

# White Collar Defense and Investigations



September 4, 2024

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## 'Control' Under the UK's Sanctions: The Emergence of Clarity?

### Introduction

Russia's invasion of Ukraine has resulted in unprecedented judicial scrutiny of the UK's sanctions regulations. While the judgments delivered in many cases have provided companies with needed certainty on some topics, the courts have struggled to provide clarity on the key issue of when an entity is indirectly targeted by sanctions due to a targeted person *controlling* an entity. This issue can be of central importance in a variety of contexts, such as when considering if contractual rights not to pay are triggered, whether shares or other assets should be treated as frozen and, ultimately, whether any civil or criminal liability may flow from a particular course of action.<sup>1</sup>

In this article we examine a number of recent judgments that demonstrate the difficulties the courts are finding in reconciling the broad drafting of the UK's control test with the UK government's decision to target a large number of prominent Russian public officials, including President Vladimir Putin.

### Legal Test

Under the UK's sanctions regulations, including the Russia (Sanctions) (EU Exit) Regulations 2019 (the **Russia Regulations**), the UK imposes restrictions on:

- Dealing with funds and economic resources owned, held or controlled by a designated person (*i.e.*, for this purpose, an asset freeze target).
- Making funds or economic resources available to or for the benefit of a designated person.

These restrictions extend to entities owned or controlled, directly or indirectly, by a designated person.

The UK's sanctions regulations set out two conditions for establishing "ownership" and "control":

- The first condition is that a person holds, directly or indirectly, more than 50% of the shares or voting rights in an entity, or the right to appoint or remove a majority of the board of directors of the entity.
- The second condition is that it is reasonable, with regard to all the circumstances, to expect that the person would (if they chose to) be able, in most cases or in significant

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<sup>1</sup> This client alert is for informational purposes only and does not constitute legal advice. Complex assessments often have to be made as to which sanctions regime applies in any given instance, given the multinational touch points of many entities and individuals. In that regard, given the complex and dynamic nature of these sanctions regimes, there may be developments not captured in this summary. Moreover, while the summary was accurate when written, it may become inaccurate over time given developments. For all of these reasons, you should consult with a qualified attorney before making any judgments relating to sanctions, as there are potentially severe consequences of failing to adhere fully to sanctions restrictions.

# 'Control' Under the UK's Sanctions: The Emergence of Clarity?

respects, by whatever means and whether directly or indirectly, to achieve the result that the entity's affairs are conducted in accordance with their wishes.

The UK government has issued [guidance on these tests](#) that includes setting out a nonexhaustive set of circumstances where it considers that the tests may be met. The government also issued guidance on its expectations regarding the level of [due diligence that companies should undertake](#) when assessing whether these tests are met.<sup>2</sup>

## In a State of Flux — The 'Control' Test

The English courts have considered the interpretation of the "control" test under the Russia Regulations in a number of recent cases. While the court has sought to clarify and provide guidance regarding the interpretation of the test, the judgments have led to considerable uncertainty for companies seeking to navigate this complex area and to comply with UK sanctions.

## The Judgment in *Mints*<sup>3</sup>

The background to *Mints* can be found in our previous [alert published on 20 October 2023](#). In summary, *Mints* relates to a claim brought by two Russian banks — PJSC National Bank Trust (**NBT**) and PJSC Bank Otkritie Financial Corporation (**Otkritie**) — against four defendants whom they alleged conspired with representatives of the banks to enter into uncommercial transactions with companies linked to the defendants. The defendants sought a stay of the proceedings on the basis that Otkritie — which has been listed as a designated person by the UK government since 28 February 2022 — and NBT were designated persons.

In relation to NBT, the defendants alleged that — given the bank was almost solely owned by the Central Bank of Russia — NBT was "controlled" by two designated persons, namely President Putin and Elvira Nabiullina, the governor of the Central Bank of Russia. In proceedings before the High Court of Justice and the UK Court of Appeal (**CoA**), the two courts took conflicting *obiter* (nonbinding) positions: While the High Court disagreed with the defendants, the CoA stated that there was a reasonable suspicion that President Putin could "call the shots" with regards to the Central Bank of Russia's activities, and therefore those of NBT. The CoA stated that the second condition (see above) for establishing ownership and control has been phrased broadly

and "does not have any limit as to the means or mechanisms by which a designated person is able to achieve [control]."<sup>4</sup>

The CoA acknowledged that this broad interpretation could have significant — and potentially impractical — consequences, given that President Putin could be "deemed to control everything in Russia."<sup>5</sup> In practice, the interpretation would mean that UK persons and entities would be prohibited from transacting with all entities within Russia except under licence or pursuant to an exception under the Russia Regulations.

The UK Supreme Court granted permission to appeal, and the case is due to be heard in March 2025. The issue of control is one of the issues expected to be argued.

## The Judgment in *Litasco*<sup>6</sup>

In the *Litasco* case, the High Court considered the CoA's nonbinding comments in *Mints* related to the control test in the context of the *Litasco* dispute. The *Litasco* dispute related to the sale of crude oil by Litasco to Der Mond Oil and Gas Africa SA (**Der Mond**) under a contract dated April 2021. Litasco had delivered crude oil under the contract but Der Mond had not made payment. While the matter was a contractual dispute related to nonpayment for delivery of crude oil under the contract, the court had to consider the issue of "control."

The contract included a clause that permitted either party to suspend performance if any sanctions became directly or indirectly applicable to the parties or prohibited the transaction. The defendants argued that, while the UK government had not directly sanctioned Litasco or its parent entity, Lukoil, the entities should be considered "controlled" by designated persons and therefore subject to a UK asset freeze. In particular, the defendants alleged that Mr. Vagit Alekperov, the former CEO and president of Lukoil, and President Putin "controlled" Lukoil and therefore Litasco.

The court rejected the proposition that Mr. Alekperov controlled Litasco since he was no longer CEO of the company. Regarding potential control by President Putin, the court considered the *Mints* judgment and distinguished it from the *Litasco* dispute. As noted above, *Mints* considered the issue of whether NBT was controlled by the Central Bank of Russia, a government body which owned c. 97.9 – 99.9% of the shares in NBT. In contrast, Lukoil was not a state-owned entity, and the defendants had offered no evidence to suggest it, or Litasco, were under *de facto* control of President Putin. The court stated that the better interpretation of the control

<sup>2</sup> Relevantly, the UK's ownership and control tests are now divergent from their EU equivalents after recent updates to the European Union Best Practices for the Effective Implementation of Restrictive Measures.

<sup>3</sup> *PJSC National Bank Trust v. Mints* [2023] EWHC 118 (Comm); *Mints & Ors v. PJSC National Bank Trust & Anor* [2023] EWCA 1332

<sup>4</sup> *Ibid*, para. 114

<sup>5</sup> *Ibid*, para. 233

<sup>6</sup> *Litasco SA v. Der Mond Oil and Gas Africa SA and Locafrique Holding SA* [2023] EWHC 2866 (Comm)

# 'Control' Under the UK's Sanctions: The Emergence of Clarity?

test is whether the designated person has “an existing influence ... over a relevant affair of the company ... not a state of affairs which a designated person is in a position to bring about.”<sup>7</sup> In sharp contrast to the position in *Mints*, the court added that this distinction was important because otherwise “President Putin was arguably in control ... of companies of whose existence he was wholly ignorant, and whose affairs were conducted on a routine basis without any thought of him.”

The High Court distinguished the *Litasco* case from *Mints* and sought to clarify the control test with a more nuanced, logical approach. Notably, the *Litasco* judgment is binding, while the comments made by the CoA in *Mints* are not.

## The Judgment in *Hellard*<sup>8</sup>

Most recently, in July 2024, the High Court again had to grapple with the control test in the context of bankruptcy proceedings. The *Hellard* case related to the UK and Russian bankruptcy proceedings regarding a nonsanctioned Russian national resident in the UK. The UK trustees in bankruptcy sought direction from the court related to, among other items, whether certain Russian bank creditors of the resident were subject to UK sanctions and, if so, how this may impact those creditors' participation in the insolvency proceedings.

The Russian bank creditors were OJSC Rossiysky Kredit Bank, CJSC Mosstroyeconombank, AMB Bank and JSC KB Retail Lending Company. The Russian bank creditors were formerly controlled by the UK resident and had gone into insolvency shortly before his departure from Russia, allegedly as a result of his mismanagement and potential criminal activity. Of the UK resident's total debt of £741 million, the Russian bank creditors comprised 52.88%. The liquidation process for the Russian bank creditors was administrated by the Deposit Insurance Agency, a Russian state corporation responsible for managing the deposit insurance system in Russia (the **DIA**).

While the UK trustees were satisfied that the Russian bank creditors were not owned by a designated person, the trustees were unclear about the application of the “control” test, which the court acknowledged had been “thrown into sharp relief by the decision in *Mints*.”<sup>9</sup> The court sought to reconcile the nonbinding comments in *Mints* and the *Litasco* judgments by examining the type of control that a designated public official may exercise over the relevant company in each case. The court referred to four categories of “control”:

- **De jure control:** where there is a legal right to exercise control (for example, in the company's articles and constitutional documents).
- **Actual present de facto control:** where the alleged controller has a “decisive influence”<sup>10</sup> to control what is happening in the company, even if he or she has no legal right to do so.
- **Potential future de jure control:** where the alleged controller has no current legal right of ownership or control, but has the legal means to obtain it at a later stage (e.g., an option agreement, a forward contract, etc.).
- **Potential future de facto control:** where there is a good reason to believe that the alleged controller could, if he or she wished, exercise control in some manner otherwise than by the exercise of a legal right or power. The court stated that it thought this category of control would be “rare.”<sup>11</sup>

In determining the question of whether the Russian bank creditors were controlled by designated persons, the court addressed two questions: (i) do President Putin and/or Governor Nabiullina exercise control over the Russian bank creditors via their liquidators; and (ii) if President Putin and/or Governor Nabiullina could not be said to exercise such control, what circumstances would be required to bring about potential future *de facto* control.

Regarding the first question, the UK trustees were concerned that the constitutional arrangements for the Russian bank creditors showed “significant but limited influence of Governor Nabiullina, and the influence of President Putin, over the management of the DIA.”<sup>12</sup> The UK trustees were concerned that this, as well as Governor Nabiullina's position as chairperson of both the Central Bank of Russia and the DIA, would be sufficient to give rise to “reasonable grounds to suspect that the DIA is controlled by [Governor Nabiullina] and/or President Putin.”

The court held that the available evidence did not demonstrate that the UK trustees had reasonable grounds to suspect that the DIA was controlled by a designated person within the meaning of the first three categories of control referred to above. The court noted that Governor Nabiullina and President Putin do not have the ability to control the liquidators who were responsible for managing the bankruptcy processes conducted by the DIA, nor do the two Russian officials appear to have interfered with the conduct of the liquidation proceedings.

The court also held that there would be “no easy way” for Governor Nabiullina and/or President Putin to exercise potential future *de facto* control, and to do so (for example, by giving

<sup>7</sup> *Ibid.*, para. 70

<sup>8</sup> *Hellard & Others v. OJSC Rossiysky Kredit Bank (in Liquidation) & Others* [2024] EWHC 1783 (Ch)

<sup>9</sup> *Ibid.*, para. 55

<sup>10</sup> *Ibid.*, para. 77

<sup>11</sup> *Ibid.*, para. 78

<sup>12</sup> *Ibid.*, para. 114

# 'Control' Under the UK's Sanctions: The Emergence of Clarity?

orders directly to the liquidators) would breach existing constitutional arrangements.<sup>13</sup> The court acknowledged that the two Russian officials could seek to bring about such control by “appointing placemen,” but any such arrangement would come at “the expenditure of political and/or reputational capital, as it would be obvious to the world that it was improper for them to interfere in a statutory process.” The court took comfort that any such attempts by President Putin or Governor Nabiullina would require the cooperation of other government authorities (*i.e.*, the Duma), and it would therefore be apparent that such control was seeking to be exercised.

## UK Government Guidance

While the High Court and the CoA’s judgments and nonbinding comments have left the control test in a state of flux and the Supreme Court has yet to clarify the position, the UK government responded promptly to address the potential challenges posed by *Mints*. On 17 November 2023, [the UK government published guidance](#) to confirm that:

- A UK asset freeze against public officials is not intended to prohibit routine transactions with the public bodies associated with such officials (*e.g.*, the payment of taxes, fees, import duties, etc.).
- In relation to public and government bodies, the UK government does not generally consider designated individuals to “control” such bodies for the purpose of a UK asset freeze.
- There is no presumption that private entities are controlled by a designated public official because the entity is incorporated or located in a jurisdiction where that official exercises a leading role in economic policy and decision-making. Evidence would be required that the designated official exercises “control” over a specific private entity.

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<sup>13</sup>Ibid, para. 122

The UK government’s guidance is a helpful clarification of the interpretation of the “control” test, which also appears to have been welcomed by the High Court. In *Hellard*, the court specifically noted that its judgment was “consistent with the guidance published by OFSI.”<sup>14</sup> The guidance is useful for UK companies, but the position will not be entirely settled until the UK Supreme Court determines the appeal in *Mints* in 2025.

## Conclusion

For companies, the differing views of the English courts on the issue of “control” are undoubtedly unhelpful. While the courts seem to be moving in a sensible direction in the *Litasco* and the *Hellard* judgments, companies will likely need to tread cautiously until the Supreme Court’s judgment in *Mints* in 2025. Companies should also be mindful that issues around control extend beyond the UK’s sanctions on Russia; the UK targets senior public officials under other regimes, such as its Syrian, Afghan and Myanmar regimes.

Ahead of the UK Supreme Court’s judgment, in practical terms, companies can take some comfort from the UK government’s November 2023 guidance regarding the risk of an enforcement action being brought. However, companies may wish to conduct additional due diligence regarding the links of their counterparties, especially state-owned enterprises and public bodies, to senior Russian public officials who are UK asset-freeze targets, especially when companies consider exercising certain contractual rights, including termination rights and rights not to pay. Obtaining additional contractual protections may also be appropriate when entering into new or renewing relationships. These steps may help to mitigate the risk of successful claims for breach of contract being brought in the future.

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<sup>14</sup>Ibid, para. 124