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– UK Sanctions

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UK Sanctions:

A Review of 2023 Key Challenges and Trends

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Introduction

Since Russia's full-scale invasion of Ukraine on February 24, 2022, the United Kingdom has joined the United States and other allies in an unprecedented, coordinated sanctions response. Then UK Foreign Secretary Liz Truss emphasized the country's unwavering commitment to intensifying pressure on individuals linked to the Kremlin and other key enablers, targeting not only their businesses, but also their assets and lifestyle, as long as Russian forces maintained a presence in Ukraine.

As of August 2023, more than 1,600 individuals and 230 entities have been subject to UK sanctions under the *Russia (Sanctions) (EU Exit) Regulations 2019* (Russia Regulations). Among them, at least 129 "oligarchs", with a combined net worth of over £145 billion, have been subject to this targeted approach, the House of Commons Library reports. In the meantime, this unprecedented response has also led to challenges in English courts. Since 2021, more than 30 individuals have requested a revision of their designation, whether under the Russia Regulations or other regimes.

As cases start to be appear in court, they highlight a very low threshold when it comes to the designating process, but a high bar when it comes to challenging said designation. At the same time, while the designation process itself is hardly questioned by the courts, the enforcement of the sanctions regime is put to test. This article explores challenges and trends that have characterized the UK sanctions landscape in 2023. In particular, it focuses on key landmark decisions involving sanctioned individuals, as well as policy developments in the UK aimed at improving sanctions implementation.

A BROAD REMIT FOR DESIGNATING - A HIGH BAR FOR CHALLENGING.

The year 2023 has witnessed a series of landmark decisions regarding sanctions designations, both in the context of the Russia Regulations and relating to the broader UK sanctions landscape. Three cases in particular underscore a prevailing trend surrounding the considerable leeway granted

to the Foreign, Commonwealth and Development Office (FCDO) in making designations: *LLC Synesis v Secretary of State for Foreign, Commonwealth and Development Affairs* [2023] EWHC 541(Admin) (*Synesis*), *Eugene Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2023] EWHC 2121 (Admin) *(Shvidler)*, and *Mints v National Bank Trust and Bank Okritie* [2023] EWCA Civ 1132 (*Mints*). These cases also clarify key issues in sanctions designation processes, including the concept of "involved person", the standard of proof and the type of evidence that can be used by the decision-maker for the designation, and the concepts of "ownership" and "control".

The *Synesis* case, albeit not concerning the Russia Regulations, laid the foundations for ensuing challenges. In this case, the court rejected a designation challenge under section 38 of the Sanctions and Anti-Money Laundering Act 2018 (SAMLA). The court upheld the FCDO's decision not to remove Synesis from the list of designated persons, emphasizing its role in scrutinizing procedural aspects of the designating process rather than "standing in the shoes" of the decision-maker in relation to the evidence on which the designation is made. The court also confirmed that:

a. historic behavior could still be subject to sanction, and as such an individual or entity can still be considered an "involved person", and therefore designated, even if they are no longer actively engaged in the sanctionable activity;
b. the statutory threshold applied by the FCDO for designations extends beyond mere "reasonable grounds to suspect", to include (i) hearsay, (ii) multiple hearsays, (iii) allegations, and (iv) intelligence. Crucially, the decision-maker is only required to evaluate the available information in good faith; and
c. the role of the court when making its review under Article 38 of SAMLA is only to examine whether the decision-maker's decision was either based on no evidence or was irrational, and not to make a judgment itself.

The *Synesis* case serves as a significant indicator of the low bar given to the executive in matters of designation processes, and the little that courts can do about it.

The same trend was reflected in the *Shvidler* case, the first legal challenge to a designation under the Russia Regulations brought by Eugene Shvidler. Shvidler was designated right in the aftermath of Russia's invasion of Ukraine on the grounds he was an "involved person", due to his alleged ties with Roman Abramovich and past association with Evraz PLC, a company accused of aiding the Russian war effort.

The court's ruling mirrors in many ways the *Synesis* case:

a. The court confirmed the lower threshold for imposing sanctions, as long as the decision is reasonable and proportionate. It also rejected Shvidler's argument that personal suffering caused by sanctions should outweigh designation even in cases when "the foreign policy objectives (...) are of the highest order".

b. The court held that the imposition of sanctions serves as a message to the designated individual and others in a similar position surrounding their conduct.

c. The court confirmed that historic behavior can still be subject to sanction. In particular, in response to Shvidler's argument that he had condemned Russia's actions in Ukraine, Mr. Justice Garnham held that "the value of [the] messages [of a sanction designation] persists even if the person in question ceases the conduct complained of and makes statements distancing himself from the Russian regime".

The English courts have also implied that broad scope should not limited to the kind of evidence the FCDO can assess when imposing sanctions or to the concept of "involved person", but also to the concept of "ownership" and "control". On October 6th, 2023, the Court of Appeal handed down judgment in the case of *Mints*, in which it included comments on the control potentially exercised by President Putin, who was personally sanctioned by the UK government after the invasion of Ukraine, over the Russian economy. In this context, the influence wielded by President Putin by virtue of his political office was considered so significant that "the consequence might well be that every company in Russia was 'controlled' by Mr. Putin and hence subject to sanctions". OFSI and the FCDO published a statement shortly after the judgment, noting that "[t]here is no presumption on the part of the Government that a private entity based in or incorporated in Russia or any jurisdiction in which a public official is designated is in itself sufficient evidence to demonstrate that the relevant official exercises control over that entity".

HIGHLY LITIGIOUS AND HIGHLY EVASIVE

The imposition of sanctions and recent court judgments have not deterred designated entities and individuals from utilizing English courts to pursue litigation. This point has also been made in the Mints case, which confirmed that designated persons could not be excluded from the English courts. More than 30 sanctioned individuals have sought a government review of their designations since 2021, while others have challenged the National Crime Agency's (NCA) investigations into alleged sanctions evasion. This raises questions, if not on the robustness of UK sanctions designation processes, then on the effectiveness of its sanctions enforcement.

Beside the case of Shvidler, whose lawyers announced he would appeal, Petr Aven, the former director of Russian banking giant Alfa Group, contested a NCA investigation on suspected sanction evasion. In *NCA v. Westminster Magistrates' Court* [2022] EWHC 2631 (Admin), Aven demanded the reversal of two Account Freezing Orders (AFOs), citing the NCA's "chaotic and unprincipled approach" and asserting that there was no reasonable basis for any "purported suspicion" of the offense being committed. In July 2023, the Westminster Magistrates' Court ruled that the frozen funds could be used to cover some of Aven's expenses, with civil society organizations raising concerns over potential asset flight. Meanwhile, Mikhail Fridman secured permission to challenge a NCA's raid at his London property as part of another investigation into alleged sanction evasion, an "egregious" conduct in obtaining a search warrant, according to the judge (Fridman v. National Crime Agency, case number CO/760/2023).

Sanctions have not prevented designated parties from attempting to circumvent sanctions either. While cases of sanctions evasion have started to be brought before US courts, the UK's Combatting Kleptocracy Cell, specifically tasked with targeting evasion, is yet to showcase concrete results. Beyond the timid investigations into alleged misconduct by Aven and Fridman, being tougher on sanctions evasion remains in the UK a policy intention rather than a reality. Yet, there is evidence of designated individuals proactively restructuring their wealth to avoid detection, often shortly before sanctions hit.

To prevent this, in June 2023 the UK government announced its intention to introduce a disclosure obligation for designated persons under UK sanctions surrounding the assets they hold in the UK. This proposal, which was initially advanced by the Royal United Services Institute and Spotlight on Corruption, awaits publication – its impact on enhancing sanctions enforcement unknown.

SHIFTING PARADIGMS

Sanctions have traditionally served as a foreign policy instrument aimed at inducing behavioral change, with the expectation that, once achieved, they can be lifted. As Mr. Justice Garnham wrote in the *Shvidler* judgment, "the effects of a designation are temporary and reversible, not fixed and permanent". Recent developments in the UK sanctions landscape, however, denote a shift from conventional practices surrounding the interpretation and enforcement of sanctions designations.

A question then arises: what criteria must be met for sanctions to be lifted in the UK? The *Shvidler* case illustrates that merely speaking out against the war may not suffice, and sanctions can persist even if the designated individual has altered their behavior. Opting for an administrative route, rather than a litigious one, has proven to be more effective. For instance, Oleg Tinkov successfully persuaded the FCDO to lift sanctions through an out-of-court administrative review, on the grounds that he was no longer in a sector of strategic significant for the Russian economy. In this case, the role of the FCDO in making the decision, rather than the court's, was pivotal. For oligarchs seeking to have their name struck off the sanctions list, garnering support from the UK government appears to be key. Speculation has circulated about designated individuals voluntarily transferring part of their wealth for Ukraine's recovery and denouncing the Kremlin's actions in Ukraine in exchange for lifting sanctions – a proposal notably supported by Fridman himself. Together with the proposal to introduce disclosure obligations, the UK government announced in June 2023 new legislation that would allow sanctioned oligarchs to donate frozen funds to Ukraine for its reconstruction. Even though it has denied a direct link between this proposal and sanctions relief, questions arise surrounding its efficacy, which hinges on the incentives for oligarchs to come forward, and the importance of not skewing the purpose of sanctions in the process.

The latter discourse also brings back into the spotlight a matter that – albeit not present in UK courts yet – has been a topic of conversation since February 2022: the recovery of assets currently frozen under sanctions. On the one hand, the Government's announcement of disclosure obligations for sanctioned individuals may trigger the introduction of a "failure to disclose" offense as a form of sanctions evasion which could lead to confiscation of some assets, albeit in limited amount. On the other hand, the Government's emphasis on the voluntary nature of donations indicates an intention, at least in the asset recovery context, of ensuring fairness and proportionality, as the frozen assets of sanctioned individuals and entities cannot legitimately be seized in the absence of a specific criminal conduct. As other countries push for furthering measures that would allow confiscation stemming from a sanctions designation (see, for instance, Canada's Bill S-278, An Act to amend the Special Economic Measures Act (disposal of foreign state assets)), one may wonder how long this balance will be respected.

CONCLUSIONS

In the realm of UK sanctions, striking a balance between inducing behavioral change, ensuring fairness and proportionality, and seeking targeted legal action against criminal conduct is paramount. It is a crucial, yet complex, imperative which has emerged in 2022, manifested in 2023, and will continue to shape the dynamics of sanctions implementation in 2024.

Sanctions, while a useful policy tool, not only in the foreign policy realm but in the criminal justice context as well, should not be the default option when criminality is identified. While UK courts have so far demonstrated a disposition towards not putting themselves in the executive's shoes as relates to sanctions designation processes, they have also proven to be more cautious when criminal conduct - whether sanctions evasion or corruption – is involved. Once key concepts surrounding sanctions designations are established, the enforcement of sanctions in the UK context will need to take account of many factors, including the evolving legal landscape, challenges posed by designated entities and individuals, individual rights and rule of law challenges, and political imperatives.

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