

Sanctions in the spotlight

Can persons on the receiving end of targeted sanctions challenge this designation, & where do their legal representatives stand? **Simon Davenport QC & Matthew Happold** investigate

IN BRIEF

► Examines the recent UK sanctions against Russia, and how they impact what the legislation calls 'designated persons' subjected to targeted sanctions.

► Although some commentators have questioned the ethics of legal advisers who represent those persons seeking to challenge their designation, access to legal representation remains a fundamental cornerstone of the rule of law.

Economic sanctions have been much in the news in recent weeks. In response to Russia's invasion of Ukraine, the UK, together with the European Union, the USA and other states, has imposed far-reaching sanctions on Russia seeking to degrade its ability to prosecute the conflict and persuade it to end its aggression. One aspect of these regimes is the use of so-called 'targeted sanctions' imposing specific measures, such as asset freezes and travel bans, on particular persons. As a result, sanctions have become an issue of law as well as policy. Once sanctions directly affect a person's legal interests, then questions of their compatibility with due process and with individual rights arise.

This article looks at the recent sanctions against Russia as they affect what the legislation calls 'designated persons' subjected to targeted sanctions. It examines the legal issues at stake, while also considering the ethics of lawyers representing persons seeking to challenge their designation. Although such persons are being portrayed as particularly unsympathetic, as Lord Pannick QC wrote to *The Times* on 3 March this year: 'These critics [some journalists and politicians] have lost sight of one of the basic pillars of the rule of law which distinguishes our society from Putin's Russia: people are entitled to advice from solicitors and barristers on their legal rights and duties, and they are entitled to legal representation in court, however reprehensible their alleged conduct. The principle applies to oligarchs as it does to alleged murderers.'

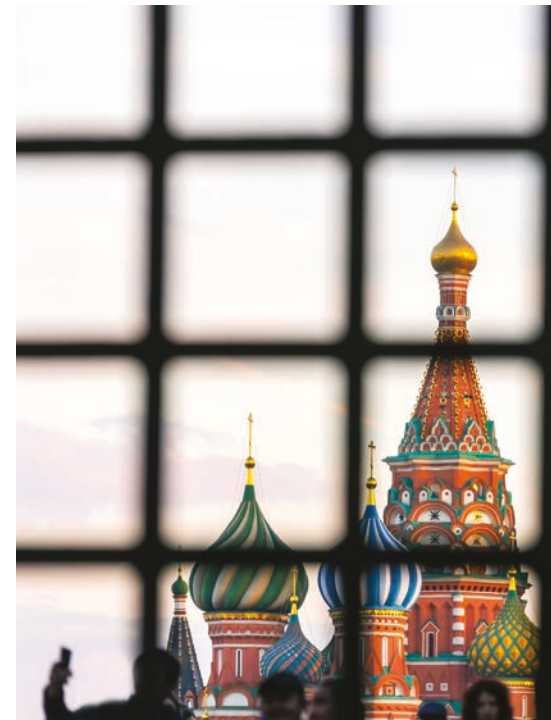
The legal framework

In the UK, the imposition and maintenance of sanctions is now governed by the Sanctions and Anti-Money Laundering Act 2018 (SAML 2018), enacted in anticipation

of the UK leaving the EU. SAML 2018 governs the implementation of sanctions ordered by the United Nations Security Council (which the UK is obliged to do because it is a UN member state), but also empowers the government to impose sanctions autonomously. SAML 2018 was recently amended by the Economic Crime (Transparency and Enforcement) Act 2022, (EC(TE)A 2022) which was fast-tracked through Parliament in response to Russia's invasion of Ukraine. Introduced in the House of Commons on 1 March, EC(TE)A 2022 received royal assent as recently as 15 March.

SAML 2018 provides the framework for the imposition of economic sanctions. It grants appropriate ministers (the secretary of state or HM Treasury) a power to make sanctions regulations for a series of discretionary purposes: for the prevention of terrorism; in the interests of national security, or of international peace and security; to further a governmental foreign policy objective; to promote the resolution of armed conflicts or the protection of civilians in conflict zones; to provide accountability for, or be a deterrent to, gross violations of human rights, or otherwise to promote compliance with international human rights law or respect for human rights; to promote compliance with international humanitarian law; to contribute to multilateral efforts to prevent the spread and use of weapons of mass destruction; or to promote respect for democracy, the rule of law and good governance. This was already a wide power even prior to the repeal, in EC(TE)A 2022, of the requirement that a minister could only make regulations that were 'appropriate' for the discretionary purpose for which they were made.

Regulations can give ministers the power to designate persons as subject to sanctions. Persons can be individuals or entities, whether incorporated or unincorporated. EC(TE)A 2022 makes important changes to the circumstances in which persons can be designated, creating a new urgent procedure for designation. Under the original (now the standard) procedure, persons can be designated when the minister has reasonable grounds to suspect that they are or have been involved in an activity specified in the regulations; are owned or controlled by a person who is or has been so involved; or



are acting on behalf of or at the direction, or is a member of, or associated with, such a person. EC(TE)A 2022 has removed the requirement that an activity could only be specified if the minister considered that doing so was appropriate having regard to the purpose of the regulations. Under the new urgent procedure, persons who have already been made subject to targeted sanctions by the EU, the USA, Australia, Canada and (potentially) other countries can be designated if the minister thinks it in the public interest to do so. Designation under the urgent procedure, however, is temporary and ceases to have effect after a maximum of 112 days (for an original period of 56 days which can be renewed once). For it to continue thereafter, the minister must certify that the conditions required for designation under the standard procedure are now met.

Sanctions against Russia were originally imposed by the EU in 2014 in response to Russia's occupation and purported annexation of the Crimea, and support for separatists in the Donbas. An amalgamation of provisions of the three EU regimes in the Russia (Sanctions) EU Exit Regulations 2019 (SI 2019/855) meant that substantially the same measures continued to apply in the UK post-Brexit. The 2019 Regulations were tweaked by two 2020 Regulations, and in the same year 45 Russians were designated under the Global Human Rights Sanctions Regulations 2020 (SI 2020/680) which provide for the designation of persons involved in serious human rights abuses. Since 10 February 2022, however, seven further Russia sanctions regulations have been adopted, the most recent being on 30 March.



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By the first of these regulations, the grounds for designating persons were expanded. The 2019 Regulations provided for the designation of persons on the basis of their involvement in destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine. To this was added obtaining a benefit from or supporting the Russian government: or being owned or controlled by, acting on behalf or at the direction of, or being a member of associated with, a person so involved. Being involved in obtaining a benefit from or supporting the Russian government includes carrying on business as a Russian government-affiliated entity, or of economic significance to the Russian government, or in a sector of strategic significance to the Russian government. Sectors of strategic significance are defined as the Russian chemicals, construction, defence, electronics, energy, extractives sector, financial services, information, communications and digital technologies, and transport sectors: that is, virtually all sectors of significance to the Russian economy.

The impact of sanctions

As of 11 April 2022, 1,000 individuals (including over 80 'oligarchs' and their family members) and 105 entities have been designated either under either the standard or the urgent procedures. In general, designated persons are subject to financial sanctions (asset freezes) and (if individuals) to immigration sanctions, but a number of entities (mainly banks) are subject to various financial and investment restrictions. Financial sanctions freeze funds

and economic resources owned, held or controlled by designated persons. Dealing with the assets of designated persons and making economic resources available to them or for their benefit is prohibited, and anyone who does so, whether knowingly or not, commits a criminal offence. Reports suggest that over £170bn-worth of assets have been frozen.

Immigration sanctions mean that any leave to enter or remain in the UK is cancelled, so that the designated person is banned from entering and remaining in the country. Although licences can be granted, eg to meet basic needs or pay for legal services, they must be applied for from the Office of Financial Sanctions Implementation (OFSI). Designations can, therefore, have quite severe impacts on individuals, albeit that it depends on their circumstances. Designation of a member of the Russian Duma with no assets in the UK and no desire to visit Salisbury Cathedral, for example, would be mainly of symbolic importance. But matters would be very different for a person whose main residence was in, and whose business activities were conducted from, the UK. In addition, the authorities are casting their nets widely, including family members if it is thought that they are holding relatives' assets. For example, following the US's imposition of sanctions on President Putin's two adult daughters on 6 April, both the EU and the UK followed suit two days later.

At any time while a designation has effect, the designated person may request the minister to revoke or vary their designation. Should the minister refuse, the designated person is entitled to seek court review of the decision by application to the High Court in England and Wales, which '[i]n determining whether the decision should be set aside, ... must apply the principles applicable on an application for judicial review.' The court may set aside decisions but may not award damages unless satisfied that a decision was made in bad faith (which, it may be safely assumed, means that damages will rarely, if ever, be awarded). The provisions of the Counter-Terrorism Act 2008 relating to closed material procedures apply in relation to such proceedings.

It can be seen that the recent amendments to SAMLA 2018 by EC(TE)A 2022 make challenging designations decisions more difficult. Many disputes may turn on their facts, so claimants may wish to seek disclosure of the documents on the basis of which the decision to designate them was made. Ministers may resist such applications on the ground that such documents should not be disclosed. But it is clear that designation affects individuals' human rights, in particular under Art 8 (the right to

private and family life) and Art 1 of Protocol No 1 (the right to property) of the European Convention on Human Rights. Although both are qualified rights and can be restricted for various purposes, restrictions must be proportionate to the legitimate aim pursued. In addition, decisions of the OFSI refusing or imposing conditions on requests for licences are also amenable to judicial review. This has already happened pre-Brexit in relation to EU sanctions, when licences were granted at the national level. So in 2016, the Administrative Court dismissed a claim for judicial review challenging a Treasury decision on the release of frozen funds for the payment of legal expenses (*R (Ezz) v HM Treasury* [2016] EWHC 1470 (Admin) [2016] All ER (D) 144 (Jun)).

The rule of law

Attention has focused in recent weeks on 'enablers', including those lawyers who, it is said, have allowed kleptocrats, oligarchs and other undesirables to launder their ill-gotten gains and to stifle legitimate commentary on their nefarious activities. Indeed, in response to the naming of several law firms in Parliament, Solicitors Regulation Authority (SRA) chief executive Paul Philip announced that the SRA was commencing visits to the firms named. But to deprive a person of their property for an indefinite (and quite possibly prolonged) period, without them being able to have the legality of such action judicially determined, is inimical to the rule of law. And preventing access to legal representation in such circumstances renders the right of access to a court (which SAMLA 2018 specifically provides) nugatory. Indeed, the 2019 Regulations specifically provide that the OFSI can grant licences to permit the payment of reasonable professional fees for, and reasonable expenses associated with, the provision of legal services. Providing solicitors comply with their other professional obligations and their obligations under SAMLA 2018, they are not acting professionally unethically in representing designated persons, whatever parliamentarians or the press might say. As for barristers, both the cab rank rule and the duty not to discriminate unlawfully apply, and they would act contrary to the Code of Conduct were they to refuse to represent designated persons, whether Russian or otherwise, based on the nature of the allegations against them, their character or conduct, or their national origins or nationality.

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