

# Cos. Must Monitor Sanctions Regime As Law Remains Unclear

By **Michael Ruck, Rosie Naylor and Joseph Skilton** (December 15, 2023)

In October, in *Boris Mints v. PJSC National Bank*, the Court of Appeal of England and Wales suggested that all companies operating in Russia could be considered sanctioned under U.K. law because they are potentially controlled by President Vladimir Putin.[1] This caused understandable alarm among compliance professionals and to any company with connections to Russia.

Newly published guidance by the U.K. government on Nov. 17 and the High Court of Justice of England and Wales judgment in *Litasco SA v. Der Mond Oil and Gas Africa SA*, delivered on Nov. 15,[2] both attempt to address these issues, but have they brought the disarray to an end?

## How did we get here?

On Oct. 6, the Court of Appeal handed down its judgment in *Mints v. PJSC National Bank*. The *Mints* judgment included nonbinding comments, which suggested that all companies operating in Russia could be considered sanctioned under U.K. law because they are potentially controlled by a sanctioned individual, namely Putin.

These comments came in the court's application of the ownership and control test in U.K. sanctions law. Under this test, an organization is sanctioned if it is owned or controlled by a designated individual. A designated individual is someone listed by the U.K. government as being subject to U.K. sanctions.

Although the Court of Appeal's comments were nonbinding, they may be considered persuasive by future courts or tribunals, especially as the Court of Appeal is the second most senior court in England and Wales.

As a result, lawyers have been monitoring the judicial and government reaction to the implication that all companies in Russia could be sanctioned under U.K. law due to the sanctions imposed on Putin.

The U.K. government was likely forced to issue guidance on its approach to implementing sanctions law, and compliance professionals were on the lookout for further court judgments. The U.K. government has now issued such guidance, and a new High Court judgment applies a different interpretation to that included in the *Mints* judgment.

## The new guidance clarifies the U.K.'s sanctions regime approach.

The new U.K. guidance was published on Nov. 17 by the Office of Financial Sanctions Implementation and the Foreign, Commonwealth and Development Office, or FCDO.



Michael Ruck



Rosie Naylor



Joseph Skilton

Overall, the guidance repeats the high-level principles previously detailed by the U.K. government agencies and makes the following key points.

- The intention of the U.K. government's approach to ownership and control in U.K. sanctions regulations is to ensure that sanctions cannot be easily circumvented.
- Companies will need to undertake risk-based due diligence and screening, but there is no one-size-fits-all approach.
- The FCDO does not generally consider a designated public official to exercise control over a public body solely because the official holds a leadership function in that body.
- The FCDO would look to designate the relevant public body if it considers that the designated public official exercises control.
- A relevant consideration as part of any assessment of control will be whether the designated person derives a significant personal benefit from payments to the public body, such that they amount to payments to that person rather than the public body.
- There is no presumption on the part of the U.K. government that a private entity is subject to the control of a designated public official simply because that entity is based or incorporated in a jurisdiction in which that official has a leading role in economic policy or decision making. Instead, further evidence will be required to demonstrate control.
- The U.K. government does not consider Putin to exercise control over all entities in Russia. A person will only be considered to exercise control over a private entity when supported by sufficient evidence on a case-by-case basis.

The final bullet point above is a direct response to and attempted repudiation of the nonbinding comments in the Mints judgment regarding the court's interpretation of the control test for the purposes of the U.K. sanctions regime.

### **The Litasco decision distinguishes actual control from the capacity to control.**

The High Court judgment in *Litasco v. Der Mond Oil* was published on Nov. 15. In *Litasco*, the defendants attempted to resist the claimant's claim by citing the Mints judgment.

The defendants argued that because the claimant was owned by a Russian company and all Russian companies are controlled by a sanctioned individual, i.e., Putin, according to nonbinding comments in the Mints judgment, the claimant must be subject to the same sanctions.

This argument was rejected by the High Court. Judge David Foxton's judgment set out the court's opinion that a company is sanctioned when a designated individual is actually exercising control over it. He distinguished this from a situation in which a designated individual, like Putin, has the capacity or potential to exercise control over a company, but, in fact, never does exert any control.

This distinction between actual control and the capacity to control hopefully provides further clarity to those undertaking due diligence in this regard. However, potential disarray remains for two reasons.

First, this is a judgment from the U.K.'s lowest court, and any future courts hearing similar issues are unlikely to consider themselves bound by its interpretation.

Second, this judgment does not directly address the potential for Putin to be deemed to be exercising control over the whole Russian economy and, therefore, every entity within that economy.

As a result, the law remains unsettled and the potential for differing views to be taken remains. Only time will tell what interpretation takes precedence in the future and whether the recent U.K. government guidance achieves its objective.

### **Is the disarray dissipating?**

The U.K. government's newly published guidance and the High Court's recent judgment strike a reassuringly similar tone. Both provide authority for the contention that the capacity to control — more specifically, the holding of a certain political office — is unlikely to be sufficient on its own to prove an entity is controlled by such a sanctioned individual.

Instead, any assessment of control will need to consider all available evidence and due diligence on a case-by-case basis. However, the potential disarray remains because the judicial interpretation of control for the purposes of the U.K. sanctions regime is still unsettled.

Future court judgments will inevitably have to consider and opine on the meaning of control under U.K. sanctions law. It may take a change in the regulations issued by the U.K. government or the binding judgment of an appellate court to bring certainty.

While the Litasco judgment appears to resile from the broad interpretation of control discussed in obiter in the Mints judgment, the Litasco ruling was issued by a lower court than that in Mints. Litigants will inevitably seek to refer to the interpretation they prefer in support of their respective cases, likely leading to ongoing conflict between future judgments in this regard.

Taking into account the latest developments, including the new U.K. government guidance and the Litasco judgment, individuals and corporates should consider the following.

Individuals and corporates are recommended to understand their unique exposure to the U.K. sanctions regime and how this exposure is shaped by their present, and planned,

activities and business operations. They should also ensure that they are in a position to review their sanctions exposure in light of potential changes to how the various sanctions requirements will be interpreted by the U.K. government agencies and U.K. courts.

Furthermore, consideration should be given to the new government guidance on U.K. sanctions law,[3] and businesses should stay up to date on U.K. sanctions developments, including monitoring new court judgments that interpret the control test. There should also be an understanding that, as a result of the developments discussed in this article, an entity will not be sanctioned only by reason of a person associated with it holding a political office.

Furthermore, it is recommended that individuals and corporates follow the expectations of the Office of Financial Sanctions Implementation that firms and individuals fully consider the risks of an entity being owned or controlled by a designated individual — typically by conducting research or requesting further information from the entity.

However, there is no prescribed level or type of due diligence that will always ensure compliance with sanctions. Therefore, firms must approach each exercise by responding to the necessary demands of the particular case.

---

*Michael Ruck is a partner and leader of the U.K. sanctions team at K&L Gates LLP.*

*Rosie Naylor is a senior associate at the firm.*

*Joseph Skilton is a trainee solicitor at the firm.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] *Mints and others v. PJSC National Bank* [2023] EWCA Civ 1132.

[2] *Litasco SA v. Der Mond Oil* [2023] EWHC 2866 (Comm).

[3] <https://www.gov.uk/government/publications/ownership-and-control-public-officials-and-control-guidance/ownership-and-control-public-officials-and-control-guidance>.