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Applying UK Sanctions to group structures: ownership, control, and the section 44 SAMLA defence

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Victor Steinmetz of 3 Verulam Buildings examines the complex application of UK sanctions to corporate group structures where an entity may be owned or controlled by a designated person. The column explores the statutory framework for "ownership and control" under Regulation 7 of the Russian (Sanctions) (EU Exit) Regulations 2019, highlighting the practical difficulties in assessing indirect control. It considers the relevance of EU guidance and case law following the Court of Appeal's decision in Mints v PJSC National Bank Trust and discusses practical steps to mitigate risk.

Applying UK Sanctions to group structures: Ownership, Control, and the section 44 SAMLA Defence

Markets are now regularly exposed to individuals and entities that are either themselves listed or owned or controlled by a designated person. The resulting sanctions issues arise in all types of banking transactions, including derivatives, letters of credit, and bond issuances. The main financial prohibitions are asset-freeze restrictions and prohibitions on making funds or economic resources available, directly or indirectly, to or for the benefit of a designated person or an entity owned or controlled by a designated person. A financial counterparty may be a part of a group of companies and in practice, the greatest difficulty tends to arise in respect of direct or indirect control.

Ownership and Control: The Statutory Framework

Regulation 7 of the *Russian (Sanctions) (EU Exit) Regulations 2019* (the UK Regulations) provides that an entity is "*owned or controlled directly or indirectly*" by another person if either:

- The person holds, directly or indirectly, more than 50% of the shares or voting rights, or holds the right to appoint or remove a majority of the entity's board of directors, or
- It is reasonable, having regard to all the circumstances, to expect that the person would be able, in most cases or in significant respects, to achieve the result that the entity's affairs are conducted in accordance with that person's wishes.

These two conditions are not cumulative; satisfying either one is sufficient. The Court of Appeal has held that "both conditions relate to ownership or control, and it is not the case that the first condition is concerned with ownership and the second with control." Although OFSI's general guidance provides further assistance on these issues, identifying who is "*calling the shots*" is a highly factual exercise for which there are no shortcuts.

Interpreting the UK Regulations: is EU guidance relevant?

In conducting statutory interpretation, there is an overarching requirement that a court should give effect to the intention of the legislator. The purpose underlying the UK Regulations is to increase pressure on Russia to force Russia to stop destabilizing Ukraine or undermining Ukrainian sovereignty. The Supreme Court has held that the sanctions regime deliberately casts a wide net, with licensing as the mechanism to address unintended or disproportionate outcomes.

The UK and EU sanctions regimes share the same purpose and in Mints v PJSC National Bank Trust,

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the Court of Appeal held that the *Sanctions and Anti-Money Laundering Act 2018* (SAMLA) and the UK Regulations were intended by Parliament and the Government to continue the EU sanctions regime without any substantive change. Although the UK Regulations do not simply replicate the EU regime, the Court of Appeal considered that those differences are to be explained as "*putting the same thing differently*." EU case law and guidance, including the European Commission's opinions on the interpretation of the equivalent EU legislation may thus be relevant to the interpretation of the UK Regulations.

A Rebuttable Presumption under the UK Regime?

In LLC EuroChem North-West-2 v Societe Generale SA (a case on Article 2(2) of EU Regulation 269/2014) Bright J, having had regard to the position under EU law, concluded that where an entity is owned or controlled by a designated person, there is a rebuttable presumption that the control extends to all of the entity's assets, including those of its subsidiaries. The party seeking to rebut that presumption bears the burden of showing that the funds will not be used by or for the benefit of the designated person. Such an assessment has to be made on a case-by-case basis using a risk-based approach, taking into account all the relevant circumstances, for example that effective firewalls or ringfencing measures that remove the designated person from day-to-day operations and prevent access to the relevant funds or assets have been put in place.

Article 2(2) is closely analogous to Regulations 12 and 13 of the UK Regulations and in light of the decision in Mints, the same rebuttable presumption may well be held to apply under the UK Regulations. However, this has yet to be confirmed by the courts. In addition, neither the English legislation nor OFSI's guidance refers to the existence of a rebuttable presumption. Instead, such an approach would sit uneasily with the express wording of Regulation 7, which refers to "*ownership or control*" (which would indicate that ownership itself, without control, would suffice for the sanctions regime to apply). There is therefore an open question about how to apply UK Sanctions.

The Section 44 SAMLA Defence

Section 44 of SAMLA protects a person from civil liability for an act or omission done in the reasonable belief that the act complies with sanctions regulations made under SAMLA. The defence therefore applies where a party withholds payment, freezes funds, or refuses to perform a contractual obligation on sanctions grounds, and offers protection in respect of debts, interest and associated costs. Whether a defendant actually held the requisite reasonable belief is a question of fact. The belief must be both genuinely held and objectively reasonable. Once a licence is granted, it would appear unlikely that a s.44 SAMLA belief could continue to be reasonably held. Parties should not assume a licence will be granted and should not carry out prohibited activity until it is granted. Breaches can expose parties to criminal enforcement, OFSI monetary penalties and serious commercial consequences.

The rebuttable presumption discussed above may complicate reliance on this defence for example where an entity is owned or controlled by a designated person, but it is clear on the evidence that no actual control over the assets exist, e.g. due to ringfencing measures. In such a case, it may be difficult to maintain a reasonable belief that payment is prohibited.

Practical steps to take

- **Screen against the lists:** Before effecting any payment or entering into a transaction undertake comprehensive screening of all counterparties, beneficial owners, and related entities against the UK sanctions list (the Consolidated List maintained by OFSI) and, where relevant, equivalent EU and international lists.
- **Go beyond the lists:** Conduct ownership and control due diligence on all parties involved (including counterparties, beneficiaries, guarantors, banks and payment recipients). Review structure charts, shareholder agreements, board appointment rights, voting arrangements, financing documents, mandates and evidence of actual influence. Identify any designated person at any level.
- **When in doubt, hold.** Freeze or ring-fence funds where required. Record the factual basis for any determination as to ownership or control, the legal analysis, and the grounds for any reliance on the section 44 defence.
- **Apply for a licence where payment may be prohibited.** Licence applications can take a significant period of time to process which should be factored into transaction timetables.

The law in this area is evolving rapidly, and it is advisable to monitor developments closely.

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