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COMMISSION OPINION

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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).¹

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 request for an opinion from a Member State NCA concerning a request for the release of frozen funds by way of enforcing a financial guarantee under Council Regulation (EU) No 224/2014 (‘Regulation’)².

Background

Article 5(1) of the Regulation imposes an asset freeze on all funds and economic resources belonging to, owned, held or controlled by any person, entity or body (the ‘Designated Person’) listed in Annex I to the Regulation³. Furthermore, Article 5(2) of the Regulation prohibits EU operators from making funds or economic resources available, directly or indirectly, to or for the benefit of any Designated Person listed in Annex I to the Regulation⁴.

However, according to Article 9 of the Regulation, by way of derogation from Article 5 of the Regulation, if a payment by a Designated Person is due under a contract or agreement that was concluded by, or under an obligation that arose for, the Designated Person before the date of its listing, the NCA may authorise, under such conditions as they deem appropriate, the release of certain frozen funds or economic resources, provided that certain conditions are met⁵.

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

² Council Regulation (EU) No 224/2014 of 10 March 2014 concerning restrictive measures in view of the situation in the Central African Republic (OJ L 70 11.3.2014, p. 1).

³ Article 5(1) of the Regulation reads: ‘*All funds and economic resources belonging to, owned, held or controlled by any natural or legal person, entity or body listed in Annex I shall be frozen.*’

⁴ Article 5(2) of the Regulation reads: ‘*No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of any natural or legal person, entity or body listed in Annex I.*’

⁵ Article 9 of the Regulation reads: ‘*By way of derogation from Article 5, and provided that a payment by a natural or legal person, entity or body listed in Annex I is due under a contract or agreement that was concluded by, or under an obligation that arose for, the natural or legal person, entity or body concerned, before the date on which that natural or legal person, entity or body had been designated by the UN Security Council or the Sanctions Committee, the competent authorities of the Member States may authorise, under such conditions as they deem appropriate, the release of certain frozen funds or economic resources, provided that the competent authority concerned has determined that:*

(a) the funds or economic resources shall be used for a payment by a natural or legal person, entity or body listed in Annex I;

The NCA's referral concerns a request by an EU-incorporated financial institution to unfreeze certain funds of a Designated Person, in order to enforce a guarantee provided by the latter to that financial institution. The guarantee agreement in question predates the listing of the Designated Person.

In essence, the NCA asks the following questions:

1. In Article 9 of the Regulation, does the phrase "a payment by a natural or legal person, entity or body listed in Annex I is due under a contract or agreement (...)" mean that such a payment can only be executed by the Designated Person itself, and thus on a voluntary basis?
2. When the derogation for the execution of a payment by a Designated Person under a contract or agreement is invoked by a co-contractor or a third party concerned, does the latter need to prove that the Designated Person has given its consent to execute the payment?
3. Does Article 9 of the Regulation also cover the (forced) execution of the payment by a co-contractor or a third party concerned? Does this interpretation also extend to the enforcement of financial guarantees by a financial institution because a Designated Person who is the borrower no longer repays its credit to the same financial institution?
 - 3.1. In this scenario, can a judicial, administrative or arbitral judgment, decision or award handed down after the listing of the Designated Person allow to enforce the payment regardless of the Designated Person's consent?
 - 3.2. In its absence, is it the NCA's responsibility to verify the validity and scope of the contractual or other obligations that arose before the Designated Person was listed?
 - 3.3. If so, how should the NCA reconcile the right of ownership of the Designated Person and the right of ownership of the non-designated co-contractor or third party concerned?

Legal Assessment:

In substance, the NCA wishes to know whether a guarantee stipulated under a contract that was concluded by the Designated Person, as a guarantor, prior to its listing under Annex I to the Regulation, can be enforced by a non-designated counterpart, an EU-incorporated financial institution, against the frozen assets of the Designated Person and whether the latter's consent is necessary to that end. The NCA further asks whether, regardless of the Designated Person's consent, a judicial, administrative or arbitral judgment, decision or award rendered after its listing may serve as grounds for enforcing the guarantee. Finally, the NCA asks whether, in the absence of such a decision, the NCA can autonomously decide whether the guarantee should be enforced and if so, based on what elements.

The freezing of a person's assets does not have a punitive purpose and does not amount to confiscation. Such a measure is meant to prevent the Designated Person from freely accessing and using its assets for the purposes, which led to its designation. To the extent that the asset freeze involves a limitation of the Designated Person's fundamental right to property, as guaranteed by Article 17 of the Charter of Fundamental Rights of the EU, it needs to be proportionate. It must also avoid, to the greatest possible extent, impinging on third parties' rights.

(b) the payment is not in breach of Article 5(2); and

(c) the Sanctions Committee has been notified by the relevant Member State of the intention to grant an authorisation 10 working days in advance.'

For these reasons, EU Regulations imposing an asset freeze also contain a series of exceptions⁶ aimed at allowing certain uses of the frozen assets, which the legislator considers lawful and appropriate. Some of these exceptions are subject to prior NCA authorisation, and as such fall within the category of derogations. One such derogation is enshrined under Article 9 of the Regulation.

Its purpose is to enable the exercise of legitimate rights of non-designated third parties under private law by allowing the Designated Person to comply with its obligations and execute a payment that is due to a third party. The derogation under Article 9 of the Regulation requires the fulfilment of a set of cumulative conditions, namely:

1. the payment by the Designated Person is due under a contract or agreement concluded by, or under an obligation that arose for, the Designated Person;
2. the contract or agreement was concluded by, or arose under an obligation for, the Designated Person before its listing;
3. the NCA has ascertained that:
 - (a) the payment is made by a Designated Person listed in Annex I to the Regulation;
 - (b) the payment is not in breach of Article 5(2) of the Regulation;
 - (c) the Member State whose NCA is seized with the authorisation request has notified the relevant United Nations Sanctions Committee of the intention to grant an authorisation 10 working days in advance.

In the Commission's view, **satisfying a guarantee claim amounts to a payment in the sense of Article 9 of the Regulation**, given that for the Designated Person it ultimately means paying the guaranteed amount to the non-designated counterpart, an EU-incorporated financial institution.

Moreover, the NCA asks whether the condition in Article 9(a) of the Regulation, namely that the payment is made by the Designated Person, requires that the payment is made voluntarily (i.e. based on the Designated Person's consent), or whether the payment can also be enforced based on contractual grounds.

Firstly, Article 9(a) of the Regulation does not establish such a distinction. Secondly, a narrow reading of Article 9(a) of the Regulation, whereby the Designated Person would only voluntarily execute a payment due under a prior contract or obligation, is not in line with the purpose of Article 9 of the Regulation. The purpose of this provision is not only to enable the Designated Person to comply with its pre-existing contractual commitments or obligations, but also to permit the exercise of pre-existing (contractual) rights by non-designated persons. Thirdly, such a narrow interpretation would render the execution of obligations under pre-existing contracts subject to the consent of one party, in this particular case the Designated Person. This interpretation would not seem warranted in light of the letter and spirit of the Regulation, and would possibly amount to an unjustified and disproportionate impingement on the rights of the other contractual party (i.e. an EU-incorporated financial institution).

Thus, the Commission is of the view that Article 9(a) of the Regulation warrants a broader interpretation. The purpose of this article should be to enable the execution of the payment

⁶ Exceptions from EU sanctions usually take the form of derogations or exemptions. Derogations mean that a restricted (prohibited) action can be carried out only after the NCA has granted an authorisation. Exemptions mean that a restriction does not apply when the purpose of the action coincides with the scope of the exemption; as a result, persons falling within the purview of the exemption can carry out the action at hand without any delay.

under a contract concluded by, or under an obligation that arose for, the Designated Person prior to its listing, and not to make it conditional on the consent of the Designated Person. This understanding is confirmed by the national practices of the EU Member States, which appear to endorse this interpretation, as shown by the EU Best Practices for the effective implementation of restrictive measures (“Best Practices”). The Best Practices state that it is for the interested parties, not only for the Designated Person, to request authorisations for access to frozen funds or economic resources in accordance with national procedures⁷.

Therefore, the Designated Person’s consent is not a pre-condition for executing a payment to satisfy the guarantee. Thus, the decision whether or not to ultimately enforce the guarantee in question can also be enforced against the Designated Person.

The execution of a payment to satisfy the guarantee can, for example, be warranted as a result of a judicial, administrative or arbitral judgment, decision or award, against the Designated Person.

The mere fact that a guarantee could be enforced regardless of the consent of the Designated Person should not be seen as disproportionately affecting its rights and interests. If the financial commitments, as stipulated under the applicable contractual framework, are not fulfilled, it is in the nature of the guarantee to be triggered and thereby enforced. This is independent from, and thus not affected in any way by, the fact that the Designated Person is subject to restrictive measures.

As anticipated, prior to authorising the release of the frozen funds to satisfy the guarantee, **the NCA also needs to ascertain** that the other conditions under Article 9 of the Regulation are fulfilled, particularly, **whether the payment in question is due under a contract or agreement concluded by or under an obligation that arose for, the Designated Person before its listing. In other words, it should be established whether the contractual conditions for enforcing the guarantee are fulfilled.**

A judicial, administrative or arbitral judgment, decision or award recognizing the right of the non-designated entity to execute the guarantee on the basis of a pre-existing contractual obligation will facilitate this assessment. However, in the Commission’s view, the Regulation empowers the NCA to decide whether to grant the authorisation also in the absence of such a pronouncement, based on all the factual and legal elements at its disposal, including the Designated Person’s views where possible.

This appears to be the practice at national level, as reflected in the Best Practices, which indicate that the Designated Person should, to the extent possible, be informed of such requests, and that the ordinary procedures to determine the validity of claims against the Designated Person continue to apply. The Best Practices also indicate that it is for the NCAs to “*take into account evidence provided by the creditor and the designated person or entity as to whether there is a legal obligation (contractual or statutory) to provide the funds or economic resources*”⁸. Moreover, “*while acting consistently with the letter and spirit of the Regulation*”, the NCA may consider inter alia the “*right of ownership of both the designated person or entity and a non-designated person or entity in relation to contracts concluded between them before the designation*”⁹.

As to the other conditions set out in Article 9 of the Regulation, the Commission is of the view that they are fulfilled. First, the obligation to satisfy the guarantee claim stems from a

⁷ 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>, para. 82.

⁸ Ibid.

⁹ EU Best Practices, para. 76.

contract between the Designated Person and the requesting EU-incorporated financial institution. Second, the contract was concluded by the parties prior to the listing of the Designated Person under Annex I to the Regulation. Lastly, the payment of the guarantee would benefit an EU-incorporated financial institution, which is not listed under Annex I of the Regulation (as per Article 9(b) of the Regulation).

Should the NCA intend to authorise the release of the relevant funds, the Commission recalls that the relevant United Nations Sanctions Committee needs to be informed 10 working days in advance (as per Article 9(c) of the Regulation). In issuing the authorisation, the NCA may also limit its scope by establishing the conditions that it deems appropriate to ensure that the authorised actions (i.e. the release of certain frozen funds) do not frustrate or circumvent the restrictive measures in accordance with Article 12 of the Regulation.

Conclusions

The Commission takes the view that:

- (1) The execution against the frozen funds of a Designated Person of a guarantee stipulated by the latter prior to its listing amounts to a “payment” in the sense of Article 9 of the Regulation;
- (2) Provided that all the conditions in Article 9 of the Regulation are fulfilled, the guarantee can be executed also without the consent of or against the Designated Person;
- (3) It is for the NCA to determine whether these conditions are fulfilled. In particular, in ascertaining whether the payment of the guarantee is due under a prior contract or arises from a prior obligation, the NCA may take into account judicial, administrative or arbitral judgments, decisions and awards rendered after the listing of the Designated Person. In their absence, the NCA will need to make this assessment autonomously. The applicable substantive and procedural rights as prescribed by national law continue to apply. Moreover, the NCA can accompany the authorisation with the conditions that it deems appropriate to ensure that the authorised actions do not frustrate or circumvent the restrictive measures in accordance with Article 12 of the Regulation.

Done at Brussels, 2.6.2021

For the Commission
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