

The Control Test in the UK's Sanctions Framework: Recent Developments

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A key feature of the UK's financial sanctions framework is that not only designated persons (listed on the UK's Consolidated List¹) are subject to sanctions, but also entities that are 'owned or controlled' by designated persons, even if not themselves listed.²

This alert memorandum discusses recent developments relating to the 'control' test and its application, including the Court of Appeal judgment in *Mints & Ors v PJSC National Bank Trust & Anor* ("Mints", considered in detail in our firm's dedicated alert memorandum, accessible [here](#)), the recent High Court judgment in *Litasco SA v Der Mond Oil and Gas Africa SA & Anor* ("Litasco"), and the "Ownership and Control: Public Officials and Control guidance" (the "Control Guidance") issued jointly by HM Treasury's Office of Financial Sanctions Implementation ("OFSI") and the Foreign, Commonwealth and Development Office (the "FCDO").

Key takeaways are:

- OFSI/the FCDO do not automatically deem public sector entities controlled by public officials holding a leadership position in relation to that entity. As a matter of case law, however, where litigants can point towards evidence showing strong links between a public sector entity and sanctioned public officials, courts may find that sufficient control exists.
- There is no presumption on the part of the UK 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. Whether a court would adopt the same position is somewhat uncertain, although, following *Litasco*, it may be that that is the case.
- Ultimately, whether an entity is under the control of another person is subject to a case-by-case assessment, and it is advisable for counterparties of such entities to conduct appropriate due diligence. What levels of due diligence will be sufficient is, again, case specific, depending on the sanctions risk arising from the specific circumstances.

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¹ The Consolidated List of Financial Sanctions Targets in the UK is accessible [here](#).

² See, e.g., in the context of the UK's Russia sanctions, the provisions relating to the asset-freeze in relation to designated persons and making funds available to designated persons under regulations 11(7) and 12(4) of the Russia (Sanctions) (EU Exit) Regulations 2019.

³ *Boris Mints & Ors v PJSC National Bank Trust & Anor* [2023] EWCA Civ 1132, accessible [here](#).

⁴ *Litasco SA v Der Mond Oil and Gas Africa SA & Anor* [2023] EWHC 2866 (Comm), accessible [here](#).

⁵ The OFSI/FCDO "Ownership and Control: Public Officials and Control guidance" is accessible [here](#).



I. Legislative background and regulatory guidance

a) Determining control

With regard to the notion of ‘control’ specifically, the test is, for the purposes of the UK’s Russia-related sanctions, set out in regulation 7(4) of the Russia (Sanctions) (EU Exit) Regulations 2019 (the “**Russia Regulations**”):

A person who is not an individual (“C”) is “owned or controlled directly or indirectly” by another person (“P”) if ... it is reasonable, having regard to all the circumstances, to expect that P would (if P chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of C are conducted in accordance with P’s wishes.

OFSI’s General guidance for financial sanctions under the Sanctions and Anti-Money Laundering Act 2018 (the “**General Guidance**”⁶) sets out some examples of situations where it could be reasonable to expect that the person would be able to ensure the affairs of the entity are conducted in accordance with the person’s wishes:⁷

- appointing, solely by exercising one’s voting rights, a majority of the members of the administrative, management or supervisory bodies of an entity, who have held office during the present and previous financial year;
- controlling alone, pursuant to an agreement with other shareholders in or members of an entity, a majority of shareholders’ or members’ voting rights in that entity;
- having the right to exercise a dominant influence over an entity, pursuant to an agreement entered into with that entity, or to a provision in its Memorandum or Articles of Association, where the law governing that entity permits its being subject to such agreement or provision;

- having the right to exercise a dominant influence referred to in the point above, without being the holder of that right (including by means of a front company);
- having the ability to direct another entity in accordance with one’s wishes. This can be through any means, directly or indirectly. For example, it is possible that a designated person may have control or use of another person’s bank accounts or economic resources and may be using them to circumvent financial sanctions.

b) Enforcement guidance

In addition to the guidance as to what might constitute ‘control’ for the purposes of the UK’s Russia sanctions regime, OFSI’s guidance on enforcement and monetary penalties for breaches of financial sanctions (the “**Enforcement Guidance**”⁸) provides some helpful guidance on how OFSI assesses potential breaches of financial sanctions.⁹

The Enforcement Guidance confirms that, where an incorrect assessment of ownership and control of an entity has led to a breach of financial sanctions, OFSI will consider the degree and quality of research and due diligence conducted on the ownership and control of that entity. Specifically, appropriate due diligence conduct will be considered as a mitigating factor, whereas a failure to carry out due diligence, or the carrying out of any due diligence in bad faith, will be considered as an aggravating factor. The weight to be attributed to the mitigating or aggravating factor (as applicable) will be assessed on a case-by-case basis.

What constitutes an appropriate level of due diligence will depend on the nature of the transaction, the nature of a person’s contractual or commercial relationship with the entity, and the overall sanctions risk resulting from these factors. OFSI would generally expect evidence of a decision-making process that involves (i)

⁶ OFSI’s General Guidance is accessible [here](#).

⁷ OFSI’s General Guidance, section 4.1.

⁸ OFSI’s Enforcement Guidance is accessible [here](#).

⁹ See paragraphs 3.23 to 3.32 of OFSI’s Enforcement Guidance, annexed below.

careful scrutiny of information obtained (e.g., on factors such as formal/informal control mechanisms, which may include open-source research as well as direct contact with the relevant entity to probe indirect control mechanisms), particularly where efforts appear to have been made by designated persons to avoid relevant thresholds; (ii) assessment of the sanctions risk based on that information; and (iii) determination of what would be an appropriate level of due diligence in light of that risk. Moreover, OFSI expect that, where relationships or activities are ongoing, companies continuously monitor compliance with sanctions and due diligence and assessments are reviewed at appropriate times.

II. Recent case law

The application of the ‘control test’ has been considered in some recent case law, specifically in some *obiter dicta* in the recent Court of Appeal judgment in *Mints* and in the recent High Court judgment in *Litasco*.

a) *Mints*

While not determinative of the outcome of the appeal, the Court considered, *obiter*, that PSJC National Bank Trust, a 99% owned subsidiary of the Central Bank of Russia, is controlled within the meaning of Regulation 7 by Mr Putin and/or Ms Nabiullina, the governor of the Central Bank of Russia.¹⁰

This was on the basis that the broad language used in regulation 7(4) of the Russia Regulations “*makes it clear that the provision does not have any limit as to the means or mechanism by which a designated person is able to achieve the result of control, that the affairs of the company are conducted in accordance with his wishes*”.¹¹ In particular, the Court rejected an interpretation of regulation 7(4) according to which ‘ownership and control’ does not include control through political office, not least because, “*given the potential uncertainty as to what would count as political office, if such a political carve-out had been intended by*

the legislature, it would have been carefully and expressly addressed in the legislation”.¹²

The Court noted that it may well be that the consequence of this construction of regulation 7(4) is that every company in Russia was “controlled” by Mr Putin and hence subject to sanctions,¹³ highlighting that “*Mr Putin is at the apex of a command economy*” and, therefore, “*in a very real sense (and certainly in the sense of Regulation 7(4)), Mr Putin could be deemed to control everything in Russia*”.¹⁴

While the Court acknowledged that this consequence would arguably be absurd, it agreed that this consequence arises “*not from giving the Regulation its clear and wide meaning but from the subsequent designation by the Government of Mr Putin, without having thought through the consequences*”,¹⁵ and that “*the remedy is not for the judge to put a gloss on the language to avoid that consequence, but for the executive and Parliament to amend the wording of the Regulations to avoid such a consequence*”.¹⁶

a) *Litasco*

In *Litasco*, Litasco SA, a Swiss oil marketing and trading company wholly-owned by Lukoil PJSC, brought a claim against a Senegalese oil trading company and its parent for sums due under an agreement for the sale of crude oil. The Claimant applied for summary judgment, which the defendant companies sought to resist by raising arguments relating to force majeure, sanctions, misrepresentation and illegality. Dismissing these arguments, the High Court granted summary judgment.

On the question of ‘ownership or control’ for purposes of the UK Russia sanctions regime, the Court rejected the Defendants’ contentions that Litasco was controlled by (a) Mr Alekperov (given that the evidence before the court did not establish a triable case to that effect¹⁷), and/or (b) President Putin.

¹⁰ *Mints*, at [225].

¹¹ *Mints*, at [229].

¹² *Mints*, at [231].

¹³ *Mints*, at [225].

¹⁴ *Mints*, at [233].

¹⁵ *Mints*, at [233].

¹⁶ *Mints*, at [225].

¹⁷ *Litasco*, at [64].

Regarding the latter point, the Court in *Litasco* initially sought to distinguish *Mints*. It was first noted that the National Bank Trust was 99.9% owned by the Central Bank of Russia, a Russian public body, the governor of which is appointed by the Duma on the recommendation of the President of Russia, board members of which are appointed on the basis of a proposal to the Duma with the agreement of the President of Russia, and which, as evidence suggested, “is an organ of the Russian state” over which President Putin exercised de facto control, and that “in practice it serves as an arm of the executive”.¹⁸ However, the Court noted that the Defendants in *Litasco* did not point to any similar evidence said to show (or arguably show) that *Litasco* was presently under the de facto control of President Putin.¹⁹ The Court further noted that the specific question, which arises through regulations 12 and 7(4) of the Russia Regulations, was whether, by virtue of any contended ‘ownership or control’, funds were being made available indirectly to President Putin, and that the Defendants had not produced any evidence providing an arguable basis for such a case.²⁰

However, the Court then went further, construing regulation 7(4) of the Russia Regulations as being “concerned with an existing influence of a designated person over a relevant affair of the company ..., not a state of affairs which a designated person is in a position to bring about. Were matters otherwise, it would follow that President Putin was arguably in control, for Regulation 7(4) purposes, of companies of whose existence he was wholly ignorant, and whose affairs were conducted on a routine basis without any thought of him”.²¹ On this basis, the Court rejected the contention that *Litasco* SA was under the control of President Putin, despite being prepared to assume “that it is strongly arguable that President Putin has the means of placing all of *Litasco* and/or its assets under his de facto control, should he decide to do so”.²²

Notably, the Court felt sufficiently confident in this conclusion to reject the Defendants’ suggestion that the

case should proceed to trial “as it would effectively be a test case for the issue of ‘control’ under the [Russia Regulations]”, considering there to be no arguable evidential basis for such a debate.²³

III. Recent governmental guidance

Shortly after the Court of Appeal’s judgment in *Mints*, the FCDO issued a public statement regarding the Government’s position on the application of the control test, and on 17 November 2023, OFSI and the FCDO jointly published the Control Guidance elaborating on this position.

Key points coming out from this guidance are:

- The policy intention of the UK government’s approach to ownership and control in UK sanctions regulations is to ensure that sanctions cannot be easily circumvented.
- The FCDO does not intend for sanctions measures targeting public officials to prohibit routine transactions with public bodies, including (but not limited to): taxes; fees; import duties; the purchase or receipt of permits, licences, or public utility services; or any other ordinary and incidental payments.
- The FCDO does not generally consider designated public officials (e.g., government ministers) to exercise control over a public body in which they hold a leadership function (e.g., a government ministry), such that the affairs of that public body should be considered to be conducted in accordance with the wishes of that individual.
- However, if there was sufficient evidence to demonstrate that the designated individual exercises control over the public body within the meaning of the relevant regulations, then the relevant legal test under UK sanctions regulations may be met. Whether that is the case will depend on the circumstances. A relevant

¹⁸ *Litasco*, at [67].

¹⁹ *Litasco*, at [68].

²⁰ *Litasco*, at [68].

²¹ *Litasco*, at [70].

²² *Litasco*, at [69].

²³ *Litasco*, at [80].

consideration could be, for example, 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.

- If the FCDO considered that a public official was exercising control over the public body under UK sanctions regulations, the FCDO would look to designate the public body where possible when designating the relevant public official.
- There is no presumption on the part of the UK 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. Specifically, for the purposes of regulation 7(4) of the Russia (Sanctions) (EU Exit) Regulations 2019, the UK government does not consider that President Putin exercises indirect or de facto control over all entities in the Russian economy merely by virtue of his occupation of the Russian Presidency.

IV. Implications

The Government's Control Guidance provides some helpful clarifications, mitigating to some extent concerns regarding regulatory enforcement risk following the overly broad view of 'control' in *Mints*. One point to consider in particular is that, in the context of the EU's sanctions regime (from which the UK's regime emerged²⁴), the (rebuttable) presumption that ownership or control results in is that assets owned by, or made available to, the owned/controlled entity are in fact within the control/would reach or benefit the designated person.²⁵ The Government's Control

²⁴ In fact, in *Mints*, the court considered that the UK's sanctions regime was "intended by Parliament and the Government to continue the EU sanctions regime without any substantive change" (see [189]).

²⁵ See, the European Commission's Frequently Asked Questions regarding Asset Freeze and Prohibition to Make Funds and Economic Resources Available (accessible [here](#)), FAQ 1.

Guidance helpfully refocuses some attention on this point, by emphasising that, in determining whether it would be reasonable to expect that the affairs of a public body could in fact be conducted in accordance with the designated person's wishes if the designated person so chose, a relevant consideration could 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*". The emphasis in *Litasco* on the designated person's ability to control the use of the funds made available²⁶ goes to the same point.

That being said, the current position regarding the 'ownership and control' test still entails a significant degree of legal uncertainty that is concerning, considering that liability for sanctions violations is strict and may be criminal in nature.

On one level, even the state of regulatory and governmental guidance leaves important questions unanswered. For example, OFSI's Enforcement Guidance emphasises the importance of due diligence, and highlights that what level of due diligence will depend on the particular circumstances, but given the serious consequences that may result from getting the level of due diligence wrong, one may wonder whether that guidance is sufficient.

More importantly, governmental and regulatory guidance does not have legislative force, and risk of enforcement by OFSI is not the only concern arising in connection with sanctions. Rather, the ultimate arbiter on the question of whether an entity is subject to sanctions will be the courts, and those determinations may have significant impact on contractual relationships and liability and reputational risk. This risk is heightened further by the considerable disagreement that currently exists between judges, as

²⁶ *Litasco*, at [68].

²⁷ See also the Law Society and Bar Council Sanctions and AML Working Group's *Note on the sanctions 'control' test*, accessible [here](#).

highlighted by the decisions reached in *Mints* and *Litasco*.

In these circumstances, various stakeholders have requested that the Government consider amending the Russia Regulations (and other sanctions regimes), so as to clarify the current position. This might entail formulating the ‘control’ test in a more concrete way, or even abolishing it, focusing instead on ownership and perhaps slightly firmer anti-circumvention provisions. However, whether the Government will be amenable to such suggestions remains to be seen.

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ANNEX – EXTRACT FROM OFSI’S ENFORCEMENT GUIDANCE

Ownership and Control

3.23 Where OFSI determines that a breach has occurred, and an incorrect assessment of ownership and control of an entity is relevant to the commission of the breach, OFSI will consider the degree and quality of research and due diligence conducted on the ownership and control of that entity.

3.24 The test for establishing ownership and control of an entity is contained in the relevant sanctions regulations, and guidance on the test can be found in OFSI’s General Guidance. OFSI does not prescribe the level or type of due diligence to be undertaken to ensure compliance with financial sanctions.

3.25 OFSI will consider appropriate due diligence conducted on the ownership and control of an entity to be a mitigating factor where the ownership and control determination reached was made in good faith and was a reasonable conclusion to draw from such due diligence. OFSI may also consider a failure to carry out appropriate due diligence on the ownership and control of an entity, or the carrying out of any such due diligence in bad faith, as an aggravating factor. The weight to be attributed to the mitigating or aggravating factor (as applicable) will be assessed on a case-by-case basis.

3.26 OFSI will consider whether the level of due diligence conducted was appropriate to the degree of sanctions risk and nature of the transaction. The nature of a person’s contractual or commercial relationship with the entity will also be relevant to OFSI’s consideration of the appropriateness of measures undertaken. OFSI would expect to see evidence of a decision-making process that took account of the sanctions risk and considered what would be an appropriate level of due diligence in light of that risk. OFSI would usually expect these decisions to be made by reference to an internal framework or policy, but recognises that there is no one-size fits all approach. OFSI expects careful scrutiny of information obtained as part of any ownership and control assessments, particularly where efforts appear to have been made by designated persons to avoid relevant thresholds.

3.27 Depending on the circumstances, OFSI may consider demonstration of any and/or all of the following efforts as potentially mitigating:

- An examination of the formal ownership and control mechanisms of an entity to establish whether there is available evidence of ownership and control by a designated person
- An examination of actual, or the potential for, influence or de facto control over an entity by a designated person
- Open-source research on an entity and any persons with ownership of, or the ability to exercise control over, the entity, together with an examination of whether such persons are, or have links to, designated persons such that further investigation may be warranted
- Direct contact with the entity and/or other relevant entities to probe into indirect or de facto control, including, where appropriate, seeking commitments by UK persons as to the role of any designated person or person with links to a designated person
- Regular checks and/or ongoing monitoring of the above where appropriate

3.28 Whilst paragraph 3.8 expands on the above by listing some specific potential areas of enquiry, it is not possible for OFSI to set out an exhaustive list of factors that could be considered as each case will depend on its individual circumstances.

3.29 Where we determine a breach to have occurred, OFSI will take into account any relevant efforts and checks undertaken. The extent to which the efforts and checks undertaken are appropriate and reasonable in a given case will inevitably depend on the facts of the case, the degree of sanctions risk of the relevant entities and the nature of the transaction.

3.30 Examples of areas of enquiry OFSI may expect to be undertaken by persons seeking to establish whether an entity is owned or controlled by a designated person are below. It may not be necessary for the due diligence undertaken in a given case to have covered all of the areas of enquiry set out in paragraph 3.8 in order for such due diligence to be a mitigating factor. It may not always be necessary to assess all of these for lower risk activities and transactions, and a relevant consideration may be the existence or lack of a direct or ongoing relationship. These are not intended and should not be considered thresholds for meeting the ownership and control test in the regulations.

Formal ownership and/or control

- The percentage of shares and/or voting power of shareholders
- The ownership and distribution of other shares in a company
- Whether ownership / shareholding has recently been altered or divested, including in possible anticipation or response to the imposition of financial sanctions. If so, consideration of whether this warrants further investigation into the possibility of joint arrangements or indirect or de facto control
- The composition of shares, and whether shares have been split into different classes, or other structural changes made
- Whether changes to ownership and/or control were part of a pre-planned or wider business/financial strategy
- Corporate constitutional documents, including articles of association or constitution
- Any commercial justifications for complex ownership and control structures
- Agreements between shareholders or between any shareholders and the entity (e.g., shareholders', joint venture, operating, or guarantee agreements)

Indirect or *de facto* control

- Indications of continued influence (or the potential for it) by a designated person, including through personal connections and financial relationships
- The presence or involvement of proxies, including persons holding assets on behalf of a designated person
- Ownership, holdings of shares, or control by trusts associated with a designated person
- If shares or other ownership interests of a designated person have been divested, the nature of any relationships and prior involvement of the person benefitting

- If applicable, how recent transfers of shares were funded and whether this was done at an accurate and true valuation
- Any operational steps taken to ensure that the designated person cannot exercise control over the entity and/or that the designated person cannot benefit from, or use, corporate assets
- Information relating to the circumstances of board and/or management appointments, including the backgrounds, relevant experience, and relationships with designated persons
- The running of board meetings and governance processes, including board or shareholders' meeting minutes concerning recent changes in the entity's ownership and control relating to the designated person
- Ongoing financial liabilities directly related to a designated person, e.g., personal loans, loan guarantees, property holdings, equipment etc.
- Other shareholder agreements, voting agreements, put or call options or other coordination agreements in place between the entity and the designated person or controlled entities
- Whether there are any benefits conferred to the designated person by the entity or transactions between the entity and the designated person

3.31 Where relationships or activity is ongoing, OFSI expects that due diligence is, and assessments are, reviewed at appropriate times. Ownership and control is not static and OFSI's consideration of the due diligence undertaken will consider the regularity of checks, and/or ongoing monitoring where appropriate.

3.32 For consideration of due diligence as a mitigating factor, the onus for demonstrating that reasonable and appropriate due diligence into ownership and control has been undertaken, and that the ownership and control determination reached was made in good faith and was a reasonable conclusion to draw from such due diligence, rests with the person against whom OFSI is considering taking enforcement action.