



# INTERPRETATION AND APPLICATION OF THE EU REGULATIONS ON RESTRICTIVE MEASURES : WHAT IS THE INTENTION OF THE LEGISLATOR ?

1. Introduction
2. Regulation 269/2014 : articles 6 and 6ter (5) (6b)
3. Problem : what is a payment ?



# 1. INTRODUCTION

- Disclaimer: the views in this presentation are only for academic purposes and can not in any way be used as a justification or reference point for decisions taken by the Belgian Treasury
- Competent authority for financial sanctions : BE Treasury
- 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



# BE TREASURY

- The General Administration of the Treasury is authorised to carry out the administration and compliance inspection for financial sanctions. This means that the Treasury is responsible for, inter alia:
  - Answering questions relating to financial sanctions
  - Investigating cases of homonymy
  - Granting permission to deviate from certain financial sanctions
  - Handling requests to release or make available frozen assets
  - Managing information on the implementation of financial sanctions in Belgium
  - Verifying compliance with the financial sanctions



## REGULATION 269/2014 (1)

- Article 6:
  - “By way of derogation from Article 2 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 was included in Annex I, 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; and
    - (b) the payment is not in breach of Article 2(2).



## REGULATION 269/2014 (2)

- Article 6ter (5) (article 6b)
  - “By way of derogation from Article 2, the competent authorities of a Member State may authorise the release of certain frozen funds or economic resources belonging to the entity listed under entry number 101 in Annex I, or the making available of certain funds or economic resources to that entity, under such conditions as the competent authorities deem appropriate and after having determined that such funds or economic resources are necessary for the termination by 7 January 2023 of operations, contracts or other agreements concluded with, or otherwise involving, that entity before 3 June 2022.”



## REGULATION 269/2014(3)

- BE Treasury received massive number of demands for the liberation of funds based on article 6ter (5) and on article 6
- Problem : which article applies ?



## REGULATION 269/2014 : ARTICLE 6

- Applies when:
  - the release of certain frozen funds or economic resources
  - a payment is due
  - by a natural or legal person, entity or body listed in Annex I
  - under a contract or agreement
  - concluded by, or under an obligation that arose for the natural or legal person, entity or body concerned
  - before the date the natural or legal person, entity or body concerned included in Annex I



## REGULATION 269/2014 : ARTICLE 6TER (5)

- Applies when:
  - certain frozen funds or economic resources
  - belonging to the entity listed under entry number 101 in Annex I (= NSD)
  - or the making available of certain funds or economic resources to that entity
  - under such conditions as the competent authorities deem appropriate
  - such funds or economic resources are necessary for the termination (by 7/1/23)
  - of operations, contracts or other agreements concluded with, or otherwise involving, that entity (before 3/6/22)





## PROBLEM : WHAT IS A PAYMENT ? (1)

- Article 6ter (5) was designed to end contracts with NSD to liberate frozen funds held on accounts of NSD
- In Belgium : held by Euroclear
- But :
  - need to comply with conditions set by the Treasury
  - a lot of demands for NSD (and other entities) argue on the basis of article 6 when it involves the transfer of financial instruments from Euroclear to another securities account = transfer of financial instruments from one securities account to another securities account + account with NSD is closed
    - ➔ Argument made : this is a payment



## PROBLEM : WHAT IS A PAYMENT ? (2)

- If application of article 6 to the transfer of financial instruments from one securities account to another securities account : problems
  - Why the word 'payment' as a condition ?
  - If article 6 applies for 'the release of certain frozen funds or economic resources' other than a payment : condition not necessary
  - Why the need for article 6ter (5) ?
    - = lex specialis
    - specifically for closing down the accounts
      - Transfer of financial instruments = account will be closed
      - No need for this if it would be possible under article 6



## PROBLEM : WHAT IS A PAYMENT ? (3)

- What does the word 'payment' mean in the Regulation? No definition in the Regulation
  - Strict ? = interpret it as in Payment services directive (EU 2015/2366) ? But in principle only for this Directive
    - 'payment transaction' means an act, initiated by the payer or on his behalf or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee
    - 'funds' means banknotes and coins, scriptural money or electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC
  - Wide ? = interpret it as in civil law ? BE Code of Civil Law ? But EU Regulations and directives have to be interpreted uniformly across EU. No national definitions
    - BE civil code : payment : 'the performance owed is executed' :
      - no limitation to funds
      - The performance = ? the restitution of the financial instruments



## PROBLEM : WHAT IS A PAYMENT ? (4)

- Financial instruments on securities account
  - Account holder has restitution and revindication right
  - Duty of financial institution to return the financial instruments  
= an obligation of a performance  
→ Under wide interpretation = a payment
  - Are dematerialized and transfered by (bank) transfer from one account to another account
  - Custodian returns financial instruments on demand : is not the payment of the performance but only the restitution of the property

?? Is the fact that it is transfered by accounts a defining criterium to qualify it as a payment

?? Does the EU legislator include this in article 6



THANK YOU FOR YOUR ATTENTION