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COMMISSION OPINION

of 4.7.2019

on a request for interpretation concerning the freeze of funds of a non-designated person transferred into a Member State from a designated bank and the derogation for “extraordinary expenses” under Article 28 of Council Regulation (EU) 267/2012

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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.

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 adopted on the basis of Article 215 TFEU or to provide guidance on their implementation.

The Commission has received a request for an opinion from the national competent authority of a Member State (‘NCA’) concerning the freezing of funds of a non-designated person transferred into a Member State from a designated bank, and the scope of the derogation for “extraordinary expenses” under Article 28 of Council Regulation (EU) 267/2012².

BACKGROUND

The NCA submitted to the Commission the following questions:

- Should a bank established in a Member State freeze the funds of a non-designated person that are transferred from a bank listed in Annex IX to Council Regulation (EU) 267/2012?
- Does the derogation under Article 28 of Council Regulation (EU) 267/2012 extend to expenditures of non-designated persons, as opposed to expenses of the designated bank involved in the transfer of funds into the European Union (EU)?
- If so, does the purchase of a house fall under the definition of extraordinary expenses?

LEGAL ASSESSMENT

(1) Freezing of funds of a non-designated person transferred into a Member State from a designated bank

Article 23(2) of Council Regulation (EU) 267/2012 provides that “*all funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex IX shall be frozen*” (emphasis added).

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) No 267/2012 of 23 March 2012 [concerning restrictive measures against Iran and repealing Regulation \(EU\) No 961/2010](#) (OJ L 088 24.3.2012, p. 1).

Based on the information of the NCA, the Commission understands that the sender of the funds is not designated, hence the only designated person intervening in the described transaction is the intermediary bank.

Funds of a non-designated person that are deposited in or even just transferred to a bank can be considered to be “held”, albeit temporarily, by the bank in question. Article 23(2) does not require a minimum duration of the possession of the funds by the entity designated under Annex IX to Council Regulation (EU) 267/2012 to trigger the obligation to freeze them. Hence, **any funds held by the persons, entities and bodies listed in Annex IX of Regulation (EU) No 267/2012 shall be frozen by operators falling under the scope of application of the Regulation pursuant to its Article 49. This includes funds that are temporarily held by and transferred through the accounts of a designated bank.**

This interpretation is also in line with the broad definition in Article 1(k) of Council Regulation (EU) 267/2012, according to which “*freezing of funds' means 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 (...)*”.

In the Commission’s view, the opposite interpretation, whereby only the funds that have been held by a designated bank for a significant timeframe should be frozen, finds no support in the text of Council Regulation (EU) No 267/2012. Moreover, an interpretation requiring an arbitrary minimum duration for the possession would undermine the effectiveness of Article 23(2), which would be easily circumvented by artificial transfers of the funds before entering in the possession of a person referred to in Article 49 of the Regulation.

(2) The derogation under Article 28 extends to expenditures of the non-designated owner of the funds

Article 28 of Council Regulation (EU) 267/2012 provides that competent authorities may authorise the release of certain frozen funds, after having determined that the funds or economic resources concerned are necessary for extraordinary expenses.

Article 28 does not specify whether the derogation covers extraordinary expenses needed for the benefit of the designated person or of someone else. The Commission considers that in an atypical situation such as the one presented by the NCA, whereby the funds legally owned by a non-designated person are frozen as a consequence of their transit through a designated bank, the legitimate owner should be in a position to access such funds through the derogation in Article 28, provided that three cumulative conditions are met:

(a) The expense can be qualified as “extraordinary”.

Derogations from the asset freeze provisions should apply narrowly in order not to deprive the Regulation of its *effet utile*. In this vein, the applicant for a license under Article 28 must demonstrate specifically that the expenditure for which the release of the funds is sought qualifies as “extraordinary”.

In the Commission’s view, the notion of “extraordinary expense” requires the latter to be unexpected, unforeseen, and unavoidable in the light of their purposes. This interpretation fits in the overall system of derogations established in Regulation (EU) 267/2012 (and in practically all Council Regulations establishing asset freezes). The legislator has laid down derogations for the most common expenses or disbursements a designated person can be expected to face, such as payments for foodstuffs, rent, mortgage, medicines, taxes, professional fees, prior contractual obligations, judicial decisions, etc. The “extraordinary expenses” necessarily have to be a separate category of payments that a designated person

could not reasonably expect having to face, but that would be unavoidable, in the light of the exceptional circumstances (such as repairs to a building due to natural disasters, etc.).

From this perspective, the acquisition of a house does not appear to qualify in itself as extraordinary expenditure. However, the specific circumstances of the application may suggest otherwise, and it is for the NCA to assess all the elements provided by the applicant to show why this would be the case.

- (b) The non-designated legal owner of the frozen funds finds itself in a situation in which it cannot sustain the extraordinary expenses in question from its other, non-frozen assets.

Derogations from the asset freeze measures contained in Regulation (EU) 267/2012, as well as in all Council Regulations, are meant to mitigate the effects that such measures have on the designated persons, namely their impossibility to sustain any sort of expense while the asset freeze is in place. These derogations are an expression of the principle of proportionality.

Unlike a designated person, the non-designated legal owner of the frozen funds is free to dispose of all its other funds and assets. Its ability to conduct its usual activities, although hindered by the unavailability of the frozen funds, is in principle not rendered impossible or excessively difficult. The two situations are thus significantly different.

- (c) The NCA ascertains, by assessing all the circumstances of the case, that the request for derogation does not amount to an attempt to circumvent the asset freeze measures³.

The use of the derogation for extraordinary expenses contained in Article 28 should not give ground to circumventing the restrictive measures⁴. The goal of the second paragraph of Article 23 of Council Regulation (EU) 267/2012 is to cut the designated person off from the EU economic circuit, in order to avoid that it uses its economic resources for prohibited purposes. Transfers of funds between non-designated persons using designated banks constitute a source of revenue for the banks in question, and grant them access third-party funds they would otherwise not have access to while those are in their possession.

An abusive use of the system of derogations established in Council Regulation (EU) 267/2012 would render the freezing of those assets purely symbolic, and would encourage further transactions flowing into the Union through those designated entities. This would frustrate the very purpose of the asset freeze.

In assessing whether the specific derogation at stake forms part of a circumvention attempt, the NCA could look at elements such as: the applicant's knowledge that the funds received had been transferred through a designated entity; the availability of non-designated entities banks for the transfer in question; the number of such transactions, and their frequency; etc.

³ Article 41.

⁴ Article 41 of Council Regulation 267/2012; Case C-585/13P, *Europäisch-Iranische Handelsbank AG v Council of the European Union*, ECLI:EU:C:2015:145, paragraphs 78 and 79.

CONCLUSION

The Commission takes the view that:

- A bank established in a Member State and falling within the scope of Article 49 of Regulation (EU) 267/2012 must freeze the funds of a non-designated person, that are held by/transferred through a bank designated in Annex IX to that Regulation.
- The derogation under Article 28 of Council Regulation (EU) 267/2012 extends to extraordinary expenditures of the non-designated owner of the frozen funds, provided that (a) the expense can be qualified as “extraordinary”; (b) the non-designated legal owner of the funds finds itself in an analogous situation to that of the designated person, e.g., is unable to sustain the expense in question from its other resources; and (c) the national competent authority is satisfied that the request for derogation does not amount to an attempt to circumvent the asset freeze measures.
- The purchase of a house does not, in itself, amount to an extraordinary expense. It is for the national competent authority to ascertain whether, in the specific circumstances of the pending case, it indeed constitutes one.

Done at Brussels, 4.7.2019

For the Commission
Federica MOGHERINI
Vice President