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COMMISSION OPINION

of 8.6.2021

on Article 2(2) of Council Regulation (EU) No 269/2014

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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 two requests for an opinion from an NCA on the application of the financial measures laid down in Article 2(2) of Council Regulation (EU) No 269/2014² (‘the Regulation’). As these two requests concern the same legal provision, they will form the object of a single opinion of the Commission.

BACKGROUND

Pursuant to Article 2(2) of the Regulation, EU operators are prohibited from making funds or economic resources available, directly or indirectly, to or for the benefit of the persons listed in Annex I to the Regulation.³

First request

One designated person listed in Annex I to the Regulation is the Chairman of the Board of Directors of a non-designated, non-EU entity (‘Entity A’). According to the NCA and based on the statute of Entity A, this management role makes the designated person responsible for organising the work of the board of Entity A and ensuring the successful fulfilment of tasks of the board by its members. In turn, Entity A owns a subsidiary company based in an EU Member State (‘the EU Subsidiary’).

The NCA submits the following questions:

‘1.1 Based on the information provided and information available from open-sources, can it be concluded that the designated person controls Entity A?’

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 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. 6–15.

³ Article 2(2) of the Regulation reads: “*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, or natural or legal persons, entities or bodies associated with them, as listed in Annex I*”.

1.2. *If yes, does the Regulation prohibit an EU operator from making payments to the EU Subsidiary controlled by Entity A for purchasing products originating from Entity A? Does the Regulation prohibit an EU bank from processing these payments?’*

Second request

According to the NCA, a designated person listed in Annex I to the Regulation controls a non-designated, non-EU entity (‘Entity B’). The goods produced by Entity B are sold by companies based in third-countries (‘the Third-Country Intermediaries’) to EU operators.

The NCA submits the following questions:

‘2.1. Does the Regulation prohibit EU operators from making payments in favour of non-EU entities acting as Third-Country Intermediaries for products of Entity B controlled by the designated person?’

2.2. Does the Regulation prohibit EU banks from processing payments from the national accounts of EU operators to the accounts of the mentioned non-EU entities, if these transactions are based on invoices issued for the products of Entity B controlled by the designated person?’

2.3. If the products in question were purchased by an EU operator from an operator in another Member State that, in its own right, had acquired them from another non-EU entity, would this represent a breach of the Regulation by the purchasing operator? Similarly, would the processing of the underlying transactions by an EU bank represent a breach of the Regulation?’

LEGAL ASSESSMENT

First request

Question 1.1

The Commission has previously identified⁴ a number of criteria which should be taken into account to determine whether a legal entity is controlled by another person or entity, that is to say, whether the latter *‘is able to and effectively asserts a decisive influence over the conduct of the other entity in question’*. These criteria are the following:

- a. the power to appoint or remove a majority of the members of the administrative, management or supervisory body of such legal person or entity;*
- b. using all or part of the assets of a legal person or entity;*
- c. sharing jointly and severally the financial liabilities of a legal person or entity, or guaranteeing them;*
- d. having influence as regards corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters;*
- e. putting in place or maintaining mechanisms to monitor the commercial conduct of the legal person or entity;*

⁴ Answer to question 9 in Frequently Asked Questions on EU restrictive measures in Syria (https://ec.europa.eu/info/files/170901-faqs-restrictive-measures-syria_en).

*f. other indicia such as sharing a business address or using the same name which could cause third parties to have the impression that the two entities are in fact part of the same undertaking.*⁵

In the Commission's view, if the designated person is determined to have control over Entity A, it can be presumed that the control extends to all assets nominally owned by the latter.⁶

The NCA is competent to factually determine whether the elements that it has identified as linking the designated person to Entity A amount to meeting any of these criteria or others which may prove that the designated person has control over Entity A. This determination should be made in light of the above clarifications, taking into account all the elements at the NCA's disposal and the specific circumstances of the case. The Commission is not empowered to make this factual determination on behalf of the NCAs.

Question 1.2

The Commission will address this question assuming that the NCA's factual assessment ultimately shows that the designated person exercises control over Entity A.

Article 2(2) of the Regulation prohibits all EU operators, including banks, from making funds or economic resources available, directly or indirectly, to or for the benefit of designated persons.

The Commission has already taken the view that making funds or economic resources available to a non-designated entity, which is owned or controlled by a designated person, entity or body, amounts to making them indirectly available to the latter.⁷ Pursuant to that, *'if ownership or control is established on the basis of appropriate due diligence, the making available of funds or economic resources to non-designated legal persons or entities which are owned or controlled by a listed person or entity will in principle be considered as making them indirectly available to the latter, unless it can be reasonably determined, on a case-by-case basis using a risk-based approach, taking into account all of the relevant circumstances, that the funds or economic resources concerned will not be used by or be for the benefit of that designated person or entity'*⁸.

As generally parent companies exercise control and direction over the activities of their subsidiaries, in the Commission's view, once control by a designated person over a non-designated entity is determined, it can be presumed that the control also extends to the subsidiaries and the assets of the non-designated entity. This presumption can be rebutted on a case-by-case basis by the EU Subsidiary, if it can demonstrate that some or all of its assets are outside the control of the parent entity, or that the latter is, in fact, not controlled by the designated person.⁹

It follows that making funds or economic resources available to such a subsidiary would amount to making them indirectly available to the designated person, unless it can be

⁵ These criteria, while not identical, reflect in substance those set out in paragraph 63 of the EU Best Practices. 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>).

⁶ Commission Opinion on Article 2 of Council Regulation (EU) No 269/2014 of 19.6.2020 (C(2020) 4117 final).

⁷ Frequently Asked Questions on EU restrictive measures in Syria (https://ec.europa.eu/info/files/170901-faqs-restrictive-measures-syria_en). See also Commission Opinion on Article 2 of Council Regulation (EU) No 269/2014 of 19.6.2020 (C(2020) 4117 final).

⁸ Answer to question 9; see also paragraph 66 of the EU Best Practices.

⁹ Commission Opinion on Article 2 of Council Regulation (EU) No 269/2014 of 19.6.2020 (C(2020) 4117 final).

reasonably determined, on a case-by-case basis using a risk-based approach, taking into account all the relevant circumstances, that the funds or economic resources concerned will not be used by or be for the benefit of that designated person.

Following its factual assessment, the NCA appears to have concluded that in this specific case the EU Subsidiary is controlled by Entity A, which in its turn is controlled by the designated person.

The place of incorporation of such subsidiaries, and specifically whether they are incorporated in a Member State or in a third country, bears no impact on this assessment, unless the EU legal acts laying down the restrictive measures contain an explicit provision in this regard. This is not the case here.

All EU operators, including banks, must put in place the required due diligence procedures and conduct the appropriate checks in order to avoid breaches of the Regulation. These procedures may include screening, risk assessment, multi-level based due diligence and ongoing monitoring.

In the Commission's view, the EU operator that entered into a contractual relationship with the EU Subsidiary controlled by the designated person and that initiates the related transfer of funds bears primary responsibility for such transfers. Nonetheless, each EU operator must meet its own obligations under EU restrictive measures and conduct the appropriate checks, as indicated in the previous paragraphs. Consequently, EU banks must apply due diligence mechanisms to ensure that processing a payment linked to an underlying transaction does not result in the indirect making available of funds to a designated person. By failing to comply with this obligation, the EU bank in question can be in breach of Article 2(2) of the Regulation. In addition, the EU bank should inform the NCA and the Commission immediately, as required by Article 8¹⁰ of the Regulation.

Moreover, it is to be recalled that Article 9 of the Regulation prohibits all EU operators, including banks, from participating, *'knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in Article 2'* of the Regulation.

The above elements are without prejudice to Article 10(2) of the Regulation, which establishes that actions by EU operators do *'not give rise to any liability of any kind on their part if they did not know, and had no reasonable cause to suspect, that their actions would infringe the measures set out in the Regulation'*, including those in Article 2(2).

Therefore, the Commission takes the view that making payments to an EU Subsidiary controlled by Entity A amounts to making them available to the latter. To the extent Entity A is controlled by the designated person, the payments can be considered as made indirectly available to the designated person. Such payments are therefore prohibited, unless authorised by the NCA pursuant to one of the derogations provided for in the Regulation, or unless it is reasonably determined, on a case-by-case basis using a risk-based approach, taking into account all of the relevant circumstances, that the funds will not be used by or be for the benefit of the designated person. EU banks must apply the appropriate due diligence procedures to avoid that a payment made to a certain non-designated entity results in the indirect making available of funds to a designated person.

¹⁰ Article 8 of Council Regulation (EU) No 269/2014 provides that "(...) *natural and legal persons, entities and bodies shall: (a) supply immediately any information which would facilitate compliance with this Regulation, (...) to the competent authority of the Member State where they are resident or located, and shall transmit such information, directly or through the Member State, to the Commission.*"

Second request

Question 2.1

The Commission will address this and the following questions assuming that the NCA's factual assessment ultimately shows that the designated person exercises control over Entity B.

Article 2(2) of the Regulation prohibits all EU operators, including banks, from making funds or economic resources available, directly or indirectly, to or for the benefit of designated persons.

As indicated in the answer to Question 1.2, the Commission has taken the view that making funds or economic resources available to a non-designated entity, which is owned or controlled by a designated person, entity or body, amounts to making them indirectly available to the latter¹¹.

In the case at hand, the EU operator has acquired the goods from a non-designated Third-Country Intermediary. It is to be assumed that the latter (i) has paid or will pay Entity B, or (ii) it has provided or will provide some form of consideration to the Entity in exchange for the goods in question. Consequently, any EU operator acquiring the goods from and making payments or offering any other form of consideration to the Third-Country Intermediary indirectly allows funds and/or economic resources to be channelled to Entity B. **As found in the reply to Question 1.1, to the extent that Entity B is controlled by a designated person, the related transaction ultimately amounts to making funds and/or economic resources indirectly available to the designated person.**

Any other conclusion would imply that Article 2(2) of the Regulation could be circumvented by setting up shell companies, whether in Member States or in third countries, through which funds or economic resources could be indirectly channelled to designated persons or entities through an entity controlled by the latter.

In determining whether payments made amount to making funds and/or economic resources indirectly available to a designated person as in the case at hand, EU operators should assess all factual elements at their disposal. Such elements may include inter alia: the intervention of numerous intermediaries in the chain leading from the manufacturer to the end-user; the mismatch between the country of origin of the goods and the one where an intermediary company is located; the shipment of the goods into the EU from such a third country; and the existence of EU restrictive measures targeting a significant number of natural or legal persons in either country.

Moreover, it is to be recalled that Article 9 of the Regulation prohibits all EU operators, including banks, from participating, *'knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in Article 2'* of the Regulation.

The above elements are without prejudice to Article 10(2) of the Regulation, which establishes that actions by EU operators *'do not give rise to any liability of any kind on their part if they did not know, and had no reasonable cause to suspect, that their actions would infringe the measures set out in the Regulation'*, including those in Article 2(2) of the Regulation.

¹¹ Frequently Asked Questions on EU restrictive measures in Syria (https://ec.europa.eu/info/files/170901-faqs-restrictive-measures-syria_en). See also Commission Opinion on Article 2 of Council Regulation (EU) No 269/2014 of 19.6.2020 (C(2020) 4117 final).

Therefore, the Commission takes the view that making payments in favour of Third-Country Intermediaries for products originating from Entity B can be considered as making funds indirectly available to the designated person, given that (i) the Third-Country Intermediaries have provided consideration to Entity B in exchange for the goods, and (ii) the Entity is controlled by the designated person, hence it is presumed to channel to or use the funds and economic resources for the benefit of the latter. Such payments are therefore prohibited, unless authorised by the NCA pursuant to one of the derogations provided for in the Regulation or unless it is reasonably determined, on a case-by-case basis using a risk-based approach, taking into account all the relevant circumstances, that the funds will not be used by or for the benefit of the designated person.

Question 2.2

As indicated in the answer to Question 1.2 of the first request, EU banks have an obligation to perform due diligence procedures and check whether any transaction they are processing would amount to making funds or economic resources available, directly or indirectly, to or for the benefit of designated persons or entities. Should an EU bank be aware, or have reasonable grounds to believe, that a transaction it is processing would amount to making funds or economic resources directly or indirectly available to a designated person, it must refrain from processing the transaction, freeze the amount and inform the NCA and the Commission immediately, in order not to violate Articles 2(2) and 8¹² of the Regulation.

Moreover, it is to be recalled that Article 9 of the Regulation prohibits all EU operators, including banks, from participating, *‘knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in Article 2’* of the Regulation.

This is without prejudice to Article 10(2) of the Regulation, which establishes that actions by EU operators do *‘not give rise to any liability of any kind on their part if they did not know, and had no reasonable cause to suspect, that their actions would infringe the measures set out in the Regulation’*, including those in Article 2(2) of the Regulation.

Question 2.3

Article 2(2) and Article 9 of the Regulation do not refer in any way to the location of the party receiving the funds. Therefore, all EU operators, including banks, are prohibited from making payments to any entity, irrespective of where it is based, if this would entail making funds or economic resources available, directly or indirectly, to or for the benefit of a designated person.

This is without prejudice to Article 10(2) of the Regulation.

CONCLUSIONS

In light of the above, the Commission takes the view that:

- (1) It is the competence of the NCA to determine, taking into account all the elements at its disposal and the specific circumstances of the case, whether a designated person has control over Entity A or Entity B.

¹² Article 8 of Council Regulation (EU) No 269/2014 provides that “(...) *natural and legal persons, entities and bodies shall: (a) supply immediately any information which would facilitate compliance with this Regulation, (...) to the competent authority of the Member State where they are resident or located, and shall transmit such information, directly or through the Member State, to the Commission.*”

If control by the designated person over Entity A is established:

- (2) Making payments to the EU Subsidiary controlled by Entity A amounts to making them available to the latter; and to the extent Entity A is controlled by the designated person, the payments can be considered indirectly made available to or for the benefit of the designated person.

If control by the designated person over Entity B is established:

- (3) Making payments in favour of Third-Country Intermediaries for products originating from Entity B can be considered as making funds or economic resources indirectly available to the designated person.

In both cases:

- (4) EU banks must apply the appropriate due diligence procedures to avoid that a payment made to Entity A or Entity B could result in the indirect making available of funds or economic resources to or for the benefit of the designated person.
- (5) All EU operators, including banks, are prohibited from making payments to any entity, irrespective of where it is based, if this would entail making funds or economic resources directly or indirectly available to or for the benefit of a designated person.

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For the Commission
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