

Third Time Lucky? UK High Court Issues Another New Interpretation of the UK Sanctions “Control” Test

23 November 2023

On 15 November 2023, Mr Justice Foxton handed down judgment in the case of *Litasco SA v Der Mond Oil and Gas Africa SA & Locafrique Holdings SA* [2023] EWHC 2866 (Comm). The judgment follows on the heels of the recent High Court and Court of Appeal decisions in the case of *Mints v National Bank Trust and Bank Okritie*, which suggested very different interpretations of the “control” test under the UK sanctions regime (as discussed in our client update, available [here](#)). The judgment in *Litasco* narrows the gap between the two previous decisions by emphasising that “control” in this context depends on the specific facts of each case. In so doing, the *Litasco* decision may bring some comfort—though not complete clarity—to companies navigating this complex issue.

BACKGROUND

Litasco SA (“Litasco”) applied for a summary judgement against Der Mond Oil and Gas Africa SA (“Der Mond”) and its parent company, Locafrique Holdings SA, two Senegalese companies. Litasco is a Swiss oil marketing and trading company that is wholly owned by a Russian oil company, Lukoil PJSC (“Lukoil”). Litasco and Der Mond entered into a contract in April 2021 whereby Litasco agreed to supply Der Mond with Nigerian crude oil. The obligations under the contract were modified by an addendum on 7 November 2022. Der Mond failed to fulfil certain payment obligations, and Litasco sued for the outstanding amount.

Der Mond advanced a number of defences, including under the sanctions and *force majeure* clauses in the Addendum. Der Mond also argued that—although neither Litasco nor Lukoil were designated persons under the UK sanctions regime—it was prohibited from paying Litasco under regulation 12 of the Russia (Sanctions) (EU Exit) (Amendment) Regulations 2019 (“Russia Sanctions Regulations”). Regulation 12 states that a person “*must not make funds available directly or indirectly to a designated person*”, including “*a person who is owned or controlled directly or indirectly*” by a designated person.

Regulation 7 of the Russia Sanctions Regulations deals with the concept of “ownership or control”. The ownership criteria are met if a designated person holds more than 50% of the shares or voting rights in the entity or has the right to appoint or remove a majority of the board of directors of the entity. An entity is controlled by a designated person if it is reasonable, having regard to all the circumstances, to expect that the designated person would be able to achieve the result that the entity’s affairs are conducted in accordance with the designated person’s wishes.

Der Mond argued that Litasco should be treated as a designated person because it was controlled by one or more designated persons, including Mr Alekperov, the founder and CEO of Lukoil until April 2022, and President Putin.

THE CONTROL TEST

In reaching his conclusion on the issue of control, Mr Justice Foxton reviewed the High Court and Court of Appeal decisions in the *Mints* case.

Mints 1

On 27 January 2023, Mrs Justice Cockerill handed down the first instance judgment in the case of *PJSC National Bank Trust and another v Mints and others* [2023] EWHC 118 (Comm) (“Mints 1”).¹ On the issue of whether the claimant bank, which was owned by the Central Bank of Russia, was “controlled” by Mr Putin, Mrs Justice Cockerill found, in the nonbinding portion of the decision, that the control condition served as a “backstop” for ownership when an entity falls just short of being owned by designated person. The Judge stated that a broader interpretation of control could lead to an “implausible” result where major entities are “sanctioned by a sidewind, in circumstances where they would have no notice of the sanction and be unable themselves to challenge the designation.”²

Mints 2

On 6 October 2023, the UK Court of Appeal handed down its judgment in the *Mints* case ([2023] EWCA Civ 1132, “Mints 2”).³ Although the Court of Appeal upheld the High Court’s substantive decision, it disagreed with Mrs Justice Cockerill’s views on the limits of the control test. The Court of Appeal stated, also in the nonbinding portion of the decision, that the control test is to be interpreted broadly and means that any entity in which a designated person “calls the shots” must be treated as controlled by a

¹ See Debevoise Debrief, “UK High Court Issues Key Decision Considering UK Sanctions ‘Ownership and Control’ Test” (21 February 2023), available [here](#).

² *Mints 1*, para. 237-241.

³ See Debevoise Debrief, “New Decision on UK Sanctions ‘Ownership and Control’ Test: UK Court of Appeal Removes Guardrails to Control Test” (11 October 2023), available [here](#).

designated person. The court acknowledged that, on this interpretation, “Mr Putin could be deemed to control everything in Russia.”⁴

Litasco

Mr Justice Foxton found that Litasco was not controlled by Mr Alekperov because (i) Mr Alekperov stood down from Lukoil’s board shortly after being sanctioned, (ii) his shareholding in Lukoil was only 8.5%, not enough to amount to a controlling stake, and (iii) the defendants adduced no evidence to suggest that Mr Alekperov continued to exercise control over Lukoil.

In respect of the allegation that Litasco and Lukoil were controlled by Mr Putin, Mr Justice Foxton noted that the *Mints 2* court’s conclusion that Mr Putin controlled the bank was not surprising because the bank was in at least 97.9% owned by the Central Bank of Russia, which is “an organ of the Russian state.” Mr Justice Foxton noted that Lukoil is not a state-owned body, and there was no evidence before the Court that it functioned as such. Rather, the Judge focused on whether “making funds available to Litasco amounts to making funds indirectly available to President Putin.” He stated that “the issue of control has, as its central focus, the ability of the designated person to control the use of the funds made available.” Mr Justice Foxton concluded that it was “wholly improbable” that the payment of Der Mond’s debt would be used in accordance with Mr Putin’s wishes or made available to him.

Mr Justice Foxton noted that, although Mr Putin arguably could place “all of Litasco and/or its assets under his de facto control, should he decide to do so,” the control test requires “an existing influence” by a designated person over the relevant business of the company, not influence that a designated person theoretically could bring about. The Judge observed that, in Litasco’s case, Mr Putin was “wholly ignorant” of Litasco’s existence and Litasco’s affairs “were conducted on a routine basis without any thought of him”. He therefore concluded that there was no arguable case that Mr Putin controlled Litasco.

KEY TAKEAWAYS

The *Litasco* case is the first binding decision by the UK courts relating to the control test under the UK sanctions regime. Moreover, Mr Justice Foxton dismissed the defendants’ control argument as not even arguable.

⁴ *Mints 2*, para. 229-233.

The decision seeks to find a middle ground between the narrow approach taken in *Mints 1* and the expansive one suggested by *Mints 2*. The *Litasco* approach emphasises the need to establish *de facto* control on a case-by-case basis, considering whether the designated person actually exercises control over the entity on a “*routine basis*”. It is not, therefore, a hypothetical question to be addressed in the abstract. Nor is it correct to assert that Mr Putin’s control over Russian entities is predetermined because of Mr Putin’s authority as President of Russia.

The fact-specific approach in *Litasco* aligns with that taken by the UK Office of Financial Sanctions Implementation (“OFSI”).⁵ The recently updated OFSI enforcement guidance emphasises that, when determining whether a counterparty is sanctioned, one must conduct thorough factual due diligence and investigate indications of indirect or *de facto* control by a designated person. In fact, just two days after the *Litasco* judgment, OFSI and the Foreign, Commonwealth & Development Office (the “FCDO”) issued joint guidance on the issue of control. It confirmed that incorporation of an entity in a jurisdiction in which a sanctioned public official “*has a leading role in economic policy or decision-making*” is insufficient to establish control by such official over the entity. Rather, “*further evidence*” of control must be adduced.⁶

However, another element of the *Litasco* decision appears to narrow the control test and depart from OFSI’s position: The Court interpreted control as limited to the specific context of the asset freeze. In other words, the Court narrowed the relevant question to whether the sanctioned person controls (or could control) the use of the funds made available to the relevant entity, not whether the sanctioned person controls the entity more generally. This interpretation suggests that, regardless of the connection between a designated person and an entity, there is no control if the designated person does not control the funds of the entity and does not benefit from those funds. This interpretation would mean that corporate office holders who can control the use of an entity’s funds are more likely to satisfy the control condition.

Mr Justice Foxton’s decision in the *Litasco* case, when read alongside the OFSI and FCDO guidance, suggests that businesses can mitigate their sanctions risk by following the due diligence steps set out in the OFSI enforcement guidance. If, following that due diligence, there is nothing to suggest that the relevant entity is controlled by a designated person, the control condition is unlikely to be satisfied. It remains to be seen whether the UK government will address the additional limitation imposed by Mr Justice Foxton and endorse focusing on a designated person’s ability to influence

⁵ See Debevoise Debrief, “OFSI Clarifies UK Sanctions ‘Ownership and Control’ Due Diligence Expectations” (21 March 2023), available [here](#).

⁶ OFSI and FCDO, “Ownership and Control: Public Officials and Control guidance” (17 November 2023), available [here](#).

particular transactions and dispose of funds belonging to the entity. Absent further guidance, businesses subject to UK sanctions should treat entities governed by designated senior executives with greater caution.

The Debevoise sanctions team is available to answer any questions you may have regarding the judgment or its implications for your business.

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Please do not hesitate to contact us with any questions.



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