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SANCTIONS: CHALLENGING DESIGNATIONS

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Sanctions are designed to put pressure on those responsible for the targeted behaviour by imposing restrictive measures. Sanctions targets face a raft of draconian measures, which effectively shut them out of the international financial system and business and/or employment in those countries implementing the sanctions. Consequently, designated persons may wish to challenge the basis on which they have been sanctioned. This note addresses ways of doing that, focusing on designated persons in or related to the UK.

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CONTENTS

- Scope of this note
- How can designations be challenged?
  - When a person or entity is designated by the UN
- Challenging designations at the UN level
  - Structure of UN Security Council sanctions programmes
- Challenging designations at the EU level
- Challenging designations in the UK
- Challenging designations in practice

SCOPE OF THIS NOTE

In modern geo-politics, sanctions are a key foreign policy and national security tool. “Smart sanctions” are designed to put pressure on those responsible for the targeted behaviour by imposing restrictive measures on them and people and entities associated with them. Sanctions targets face a raft of draconian measures, which effectively shut them out of the international financial system and business and/or employment in those countries implementing the sanctions.

Designated persons may wish to challenge the basis on which they have been designated. This note addresses ways of doing that, focusing on designated persons in or related to the UK.

HOW CAN DESIGNATIONS BE CHALLENGED?

Designated persons will have been identified on a sanctions list in a decision made by any of the following:

- The UN Security Council and/or one of its sanctions sub-committees.
- The Council of the European Union.
- Her Majesty’s government operating under an autonomous UK sanctions regime. (This will become more significant after the implementation of the *Sanctions and Anti-Money Laundering Act 2018*.)

The three different routes of designation are important because they may affect how to challenge a designation. UN sanctions programmes are established by resolutions of the Security Council, acting under Chapter VII of the UN Charter in response to threats to international peace and security. UN member states are obliged under the UN Charter to implement these resolutions. All UN lists of designated persons are transposed into EU law and, as such, are directly applicable in EU member states.

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This gives two potential routes to challenge a UN designation:

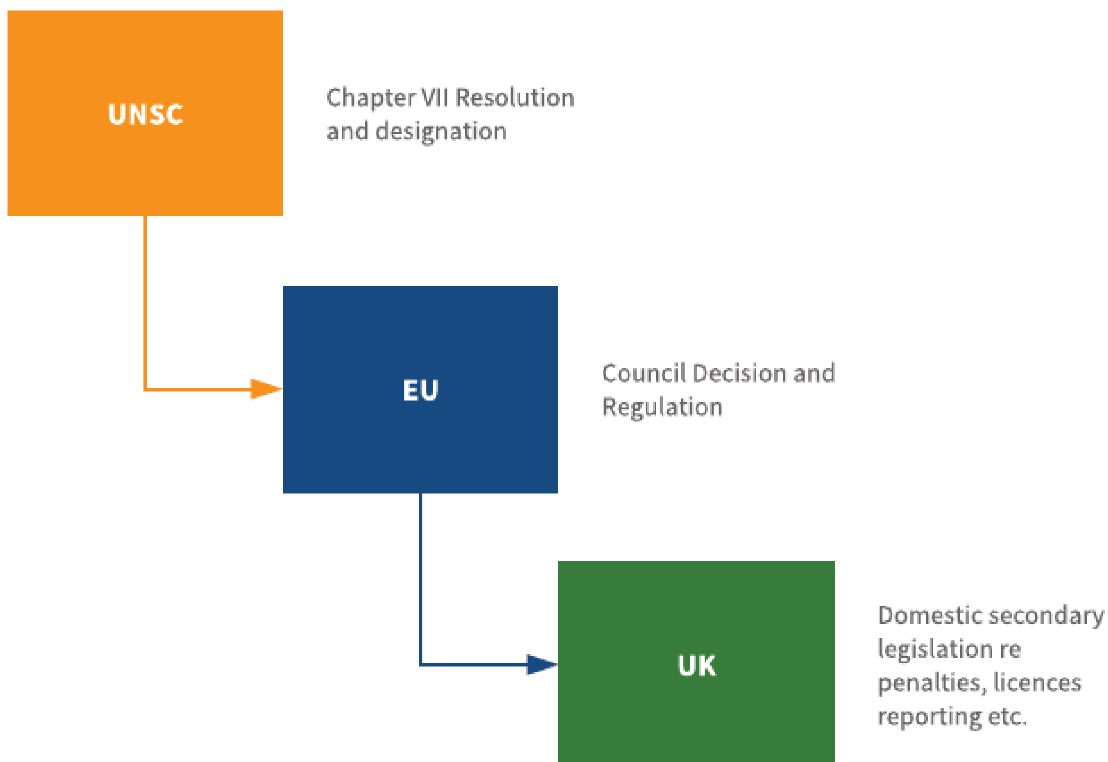
- Before the relevant UN body.
- Within the EU system.

The EU also establishes its own sanctions regimes (for example, in respect of Syria, Russia and Myanmar) and maintains its own lists of designated persons who have not been designated by the UN in overlapping sanctions regimes (for example, Iran). These EU listing decisions can be challenged by requesting the Council of the EU to reconsider the listing or by bringing an action for an annulment of the Council's decision before the General Court of the EU.

In limited circumstances it may also be possible to challenge a decision by the government that led to or is otherwise related to an EU listing. Autonomous sanctions designations by the government can be challenged in the High Court. One of the effects of Brexit will be the withdrawal of the UK from the system of directly effective EU sanctions. In preparation, the government has brought forward the Sanctions and Anti-Money Laundering Act 2018. The Act, which received Royal Assent on 23 May 2018, provides an autonomous UK sanctions regime which includes mechanisms to challenge UK designation decisions in UK courts (see *Article, Sanctions: Brexit bill mark one makes its way through Parliament*).

For more information on sanctions see, *Practice note, Financial sanctions* and *Practice note, Trade sanctions: overview of the UK trade sanctions regime and criminal penalties*.

When a person or entity is designated by the UN



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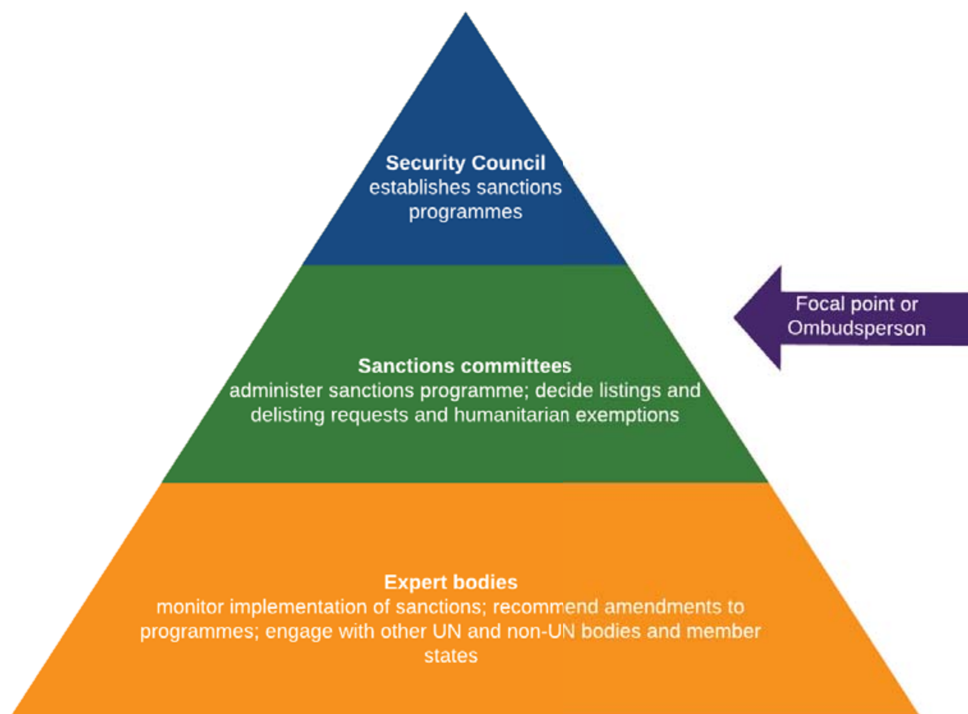
CHALLENGING DESIGNATIONS AT THE UN LEVEL

When the UN Security Council establishes a sanctions regime it creates a sub-committee to administer the regime and make further listing and delisting decisions. These sanctions committees are political bodies made up of representatives of Security Council members. They receive designation requests by UN member states and then decide who is designated and who remains on or is removed from the list of sanctions targets. Sanctions committees are assisted by a panel of experts.

Each sanctions committee has its own procedures but there are broad points of consistency, including:

- Publication of narrative summaries of the non-confidential reasons for designating a sanctions target and guidelines on listings and delisting petitions.
- Periodic reviews of listings.
- In relation to sanctions other than the ISIL (*Da'esh*) and *Al-Qaida* sanctions, the process whereby designated persons can apply for delisting through the UN Focal Point for De-listing rather than through their state of nationality or residence.
- Decision-making by consensus with the ability to refer matters to the Security Council if consensus cannot be reached.

Structure of UN Security Council sanctions programmes



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The UN Focal Point is administered by the UN Secretariat. It receives delisting requests and establishes communications with and between designating states, other reviewing states and the relevant sanctions committee. It does not make any substantive decisions (apart from deciding an application is inadmissible for being a repeat request containing no new information) or recommendations to the sanctions committees.

In contrast, the Office of the Ombudsperson has a more proactive role in gathering information from the petitioner, relevant states and organisations, and recommending to the ISIL (*Da'esh*) and *Al-Qaida* sanctions committee whether a delisting request should be granted. Nonetheless, the decision-making power remains with the ISIL (*Da'esh*) and *Al-Qaida* sanctions committee and as such the process remains inherently political, as it is in the other sanctions committees. In neither case is a petitioner whose delisting request is refused entitled to know the reasons why.

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The last Ombudsperson resigned her position in August 2017; her successor was not appointed until 24 May 2018. In her resignation letter the Ombudsperson wrote:

> "… in the last two years, I have observed an increasing intrusion of the Committee in a sensitive area for the fairness to petitioners of the Ombudsperson's process. I have witnessed a set-back imposed by the Committee concerning the right of petitioners to receive substantive reasons when they are retained on the sanctions list as a result of the Ombudsperson's recommendation. In my opinion, this situation also affects the general credibility of the Ombudsperson mechanism. Such practice lends support to those who consider that, short of a judicial mechanism, full fairness and transparency cannot be guaranteed."

Some petitioners have been successful in challenging their designation at the UN level. However, the substantive decisions on delisting requests are shrouded in secrecy and the due process safeguards familiar in many domestic legal systems are notably absent. The decision whether to challenge a designation by a UN petition is a difficult strategic one. In many cases, there is a higher likelihood of success in challenging a designation at the EU level, although that is not without its own significant, practical shortcomings (see *Challenging designations at the EU level*).

CHALLENGING DESIGNATIONS AT THE EU LEVEL

At the EU level, challenges can be brought against:

- EU decisions to apply restrictive measures against persons designated by the UN Security Council and its sanctions committees.
- Autonomous EU decisions to designate persons on separate EU sanctions lists (that is, where the persons are not listed by the UN).

There are two routes:

- A designated person can submit a request, with supporting documents, to the Council for reconsideration of its listing decision.
- The person can apply to the General Court for a decision annulling the act which imposed restrictive measures on them.

As a result of legal challenges, a large body of case law has now developed.

The seminal decision of the European Court of Justice (ECJ) in *Kadi v Council of the European Union (Cases C-402/05 P and C-415/05 P) ECLI:EU:C:2008:461* (*Kadi I*) made clear that persons subject to EU restrictive measures following their designation under UN sanctions can seek judicial review in the EU courts and that EU law and fundamental rights are applicable, as they are to EU autonomous listing decisions.

Kadi I was followed by *European Commission v Kadi (Cases C-584/10 P, C-593/10 P and C-595/10 P) ECLI:EU:C:2013:518* (*Kadi II*), in which the ECJ annulled the re-listing of Mr Kadi by the EU (on the basis of the UN listing) because, among other things, insufficient reasons had been given for his designation as an "associate" of Osama bin Laden and *Al-Qaida*, and insufficient evidence had been provided to enable the court to determine whether the reasons were substantiated.

Since then, numerous EU sanctions listings have been annulled for the EU institutions' failure to provide evidence to substantiate listings decisions claiming that the evidence was classified for legitimate security reasons and/or provided by third states on a confidential basis. This precipitated an amendment of the EU General Court's rules of procedure to allow the submission of classified material to the court on a confidential basis without disclosure to the other party in the litigation (*Article 105, Rules of Procedure for the General Court (OJ L 105 at page 37)*; see also *Decision (EU) 2016/2386 of the Court of Justice of 20 September 2016 concerning the security rules applicable to information or material produced before the General Court in accordance with Article 105 of its Rules of Procedure*). To date, however, this mechanism has not been used by the Council amid concerns for the security of classified material (*HoL: Select Committee on the EU's External Affairs Sub-Committee: Brexit: sanctions policy: Oral evidence of Matthew Findlay (14 September 2017), Q30*).

Despite some litigants' successful legal challenges to designation decisions in the EU courts, questions remain over the practical effect of these annulments and the right to an effective remedy. This is because following decisions by the EU General Court to annul restrictive measures against applicants, the Council of the EU often re-lists applicants under a slightly different limb of the same designation criterion where there has been no change in the factual circumstances. A decision of the ECJ on this point is due in *National Iranian Tanker Company v Council of the European Union (Case C-600/16 P) ECLI:EU:C:2018:227*.

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CHALLENGING DESIGNATIONS IN THE UK

At present and until it leaves the EU, the UK implements UN sanctions programmes through the EU framework of restrictive measures described above. This means that the appropriate forum for most legal challenges to sanctions listing decisions, whether the original listing was by the UN or by the Council of the EU in respect of a person not listed by the UN, will be the EU General Court not the High Court (see, for example, *National Iranian Tanker Company, Golparvar v Secretary of State for Foreign and Commonwealth Affairs [2015] EWHC 282 (Admin); R (Bredenkamp) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 3297 (Admin); R (El-Maghraby) v HM Treasury [2012] EWHC 674 (Admin)*, considering the application of the Foto Frost principle which precludes national courts from declaring an act of an EU institution invalid).

There may, however, be scope to challenge the action of a minister that is ancillary or otherwise related to a UN or EU listing decision. In *Bredenkamp*, the claimant brought judicial review proceedings against the Secretary of State's decision to propose his designation under the EU sanctions against the Mugabe regime in Zimbabwe and for refusing to assist him get delisted. In *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs [2016] AC 1457*, the Supreme Court ultimately upheld the dismissal of the claim for judicial review of the Secretary of State's decisions:

- To accede to his listing by the UN *Al-Qaida* sanctions committee despite having concluded that he no longer met the criteria for designation.
- Not actively to support the claimant's request for delisting from the EU's sanctions list.
- To accept a subsequent recommendation of the UN Ombudsperson that the claimant's listing be retained due to his public utterances and prominent position in extremist circles.

(See also *R (Khaled) v Secretary of State for Foreign and Commonwealth Affairs [2011] EWCA Civ 350*.)

Autonomous, domestic UK sanctions regimes can be established under the following legislation:

- *Anti-Terrorism, Crime and Security Act 2001* (ATCSA 2001).
- *Counter-Terrorism Act 2008* (CTA 2008).
- *Terrorist Asset Freezing etc Act 2010* (TAFA 2010).

Asset freezing orders were imposed on Andrey Lugovoy and Dmitri Kovtun in 2016 pursuant to the ATCSA 2001 after they were named as responsible for the murder of Alexander Litvinenko (the original order imposed on 22 January 2016 was renewed on 22 January 2018; see HM Treasury: Financial sanctions, UK freezing orders).

Under the CTA 2008 financial sanctions were applied against Iranian entities that had not listed by either the UN or the EU (see, for example, the Financial Restrictions (Iran) Order (*SI 2009/2725*), which required financial credit institutions to cease business with Bank Mellat and Islamic Republic of Iran Shipping Lines). Similarly, the TAFA 2010 enables counter-terrorist financing measures against individuals and entities not designated by either the UN or the EU.

Decisions under these three Acts can be challenged in the High Court but they are subject to different standards of review. Appeals against HM Treasury designations under the TAFA 2010 are merit-based reviews (see section 26, TAFTA 2010 and *C v HM Treasury [2016] EWHC 2039 (Admin)*), whereas challenges to designation decisions and freezing orders under the ATCSA 2001 and the CTA 2008 are by way of more limited judicial review principles (*section 63(3), CTA 2008*). Part 6 of the CTA 2008 and Civil Procedure Rule 79 provide for, among other things, a closed material procedure in the High Court, including the appointment of special advocates, to manage sensitive material that is relied on by the government to justify designations. The use of CMP has meant that in several cases, the court has had to consider the extent of disclosure to listed persons that is necessary to ensure that their right to know the case against them is not infringed.

Sanctions and Anti-Money Laundering Act 2018

The Sanctions and Anti-Money Laundering Act 2018 (SAMLA 2018) is enabling legislation to allow the UK to impose economic and other sanctions, and money laundering regulations, after its departure from the EU. For more information see *Practice note, The Sanctions and Anti-Money Laundering Act 2018: Sanctions*.

Before the current practice of implementing UN sanctions through EU measures, the UN Act 1946 was the enabling Act pursuant to which statutory instruments implementing UN sanctions regimes in the UK were adopted. In *HM Treasury v Ahmed [2010] UKSC 2*, the Supreme Court held that this was unlawful in relation to UN sanctions that did not respect listed persons' fundamental rights. Under the Act, a designated person will have the right to request a minister to revoke or vary a designation but will only be able to make a subsequent request where there is a new significant matter that has not been considered by the minister (see *section 23, Sanctions and Anti-Money Laundering Act*).

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SAMLA 2018 provides for the making of regulations concerning the procedure of ministerial reviews, which must require the relevant Minister to determine the request and inform the designated person of the non-sensitive reasons for his decision as soon as practicable (*section 33*). Persons listed by the UN may request only that the Secretary of State use his "best endeavours to secure that the person's name is removed from the relevant UN list" (*section 25(2)* and *29(2)* and *37(2)*).

Decisions in respect of requests for ministerial reviews of designations will be subject to judicial review (not a full merits-based assessment) and subject to the same procedural regime as currently established under Part 6 of the CTA 2008 (*section 38*).

CHALLENGING DESIGNATIONS IN PRACTICE

Challenging designation decisions is notoriously difficult, not least because the standard of listing criteria is so low (usually akin to a reasonable ground to suspect that a person is engaged in the targeted behaviour or associated with such a person). The procedural safeguards in the UN system remain woefully inadequate. Nevertheless, some designated persons have successfully petitioned to be delisted.

Whether to use the UN delisting mechanisms requires careful strategic consideration. UN listed persons often stand a greater chance of success in a challenge before the EU courts, which have insisted on being able to review sufficient evidence to support the reasons given for listing a person. That avenue is likely to be blocked for UK-related persons post-Brexit, who will be left with either using the UN mechanism or challenging a refusal by the government to use its "best endeavours" to secure their delisting by the relevant UN body. The new domestic regime is likely, however, to spawn a considerable amount of litigation as sanctions remain a key foreign policy and national security tool.

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