

Case C-84/24**Request for a preliminary ruling****Date lodged:**

1 February 2024

Referring court:

Lietuvos Aukščiausiasis Teismas (Lithuania)

Date of the decision to refer:

31 January 2024

Applicant at first instance and [appellant on a point of law]:

EM SYSTEM UAB

Defendants at first instance and [respondents on a point of law]:

SEB bankas AB

Citadele banka Lietuvos filialas AS

[...]

LIETUVOS AUKŠČIAUSIASIS TEISMAS (Supreme Court of Lithuania)**ORDER**

31 January 2024

Vilnius

The panel of judges of the Civil Division of the Supreme Court of Lithuania, [...] [composition of the court]

[...] in [...] an appeal on a point of law brought by the applicant **EM SYSTEM**, a private limited liability company, for the [review] of the order of [...] the Vilnius Regional Court of 23 May 2023 in the civil case concerning the revised action brought by the applicant EM SYSTEM UAB against the defendants *SEB bankas AB* and *AS Citadele banka Lietuvos filialas* ('*Citadele banka AS (Lithuanian branch)*') for the termination of unlawful actions,

states as follows:

- 1 The case in the appeal on a point of law concerns the interpretation and application of the rules of substantive law governing the justification for freezing the company's funds on the basis of Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine ('Regulation No 765/2006', or the 'Regulation').
- 2 The case concerns an action brought by the applicant *EM SYSTEM* against the defendants *Citadele banka AS (Lithuanian branch)* and *SEB bankas AB* concerning restrictions on [accessing] funds held in bank account [...] with *Citadele banka AS (Lithuanian branch)* and in bank accounts [...] with *SEB bankas AB*. The applicant requested the court to order the defendants [...] to perform the agreement to operate those bank accounts by allowing the applicant to access [those] funds [...] without restrictions, as well as to pay the costs of proceedings.
- 3 The issue of the freezing of the company's funds on 18 December 2020 falls within the scope of Regulation No 765/2006.
- 4 [...]. [positions of the parties and the first instance court on reference to the Court of Justice]
- 5 [...] [obligation to refer pursuant to the third paragraph of Article 267 TFEU]
- 6 In the case under consideration, the need for the court hearing the appeal on a point of law to refer questions to the Court of Justice is based on the fact that the content of legal provisions of European Union law which are relevant to resolving the case are not definitively clear under either the *acte clair* doctrine or the *acte éclairé* doctrine. The answer to the questions referred to the Court of Justice is therefore of fundamental importance for the present case, since it would allow the provisions of Regulation No 765/2006 on which the Court of Justice has not yet ruled to be applied correctly.
- 7 [...] [standard procedural wording]

I. Legal framework. EU law

- 8 The restrictive measures of the European Union in relation to supporters of the Belarusian regime relevant to the present case were imposed by Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus ('Decision 2012/642/CFSP') and by Regulation No 765/2006.
- 9 Article 4 of Decision 2012/642/CFSP (version in force on 18 December 2020) states:

1. *All funds and economic resources belonging to, owned, held or controlled by:*
 - (a) *persons, entities or bodies responsible for serious violations of human rights or the repression of civil society and democratic opposition, or whose activities otherwise seriously undermine democracy or the rule of law in Belarus, or any natural or legal persons, entities or bodies associated with them, as well as legal persons, entities or bodies owned or controlled by them;*
 - (b) *natural or legal persons, entities or bodies benefiting from or supporting the Lukashenka regime, as well as legal persons, entities or bodies owned or controlled by them, as listed in the Annex shall be frozen.*
2. *No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of such natural or legal persons, entities or bodies listed in the Annex.'*

10 Article 2 of Regulation No 765/2006 (version in force on 18 December 2020) states:

1. *All funds and economic resources belonging to, or owned, held or controlled by the natural or legal persons, entities and bodies listed in Annex I 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 and bodies listed in Annex I.*
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.*
4. *Annex I shall consist of a list of the natural or legal persons, entities and bodies who, in accordance with point (a) of Article 4(1) of Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus, have been identified by the Council as being responsible for serious violations of human rights or the repression of civil society and democratic opposition, or whose activities otherwise seriously undermine democracy or the rule of law in Belarus, or any natural or legal persons, entities and bodies associated with them, as well as legal persons, entities or bodies owned or controlled by them.*
5. *Annex I shall also consist of a list of the natural or legal persons, entities and bodies who, in accordance with point (b) of Article 4(1) of Decision 2012/642/CFSP, have been identified by the Council as benefiting from or supporting the Lukashenka regime, as well as legal persons, entities and bodies owned or controlled by them.'*

- 11 Paragraph 55a of the Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy of 4 May 2018 (Note No 5664/18 of the General Secretariat of the Council of the European Union) ('the 2018 Guidelines') drawn up by the Council of the European Union states:

'The criterion to be taken into account when assessing whether a legal person or entity is owned by another person or entity is the possession of more than 50% of the proprietary rights of an entity or having majority interest in it¹⁷. If this criterion is satisfied, it is considered that the legal person or entity is owned by another person or entity.'

- 12 Footnote 17 to that paragraph contains the following reference:

'Criterion as in definition provided for in Regulation 2580/2001.'

- 13 Paragraph 62 of the latest version of the EU Best Practices for the effective implementation of restrictive measures from the Council of the European Union (27 June 2022, Document No 10572/22, the 'Best Practices 2022') points out:

'The criterion to be taken into account when assessing whether a legal person or entity is owned by another person or entity is the possession of more than 50% of the proprietary rights of an entity or having majority interest in it²⁰. If this criterion is satisfied, it is considered that the legal person or entity is owned by another person or entity.'

- 14 Footnote 20 of this paragraph contains the following reference:

'Criterion as in definition provided for in Regulation 2580/2001.'

- 15 Article 1(5) of Regulation No 2580/2001 contains the following definition:

"'Owning a legal person, group or entity" means being in possession of 50% or more of the proprietary rights of a legal person, group or entity, or having a majority interest therein.'

- 16 Paragraph 55b of the 2018 Guidelines and paragraph 63 of the Best Practices 2022 provide a non-exhaustive list of criteria to be taken into account when assessing whether a legal person or entity is controlled by another person or entity.

- 17 Paragraph 55c of the 2018 Guidelines and paragraph 65 of the Best Practices 2022 document provide that the fulfilment of the above criteria of ownership or control may be refuted on a case-by-case basis.

- 18 Paragraph 55d of the 2018 Guidelines states:

'If the ownership or control is established in accordance with the above criteria, the making available of funds or economic resources to non-listed 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, including the criteria below, that the funds or economic resources concerned will not be used by or be for the benefit of that listed person or entity.

The criteria to be taken into account include, inter alia:

- (a) the date and nature of the contractual links between the entities concerned (for instance sales, purchase, or distribution contracts);*
- (b) the relevance of the sector of activity of the non-listed entity for the listed entity;*
- (c) the characteristics of the funds or economic resources made available, including their potential practical use by, and ease of transfer to, the listed entity;*
- (d) An economic resource will not be considered to have been for the benefit of a listed person or entity merely because it is used by a non-listed person or entity to generate profits which might be in part distributed to a listed shareholder.'*

19 Paragraph 66 of the Best Practices 2022 states:

'If the ownership or control is established in accordance with the above criteria, the making available of funds or economic resources to non-listed 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, including the criteria below, that the funds or economic resources concerned will not be used by or be for the benefit of that listed person or entity.

The criteria to be taken into account include, inter alia:

- (a) the date and nature of the contractual links between the entities concerned (for instance sales, purchase, or distribution contracts);*
- (b) the relevance of the sector of activity of the non-listed entity for the listed entity;*
- (c) the characteristics of the funds or economic resources made available, including their potential practical use by, and ease of transfer to, the listed entity.'*

II. Lithuanian legislation relevant for resolving the dispute between the parties

20 Pursuant to the provisions of the [Law of the Republic of Lithuania on the Implementation of Economic and Other International Sanctions] in force at the time of the freezing of funds on 18 December 2020, the Ministry of Foreign

Affairs of the Republic of Lithuania coordinates the implementation of international sanctions in the Republic of Lithuania and provides information to natural and legal persons on matters related to the implementation of international sanctions (Article 11(1)), and the Financial Crime Investigation Service under the Ministry of the Interior of the Republic of Lithuania, the Customs Department under the Ministry of Finance of the Republic of Lithuania, and the Bank of Lithuania, in accordance with their competence, were responsible for the supervision of implementation of financial sanctions (Article 12(1)(2)). The Ministry of Foreign Affairs was responsible for the implementation of the specific exemptions from the sanctions set out in the European Union regulations. In order to benefit from the exemptions, the entities had to apply to the authority supervising the implementation of international sanctions referred to in Article 12 of the Law, and that authority or financial institution had to make an application to the Ministry of Foreign Affairs with regard to the implementation of the exemption on a case-by-case basis, and to implement the exemption only after obtaining the consent of the latter (Article 4(2)).

- 21 According to the provisions of the Law of the Republic of Lithuania on International Sanctions in force at the time of the appeal on a point of law, the implementation of international sanctions is coordinated by a commission established by the Government (Article 10(1)), and the Financial Crime Investigation Service under the Ministry of the Interior of the Republic of Lithuania, the Ministry of Finance, the Customs Department under the Ministry of Finance of the Republic of Lithuania and other institutions, according to the areas of activities assigned to them, are the competent authorities for the implementation of the restrictions on accessing funds and economic resources, restrictions on payments, and restrictions on other financial activities (financial sanctions) (Article 11(3)(1)). In accordance with paragraph 13 of the Description of the Procedure for the Implementation of International Sanctions, approved by Resolution No 535 of the Government of the Republic of Lithuania of 25 May 2022 ('the Description'), the Financial Crime Investigation Service, in the exercise of the functions of a competent authority as referred to in Article 11(1) of the Law on International Sanctions, is to coordinate, supervise and ensure the implementation of financial sanctions in the Republic of Lithuania (restrictions on the disposal of funds and economic resources). In accordance with paragraph 13(3) of that Description, the Financial Crime Investigation Service is to adopt decisions on applications for exceptions or exemptions from restrictions and obligations, as provided for in the international sanctions legislation.

III. Relevant facts

- 22 The applicant has concluded agreements to operate a bank account with the defendants *SEB bankas AB* and *Citadele banka AS (Lithuanian branch)*, on the basis of which bank accounts were opened in the applicant's name. On 18 December 2020, the defendants unilaterally, on their own initiative, froze the funds held by the applicant in the accounts with the banks mentioned above, in view of the fact that A.V.S., a shareholder of the applicant, on 17 December 2020

was included in the list of persons and entities subject to sanctions by the European Union in accordance with the provisions of Regulation No 765/2006 and informed the applicant by e-mail. A.V.S. has a 50% shareholding in the applicant.

- 23 The applicant requested the court to order the defendants [...] to perform the agreement to operate a bank account, to allow the applicant to access the funds in the bank accounts without restrictions.
- 24 By judgment of 25 January 2023, Vilniaus miesto apylinkės teismas (Vilnius City District Court) dismissed the applicant's action.
- 25 In the view of that court, the fact that A.V.S. has a 50% shareholding in the company, established in the light of [...] [the Best Practices 2022 document] and the Guidelines on implementation and evaluation, led to the conclusion that A.V.S. owned the applicant and that the applicant's funds were under the control of a person listed in Annex I to Regulation No 765/2006. Paragraph 63 of the Best Practices (paragraph 55b of the Guidelines) sets out one of the criteria to be taken into account when assessing whether a legal person or entity is controlled by another person or entity, whether alone or by agreement with another shareholder or other third party, as having the right or exercising the power to appoint or remove a majority of the members of the administrative, management or supervisory body of such legal person or entity. Pursuant to paragraph 7.3 of the applicant's Articles of Association, taking into account the fact that the applicant's shareholders have equal shareholdings (50% – A. V. S., the other 50% – I. S.), it would not be possible to appoint the head of the applicant without the decision of the person subject to sanctions (A.V.S.) and the consent of the other shareholder. The court therefore concludes that the applicant fulfils the criteria laid down in Article 2(1) of Regulation No 765/2006 for sanctions to be imposed on the applicant's funds.
- 26 By its judgment of 23 May 2023, the panel of judges [...] of Vilnius Regional Court, having heard the appeal by the applicant EM SYSTEM UAB, upheld the decision of the Vilnius City District Court of 25 January 2023.
- 27 The panel of judges stated that, having regard to (i) the regulatory scope of Article 1 of Regulation No 2021/1030 amending Regulation No 765/2006 concerning restrictive measures against Belarus, (ii) the content of Articles 1j and 1k, it was concluded that the articles of the Regulation (1j, 1jb, 1k, 1zb) are addressed to legal persons established in Belarus (or outside the Union), where more than 50% of the shares of such persons are state-owned, and that [Articles 1j, 1jb, 1k, 1zb] therefore could not be applied to a legal person established in Lithuania.
- 28 The panel of judges held that the first instance court was justified in concluding that the fact that A.V.S. owns 50% of the shares in the company made it possible to conclude that A.V.S. owns the applicant, which is why the applicant's funds are

under the control of a person listed in Annex I to the Regulation, and the applicant therefore meets the criteria laid down in Article 2(1) of the Regulation, rendering the applicant's funds subject to the sanctions.

- 29 By Order No V-222 of 14 October 2022 of the Director of the Financial Crime Investigation Service under the Ministry of the Interior of the Republic of Lithuania ('FCIS') 'On the Approval of the List of the Sanctioned Entity Owned or Controlled by a Legal Person or Other Organisations without the Status of a Legal Person', *EM SYSTEM UAB* was added to the list of companies with links to the persons subject to sanctions. A case is pending before the Vilnius Regional Administrative Court (administrative case No e12-4937-595/2023) concerning an action lodged by the applicant *EM SYSTEM UAB* on 17 February 2023 seeking annulment of the order of the FCIS imposing international sanctions on *EM SYSTEM UAB*.

The present panel of judges

finds as follows:

IV. Arguments of the court hearing the appeal on a point of law and its position in the preliminary ruling procedure

- 30 Article 2(1) of Regulation No 765/2006 provides that 'all funds and economic resources belonging to, or owned, held or controlled by the natural or legal persons, entities and bodies listed in Annex I shall be frozen'. Pursuant to Article 4 of Decision 2012/642/CFSP, which is implemented by Regulation No 765/2006 (and to which reference is made in Article 2(4) of that Regulation), funds belonging to, owned, held or controlled by the persons and legal entities listed in the Annex and by persons and legal entities owned or controlled by them are to be frozen. Therefore, in interpreting which funds, owned by which legal persons, are to be frozen pursuant to Article 2(1) of Regulation No 765/2006, both (i) criteria for ownership and control over a legal person and (ii) the circumstances in which funds of an owned or controlled legal entity are to be understood as being funds owned, held or controlled by a person subject to sanctions, are important.
- 31 At the date when the bank accounts in question were frozen (18 December 2020), Regulation No 765/2006, which laid down such sanctions, did not define the criterion to be taken into account when assessing whether a legal person or entity is owned by another person or entity. The then current version of the [Guidelines on implementation and evaluation] sets out a criterion of 'more than 50% of the proprietary rights of an entity or having majority interest in it', but Regulation No 2580/2001, referred to in a footnote as the source of that provision, contains the wording 'possession of 50% or more of the proprietary rights of a legal person, group or entity, or having a majority interest therein'. The same interpretation by the Council of the European Union was given in the most recent version of the EU Best Practices for the effective implementation of restrictive

measures (27 June 2022, document No 10572/22, paragraph 62). It is therefore not clear which criterion the national court is to apply in its assessment of whether the private sector entity (the bank) which applied the sanctions (freezing of funds) correctly assessed that the applicant (a legal entity) is owned by a person subject to sanctions under Regulation No 765/2006, as set out in Annex I to that Regulation.

- 32 The legal uncertainty is increased by the fact that the subsequent and current amendments to Regulation No 765/2006 (Articles 1j(c) and 1k(1)(c)) provide that certain sanctions are to be imposed on a legal person, entity or body established outside the Union ‘whose proprietary rights are directly or indirectly owned for more than 50%’ by entities listed in that Regulation. Therefore, doubts may arise as to whether the interpretation of the links to legal persons and entities subject to sanctions under that Regulation, as provided for in Articles 1j, [1k] and 2 of that Regulation, ought to be guided by different criteria describing such links, or whether, when interpreting that Regulation systematically, the criterion of ‘proprietary rights [...] for more than 50%’ explicitly referred to in that Regulation (in Articles 1j and 1k) is to apply.
- 33 In the event that the possession of exactly 50% of the shares in a company is not to be regarded as ownership of a legal person for the purposes of Article 2(1) of Regulation No 765/2006, the panel of judges raises the question whether the possession of such shareholding ought to be regarded as having control over a legal person.
- 34 In the event that the possession of exactly 50% of the shares in a company is be regarded as ownership or control of a legal person, the question arises as to whether the condition for the application of Article 2(1) of the Regulation, namely that the funds of that legal person belong to, are owned, held or controlled by a natural person listed in Annex I to the Regulation, is to be presumed to be satisfied.
- 35 In the event that it is presumed that the condition for the application of Article 2(1) of the Regulation is met, the question arises whether that presumption can be rebutted in a case such as that at issue in the main proceedings, that is to say, in a civil action in which a company is requesting the court to order the banks as the defendants to perform the agreement to operate a bank account by permitting the company to access the funds in its bank accounts without restrictions. The question in the present case is whether, in that event, a company whose funds are frozen may rely on the fact that the condition in Article 2(2) of Regulation No 765/2006 – that the prohibition on accessing funds applies if the company’s funds are used by, or for the benefit of, a person listed in Annex I to that Regulation – is not fulfilled.
- 36 That question arises in the light of the clarifications provided in the 2018 Guidelines paragraph 55d, Best Practices 2022, paragraph 66) that if ownership or control is established in accordance with the criteria therein, the making available

of funds or economic resources to non-listed 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 relevant circumstances, including the criteria set out in the Best Practices documents, that the funds concerned will not be used by or be for the benefit of that listed person or entity. If the assessment according to the criteria set out in the Best Practices documents is carried out by a bank, the question arises whether an unreasonable burden would be imposed on a private sector entity, taking into account that under the Regulation, the competent national authorities are also subject to a number of obligations in relation to the proper implementation of sanctions.

- 37 The view of the panel of judges is that, in terms of its implementation, European Union law should be interpreted in such a way as not to impose an unreasonable burden on private sector entities which are subject to the obligation to apply sanctions pursuant to Regulation No 765/2006. If such entities were required to carry out a detailed assessment of the structure and activities of the legal entity on a case-by-case basis when deciding whether to apply sanctions, that could be regarded as a restriction on the freedom to conduct a business, as provided for in Article 16 of the Charter of Fundamental Rights of the European Union. On the other hand, respect for the fundamental rights of the persons subject to sanctions must also be ensured, such that the criteria and procedures for the application of sanctions must be clear and the outcome predictable.
- 38 If, however, the Court of Justice finds that the applicant in national proceedings, such as those in the main proceedings may rely on the fact that the condition in Article 2(2) of Regulation No 765/2006 that the prohibition on the use of funds applies if the company's funds are used by or for the benefit of a person listed in Annex I to the Regulation is not met, the question for the panel of judges is which criteria are to be used for the purposes of assessment in such national proceedings. In the applicant's view, the following circumstances permit the conclusion that the company's funds are not used for the benefit of a person listed in Annex I to the Regulation: (1) pursuant to the legal regulation, the assets of the shareholder and the company are separate, (2) the company is led by a director who is a person other than a person listed in Annex I to the Regulation, (3) the head of the company has concluded contracts with the defendants on behalf of the company, (4) the head of the company was provided with the bank cards and the access devices, codes and passwords to the bank accounts opened on behalf of the company, (5) the head of the company has undertaken not to disclose data enabling access to the company's accounts. The panel of judges has doubts whether such circumstances could be regarded as precluding the use of the company's funds for the benefit of a person listed in Annex I to the Regulation.
- 39 In view of the doubts as to the interpretation of the term in Article 2(1) of Regulation No 765/2006 as 'funds and economic resources belonging to, or owned, held or controlled by the natural or legal persons, entities and bodies' and

the conditions for the application of Article 2(2), it is necessary to refer the matter to the Court of Justice for an interpretation of Articles 2(1) and (2) of Regulation No 765/2006.

- 40 The case-law of the Court of Justice confirms that it has jurisdiction to give preliminary rulings on the interpretation of regulations relating to the common foreign and security policy (judgment of the Court of Justice of 12 June 2014 in *Peftiev*, Case C-314/13).

The panel of judges [...] [standard procedural wording]

orders as follows:

The following questions of significance for the present case are referred to the Court of Justice for a preliminary ruling:

1. *Are Articles 2(1) and (2) of Regulation No 765/2006 to be interpreted as meaning that, where it is established that a person listed in Annex I to the Regulation owns exactly 50% of the shares in a company, it is presumed that the funds of the company, are owned, held or controlled by the entity listed in Annex I to the Regulation?*

2. *In proceedings before a national court, such as those at issue in the main proceedings, where a company whose funds have been frozen because exactly 50% of its shares are held by a person listed in Annex I to Regulation No 765/2006 seeks an order from the court to require the banks as defendants to perform the agreements to operate a bank account allowing that company to access the funds in its bank accounts without restrictions, can the bank's decision to freeze its funds be challenged on the basis of the argument that the company's funds are not used by, or for the benefit of, a person listed in Annex I to that Regulation?*

3. *If the answer to the second question is in the affirmative, which criteria must be applied to assess in such proceedings before a national court in order to determine whether the funds are not used by, or for the benefit of, a person listed in Annex I to Regulation No 765/2006? Could circumstances such as (1) the separation of the assets of the company from those of its shareholders, (2) the fact that the head of the company (other than a person listed in Annex I to the Regulation) acts on behalf of the company, and (3) the fact that access to the company's bank accounts is granted only to the head of the company, be regarded as precluding the use of the company's funds for the benefit of a person listed in Annex I to the Regulation whose shareholding in the company is exactly 50%?*

[...]. [standard procedural wording]

[...] [composition of the court]