EXPLANATORY MEMORANDUM TO

THE CYBER (SANCTIONS) (EU EXIT) REGULATIONS

2020 No. 597

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 cyber sanctions regime after the end of the Transition Period. When these Regulations come into force they will replace, with a similar effect, the EU sanctions regime relating to cyber security that is currently in force under EU legislation and related UK regulations. The EU sanctions regime is aimed at deterring and responding to cyber-attacks or attempted cyber-attacks with a significant or potentially significant effect which constitute an external threat to the European Union or its Member States; it also covers similar cyber-attacks in respect of third States or international organisations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The instrument is being laid before Parliament under section 55(3) of the Sanctions and Anti-Money Laundering Act 2018 ("the Sanctions Act") and is subject to the made affirmative procedure. It 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. Section 56(5) of the Sanctions Act provides that the instrument must be approved by resolution of both Houses within 60 days of the Regulations coming into force for it to continue to have effect.

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 The territorial application of this instrument includes Scotland and Northern Ireland.

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.

5. European Convention on Human Rights

5.1 The Minister of State for South Asia and the Commonwealth at the Foreign and Commonwealth Office, Lord Ahmad of Wimbledon, has made the following statement regarding Human Rights:

"In my view the provisions of the Cyber (Sanctions) (EU Exit) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 When the UK was a member of the European Union, the UK's 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) 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 and thematic sanctions regimes, including in relation to Russia, DPRK and counter-terrorism.

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 EU cyber sanctions regime imposed for the purpose of preventing and responding to cyber-attacks, currently has effect in the UK through both EU instruments and related UK regulations. Using the power contained in section 54(2) of the Sanctions Act, the following will be revoked and replaced by these Regulations: Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States; and the Cyber-Attacks (Asset-Freezing) Regulations 2019 (S.I. 2019/956).

7. Policy background

What is being done and why?

7.1 Pursuing these purposes will help address the ongoing and increased threat in cyberspace. Cyber attacks know no international boundaries and have grown in terms

of intensity, complexity and severity. Malicious actors in cyberspace are active and able to execute successfully operations on countries affecting critical national infrastructure, democratic institutions, businesses and the media. These actors are demonstrating an increased risk appetite, be it for economic, strategic, regional or financial gain. Over the last few years there has been a rise in the scale and impact of operations, with co-ordinated campaigns as opposed to single incidents that potentially allowed wide-ranging access to thousands of victims in countries globally and causing significant financial and material damage. The purpose of the sanctions regime is to deter those who are, or considering, conducting or directing relevant cyber activity that undermines, or is intended to undermine, the integrity, prosperity or security of the United Kingdom or a country other than the United Kingdom; international organisations; and non-governmental organisations whose purposes relate to the governance of international sport or the Internet. It will do this by imposing a meaningful cost and signalling at a political level that malicious cyber activity has consequences. This will help change the behaviour of those responsible for malicious cyber activity.

7.2 The EU introduced a cyber sanctions regime in May 2019. These Regulations are intended to deliver similar policy effects to that existing EU sanctions framework.

7.3 Bringing this sanctions regime into UK law using the powers in the Sanctions Act will enable the existing sanctions framework to continue to operate effectively after the UK leaves the EU, as well as enabling HMG to make designations or amend or lift the framework autonomously.

7.4 This instrument is accompanied by two statutory reports that are required to be published under the Sanctions Act.

7.5 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 purpose of this instrument would meet one or more of the discretionary purposes set out in the Sanctions Act; why there are good reasons to pursue that purpose; and why the Minister considers that the imposition of sanctions is a reasonable course of action for that purpose.

7.6 Secondly, and in accordance with section 18 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 or circumventing the substantive financial sanctions measures or providing false information for the purpose of obtaining a Treasury licence.

7.7 Part 2 of this instrument deals with the designation of persons (including individuals, entities and organisations) under the sanctions regime. It lists the criteria against which the Secretary of State may make a decision to designate a person as being subject to a travel ban or asset freeze ("designated persons"). The names of any designated persons 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.

7.8 Part 3 of the instrument sets out financial sanctions measures that can be 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.

7.9 Part 4 of the instrument sets out the effect of immigration measures made under this instrument. A designation for the purpose of regulation 17 (immigration) 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.

7.10 Part 5 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. Guidance will provide further detail about licensing.

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 similar effect, the existing EU cyber 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 Act.

10.2 There is neither a requirement in the 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 maintains with similar effect the existing sanctions framework that is 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 EU law ceases to apply at 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 these Regulations, as the instrument is intended to ensure the existing sanctions framework remains in place following EU exit. This instrument is intended to deliver a similar policy effect as the existing EU sanctions framework. 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 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 with similar effect 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 Oliver Case at the Foreign and Commonwealth Office telephone: 020 7008 0951 or email: Sanctions.SIs@fco.gov.uk can be contacted with any queries regarding the instrument.

15.2 Lisa Maguire, Deputy Director at the Foreign and Commonwealth Office, can confirm that this Explanatory Memorandum meets the required standard.

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