

EXPLANATORY MEMORANDUM TO

THE SOUTH SUDAN (SANCTIONS) (EU EXIT) REGULATIONS 2019

2019 No. 438

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Foreign and Commonwealth 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 These Regulations are intended to ensure that the UK can operate an effective sanctions regime in relation to South Sudan after the UK leaves the EU. When these Regulations come into force they will replace, with substantially the same effect, the EU sanctions regime relating to South Sudan that is currently in force under EU legislation and related UK regulations. This sanctions regime gives effect to the UK's obligations under United Nations Security Council resolutions 2206 and 2428 and is aimed at bringing peace, stability and an end to the conflicts in South Sudan.

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 (“**the Sanctions Act**”) and is subject to the negative procedure. This instrument does not come into force until a date or dates to be appointed in separate regulations made under section 56 of the Sanctions Act (see regulation 1(2)). Section 56 of the Sanctions Act enables special provision to be made for the commencement of sanctions 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 outside the UK. In addition, the maritime enforcement powers contained in Part 9 of this instrument apply in relation to British ships in foreign or international 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 The UK's implementation of United Nations (UN) and other multilateral sanctions currently relies largely on the European Communities Act 1972. Each sanctions regime generally consists 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. There are currently around 35 sanctions regimes that take effect in the UK under EU law and associated UK secondary legislation. These include country-specific sanctions regimes, including in relation to Russia, the Democratic People's Republic of Korea (DPRK) and Iran, as well as regimes targeting ISIL (Da'esh), Al-Qaida and other terrorist groups.
- 6.2 The European Union (Withdrawal) Act 2018 will repeal the European Communities Act 1972 and provides for some EU sanctions law to form part of domestic law after the UK has left the EU. 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 Council 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 UN 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 the resolution of armed conflicts or the protection of citizens in conflict zones; or promoting compliance with international humanitarian law.
- 6.4 The EU sanctions regime imposed on South Sudan for the purpose of encouraging the resolution of the political crisis and armed conflicts in South Sudan currently has effect in the UK through both EU instruments and related UK regulations. Using the power contained in section 54(2)(a) of the Sanctions Act, Council Regulation (EU) No 2015/735 of 7 May 2015 (to the extent that it constitutes retained EU law) and the South Sudan (European Union Financial Sanctions) (No. 2) Regulations 2015 will be revoked and the Export Control (Sudan, South Sudan and Central African Republic Sanctions) Regulations 2014 will be amended to exclude references to South Sudan; these instruments will in effect be replaced by these Regulations.

7. Policy background

What is being done and why?

- 7.1 Her Majesty's Government's (HMG) policy on South Sudan includes the use of sanctions to encourage the resolution of the political crisis and armed conflicts in South Sudan. Sanctions are a vital lever for HMG to hold accountable those who seek to undermine the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) done at Addis Ababa on 17 August 2015, and the revitalised ARCSS (R-ARCSS) done at Addis Ababa on 12 September 2018 and wider efforts to bring

peace, stability and an end to the suffering of the people of South Sudan. Sanctions signal the UK's concern over the lack of accountability for violations of international humanitarian law and in relation to the perpetrators of human rights violations and abuses. Sanctions also tackle the culture of impunity surrounding ceasefire violations and continued offensives against civilians.

- 7.2 Corruption is endemic in South Sudan, enabling and sustaining the conflict. Chapter Four of the R-ARCSS promotes transparency and accountability of resource management. Sanctions on those who fuel corruption in South Sudan by participating in the misappropriation of State funds or the illicit exploitation of natural resources are part of HMG's policy to drive positive behaviour change, uphold the R-ARCSS Peace Agreement and encourage implementation of its provisions in full to support peace and stability in South Sudan.
- 7.3 The EU first imposed sanctions on South Sudan in 2014 for the purpose of encouraging an inclusive and sustainable peace in South Sudan and to prevent the commission of serious human rights violations. The EU adopted sanctions to target persons complicit in or responsible for undermining the peace, stability and security of South Sudan. The purpose of the sanctions imposed by that regime was to support the implementation of ceasefire and peace agreements and to hold those who commit human rights violations to account. In view of the continuing conflicts, the UN Security Council adopted Resolution 2206 in 2015 which established the framework for targeted UN sanctions in South Sudan. In 2018, Resolution 2428 imposed a mandatory arms embargo on South Sudan. These Regulations contain measures the UK is obliged, as a matter of international law, to implement in order to meet its UN obligations, as well as measures implemented otherwise than for the purpose of compliance with UN obligations.
- 7.4 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 after the UK leaves the EU, as well as enabling HMG to amend and lift the sanctions, or impose further sanctions, autonomously.
- 7.5 This instrument is accompanied by two statutory reports that are required to be published under the Sanctions Act.
- 7.6 Firstly, and in accordance with section 2(4) of the Sanctions Act, a report has been produced to explain why the Minister considers that the carrying out of the stated purposes of this instrument would meet one or more of the discretionary purposes (i.e. purposes other than implementing UN obligations) set out in the Sanctions Act; why there are good reasons to pursue those purposes; and why the Minister considers that the imposition of sanctions is a reasonable course of action for those purposes.
- 7.7 Secondly, and in accordance with section 18(2) of the Sanctions Act, a report has been produced that identifies the offences contained in this instrument; explains why there are good reasons for those offences; and explains why there are good reasons for the prescribed penalties in relation to those offences. Offences include, for example, breaching the prohibition on exporting military goods to South Sudan or failing to comply with the conditions of a licence.
- 7.8 Part 2 of this instrument deals with the designation of persons (including individuals, entities and organisations) under the sanctions regime. It provides that any person for the time being named by the Security Council or its Sanctions Committee for the purposes of paragraph 12 of UN Security Council resolution 2206 (2015) is a designated person for the purposes of the asset-freezing and other financial measures. It also lists

the criteria against which a Minister may make a decision to designate a person as being subject to a travel ban or asset freeze (“**designated persons**”), including where an individual is or has been involved in actions, policies or activities which threaten the peace, stability and security of South Sudan or undermine efforts to resolve the political crisis and armed conflicts in South Sudan.

- 7.9 The names of designated persons are not included in this instrument. The names of those designated by the Secretary of State will be held on a separate administrative list on gov.uk to enable immediate publication following a decision to make or amend a designation. This limits the opportunity for designated persons to remove assets from the UK. Persons designated by the UN are listed on the United Nations Security Council Consolidated List and designations will also be publicised on gov.uk.
- 7.10 Part 3 of the instrument sets out the financial sanctions measures that are imposed on designated persons. Financial sanctions include freezing a designated person’s funds and economic resources (non-monetary assets, such as property or vehicles) and ensuring that funds and economic resources are not made available to or for the benefit of a designated person, either directly or indirectly. The instrument sets out exceptions and licensing derogations from these sanctions that will be applicable or available, as the case may be, under certain prescribed circumstances, such as to enable those listed to have access to funds, for example, to satisfy their basic needs.
- 7.11 Part 4 of the instrument sets out the effect of immigration measures made under this instrument. A designation under regulation 5 of the instrument means that section 8B of the Immigration Act 1971 then applies to the person: a designated person is banned from travelling to or via the UK and any permission to stay in the UK that they may have is cancelled. In certain circumstances, the Secretary of State may direct, on an individual basis, that the travel ban does not apply, for example for the purposes of attending UN meetings to further the objective of peace and national reconciliation in South Sudan. The travel ban in respect of persons named on the UN’s South Sudan Sanctions List is implemented through section 8B of the Immigration Act 1971, and not these Regulations. The travel ban in respect of persons named on the UN’s South Sudan Sanctions List is implemented through section 8B of the Immigration Act 1971, and not these Regulations.
- 7.12 Part 5 of the 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. They also include restrictions on the provision of technical assistance, financial services and funds, and brokering services related to military goods and technology, and relating to enabling or facilitating the conduct of armed hostilities in South Sudan.
- 7.13 Part 6 of the 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, and in relation to Treasury licences, a designated person can apply for a licence allowing funds to be released in order to pay for essential goods or services such as food. It states that the Treasury may issue licences to permit activity prohibited by Part 3 (Finance) where it is appropriate for a purpose set out in Schedule 2 of the instrument. Part 6 also states that licences provided by the Secretary of State may permit activity prohibited by Part 5 (Trade). Guidance will provide further detail about licencing.

7.14 Part 9 of the 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 sanctions regime in respect of South Sudan.

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 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 Act, guidance will be published in relation to the prohibitions and requirements under these Regulations. This guidance will be available on gov.uk before these Regulations come into force.

12. Impact

12.1 As this instrument in effect 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 once the UK leaves the EU.

12.2 There is no significant impact on the public sector.

12.3 An Impact Assessment has not been produced for these Regulations, as they are 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 These Regulations apply to activities that are undertaken by small businesses.
- 13.2 These Regulations are intended to continue the regulatory requirements under the existing EU sanctions regime. The Foreign and Commonwealth Office does not believe it is possible to exempt smaller businesses from the requirements to comply with these Regulations as this could provide a route for the circumvention or evasion of sanctions.

14. Monitoring & review

- 14.1 The Sanctions Act requires regular reviews of these Regulations. Under section 30 of the Act, the Secretary of State must consider whether or not these Regulations are still appropriate for their 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 these Regulations is appropriate.

15. Contact

- 15.1 Clare Kendall-Bohoslawec at the Foreign and Commonwealth Office telephone: 020 7008 8637 or email: Sanctions.SIs@fco.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Qudsi Rasheed, Deputy Director at the Foreign and Commonwealth Office, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Mark Field MP, Minister of State at the Foreign and Commonwealth Office, can confirm that this Explanatory Memorandum meets the required standard.