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COMMISSION OPINION

of 29.8.2019

on the application of derogations from the freezing of funds and from the prohibition of making funds and economic resources available to designated persons and entities

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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 of the Treaty on the Functioning of the European Union or to provide guidance on their implementation.

The Commission has received a request for an opinion from a national competent authority ("NCA") of a Member State concerning the application of certain derogations from the asset freeze obligations and the prohibition of making funds and economic resources available to designated persons and entities.

Background

Council regulations containing asset freezes and prohibitions on making resources available to designated persons, entities and bodies also provide for certain derogations from these measures. Such derogations are meant to enable the designated persons to satisfy certain needs and obligations, and are a clear expression of the targeted nature of EU restrictive measures and of the respect for the principle of proportionality.

The most common derogations refer to the possibility to release funds of, or make economic resources available to, designated persons, in order to satisfy basic needs, to pay for reasonable legal fees, to satisfy contractual obligations which arose prior to the imposition of the restrictive measures, etc. These derogations are often accompanied by strict conditions which the national authorities in charge of assessing the requests need to verify.

The NCA submitted to the Commission the following question²:

Can services such as direct debit, drawing up of annual accounts, administrative management, bookkeeping and tax declaration of a designated company, be considered "routine holding" of frozen funds or economic resources covered by the relevant derogations from restrictive measures?

Would the payment of taxes by the same company fall within the same category?

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 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.

Assessment

The question raised by the NCA is horizontal in nature, given that the wording of the relevant derogations is practically the same in all Council regulations imposing restrictive measures. The standard drafting of the relevant restrictions is the following:

1. *All funds and economic resources belonging to, owned, held or controlled by [natural or legal persons, entities or bodies] as listed in Annex X, shall be frozen.*
2. *No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of [natural or legal persons, entities or bodies] as listed in Annex I.*

The standard drafting of the derogations which may be relevant for the question submitted by the NCA is the following:

“1. By way of derogation from Article [Y], the competent authorities may authorise the release of certain frozen funds or economic resources or the making available of certain funds or economic resources, under such conditions as they deem appropriate, after having determined that the funds or economic resources concerned are:

- *(a) necessary to satisfy the basic needs of natural or legal persons, entities or bodies listed in Annex X, and dependent family members of such natural persons, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges; (...)*
- *(c) intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources.”*

It is recalled that derogations must be interpreted strictly³ in order not to deprive the restrictive measures in place of their *effet utile*. They should also be interpreted in light of the non-circumvention provision that restrictive measures also typically include, according to which *“It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the [restrictions]”*.

The designation of a legal person or entity (hereafter, company) does not amount to its dissolution or closure. The company becomes however subject to certain restrictions, such as a freezing of all its assets and a prohibition on any person subject to the jurisdiction of an EU Member State to make resources available to it. These restrictions do not modify, nor extinguish the company’s ownership over its frozen funds. They are preventative measures meant to ensure that the behaviour for which the company was designated is not repeated, and is eventually corrected.

The existence of a designated company, like the existence of any other company, requires the fulfilment of inevitable obligations and formalities, some of which are imposed by the law. It is the Commission’s view that drawing up of annual accounts, bookkeeping, declaring taxes and ensuring the administrative management (strictly limited to what is necessary to continue to exist) of a company could, in principle, be considered essential activities without which the latter would not be able to function legally. Similarly, the payment of taxes due to the public

³ See for example Judgment of 5 March 2015, Statoil Fuel & Retail, C-553/13, EU:C:2015:149, paragraph 39; judgment of 6 July 2000, Dietrich, C-11/99, EU:C:2000:368, paragraph 50

authorities appears to be, in principle, a requisite *sine qua non* for a company to be allowed to continue existing⁴.

Consequently, the above activities could, in principle, be considered basic needs of a company and open the way to applying for the relevant derogation. It must be stressed that two types of applications could be envisaged here, depending on the circumstances of the case.

On the one hand, the application of the service provider (for example the external third party drawing up the accounts, or ensuring the administrative management of the company), in order to be allowed to provide such services, inasmuch as they could amount to making economic resources available to the designated company.

On the other hand, the application of the company itself in order to be allowed to pay for such services, which would require part of its frozen assets to be released.

With regard to the direct debit, the Commission does not have sufficient information in order to take a view on whether this could potentially fall under the category of basic needs as well, or whether it might fall under that of routine holding of accounts, or under neither. The NCA, when assessing the case, would need to carefully assess the circumstances and purpose of the direct debit. In any event, the nature of a direct debit, which presupposes that a third party is allowed to draw funds directly from an account, might raise issues with regard to the control that the NCA has over the type of transactions and the amounts being processed.

As a principle, the NCA should assess on a case-by-case basis using a risk-based approach, taking into account all the relevant circumstances, that the funds potentially released will not be made available to or for the benefit of a designated person or entity.

Conclusion

The Commission takes the view that, in principle:

1. the drawing up of annual accounts, bookkeeping, declaring taxes and ensuring the administrative management of a company, as well as the payment of taxes due, constitute activities that could be qualified as basic needs of a company in so far as they are requisite *sine qua non* for a company to be allowed to continue existing in accordance with the legal obligations applying to it;
2. these activities could underpin an application for authorisation pursuant to the derogation contained in the relevant Council Regulation.

The Commission does not have sufficient information in order to take a view on whether direct debit could fall under derogations for basic needs or routine holding of accounts established in Council Regulations imposing restrictive measures.

⁴ Exerting activities considered as basic needs of a company, either by an external service provider or by the company itself, should be without prejudice to obligations of obliged entities stemming from Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

Done at Brussels, 29.8.2019

For the Commission
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Vice-President