



Brussels, 17.10.2019
C(2019) 7476 final

COMMISSION OPINION

of 17.10.2019

on Article 5(1) of Council Regulation (EU) No 833/2014

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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, 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'), in regard to the interpretation of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine² (hereafter: Regulation 833/2014). The NCA submitted to the Commission the following questions:

- 1. In relation to the provisions of Article 5(1) of Council Regulation (EU) No 833/2014 of 31 July 2014, as amended, should it be interpreted that point (b) excludes EU entities owned by designated entities, whereas point (c) does not exclude EU entities if acting on behalf of designated entities, since it does not refer specifically to them? In other words, would EU entities, if acting on behalf or under the direction of designated entities, fall under the scope of point (c) of Article 5(1) of this Regulation?*
- 2. This would mean that EU entities can only fall under the scope of Article 5(1) through point (c) - and only if they act on behalf or at the direction of a designated entity. However, how should we interpret Article 5(1) in the case of an EU entity that is owned and/or controlled by a designated entity? Should we assume that this EU entity is acting on behalf or at the direction of a designated entity, and thus apply point (c)? Even in cases where there is no evidence that it is participating in activities to circumvent the prohibitions?*
- 3. Or, in cases where the EU entity that is owned and/or controlled by a designated entity is a financial institution established in the EU (and thus subject to all European regulations and compliance standards), should we require evidence of its participation in activities to circumvent the prohibitions in order to apply point (c)?*
- 4. In this regard, the EU Best Practices (§ 63) and Guidelines (§ 55b) for the effective implementation of restrictive measures resort to Article 1(6) of Council Regulation (EC) No 2580/2001 of 27 December 2001 in order to find criteria that allow for an accurate use of the concepts of "ownership" and "control". Should these criteria be also used when determining what "acting on behalf or under the direction" is? If not, in what cases should "acting on behalf or under the direction" be applicable?*

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 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229, 31.7.2014, p. 1-11.

Assessment

The questions above concern the applicability and implementation of Article 5(1) of Council Regulation (EU) No 833/2014 in the case where certain types of transferable securities and/or money-market instruments are issued by an EU entity that is owned or controlled by an entity listed in Annex III to the Regulation.

Firstly, it should be determined whether the scope of the indicated provisions also extends to EU entities. From a general point of view it is worth noting that, although the objectives of EU restrictive measures are grounded in the principles of the common foreign and security policy³, the Treaties do not preclude the imposition of restrictions against the activities of EU persons, entities or bodies.

This is reflected in the provisions in question. Point (b) of Article 5(1) of Council Regulation (EU) No 833/2014 concerns certain types of securities and instruments issued by “*a legal person, entity or body established outside the Union whose proprietary rights are directly or indirectly owned for more than 50 % by an entity listed in Annex III*”, whereas point (c) of that article concerns the same types of securities and instruments when issued by “*a legal person, entity or body acting on behalf or at the direction of an entity referred to in point (b) of [paragraph (1)] or listed in Annex III*”. While in point (b) it is specified that the provisions relate to legal persons, entities or bodies established outside the EU, no such distinction is made in point (c). It follows that the latter point also affects entities established within the EU.

The following two sets of questions posed by the NCA can be taken together.

In the broader context of EU restrictive measures, Article 1(5) and Article 1(6) of Council Regulation (EC) No 2580/2001⁴ provide for a definition, respectively, of the notions of ‘ownership’ and ‘control’ of an entity by a targeted entity. While not directly relevant in so far as the interpretation of Council Regulation (EU) No 833/2014 is concerned, such definitions include certain criteria which, in what regards control, are relevant and could be used by the NCA in assessing the presence of the relation. Adding to these definitions and criteria, Council guidance documents for the effective implementation of restrictive measures⁵ further detail the incidence and effects of ownership and control. On the contrary, the notion of ‘acting on behalf or at the direction’ of a targeted entity has not been defined in relevant EU legal acts or guidance documents. Furthermore, the jurisprudence of the Court has dealt with this notion only in passing though in the context of a different sanctions regime - Council Regulation (EU) No 961/2010.⁶

While this notion is distinct from those of ownership and control, as made evident by the parallel presence of all three in Article 5(1) of Council Regulation (EU) No 833/2014, in the area of restrictive measures their effects can be placed on an equal footing. As found by the Grand Chamber in *HTTS Hanseatic Trade Trust & Shipping GmbH v Council*, “[i]f that link had to be established solely on the basis of the direct ownership or control [...], the measures could be circumvented by numerous contractual or de facto possibilities of control, possibilities which would confer on a company opportunities to exert influence over other entities that are as extensive as in the case of direct ownership or control”.⁷ Acting on behalf

³ Article 21 of the Treaty on European Union (TEU).

⁴ Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344, 28.12.2001, p. 70–75.

⁵ Guidelines on the implementation and evaluation of restrictive measures (sanctions) - 4 May 2018; Best practices for the effective implementation of restrictive measures - 4 May 2018.

⁶ Judgment of 10 September 2019, *HTTS Hanseatic Trade Trust & Shipping GmbH v Council*, C-123/18 P, EU:C:2019:694, paragraphs 77-79.

⁷ *Id.*, paragraph 69.

or at the direction of a targeted entity and acting under the ownership or control might thus be equated for what it concerns the effects, but the former relation should be determined in and of itself. Ownership or control of the latter entity over the former is an element that can be considered by the NCA to increase the likelihood of such conduct, but cannot suffice in determining whether the conduct did occur.

In the absence of a definition and/or criteria that can be used to assess whether an entity acted on behalf or at the direction of a targeted entity, the NCA should take into account all the relevant circumstances in order to establish the situation at hand. These can include, for example, the precise ownership/control structure, including links between natural persons; the nature and purpose of the transaction, coupled with the stated business duties of the entity that is owned or controlled; previous instances of acting on behalf or at the direction of the targeted entity; disclosure made by third parties and/or factual evidence indicating that directions were given by the targeted entity.

Additionally, for the purposes of this determination, the NCA questioned the relevance of participation (or lack thereof) in activities the object or effect of which is to circumvent the prohibitions laid down in Article 5. The Commission would like to point out that Article 12 of Council Regulation (EU) No 833/2014 separately prohibits such activities. An inquiry in this regard, which can lead to findings of a separate breach of the regulation, is not necessarily ancillary to the one establishing the presence of a conduct directly prohibited under Article 5, and can be made in parallel. To establish possible breaches of Article 12, the NCA should, in the absence of clearly defined criteria, once again take into account all the relevant circumstances. In the Commission's view, the fact that the entity concerned is a financial institution established in the EU and thus subject to EU regulations and compliance standards may be taken into consideration as a factor reducing the associated risks, but cannot suffice in determining the true object of the conduct.

Conclusion

In light of the above, the Commission takes the view that Article 5(1), point (c) of Council Regulation (EU) No 833/2014 applies, *inter alia*, to an EU entity owned or controlled by an entity listed in Annex III to the Regulation, insofar as national competent authorities determine, on the basis of all information available to them and on the basis of all the relevant circumstances to be assessed on a case by case basis, that the former entity acted on behalf or at the direction of the latter when issuing financial securities and/or instruments of the type specified in Article 5(1).

Done at Brussels, 17.10.2019

For the Commission
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Vice President