NEW GOVERNMENT GUIDANCE AND UK HIGH COURT SEEKS TO SETTLE DISARRAY IN UK SANCTIONS LAW

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UK Policy and Regulatory Alert

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In October, the Court of Appeal suggested all companies operating in Russia could be considered to be sanctioned under UK law because they are potentially controlled by President Putin. This caused understandable alarm to compliance professionals and to any company with connections to Russia. Newly published government guidance and a recent High Court judgment both attempt to address these issues, but have they brought the disarray to an end?

HOW DID WE GET HERE?

On 6 October 2023 the Court of Appeal handed down its judgment in *Mints and others v. PJSC National Bank and others* [2023] EWCA Civ 1132 (the Mints judgment). The Mints Judgment included non-binding comments, which suggested that all companies operating in Russia could be considered sanctioned under UK law because they are potentially controlled by a sanctioned individual, President Putin.

These comments came in the court's application of the “ownership and control” test in UK sanctions law. Under this test, an organisation is sanctioned if they are owned or controlled by a designated individual. A designated individual is somebody listed by the UK government as being subject to UK sanctions.

You can read our article explaining this case and its implications for businesses here. In that article, we predicted the UK government would be forced to issue guidance on its approach to implementing sanctions law and recommended that compliance professionals watch out for further court judgments. The UK government has now issued such guidance and a new High Court judgment applies a different interpretation to that included in the Mints Judgment.

GOVERNMENT GUIDANCE

The new UK guidance was published by the Office of Financial Sanctions Implementation (OFSI) and the Foreign, Commonwealth & Development Office (FCDO) on 17 November 2023. Overall, the guidance repeats the high level principles previously detailed by the UK government agencies and makes the following key points:

- The intention of the UK government's approach to ownership and control in UK 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;

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- 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 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. Instead, further evidence will be required to demonstrate control; and
- The UK government does not consider President Putin to exercise control over all entities in Russia. A person will only be considered to exercise control over a private entity where supported by sufficient evidence on a case-by-case basis.

HIGH COURT JUDGMENT

A High Court Judgment in the matter of *Litasco SA v. Der Mond Oil* [2023] EWHC 2866 (Comm) (Litasco) was published on 15 November 2023. 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. President Putin, according to non-binding comments in the Mints Judgment, then the claimant must be subject to the same sanctions.

This argument was rejected by the High Court. Justice 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 distinguishes this from a situation in which a designated individual—like President 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 as this is a judgment from the UK's lowest court and any future courts hearing similar issues are unlikely to consider themselves bound by this interpretation. The potential for differing views to be taken remains and only time will tell which interpretation takes precedence in the future and whether the recent UK government guidance achieves its objective.

TAKEAWAYS—DISARRAY DISSIPATING?

The UK government's newly published guidance and the High Court's recent judgment strike a reassuringly similar tone. Both provide authority for the contention that capacity to control on its own, or 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.

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We encourage everyone to read the new government guidance and keep abreast of the latest developments, including our future alerts on this issue.

Our lawyers continue to monitor developments in the UK sanctions regime and, more widely, across the United States, European Union, and other territories. If you have any questions regarding the UK sanctions regime or the issues raised in this alert, please do not hesitate to contact Michael Ruck or Rosie Naylor.

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