

Case C-483/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

26 July 2023

Referring court:

Tribunale Amministrativo Regionale per il Lazio (Italy)

Date of the decision to refer:

11 April 2023

Applicants:

A

B

C

D

T

Defendants:

Ministero dell'Economia e delle Finanze (Ministry of Economy and Finance)

Comitato di Sicurezza Finanziaria (Financial Security Committee)

Agenzia del Demanio (State Property Office)

Subject matter of the main proceedings

Administrative legal proceedings brought by commercial companies held in a trust, against the measure issued by the administrative authority ordering the freezing of shares and assets belonging to those companies, in so far as they are indirectly linked to the settlor of the trust, who was included in the list of

addressees of the restrictive measures provided for by Regulation (EU) No 269/2014.

Subject matter and legal basis of the request

Request for a preliminary ruling pursuant to Article 276 TFEU concerning the interpretation of Article 2(1) of Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, as amended by Regulation (EU) No 476/2014; in particular, interpretation of the concepts of ‘belonging’ and ‘control’ of assets held in a trust, with reference to the figure of the settlor of the trust.

Questions referred for a preliminary ruling

(1) Should Article 2(1) of Regulation (EU) No 269/2014 be interpreted as meaning that the freezing measure may also be taken in the event of the transfer of assets or resources to a trust by the settlor indicated in Annex I to the Regulation (designated or listed person), who is to be regarded as the party to whom the asset or those resources belong?

(2) [In the event of a negative reply: should] Article 2(1) of Regulation (EU) No 269/2014 be interpreted as meaning that the freezing measure may also be taken in the event of the transfer of assets or resources to a trust by the settlor indicated in Annex I to the Regulation (designated or listed person), who is to be regarded as the party associated with the person to whom the asset or resources belong?

(3) [In the event of a negative reply: should] Article 2(1) of Regulation (EU) No 269/2014 be interpreted as meaning that the freezing measure may also be taken in the event of the transfer of assets or resources to a trust by the settlor indicated in Annex I to the Regulation (designated or listed person), who is to be regarded as the party who controls the asset or the resources?

Provisions of international law relied on

Convention adopted in The Hague on 1 July 1985 on the law applicable to trusts and their recognition. Specifically,

the first paragraph of Article 2:

‘For the purposes of this Convention, the term “trust” refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose’.

The second paragraph of Article 2:

‘ ...

- (a) the assets constitute a separate fund and are not a part of the trustee’s own estate;
- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law’.

The first paragraph of Article 6:

‘A trust shall be governed by the law chosen by the settlor. ...’

Provisions of European Union law relied on

Council Decision (CFSP) 2022/337 of 28 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

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, as amended by Council Regulation (EU) No 476/2014 of 12 May 2014 and implemented by Council Implementing Regulation (EU) 2022/336 of 28 February 2022.

Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

Provisions of national law relied on

Decreto legislativo 22 giugno 2007, n. 109 – Misure per prevenire, contrastare e reprimere il finanziamento del terrorismo e l’attività dei Paesi che minacciano la pace e la sicurezza internazionale (Legislative Decree No. 109 of 22 June 2007 – Measures to prevent, combat and suppress terrorist financing and the activities of countries that threaten international peace and security), implementing Directive 2005/60/EC: in particular, Article 3 (establishment of the Financial Security Committee, a body within the Ministry of Economy and Finance which takes the freezing measures ordered by the United Nations, the European Union and the

Minister for Economic Affairs and Finance) and Article 5 (prohibiting the transfer, disposal or use of frozen resources and prohibiting making available, directly or indirectly, funds or economic resources to or for the benefit of designated parties).

Decreto legislativo 25 maggio 2017, n. 90 – Attuazione della direttiva (UE) 2015/849 e del regolamento (UE) n. 2015/847 riguardante i dati informativi che accompagnano i trasferimenti di fondi (Legislative Decree No. 90 of 25 May 2017 – Implementation of Directive (EU) 2015/849 and Regulation (EU) 2015/847 on information accompanying transfers of funds. In particular, Article 2(1) of that legislative decree imposes an obligation on trustees of express trusts to keep adequate and up-to-date information on the beneficial ownership of the trust (settlor, trustee, protector, beneficiary or any other person who exercises effective control over the trust assets).

Decreto legislativo 21 novembre 2007, n. 231 – Attuazione della direttiva 2005/60/CE nonché della direttiva 2006/70/CE che ne reca misure di esecuzione, come modificato dal Decreto legislativo n. 90/2017 (Legislative Decree No. 231 of 21 November 2007 – Implementation of Directive 2005/60/EC and Directive 2006/70/EC laying down implementing measures, as amended by Legislative Decree No 90/2017.

Legge 16 ottobre 1989, n. 364 – Ratifica ed esecuzione della convenzione sulla legge applicabile ai trusts e sul loro riconoscimento, adottata a L'Aja il 1° luglio 1985 (Law No. 364 of 16 October 1989 – Ratification and implementation of the Convention on the law applicable to trusts and their recognition, adopted at The Hague on 1 July 1985), which allows the trust instrument to be used in Italy.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant companies B, A, C and D engage in commercial activities and are wholly owned by a company established in Bermuda ('the parent company'), which is in turn held in a trust ('the Trust'). The Trust was created by a natural person ('the settlor') by deed of 18 July 2007, amended on 22 December 2014, and is governed by the law of the State of Bermuda.
- 2 The Trust provides for the figure of the trustee, a role carried out by company T, to manage and administer the assets held in accordance with the provisions of the trust deed and to transfer the assets held to the beneficiaries, upon termination of the Trust or in accordance with it, as well as the figure of the protector, entrusted to a third party, a natural person, who is responsible for supervising the proper implementation of the plan provided for in the Trust. Those administrative bodies have changed over time.
- 3 The settlor was initially one of the beneficiaries of the Trust, together with his sister and his nephew (removed from the Trust deed of 19 December 2017) and any descendants thereof, but he was removed by deed of 7 February 2022. It does

not appear that the settlor can be reinstated as a beneficiary of the trust or that he has powers to manage or use the assets held therein.

- 4 By decision (CFSP) 2022/337 of 28 February 2022, amending decision (CFSP) 2014/145, and Implementing Regulation (EU) 2022/336 of 28 February 2022 that implements Regulation (EU) No 269/2014, the Council of the European Union included the settlor in the list of recipients of the measures provided for in that Regulation.
- 5 Thus, by a decision notified on 16 March 2022 to the legal representative/managing director of companies B, A, C and D, the Financial Security Committee established by the Ministry of Economy and Finance declared, pursuant to Regulation (EU) No 269/2014 (Article 2) and Legislative Decree No 109/2007 ('Legislative Decree No. 109/2007'), the 'freezing' of the shares and assets owned by the companies B, A, C and D ('the freezing order'), in so far as they are 'indirectly linked to the [settlor]' as their beneficial owner, included in the list provided for in the Annex to Regulation No 269/2014, as amended by Implementing Regulation No 336/2022.
- 6 By an application lodged on 11 May 2022, companies B, A, C and D and company T (the trustee) asked the referring court to annul the freezing order.

The essential arguments of the parties in the main proceedings

- 7 According to the applicants, the freezing order is based exclusively on Article 2(1) of Regulation No 269/2014, which, following the amendment made by Regulation No 476/2014, provides for the freezing of all funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them as listed in Annex I to that regulation ('the designated parties'). By that amendment, the words 'directly or indirectly' appearing after the words held or controlled' were deleted; therefore, according to the applicants, the indirect connection between the assets and the designated party, or any situations other than those strictly stated in the provision, namely ownership, possession, holding and control, cannot be considered relevant as criteria for linking the frozen assets to the designated parties.
- 8 The applicants therefore submit that the freezing order is unlawful considering they do not in any way fall within the sphere of influence of the designated party, namely the settlor. By the transfer to the Trust of their parent company, the applicants' assets were separated from those of the settlor and, after that party was removed as a beneficiary of the Trust, the assets were transferred to the trustee, company T. The settlor has no power (direct or indirect) of management and control, by virtue of the trust deed and the applicable law, and could not therefore exercise any further influence.

- 9 The Ministry of Economy and Finance contends the full lawfulness of the order and states that the transfer to the trust, which does not result in the transfer of the beneficial ownership, does not totally sever the link between the settlor and the assets and relationships held in the Trust, which include the assets and shares of applicants B, A, C and D.
- 10 In support of its argument, the Ministry of Economy and Finance recalls Directive 2015/849. According to Article 3(6)(b)(i) of that directive, in the case of a trust, the settlor falls within the definition of ‘beneficial owners’, that is, a party ‘who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted’. The Ministry observes moreover that, although currently the settlor is no longer a beneficiary of the assets, beneficial ownership/right to dispose of those assets could nevertheless ‘revert’ to him if they were not definitively transferred for the benefit of the parties designated as beneficiaries (for example, if they are surrendered or upon the early dissolution of the trust).

Succinct presentation of the reasoning in the request for a preliminary ruling

- 11 The referring court has doubts regarding the correct interpretation of Article 2(1) of Regulation No 269/2014, in particular regarding the implications and effects of that legislation in a situation in which the trust instrument is used, on the role of the settlor, where he or she is not the manager or user of the assets held, does not hold any other position and is not the final beneficiary.
- 12 In essence, the referring court seeks to ascertain whether the assets, resources and relationships transferred may nevertheless be considered as ‘belonging’ to the settlor, even though he is neither user nor manager of the assets held, nor the final beneficiary of the assets, or ‘belonging’ to an party associated with the settlor or, ultimately, ‘controlled’ by the settlor himself, in which case, if the assets were held in the trust by the settlor, the freezing measures provided for in Article 2(1) of Regulation EU No 269/2014 could be applied.
- 13 As regards the criterion of belonging to the settlor, the referring court points out that, according to the trust scheme, which is internationally recognised, and on the basis of point (b) of the second paragraph of Article 2 of the Hague Convention, assets held by the settlor are transferred in the name of the trustee, who then administers and manages them in accordance with the trust deed and the applicable law. The trustee therefore has the power to dispose of the asset, which is the main characteristic of the right of ownership. That power of disposal is not, however, fully transferred to the trustee, as it is limited by the need to comply with the restrictions imposed by the trust deed and to transfer the asset to the beneficiaries, in accordance with that deed. The beneficiaries become absolutely entitled to the assets as soon as they are transferred.
- 14 The aim of the institution, emphasised by the referring court, is primarily to achieve the intentions of the settlor, which obtains the separation of his or her own

personal property from the total assets and rights held, at the same time freeing himself or herself of the managerial responsibilities which are transferred, together with formal title, into the name of the trustee, with the settlor's assets and rights being further separated from the trustee's own property.

- 15 It could therefore be considered that the formal transfer into the name of the trustee does not give rise to the transfer of the beneficial ownership of the assets, but merely transfers their title in the name of the trustee, free of charge, essentially for the purpose of separating them (principally from the settlor's personal assets). In support of that approach, the referring court cites the national case-law (Supreme Court of Cassation) according to which the transfer of title of the assets into the name of the trustee 'takes place free of charge, but does not result in the transfer of the beneficial ownership, since it does not confer the assets definitively to the trustee, who is only required to administer and safeguard them under the separation of property regime, pending their transfer to the beneficiaries of the "trust"'. The asset transferred to a trust would therefore continue to 'belong' to the settlor, at least until it is transferred definitively to the beneficiaries. The condition whereby the asset is 'belonging' to the designated party, as laid down in Article 2(1) of Regulation No 269/2014, is therefore satisfied for the purpose of a freezing order in respect of that asset, at least until it is transferred to the beneficiaries.
- 16 According to the referring court, the concept of 'belonging' indicated in that article may refer both to the conventional situation, in which the party listed to in Annex I has full and exclusive ownership of the asset, as well as 'atypical' or 'hybrid' situations, such as those relating to the transfer of the asset to a trust, in which the title to the assets are transferred into the name of an individual (the trustee), without however, the trustee being considered in essence as the beneficial owner, as he or she does not have a full and unconditional power to dispose of the assets.
- 17 The referring court points out that, as established by the Ministry of Economy and Finance, the assets transferred to a trust may, in any event, until they are transferred to the third-party beneficiaries, revert definitively to the formal ownership of the settlor, either when the early termination of the trust is ordered or where the beneficiaries do not accept the transfer of the assets held. In other words, following the transfer, the link of 'belonging' between the asset transferred and the settlor, is not definitively severed.
- 18 In support of the interpretation that the settlor does not cease to have a legally relevant link with the assets following the formal change in their title, the referring court recalls Directive 2015/849, which seeks to prevent the use of the EU's financial system for money laundering or terrorist financing purposes. For the purposes of Article 3(6)(b)(i) of that directive, in the case of a trust, the settlor, together with the other qualified parties referred to therein, represents the 'beneficial owner', namely 'the natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity

is being conducted ...'. The referring court states that a similar provision applies in the national law (Article 22(5) of Legislative Decree No 231/2007, as amended by Article 2(1) of Legislative Decree No 90/2017).

- 19 Furthermore, Article 3(6)(b)(v) envisages the possibility of 'control over a trust by means of direct or indirect ownership'.
- 20 According to the referring court, the objective scope of application of Directive 2015/848, which is different from that of Regulation No 269/2014, does not prevent that directive from being used for the purposes of interpreting Article 2(1) of that regulation: in both situations, the settlor of the trust is a figure who, together with the other figures who play an important role in the management or pursuit of the trust's objectives (the trustee or the beneficiaries), maintains strong links with the assets held, with the ability, in one way or another, to influence their management. The concept of 'belonging' mentioned in Article 2(1) of Regulation No 269/2014 could therefore refer not only to cases of the assets' formal or direct belonging to the designated party, but also cases in which the state of 'belonging' is 'substantial or indirect', for example, in a trust: here, a party (the settlor), although not having direct ownership of the assets held, nor having the right to dispose of the assets or having the formal title thereto, is objectively in a position to exercise substantial influence over them, either because he or she is able to reacquire formal title to them or because, by creating the trust and delegating the management and control to individuals of his or her confidence and choice, he or she is in a position, before all others, to direct their use (and above all, their final allocation).
- 21 In the alternative, as regards the criterion of belonging to a person (natural or legal) associated with the settlor, the referring court notes that Article 2(1) of the Regulation, by ordering the freezing, not only of the assets belonging to a designated natural or legal person, but also of those belonging to natural or legal persons (or entities or bodies) 'associated with them', may also refer to a trust. The asset, which is in fact no longer held in the name of the settlor, the party listed in Annex I, continues to maintain close links with the settlor; the trustee represents the associated person, chosen by the settlor, who administers the assets held by him or her, according to the plan that he or she intended.
- 22 In the further alternative, for the purposes of the lawfulness of freezing measures pursuant to Article 2(1) of Regulation (EU) No 269/2014, the referring court takes the view that it may be argued that the settlor is in any event in a position of 'control' in relation to the assets held, given the configuration of the trust, since he or she continues to play a decisive role in the administration of the assets held (creation of the trust, appointing key figures responsible for management and supervision, establishing the final plan and setting the rules for asset allocation). That situation would therefore be fulfilled irrespective of the fact that the settlor does not have powers of direct management and disposal of the assets held and is not included as one of the beneficiaries. The referring court recalls in this regard, the case-law of the Court, which has defined the concept of 'control' as 'the

possibility, conferred by rights, contracts or other means, of exercising decisive influence' (judgment of the Court of Justice, Fourth Chamber, of 4 March 2020, Case C-10/18 P, ECLI:EU:C:2020:149).

- 23 Lastly, the referring court takes the view that no changes affecting the administrative figures are envisaged during the period of validity of the trust, subsequent to the trust deed, which would, in any event, be specifically provided for by the settlor in that deed. The referring court invites the Court to provide any necessary clarifications on the conditions to be satisfied in order to consider the existence of the settlor's 'control' over the assets even after any such changes have occurred, irrespective of the settlor's consent and even if he no longer has powers of management or use with respect to the assets held.

WORKING DOCUMENT