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Dear [illegible]

Sanctions and Anti-Money Laundering [Lords] Bill UK Finance Written Submission

We are pleased to respond to this call for written evidence to the Public Bill Committee on the Sanctions and Anti-Money Laundering Bill ("the Bill"). At the outset, we wish to highlight that UK Finance and our members recognise that decisions on whether to impose sanctions as a foreign policy and national security tool is a matter for the Government. As such, our response is aimed at informing the viability of implementation to ensure the future application of UK sanctions measures can achieve their intended objectives whilst being practical to apply.

Background

1. UK Finance represents nearly 300 of the leading firms providing finance, banking, markets and payments-related services in or from the UK. UK Finance has been created by combining the activities of the Asset Based Finance Association, the British Bankers' Association, the Council of Mortgage Lenders, Financial Fraud Action UK, Payments UK and the UK Cards Association.

2. Our members are large and small, national and regional, domestic and international, corporate and mutual, retail and wholesale, physical and virtual, banks and non-banks. Our members' customers are individuals, corporates, charities, clubs, associations and government bodies, served domestically and cross-border.

3. These customers access a wide range of financial and advisory products and services, essential to their day-to-day activities. We support our members to ensure the UK remains a global leader in financial services as well as keeping their customers' interests at the heart of what we do. We also aim to make the UK the safest and most transparent place to do business.

4. UK Finance is the UK representative on a number of international trade associations including the European Banking Federation and the International Banking Federation.

5. UK Finance has a well-established and globally-recognised sanctions panel of European and international banks which undertake extensive work and liaisons with EU and US counterparts. At an international level, we have been working closely with the United Nations, the EU and Government officials on a range of sanctions implementation matters, such as: the easing of Iranian nuclear sanctions, Russia, and humanitarian issues. You may be interested to learn that UK Finance will have forthcoming meetings with international counterparts on navigating humanitarian permissions within licensing, addressing North Korean sanctions evasion, and discussing the impact of US-Russian sanctions.

6. UK Finance is committed to support the Government's effort on AML and the wider economic crime regime. The financial services sector has committed to support this effort through investing in new approaches to improve the efficiency and effectiveness in disrupting financial crime and protecting customers, including participation in the Joint Money Laundering Intelligence Taskforce ("JMLIT") and the reform of the Suspicious Activity Reporting ("SARs") regime.

7. We want to ensure that the domestic regime maintains its reputation for an effective and robust AML regime in line with international best practice standards, both through the effective implementation of the Fourth Money Laundering Directive ("4AMLD") and responding to the ongoing mutual evaluation review of the UK by the Financial Action Task Force ("FATF").

8. Regarding our work within the UK sanctions policy landscape, we responded to the FCO's Sanctions White Paper, submitted written evidence to the recent House of Lords European Union Committee inquiry on sanctions, and published a Parliamentary briefing on the impact of Brexit on sanctions to peers and MPs.

9. As we have been engaged on all aspects of the Government's sanctions and AML strategy, UK Finance and our members are well placed to recognise the crucial importance for the Government to have and implement an effective and proportionate sanctions and AML regime. The main points that members would like UK Finance to reinforce are specifically categorised below.

Guidance

10. The Bill text indicates that guidance accompanying new sanction regimes must be issued, however there is no certainty regarding what it will contain as section 37(2) only specifies what it "may" include rather than what it "must" include.

11. We welcome the Government's commitment to issue guidance and we view this as a major step forward, however our members strongly urge a more precise requirement of what guidance must be issued. This is especially the case given that the current available Government guidance is generally considered to be extremely limited in scope, relatively outdated and does not sufficiently cover the full breadth of sanctions obligations.

12. We further believe that Government should be obligated to issue guidance on civilian payments and humanitarian activity exempt from prohibitions and requirements imposed by regulations.

13. The Office of Financial Sanctions Implementation ("OFSI") has recently issued guidance in respect to NGOs and their sanctions obligations. However, this guidance deals with legal obligations at a general level and is not regime or programme specific.

14. Moreover, to date no guidance has been issued that specifically deals with regimes such as Syria where there are broad based financial sanctions in place alongside a major humanitarian situation. Since 2012, the banking sector has proactively, and unsuccessfully, called for guidance to help address the very significant challenges of sending funds to Syria in support of humanitarian activity.

15. Considering the billions of international humanitarian funds mobilised to date in support of the Syrian civilian population, the ability to find safe, transparent and dependable banking and payment channels that covers the whole of Syria has become an international imperative priority for the majority of humanitarian actors.

16. Additionally, ensuring a shared view between the Government, banks and NGOs on how best to risk manage such payments and identification of viable avenues for processing such payments will ensure humanitarian funds are able to reach their intended destination whilst also strengthening the wider foreign policy effectiveness of the prohibitions imposed.

A Forward Leaning Approach to Licensing

17. Now is an opportune time to create a domestic licensing regime which responds to the sanctions legislation in a comprehensive and coherent manner. This is viewed as especially important if the UK wishes to remain competitive within international trade and global finance.

18. Recognising that UK–EU commercial activity may require multiple licences, consideration should be given to licences required from EU member states, i.e. will the EU be able to grant EU licences for activity in multiple member states and the UK or will licences be required from each EU member state where the activity would otherwise be prohibited?

19. The Bill appears to offer the ability for the UK to consider greater use of general licences or broader project-based licences for at least transactional related activities (e.g. humanitarian relief activity in otherwise sanctioned territories, or via interaction with otherwise sanctioned governments).

20. In doing so, it is important that general licences or broader project-based licences permit activity by both UK and non-UK persons (and then permit UK institutions to perform activities ordinarily incidental to the permitted/licensed activity, such as processing a payment for the licensed activity).

21. We would further stress that future general licensing powers should be broad and allow OFSI to issue licences where it is in the public interest to do so.

22. UK Finance members have increasingly articulated that the current framework permitting humanitarian transactions into sanctioned and conflict environments needs to be reconsidered and updated. We propose that a new equilibrium be found that recognises the strategic importance of facilitating both humanitarian aid and permissible civilian transaction to high risk jurisdictions subject to economic sanctions, whilst balancing expectations of appropriate sanctions compliance and counter terrorist financing controls.

23. Currently banks and their international charity clients are required to navigate a combination of complex multi-jurisdictional regulatory guidance and an inconsistent licensing regime. This has led to a significant impact on the funding of legitimate humanitarian projects into certain conflict zones and other high-risk countries subject to sanctions.

24. In addition, the broader financial crime risks arising from FATF citing non-profit organisations as targets of terrorist financing, has led to non-profit organisations increasingly becoming identified as higher risk clients subject to enhanced due diligence and in some cases, account closure.

25. In response to the challenges of processing legitimate payments into sanctioned environments UK Finance members have been at the forefront of advancing a range of initiatives with key stakeholders. These initiatives have explored new opportunities for creating a more conducive international regulatory and legal environment in support of permissible humanitarian transactions.

26. We believe that as the UK will be required to develop a new approach towards licensing, this will offer a clear opportunity to advance a new 'fit for purpose' and forward leaning regime.

27. Where governments have aligned foreign policy objectives to impose sanctions on a given country, consideration should be given to developing a framework that offers a degree of mutual recognition for humanitarian licenses issued by 'like-minded' competent authorities. This could be undertaken on a case by case basis, limited to certain situations and could be accompanied by a country-to-country notification arrangement so as to protect the integrity of the licensing framework.

28. For example, at the moment processing humanitarian transactions to Syria is likely to include some type of exposure to multiple sanctions authorities across the EU and the US. This can be time consuming, costly and increasingly impacts on the risk appetite of banks to process such payments.

29. We also believe it would be useful for future consideration to be given to exploring how the Government can work with like-minded countries, e.g. EU member states and the US, to streamline humanitarian licensing. This recognises that payments and banking activity are international in nature and will thus involve a range of competent authorities.

30. Essentially, our proposal is to future-proof the Bill for promoting multilateral licensing cohesion where this is deemed desirable and meets the desired foreign policy objectives of those involved.

Enhanced Parliamentary Reporting

31. Current EU sanctions scrutiny on the whole is fairly narrow and mostly focuses on whether the reasons why sanctions have been imposed remain relevant.

32. We propose that to ensure sufficient parliamentary scrutiny there should be a requirement for Government to lay before Parliament every 12 months a report on the use of both humanitarian and non-humanitarian exemptions and licensing as proposed in Amendment NC5 to the Bill.

33. We recognise that this will create an extra administrative burden. However, the key advantage is that such a framework would help Parliament identify areas of potential concern in the technical application of individual sanction regimes. For example, the types of issues that would likely be flagged could include the speed of processing humanitarian licences, narrow and inconsistent approaches to licensing activity, limited access to relevant banking facilities etc.

34. A similar framework is in place via the Justice and Security Act 2013, part of the Act requires Government to report to Parliament on closed material proceedings. We therefore believe this framework could be helpfully expanded to cover sanctions implementation matters.

Defining UK Nexus

35. To determine the true impact of an independent sanctions regime it will be critical for the UK nexus from a sanctions perspective to be clearly defined. For example, there needs to clarity on: 1) the legal basis for considering foreign-registered subsidiaries of UK companies to constitute a UK nexus and; 2) financial products brought on the UK markets but held or used overseas.

36. Moreover, the recent Government public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions provides a reference to GBP overseas transactions that clear in the UK. However, it is not clear who may ultimately be held responsible for breaching sanctions under a UK regime, or who has the freezing obligation if, say, a Japanese company pays GBP to a GBP account held at a German bank by a UK designated person and which clears through Bank ABC in UK.

Reporting Obligations

37. In parallel to defining the UK nexus, we have recommended to the Government the need to set out a clearer articulation of their intended reporting obligations to be placed on industry, particularly in cases where: the situation does not involve frozen assets, constitutes a clear sanctions breach, is a rejected payment, or a firm becomes aware another firm may have breached sanctions.

38. The Government's public consultation articulates that the new sanctions powers will include reporting obligations, including to report to Government if they know, or suspect, that a current customer, or any customer, in the previous five years, is a sanctioned person.

39. In a number of situations, it may be unlikely that a bank will know, or suspect, that it held a customer relationship with a designated person in the previous five years. The only way it could ascertain this, is to undertake a look back over all its closed accounts in the past five years, but if there was no suspicion, or it didn't know, it would not need to do that.

NC9 – Failure to prevent money laundering

40. New Clause 9 would make it an offence if a relevant body failed to put in place adequate procedures to prevent a person associated with it from carrying out a money laundering facilitation.

41. We consider that existing requirements already provide for effective deterrence of money laundering facilitation, including substantial corporate sanctions for financial crime failings and the introduction through the Senior Managers and Certification Regime ("SM&CR") of a prescribed responsibility for senior managers in all financial services firms to ensure that their policies and procedures counter the risk that the firm might be used to further financial crime.

42. It is important to recognise that the money laundering regime under sections 327-329 of the Proceeds of Crime Act 2002 ("POCA") is predicated on the basis that banks cannot prevent and detect all money laundering activity. Banks are therefore required, through their nominated officers and supporting staff, to identify and report suspicious activity as soon as practicable once it has been identified. The basis for reporting is a subjective assessment of whether activity is suspicious or not. It is difficult to understand any justification for prosecuting a corporate for a judgment call made by an employee (at any level within the organisation), or the failure to make such a judgment call.

43. It is acknowledged that in egregious cases, where there is a persistent failure to report suspicions of money laundering, this may be an indicator of a deficiency in a firm's systems and controls. However, we consider there are already sufficient sanctions and deterrents in place in the form of the FCA's Senior Management. Arrangements, Systems and. Controls ("SYSC") requirements, failure to comply with which may incur both regulatory sanctions and/or criminal prosecution under the Money Laundering Regulations ("MLR").

44. In addition, there already exists the ability to prosecute firms for offences committed under the Financial Services & Markets Act 2000 ("FSMA"). Section 400 of FSMA sets out the basis for prosecuting a corporate entity for offences under FSMA where it can be demonstrated these have been committed with "the consent or connivance" or is "attributable to any neglect" on the part of an officer of the corporate. An officer is defined as "a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the [company], or a person purporting to act in any such capacity" and "an individual who is a controller" of the company. The ability to prosecute extends beyond corporates to partnerships.

45. We therefore consider that criminal liability for the principal money laundering offences under POCA is already adequately addressed by existing regulation and legislation and that these are not appropriate for inclusion within the scope of a new corporate criminal liability provision within the Sanctions and Anti-Money Laundering Bill.

46. We also consider that there are risks of significant unintended consequences if new criminal requirements for economic crime prevention are overlaid on current regulatory requirements.

47. Overlaying new liabilities on existing regulatory requirements may decrease banks' commercial risk appetite for dealing with clients in sectors viewed as higher risk (including those identified as such in the Government's National Risk Assessment). The banking sector is working with the Government on a wide range of public policy objectives, such as expanding access to banking, and we are concerned that impacts on banks' commercial risk appetite could run contrary to these initiatives.

48. For example, creating a corporate 'failure to prevent' liability for money laundering could unbalance the SM&CR by in practice reinstating the presumption of responsibility. We believe that effectively reintroducing the reverse burden of proof would reduce the effectiveness of corporate preventive measures and change focus and behaviour in a way that reduces broader and collective risk mitigation.

49. Pursuing a new 'failure to prevent' provision would focus on activity that delivers little in terms of outcomes on identifying and preventing economic crime, and would fetter expansion of successful initiatives being under taken elsewhere. The banking sector has committed to support the Government work to tackle and prevent economic crime. This includes work to strengthen financial crime regulation, such as through implementation of the 4AMLD and amendments to this Directive, closer partnership working between law enforcement and banks, and the Criminal Finances Act 2017 which will strengthen information sharing powers.

Future EU-UK Sanctions Cooperation

50. Our members note indications from Government that the UK will not seek to diverge from current EU sanctions policy and will continue to coordinate with the EU and other international partners, including the US.

51. We overwhelmingly support this approach but also recognise that differing EU–UK legal structures and political foreign policy priorities will, over time, result in a likely element of EU–UK sanctions divergence. We further recognise that operating outside the current EU framework will enable, and may somewhat necessitate, a greater flexibility in the design of sanctions programmes.

52. Overwhelming, EU harmonisation is viewed by our members to have heightened the impact of sanctions on designated entities and individuals no matter where in the EU these designated parties are located or where they access finance services. Post-Brexit divergence between EU and UK sanctions would create uncertainty for financial institutions in respect of compliance, and we believe would weaken the overall effectiveness of both EU and UK sanctions implementation.

53. As sanctions practices develop and evolve, ensuring EU–UK foreign policy cohesion should remain a central priority. We propose that in moving forwards an option for ensuing future cohesion could potentially involve some type of decision-making apparatus involving both EU and UK sanction authorities.

54. The aim, wherever possible, should be to preserve EU–UK harmonised approaches for designing, implementing, lifting and enforcing sanctions. We further stress that continuing EU–UK interaction will also provide a stronger platform for reducing divergence of approach with other key actors where political interests may not always be aligned. For example, EU–US diversion of sanctions policy towards Iran and Russia.

Conclusion

55. Our members welcome the opportunity to contribute to this important call for evidence and we trust our response helps inform the Committee's thinking. In moving forwards, UK Finance remains committed to working with both UK and EU authorities to help advance a broad-based understanding on the sanctions implications that may arise once the UK has withdrawn from the EU.

56. As Chair of the European Banking Federation sanctions expert group, UK Finance will continue to explore future options for cooperation with our European counterparts.

57. As ever we stand ready to assist with further deliberations and would be happy to provide further input to the Committee and the Government as required.

Yours sincerely,

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