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COMMISSION OPINION

of 7.6.2019

on Article 5(4) of Council Regulation (EU) 2016/44

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The request for an opinion

In its role as the guardian of the treaties, the European Commission ('Commission') monitors the implementation of EU law by the Member States¹.

In the context of restrictive measures adopted pursuant to Article 215 TFEU, the competent authorities 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.

The Commission has received a request for an opinion from a Member State competent authority ('NCA') concerning the handling of frozen funds under Council Regulation (EU) 2016/44 ('Regulation 2016/44')².

Background

The NCA asks the following question:

Article 5(4) of Regulation 2016/44 provides that “All funds and economic resources belonging to, or owned, held or controlled on 16 September 2011 by the entities listed in Annex VI and located outside Libya on that date, shall remain frozen”. Our understanding of this article and the underlying United Nations Resolution 2009 (16 September 2011) is that as from 16 September 2011 interests, dividends, subscription rights or any other funds or economic resources generated from blocked assets are not subject to the freezing of funds. Could you please confirm such interpretation or otherwise provide us with your general guidance on the matter?

In addition, the Commission has become aware that the measures targeting the abovementioned entities have been interpreted differently by economic operators and national authorities across Member States. At least for a certain period of time, this led to different national practices regarding the freezing of interest which was generated by the frozen assets of the relevant entities after 16 September 2011. While some Member States and the economic operators subject to their jurisdiction understood that such interest was to be frozen and acted accordingly, others took the view that that interest and other earnings on the frozen accounts of those entities needed not be frozen.

It is thus essential for the Commission to support the uniform implementation of the relevant provisions by issuing the present opinion.

Scope of this Opinion

The Commission is competent to interpret the provisions of EU law falling under its implementation oversight under the Treaties³. The Commission is not in a position to issue

¹ The Commission oversees the application of Union law under the control of the Court of Justice of the European Union. Pursuant to the Treaties, only the Court of Justice of the European Union can provide legally binding interpretations of acts of the institutions of the Union.

² Council Regulation (EU) 2016/44 of 18 January 2016 concerning restrictive measures in view of the situation in Libya (OJ L 12, 19.1.2016, p. 1).

interpretative guidance on other provisions, such as the United Nations Security Council Resolution 2009 (2011) of 16 September 2011, referred to by the NCA.

Consequently, this opinion will focus on the interpretation of Regulation 2016/44.

Assessment

Council Regulation (EU) No 204/2011 concerning restrictive measures in view of the situation in Libya⁴ transposed into EU law UN Security Council Resolution (UNSCR) 1970 (2011) of 26 February 2011. Article 5 of Regulation 204/2011 established an asset freeze and a prohibition to make resources available with regard to persons and entities designated by the United Nations in UNSCR 1970 (2011). The entities currently listed in Annex VI to the Regulation, namely the Libyan Investment Authority (LIA) and the Libyan Africa Investment Portfolio (LAIP), were added to the list of designated entities by UNSCR 1973 (2011) of 17 March 2011, which was transposed into EU law by Council Implementing Regulation (EU) No 288/2011 of 23 March 2011.

In order to transpose into EU law the subsequent UNSCR 2009 (2011) of 16 September 2011, which modified the measures imposed in UNSCR 1970 (2011) and UNSCR 1973 (2011), the Council adopted Council Regulation (EU) No 965/2011 of 28 September 2011 amending Council Regulation (EU) No 204/2011. A fourth paragraph, specifically referring to LIA and LAIP, was added to Article 5, providing that “*all funds and economic resources belonging to, or owned, held or controlled (...) by*” these entities **on 16 September 2011 and located outside Libya** on that date would “*remain frozen*”. Paragraphs 1 and 2 of Article 5, concerning the other persons and entities subject to restrictive measures (referred to in Annexes II and III), remained unchanged. No equivalent provision to Article 5(2), which established a prohibition to make funds or economic resources available to the other persons and entities, was added for LIA and LAIP.

Through Council Regulation (EU) 2015/813 of 26 May 2015, which transposed UNSCR 2213 (2015), LIA and LAIP were included in a separate Annex to Council Regulation (EU) No 204/2011. Council Regulation (EU) No 204/2011 was later consolidated by Regulation 2016/44. The content and structure of Article 5 has not changed, and reads as follows:

Article 5

1. All funds and economic resources belonging to, owned, held or controlled by the natural or legal persons, entities and bodies listed in Annexes II and III shall be frozen.

[...]

4. All funds and economic resources belonging to, or owned, held or controlled on 16 September 2011 by the entities listed in Annex VI and located outside Libya on that date, shall remain frozen.

It follows from this wording, which is distinct for LIA and LAIP, on the one hand, and the rest of the designated entities and individuals, on the other, as well as from the sequence of the above legislative amendments, that the intention of the Legislator was to subject the persons and entities in Annexes II and III of Regulation 2016/44 to a freezing of all their assets.

³ See footnote 1.

⁴ Council Regulation (EU) No 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya (OJ L 58, 3.3.2011, p. 1-13).

It is just as clear that, by contrast, the Legislator intended to limit the asset freeze regarding the entities in Annex VI, that is, LIA and LAIP, to assets outside Libya which belonged to, were owned, held or controlled by these entities on 16 September 2011.

The Commission understands that the specificity of the measures targeting LIA and LAIP, namely the inclusion of a cut-off date, may have caused interpretative issues to national authorities and economic operators. However, in the Commission's view, Article 5(4) of Regulation 2016/44 must be read in conjunction with the definitions referred to in Article 1(a)(iv), (b) and (d). Under these definitions 'fund' means "*financial assets and benefits of every kind, including but not limited to [...] interest, dividends or other income on or value accruing from or generated by assets*", which implies that the definition of 'freezing of funds' provided for by the same Article means "*preventing any move, transfer, alteration or use of, access to, or dealing with funds [...]*" including interest, dividends or other income on or value accruing from or generated by them. Furthermore, it must be highlighted that Article 5(4) refers also to the '*freezing of economic resources*', which as defined in the same provisions means "*preventing their use to obtain funds, goods or services [...]*".

In the light of the above, the Commission is of the opinion that the obligation to freeze the funds of LIA and LAIP in and of itself implied the obligation to also freeze the interest, dividends, subscription rights or any other funds or economic resources generated by frozen assets.

This interpretation is in line with the UN Security Council's position regarding the underlying resolutions. It also follows the case-law of the Court of Justice, according to which "*the notion of 'funds and economic resources' is wide in scope, covering assets of every kind, however acquired*"⁵.

In view of the current provisions of the Regulation, the Commission therefore concludes that the funds and the economic resources belonging to, or owned, held or controlled on 16 September 2011 by the entities listed in Annex VI of that Regulation, located outside Libya on that date, which shall remain frozen under its Article 5(4), include and extend to interest, dividends or other income on or value accruing from or generated by the frozen assets.

Conclusion

All funds and economic resources belonging to, or owned, held or controlled on 16 September 2011 by the entities listed in Annex VI of Regulation 2016/44 and located outside Libya on that date, that shall remain frozen pursuant to Article 5(4) of that Regulation, include and extend to interest, dividends or other income on or value accruing from or generated by the frozen assets.

Done at Brussels, 7.6.2019

For the Commission
Federica MOGHERINI
Vice President

⁵ See Case C-168/17, *SH*, Judgment of 17 January 2019, EU:C:2019:36, paragraph 53. See by analogy Case C- 550/09, *E and F*, Judgment of 29 June 2010, EU:C:2010:382, paragraphs 69.