

Case C-340/20**Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

24 July 2020

Referring court:

Cour de cassation (France)

Date of the decision to refer:

10 July 2020

Applicant:

Bank Sepah

Defendants:

Overseas Financial Limited

Oaktree Finance Limited

I. Subject matter and circumstances of the dispute

- 1 In accordance with United Nations Security Council Resolution 1737 (2006) of 23 December 2006, Council Common Position 2007/140/CFSP of 27 February 2007 imposed certain restrictive measures against Iran, including the freezing of funds and economic resources of persons and entities engaged in, directly associated with or providing support for Iran's enrichment-related, reprocessing or heavy water-related activities or the development by it of nuclear weapon delivery systems. Those measures were implemented in the European Union by Council Regulation (EC) No 423/2007 of 19 April 2007. **[Or. 4]**
- 2 By Resolution 1747 (2007) of 24 March 2007, the Security Council designated Bank Sepah as one of the 'entities involved in [Iran's] nuclear or ballistic missile activities' to which the asset-freezing measure was to apply. That resolution was transposed into EU law by Commission Regulation (EC) No 441/2007 of 20 April 2007 amending Council Regulation (EC) No 423/2007, which entered into force on 21 April 2007.

- 3 By judgment of 26 April 2007, which has since become final, the cour d'appel de Paris (Court of Appeal, Paris) ordered Bank Sepah to pay Overseas Financial Limited ('Overseas Financial') the EUR equivalent of USD 2 500 000 and to pay Oaktree Finance Limited ('Oaktree Finance') the EUR equivalent of USD 1 500 000, plus interest at the statutory rate from the date of that judgment.
- 4 On 17 January 2016, the Security Council removed Bank Sepah from the list of persons and entities subject to restrictive measures against Iran. That decision was transposed into EU law by Council Implementing Regulation (EU) 2016/74 of 22 January 2016, which entered into force on 23 January 2016.
- 5 On 17 May 2016, Overseas Financial and Oaktree Finance issued formal notices of attachment and sale against Bank Sepah.
- 6 On 5 July 2016, they attached receivables, shareholder rights and transferable securities held by Société générale but belonging to Bank Sepah.
- 7 On 13 June and 15 July 2016, Bank Sepah brought proceedings against Overseas Financial and Oaktree Finance before the court responsible for enforcement with a view to challenging those enforcement measures.
- 8 An appeal was lodged against the decision of the court responsible for enforcement, which the Paris Court of Appeal disposed of by judgment of 8 March 2018.
- 9 Bank Sepah, on the one hand, and Overseas Financial and Oaktree Finance, on the other, lodged an appeal on a point of law against that judgment of the Paris Court of Appeal [(‘the judgment under appeal’)]. Those appeals in cassation, which were assigned case numbers B 18-18542 and G 18-21.814 respectively, were joined on account of the connection between them.

II. Provisions at issue

Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran

- 10 Article 1(h) and (j) of Regulation No 423/2007 provides:

‘For the purposes of this Regulation only, the following definitions shall apply:

...

- (h) *“freezing of funds” means preventing any moving, 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;*

...

- (j) “freezing of economic resources” means preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them; ...’

11 Article 7(1) of that regulation provides:

- ‘1. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex IV shall be frozen. Annex IV shall include the persons, entities and bodies designated by the United Nations Security Council or by the Sanctions Committee in accordance with paragraph 12 of UNSCR [United Nations Security Council Resolution] 1737 (2006). ...’

Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007

12 Article 1(h) and (i) of Regulation No 961/2010 provides:

‘For the purposes of this Regulation, the following definitions shall apply:

...

- (h) “freezing of economic resources” means preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them;
- (i) “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; ...’

13 Article 16(1) of that regulation provides:

- ‘1. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VII shall be frozen. Annex VII shall include the persons, entities and bodies designated by the United Nations Security Council or by the Sanctions Committee in accordance with paragraph 12 of UNSCR 1737 (2006), paragraph 7 of UNSCR 1803 (2008) or paragraph 11, 12 or 19 of UNSCR 1929 (2010). ...’

Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010

14 Article 1(j) and (k) of Regulation No 267/2012 provides:

‘For the purposes of this Regulation the following definitions shall apply:

...

- (j) *“freezing of economic resources” means preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them;*
- (k) *“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; ...’*

15 Article 23(1) of that regulation provides:

- ‘1. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VIII shall be frozen. Annex VIII includes the persons, entities and bodies designated by the United Nations Security Council or by the Sanctions Committee in accordance with paragraph 12 of UNSCR 1737 (2006), paragraph 7 of UNSCR 1803 (2008) or paragraph 11, 12 or 19 of UNSCR 1929 (2010). ...’*

III. Grounds relied on by Bank Sepah in support of its appeal (B 18-18542)

- 16 The judgment under appeal, inter alia, dismissed Bank Sepah’s claims for, first, an order to stop interest from running on account of the occurrence of force majeure and, secondly, an exemption from the increase in the statutory interest rate provided for in Article L. 313-3 of the code monétaire et financier (Monetary and Financial Code) in the event of a court decision making a financial award.
- 17 In support of its appeal, Bank Sepah relies on a first ground alleging that, under French law, the freezing of its assets constituted a case of force majeure which prevented it from fulfilling its payment obligation and made it impossible for Overseas Financial and Oaktree Finance to receive any payment from it.
- 18 Bank Sepah also relies, in the alternative, on a second ground alleging infringement of Article L. 313-3 of the Monetary and Financial Code.

IV. Sole ground relied on by Overseas Financial and Oaktree Finance in support of their appeal (G 18-21.814)

- 19 The judgment under appeal, inter alia, held that the interest claimed by Overseas Financial and Oaktree Finance in respect of the period prior to 17 May 2011 was time barred, because they could not rely on any ground for interruption of the limitation period and had not taken any steps themselves to stop the limitation

period from running even though they had the opportunity to do so, since ‘there was nothing to preclude [them] ... from initiating enforcement measures, even if only on a preventive basis, in respect of a retained asset or claim, as such retention only suspends the earmarking effect of any attachment of receivables’.

- 20 In support of their appeal, Overseas Financial and Oaktree Finance rely on a sole ground alleging, inter alia, infringement of Articles 1 and 7 of Regulation No 423/2007, reproduced in Articles 1 and 17 of Regulation No 961/2010.
- 21 Overseas Financial and Oaktree Finance contend that the limitation period does not run against the person barred from bringing proceedings as a consequence of a statutory impediment and that a law imposing a fund-freezing measure prevents the creditor of a person to whom such a measure applies from initiating any enforcement measures relating to the frozen funds, including on a preventive basis. They assert that any preventive measure would amount to an alteration of the funds resulting in a change in their destination. That statutory impediment is also apparent from the Minister for the Economy’s refusal to authorise in their favour the release of funds belonging to Bank Sepah, an authorisation required by Article 8 of Regulation No 423/2007 and subsequently by Article 17 of Regulation No 961/2010.

V. Findings of the Court of Cassation

The first ground relied on by Bank Sepah in support of appeal B 18-18.542, alleging the existence of force majeure

- 22 The Court of Cassation considers that freezing the assets of a person or entity who is subject to that measure on account of their activities does not constitute force majeure for the affected party, in the absence of an extraneous event.
- 23 The Court of Cassation considers that the impossibility of Bank Sepah fulfilling its payment obligation, on which Bank Sepah relies, is not the result of circumstances extraneous to its activity and therefore dismisses the first ground put forward by it.

Sole ground raised by Overseas Financial and Oaktree Finance in support of appeal G 18-21.814

- 24 The Court of Cassation reasons that the outcome of the proceedings hinges on whether Overseas Financial and Oaktree Finance could have interrupted the limitation period by implementing protective or enforcement measures in respect of Bank Sepah’s frozen assets.
- 25 The Court of Cassation notes that Regulations No 423/2007, No 961/2010 and No 267/2012 do not contain any provision expressly prohibiting a creditor from

implementing protective or enforcement measures in respect of a debtor's frozen property.

- 26 It also notes that those regulations define 'freezing of funds' as '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' and 'freezing of economic resources' as 'preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them'.
- 27 In the light of those definitions, the Court of Cassation considers that all that appears to be prohibited, in the case of frozen funds, is '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', and, in the case of economic resources, 'the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them'.
- 28 The Court of Cassation is of the view that the implementation of measures which do not fall within any of those prohibitions cannot, therefore, be excluded in respect of frozen assets.
- 29 Furthermore, the Court of Cassation considers it likely that measures which cause an outflow of assets from the debtor's estate (earmarking effect) may be implemented in respect of frozen assets only with prior authorisation from the competent national authority and only in the situations referred to in Articles 8 to 10 of Regulation No 423/2007, Articles 17 to 19 of Regulation No 961/2010 and subsequently Articles 24 to 28 of Regulation No 267/2012.
- 30 The question arises, therefore, whether measures which do not have such an earmarking effect may be implemented, without prior authorisation, in respect of frozen assets. Those measures are judicial liens and preventive attachments, which are preventive measures.
- 31 Judicial liens, whether they are imposed on immovable property (mortgage), on business assets or on shares or transferable securities (collateral security), have no earmarking effect. Their only effect is that the claim held by the party which established the judicial lien must be paid on a priority basis out of the transfer price in the event of transfer of the assets and rights on which the lien was imposed.
- 32 Preventive attachments may cover, inter alia, monetary claims or shareholder rights and transferable securities. They have no earmarking effect. The attached property, claims and rights remain within the debtor's estate.

- 33 Under Article L. 523-1 of the code des procédures civiles d'exécution (Code of Civil Enforcement Proceedings), the preventive attachment of claims is to produce the effects of a consignment provided for in Article 2350 of the code civil (Civil Code), under which 'the deposit or consignment of sums, effects or securities, ordered by a court as a guarantee or as a preventive measure, entails a special appropriation and a right of preference within the meaning of Article 2333'. Article 2333 of that code states that 'a pledge is an agreement under which the pledgor grants a creditor the right to be paid in preference to his or her other creditors out of a tangible movable asset or a set of tangible movable assets, whether present or future'.
- 34 The Court of Cassation enquires whether, despite the lack of earmarking effect, such measures do not entail a change in the 'destination' of the funds to which they apply, within the meaning of that term in the definition of 'freezing of funds'.
- 35 It considers that Article 1(h) of Regulation No 423/2007, Article 1(i) of Regulation No 961/2010 and Article 1(k) of Regulation No 267/2012 might conceivably be interpreted as meaning that the right to be paid on a priority basis out of the transfer price of shareholder rights or transferable securities, such as the special appropriation of claims and the right of preference over them, change the destination of those funds.
- 36 More generally, it asks whether, despite the lack of earmarking effect, judicial liens and preventive attachments are not capable of enabling the 'use of' the funds to which they apply, within the meaning of that term in the definition of 'freezing of funds', and the 'use of' the economic resources to which they apply 'to obtain funds, goods or services in any way', within the meaning of that expression in the definition of 'freezing of economic resources'.
- 37 Those measures ensure that the person implementing them will be paid on a priority basis out of the assets, rights and claims attached as a preventive measure, once the freezing has been lifted. They could, therefore, be regarded as liable to encourage an economic operator to conclude contracts with the person or entity whose assets are frozen, which would be tantamount to the use by that person or entity of the economic value of their assets classified as funds, or to obtaining, as a result of the economic value of their assets classified as economic resources, funds, goods or services.
- 38 The Court of Cassation notes that there is no such risk in the present case, since Overseas Financial and Oaktree Finance are seeking to recover a claim established by a court decision subsequent to the freezing of Bank Sepah's assets, based on grounds unrelated to Iran's nuclear and ballistic programme and which pre-date the imposition of the freezing order.
- 39 The question arises, therefore, whether the possibility of implementing, without prior authorisation, a measure in respect of frozen assets must be assessed by reference to the type of measure, without regard to the specific features of the

case, or whether, on the contrary, those specific features may be taken into account.

- 40 The Court of Cassation considers that the answer to those questions is not immediately obvious, while the EU regulations do not contain any express provision and neither the General Court nor the Court of Justice has had the opportunity to give a ruling.
- 41 It has, therefore, decided to stay the proceedings relating to the second ground in appeal B 18-18.542 and the sole ground in appeal G 18-21.814 and to make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU.

VI. Questions referred for a preliminary ruling

- 42 The Court of Cassation refers the following questions to the Court of Justice of the European Union for a preliminary ruling:
- ‘(1) Are Article 1(h) and (j) and Article 7(1) of Regulation (EC) No 423/2007, Article 1(i) and (h) and Article 16(1) of Regulation (EU) No 961/2010 and Article 1(k) and (j) and Article 23(1) of Regulation (EU) No 267/2012 to be interpreted as precluding a measure with no earmarking effect, such as a judicial lien or preventive attachment, provided for in the French Code of Civil Enforcement Proceedings, from being implemented, without prior authorisation from the competent national authority, in respect of frozen assets?
- (2) Is it relevant to the answer to the first question that the grounds for the claim to be recovered from the person or entity whose assets are frozen are unrelated to Iran’s nuclear and ballistic programme and pre-date United Nations Security Council Resolution 1737 (2006) of 23 December 2006?’