

Alert | Export Controls & Economic Sanctions



October 2023

UK Court of Appeal Expands Scope of ‘Control’ Under Russia Sanctions Regulations: ‘Mr Putin could be deemed to control everything in Russia’

In a **judgment** handed down on 6 October, a UK Court of Appeal (the Court) provided an *obiter*, or non-binding, ruling expanding the scope of ‘control’ under Regulation 7(4) of the Russia (Sanctions) (EU Exit) Regulations 2019 (the Regulations).

While upholding Mrs Justice Cockerill’s substantive lower court judgment (see our **February 2023 article**) the Court disagreed with that court’s decision that the ‘control’ test was intended as a back stop to ownership and did not extend to control exercised through political office. Rather, the Court stated that the ‘control’ test is to be interpreted broadly, meaning that any entity in which a person the UK government has designated to have their assets frozen (DP) “calls the shots” will be subject to sanctions, accepting that “*in a very real sense...Mr Putin could be deemed to control everything in Russia.*”

In the instant case, the Court considered an ongoing litigation in the Commercial Court commenced in June 2019 between the claimant banks (PJSC National Bank Trust (NBT) and PJSC Bank Okritie) and the Appellants over an alleged conspiracy to defraud the banks of USD \$850 million. Vladimir Putin was designated in February 2022, and Elvira Nabiullina, governor of the Central Bank of Russia (CBR), was designated in September 2022; at the time of Nabiullina’s designation, the Foreign Commonwealth and Development Office (FCDO) issued a statement clarifying that it did not consider Nabiullina to own or

control the CBR. The Appellants contended that NBT was indirectly sanctioned, as it is a 99%-owned subsidiary of the CBR, which is controlled by Putin and/or Nabiullina.

Judgment – significant implications

The Court held that the Regulations did not prohibit the entry of judgment in favour of a DP on the basis that the DP has a valid cause of action, noting that section 44 of the Sanctions and Anti-Money Laundering Act 2018 was predicated on the DP being able to pursue civil proceedings to judgment, “*otherwise the defence would be unnecessary*”. Furthermore, the Court upheld that the Office of Financial Sanctions Implementation (OFSI) was entitled to issue licences authorising relevant litigation steps via the ‘extraordinary expenses’ licencing ground.

In light of the decision on the first two issues, the Court did not have to address the control issue point; however, it was considered to be a point of “*general significance*” and as it had been fully argued, it was addressed on an obiter, non-binding, basis.

Control Issue

Under the Regulations, an entity that a DP owns or controls must be treated as a DP for the purpose of the asset freeze. Regulation 7 sets out two independent conditions for establishing “*ownership or control*”: the first condition (Regulation 7(2)) is that a person, directly or indirectly, holds 50% of the shares or voting rights in an entity, or has the right to appoint or remove a majority of the board of directors of the entity. The second condition (Regulation 7(4)) is that “*it is reasonable, having regard to all the circumstances, to expect that the [DP] would 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 DP’s] wishes.*”

The Court considered the second condition was to be described “*in wide terms,*” and the Regulation’s use of the words “*in all the circumstances*” and “*by whatever means*” excluded any limitation as to its interpretation. The Court therefore rejected the lower court’s conclusion that the second condition was limited to complex corporate structures that did not appear to fall within the first condition: “***The judge evidently put an impermissible gloss on the language of the Regulation because of a concern on her part that, if the appellants were correct about the construction...the consequence might well be that every company in Russia was ‘controlled’ by Mr Putin and hence subject to sanctions.***” [Emphasis added.]

The Court concluded that Putin and/or Nabiullina controlled NBT for the purpose of the UK sanctions regime: “*Mr Putin is at the apex of a command economy. In those circumstances...In a very real sense...Mr Putin could be deemed to control everything in Russia.*”

The Court has recognised that this conclusion gives rise to potentially absurd consequences but highlighted that these are the result of the UK government’s designation of Putin “*without having thought through the consequences.*” It is therefore not for the Court to impose a limitation, but for the UK government to clarify and, if necessary, amend the wording of the Regulations to cure such an unintended consequence. As the FCDO’s statement concerning Nabiullina’s designation indicated, such a conclusion can’t have been Parliament’s intention.

Government Response

On 16 October, the FCDO (responsible for the UK's financial sanctions policy and for managing the sanctions list) issued an e-alert (the alert), supported by OFSI (responsible for sanctions enforcement) in response to the Court's judgment indicating the UK government is considering its impact, in particular that NBT is controlled by a DP by virtue of the DP's political office.

Consistent with the FCDO statement that accompanied Nabiullina's designation, the alert notes that *"FCDO would look to designate a public body where possible when designating a public official if FCDO considered that the relevant official was exercising control over the public body."* As regards a private entity based in or incorporated in Russia, or in any jurisdiction, the UK government will not presume that such an entity is controlled by the relevant designated official.

Notably, the alert concludes: *"In the interests of reducing any uncertainty, we are exploring the options available to the Government in clarifying this position further."*

Key Takeaways

Although the Court's conclusion on the final issue is obiter and not binding, such comments are persuasive in lower courts and provide the clearest indication to date as to how this issue will be approached in future. Moreover, the decision could have equally wide implications for other sanctions regimes where a DP could be seen as being at the apex of a command economy (e.g., Belarus).

The practical effect of the Court's interpretation will likely be significant. The alert suggests that OFSI will not seek to take action against a UK person that deals with a Russian entity simply because Putin is a DP. This approach is akin to that applied by the U.S. Office of Foreign Asset Control (OFAC). OFAC has a well-established record of designating public office holders across various sanctions regimes, but such designation does not impose comprehensive sanctions across a country or mean that such a DP can be considered to control everything, which the court recognises is a potential consequence of the Regulations' wording. However, the alert is not explicit and leaves ajar the risk that a bank or a financial institution, for example, may nevertheless freeze funds or economic resources given uncertainty that they may have reasonable grounds to suspect they might be dealing with, directly or indirectly, a DP.

We note the UK Government's efforts to provide some degree of clarification; however, that it is *"exploring the options"* emphasises the extent of uncertainty that remains, and it is important to highlight that no timeframe has been put on the exercise. The issues caused by the Court's judgment likely cannot be resolved by anything other than an amendment to the Regulation. In the interim, the UK Government may provide a broader statement as to its interpretation of this decision.

Authors

This GT Alert was prepared by:

- [Annabel Thomas](#) | +44 (0) 203.349.8700 | Annabel.Thomas@gtlaw.com
- [Gavin Costelloe](#) | +44 (0) 203.349.8700 | Gavin.Costelloe@gtlaw.com
- [Bethany Histed](#) | +44 (0) 203.349.8700 | Bethany.Histed@gtlaw.com

*Special thanks to Gabi Wong ~ for her valuable contributions to this GT Alert.

~ *Not admitted to the practice of law.*

Additional Contact

- [Kara M Bombach](mailto:Kara.Bombach@gtlaw.com) | +1 202.533.2334 | Kara.Bombach@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Berlin.~ Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Houston. Kingdom of Saudi Arabia.« Las Vegas. London.* Long Island. Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Diego. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Singapore.~ Tallahassee. Tampa. Tel Aviv.^ Tokyo.² United Arab Emirates.< Warsaw.- Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. «Khalid Al-Thebity Law Firm in affiliation with Greenberg Traurig, P.A. is applying to register a joint venture in Saudi Arabia. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ~Greenberg Traurig's Singapore office is operated by Greenberg Traurig Singapore LLP which is licensed as a foreign law practice in Singapore. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¢Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <Greenberg Traurig's United Arab Emirates office is operated by Greenberg Traurig Limited. ~Greenberg Traurig's Warsaw office is operated by GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2023 Greenberg Traurig, LLP. All rights reserved.*