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COMMISSION OPINION
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THE REQUEST FOR AN OPINION

In its role as the guardian of the treaties, the European Commission (hereinafter “the Commission”) monitors the implementation of Union law by the 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, from two NCAs, requests for an opinion on changing the character and location of funds frozen pursuant to Council Regulation (EU) 2016/44 of 18 January 2016 concerning restrictive measures in view of the situation in Libya and repealing Regulation (EU) No 204/2011² (the ‘Libya Regulation’) and Council Regulation (EU) No 36/2012³ of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 (the ‘Syria Regulation’), respectively.

BACKGROUND

The question posed by the first NCA concerns a compartment of an EU investment fund where an EU-based bank holds a participation on behalf of an entity listed pursuant to the Libya Regulation. The NCA asks whether the liquidation of that compartment by the managing investment company, followed by the freezing of the proceeds attributable to the listed entity in a segregated account at the EU-based bank, would be compatible with the Libya Regulation. The NCA also asks whether these actions would require prior authorisation from the NCA.

The second NCA asks whether a bank branch established in a Member State, which has frozen an account opened within that branch by an entity listed pursuant to the Syria Regulation, is entitled to move (“re-book”) the account to the parent bank located in the United Kingdom (‘UK’), and if such a move would require prior authorisation from the NCA.

Since both questions concern the interpretation of the notion of “freezing of funds” and the consequences attached to it, the Commission will answer them together.

LEGAL ASSESSMENT

a) Legal framework

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

² OJ L 12, 19.1.2016, p. 1.

³ OJ L 16, 19.1.2012, p. 1.

According to Article 1(b) of the Libya Regulation and Article 1(i) of the Syria Regulation, “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 or other change **that would enable the funds to be used, including portfolio management;**” (emphasis added).

Article 5 of the Libya Regulation establishes that:

“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.

2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities or bodies listed in Annexes II and III.

3. The participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent the measures referred to in paragraphs 1 and 2 shall be prohibited.”

Similar wording, in substance, can be found in Article 14 of the Syria Regulation.

The freezing of funds is meant to prevent any action that would enable the funds to be used. This implies that, in principle, changes to certain features of the funds are not precluded, provided that they do not affect the continuity of an asset freeze.

b) Question 1: Change of the character of frozen funds

A change of the character of the frozen shares would possibly not be in breach of the asset freeze laid down under Article 5 of the Libya Regulation if the change did not enable the funds to be used (by anyone) as long as the EU restrictive measures are in force. The immediate freezing of the resulting proceeds is necessary to ensure that this condition is fulfilled.

Restrictive measures are not punitive, nor confiscatory in nature, but merely preventative. While the Libya Regulation requires and entitles EU operators to carry out any action necessary to freeze the funds, it does not grant a right of disposition of those assets or a right to inflict on their owners burdens or losses that are not inherent to the asset freeze.

It falls within the remit of the NCA to verify whether, and to satisfy itself that, the actions resulting in a change in the character of the funds would not result in enabling the use of the funds.

Additionally, pursuant to Article 5(3) of the Libya Regulation, the NCA should satisfy itself that the abovementioned changes do not have the object or effect of circumventing the respective asset freeze.

c) Question 2: Change of the location of a frozen account to the United Kingdom

Pursuant to Article 35(e) of the Syria Regulation, the provisions of that act, including Article 14, apply to any legal person, entity or body in respect of any business done in whole or in part within the Union. It follows that the EU branch of a UK parent bank, despite not being incorporated or constituted under the law of a Member State, must apply the Regulation when initiating a bank transfer from the EU to the UK.

By virtue of Article 127 of the Withdrawal Agreement⁴, the UK was bound to apply EU law until 31 December 2020, which marked the end of the transition period. Until that date, the UK remained fully bound by EU restrictive measures, and the re-booked accounts would have been subject to the same freezing obligations in the UK as they would have been in any Member State.

However, as of 1 January 2021, a number of entries previously designated under EU legislation, including the Syria Regulation, are no longer designated under UK law. As a result, these entries are currently not subject to an asset freeze in the UK or listed on that country's consolidated list. This means that, as of 1 January 2021, the UK, as a third country, does not have in place measures identical to the EU autonomous restrictive measures, including the ones concerning Syria.

The parent bank was thus subject to the same freezing obligations as the originating EU branch until the end of the transition period only.

Therefore, from 1 January 2021, prior to re-booking a frozen account to the UK, the EU branch must verify that the holder of the account is also subject to an asset freeze in the UK. If this is not the case, the change of the location of the frozen account to the UK would immediately be tantamount to breaching Article 14(1) of the Syria Regulation. If the funds in question benefit the designated person, this would also amount to a breach of Article 14(2) of the Syria Regulation.

According to Article 28 of the Syria Regulation, operators do not incur any liability if they did not know, and had no reasonable cause to suspect, that their actions would infringe the Regulation. However, in the Commission's view, the possibility that in the future the UK will adopt further diverging measures must be duly taken into consideration.

In light of the above, it is for the originating EU branch to assess and mitigate the risk that UK restrictive measures concerning Syria may further diverge from those adopted by the EU and may thus render the transfer in the case at hand incompatible with the latter measures. Failing in this duty could lead, in the Commission's view, to a breach of the asset freeze laid down in Article 14(1) of the Syria Regulation, if the change of the frozen account's location subsequently enables the funds therein to be used (by anyone). If the funds in question benefit the designated person, this would also amount to a breach of Article 14(2) of the Syria Regulation. It falls within the remit of the NCA to verify whether the branch in question had sufficient reasons to conclude that a transfer to the UK would not allow any eventual use of the funds in question.

Additionally, pursuant to Article 14(3) of the Syria Regulation, EU operators, including banks, are prohibited from participating knowingly and intentionally in activities the object or effect of which is, directly or indirectly, to circumvent the asset freeze imposed by Article 14(1) of the Syria Regulation. A more general prohibition to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent *inter alia* the provisions of Article 14 is contained in Article 27a of the Syria Regulation.

Transfers of frozen accounts or funds to the UK may exceptionally occur for valid and legally sound reasons. However, given that the risks to the continued freezing of the funds associated with this context can materialise starting from 1 January 2021, if then a divergence between EU restrictive measures and UK restrictive measures emerges, as in this specific case, and the EU branch does not take reasonable steps to prevent this change of the location, in the Commission's view the NCA can consider this as an indication that the branch in question

⁴ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2019/C 384 I/01, OJ C 384I, p. 1.

participated knowingly and intentionally in an activity the effect of which was to circumvent the asset freeze.

d) The prior authorisation from the NCA

The two Regulations in question do not contain prior authorisation requirements as such for changes such as those described in the NCAs' questions. However, in order to ensure compliance with these Regulations and the uniform application of EU restrictive measures, Article 18(1)(a) of the Libya Regulation and Article 29(1)(a) of the Syria Regulation do require EU operators to inform "immediately" the NCAs about accounts and amounts frozen, including changes thereto. The same provisions indicate that the Commission must also be informed. Moreover, in accordance with Article 18(1)(b) of the Libya Regulation and Article 29(1)(b) of the Syria Regulation, EU operators are also required to cooperate with the NCAs in any verification of the information provided.

CONCLUSION

The Commission takes the view that:

- (1) **A change in the character of funds frozen pursuant to Council Regulation (EU) 2016/44 would be incompatible with this Regulation if it enabled the funds to be used by anyone at any time while the EU restrictive measures are in force, or if it had the object or effect of circumventing the asset freeze. It falls within the remit of the NCA to verify whether, and to satisfy itself that, the actions resulting in a change in the character of funds frozen would not result in enabling their use or in circumventing the asset freeze.**
- (2) **A change of the location of an account frozen pursuant to Council Regulation (EU) No 36/2012, from a Member State to the UK, would be incompatible with this Regulation if it enabled the funds to be used by anyone at any time while the EU restrictive measures are in force, or if it had the object or effect of circumventing the asset freeze. EU operators must take measures to avoid such incompatibility, taking into account the possibility that, after 1 January 2021, the respective policies of the EU and the UK in what regards restrictive measures can diverge in a way that would enable the transferred funds to be used. It falls within the remit of the NCA to verify whether, and to satisfy itself that, the actions resulting in a change in the location of an account frozen to the UK would not result in enabling the use of the funds or in circumventing the asset freeze.**

- (3) EU operators are required to inform “immediately” the NCA and the Commission about changes affecting accounts and amounts frozen and to cooperate with the NCA in the verification of such information.**

Done at Brussels, 27.5.2021

For the Commission
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Member of the Commission

