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**COMMISSION OPINION**

**of 19.6.2020**

**on Article 2 of Council Regulation (EU) No 269/2014**

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### THE REQUEST FOR AN OPINION

In its role as guardian of the treaties, the European Commission (hereinafter “the Commission”) monitors the implementation of Union law by Member States under the control of the Court of Justice of the European Union (CJEU).<sup>1</sup>

In the context of restrictive measures adopted pursuant to Article 215 of the Treaty on the Functioning of the European Union (TFEU), national competent authorities (NCA) of the Member States may request the Commission to provide its views on the application of specific provisions of the relevant legal acts or to provide guidance on their implementation. NCAs may also ask the Commission to provide guidance on the interpretation of Article 215 TFEU itself.

The Commission has received a joint request for an opinion from several NCAs on the application of the financial measures laid down in Article 2 of Council Regulation (EU) No 269/2014<sup>2</sup> (“the Regulation”).

### BACKGROUND

Article 2(1) of the Regulation imposes an asset freeze on all funds and economic resources belonging to, owned, held or controlled by, among others, any persons listed in Annex I to the Regulation. In addition, pursuant to Article 2(2) of the Regulation, EU operators are prohibited from making funds or economic resources available, directly or indirectly, to these designated persons.

One such designated person listed in Annex I to the Regulation has a management role in a non-designated, non-EU entity (‘the Entity’). According to an NCA and based on the statute of the Entity, the designated person has inter alia the following powers: defining the Entity’s corporate structure and the single policy of the Entity’s activities, directing its financial and economic activities, deciding on the opening of current accounts, on currencies and on other accounts, as well as performing all operations on the accounts.

The NCAs submit the following questions:

*“1. How would paragraph 63 (‘Control’) of the EU Best Practices<sup>3</sup> apply to the designated person, based on the statute of the Entity? How should it be read in conjunction with paragraphs 66-68 (‘Making indirectly available funds or economic resources to designated persons and entities’) of the same EU Best Practices?”*

*2. In this specific context:*

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<sup>1</sup> Pursuant to the Treaties, only the Court of Justice of the European Union can provide legally binding interpretations of Union law.

<sup>2</sup> Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78, 17.3.2014, p. 6–15.

<sup>3</sup> EU Best Practices for the effective implementation of restrictive measures (doc. 8519/18) <https://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/en/pdf>.

2.1 Do the assets of the Entity have to be frozen?

2.2 Must EU economic operators separately assess whether the designated person has control over each asset (e.g. bank account) of the Entity in order to freeze them?

2.3 Must EU economic operators block all financial transactions only **to** bank accounts of the Entity, or both **to** and **from** said bank accounts? Does it mean that, before each financial transaction with the Entity, EU economic operators must assess whether the transaction makes economic resources available to the designated person?

2.4 Can providing services by EU economic operators to or working for the Entity be considered as making economic resources available to the designated person?

2.5 Given the wording of Article 4(1)(c) of the Regulation, does the scope of this provision include fees for the holding of funds on the current account of a client with whom a bank has terminated cooperation after clearing the account balance and closing the account?"

## LEGAL ASSESSMENT

### Preliminary observations

EU Best Practices are non-binding recommendations reflecting the common understanding by the Member States and the Commission of certain provisions of EU restrictive measures, which aim to promote uniform implementation. The Commission's interpretative role is limited to provisions of EU law. Consequently, the Commission's assessment will not concern the interpretation of the EU Best Practices, but the relevant provisions of the Regulation only.

### Question 1

The possibility that assets of a non-designated entity may be used by a designated person to circumvent the sanctions imposed against the latter was acknowledged by the Court of Justice<sup>4</sup>. Moreover, the Commission has already taken the view that making funds or economic resources available to a non-designated entity, which is owned or controlled by a designated person, entity or body, amounts to making them indirectly available to the latter<sup>5</sup>. Pursuant to that, *“if ownership or control is established on the basis of appropriate due diligence, the making available of funds or economic resources to non-designated legal persons or entities which are owned or controlled by a listed person or entity will in principle be considered as making them indirectly available to the latter, unless it can be reasonably determined, on a case-by-case basis using a risk-based approach, taking into account all of the relevant circumstances, that the funds or economic resources concerned will not be used by or be for the benefit of that designated person or entity”*<sup>6</sup>. In the same guidance document, the Commission identified a number of criteria which should be taken into account to determine whether a legal entity is controlled by another entity, that is to say, whether the latter *“is able to and effectively asserts a decisive influence over the conduct of the other entity in question”*. By way of example, the Commission identified the following:

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<sup>4</sup> Judgment of the General Court in Case T-246/08, *Melli Bank plc v Council*, paragraph 107; confirmed by the judgment of the Court of Justice in case C 380-09 P, *Melli Bank plc v Council*.

<sup>5</sup> Frequently Asked Questions on EU restrictive measures in Syria ([https://ec.europa.eu/info/files/170901-faqs-restrictive-measures-syria\\_en](https://ec.europa.eu/info/files/170901-faqs-restrictive-measures-syria_en)).

<sup>6</sup> Answer to question 9; see also paragraph 66 of the EU Best Practices.

- a. the power to appoint or remove a majority of the members of the administrative, management or supervisory body of such legal person or entity;*
- b. using all or part of the assets of a legal person or entity;*
- c. sharing jointly and severally the financial liabilities of a legal person or entity, or guaranteeing them;*
- d. having influence as regards corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters;*
- e. putting in place or maintaining mechanisms to monitor the commercial conduct of the legal person or entity;*
- f. other indicia such as sharing a business address or using the same name which could cause third parties to have the impression that the two entities are in fact part of the same undertaking.”.*

These criteria, while not identical, reflect in substance those identified in paragraph 63 of the EU Best Practices.

The NCA is competent to determine, in light of the above clarifications, taking into account all the elements at its disposal and the specific circumstances of the case, whether the designated person has control over the Entity.

**The Commission will address the remaining questions assuming that the NCA’s factual assessment shows that the designated person exercises control over the Entity.**

### **Question 2.1 and Question 2.2**

EU restrictive measures clearly establish that the freezing of funds and economic resources (‘asset freeze’) covers the assets belonging to, owned, held or controlled by those specifically named in the respective annexes to the EU legal acts. In particular, Article 2(1) of the Regulation reads: “[a]ll funds and economic resources belonging to, owned, held or **controlled** by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I, shall be frozen” (emphasis added).

In the Commission’s view, if the designated person is determined to have control over the Entity, it can be presumed that the control extends to all assets nominally owned by the latter. Such assets must be frozen pursuant to Article 2(1) of the Regulation. Otherwise, designated persons could circumvent the asset freeze imposed on them by continuing to have access to funds or economic resources through the non-designated third parties that they control.

The Entity may obtain the lifting of the freeze on some or all of its assets by demonstrating that these are in fact not “controlled” by the designated person, for instance because safeguards are put in place preventing the designated person from having access to them. The details of the administrative procedure by which the Entity may do so are to be decided in accordance with national rules.

Article 2(1) of the Regulation is to be implemented inter alia by banks and other EU economic operators incorporated or constituted under the law of a Member State. It is thus possible that EU economic operators will find indications that their clients or counterparts, although non-designated, may be controlled by a designated person. Pursuant to Article 8 of the Regulation, EU economic operators are required to provide such information immediately to the NCA and the Commission, and to cooperate with the NCA in any verification thereof.

In order to ensure legal certainty, the NCAs should publish their conclusions on the relationship of control between designated persons and controlled entities. This will allow economic operators to become aware of the determinations made by the NCA and, consequently, to comply with the freezing obligations under Article 2(1) of the Regulation. In order to avoid over-compliance, the NCAs could also publicly indicate the assets of these entities that they have determined are not controlled by the designated persons and therefore do not need to be frozen, if any.

Moreover, in accordance with Article 12 of the Regulation, Member States should inform each other and the Commission of their conclusions regarding controlled entities and assets frozen. This will allow other Member States to identify similar cases in their own jurisdiction, and will foster uniform implementation of the asset freeze within the internal market. The Commission can facilitate the task of the Member States, for instance by collecting and sharing the information received from each Member State with the others.

**In light of the foregoing, if the designated person is determined to have control over the Entity, the Commission takes the view that the assets of the Entity must be frozen. The Entity may obtain the lifting of the freeze on some or all of its assets by showing that they are in fact not “controlled” by the designated person. The way to do so depends on national procedures. NCAs should make the conclusions regarding the existence of such control public.**

**The information-sharing obligations provided for in Articles 8 and 12 of the Regulation are applicable to the case at hand. The Commission stands ready to support Member States in complying with these obligations under the Regulation.**

### **Question 2.3**

The NCAs' question on financial transactions concerns two different aspects: a) the asset freeze affecting the accounts of the Entity identified as being “held or controlled” by the designated person (application of Article 2(1) of the Regulation); and b) the prohibition to indirectly make funds and economic resources available to the designated person through the Entity (application of Article 2(2) of the Regulation).

Regarding point a), as explained in the answer to Questions 2.1 and 2.2, once the designated person is found to be in control of the Entity, the assets of the latter should in principle be frozen pursuant to Article 2(1) of the Regulation. Conversely, if the designated person is found not to be in control of a specific bank account nominally owned by the Entity, that account should not be frozen under Article 2(1).

Article 1(f) of the Regulation defines the freezing of funds as “*preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or any other change that would enable the funds to be used, including portfolio management*”.

Consequently, all transfers to and from the frozen accounts of the Entity must be blocked, unless otherwise authorised by the NCA pursuant to one of the applicable derogations provided for in the Regulation.

However, by virtue of Article 7(1) of the Regulation, financial or credit institutions may credit frozen accounts in the event of transfers from third parties, provided that any such additions are also frozen. The NCA must be duly informed about any such transactions without delay.

Regarding point b), Article 2(2) of the Regulation prohibits EU operators from making funds and economic resources available to the Entity, as this would amount to making them

indirectly available to the designated person. This prohibition extends to payments made to any account of the Entity, including those not frozen, unless (a) the payments are authorised in advance by the NCA pursuant to one of the derogations provided for in the Regulation, or (b) it is reasonably determined that such payments will not be made available to the designated person. As mentioned above, EU banks may credit frozen accounts insofar as the incoming funds are also then frozen.

Therefore, the Commission takes the view **that making payments to any bank account of the Entity is prohibited, unless authorised by the NCA pursuant to one of the derogations provided for in the Regulation or unless it is reasonably determined that the funds will not be made available to the designated person. EU banks may credit frozen accounts insofar as the incoming funds are also then frozen. Making payments from frozen bank accounts of the Entity is prohibited, unless authorised by the NCA pursuant to one of the derogations provided for in the Regulation. Payments from non-frozen accounts of the Entity are allowed.**

#### Question 2.4

Article 1(d) of the Regulation defines economic resources as “*assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but may be used to obtain funds, goods or services*”. Article 2(2) of the Regulation, which prohibits the making available of economic resources, directly or indirectly, to a designated person, aims at preventing the latter from using economic resources to obtain funds, goods or services. In the Commission’s view, in light of the wording of Article 1(d) of the Regulation and of the broad interpretation given by the Court of Justice<sup>7</sup>, the provision of labour and services can be considered as economic resources, and can thus enable a designated person to obtain benefits.

In order to assess the applicability of Article 2(2) to the provision of specific labour and services, the NCA should determine whether the activity in question can be used, directly or indirectly, by the designated person to obtain funds, goods or services.

Therefore, the Commission takes the view that **providing services to or working for the Entity can be considered as making economic resources indirectly available to the designated person exerting control over the Entity, insofar as it enables the latter to obtain funds, goods, or services.**

It is for the NCA to assess if that is the case.

#### Question 2.5

Restrictive measures are neither punitive nor confiscatory in nature, but preventive instruments. Article 4(1)(c) of the Regulation, which establishes a derogation from the financial restrictions set out in Article 2, allows NCAs to authorise the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, after having determined that these are “*intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources*”.

This provision enables the routine holding of the funds in order to, on the one hand, allow the holding bank to be paid for the maintenance and service it continues to provide, and, on the other, to avoid outcomes causing a disproportionate burden on the designated person, which would go beyond the objectives of restrictive measures.

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<sup>7</sup> Judgment of the Court of Justice in case C-117/06, *Möllendorf*, paragraphs 56 and 62.

The right to levy fees or service charges remains in general governed by the terms of the contractual agreement between the account owner and the bank, together with the applicable national legislation. However, certain exceptional holding fees or service charges, particularly those that had not been mutually agreed prior to designation, may not fulfil the purpose of maintaining an existing frozen account. In such cases, Article 4(1)(c) of the Regulation does not open the way to payments derogating from Article 2.

Therefore, the Commission takes the view that **the applicability of the derogation laid down in Article 4(1)(c) of the Regulation is limited to fees or services charges that would ensure the routine holding of existing frozen funds.**

## CONCLUSIONS

**In light of the above, the Commission takes the view that:**

- (1) It is the competence of the NCA to determine, taking into account all the elements at their disposal and the specific circumstances of the case, whether the designated person has control over the Entity.

**If control by the designated person over the Entity is established, then:**

- (2) The assets of the Entity must be frozen. The Entity may obtain the lifting of the freeze on some or all of its assets by showing that they are in fact not “controlled” by the designated person. The way to do so depends on national rules. NCAs should make the conclusions regarding the existence of such control public.

**The information-sharing obligations provided for in Articles 8 and 12 of the Regulation are applicable to the case at hand. The Commission stands ready to support Member States in complying with these obligations under the Regulation.**

- (3) Making funds available to the Entity (for instance through payments to any of its bank accounts) is prohibited, unless authorised by the NCA pursuant to one of the derogations provided for in the Regulation or unless it is reasonably determined that the funds will not be made available to the designated person. EU banks may credit frozen accounts insofar as the incoming funds are also then frozen.

**Making payments from frozen bank accounts of the Entity is prohibited, unless authorised by the NCA pursuant to one of the derogations provided for in the Regulation. Payments from non-frozen accounts of the Entity are allowed.**

- (4) Providing services to or working for the Entity can be considered as making economic resources indirectly available to the designated person, insofar as it enables the latter to obtain funds, goods, or services. It is for the NCA to make such an assessment.

**In addition,**

- (5) The applicability of the derogation laid down in Article 4(1)(c) of the Regulation is limited to fees or services charges that would ensure the routine holding of existing frozen funds.

Done at Brussels, 19.6.2020

*For the Commission*  
*Valdis DOMBROVSKIS*  
*Executive Vice-President*

