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Ownership and Control Test Under UK Sanctions Clarified Following Mints Judgment

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The UK Office of Financial Sanctions Implementation (OFSI) and the Foreign, Commonwealth and Development Office (FCDO) recently published important guidance on the meaning of 'ownership and control' in the context of UK sanctions regulations, including the Russia (Sanctions) (EU Exit) Regulations 2019 (Russia Regulations). The guidance comes following the controversial judgment in the case of *Mints v. National Bank Trust and Bank Otkritie*,[1] handed down by the UK Court of Appeal in October 2023.

The Court of Appeal's decision in *Mints*

The case concerned a claim brought by National Bank Trust and Bank Otkritie against Boris Mints and others, in which the defendants appealed against the refusal of their application for a stay of proceedings on the basis that the claimants were sanctioned or controlled by designated persons (DPs). The Court of Appeal's judgment considered the following three key issues:

i. Whether judgment could lawfully be entered in favour of a DP following a trial at which it was established that they had a valid cause of action.
ii. Whether OFSI could licence certain litigation-related payments – including the payment of a costs order in favour of a DP and the payment by a DP of an adverse costs order.
iii. Whether a DP 'controls' an entity within the meaning of Regulation 7 of the Russia Regulations, where the entity was not a personal asset of the DP, but they were able to exert influence over it by virtue of their political office.

In relation to issue (i), the court held that the Russia Regulations permitted the entry of judgment in favour of DPs, which did not constitute the 'making available of funds' to a DP. As to issue (ii), the court held that OFSI could licence such payments.

On issue (iii), while the court found in favour of the claimants on the first two issues, and so a ruling on the issue of control was nonbinding, the court commented obiter on the ownership and control test under UK sanctions legislation.

The court considered the two conditions for establishing ownership and control of an entity set out in Regulation 7 of the Russia Regulations – first, that a person must, directly or indirectly, hold more than 50% of the shares or voting rights in the entity, or have the right to appoint or remove a majority of the board of directors, and second, that it is reasonable, in the circumstances, to expect that the DP would (if they chose to) be able, in most cases or in significant 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 court noted that the second condition was drafted in wide terms and did not have any limit as to the means or mechanism by which a DP is able to achieve the result of control. The second condition was, therefore, not limited to personal control, and the political office held by a DP was thus relevant to the control test. The court commented that Regulation 7 applies to an entity if a DP 'calls the shots, or can call the shots' and concluded that it could be said that Putin (Russian president and a designated person) could be deemed – in the context of him being at the apex of a command economy – to control everything in Russia under the terms of Regulation 7.

Aftermath

Following the broad interpretation given to the ownership and control test by the court, the FCDO issued a formal statement confirming that it was considering the impact of the judgment. It noted that the 'FCDO would

look to designate a public body where possible when designating a public official if [it] considered that the relevant official was exercising control over the public body'. It also confirmed that it was looking to clarify the position further.

The guidance

In light of the above developments, OFSI and the FCDO have sought to provide clarity by issuing new guidance concerning public officials and the ownership and control test. The key points from this guidance are as follows:

Examples

The guidance sets out examples of what could amount to 'control' – including having the right to exercise a dominant influence over an entity pursuant to an agreement or memorandum, or having the ability to direct another entity in accordance with one's wishes (e.g., where a DP has control of another person's bank accounts and is using them to circumvent financial sanctions).

Control of public bodies

- The FCDO does not generally consider designated public officials to exercise control over a public body in which they hold a leadership function.
- Sanctions targeting public officials are not intended to prohibit routine transactions with public bodies.
- If the FCDO considered that a designated public official was exercising control over a public body, it also would designate the public body, where possible.
- Notwithstanding the above, if there was sufficient evidence to show that the DP exercises control over the public body, then the relevant legal test under UK sanctions regulations may be met, depending on the circumstances (e.g., where the DP derives a significant personal benefit from payments to the public body such that they amount to payments to that DP rather than to the public body).

Control of private entities

- There is no presumption that a private entity is subject to the control of a designated public official just because it is based or incorporated in a jurisdiction in which that official has a leading role in economic policy or decision-making.
- Importantly, the guidance seeks to specifically clarify the position as regards the 'absurd consequence' of the Court of Appeal's judgment that Putin controls every Russian company. It stipulates that the UK government does not consider that Putin exercises control over all entities in Russia just because he is the president of Russia. A person will only be considered to exercise control over entities where this is supported by sufficient evidence on a case-by-case basis.

What does this mean in practice?

This guidance provides some clarity as to whether and when nonsanctioned Russian entities are caught by UK sanctions legislation, clearly seeking to narrow the scope of the interpretation of 'control' given by the Court of Appeal. In practice it means that, contrary to the obiter suggestion of the court, not all Russian businesses will be considered by the UK government to be 'controlled' by Putin.[2] The determination of whether an entity will be caught by the UK sanctions regime instead follows a case-by-case and evidence-based approach.

Whilst this is welcome, and whilst the court recognised in *Mints* the absurd consequences of the suggestion that Putin controls 'everything', the case demonstrates the very broad nature of the ownership and control test under UK sanctions and the potential flexibility that it also affords regulators when applying and enforcing sanctions. For companies considering their compliance with sanctions, in practical terms, it means that a careful and robust review of counterparties needs to be undertaken in each instance.

If you have any questions, please reach out to any of the Cooley lawyers listed below who can advise on applicable UK sanctions and how they affect you and your business.

Notes

1. [2023] EWCA Civ 1132.
2. This approach also has been taken by the High Court in *Litasco SA v. Der Mond Oil and Gas Africa SA*,

where the court held that just because Putin **could** place a company under his control did not mean that all companies **were** under his control, and the Russia Regulations were concerned with existing influence of a DP over a company.

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