



High Court highlights four distinct categories of control in "ownership and control" test under UK sanctions regulations

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The decision provides important guidance to persons seeking to comply with UK sanctions.

The High Court has directed the trustees in a UK bankruptcy case to treat certain Russian bank creditors as not being subject to UK sanctions, unless new evidence suggests otherwise. The trustees had applied to the Insolvency and Companies List for directions due to their concerns about whether these creditors were owned or controlled by a designated person (a person or entity subject to financial sanctions):

[Hellard & Ors v OJSC Rossiysky Kredit Bank & Ors \[2024\] EWHC 1783 \(Ch\)](#).

Although set in a bankruptcy context, the decision is noteworthy due to the court's interpretation of the "ownership and control" test under the UK sanctions regime, which is different to that in [PJSC National Bank Trust and another v Mints and others \[2023\] EWCA Civ 1132](#) and [Litasco SA v Der Mond Oil and Gas Africa SA & Anor \[2023\] EWHC 2866 \(Comm\)](#) (see our blog posts on the decisions [here](#) and [here](#)).

The "ownership and control" test determines when companies which are not expressly listed as designated persons must nevertheless be treated as subject to sanctions due to their ownership or control by a designated person. The court in the present case held that this test is satisfied if a designated person has: (1) *de jure* control; (2) actual present *de facto* control; (3) potential future *de jure* control; or (4) potential future *de facto* control.

The Russian bank creditors, who are not designated, were in liquidation in Russia which was managed by the Russian Deposit Insurance Agency (**DIA**). The DIA is a state corporation in Russia whose Supervisory Board is chaired by the Central Bank of Russia's governor, Ms. Elvira Nabiullina (a designated person under UK sanctions regulations). The court considered the four categories of "control" before concluding that there was insufficient reason for the trustees to believe that President Putin or Governor Nabiullina "own or control" the Russian bank creditors due to the liquidation process. Although Nabiullina and Putin have significant influence over the DIA's supervision and senior management, there was no evidence that they could control individual liquidators managing specific liquidations, or that they had interfered with these processes or could do so without violation of current constitutional arrangements. This was in contrast to the *obiter* comments of the Court of Appeal in *Mints*.

The decision also highlights the limited comfort that the Office of Financial Sanctions Implementation (**OFSI**) is willing to provide to commercial parties. In this case, OFSI declined to express any opinion on the central issues raised by the application and chose not to appear or be represented at the hearing. The court acknowledged that it is understandable for OFSI to refrain from expressing any view, as doing

so might limit its future discretion in determining whether any of the Russian bank creditors are under the control of a designated person.

We consider the decision in more detail below.

Background

The case involves the bankruptcy of Mr Anatoly Motylev, a Russian national residing in London. Mr Motylev previously controlled four Russian banks, now in liquidation in Russia (the **Russian Bank Creditors**). In 2018, Mr Motylev was declared bankrupt in Russia, a decision later recognised in the United Kingdom. In 2020, an English bankruptcy order was also issued against him and trustees in bankruptcy were appointed (the **Trustees**). A creditors' committee was established for the English bankruptcy, with the Russian Bank Creditors making up most of the committee.

The Trustees subsequently became concerned that the Russian Bank Creditors might be subject to the UK sanctions, potentially exposing them to criminal and substantive civil liability. This was based on [Regulation 7 of the Russia \(Sanctions\) \(EU Exit\) Regulations 2019 \(the 2019 Regulations\)](#), which outlines when a non-individual entity can be considered to be "owned or controlled" by a person subject to sanctions (a designated person). Equivalent provisions regarding ownership and control appear in all other UK sanctions regimes.

The Trustees were particularly concerned about Regulation 7(4), which is very broadly drafted, and states that an entity can be considered to be controlled by another person if *"it is reasonable, having regard to all the circumstances, to expect that [the person] would (if [the person] 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 affairs of [the entity] are conducted in accordance with [the person's] wishes"*. The Trustees had not been able to obtain any further comfort on these matters from OFSI or from the Russian Bank Creditors.

Upon reviewing public documents, the Trustees satisfied themselves that the Russian Bank Creditors are not themselves designated persons. However, the Trustees were concerned that dealing with them could constitute an offence if the Russian Bank Creditors are considered to be owned or controlled by a designated person under Regulation 7(4). This concern arose because the Russian Bank Creditors' own Russian liquidation arrangements appeared to place them under the "direct or indirect" control of senior Russian officials who are personally designated under the 2019 Regulations (namely President Putin and/or Governor Nabiullina).

The Russian Bank Creditors are subject to Russian insolvency proceedings managed by the Russian DIA. The DIA is a Russian state corporation, controlled by the Federal Agency for State Property Management (Rosimushchestvo), which itself is not a designated person. However, the Trustees noted the involvement of Governor Nabiullina, a designated person, who: (i) chairs the DIA's Supervisory Board; (ii) serves as the Governor of the Central Bank of Russia (which exerts some financial influence over the DIA); and (iii) controls the composition of the DIA's Management Board, although this requires approval from President Putin (also a designated person) and the Russian parliament (the Duma).

Consequently, the Trustees applied to the court for directions under section 303(2) of the Insolvency Act 1986 (**IA 1986**) on whether they should treat the Russian Bank Creditors as subject to the sanctions

imposed under the 2019 Regulations due to their potential "control" by President Putin or Governor Nabiullina.

Decision

The High Court found that, based on the evidence provided, the Russian Bank Creditors should not be regarded as being owned or controlled by a designated person under Regulation 7(4).

The key issues that will be of interest to persons seeking to comply with UK sanctions are set out below.

Types of "control" for the purposes of Regulation 7(4)

Regulation 7 provides that an entity is "owned or controlled" by a person where one or both of two conditions are met. The first condition is factual and straightforward to apply: it is based on the ownership of shares, voting rights and control over board appointments.

However, the court said that the second condition outlined in Regulation 7(4) (detailed above) is more difficult to apply as it requires a subjective assessment of whether a person could, in most cases or significant respects, control another's affairs if they so chose. This involves considering all the circumstances and making value judgments about what is "reasonable" to expect, and what constitutes "most cases" or "significant respects".

Next, the court highlighted two recent decisions which had scrutinised the application of the second condition. In *Mints*, the Court of Appeal considered proceedings involving a subsidiary of the Central Bank of Russia which was said to be "owned and controlled" within the meaning of Regulation 7 by President Putin and Governor Nabiullina. The court found (albeit on an *obiter* basis) that control via political office fell within the test for control under Regulation 7(4), and that – since he is at the "*apex of a command economy*" – President Putin "*could be deemed to control everything in Russia*". In contrast, in *Litasco*, the court dismissed the argument that a Swiss subsidiary of a Russian oil company was "owned or controlled" by President Putin. There was no evidence to show that the Swiss company was under the de facto control of President Putin; it was not a state-owned body and there was no suggestion it functions as an organ of the Russian state. The court also distinguished between existing influence and potential future control, concluding that while Putin might have the means to place the company under his control, there was no evidence to suggest he was currently doing so.

In the present case, the court emphasised that the language of Regulation 7(4) is readily reconcilable with the approach taken in *Litasco*. The court said it found it useful to break down the concept of "control" in Regulation 7(4) into four types:

1. **De jure control** exists when there is a legal right to exercise control, embedded in the constitution of a company or body. It is proven by examining constitutive documents or legal instruments.
2. **Actual present de facto control** exists where the putative controller is evidently "*calling the shots*" without a legal right to do so. It is demonstrated by evidence of decisive influence by the putative controller.
3. **Potential future de jure control** applies when a designated person has the legal means to obtain ownership or control in the future, such as through an option or forward contract.

4. **Potential future de facto control** occurs when, although there is no evidence of current *de facto* control, there is a reasonable belief that the designated person could exercise control if they chose to. It requires a specific feature "*leading one to believe that the putative controller could, if he or she wished, exercise control in some manner otherwise than by the exercise of a legal right or legal power*".

The court noted that potential future de facto control will be rare, as the words "*(if P chose to)*" in Regulation 7(4) should be given a strict meaning. This interpretation means that a designated person's choice and actions alone must be sufficient to establish ownership or control, and that choice must not be hindered by potential penalties or other adverse consequences.

The court went on to emphasise that, when applying these categories of control, one could see how the results in *Mints* and *Litasco* were arrived at. In *Mints*, it was conceded that President Putin had existing de facto control over the Central Bank, and the company in question was almost a 100% subsidiary of the Central Bank. It was not surprising to find control in that context. There was a combination of existing de facto control at the level of the Central Bank, and existing de jure control as between the Central Bank and the company in question. In contrast, in *Litasco* there was no evidence of existing de jure or existing de facto control or of future de jure control.

Application to the Russian Bank Creditors in the present case

Applying this logic to the current case, the court found that there is no sufficient reason for the Trustees to know or suspect that President Putin or Governor Nabiullina "*own or control*" the Russian Bank Creditors via their liquidators. This was because there was no evidence of:

1. **Present or future de jure control.** While Governor Nabiullina and President Putin have significant influence over the supervision and senior management of the DIA, there is no direct or indirect evidence that they can control the individual liquidators managing specific liquidations. It is highly unlikely that those in supervisory roles could legally direct individual liquidators in their statutory duties.
2. **Actual present de facto control.** There is no publicly available evidence indicating that Governor Nabiullina or President Putin have interfered with any liquidation processes managed by the DIA.
3. **Potential future de facto control.** Even if Governor Nabiullina or President Putin wished to influence the liquidators, there would be no straightforward method for them to do so. This would require breaching current constitutional arrangements and directly directing liquidators, or possibly appointing placemen to key positions, who could then influence the liquidators. Such actions would likely require cooperation from others and the Duma, and would involve significant political and reputational risks, making such interference highly impractical.

The court underlined that its conclusion was consistent with the "Ownership and Control: Public Officials and Control Guidance" issued by OFSI and the Foreign and Commonwealth Office on 17 November 2023 (further detail on which is set out in our [previous post](#)).

Accordingly, having regard to the matters above, the court said it would not go so far as to make a declaration in relation to the status of the Russian Bank Creditors. However, it would give directions under section 303 IA 1986 to implement the following points:

- pending any change in circumstances, including any new facts of which the Trustees may become aware, or any notice or requirement from OFSI, or any new guidance from the court (including as a result of the appeal to the Supreme Court in *Mints*), the Trustees should deal with the Russian Bank Creditors on the understanding that they are not designated persons and are not owned or controlled by any designated person and on the basis that they have no knowledge and no grounds for reasonable suspicion that this is not the case;
- the Trustees should, however, undertake (to an extent that is proportionate having regard to cost) enhanced monitoring of the position of the Russian Bank Creditors, checking at least on each occasion that they are considering a distribution to creditors that there is no change in the public records on which they have relied or other matter reasonably accessible within the public domain that would or might change the position significantly from the one presented to the court.