Lords

Tuesday 21 November 2017

The Law Society of England and Wales is the independent professional body that works to support and represent over 170,000 members, promoting the highest professional standards and the rule of law.

1. Introduction and overview

This briefing outlines the Law Society's views on the Sanctions and Anti-Money Laundering (AML) Bill. We acknowledge the necessity of ensuring that the UK's sanctions regime continues to operate effectively and in line with international best practice following the UK's exit from the EU. To maintain the effectiveness of the sanctions and AML regime, this Bill should not merely transpose existing EU sanctions registers but authorise the addition of persons or entities to national sanctions lists, and enforce penalties for sanctions breaches.

The Bill in its current form goes beyond what is required to achieve those objectives. It provides broad powers to Ministers and the ability to make substantial changes to the regulatory regime and scope of serious criminal offences through secondary legislation. In turn, that opens up the possibility of infringements to the rights of sanctioned persons to due process and access to justice. It also generates compliance uncertainty for businesses and those advising them.

The Law Society calls for:

- Misappropriation sanctions to be included as part of section 1.2 (c).
- An impact assessment to be carried out in consultation with stakeholders and for this assessment to be laid before Parliament, as suggested in the amendment proposed by Baroness Northover and Baroness Sheehan on section 1.2.
- Part 2 to be removed, as it is outside the essential policy objectives of the Bill. Changes to the UK AML regime should be made within the associated legislative and consultative frameworks
- Sections 1, 10, 15, 16 and 39 to be amended to limit the scope of ministerial powers and for safeguards to be put in place to ensure legal certainty, in line with the recent report of the House of Lords Constitution Committee.
- Sections 2, 15 and 39 to be amended as in their current form the provisions could generate compliance uncertainty, disproportionate costs and potential divergence between the EU, the US and UK's sanctions regime.
- Schedule 1, sections 10,11,12, 20, 33 and 35 to be amended as in their current wording the provisions would affect due process and the ability of people and businesses to access justice.
- Not lowering the current threshold for terrorist asset freezing.
- The Bill to directly transpose into UK law the current EU procedural safeguards for persons designated by the UN.
- The Bill to revert to the current, annual, frequency of reviews for all designations, and not just those set out in section 20.3.
- Guidance to be given on the terms used in sections 2, 10, 15, 17 and 46 of the Bill.

2. Policy objectives of the Bill and impact assessment in consultation with stakeholders (section 1)

Section 1 (2) does not currently permit the introduction or perpetuation of so-called "misappropriation sanctions", designed to penalise individuals or entities which embezzle state wealth.

We therefore recommend amending section 1 (2) c,to ensure that misappropriation and similar financial sanctions are available to the UK following Brexit. The Bill should specify that all new types of sanctions introduced in pursuit of one of the policy objectives in section 1 (2) should be proportionate to the policy objective.

Furthermore, we support Baroness Northover and Baroness Sheehan's amendments on clause 1.2 (annex 1) which reiterate the importance of carrying out an impact assessment in consultation with the relevant stakeholders and for this assessment to be laid before Parliament.

3. Money laundering and terrorist financing (part 2 of the Bill)

Part 2 of the Bill would allow Ministers to significantly change the scope of regulations related to money laundering and terrorist financing, without specifying the level of scrutiny and consultation involved in this process. This part of the Bill goes beyond what is necessary to secure the continued effectiveness of the UK sanctions regime which is the purported objective of the Bill.

The Law Society's view is that the creation of new AML provisions should be outside the scope of this Bill. The UK's AML regime is laid out in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 and associated legislation. The Money Laundering Regulations deal primarily with compliance, whilst the sanctions regulations deal primarily with substantive prohibitions and restrictions: the two areas have some overlap, but it is limited.

The Money Laundering Regulations were preceded by the fourth EU Anti-Money Laundering Directive 2015 which underwent substantial debate and scrutiny in the EU Parliament and was itself derived from detailed international standards set out in the Financial Action Task Force's Recommendations.

By contrast, only a subset of EU sanctions derive from UN Recommendations. The technical content and the legislative regime surrounding the AML Regulations are thus substantially different to existing sanctions processes at EU or UN level.

There are also well-established mechanisms for engaging law enforcement agencies and the regulated sectors in changes to the AML regulatory regime. Changes to that regime should not bypass those mechanisms by being made through sanctions legislation.

Additionally, many regulated firms address AML compliance within the context of other anti-financial crime or conduct obligations. Whilst there is some overlap between the obligations imposed by AML legislation and the steps to ensure compliance with sanctions legislation, AML compliance obligations can more relevantly be considered within the framework of firms' wider regulatory obligations.

4. Breadth of ministerial powers and designated minister (sections 1, 10, 15, 16 and 39)

We recognise the need for the UK to have substantial powers in pursuit of an effective and independent UK sanctions regime. However, only primary legislation would provide the necessary transparency, and stakeholder consultation and thorough scrutiny.

We share the House of Lords Constitution Committee's conclusion in its report that it is constitutionally inappropriate for Ministers to create new sanctions by regulations and have powers as broad as those conferred by clause 39. We also share the Committee's conclusion that sufficient safeguards and adequate parliamentary scrutiny are needed to make the delegated powers constitutionally acceptable.

The report highlighted concerns about legal certainty. In its current form the Bill prevents individuals subject to sanctions from preparing their case, undermining common law principles and procedural fairness. It also allows ministers to create criminal offences punishable by up to 10 years' imprisonment, while also setting the rules on evidence consideration and defence to those offences.

The Law Society believes ministerial powers should be subject to greater limitations and safeguards than currently proposed, through the following measures:

- **Section 10 (6) - definitions of ownership and control** - The concepts of ownership and control are fundamental to understanding who is affected by the sanctions regime, and the scope of sanctions. The risks involved in creating divergent definitions of ownership and/or control across various international regimes are such that Parliament should be fully engaged in making any change. We recommend amending section 10 (6) to that effect.

- **Section 15 - introducing new compliance requirements.** The use of secondary legislation in introducing new information and reporting obligations should be limited. The regime currently in force allows HM Treasury to request information for specific purposes only. New powers should be introduced only with the transparency, scrutiny and consultation afforded by primary legislation.

- **Section 16 - criminal penalties.** It is not clear from the current wording of section 16 that new offences would be the same or similar in scope to existing offences under the EU trade and financial sanctions regime. Substantive new indictable criminal offences (with penalties of up to 10 years) should only be introduced by means of primary legislation following thorough discussions in Parliament.

- **Section 39 - new types of sanctions.** The powers granted to Ministers to introduce new types of sanctions outside of those in sections 2-7 should be limited so that new types of sanctions receive proper scrutiny in Parliament. We recommend amending section 39 to reflect the need for Ministers to introduce new types of sanctions only by primary legislation.

The Bill also states that any of the powers are to be exercised by the "appropriate Minister". The Bill should specify, or be accompanied by guidance that specifies, how powers are to be apportioned between the Home Office, the Department for International Trade, the Foreign and Commonwealth Office, the Treasury or several of them acting together.

5. Compliance challenges (section 2, 15 and 39)

Many of the provisions in the Bill would generate uncertainty over the future burden of compliance, and have the potential to introduce divergence between the EU, the US and the UK's sanctions regimes.

A clause should be inserted to reflect a commitment to a sanctions regime which is capable of application by businesses and is without disproportionate costs, especially given the severe penalties for non-compliance. Specifically:

- **Section 2 – sanctions by description and ban on "ownership" of designated persons.** The meaning of sanctions "by description" in section 2 (a) ii should be clarified. Compliance difficulties could arise where it is not immediately clear to third parties or

verifiable by reference to a list whether a named individual or entity fits a "description". We recommend clarifying whether the "description" is intended to refer to a "class of persons" or a similar category.

- **Section 2 (g) specifies that financial sanctions can prevent persons from owning, controlling or having an interest in designated persons**. To avoid forced divestment of pre-existing interests as a result of new designations, only "acquisition or extension" of interests in designated persons should be prohibited, instead of "ownership". We recommend that section 2 (g) should be amended to this effect.

- **Section 15 – introducing new information obligations.** Section 15 should make clear that all information obligations and obligations to report are subject to Legal Professional Privilege (i.e. client-lawyer confidentiality). It is worth adding at this point that the scope of the information requirement brought into force on 8 August under the EU Financial Sanctions Regulations 2017 is still not clear, and could result in large amounts of low value alerts being addressed to the Office of Financial Sanctions Implementation. Given that non-compliance with the reporting requirement under the Regulations could result in criminal penalties, it is particularly important that the Bill does not seek to extend the scope of the current reporting requirement without first committing to clarify its present scope.

- **Section 39 – new types of sanctions**. The possible future creation of new types of sanctions could lead to compliance uncertainties for firms operating across national boundaries. A commitment should be made in this section to the creation of proportionate sanctions that do not diverge from international practice, except where required for immediate and limited national security reasons.

6. Concerns on access to justice and due process (schedule 1, section 10,11,12, 20, 33 and 35)

The Bill in its current form curtails the ability of people and businesses to access justice and affects due process. Mainly:

- **Schedule 1, paragraph 11** currently states that "all services" provided to designated persons could be prevented. In its current wording this could mean that designated persons would not be able to access legal advice and representation. The paragraph should confirm that proscribed services do not include legal services, to avoid infringing the right of proscribed individuals to access legal advice.

- **Section 10 and section 11** lowers the current threshold for terrorist asset freezing from the "reasonable belief" and "necessary" designation specified in section 47 of the Terrorist Asset Freezing Act 2010 (TAFA), to merely a "reasonable suspicion" test. Similarly, section 4 of the Anti-Terrorism, Crime and Security Act 2001 (ACSA) states that HM Treasury must "reasonably believe" that "action detrimental to the UK's economy" or "action to constituting a threat to the life or property" of a UK national has been or is likely to be taken. The lower threshold in sections 10 and 11 have been set without providing clear reasons for doing so. We recommend aligning the threshold in the Bill with that contained in section 47 of the repealed TAFA and ACSA.

- **Section 12** currently states that any UN listed person is automatically designated in the UK. The EU position (and the current UK position) is that it is contrary to the rule of law for a UN listing to be implemented without procedural safeguards (i.e. reasons, supporting evidence, rights of defence, effective judicial review & quashing order, proportionality). If these requirements are not complied with, the EU listing could be annulled.

- **Section 35** on suspending sanctions is procedurally improper. Either sanctions on an individual are justified and proportionate or they are not – if the latter they should be revoked. Sanctions still in place but not enforced have a negative reputational (and other) impact but will be very hard to challenge because the actual interference with rights (e.g. property rights) is small.

- **Section 33.2.** This section on damages, should refer to the Government not carrying out its duties diligently or acting in bad faith but not to the "tort of negligence" having to be satisfied.

There are additional provisions that are missing in the Bill which in the Law Society's view are necessary to safeguard due process:

- **Jurisdiction of UK Courts to hear wrongful listings.** The Bill does not require or permit a UK court to quash a wrongful listing for a person who is UN listed and can only ask the Government to use its "best endeavours" to secure a de-listing in the UN. We would recommend that the Bill directly transposes into UK law the current EU procedural safeguards for persons designated by the UN.

- **Annual Reviews.** The Bill reduces the frequency of reviews of whether designations are justified from the current EU requirement for doing so annually to every 3 years for those designation decisions set out in section 20 (3) a. To avoid a lowering of human rights standards in the UK following Brexit, we would recommend the Bill reverts to the current, annual, frequency of reviews for all designations, and not just those set out in section 20 (3) a. Renewal should only occur if sanctions remain relevant, necessary and proportionate to legitimate aims.

- **Closed Material procedures**. Section 34 should include express recognition that there must be at least a summary of key allegations as an irreducible minimum (in line with UK case law and ECHR case law and stating that this applies to asset freezing decisions).

5. Definitional issues and further guidance (section 2, 10, 15, 17 and 46)

Further guidance should be issued on the following elements of the Bill:

- **Section 2**: the term "connected with" and clarify the scope or circumstances in which someone could be designated merely through being "connected" with a country.

- **Section 10:** the terms "ownership", "control", "at the direction of", "on behalf of", "associated with" and "making available".

- **Section 15**: the meaning of information provision and clarify what notification obligations will apply post-Brexit to UK and other persons.

- **Section 17:** the scope of the application of the Bill. Under this provision it is unclear whether the UK sanctions regime would apply where UK currency is used, where a non-UK subsidiary of a UK company is involved, or where a UK person on the board of a non-UK company is present when a decision is taken in breach of the UK sanctions regime. Further clarity is required on such issues, and stakeholders should be properly consulted to assess the impact of the scope of application of the UK sanctions regime. Section 17 should be renamed "UK nexus" as its current subject matter does not deal sufficiently with "extra-territorial application".

- **Section 46:** The level of due diligence expected of the private sector should be explained in accompanying guidance. Furthermore, to guarantee due process the Bill (or the guidance) should make explicit provision for: individual notification of designations,

clear and specific reasons for designations, the need to give evidence underlying designation decisions on request to the designated persons, following an initial designation, and not just during the court process, advance notice of a proposed decision to re-designate, including advance notice of any proposed new reason for re-designation, opportunities by designated persons to make representations and have these properly considered prior to re-designation and review provisions prior to commencement.

This guidance should be made available shortly after the Bill is enacted but before it comes into force.

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Annex 1

BARONESS NORTHOVER
BARONESS SHEEHAN
Clause1

[…]. Page2, line 24, at end insert— "(4A) Before making regulations under this section, the appropriate Minister must carry out an impact assessment in consultation with the relevant stakeholders.
(4B) The impact assessment under subsection (4A) must be laid before Parliament."