

EXPLANATORY MEMORANDUM TO
THE AFGHANISTAN (SANCTIONS) (EU EXIT) REGULATIONS

2020 No. 948

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Foreign, Commonwealth and Development Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is intended to give effect to the UK's obligations under United Nations Security Council Resolution 2255 (2015). Resolution 2255 provides for a sanctions regime relating to Afghanistan, ("the UN regime") which is currently implemented through EU legislation and related UK legislation. UN sanctions were initially imposed in 1999, in response to the actions of the Taliban, including providing sanctuary and training for international terrorist groups. This instrument is intended to ensure that the UK continues to meet its obligations under the UN regime after the Transition Period ends on 31 December 2020. EU sanctions continue to apply in the UK during the Transition Period.
- 2.2 Under the UN regime, certain measures are imposed upon those named on the UN's 1988 Sanctions List. When this instrument comes into force it will replace, with substantially the same effect, relevant existing EU legislation and related UK legislation by which the UK's UN obligations are given effect in domestic law.

3. Matters of special interest to Parliament.

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is laid before Parliament under section 55(6) of the Sanctions and Anti-Money Laundering Act 2018 ("the Sanctions Act") and is subject to the negative procedure. This instrument does not come into force until a date to be appointed under separate regulations (see regulation 1(2)). This uses the power in section 56 of the Sanctions Act, which enables special provision to be made for the commencement of regulations where such provision is appropriate in consequence of, or otherwise in connection with, the withdrawal of the UK from the EU.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the whole of the UK.
- 4.2 Subject to paragraph 4.3, the territorial application of this instrument is the UK.

4.3 This instrument also applies to conduct by UK persons where that conduct is wholly or partly outside the UK, and some parts of it also apply to conduct by any person in the territorial sea adjacent to the UK. In addition, the maritime enforcement powers contained in Part 8 of this instrument apply in relation to British ships in international or foreign waters, ships without nationality in international waters and foreign ships in international waters.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 When the UK was a member of the European Union, its implementation of UN and other multilateral sanctions relied largely on the European Communities Act 1972. Each sanctions regime generally consisted of an EU Council Decision, a corresponding directly applicable EU Council Regulation, and related UK regulations made under section 2(2) of the European Communities Act 1972 and other domestic legislation. The European Union (Withdrawal) Act 2018 repealed the European Communities Act 1972. However, during the Transition Period, EU sanctions continue to apply in the UK in accordance with the Withdrawal Agreement: section 1A of the European Union (Withdrawal) Act 2018 (c.16)¹ saves the effect of the European Communities Act 1972 for the purposes of the Withdrawal Agreement. There are currently around 35 sanctions regimes that take effect in the UK. These include country-specific sanctions regimes, including in relation to Russia, DPRK and Iran, as well as regimes targeting Da'esh, Al Qaida and other terrorist groups.

6.2 The European Union (Withdrawal) Act 2018 provides for some EU sanctions law to form part of domestic law at the end of the Transition Period. However, that Act does not provide powers to substantially amend that retained EU law and it does not provide powers to lift sanctions or impose new sanctions. In addition, that Act does not retain the effect of certain sanctions (travel bans) which are in force by virtue of EU Council Decisions (rather than under EU Regulations). The Sanctions Act was introduced to address these issues by providing the UK with the legal framework necessary to allow the UK to implement sanctions autonomously.

6.3 Section 1 of the Sanctions Act enables sanctions regulations to be made for the purposes of compliance with United Nations obligations and other international obligations, as well as for a number of other purposes which include: furthering the prevention of terrorism; national security; promoting international peace and security; promoting compliance with international human rights law and respect for human rights; or furthering foreign policy objectives.

6.4 The UN sanctions regime imposed in relation to Afghanistan currently has effect in the UK through both EU instruments and related UK legislation. Using the power contained in section 54(2)(a) of the Sanctions Act, the following will be revoked and replaced by these Regulations: Council Regulation (EU) No 753/2011, concerning restrictive measures directed against certain individuals, groups, undertakings and entities in view of the situation in Afghanistan; the Export Control (Al-Qaida and Taliban Sanctions)

¹ As inserted by section 1 of the European Union (Withdrawal Agreement) Act 2020.

Regulations 2011 (S.I. 2011/2649); and the Afghanistan (Asset-Freezing) Regulations 2011 (S.I. 2011/1893).

7. Policy background

What is being done and why?

- 7.1 The UK is a supporter of sanctions in relation to Afghanistan at the UN Security Council. The current sanctions regime was initially established by UNSCR 1267 (1999) which included financial and transport sanctions on the Taliban. It formed part of the UN's response to the ongoing political and security challenges in Afghanistan. It was expanded by UNSCR 1333 (2000), to expand the transport sanctions and to freeze funds of Osama bin Laden and associates. UNSCR 1333 also imposed an arms embargo. UNSCR 1988 (2011) separated listings for the Taliban and its supporters from those for al-Qaida and Daesh, which remain under the ISIL (Da'esh) and Al Qaida (1267) sanctions regime, and imposed an asset freeze, travel ban and targeted arms embargo. UNSCR 2255 (2015) restated these measures as substantive obligations. 135 individuals and 5 entities have been designated by the Sanctions Committee established in accordance with paragraph 30 of UNSCR 1988 (the "Sanctions Committee"), for engaging in or providing support for acts which threaten the peace, security and stability of Afghanistan.
- 7.2 Bringing this sanctions regime into UK law using the powers in the Sanctions Act will enable all the sanctions measures to continue to operate effectively at the end of the Transition Period.
- 7.3 In accordance with section 18 of the Sanctions Act, a report has been produced that identifies the offences created by this instrument and the prohibitions and requirements to which they relate; explains why there are good reasons for those prohibitions and requirements to be enforceable by criminal proceedings; and explains why there are good reasons for the prescribed penalties in relation to those offences. Offences include, for example, contravening the principal prohibitions in the Regulations (e.g. breaching an asset-freeze) or trying to circumvent those principal prohibitions.
- 7.4 Part 2 of this instrument provides that anyone named by the UN Security Council or the Sanctions Committee is a designated person for the purposes of Part 3 (Finance) (including individuals, entities and organisations) and Part 4 (Trade). A person may be designated by the Sanctions Committee for reasons set out in the relevant UN Security Council Resolutions, which include participating in, financing, planning, recruiting for or otherwise supporting the acts or activities of designated individuals and others associated with the Taliban as a threat to the peace, security and stability of Afghanistan.
- 7.5 The names of designated persons are not included in this instrument. Persons designated by the UN are listed on the United Nations Security Council Consolidated List and designations will be publicised on gov.uk.
- 7.6 Part 3 of this instrument sets out financial sanctions measures that can be imposed on designated persons and offences which can be committed if the measures are not adhered to. Financial sanctions include an asset freeze, ensuring a designated person's funds and economic resources (non-monetary assets, such as property or vehicles) are not dealt with, and ensuring that funds and economic resources are not made available to or for the benefit of a designated person, either directly or indirectly.

- 7.7 Part 4 of this instrument sets out trade sanctions. These sanctions include restrictions on the trade in military goods and military technology, i.e. the goods and technology for the time being specified in Schedule 2 to the Export Control Order 2008, where the trade is with, or benefits, a designated person. They also include restrictions on the provision of technical assistance, financial services and funds, and brokering services relating to military goods and military technology to, or for the benefit of, a designated person. There are also restrictions on the provision to, or for the benefit of, a designated person, of technical assistance, armed personnel, financial services or funds, and brokering services which enable or facilitate the conduct of armed hostilities.
- 7.8 Part 5 of this instrument makes provision in respect of exceptions and licences that may apply or be available, as the case may be, in respect of prohibitions and requirements under this regime. For example, in relation to Treasury licences, a designated person can apply for a licence allowing funds to be released or made available in order to pay for basic needs, such as food. It states that the Treasury may issue licences to permit activity prohibited by Part 3 (Finance) where it is appropriate for one or more of the purposes set out in Schedule 2 of this instrument.
- 7.9 Part 8 of this instrument confers powers on maritime enforcement officers. These powers are analogous to maritime enforcement powers contained in existing legislation, such as Chapter 5 of the Policing and Crime Act 2017. The key distinction is that those powers are contingent on there being reasonable grounds to suspect that a criminal offence has been committed, whereas the purpose of these powers is to identify, seize and dispose of goods which are being dealt with in contravention, or deemed contravention, of certain trade sanctions.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act but it relates to the withdrawal of the UK from the EU. This is because this instrument replaces, with substantially the same effect, the existing EU Afghanistan sanctions regime.

9. Consolidation

- 9.1 This instrument does not consolidate previous instruments.

10. Consultation outcome

- 10.1 HMG ran a public consultation on the Sanctions Act which was open for nine weeks. Over 30,000 individuals and companies received a copy of the White Paper, and 34 individuals provided written responses. Government officials held a number of roundtables with key sectors, including financial services, trade bodies, the legal profession, NGOs and industry professionals and regulators. The main areas of concern raised in consultation responses were around the legal threshold for sanctions designations, the rights of designated persons to challenge their designations, and licensing procedures. All of these concerns were taken into account in the drafting of the Sanctions Act.
- 10.2 There is neither a requirement in the Sanctions Act for public consultation on instruments made under the Sanctions Act, nor is there any other legal obligation to consult in respect of this instrument. HMG will continue engagement with stakeholders on the implementation of UK sanctions.

11. Guidance

- 11.1 In accordance with section 43 of the Sanctions Act, guidance will be published in relation to prohibitions and requirements under these regulations. This guidance will be available on gov.uk before this instrument comes into force.

12. Impact

- 12.1 As this instrument maintains existing sanctions measures that are already applicable to UK business, charities and voluntary bodies through EU law, we assess that there is no new substantial impact. Businesses and charities will need to ensure that they are referring to and complying with the relevant UK law following the end of the Transition Period.
- 12.2 There is no significant impact on the public sector.
- 12.3 An Impact Assessment has not been produced for this instrument, as it is intended to ensure existing sanctions remain in place following EU exit. This instrument is intended to deliver substantially the same policy effects as the existing EU sanctions. An impact assessment was, however, produced for the primary legislation and can be found at <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0069/sanctions-and-anti-money-laundering-IA.pdf>. That assessment concluded that the introduction of the Sanctions Act, and statutory instruments under it to transfer existing regimes into UK law, would overall reduce uncertainty for business and would not result in significant costs or impact, apart from some familiarisation costs for businesses associated with adapting to the new legislative framework.

13. Regulating small business

- 13.1 This instrument applies to activities that are undertaken by small businesses.
- 13.2 This instrument is intended to continue the regulatory requirements under the existing EU sanctions regime. The Foreign, Commonwealth and Development Office does not believe it is possible to exempt smaller businesses from the requirements to comply with this instrument as this could provide a route for designated persons to evade sanctions.

14. Monitoring & review

- 14.1 The Sanctions Act requires regular reviews of this instrument. Under section 30 of the Act, the Secretary of State must consider whether or not this instrument is still appropriate for its stated purpose and lay an annual report before Parliament, confirming either that is the case or explaining what action has or will be taken in consequence of that review. As such, the Minister does not consider that a review clause in this instrument is appropriate.

15. Contact

- 15.1 Sarah Henson at the Foreign, Commonwealth and Development Office telephone: 020 7008 0951 or email: Sanctions.SIs@fcdo.gov.uk can be contacted with any queries regarding this instrument.
- 15.2 Lisa Maguire, Deputy Director at the Foreign, Commonwealth and Development Office, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Ahmad of Wimbledon, Minister of State at the Foreign, Commonwealth and Development Office, can confirm that this Explanatory Memorandum meets the required standard.