HOUSE OF LORDS

Select Committee on the European Union

External Affairs Sub-Committee

Corrected oral evidence
Brexit: sanctions policy

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Watch the meeting

Members present: Baroness Verma (The Chairman); Baroness Brown of Cambridge; Lord Dubs; Lord Horam; Baroness Manzoor; Earl of Oxford and Asquith; Lord Risby; Lord Stirrup; Baroness Suttie.

Evidence Session No. 1 | Heard in Public | Questions 1 - 9

Witnesses

I: Mr Ross Denton, Partner, Baker and McKenzie LLP; Ms Maya Lester QC, Barrister, Brick Court Chambers.

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Examination of witnesses

Mr Ross Denton and Ms Maya Lester.

Q1 **The Chairman:** The Committee welcomes Mr Ross Denton and Ms Maya Lester QC. This session is live and will be broadcast. The transcript will be delivered to you after the session. If something needs to be corrected, please correct it and send it back to us. We are very pleased to have you here this morning. I start by asking you to give a quick overview of the different types of sanctions regimes applied by the UK and the principal differences you feel there are between the EU and the UN-derived sanctions.

Maya Lester: Thank you very much. I am very grateful for the opportunity to appear here. Currently the UK implements a number of different sanctions: those derived from the UN, those derived from the European Union, and some derived from our own existing autonomous powers. UN sanctions are largely implemented via the EU's Common Foreign and Security Policy, but the obligation is on the United Kingdom, as a matter of international law, to implement those United Nations sanctions, and that, of course, will continue to be our international obligation. At the moment, the European Union implements those sanctions as a bloc. There are currently 13 UN sanctions regimes.

Secondly, EU sanctions regimes—in other words, those going beyond UN sanctions, but also some separate EU sanctions regimes—are not imposed by the UN. There are around 30 at the moment. Our own autonomous powers are limited at the moment to counterterrorist asset freezing and some element of weapons of mass destruction (WMD) and proliferation sanctions, but UK sanctions are, largely speaking, counterterrorist sanctions.

All these measures broadly do the same thing. In the case of UN sanctions they are usually asset freezes and almost worldwide; they cover about 200 countries. In the case of the EU, they have effect only in EU Member States. They are largely asset freezes, travel restrictions, arms embargos and sometimes other broader sectoral restrictions on, for example, certain kinds of financial transactional or certain types of trade, depending on the measure.

The design does not particularly differ according to whether they are UN or EU sanctions. Some are targeted at specific individuals and entities, while some are much broader and are sectoral. Again, that is the case for UN and EU sanctions. UN and EU sanctions have a number of different aims: compliance with human rights and the rule of law, specific foreign policy goals such as trying to persuade a state to change its policy in a certain area, sometimes supporting a new fledgling democracy, counterterrorism, counterproliferation, and so on.

The differences are, first, that UN sanctions apply in a far broader area of the world than EU sanctions do. Secondly, there are far more EU regimes than UN regimes, largely because the presence of some countries on the

UN Security Council makes agreement more difficult, and the obligation on the United Kingdom is different, as I have already said.

Ross Denton: Thank you very much for the opportunity to speak to you today. I agree with everything that Ms Lester has said. I would at least emphasise that the UN does not act as quickly and as expeditiously in all cases as the European Union can, so the European Union, as Ms Lester said, has a number of sanctions regimes that are not present at the UN level; they are seen as autonomous regimes.

We have seen over the years the development in the UN and the European Union of increasingly sophisticated sanctions regimes. They have developed from simply being asset freezes and fund controls and so on into a very rich series of rules that come from both the UN and, more particularly, the European Union level. We have moved away from simply having freezes on individuals or regimes into having very sophisticated measures, such as fund transfer controls or restrictions on particular categories of product. Probably the two most highly developed regimes have been those in respect of Iran—of course, since the Joint Comprehensive Plan of Action (JCPOA) that has changed—and Russia, in relation to which we have a very sophisticated regime.

At least from the West's perspective we have seen a high degree of coalescence between the European Union, the United States and others on their positions on particular things, such as whether those are the types of measures to be implemented and in some cases even lists of people who will be targeted in those regimes.

Q2 **Baroness Manzoor:** From a legal perspective, what advantages and disadvantages does EU membership have for the UK with regard to its approach to the design and implementation of sanctions?

Ross Denton: The most important thing to get across about the current structure of the EU is that the UK has a very important position in the development and promulgation of EU sanctions. We are a very important part of that structure. I do not think it would be too harsh to say that the UK forms a major part of the backbone of the European Union's sanctions policy through the FCO and the expertise that we have in the UK. We are front and centre in the development of measures that can be used to form sanctions regimes.

Again, I do not think it is too harsh to say that we provide a significant part of the political will in respect of many regimes. There are lots of different views inside the European Union on the Russian regime, for example, but the UK is clearly pushing to make sure that not only are the sanctions developed in a way that is appropriate but that they are renewed to keep the pressure on Russia. That is one of the advantages of the UK being there: it can use its resources to influence other EU Member States and to guide them in a similar direction to that of the UK. Once the UK leaves the European Union, there is a strong possibility that the EU 27 will no longer have the resources, or at least will have to develop their

own resources, and may lack the political will to carry on in the current direction.

In terms of where we are at the moment, looking at this from the other side, the UK's foreign policy position is relatively limited. It is constrained by being a member of the European Union and is therefore of course subject to compromise. So the UK will have the ability to take an independent view on a number of subjects to do with sanctions policy, even developing its own sanctions policies or sanctions regimes that are not agreed with the European Union. Of course, the go-it-alone idea potentially reduces the UK's influence, which at the moment is amplified through membership of the European Union. It is also really important to say that a significant part of EU sanctions policy at the moment is at a national level, so all licensing and enforcement is done by the Member States and only by the Member States. That is separate from the development of policy in the architecture.

Maya Lester: Could I just add a couple of points? From a legal perspective, the first key advantage is that instead of the ability only to be able to impose, for example, asset freezes and other measures that have an impact in the UK or on UK businesses, if the UK can amplify its sanctions policies by doing so as part of a bloc of 28 Member States, the legal effect is automatically EU-wide. That is very significant, as it means that you do not freeze people's assets only in the UK; you do so across the EU as a whole.

Secondly, the value of uniformity of approach and consistency in having one regime to deal with for businesses, NGOs, individuals and other organisations is enormous. The most obvious example of that is that at the moment one only has to apply for one authorisation—in other words, a licence exception to sanctions—once for it to be valid across all EU Member States. If you go to the German national authority you get a licence. You do not have to go to other authorities in the EU, even if there is relevant business going on there. That is another major legal advantage.

An advantage from the Government's perspective is that, as you probably know, there has been a great deal of litigation involving the listing processes relating to sanctions, and to a large degree the UK courts and the UK Government have been insulated from that, in the sense that if you are challenging the validity of a piece of EU legislation you have to go to the European Court of Justice in Luxembourg to do so. So although there have been a few cases here, there has been far less litigation. That is an advantage—or a disadvantage, depending on whose perspective one looks at. There is certainly less litigation at the moment.

A final advantage that I would identify is that if individual Member States have their own regimes, they are of course more susceptible to counter-sanctions being imposed on them. It is easier if you are a third country to retaliate against one country—as Russia has done in a number of instances recently, for example in its food and agricultural measures and its measures against Turkey—than it is across the bloc.

There are also significant advantages to the European Union, as well as to United Kingdom from the UK's presence, which Mr Denton has already mentioned. We are, as you said, at the forefront of sanctions policy. In his evidence to the EU Committee that issued its report on the legality of sanctions, the senior legal adviser to the European Council emphasised the role of the United Kingdom in the listing process. The UK is responsible certainly for the majority of designation decisions in the EU. Of course, the extent to which it is possible for that to continue, which we will come on to, can be debated, but we are certainly the most active in the design and the enforcement of sanctions. Again, we will come on to that later.

In terms of the disadvantages to the United Kingdom of the current system, the first, of course, is the need for agreement by all Member States, which can lead to compromise. Sometimes that is to our advantage and sometimes not. It sometimes means that, as with all EU legislation, one gets language that is rather difficult to understand, because to some extent it is the subject of give and take by a number of different Member States.

Secondly, there has been a real absence of guidance, frequently asked questions, and other clarification, both by the EU institutions and the European Court of Justice, on the meaning of some of the more obscure parts of sanctions. That is a disadvantage of acting through the EU. If the UK were acting alone it could give clearer guidance. On the other hand, it would be guidance that applied only UK-wide.

There is a rather restrictive system for granting exceptions, licences and authorisations in the European Union, partly as a result of some case law from the European Court of Justice. I would hope that if we had our own regime we could be less restrictive, but again we could be less restrictive only within our jurisdiction.

The report on the legality of sanctions identifies a number of disadvantages of the current EU system for the due process and the delisting and listing processes, which I will not go into now but which are all set out in that report.

To some extent, all those disadvantages could be alleviated if we leave the European Union and have our own system, but at a cost, which we will come on to.

Lord Stirrup: May I just follow up on that before we delve further into the post-Brexit mechanics? There is a lot of debate about the efficacy of sanctions in the first place. Some would argue that in the case of Russia the true value of the EU sanctions regime is that it demonstrated political solidarity and political will, despite the fact that there were diverse economic pressures pushing in different directions on different countries. If, as Mr Denton said, the UK has been one of the prime movers in establishing those sanctions regimes and therefore in helping to achieve that degree of political consensus, is there a serious risk that if the UK is no longer a member of the EU, the efficacy of the EU sanctions regime—

the non-UN sanctions regime—will be seriously weakened as a consequence?

Ross Denton: The answer is inevitably yes, at least in the short term and maybe in the medium to long term. The European Union will have to develop an infrastructure that accommodates the fact that it has lost the UK part of the infrastructure. We have already seen that with the Russian sanctions, for example. Every six months when they get renewed there is always an upsurge in lobbying on whether to keep them or not. It is fair to say that there are significant pressures inside the EU 27 not to continue with the Russia sanctions or not to use them too aggressively. However, the UK holds their feet to the fire, and when we leave the European Union there must be the possibility that the nature of the sanctions policies or regimes that get developed will change. There is a risk, particularly in respect of Russia, that those sanctions will look different.

On the efficacy point, we can see from the way in which business is operating in Russia and complying with those sanctions at the moment that it has radically changed the nature of certain businesses in Russia and that the Russians in certain industries are being significantly impacted by that. There is always the general question: how effective are sanctions? I can only tell you that in certain industries they are very effective; they have changed the nature of business in Russia, they have changed the way in which certain businesses operate, and they have changed the way in which Russia wants to do business with the West.

Maya Lester: The degree to which EU sanctions become less effective if we are no longer a Member State depends entirely on what happens afterwards. If, as seems likely, it is in the mutual interest of the EU without the UK and of the UK that there is continued very close co-operation, including on the implementation and at the earlier design stage of sanctions, there will not necessarily be an enormous divergence between the EU's approach now and its approach afterwards. That will depend entirely on the degree to which it is possible, and is seen as desirable by everyone, for the UK to continue to have the leading role that it has at the moment.

Perhaps as a naive outsider I cannot see at the moment why it would be in anyone's interest for that not to continue to be the case if it is possible to work it out legally and from the perspective of negotiations. Whether or not it will necessarily be a bad thing if in some instances the UK can strengthen sanctions above and beyond if it wishes to do so, is a matter of foreign policy; what the EU decides depends entirely on the particular regime. In the case of a country with a very large exposure to UK financial markets and asset holdings in the UK, the position taken by the UK may impose more pressure than some other Member States do. In other regimes, that is not the case and the UK is a less significant market. So it is quite hard to generalise.

Lord Horam: But is that not the point? I am very interested in what you have said, Ms Lester: that we have played this role in the European

Union. On the face of it, as Mr Denton said, our departure will weaken it, but it absolutely depends on the attitude of the UK Government post-Brexit. I fully accept that it is very difficult to speculate on that. We are trying to speculate on many aspects of the future post-Brexit, but this is a particularly difficult aspect to speculate on.

Given what you know, as experts in this field, about the UK Government's attitude inside the European Union, you could presumably argue that they will want to carry on. The continuity element will be quite strong because of self-interest, as well as European self-interest, in sanctions being effective. It has been part of their foreign policy. They want to be seen to be playing a role. In many ways, they will want to play a bigger role post-Brexit because they will not want to be seen to be retreating from an international role; they will want to be seen to be playing the major part. You could therefore argue that in fact it will be no different, so the continuity will be there.

Ross Denton: I think Ms Lester's point is absolutely correct: that there are a number of ways in which we can move forward on sanctions after we leave the European Union. From our perspective, and possibly from a common sense perspective, it would make sense for us to remain as close to the European Union position as we can, but then we have to think of the mechanism by which we develop those sanctions and provide assistance, and our part in the decision-making process. We could find that we do all the work but have no say in what comes out of the process. That is one model.

You are far better able to consider this point than I am, but it does make you wonder about what the reaction in the country would be if we said that we had left the European Union and now had the ability to formulate our own foreign policy but that we are sticking to that of the European Union without too much influence on how the rules get set. I do not know, but that is a possibility. If I were a gambling man, which I certainly am not, I would say that it is also possible that the UK will inevitably move slightly more towards the US than towards the European Union.

Q3 **Lord Horam:** On financial sanctions, given that the City of London plays a particularly important part in this area, post-Brexit we might well have to be more concerned about the role of the City of London, which may be under threat. That would weaken our position, because we would have less of an interest in sanctions if they adversely affected the City.

Ross Denton: Yes, agreed.

Maya Lester: I would add a couple of points in answer to your question. First, I very much hope that the Committee will take evidence from the people who are currently involved at government level in the EU sanctions system, because they will be more knowledgeable than mere lawyers on the topic of what will and will not work afterwards. Certainly it is my understanding that it will be in the Government's interests and will be their desire to carry on as much as possible with close co-operation in this field.

Second, there is a great divergence in the role of third countries, which is the umbrella for everyone who is not an EU Member State. The US, for example, is hugely significant in shaping EU sanctions policy. Other countries, such as Switzerland, Norway, and others that are identified as third countries, are simply invited by the European Union after a position has already been taken to align themselves with EU policy. It seems to me crucial and likely to be desired by the Government that we would not simply be asked to align but that we would be involved at key early stages in the design and implementation of sanctions. Whether that is possible is not for me to say and will be the subject of negotiation. If you are not an EU Member State and at none of the key decision-making meetings, that will be problematic. Given, I imagine, that the EU will want UK involvement, I should imagine that the UK would want, for all the advantages of the current system described earlier, to be a key part and that that would continue afterwards.

Q4 **Lord Risby:** One key element of what we are trying to do in this Committee is to look at the impact on businesses, which are obviously very concerned for all sorts of reasons, such as whether the supply chain will increase regulation or what have you. On the question of sanctions, of course, we are looking primarily at the EU link, although there are different sanctions regimes.

In relation to businesses and their anxieties about compliance—you mentioned that this was predominantly in London, compared with other countries, although there is an application that works in any part of the EU if successful—what is the actual process? Is it straightforward or complex? If we were to have more distinct separation than some people might think is the case, will that involve additional costs for business? Is the process expensive?

Ross Denton: That is pretty much my day job. A multiplicity of sanctions regimes definitely increases the cost to business, whether that is simply a result of having to follow through each of the slightly different processes, or, if they are substantively different, you have a number of additional costs, such as working out whether you can fit within both or which you can fit in. There are compliance costs associated with fitting within one but not another and it has to be divided up. So a multiplicity of sanctions regimes is a cost to business. All the businesses that we have worked with have always been keen to say that they understand that there is a cost associated with sanctions; that there is a foreign policy objective that is of greater importance to the country than the cost to business. They accept that there will be a cost to sanctions. That is inevitable. The message that most businesses would like to get across to government is that if there is an ability to make sanctions less onerous on businesses without affecting the foreign policy objectives, they would like the Government to take a business-friendly approach to sanctions.

To echo what Ms Lester said about the licensing system, one thing that we would like to see the Government do in respect of licensing sanctions - is to try to align that with the export control regime. Effectively if you are exporting a controlled item, whether goods, software or technology, you

apply to the Government who have almost complete discretion over whether to give you that licence or not, and that is then subject to a review process. At the moment, the European Union licence regime is very heavily skewed towards individuals and individual designated persons. If you are a designated person or a family of designated persons, there are ways in which you can get licences to do things to get money. If you are a business, the licensing regime is completely unfit for purpose.

So I would encourage anyone who is thinking about this to think about a way of aligning the systems for the sanctions regime with that of the export control regime. A business can then say that it has found itself in the past with a client that is in a joint venture with a designated person. What does it do? How does it operate a joint venture if the joint venture has critical equipment that needs to be operated but because of UK or EU rules it cannot get a licence to do so? What happens if it is a chemical plant that blows up or cannot be operated safely? All these things need to be thought through. When we have talked to the Government about these things, they have told us to point the businesses to a licensing gateway that they could use, but there is none. You end up with a very unusual 'kludge'.

I know there is EU law that says this is what you have to do and these are the parameters, but I would encourage anybody who is designing the new process to look at this as what should be a very open and powerful discretionary tool. It would obviously be subject to rules. For example, you could cite humanitarian purposes, environmental protection, health and safety. Those could all be gateways into which you could fit, but not through narrow gateways.

Lord Risby: The principle that you are talking about could in a sense be applied to the process in the EU. In your role and discussions, what has the reaction been? Why has this not evolved into a system?

Ross Denton: I do not know. I have been given no clear reason. As Ms Lester said, there is EU law that says how the licences may be granted and the situations in which they can be given.

On the question of why it is not more flexible, I can take a guess and say that it is not in governments' interests to give people exemptions from sanctions systems, so they make it hard to do that, but I have never been given a compelling explanation of why the licensing system is so narrow and so business-unfriendly.

Maya Lester: I have a couple of additional points. First, there is certainly no well-established exchange of ideas or consultation, particularly between the EU institutions and business but also between competent authorities and business, as well as charities, NGOs, and individuals affected by sanctions. As is often the case with legislation, it is promulgated at EU level and applied at national level, and sometimes, if there are significant enough lobbying bodies, they will be listened to at the EU. Generally speaking there has not been a flexible and responsive

system enabling businesses to say, "Look, this simply doesn't work", and a response at EU level. I would certainly reflect Mr Denton's hopes that that could be improved, at least in the case of the UK regime.

Secondly, there has also been a great and unfortunate divergence of approach to this whole question of licensing and exceptions between different Member States. It is easier to get a licence in some Member States than in others, to put it crudely. That is also not a terribly satisfactory position, but to some extent it follows from lack of guidance and from the fact that each Member State is responsible for enforcement and implementation of sanctions, not simply for making the rules.

To go back to your original question, the cost of compliance for business can be immense. Perhaps the most significant part of sanctions implementation is less enforcement and criminal prosecution and far more compliance at business level. That, of course, is very much higher if you are a small business, an individual or a charity having to understand these different sets of rules. If there is a multiplicity of regimes, that will of course be exacerbated.

It is also true that not only does one have to understand the really quite complex legal provisions of sanctions, but there is the additional, quite separate, question of the risk appetite of financial institutions and others, which often take the view that overlapping jurisdictions are so costly and difficult to understand that it is simpler to have policies of non-engagement with certain parts of the world. One is in the process of advising businesses not only on what they are allowed to do and not do but on what is likely to be possible in practice. The best example of that is trying to do business in Iran post the lifting of sanctions. The legal restrictions might have gone in this jurisdiction but they have not gone in the United States. There is a significant lack of clarity, but there is also the issue of risk appetite and financial institutions simply not wanting to go there. The cost of compliance and the risk that that becomes worse if there are significantly different regimes are immense.

The Chairman: In the interests of time, if we do not manage to get through all our questions I hope our witnesses will provide responses in writing. I am mindful of time. I know we have quite a few questions to get through.

Q5 **Baroness Brown of Cambridge:** Ms Lester, you have touched on enforcement. In your written evidence you also talked about the difference in enforcement between different EU Member States. In this context and because there is already this difference, would it make any difference to UK businesses if the UK created its own independent regime? Would you expect to see any change in the way the UK enforces sanctions post-Brexit? If so, what would the implications be for listed individuals and for entities?

Maya Lester: To some extent the answer is that enforcement is not really a Brexit issue, in the sense that it is already for Member States. There is an overlap in the sense that the UK has also been at the

forefront of trying to enforce in a more serious way than before. We have a new enforcement agency in the UK that is about a year old. I imagine that will continue after we are no longer a Member State, but there is also an overlap in the sense that the UK being at the forefront of enforcement has had an impact on other Member States that have been encouraged by the UK's greater degree of reporting on breaches and enforcement. Again, this comes back to what happens afterwards. If there is information sharing between different competent authorities, perhaps even more than there is at the moment, that would be helpful for enforcement across the EU. The more each country does enforcement at a unilateral level without exchanging information on cross-border situations, the less effective enforcement will be, but it is true that that is not a legal consequence of leaving the European Union.

Baroness Brown of Cambridge: So enforcement in the rest of the EU might not be as effective, but you suspect that the UK regime would remain pretty much the same.

Maya Lester: The UK, I should imagine, will remain keen to be an active enforcer of sanctions. Of course, it will be actively enforcing only its own regime within the United Kingdom. The impact of its licensing system will only be UK-wide and will not result in EU-wide business being able to be conducted. It is also true that if the UK diverges more in the strength of its enforcement, again, the more differences there are between the approaches of different Member States and the less co-operation and information sharing there is, the more the cost to business and the greater the risk of relocation of businesses will be because there will be too much uncertainty and divergence about the approaches of different countries.

Ross Denton: As licensing and enforcement is already at Member State level, we already have a multiplicity that we always refer to as the 28 flavours of enforcement. The UK leaving and continuing its own enforcement policy will not be a great change to us. It is important to note that the Office of Financial Sanctions Implementation (OFSI) has been created, revamped and given additional, increased powers. Happily, our enforcer is new, ready to go and fit for purpose. Even if we have a new policy sitting over the top, the infrastructure, potentially for licensing and certainly for enforcement, is there. Whether we see any greater enforcement appetite as a result of Brexit I do not know. We generally see that there has been an uptick in enforcement activity on sanctions in the UK, potentially as a result of OFSI being created.

Q6 **Baroness Suttie:** You have already said quite a lot about the impact on businesses of having an independent UK sanctions regime. Turning specifically to access to legal remedies, could you say a little about the impact on businesses of our UK sanctions regime for businesses operating both in the UK and in the European Union?

Maya Lester: When you say legal remedies, do you mean remedies for—

Baroness Suttie: I presume access to legal solutions.

Maya Lester: As I understand it, this question is about whether businesses have been wrongfully included in sanctions regimes. Obviously sanctions throw up a huge number of different kinds of legal remedies, such as companies suing each other. Access to legal remedies for having been unlawfully and incorrectly included in, for example, asset-freezing measures, is what has given rise to most of the litigation in the European Court of Justice. Having our own regime potentially means doubling court cases because if a business is listed by the United Kingdom and by the European Union it will have no choice if it wishes to challenge that but to go to two different courts, which is costly and will cause a great deal of delay. It also means that the Government are likely to face a great deal more application of resources to litigation because the British Government's own decisions suddenly become susceptible to review in courts here, whereas previously there has been a certain insulation from that because they have been one of 28 decision-makers and therefore legal remedies were available only in Luxembourg.

I hope that legal remedies in the UK will be more effective than they have been so far in the European Court of Justice when it comes to unlawful listings. This may be too much detail and I would be happy to follow up in writing. A lot of this has gone into in the legality of sanctions reports, but there have been a number of respects in which remedies from the European Court of Justice for unlawful listings for businesses and individuals have not been effective. It is almost impossible to get damages from the EU institutions. It is very difficult to get a remedy from the game, if you like, that has to some extent been played of businesses winning cases and then immediately being relisted and having to go back to court several years down the line when they still do not have access to remedy. There are no speedy hearings in Luxembourg, unfortunately, or very rarely. I would hope that some of that could be cured by what I hope will be a far more responsive UK court system. On the other hand, if you have to bring two sets of proceedings, it will be less effective.

Baroness Manzoor: Is it not also correct that as well as the legal system in Luxembourg not being very speedy, around 65% of cases are not upheld by the European court? Why do you think that is?

Maya Lester: By "not upheld" I think you mean that the sanctions listing has been overturned or annulled. First, I suspect that that figure is now lower than it was. Certainly fewer cases are being won by applicants. There is still a significant number of cases because there are problems at EU level about presenting evidence of a kind that will satisfy the court that an entity or individual really is responsible for the conduct or is of the status that has been identified as the reason for including them in a particular list. It is basically a problem of evidence. To a certain extent, this will be the subject of discussion whether the decision-maker is the UK or 28 Member States: is there enough to say that this person has been involved in the proliferation of nuclear weapons, in financing terrorism, in benefiting from a corrupt regime, or whatever the allegation is? As soon as you start listing individuals, individuals will start making challenges. Having acted in a number of cases, I think there is still a

problem of gathering evidence of a sufficient quality to satisfy courts. To my mind, the European Court of Justice in Luxembourg has, if anything, been even more lenient on the EU institutions about what it would regard as evidence of a sufficient quality than a UK court might be. Again, there is a lot of detail in my evidence to the Committee on the legality of sanctions.

It is true that sanctions are being annulled by the European court, but in the big scheme of things that has not resulted in a large number of people being delisted. That is for a number of reasons. First, there is the practice of relisting individuals and entities, even those who have won their annulment cases, and slightly changing the reasons why they have been included on a list, which keeps them on the sanctions list. Secondly, the criteria for including people and entities have become easier to satisfy evidentially. In other words, it is easier to show that someone is, for example, publicly funded and connected with a Government than it is to show that they are individually responsible for corrupt practices. Increasingly, as sanctions get wider in their scope, there is a trend towards it simply being easier to include people. That is why the 65% figure may have gone down, but there are still a number of cases that are won in the European court.

Ross Denton: I have one small comment to add. Part of the reason why applicants in the European Union win so frequently is that the evidence out there—if there is any evidence—may be highly confidential from an intelligence source. There is no appropriate way at the moment, at least inside the European Union system, for having that evidence aired. When an intelligence service is asked to present information, it wants to know whether it will be kept safe and secure. If the answer is, "We can't do that. It has to be held publicly", it will not offer that evidence. Therefore, some cases are just dealt with on the basis that no evidence was offered, because the intelligence services will not allow it to be offered. I believe that that situation would be radically different in the UK system, where there are protections for intelligence sources.

Q7 **The Earl of Oxford and Asquith:** You have already covered in some detail the issue of consultation between businesses, the European Union and Member States. You said that the consultation was not very effective, in your view: the licensing system is narrow and business-unfriendly and the exemption procedures are inflexible. What improvements would you recommend in the consultation between businesses and Governments? Could those be effected under an independent UK regime as a model? Is it easier to put those improvements in place in an independent regime or in the EU system?

Maya Lester: It is undoubtedly easier to do that at a Member State level. It should still happen at EU level, where there is far greater scope for consultation with the private sector than there is at the moment. If one is simply talking about a national regime, it is much easier to envisage consultation processes, perhaps even at the formative stage of sanctions, before they are imposed. Although complaints can be made about it, the new body OFSI is already better at outreach and

consultation. It is certainly making more effort to engage with the private sector than has happened before. That is obviously desirable. However, there is far more scope for guidance to be given about the meaning of sanctions and real engagement with areas of industry, businesses, charities and NGOs about the problems that they face in complying with sanctions. That could be significant and should, in my view, continue.

Ross Denton: It is also important to make the distinction between consulting business in the development of the sanctions regime and consulting business about the mechanics and operation of that regime. It is far more appropriate for businesses to be consulted about the mechanics of how the regimes work than about the development of those regimes.

One thing that we have seen in the development of OFSI powers that worries us slightly is a stated reluctance to give guidance. For some reason, OFSI seems to think that if it gives guidance on how sanctions work or are intended to be operated, that somehow leads businesses or persons to find their way around those sanctions. That is clearly not what businesses want. Businesses want to understand the rules so that they can comply with them and operate their systems lawfully, as opposed to finding a way to get around them. If you are talking about people at the edges of any regime, whether it relates to export control or even arms, they are not going to comply with the rules, whatever they are, so giving them guidance is neither here nor there. However, legitimate businesses that want to comply should be able to take some form of guidance from government agencies or at least have it provided to them in respect of certain issues.

The Earl of Oxford and Asquith: One common problem under the sanctions regimes, such as that relating to Syria, is the conflict between humanitarian exemptions and the financial mechanisms whereby you cannot move money around. Is that an area where OFSI could facilitate charities that want to operate within the humanitarian exemptions allowed under sanctions?

Ross Denton: That is possible. My understanding of the issue is not that it is not possible to get the licences; the problem is in seeing that the practices in country are carried through correctly. There is a degree of suspicion that, once the money is out of the charities' hands, it moves around. There is a high degree of scepticism. Whether that would change if there were a national, as opposed to an EU, regime, I am not sure, but it is certainly an issue.

Maya Lester: It is also partly a matter of legal powers. We have both commented that it might be possible to be more imaginative, expansive or flexible—this is also reflected in the Foreign and Commonwealth Office White Paper—on licensing than is currently the case in the European Union. Very often, the problem with humanitarian licensing is not that there are not the legal powers to grant licences for humanitarian aid; in fact, that is usually written into all sanctions measures, even at EU level. The problem is partly political and partly multilateral. For example, the

United States is a hugely significant player in world sanctions, and in a complex transaction where aid is going to a country such as Syria it is crucial that not only is a legal licence available in the EU but that comfort is given to financial institutions, correspondent banking relationships and others involved in the chain that there will not be problems with other sanctions jurisdictions.

This is a very practical way in which the different application of sanctions in different countries can lead to problems, and unless an institution is given complete comfort and confidence—this is also the case with Iran—that there will not be some extraterritorial effect of other sanctions regimes, notably but not only the United States', it is very difficult in practice to get aid to work as a licensing policy. That is why there has been talk, for example, of safe channels being developed and whether particular routes can be devised at a political as well as a legal level by which humanitarian exemptions can operate in a practical way. It will take some creative thinking beyond simply new licensing powers at national level.

Q8 **Lord Stirrup:** One of the common questions that runs across most Brexit-related issues is whether the UK has sufficient resources to cope with the additional administrative and other burdens that will apply after we are no longer in the EU. When it comes to the sanctions regime, I understand that compliance and enforcement are already national issues, but I am still not clear about the extent to which being part of the EU and sharing information within the EU structures—stand fast what Mr Denton said about intelligence—helps us with regard to compliance and enforcement and whether we would need to do more in that regard, and whether we would need more resources purely for setting policy for sanctions.

We have talked about the Office of Financial Sanctions Implementation. Will it need beefing up, or is it adequate as it is? What about all the other Government departments that are involved? Do they have sufficient resource to be able to set our own policy and to follow through on enforcement and implementation and the more complex linkages that will be required in Europe and elsewhere?

Ross Denton: Happily in this instance, and it is potentially a narrow instance, the UK is in a good position and might not need too many new resources to operate an independent sanctions regime. Of course, a lot of time and effort will be spent in developing that new sanctions regime from a statutory point of view and in getting the powers in place. That will obviously take a lot of effort that ordinarily would not be made.

However, once we are up and running outside the European Union with our own sanctions regime, I think we have the policy development and promulgation infrastructure, and we certainly have the enforcement infrastructure, in OFSI. If we change the licensing procedure, I do not know whether we will have the powers and the resources to do that. It depends where you go on that. If we stick with the very narrow gateways of the licensing procedures and processes, the effort involved will not

expand too much. If we have, as we suggest, a rather more expansive licensing regime, we would need to resource that.

Also, as we have discussed, if we try to stay close to the European Union and try to keep as many of those linkages as possible, we might have to beef up that part of our resources. In respect of sanctions generally, I think the UK is in a reasonably good place, actually. Ms Lester might disagree.

Maya Lester: I have a slightly different view. As I understand it, OFSI is relatively well resourced. I say "relatively", because the Office of Foreign Assets Control (OFAC), the US equivalent, is obviously vastly different in scale and has far greater resources than OFSI does. Resources are one thing. There is also resource in the sense of expertise, and there are aspects in which OFSI could have more expertise, for example in different business areas. Outreach could be better, and I am sure that more OFSI resourcing is a very desirable outcome.

Apart from OFSI and the resourcing side, our own sanctions regime will require the greater resourcing to an enormous degree of different government departments, notably the FCO but certainly not only the FCO, because not only will the United Kingdom have to engage in whatever level of co-operation continues when we are no longer a Member State, which could be significant, but the UK will suddenly have to make decisions about its own sanctions listing and sanctions design, which it has not done before, while also deciding which EU listings to implement and while continuing to operate the system of implementing the United Nations sanctions to deal with the inevitable huge increase in UK litigation that will result from UK decisions being made.

It therefore seems to me that, across different departments, if you were to ask the relevant departments they would identify very significant additional manpower and resources needed simply to manage the transition to a UK regime but also to keep going with our existing obligations.

Lord Stirrup: Just to be clear on your point about OFSI, are you saying that OFSI will need beefing up because of Brexit or because it would need beefing up anyway, even if we stayed in the EU?

Maya Lester: In my view, it needs beefing up anyway, but the beefing up of the other departments is more the result of Brexit.

Q9 **Lord Dubs:** How influential is the UK in the Financial Action Task Force? What role does its membership play with regard to its sanctions policy? Do you expect this to change after Brexit?

Ross Denton: Let me answer your questions in order. I think the UK plays a very active part in the Financial Action Task Force (FATF), but do not forget that it concentrates primarily on terrorist financing and money laundering and that there is a relatively limited crossover into the sanctions space. Our view is that there is likely to be little change in the UK's individual influence as part of the FATF. We would like to see more

co-ordination—I think this is mentioned in the Government's White Paper—on terrorist financing, money laundering and sanctions, at least in the UK system, to make them more integrated and in order to have a more joined-up approach to issues that have a high degree of crossover.

Maya Lester: FATF is a standard-setting recommendation-making body. The UK already has a role in it but also complies with FATF standards, and sanctions policy adds another layer. So we already comply, and we will continue to comply; the White Paper makes that clear. So I would not expect there to be an enormous change as regards FATF as a result of Brexit.

The Chairman: We have managed to get through all our questions on time, and I thank Mr Denton and Ms Lester very much for answering them very concisely and with a lot of detail. I remind our witnesses that the session was broadcast live, and we will of course make sure that you get the transcript to correct as necessary. You have been very insightful, and we could do with a good two or three hours of debate to get through more of the detail. Thank you very much for coming this morning.