

## UK UPDATE: RUSSIA SANCTIONS

*This is an updated version of a Client Alert published on 11 April 2022.*

In response to the Russian invasion of Ukraine, the United Kingdom (**UK**) has adopted a number of measures with the purpose of "encouraging Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine".<sup>1</sup> Since February 2022 these measures have been repeatedly amended, both to broaden the scope of sanctions and to deter circumvention<sup>2</sup> (including by means of sanctions against Belarus).<sup>3</sup>

UK<sup>4</sup> sanctions fall into six categories: finance, immigration, trade, aircraft, shipping and other sanctions for purposes of UN obligations; this note is primarily concerned with financial and trade sanctions relating to Russia.

UK sanctions apply to:

- any person acting (or omitting to act) in the UK, and
- UK nationals and UK incorporated entities anywhere in the world.<sup>5</sup>

The specific target of each sanction depends upon the terms of that sanction. However, generally speaking, activities which a person who is subject to UK sanctions might otherwise engage in with "designated persons" and/or "persons connected with Russia" are prohibited (i.e. an individual ordinarily resident in Russia or located in Russia, or an entity formed under Russian law or domiciled in Russia).

These sanctions apply to some 1,600 designated persons comprising high-net worth individuals and leading members of the Russian elite as well as some 229 companies (e.g. Rostec, Russia's biggest defence company) and members of the Duma and Federation council.<sup>6</sup> Immediate family members of designated individuals and the management of certain enterprises are also subject to UK sanctions.<sup>7</sup>

This note is concerned with UK sanctions in force in September 2023; as the regime has been continually evolving since February 2022 care needs to be taken if a past possible violation is being considered. The UK sanctions

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<sup>1</sup> Russia (Sanctions) (EU Exit) Regulations 2019 (SI 2019/855) (**2019 Regs**); reg 4.

<sup>2</sup> SI 2019/855; a list of successive amendments to the 2019 Regs and the accompanying government guidance can be found [here](#).

<sup>3</sup> Republic of Belarus (Sanctions) (EU Exit) Regulations 2019 (SI 2019/600) (as amended).

<sup>4</sup> The 2019 Regs apply also to Anguilla, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena, Ascension and Tristan da Cunha, South Georgia and the South Sandwich Islands, The Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus, Turks and Caicos Islands, Virgin Islands by virtue of the Russia Sanctions (Overseas Territories) Order 2020 (SI 2020/1571), Gibraltar, Guernsey, the Isle of Man and Jersey.

<sup>5</sup> 2019 Regs, regs 3(1) and 3(4) and Sanctions and Anti-Money Laundering Act 2018 (**SAMLA**), s. 21(2).

<sup>6</sup> The list of designated persons under the 2019 Regulations is available [here](#).

<sup>7</sup> 2019 Regs, reg. 6.

framework is complex and what follows is a general overview which is neither comprehensive nor, as questions with respect to the application of sanctions are very much fact specific, intended to be relied upon.<sup>8</sup>

## Designation

A Secretary of State may designate persons in accordance with specified criteria which include, amongst other things, involvement in destabilising Ukraine or benefitting from or supporting the Government of Russia.<sup>9</sup>

Designation may be made specifically or by description<sup>10</sup> and "mirroring" provisions introduced by the Economic Crime (Transparency and Enforcement) Act 2022 provide for designation to apply where a person has been designated by the European Union or the United States.

On 18 August 2023, the High Court rejected the first appeal against designation.<sup>11</sup> That designation resulted from the claimant's association with Mr Roman Abramovich, who was classed as an individual involved in obtaining a benefit from or supporting the Government of Russia, and the claimant's position as shareholder and former non-executive director of Evraz plc (active in the Russian extractives sector and a designated entity). Designation was disputed on the basis that designation contravened the right to respect for private and family life, the right to property and the right not to be discriminated against under the European Convention on Human Rights (**Convention**). The court held that the correct balance had been struck between Convention rights and the relevant foreign policy objectives and noted that "special weight" should be given to the Secretary of State's institutional expertise in making foreign policy decisions of this kind. The decision suggests that designation is unlikely to be overturned by the English courts.

## Financial sanctions

### *Asset freeze*

Several provisions apply to limit any action that may be taken in relation to the assets of a designated person and thereby "freeze" such assets. In particular, it is an offence to:

- deal with funds or economic resources which are directly or indirectly owned, held or "controlled"<sup>12</sup> by a designated person;<sup>13</sup> and
- make funds or economic resources available directly or indirectly to a designated person, or to make funds so available to any other person for the benefit of a designated person.<sup>14</sup>

To date, the UK has imposed asset freezes on 29 Russian banks, including VTB and Sberbank (Russia's largest and second-largest banks), amounting to 80% of the Russian banking sector.

### *Investment restrictions*

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<sup>8</sup> Measures taken by institutions, such as the London Stock Exchange (as referred to below) or private firms may go beyond legal requirements and are, except where explicitly referred to, outside the scope of this note.

<sup>9</sup> 2019 Regs, reg. 6.

<sup>10</sup> 2019 Regs, reg. 6A.

<sup>11</sup> *Eugene Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2023] EWHC 2121 (Admin).

<sup>12</sup> Being "controlled" directly or indirectly by a person means to act on behalf or at the direction of a person or to be associated with that person (for example, by being a family member).

The meaning of "control" was considered in *PJSC National Bank Trust and another v Boris Mints and others* ([2023] EWHC 118 (Comm)) where the High Court held, *obiter*, that "control" does not comprise control by virtue of a political office (in contrast to personally (including through a trust structure) or (potentially) via a corporate office holding).

<sup>13</sup> 2019 Regs, reg. 11.

<sup>14</sup> 2019 Regs, regs. 12-15; see also *R (on the application of M) v HM Treasury* [2008] 2 All ER 1097 (HL).

Prohibited activities include making any investment in an "ownership interest" in land in Russia (or Russian occupied areas in Ukraine), ownership or control over an entity connected with Russia, a joint venture with a person connected with Russia, and opening a representative office, branch or subsidiary in Russia.<sup>15</sup>

The notions of "ownership interest" and "control" are broadly defined. They include the direct or indirect acquisition of: any voting share or voting rights in an entity; any right to appoint or remove the majority of the board of directors of an entity; and any means of ensuring that the affairs of the entity are conducted according with the wishes of the person making the investment.

There is also a prohibition on providing any loan, credit or otherwise funding any entity with a place of business in those areas.

### *Access to finance*

Russian access to UK finance is restricted; it is prohibited for a person to directly or indirectly, deal with a transferable security or money-market instrument issued on or after 1st March 2022 by:

- an entity which is constituted under the law of the UK and owned by a person falling within Schedule 2 of the 2019 Regs or an entity acting on their behalf;
- a person connected with Russia or an entity owned or controlled by a person connected with Russia; or
- the Government of Russia or by another entity on its behalf.

It is also prohibited for a person to directly or indirectly, deal with a transferable security or money-market instrument issued on or after 16 December 2022 by an entity for the purposes of prohibited investment in relation to Russia.<sup>16</sup>

Prohibition applies to the direct or indirect grant of, or making funds or economic resources available for the purposes of enabling an entity to access to a loan made to:

- the Government of Russia;
- an entity listed in 2019 Regs, Schedule 2, an entity owned by a person so listed, or an entity acting on behalf of such an entity;
- a person connected with Russia, an entity owned by such a person or an entity acting on behalf of such person or entity; and
- an entity for the purposes of any of the prohibited investments listed above.<sup>17</sup>

Entities designated by Schedule 2 include a number of Russian banks - such as Sberbank, VTB Bank, and Gazprombank - as well as important Russian infrastructure companies, for example OPK Oboronprom (an aerospace company) and Uralvagonzavod (a machine industry company).

### *Clearing and settlement in sterling*

A UK credit or financial institution is prohibited from establishing or continuing a correspondent banking relationship and from processing sterling payments to, from or via a designated person or a credit or financial institution owned or controlled by a designated person.<sup>18</sup>

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<sup>15</sup> 2019 Regs, regs. 18 and 18B.

<sup>16</sup> 2019 Regs, reg. 16.

<sup>17</sup> 2019 Regs, reg. 17.

<sup>18</sup> 2019 Regs, reg. 17A.

As the "processing" of a sterling payment includes the clearing and settlement of such a payment wherever a payment emanates from, this measure has an extra-territorial effect. There is, therefore, potential for a transaction denominated in sterling, but with no UK nexus, to be caught and funds seized, in a manner similar, for example, to OFAC's operation of sanctions regimes with Cuba and Iran.

### *Foreign exchange*

The provision of financial services is prohibited for the purpose of foreign exchange reserve and asset management for the following:

- the Central Bank of the Russian Federation;
- the National Wealth Fund of the Russian Federation;
- the Ministry of Finance of the Russian Federation;
- a person owned or controlled (directly or indirectly) by any of the above; or
- a person acting on behalf of or at the direction of any of the above.<sup>19</sup>

### *Trust services*

The provision of trust services or similar arrangements for the benefit of designated persons or persons connected with Russia.<sup>20</sup>

The prohibited trust services include:

- the creation of a trust or similar arrangement;
- the provision of an address for a trust or similar arrangement;
- the operation or management of a trust or similar arrangement; and
- acting or arranging for another to act as trustee or an equivalent and similar position.<sup>21</sup>

The prohibition applies irrespective of the location of the trust or equivalent arrangement.

## London Stock Exchange

Although standing slightly apart from the UK statutory sanctions framework, as the London Stock Exchange (**LSE**) is not a statutory body, the LSE has suspended, "in light of market conditions, and in order to maintain orderly markets", the trading of global depository receipts and American depository receipts of a number of companies with strong links to Russia, blocking trading under their secondary listings in London.

## Trade sanctions

Wide-ranging trade restrictions apply both to (i) goods and (ii) services.

### *Trade in goods*

#### *Restricted goods and technology*

Trade in "restricted goods" and "restricted technology" is prohibited. The relevant categories of goods include critical-industry goods and technology; dual-use goods and technology; military goods and technology; aviation

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<sup>19</sup> 2019 Regs, reg. 18A.

<sup>20</sup> Persons connected with Russia may continue to benefit from any such arrangement which was ongoing prior to 16 December 2022.

<sup>21</sup> 2019 Regs, reg. 18C.

and space goods and technology; oil refining goods and technology; quantum computing and advanced materials goods and technology; defence and security goods and technology; as well as maritime goods and technology.<sup>22</sup>

Restricted goods and technology are subject to numerous prohibitions, including the prohibition against:

- the export of such goods to, or for use in, Russia;
- the transfer of such technology to Russia or to a person connected with Russia;
- the direct or indirect supply or delivery of restricted goods from a third country to Russia;
- making available such goods or technology to a person connected with Russia or for use in Russia;
- the direct or indirect provision of technical assistance relating to the restricted goods or technology to a person connected with Russia or for use in Russia; and
- the direct or indirect provision of financial services, funds or brokering services to a person connected with Russia in connection to an arrangement which aims at exporting, transferring or making available restricted goods or technology.<sup>23</sup>

The import of arms and related materiel consigned from Russia is prohibited,<sup>24</sup> as is the enabling or facilitation of the provision of military activities in Russia.<sup>25</sup> Separate provisions restrict the trade in military goods and technology to and from Russian occupied territories in Ukraine.<sup>26</sup>

*Import and export*

The following categories of goods are affected by the trade prohibitions:

Import from Russia	Export to Russia
<ul style="list-style-type: none"> <li>• Iron and steel products;</li> <li>• Revenue generating goods (listed in 2019 Regs, Schs 3D-3DA);</li> <li>• Oil and Oil Products;</li> <li>• Gold, gold jewellery and relevant processed gold;</li> <li>• Coal and Coal Products; and</li> <li>• Liquefied natural gas.</li> </ul>	<ul style="list-style-type: none"> <li>• Energy-related goods and related activities;</li> <li>• Luxury goods;</li> <li>• Banknotes;</li> <li>• Jet fuel and fuel additives;</li> <li>• G7 dependency and further goods; and</li> <li>• Russia's vulnerable goods (listed in the Export Control Order 2008, Schs 2-3, the Dual-Use Regulation, Annex 1, or 2019 Regs, Sch 2A).</li> </ul>

The import of goods originating from Russian controlled territories in Ukraine and the export of infrastructure-related goods to Russian controlled territories in Ukraine are also prohibited.<sup>27</sup>

<sup>22</sup> 2019 Regs, reg. 21.  
<sup>23</sup> 2019 Regs, Part 5, Chapter 2.  
<sup>24</sup> 2019 Regs, reg. 23.  
<sup>25</sup> 2019 Regs, reg. 30.  
<sup>26</sup> 2019 Regs, Part 5, Chapter 2A.  
<sup>27</sup> 2019 Regs, Part 5, Chapter 5.

### *Trade in services*

#### *Professional and business services*

Directly or indirectly providing certain professional and business services to a person connected with Russia is prohibited. The following services are covered: accounting, advertising, architecture, audit, business and management consulting, engineering, IT consultancy and design, public relations, and legal services. The ban on legal advisory services applies to non-contentious legal advice.<sup>28</sup>

#### *Communication services*

Providers of social media services, internet access services and/or application stores must take reasonable steps to prevent access by UK users to:

- content uploaded or shared by a designated person; and
- internet services provided by a designated person.<sup>29</sup>

#### *Services provided to Russian occupied territories in Ukraine*

It is an offence to provide services relevant to infrastructure sectors and tourism to Russian occupied territories in Ukraine.<sup>30</sup> Infrastructure sectors include transport, telecommunications, energy, and the prospection, exploration and production of oil, gas and mineral resources.

#### *Monitoring services*

It is an offence to directly or indirectly provide interception and monitoring services to, or for the benefit of, the Government of Russia.<sup>31</sup>

## **Ships**

A Secretary of State may give a direction to a British cruise ship prohibiting it from entry to ports located in Crimea, Donetsk or Kherson and Zaporizhzhia. In addition, it is an offence to allow access to UK ports, if a person knows, or has reasonable cause to suspect, that a ship is:

- owned, controlled, chartered or operated by a designated person or a person connected with Russia;
- flying the flag of Russia, registered in Russia; or
- a specified ship (that is, a ship specified by the Secretary of State as having been used to contravene or circumvent the provisions of the Regulations).<sup>32</sup>

A ship may also be subject to directions under which it is required to proceed to a specified port, leave given areas or remain where it is.<sup>33</sup> In addition, a Secretary of State may order the detention of a ship.<sup>34</sup>

The provision of technical assistance to a designated person in relation to a ship is prohibited.<sup>35</sup>

*Dalston Projects v Secretary of State for Transport* concerned a challenge brought on the grounds that the Secretary of State had acted improperly in making a detention direction in respect of a yacht moored at Canary Wharf, which had infringed the Human Rights Act 1998, s 8 (and the Convention, First Protocol, art 1 (*Right to*

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<sup>28</sup> See [Extension of UK sanctions against Russia to include provision of legal advice services](#).

<sup>29</sup> 2019 Regs, reg. 54A.

<sup>30</sup> 2019 Regs, reg. 54.

<sup>31</sup> 2019 Regs, reg. 46K.

<sup>32</sup> 2019 Regs, regs. 57, 57A and 57B.

<sup>33</sup> 2019 Regs, reg. 57C.

<sup>34</sup> 2019 Regs, reg. 57D.

<sup>35</sup> 2019 Regs, reg. 46A.

*peaceful enjoyment of property*)) and had committed the tort of conversion.<sup>36</sup> Each of these challenges were dismissed. The Judge noted, in particular, that there was a rational link with UK foreign policy, the sanction was proportionate to the public interest objective and the deference owed by the courts to the Executive in foreign policy matters - and concluded that the Secretary of State is entitled to a "broad margin of discretion" in deciding that the detention power is to be exercised in pursuit of the government's foreign policy aims and that the law sets a "high threshold" for a court to intervene.

## Aircraft

A Russian aircraft may not overfly or land in the UK.<sup>37</sup> An aircraft which is owned, operated, or chartered by demise by a designated person may not be registered in the UK.<sup>38</sup>

The provision of technical assistance to a designated person in relation to an aircraft is prohibited.<sup>39</sup>

The provision of insurance or reinsurance services relating to aviation and space goods or aviation and space technology to a person connected with Russia or for use in Russia is prohibited.<sup>40</sup>

## ENFORCEMENT

Financial sanctions<sup>41</sup> are enforced by His Majesty's Treasury's (**HM Treasury**) Office of Financial Sanctions Implementation (**OFSI**), alongside the National Crime Agency (**NCA**) which is responsible for criminal enforcement.<sup>42</sup> OFSI has the power to impose monetary penalties on a strict civil liability basis<sup>43</sup> **and** may impose monetary penalties of up to £1 million.<sup>44</sup>

OFSI has stated that, while OFSI "does not prescribe the level or type of due diligence to be undertaken to ensure compliance with financial sanctions (including as to the owned and controlled test)", mitigating/aggravating factors considered in an enforcement context include whether due diligence was done, in good faith, and the conclusion drawn from that due diligence was reasonable.<sup>45</sup>

Trade sanctions are implemented by the Export Control Joint Unit (**ECJU**) of the Department of Business and Trade and enforced by His Majesty's Revenue and Customs (**HMRC**).<sup>46</sup> HMRC has power to detain persons, ships, aircrafts and vehicles.<sup>47</sup>

The UK Office of Communications (**Ofcom**) monitors compliance with sanctions related to communications services and may impose monetary fines of up to £1 million.<sup>48</sup>

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<sup>36</sup> *Dalston Projects v. Secretary of State for Transport* [2023] EWHC 1885 (Admin).

<sup>37</sup> 2019 Regs, reg. 57J.

<sup>38</sup> 2019 Regs, reg. 57M.

<sup>39</sup> 2019 Regs, reg. 46A.

<sup>40</sup> 2019 Regs, reg. 29A.

<sup>41</sup> Financial sanctions within OFSI's remit include restrictions on maritime transportation, and associated services for the maritime transportation, of certain Russian oil and oil products - and the premium to the crude price cap.

<sup>42</sup> 2019 Regs, reg. 87 and 88C. For an overview of the various organisations responsible for the implementation and enforcement of UK sanctions, please see the government guidance available [here](#).

<sup>43</sup> Policing and Crime Act 2017, s 146.

<sup>44</sup> 2019 Regs, reg. 88C.

<sup>45</sup> OFSI enforcement and monetary penalties for breaches of financial sanctions: Guidance (August 2023), paras 3.24-3.30.

<sup>46</sup> 2019 Regs, reg. 85.

<sup>47</sup> Customs and Excise Management Act 1979, Part XI and ss 29, 34, 65.

<sup>48</sup> 2019 Regs, reg. 88A.

SAMLA, s 44 may serve to limit liability in respect of actions "where an act is done in the reasonable belief that the act is in compliance" with UK sanctions, the person "is not liable to any civil proceedings to which that person would, in the absence of this section, have been liable in respect of the act".

## Information powers

### *Financial sanctions*

A relevant firm is obliged to inform HM Treasury as soon as practicable if it knows or has reasonable suspicion that:

- a person is a designated person; or
- a person has committed an offence in breach of the financial sanctions, the provisions on maritime transportation of oil and oil products, or relevant licensing provisions.<sup>49</sup>

The definition of "relevant firm" is broad and includes, amongst others, a firm which has permission under Part 4A of the Financial Services and Markets Act 2000, a firm which transmits money by any means, and a firm or sole practitioner providing accountancy services, legal or notarial services, tax advice or trust services.<sup>50</sup>

HM Treasury also has powers to request information from:

- a designated person in relation to the funds or economic resources owned by them or held on their behalf;
- a person acting under an HM Treasury licence in relation to the funds or economic resources concerned by the licence; and
- any person that HM Treasury believes to hold certain relevant information (such as information on the nature of resources held by a designated person).<sup>51</sup> A person commits an offence if they fail to provide the relevant information within the time and in the manner specified without reasonable excuse.<sup>52</sup>

OFSI may make a "Disclosure" by publishing details of a breach of financial sanctions, including the name, the person or entity concerned and describing the circumstances in which the breach occurred.<sup>53</sup> On 31 August 2023, OFSI made use of the disclosure enforcement power for the first time against Wise Payments Limited (**Wise**).<sup>54</sup> Wise had made funds available to a designated person. As the breach was self-reported and in view of the amount concerned (£250), it was classed to be of "moderate severity". A monetary penalty was not deemed appropriate but OFSI opted to make a Disclosure; as the breach occurred as a result of shortcomings in Wise's compliance processes, publishing details of such lacunas may be useful guidance to other firms.

### *Trade sanctions*

For the purposes of 2019 Regs enforcement, HMRC has the power to request information in relation to any activity under a trade licence or any activity which would fall foul of the prohibitions and anti-circumvention provisions from the persons concerned.<sup>55</sup>

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<sup>49</sup> 2019 Regs, reg. 70.

<sup>50</sup> 2019 Regs, reg. 71.

<sup>51</sup> 2019 Regs, reg. 72.

<sup>52</sup> 2019 Regs, reg. 74.

<sup>53</sup> Policing and Crime Act 2017, s 149(3).

<sup>54</sup> Report on the decision, available [here](#).

<sup>55</sup> 2019 Regs, reg. 75 and Customs and Excise Management Act 1979, s 77A.



### *General licences*

A person acting under a general trade licence must keep a record of details of the activities done under that licence.<sup>56</sup> HMRC or a person authorised by the Secretary of State for Business and Trade may at any reasonable hour enter premises notified as the place at which the aforementioned record is kept for the purpose of monitoring compliance with the Regulations.<sup>57</sup>

### *Communication services*

Ofcom may request a person to produce information where it is reasonably necessary for monitoring purposes and Ofcom believe that a person may be able to provide the information.<sup>58</sup>

## **General Licences**

A general licence allows certain activities that would otherwise be prohibited.

OFSI has authority to grant licences in relation to financial sanctions and DBT grants licences in relation to trade sanctions.

A licence for a financial sanction may be granted only for purposes specified in the 2019 Regs.<sup>59</sup> These include the following:

- to enable the basic needs of a designated person and any of their dependent family members;
- to enable the payment of reasonable fees arising from holding or maintaining frozen assets or funds;
- to enable the payment of reasonable fees for legal services;
- to enable the payment of an extraordinary expense of a designated person or to allow for an extraordinary situation to be dealt with;
- to enable the implementation or satisfaction of a judicial, administrative or arbitral decision or lien to which a designated person is subject, provided that the decision or lien predates the designation;
- to enable the functions of a diplomatic function or consular mission in Russia, the UK and Russian occupied areas of Ukraine;
- to enable any humanitarian assistance activity; and
- to enable the distribution of medical goods and/or food to the civilian population of a country.<sup>60</sup>

A special licence may be needed where the activity is not covered by a general licence and is granted following an application.<sup>61</sup>

Licences may be limited in their application and may be varied, revoked or suspended at any time.

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<sup>56</sup> 2019 Regs, reg. 76.

<sup>57</sup> 2019 Regs, reg. 77.

<sup>58</sup> 2019 Regs, reg. 77A.

<sup>59</sup> 2019 Regs, reg. 64 and Schedule 5.

<sup>60</sup> 2019 Regs, Schedule 5.

<sup>61</sup> The High Court has been prepared to quickly appoint administrators pending the grant of a specific licence by OFSI on the basis that the grant of such a licence was reasonably likely; *Re Sberbank CIB (UK) Ltd* [2022] EWHC 1059 (Ch) and *Re CargoLogicAir Limited* [2022] EWHC 3316 (Ch).

## Circumvention

Successive amendments to the 2019 Regs have sought to limit the scope for circumvention, both through extending the scope of existing prohibitions and creating specific circumvention offences.

It is an offence for a person to intentionally participate in activities knowing that their object or effect is (whether directly or indirectly) to circumvent any of the prohibitions or to enable or facilitate the contravention of any such prohibition.<sup>62</sup> OFSI takes circumvention "very seriously" and the High Court has explicitly refused to grant an order on terms that would, in Linden J's view, have created the "opportunity" for circumvention (even in the absence of any evidence that such an opportunity would be exploited)<sup>63</sup>.

Making sure that circumvention does not occur requires care, especially where goods are imported or exported via non-sanctioning countries. In order to prevent such arrangements amounting to circumvention (and to be able to demonstrate proper compliance), companies should undertake due diligence to ensure that the end-destination of goods sold is not Russia or Russian controlled parts of Ukraine, or that services sold do not serve to indirectly support such transactions; the EJCJ has published guidance with respect to how such compliance with trade sanctions in relation to goods should be approached<sup>64</sup>.

Increasing resources from regulators and government agencies are being mobilised to identify sanctions evasion. The 2023-2026 Economic Crime Plan lists the combatting of sanctions evasion as one of three key objectives and proposes the creation of a specialised unit within the NCA for these purposes. There is a particular focus on raising awareness of evasion: the NCA and OFSI have published a Red Alert outlining various evasion typologies.<sup>65</sup> The Financial Conduct Authority encourages the reporting of any information on observed sanctions evasion or weaknesses in sanctions controls.<sup>66</sup> OFSI has published general guidance on the various reporting obligations on firms<sup>67</sup> and the DBT has published guidance on trade sanction circumvention.<sup>68</sup>

## Penalties

Contravention of the 2019 Regs is punishable by imprisonment for a maximum term of 10 years (for trade sanctions) or 7 years (for financial sanctions) and/or the payment of a fine. Where an offence is committed by a corporate entity, its officers (that is, its directors, managers and other connected persons) may also be liable if the offence is attributable to their neglect.<sup>69</sup>

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<sup>62</sup> 2019 Regs, regs. 19 and 55.

<sup>63</sup> *Mazepin v Secretary of State for Foreign Commonwealth and Development Affairs* [2023] EWH 1777 (admin), para 82; see note 72 below for the factual context of this decision.

There is scant case law with respect to circumvention. In *R v R* ([2015] EWCA Civ 796 paras 15-19 and 43; which concerned whether an English court could order an interim payment of maintenance to be made by a citizen of Russia in favour of his Russian wife to an account in Russia with a Russian bank) the Court of Appeal declined to follow such "not very helpful" guidance as the ECJ had provided in two cases which had been occasioned by financial (*Europäisch-Iranische Handelsbank AG*, C 2015/145)) and trade sanctions (*Mohsen Afrasiabi (and others)*, C-72/11, paras 58-68) aimed at discouraging Iran's nuclear programme.

<sup>64</sup> Notice NTE 2023/08: Russia sanctions – Trade sanctions circumvention (May 2023).

<sup>65</sup> NCA Red Alert, available [here](#).

<sup>66</sup> FCA webpage for reporting sanctions evasions, available [here](#).

<sup>67</sup> OFSI General Guidance for Financial Sanctions under the Sanctions and Anti-Money Laundering Act 2018, available [here](#).

<sup>68</sup> Russia sanctions – Trade sanctions circumvention guidance, available [here](#).

<sup>69</sup> 2019 Regs, reg. 80.

Although few penalties have yet to be imposed for breaching sanctions against Russia, on 22 August 2023, it was announced that a £1 million fine had been imposed upon an unnamed UK company for conducting an unlicensed trade of goods.<sup>70</sup>

## KEY COMMERCIAL TAKEAWAYS

Although UK sanctions law has its roots in European Union (EU) sanctions law<sup>71</sup>, in the aftermath of Brexit both aspects of UK's wider sanctions law framework (absorbed into UK domestic law as part of the Brexit process) and, more especially, the 2019 Regs have quickly evolved<sup>72</sup>. Consequently, notwithstanding that the EU and UK use similar vocabulary, categories and terms, and that measures against Russia have often been adopted in tandem, the UK has developed a distinct regime.<sup>73</sup>

The manner in which a balance is struck between the aim of applying pressure to Russia on the one hand the desire to minimise any perceived harm to domestic interests is one of the areas in which UK sanctions can differ from EU sanctions. For example:

- EU financial sanctions do not include a general prohibition against investment in Russia but focus more narrowly on transferrable securities, money-market instruments and energy transactions.<sup>74</sup>
- EU trade sanctions prohibit the provision, directly or indirectly, of accounting, auditing, including statutory audit, bookkeeping or tax consulting services, or business and management consulting or public relations services and the UK prohibits similar activities. However, there is no equivalent in the UK sanctions to the safe harbour the EU provides where a Russian entity is owned by, or solely or jointly controlled by, a legal person, entity or body which is incorporated or constituted under the law of an EU Member State, a country member of the European Economic Area, Switzerland or a partner country (Japan, South Korea, UK and USA).<sup>75</sup>

Compliance with multiple, now differentiating regimes, is a risk in itself. For example, the UK ban on Russian LNG and the recent US trade restrictions on support to Arctic LNG 2 will put increasing pressure on the EU to source the 16% of its LNG that it currently still receives from Russia from other producing countries. The difference between such regimes will continue to cause a compliance risk for trading desks active across those jurisdictions.

A small avalanche of cases is serving to demonstrate the pragmatic manner in which an English court is likely to approach applying financial sanctions against Russia:

- *Celestial Aviation Services Ltd v UniCredit Bank AG, London Branch*<sup>76</sup> involved detailed consideration of the interaction between criminal law relating to sanctions and contract law. Unicredit was the confirming

<sup>70</sup> See press release, available [here](#).

<sup>71</sup> Gibraltar, unusually, automatically recognises and implements within its territory both UK and EU sanctions.

<sup>72</sup> The fact that an EU court has granted relief is no guarantee that an English court will do so; in *Mazepin* the High Court refused to grant interim relief sought from financial sanctions by an aspiring Formula One driver who wished to come to the UK in pursuance of his Formula One ambitions, notwithstanding that the President of the EU General Court had granted interim relief.

<sup>73</sup> For example, the EU and UK have adopted similar prohibitions against the provision of professional and business services including, amongst others, IT consultancy, legal advisory, architecture and engineering services. The categories of goods subject to trade sanctions are also labelled similarly. However, the scope of application of the prohibitions varies.

<sup>74</sup> Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, art. 3a and arts 5-5a.

<sup>75</sup> Regulation (EU) No.833/2014, arts. 5n(1) and (7).

<sup>76</sup> *Celestial Aviation Services Ltd v UniCredit Bank AG, London Branch; Constitution Aircraft Leasing (Ireland) 3 Ltd and another v UniCredit Bank AG, London Branch* [2023] EWHC 1071 (Comm).

bank under letters of credit (**LOCs**) in relation to aircraft leases to two Russian companies. The lessees sought damages as a result of Unicredit's refusal to make payment under the LOCs, prior to the grant of a licence by OFSI, on the basis that payment would have contravened UK<sup>77</sup> and US sanctions.

The High Court disagreed. Financial assistance to assist the Russian lessees acquiring the aircraft was provided when the leases were entered into and that predated the imposition of sanctions. Further, payment under the LOC constituted neither (i) dealing with funds or economic resources owned, held or controlled by a designated person, nor (ii) making funds available for the benefit of a designated person (notwithstanding that the LOC had been issued by Sberbank which became a designated person during the period considered by the court). The obligations owed by Unicredit were distinct from those owed by the Russian companies, payment by Unicredit merely displaced payment obligations of the lessees because an obligation to reimburse Unicredit would have been substituted for Sberbank's obligation to pay the lessor, that substitution would neither benefit Sberbank nor involve funds belonging to the lessees. Furthermore, the court also suggested, albeit *obiter*, that if US sanctions had prohibited payment in US dollars, UniCredit could have made payment by alternative means (such as in cash<sup>78</sup>, rather than through a correspondent bank in the US) and in so doing so acted (by virtue of *Kleinwort Sons & Co v Ungarische Baumwolle Industrie AG*<sup>79</sup>) within the scope of UK jurisdiction<sup>80</sup>.

The decision illustrates the highly purposive (and pragmatic) approach a court can be expected to bring to applying the 2019 Regs and the importance of very carefully considering the contractual and factual nexus.

- in *Fortenova Grupa DD v LLC Shushary Holding (and five others)*<sup>81</sup> the High Court was asked to intervene in relation to €1.157 billion of senior secured floating rate notes issued by Fortenova due to mature in September 2023, nearly 40% of which were held by the defendant subsidiaries of a designated Russian bank<sup>82</sup>. Green J took the pragmatic position that "the court will fashion a remedy to ensure that a debtor is able to rid their property of encumbrances and that included directing security be released upon payment in court of sums required to redeem the notes early (and that this result applied, on the basis that the debt was created under English law, irrespective of the fact that security for that debt was located outside the UK).<sup>83</sup> The court also granted declaratory relief that Fortenova was not liable to pay default interest in respect of a period of time during which English law had prohibited the payment of interest.

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In addition, a licence may be granted in order for a designated person to pay costs, damages or satisfy an order for security for costs, such that the other party to the proceedings would not be prejudiced.

<sup>77</sup> 2019 Regs, regs. 11 (*Asset freeze in relation to designated persons*), 13 (*Making funds available for benefit of a designated person*) and 28 (*Financial services and funds relating to military goods and military technology*).

<sup>78</sup> Following *Libyan Arab Foreign Bank v Bankers Trust Company* ([1989] 1 QB 728) and having in mind also, with regard specifically letters of credit, *Salam Air v Latam Airlines* ([2020] EWHC 2414).

<sup>79</sup> [1939] 2 KB 678.

<sup>80</sup> Following *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287, an English court will not enforce an obligation performance of which is unlawful under the law of the country in which the act is to take place.

<sup>81</sup> [2023] EWHC 1165 (Ch).

<sup>82</sup> The economic importance of the issues before the court had wider implications than simply the refinancing of a significant sum. The borrower is a major food producer in central and southern Europe, employing some 45,000 people and was the largest grocery retailer in Croatia and Slovenia, the second largest in Serbia, Bosnia and Herzegovina and Montenegro and its activities in Croatia accounted for 3.5% of Croatia's national budget.

<sup>83</sup> [2023] EWHC 1165 (Ch), para 36, citing *Lysaght v Westmacott* [1864] 33 417 and *St Vincent European General Partner Limited v Robinson* [2018] EWHC 1230 (Comm), and para 40.

- authorising, in *Re Sova Capital Limited (in special administration)*, administrators of a broker dealing mainly in Russian securities to enter into a transaction to enable value otherwise trapped into those securities to be realised.<sup>84</sup>
- the effect of asset freezes on the conduct of proceedings involving designated persons has been considered in *Navigator Equities Ltd v Deripaska*<sup>85</sup> and *Maroil Trading Inc v Cally Shipholdings Inc*.<sup>86</sup> In these cases, the trials were respectively adjourned and vacated as the legal advisors of the designated persons party to the proceedings were prevented from receiving payment (pending the approval of licences). The delays were held to be required, on the facts, to ensure a realistic prospect of a fair trial for the parties.
- in *PJSC National Bank Trust v Boris Mints* the 2019 Regs were held not to prevent the entering of a judgment on a claim brought by designated persons.<sup>87</sup>

The court held that a judgment debt is on its face a "fund" under SAMLA, s 60(1) and hence capable of being caught by 2019 Regs, regs. 11-12, whereas a cause of action is an economic resource only; the court was not persuaded that the requisite level of clarity in intent existed to derogate from the fundamental right of access to the court for determination of rights<sup>88</sup>. OFSI, the court held, has the power to licence a designated person to undertake certain contentious acts (i.e. paying an adverse costs order, satisfying an order for security costs, and paying damages in accordance with an order for cross damages) but has no power to licence the entry of judgment because that is not necessary because the entry of judgement does not amount to "dealing".

### Russian counter-measures

Russia has taken a number of counter-measures in response to the various sanctions packages adopted since the invasion of Ukraine. These include an "unfriendly" nations list, in which the UK is listed. The import and export of certain goods and services from and to "unfriendly" nations is prohibited.

An entity associated with an "unfriendly nation" (including an entity registered in, or deriving its primary source of profits in, an "unfriendly nation") faces a number of restrictive measures, some of which aim to limit the ability to freely dispose of assets. For example, a number of transactions by such entities (e.g. real estate transactions) are subject to prior approval by a Russian governmental commission and sale prices may not exceed 50% of the appraised market value.

Presidential Decrees have been adopted to enable the placement of certain assets under government administration. Russia has in this way effectively taken control of Russian subsidiaries of companies incorporated in sanctioning countries. Russian subsidiaries of Danone and Carlsberg were subject to these measures, as were the Finnish and German energy companies, Fortum Oyj and Unipro.

UK-incorporated entities and legal persons face the possibility of further potential restrictions and those present in Russia should monitor and plan against these risks.

<sup>84</sup> [2023] EWHC 452 (Ch); the practical approach taken by the court in *Sova* was subsequently endorsed by the Court of Appeal at *Denaxe Limited v Cooper and another* [2023] EWCA Civ 752, para 166.

<sup>85</sup> [2022] EWHC 1637 (Comm).

<sup>86</sup> [2022] EWHC 1201 (Comm).

<sup>87</sup> *PJSC National Bank Trust and another v Boris Mints and others* [2023] EWHC 118 (Comm); in July 2023 the Court of Appeal heard an appeal and, at the time of writing, its decision is awaited.

<sup>88</sup> With respect to OFSI guidance, the court noted that questions of English law are decided by the English court and not by OFSI, OFSI's views are – and are accepted to be – capable of being of persuasive value dependent on the reasoning involved in those views, in the same way as a textbook or article may be.

## Areas of particular vigilance for commercial undertakings

The application of sanctions is acutely fact sensitive and each instance in which doubt arises is likely to depend very much on its own facts. However, areas for particular vigilance can include:

- when unwinding an investment portfolio in a manner which would provide finance to sanctioned entities, including derivatives transactions and close-out payments;
- where a joint venture involves sanctioned assets (e.g. real estate, stocks and shares) those assets will need to be isolated or divested - and time should be allowed to achieve this;
- checking that the end-destination of goods or services sold is not Russian territory and being confident that the ultimate beneficiary of activity is not a sanctioned person, especially in relation to dealings involving other countries (particularly those that have not imposed sanctions on Russia);
- where fungible goods (e.g. oil in a tank from various sources) or intangible assets (e.g. listed securities or credit pools) are involved;
- the possible application of a force majeure clause in a commercial contract where the performance of a contractual obligation may be suspended or an obligation may be terminated;
- considering the extra-territorial effect of sanctions (e.g. currency clearing or US secondary sanctions) which are likely to involve significant operational challenges for an international group (such as isolating group operational functions like IT, accounting, e-mail and other corporate services) and monitoring the activities of overseas subsidiaries that currently carry out these activities independently;
- examining supply chains dependent upon long-term supply from Russian sources for their resilience, payment and margin provisions and the likelihood that trade finance may be affected by sanctions;
- considering, where your sector is exposed to differing trading priorities in the face of UK, EU and US sanctions (e.g. LNG, electric vehicles, technology), whether there is a heightened risk of circumventing a particular set of sanctions in seeking to balance those priorities.

It is important to perform due diligence to ensure compliance and putting in place internal policies and mechanisms can provide a clear road map triggering preventative action.

*Gide's **International Trade and Regulation Teams** in Brussels, London and Paris will provide further updates and guidance as matters continue to unfold. See the [dedicated area](#) of our website for previous client alerts.*

*Our Team will gladly assist you should you have questions or need legal assistance in ensuring compliance when dealing under the newly adopted sanctions.*

You can also find this legal update on our website in the News & Insights section: [gide.com](https://www.gide.com)

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