



## Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

17 January 2019\*

(Reference for a preliminary ruling — Common foreign and security policy — Restrictive measures adopted in view of the situation in Libya — A chain of contracts concluded with the aim of issuing a bank guarantee for the benefit of an entity on a list of entities whose funds are to be frozen — Payment of costs arising under counter guarantee agreements — Regulation (EU) No 204/2011 — Article 5 — Definition of ‘funds made available to an entity referred to in Annex III to Regulation No 204/2011’ — Article 12(1)(c) — Definition of ‘a claim under a guarantee’ — Definition of a ‘person or entity acting on behalf of a person referred to in Article 12(1)(a) or (b)’)

In Case C-168/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kúria (Supreme Court, Hungary), made by decision of 23 March 2017, received at the Court on 3 April 2017, in the proceedings

**SH**

v

**TG,**

intervening party:

**UF,**

THE COURT (Third Chamber),

composed of M. Vilaras (Rapporteur), President of the Fourth Chamber, acting as President of the Third Chamber, J. Malenovský, L. Bay Larsen, M. Safjan and D. Šváby, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 23 April 2018,

after considering the observations submitted on behalf of:

- SH, by J. Burai-Kovács and G. Stanka, ügyvédek, and by Á. Mohay, jogi iroda vezetője,
- TG, by B. Kutasi and Á. Szenczy, ügyvédek, and by E. Rosenfeld, avocat,
- UF, by Z. Völgyesiné Hontvári and A. Szerencsés, ügyvédek,

\* Language of the case: Hungarian.

- the Hungarian Government, by G. Koós and Z. Fehér, acting as Agents,
- the German Government, by T. Henze and D. Klebs, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,
- the European Commission, by L. Havas and E. Paasivirta, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 October 2018,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of (i) Articles 5, 9 and 12(1) of Council Regulation (EU) No 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya (OJ 2011 L 58, p. 1), (ii) Article 12(1) of that regulation, in the version resulting from Council Regulation (EU) No 45/2014 of 20 January 2014 (OJ 2014 L 16, p. 1), and (iii) Article 17(1) of Council Regulation (EU) 2016/44 of 18 January 2016 concerning restrictive measures in view of the situation in Libya and repealing Regulation (EU) No 204/2011 (OJ 2016 L 12, p. 1).
- 2 The request has been made in proceedings between two Hungarian banks, SH and TG, before the Kúria (Supreme Court, Hungary) concerning the payment by SH to TG of, first, guarantee costs arising in connection with a bank guarantee granted by a Libyan bank, namely Sahara Bank, to a Libyan contractor, the Libyan Housing and Infrastructure Board ('HIB') and, second, costs arising in respect of a counter guarantee granted by TG to Sahara Bank.

### **Legal context**

#### ***International law***

- 3 On 26 February 2011, in view of flagrant, systematic infringements of human rights in Libya, the United Nations Security Council adopted, on the basis of Article 41 of Chapter VII of the United Nations Charter, Resolution 1970 (2011), which introduced restrictive measures against that State.
- 4 Under paragraphs 17 and 21 of that resolution, the United Nations Security Council:

'17. *Decides* that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in Annex II of this resolution or designated by the Committee established pursuant to paragraph 24 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all Member States shall ensure that any funds, financial assets or economic resource are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the Committee.

...

21. *Decides* that the measures in paragraph 17 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that the payment is not directly or indirectly

received by a person or entity designated pursuant to paragraph 17 above, and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorise, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, 10 working days prior to such authorisation.’

### *EU law*

#### *Decision 2011/137/CFSP*

5 In order to implement Resolution 1970 (2011), the Council of the European Union adopted Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya (OJ 2011 L 58, p. 53).

6 Article 6(1) and (2) of that decision provides as follows:

‘1. All funds, other financial assets and economic resources, owned or controlled, directly or indirectly, by:

(a) persons and entities listed in Annex II to UNSCR 1970 (2011), and additional persons and entities designated by the Security Council or by the Committee in accordance with paragraph 22 of UNSCR 1970 (2011), or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, as listed in Annex III;

(b) persons and entities not covered by Annex III involved in or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in Libya, including by being involved in or complicit in planning, commanding, ordering or conducting attacks, in violation of international law, including aerial bombardments, on civilian populations and facilities, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, as listed in Annex IV;

shall be frozen.

2. No funds, other financial assets or economic resources shall be made available, directly or indirectly, to or for the benefit of, natural or legal persons or entities referred to in paragraph 1.’

7 Article 7 of the decision states as follows:

‘No claims, including for compensation or any other claim of this kind, such as a claim of set-off or a claim under a guarantee, in connection with any contract or transaction the performance of which was affected, directly or indirectly, wholly or in part, by reason of measures decided upon pursuant to UNSCR 1970 (2011), including measures of the Union or any Member State in accordance with, as required by or in any connection with, the implementation of the relevant decisions of the Security Council or measures covered by this Decision, shall be granted to the designated persons or entities listed in Annexes I, II, III or IV, or any other person or entity in Libya, including the Government of Libya, or any person or entity claiming through or for the benefit of any such person or entity.’

#### *Regulation No 204/2011*

8 On the basis of Decision 2011/137, the Council adopted Regulation No 204/2011, which entered into force on 3 March 2011.

9 Recitals 1 and 2 of this regulation state as follows:

- (1) In accordance with ... Resolution 1970 (2011) ..., Decision 2011/137 ... provides for an arms embargo, a ban on internal repression equipment, as well as restrictions on the admission and the freezing of funds and economic resources of certain persons and entities involved in serious human rights abuses against persons in Libya, including by being involved in attacks, in violation of international law, on civilian populations and facilities. Those natural or legal persons and entities are listed in the Annexes to the Decision.
- (2) Some of those measures fall within the scope of the Treaty on the Functioning of the European Union and regulatory action at the level of the Union is therefore necessary in order to implement them, in particular with a view to ensuring their uniform application by economic operators in all Member States.'

10 Article 1 of that regulation provides:

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

(a) "funds" means financial assets and benefits of every kind, including but not limited to:

- ...
- (v) credit, right of set-off, guarantees, performance bonds or other financial commitments;
- (vi) letters of credit, bills of lading, bills of sale;

...

- (b) "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;
- (c) "economic resources" means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds, but may be used to obtain funds, goods or services;
- (d) "freezing of economic resources" means preventing their use to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them;

...'

11 Article 5 of Regulation No 204/2011 is worded as follows:

- '1. All funds and economic resources belonging to, owned, held or controlled by the natural or legal persons, entities and bodies listed in Annexes II and III 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 or bodies listed in Annexes II and III.
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.'

12 Under Article 9(1) of Regulation No 204/2011:

‘Article 5(2) shall not apply to the addition to frozen accounts of:

...

(b) payments due under contracts, agreements or obligations that were concluded or arose before the date on which the natural or legal person, entity or body referred to in Article 5 has been designated by the Sanctions Committee, the Security Council or by the Council,

provided that any such ... payments are frozen in accordance with Article 5(1).’

13 Article 12 of that regulation is worded as follows:

‘No claims, including for compensation or any other claim of this kind, such as a claim of set-off or a claim under a guarantee, in connection with any contract or transaction the performance of which was affected, directly or indirectly, wholly or in part, by reason of measures decided upon pursuant to UNSCR 1970 (2011), including measures of the Union or any Member State in accordance with, as required by or in any connection with, the implementation of the relevant decisions of the Security Council or measures covered by this Regulation, shall be granted to the Government of Libya, or any person or entity claiming through it or for its benefit.’

*Regulation No 45/2014*

14 Article 1 of Regulation No 45/2014 amended Article 12 of Regulation No 204/2011 as follows:

‘1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of that type, such as a claim for compensation or a claim under a guarantee, in particular a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:

(a) designated persons, entities or bodies listed in Annex II or III;

(b) any other Libyan person, entity or body, including the Libyan government;

(c) any person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in point (a) or (b).

...’

15 The amendment made to Article 12 of Regulation No 204/2011 entered into force on 22 January 2014.

*Regulation 2016/44*

16 Article 17(1) of Regulation 2016/44, which entered into force on 20 January 2016, provides as follows:

‘No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of that type, such as a claim for compensation or a claim

under a guarantee, in particular a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:

- (a) designated persons, entities or bodies listed in Annex II or III;
- (b) any other Libyan person, entity or body, including the Libyan government;
- (c) any person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in point (a) or (b).'

### **Facts of the main proceedings and the questions referred for a preliminary ruling**

- 17 On 7 July 2009, HIB and UF, a Hungarian construction undertaking, concluded a works contract the object of which was the development by the latter of public service infrastructure in the Libyan region of Zawya. HIB required that UF provide bank guarantees, to be furnished by a Libyan bank, in order to guarantee the performance of its obligations in return for (i) the advance payment received (guarantee of repayment of advance) and (ii) the carrying out of the construction works (guarantee of proper performance).
- 18 While it agreed to provide the guarantees requested by HIB, Sahara Bank required UF itself to provide a counter guarantee to be furnished by a Hungarian bank.
- 19 On 16 October 2009, UF and a Hungarian bank, SH, concluded a counter guarantee advance repayment agreement and a counter guarantee proper performance agreement, by which SH undertook to issue counter guarantees for the benefit of another Hungarian bank, TG, which was instructed by SH to provide to Sahara Bank the counter guarantee and a letter of credit which the latter had requested. As a result, on 20 November and 16 December 2009, SH issued for the benefit of TG (i) a counter guarantee of repayment of the advance in the sum of 69 499 610 Libyan dinars (LYD) (approximately EUR 49 251 000), which was to expire on 14 September 2013, and (ii) a counter guarantee of proper performance in the amount of LYD 9 266 615 (approximately EUR 6 567 000), which was due to expire on 15 July 2014.
- 20 On 24 November and 17 December 2009, TG issued in favour of Sahara Bank, respectively, a counter guarantee of repayment of the advance, which was to expire on 30 August 2013, and an irrevocable letter of credit, which was to expire on 30 June 2014, upon which Sahara Bank issued the bank guarantees required by HIB.
- 21 In return for the service provided by TG in connection with the issue of those guarantees, SH undertook to pay to TG, on a quarterly basis and in advance, a fee at an annual rate of 1.30% and to reimburse the costs and expenses incurred by Sahara Bank, along with its financing costs and any late-payment interest payable.
- 22 Council Implementing Regulation (EU) No 233/2011 of 10 March 2011 implementing Article 16(2) of Regulation (EU) No 204/2011 (OJ 2011 L 64, p. 13) added the name of HIB to the list in Annex III to the latter regulation with effect from 11 March 2011.
- 23 Council Implementing Regulation (EU) No 272/2011 of 21 March 2011 implementing Article 16(2) of Regulation No 204/2011 (OJ 2011 L 76, p. 32) added the name of Sahara Bank to the list in Annex III to the latter regulation with effect from 22 March 2011. That name was removed from that list on 2 September 2011, pursuant to Council Implementing Regulation (EU) No 872/2011 of 1 September 2011 implementing Article 16(2) of Regulation No 204/2011 (OJ 2011 L 227, p. 3).

- 24 From 2 September 2011 to 16 July 2013, TG paid to Sahara Bank the charges due under the counter guarantee agreement concluded with the latter.
- 25 On 29 November 2012, Sahara Bank attempted, at the request of HIB, to trigger the counter guarantee of repayment of the advance issued by TG. However, TG refused to do so, claiming that the request was unlawful. In that regard, by final order of 22 April 2013, the Fővárosi Ítéltábla (Budapest Regional Court of Appeal, Hungary) prohibited any such a payment as long as the name of HIB was on the list in Annex III to Regulation No 204/2011.
- 26 On 20 December 2012, SH and TG signed a memorandum of agreement to the effect that no claim could be made for payment of the guarantee of repayment of the advance as long as HIB was subject to restrictive measures. SH indicated in that memorandum that it intended to pay the costs arising under the counter guarantee of repayment of the advance and the counter guarantee of proper performance which may be claimed by TG and, through its intermediary, Sahara Bank only on condition that HIB ceased to be subject to such measures before those counter guarantees expired. SH undertook to pay into a deposit account the costs accrued but not paid at that date and all subsequent costs arising, the sums thus paid to be released in accordance with the conditions stipulated in a deposit agreement concluded by the parties and a custodian bank ('the deposit agreement').
- 27 Also on 20 December 2012, SH, TG and the custodian bank concluded the deposit agreement, under which the sums relating to the counter guarantees granted by SH to TG were to be deposited and retained, together with interest accruing thereon.
- 28 The parties to the deposit agreement provided that the sums deposited were to be paid to SH in the event that HIB's name was not removed from the list in Annex III to Regulation No 204/2011 before the dates on which the counter guarantees issued by SH expired. They provided, in the alternative, that in the event that HIB's name was removed from the list in Annex III to Regulation No 204/2011 before those dates, the sums deposited would be returned to TG.
- 29 After 20 December 2012, SH paid into the deposit account the costs payable to TG under the counter guarantees issued by the latter.
- 30 When the counter guarantee of repayment of the advance issued by SH expired on 14 September 2013, HIB's name had not been removed from the list in Annex III to Regulation No 204/2011.
- 31 Following the amendment made by Regulation No 45/2014, which came into effect on 22 January 2014, Article 12(1)(b) of Regulation No 204/2011 provided that no claim may be satisfied in connection with a contract or transaction the performance of which has been affected by the measures imposed under that regulation, where the claim is made, inter alia, by any Libyan person, entity or body.
- 32 By Council Implementing Regulation (EU) No 74/2014 of 28 January 2014 implementing Article 16(2) of Regulation No 204/2011 (OJ 2014 L 26, p. 1), HIB's name was removed from the list in Annex III to the latter regulation with effect from 29 January 2014.
- 33 On 31 January 2014, SH requested the custodian bank to release to it the amount deposited, on the ground that the counter guarantee of repayment of the advance issued by it had expired during the period in which HIB's name was on the list in Annex III to Regulation No 204/2011. TG refused to provide the necessary statement of intent required for release of the deposit under the deposit agreement on the ground that the conditions for such release were not met.

- 34 As a consequence, SH brought proceedings before the court of first instance for the release of the deposit in question. For its part, TG lodged a counterclaim seeking payment of the sum of EUR 2 072 321.18, representing the costs which it claimed were due to it in connection with the performance of its contracts with SH and the costs arising under the counter guarantee paid by it to Sahara Bank.
- 35 The court of first instance granted SH's claim but ordered it to pay the sum of EUR 1 352 713.04 to TG. It took the view that the costs payable under the counter guarantee agreements concluded between SH and TG did not fall within Regulation No 204/2011 because they constituted consideration for a service provided by a Hungarian legal person. On the other hand, it considered that the guarantee costs paid by TG to Sahara Bank did fall within Regulation No 204/2011 and that TG was not therefore entitled to claim repayment of those costs from SH.
- 36 The appeal court varied the judgment at first instance and dismissed the counterclaim in its entirety, in reliance on the fact that, as a result of the deposit agreement, the parties to the dispute had altered the terms of the counter guarantee agreements in so far as concerns the right to receive the related costs and expiry of that right. It followed that, as HIB's name had not been removed from the list in Annex III to Regulation No 204/2011 before the counter guarantees expired, TG was not entitled to receive the various costs. That court added that, even if the agreements had not been altered, TG would not have been entitled to receive such payments, on the basis that the restrictive measures imposed by EU legislation were binding, it not being possible for TG to provide a guarantee to an entity in respect of which such measures had been imposed and TG not therefore being entitled to be covered by the costs relating to such a guarantee. The guarantee costs paid by TG to Sahara Bank were indirectly intended for performance of an obligation vis-à-vis HIB, which fell within the scope of Regulation No 204/2011.
- 37 TG lodged an appeal against the decision dismissing its counterclaim before the Kúria (Supreme Court). It argued that the appeal court had misinterpreted Articles 5 and 12 of Regulation No 204/2011, on the ground that the scope of Article 5 did not extend to entities included on the sanctions list, on which the name of Sahara Bank no longer appeared, and that, during the relevant period, Article 12 of that regulation concerned only Libyan authorities. TG maintains that the guarantee costs owed to it and those paid to Sahara Bank are bank charges, that they do not constitute a guarantee and that payment of those charges does not serve the interests of HIB.
- 38 Both SH and UF, the intervener in the main proceedings in support of SH, requested the referring court to uphold the judgment on the appeal because, in their submission, the only matter of any consequence is that, among the operators in the chain of contracts signed by the parties, the name of one of them, namely HIB, was on the list in Annex III to Regulation No 204/2011.
- 39 The referring court makes a distinction between the guarantee, given in order to secure fulfilment of an obligation, and the costs arising under the guarantee, which represent the consideration for the service consisting in the guarantee obligation. In its view, if the bank guarantee had been released for the benefit of HIB, that would have constituted a payment prohibited by Regulation No 204/2011.
- 40 The referring court states that TG's counterclaim is divided into two parts, one seeking repayment of the costs arising under the guarantee that it paid to Sahara Bank, and the other relating to the costs that it was entitled to claim from SH under the counter guarantee agreements concluded between them.
- 41 The referring court is of the view that, in order to resolve the counterclaim, it is necessary to determine whether payment of guarantee costs may be regarded as an indirect payment of funds that is connected, in some way or other, to the bank guarantee. It is also necessary to determine whether, by claiming such a payment, TG may be regarded as a person acting on behalf of another person, entity



or body subject to the restrictive measures imposed by Regulation No 204/2011. The referring court is also uncertain whether Article 9 of that regulation, which provides for exceptions to the measures freezing funds and economic resources, may be applicable.

42 The referring court states that it will be necessary to rule on the basis of national law if the claim for payment of the various guarantee costs made by TG fell, in whole or in part, outside the scope of Regulation No 204/2011. If the payment of those costs were to be classified as an indirect payment within the meaning of that regulation and the rule providing for exceptions laid down in Article 9 did not apply, then the counterclaim would have to be dismissed.

43 The referring court considers that the various agreements at issue are closely linked, as they were concluded for the sole purpose of providing a bank guarantee in favour of HIB, and that they cannot be treated as giving rise to stand-alone obligations, independent of each other.

44 It notes that if the payment of guarantee costs falls within the scope of a regulation imposing restrictive measures, it will be necessary to determine which regulation is applicable, that is, Regulation No 204/2011, which was in force at the time the counter guarantees expired, or Regulation 2016/44, which came into force when the dispute was already pending before the Hungarian courts and those costs had not been calculated definitively.

45 In those circumstances, the Kúria (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Do the following obligations to pay the costs arising under a guarantee, derived from a number of counter-guarantee agreements concluded, as part of a chain of agreements, for the purpose of issuing a bank guarantee in favour of [HIB], fall within the scope of Regulation No 204/2011 or, as the case may be, Regulation 2016/44:

- (a) where, under a counter-guarantee agreement, a bank established in the European Union has an obligation to pay the costs to a Libyan bank which is included on the ... list in Annex III to Regulation No 204/2011;
- (b) where, under a counter-guarantee agreement, a bank established in the European Union has an obligation to pay the costs to a Libyan bank which is not included on the ... list in Annex III to Regulation No 204/2011 but the bank guarantee is issued in favour of HIB, which is included on that list;
- (c) where, during the period following the amendment of Regulation No 204/2011 by Regulation No 45/2014, Regulation No 204/2011 prohibits direct or indirect payments to any Libyan entity;
- (d) where the obligation to pay the costs arising under the guarantee derives from a counter-guarantee agreement concluded, in the context of the relationship between two banks established in the European Union, within a chain of agreements, for the purpose of issuing a bank guarantee in favour of HIB;
- (e) where calculation of the costs arising under the guarantee takes place after expiry of the guarantee period, in legal proceedings, after the entry into force of Regulation 2016/44?

(2) If the obligation referred to [in question 1(a) and (b)] to pay the costs arising under a guarantee falls within the scope of Regulation [204/2011], should the costs so arising that are paid to a Libyan bank — which was also included for a time on the ... list in Annex III to Regulation No 204/2011 — for the purpose of issuing a guarantee of repayment of the advance and a guarantee of proper performance in favour of HIB be considered to constitute funds used directly or indirectly for the benefit of the legal persons, entities or bodies listed in Annex III to Regulation No 204/2011?

- (3) Is Article 12(1)(b) of Regulation No 204/2011 to be interpreted, during the period following the amendment of that regulation by Regulation No 45/2014 ([question 1.(c)]), as meaning that the costs and expenses claimed by a Libyan bank and paid, under a counter-guarantee agreement, by a bank established in the European Union should be considered to constitute, directly or indirectly, claims under a guarantee?
- (4) Must a bank established in the European Union which, under a counter-guarantee agreement concluded, within a chain of agreements, for the purpose of issuing a bank guarantee in favour of HIB, is obliged to pay the costs arising under the guarantee to a Libyan entity ([question 1(d)]) be considered to be a person or entity within the meaning of Article 12(1)(c) of Regulation No 204/2011, as amended by Regulation No 45/2014 — that is, a person or entity acting through or on behalf of or for the benefit of one of the persons, entities or bodies referred to in point (a) or (b) of Article 12(1)? Should the costs arising under the guarantee claimed by that bank from another bank established in the European Union be considered to constitute, directly or indirectly, claims under a guarantee?
- (5) Does the exclusion rule in Article 9 of Regulation No 204/2011 refer to any payment?
- (6) Where calculation of the costs arising under a guarantee takes place after the entry into force of ... Regulation 2016/44, which repealed Regulation No 204/2011 but contains provisions that are in essence identical ([question 1(e)]), will Regulation 2016/44 be applicable for the purpose of resolving the dispute between the parties and must Article 17(1)(b) of that regulation be interpreted as meaning that the costs and expenses claimed by a Libyan bank and paid, under a counter-guarantee agreement, by a bank established in the European Union, should be considered to constitute, directly or indirectly, claims under a guarantee? Must a bank established in the European Union which, under a counter-guarantee agreement concluded, within a chain of agreements, for the purpose of issuing a bank guarantee in favour of HIB, is obliged to pay the costs arising under the guarantee to a Libyan entity be considered to be a person or entity within the meaning of Article 17(1)(c) of that regulation — that is, a person or entity acting through or on behalf of or for the benefit of one of the persons, entities or bodies referred to in point (a) or (b) of Article 17(1)? Should the costs arising under the guarantee claimed by that bank from another bank established in the European Union be considered to constitute, directly or indirectly, claims under a guarantee?

## Consideration of the questions referred

### *Preliminary observations*

- 46 According to the referring court, the outcome of the dispute in the main proceedings depends, in particular, on whether Regulation No 204/2011 is applicable to the costs payable under agreements issued for the purpose of providing a counter guarantee in respect of a bank guarantee the beneficiary of which has been subject to restrictive measures under that regulation.
- 47 As the various questions raised overlap in several respects, they should be regrouped and reformulated in order to provide the referring court with the most precise answers possible.
- 48 The referring court must therefore be regarded as entertaining doubts, in essence, concerning the application to a situation such as that at issue in the main proceedings of: (i) Article 5(2) of Regulation No 204/2011, which prohibits funds or economic resources being made available, directly or indirectly, to persons listed in Annex III to that regulation; (ii) Article 12 of that regulation, which provides that no claim in connection with any contract or transaction affected by the measures introduced by the

regulation may be granted; (iii) Article 9 of Regulation No 204/2011, which lays down exceptions to Article 5(2); and (iv) Article 17(1) of Regulation 2016/44, which replaced Article 12 of Regulation No 204/2011.

**Article 5(2) of Regulation No 204/2011**

- 49 The referring court seeks to ascertain, in essence, whether Article 5(2) of Regulation No 204/2011 is to be interpreted as being applicable to a situation, such as that at issue in the main proceedings, in which the costs payable under counter guarantee agreements must be paid, first, by an EU bank to a Libyan bank listed in Annex III to that regulation, second, by an EU bank to a Libyan bank that is no longer of that list, where the bank guarantee granted by the Libyan bank is for the benefit of an entity which is on that list, and, third, by one EU bank to another EU bank.
- 50 Article 5(2) of Regulation No 204/2011 provides that no funds or economic resources are to be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities and bodies listed in Annexes II and III to that regulation.
- 51 It should be noted that the prohibition laid down in that provision on making funds or economic resources available to any person on the list of persons targeted by the restrictive measures is framed in particularly broad terms, as evidenced by the use of the words ‘directly or indirectly’, and therefore encompasses all the acts necessary under the applicable national law if that person is in fact to obtain full power of disposal in relation to the funds or economic resources concerned (see, to that effect, judgments of 11 October 2007, *Möllendorf and Möllendorf-Niehuus*, C-117/06, EU:C:2007:596, paragraphs 50 and 51; of 29 June 2010, *E and F*, C-550/09, EU:C:2010:382, paragraphs 66 and 74, and of 21 December 2011, *Afrasiabi and Others*, C-72/11, EU:C:2011:874, paragraphs 39 and 40).
- 52 The broad and unambiguous terms of that provision apply to any mode of making available an economic resource and therefore also to any act which flows from the execution of a contract imposing mutual obligations and which has been agreed in exchange for payment of pecuniary consideration (judgment of 11 October 2007, *Möllendorf and Möllendorf-Niehuus*, C-117/06, EU:C:2007:596, paragraph 56).
- 53 Moreover, according to the Court’s case-law, the notion of ‘funds and economic resources’ is wide in scope, covering assets of every kind, however acquired (see, by analogy, judgment of 29 June 2010, *E and F*, C-550/09, EU:C:2010:382, paragraphs 69).
- 54 In the first place, the referring court envisages the situation in which an EU bank has to pay to a Libyan bank listed in Annex III to Regulation No 204/2011 costs arising under a counter guarantee agreement.
- 55 While the dispute in the main proceedings concerns costs payable under a counter guarantee agreement concluded between two European banks, the situation envisaged in paragraph 54 above may nonetheless have a bearing on the outcome of that dispute, in so far as it cannot be ruled out that the payment of counter guarantee costs, claimed by TG, also relates to the guarantee costs incurred by Sahara Bank in respect of the period during which its name was included on the list in Annex III to that regulation.
- 56 In the present case, the Libyan bank in question in the main proceedings, namely Sahara Bank, was on that list from 22 March to 2 September 2011, so that only Regulation No 204/2011 is relevant in that regard.

- 57 The mere fact that sums of money must be paid to such a bank, for whatever reason, brings such a transaction within the scope of Article 5(2) of Regulation No 204/2011 since, for the purposes of that provision, the transaction consists in making funds directly available to a person whose name is on the list in Annex III to that regulation.
- 58 Furthermore, as the Advocate General observed in point 34 of his Opinion, the fact that those payments are part of a transaction characterised by an economic balance between the consideration given and the consideration received and constitute acts implementing an agreement concluded before the entry into force of Regulation No 204/2011 does not, in itself, mean that they fall outside the scope of that regulation or of the prohibitions laid down therein (see, to that effect, judgment of 11 October 2007, *Möllendorf and Möllendorf-Niehuus*, C-117/06, EU:C:2007:596, paragraphs 49 and 62).
- 59 In the second place, the referring court is uncertain whether Regulation No 204/2011 is applicable to payments relating to costs payable, in connection with a counter guarantee agreement made by an EU bank, to a Libyan bank after the name of the Libyan bank has been removed from the list in Annex III to that regulation.
- 60 Such payments cannot constitute the direct making available of funds within the meaning of Article 5(2) of Regulation No 204/2011 as the name of the beneficiary of those funds is not included on the list in Annex III to that regulation or indeed on the list in Annex II to the regulation, to which the prohibition laid down in that provision also applies.
- 61 That said, such payments could constitute the indirect making available of funds for the benefit of a person whose name is on the list in Annex III to Regulation No 204/2011, such as, in the present case, HIB, the beneficiary of the bank guarantees which are the source of the counter guarantee agreements at issue in the main proceedings and whose name was on that list from 11 March 2011 to 29 January 2014, that is, after Sahara Bank had been removed from the list.
- 62 Nevertheless, in order for funds to be regarded as being made indirectly available to a person whose name is on the list in Annex III to Regulation No 204/2011, it must be possible for those funds to be passed on to that person or for that person to have the ability to dispose of them, in the light, inter alia, of the existence of financial or legal links between the beneficiary of the funds and such a person.
- 63 In the present case, the costs payable to Sahara Bank by TG represent the consideration for the bank guarantees issued for the benefit of HIB in a context in which the latter should have been the responsibility of a Hungarian bank, namely SH. Given the nature of those costs, they are not therefore intended to be passed on to HIB. Moreover, according to the evidence before the Court, HIB does not appear to be in any way connected to Sahara Bank by such links as those described in paragraph 62 above. It remains, however, the task of the referring court to verify whether that is the case.
- 64 Lastly, payments made by an EU bank of the costs due to a Libyan bank pursuant to a counter guarantee agreement can be regarded, for the purposes of Article 5(2) of Regulation No 204/2011, as being used for the benefit of a person whose name is on the list in Annex III to that regulation only if, on the basis of the bank guarantee agreement and the counter guarantee agreements, those payments enable the beneficiary of the bank guarantee, whose name is on one of those lists, directly or indirectly to secure enforcement of the bank guarantee.
- 65 That would be the case, inter alia, where the right of the beneficiary of the bank guarantee to seek enforcement of the guarantee was either wholly or partially dependent on the payment of the costs arising under a counter guarantee agreement. To that extent, payments made in respect of those costs may be regarded as being used for the benefit of a person whose name is on the list in Annex III to Regulation No 204/2011.

- 66 However, it is for the referring court to carry out the necessary checks in order to ensure that the payments made by an EU bank, namely TG, to a Libyan bank — in this instance Sahara Bank — in connection with costs payable pursuant to a counter guarantee agreement are not, in the light of the indications provided as to how the question is to be answered in paragraphs 64 and 65 above, used for the benefit of HIB.
- 67 In the third place, the payments made by one EU bank to another EU bank in relation to costs payable under a counter guarantee agreement, a part of which is used to reimburse the costs paid by the latter to a Libyan bank in connection with another counter guarantee agreement do not, in principle, fall within the scope of Article 5(2) of Regulation No 204/2011, as funds made directly available to a person whose name is on the list in Annex III to that regulation.
- 68 With regard to the indirect making available of funds to such a person or the use by that person of such funds, the considerations set out in paragraphs 61 to 66 above are applicable.
- 69 In the light of the foregoing considerations, Article 5(2) of Regulation No 204/2011 is to be interpreted as:
- being applicable in a situation, such as that at issue in the main proceedings, in which the costs payable under a counter guarantee agreement must be paid by an EU bank to a Libyan bank listed in Annex III to that regulation; and
  - not being applicable, in principle, in a situation, such as that at issue in the main proceedings, in which the costs payable under a counter guarantee agreement must be paid by an EU bank to a Libyan bank whose name is no longer on the list in Annex III to that regulation or by one EU bank to another EU bank, where the bank guarantee granted by the Libyan bank benefits an entity which is on that list, unless such a payment leads, as a result of the legal or financial links that exist between the bank receiving that payment and the entity on that list, to the costs in question being made available indirectly to that entity.

### ***Article 12 of Regulation No 204/2011***

- 70 The referring court seeks to ascertain, in essence, whether, in a situation such as that at issue in the main proceedings, Article 12 of Regulation No 204/2011 is to be interpreted as meaning that, both in its original version and in the version resulting from Regulation No 45/2014, it is applicable where costs payable under counter guarantee agreements are to be paid (i) by an EU bank to a Libyan bank listed in Annex III to that regulation, (ii) by an EU bank to a Libyan bank which is not on that list when the bank guarantee granted by the Libyan bank benefits an entity that is on the list and, (iii) by one EU bank to another EU bank.
- 71 In essence, Article 12 of Regulation No 204/2011, both in its original version and the version resulting from Regulation No 45/2014, prohibits any claim in connection with any contract or transaction affected by measures imposed by that regulation.
- 72 It should be noted that there are three parts to the prohibition mechanism laid down in Article 12 of Regulation No 204/2011.
- 73 First, the performance of a contract or the execution of a transaction must have been affected, directly or indirectly, wholly or in part, by the measures imposed by Regulation No 204/2011. Accordingly, a contract or transaction must have been the subject of restrictive measures under that regulation in order for Article 12 thereof to be triggered.

- 74 Second, Article 12 of Regulation No 204/2011 prohibits the granting of any claim in relation to such a contract or transaction, such as a claim for indemnity, a claim for compensation or a claim under a guarantee. By virtue of the general and illustrative nature of the list of claims to which it refers, which is introduced by the word ‘including’, Article 12 of that regulation encompasses all types of claims connected to a contract or transaction.
- 75 Third, claims of the type which are prohibited must have been made, according to the original version of Article 12 of Regulation No 204/2011, by the Government of Libya or any person or entity claiming through it or for its benefit, and, according to the version of that article resulting from Regulation No 45/2014, by, inter alia, any Libyan person, entity or other body not listed in Annex II or Annex III to Regulation No 204/2011.
- 76 In that context, it must be noted that the payment of the costs arising under counter guarantee agreements by a first counter guarantor to the guarantor or by a second counter guarantor to the first counter guarantor cannot, in principle, be excluded from the scope of Article 12 of Regulation No 204/2011.
- 77 First, the enforcement of a counter guarantee agreement may be affected by the measures imposed by that regulation if the name of the beneficiary of the counter guarantee is included on the list in Annex III to the regulation, as occurred with Sahara Bank in the present case over the period from 22 March to 2 September 2011, or if the name of the beneficiary of the guarantee, which is in turn covered by a counter guarantee, is included on that list, as occurred in the cases of HIB over the period from 11 March 2011 to 29 January 2014.
- 78 Second, a claim for payment of the costs payable under a counter guarantee agreement constitutes a claim ‘in connection with any contract’ within the meaning of Article 12 of Regulation No 204/2011, in its original version and in the version resulting from Regulation No 45/2014, respectively.
- 79 For that reason, in order for a claim to be prohibited by Article 12 of Regulation No 204/2011, it must necessarily be made by one of the persons referred to in that article.
- 80 In so far as it relates to the costs payable under an agreement by which an EU bank stands as counter guarantor for a Libyan bank, a claim for payment falls within the scope of Article 12 of Regulation No 204/2011, in its original version, provided that the Libyan bank may be regarded as an entity acting on behalf of the Libyan Government, the only category referred to in that article into which such a bank may fall in the present case.
- 81 In that regard, it is for the referring court to carry out the necessary checks in order to determine whether it is possible to regard Sahara Bank as acting on behalf of the Libyan Government.
- 82 With regard to Article 12(1)(b) of Regulation No 204/2011, added by Regulation No 45/2014, it is applicable in a situation such as that at issue in the main proceedings since the Libyan bank for which the EU bank acts as counter guarantor is indeed a Libyan person, entity or other body not listed in Annex II or Annex III to that regulation, as covered by that provision.
- 83 Nevertheless, it is apparent from the documents on the file submitted to the Court that the last payments by TG to Sahara Bank pursuant to the counter guarantee agreement which linked those parties was made on 16 July 2013, so that the question whether Article 12 of Regulation No 204/2011 is applicable to those payments must be determined in the light of the original version of that article.
- 84 On the other hand, in so far as the claim for payment relates to the costs payable under an agreement by which an EU bank acts as counter guarantor for another EU bank, it cannot be properly claimed, in the light of the wording of the original version of Article 12 of Regulation No 204/2011, that the latter

bank may be regarded as acting on behalf of the Libyan Government. Indeed, it receives those costs under the terms of an agreement the sole purpose of which is to provide a counter guarantee in respect of a bank guarantee granted to a Libyan bank.

85 The application of the version of Article 12 of Regulation No 204/2011 resulting from Regulation No 45/2014 is possible only if the EU bank which seeks payment of the costs due under a counter guarantee agreement from another EU bank is one of the persons referred to in Article 12(1)(c) of Regulation No 204/2011, which concerns a person, entity or body acting on behalf of one of the persons, entities or bodies referred to in Article 12(1)(a) or (b). Such an EU bank must therefore be acting on behalf of (i) a person whose name is on the list in Annex III to that regulation, such as HIB in the main proceedings, (ii) a Libyan person, entity or body, or (iii) the Libyan Government.

86 In a contractual chain consisting of a bank guarantee and two counter guarantees, there are, in principle, no valid grounds for considering that where an EU bank receives costs payable under a counter guarantee agreement with another EU bank, it is acting on behalf of the guarantor or the beneficiary of the bank guarantee. A counter guarantee agreement such as that at issue in the main proceedings is an agreement concluded between the person giving the order and a counter guarantor by which the latter undertakes unilaterally and irrevocably to pay a given sum to a beneficiary, immediately upon request by the beneficiary, without the legal relationship underlying that agreement being examined. The sole purpose of the costs payable under a counter guarantee agreement by the person giving the order to the counter guarantor is therefore to remunerate the latter for the service provided to the person giving the order in issuing the counter guarantee. In receiving that payment, the counter guarantor cannot therefore be regarded as acting on behalf of the guarantor or the beneficiary of the bank guarantee in respect of which a counter guarantee has thus been given.

87 Article 12 of Regulation No 204/2011 must be therefore be interpreted as:

- being applicable, in its original version, where costs payable under counter guarantee agreements must be paid by an EU bank to a Libyan bank listed in Annex III to that regulation and by an EU bank to a Libyan bank which is not on that list if the bank guarantee granted by the Libyan bank benefits an entity that is on that list, provided that the Libyan bank is regarded as an entity acting on behalf of the Libyan Government, which is a matter for the referring court to verify;
- not being applicable, in the version resulting from Regulation No 45/2014, where the costs payable under counter guarantee agreements must be paid by an EU bank to a Libyan bank listed in Annex III to that regulation and by an EU bank to a Libyan bank which is not on that list if the bank guarantee granted by the Libyan bank benefits an entity which is on the list, provided that those costs were paid before the entry into force of that regulation; and
- not being applicable, either in the original version or in the version resulting from Regulation No 45/2014, where the costs payable under counter agreements must be paid by one EU bank to another EU bank.

#### ***Article 9 of Regulation No 204/2011***

88 The referring court seeks to ascertain, in essence, whether Article 9 of Regulation No 204/2011 is to be interpreted as meaning that it may be applied to payments of costs such as those due under the various agreements at issue in the main proceedings.

- 89 According to Article 9 of Regulation No 204/2011, Article 5(2) thereof does not apply to the addition to frozen accounts of payments due under contracts, agreements or obligations that were concluded or arose before the date on which any natural or legal person, entity or body referred to in Article 5 was designated by the Sanctions Committee, the Security Council or by the Council, provided that any such payment is frozen in accordance with Article 5(1).
- 90 Thus, the provisions of Article 9 of Regulation No 204/2011 are directed only at payments made to persons whose name is on the list in Annex II to that regulation or the list in Annex III thereto.
- 91 In the present case, the beneficiary of the bank guarantee, namely HIB, has not received any payment under the bank guarantee agreement concluded for its benefit since its name was included on the list in Annex III to Regulation No 204/2011. Moreover, the guarantor bank, namely Sahara Bank, received the costs of providing that guarantee from the counter guarantor bank, namely TG, only during the period in which its name was not on the list in that annex.
- 92 In those circumstances, Article 9 of Regulation No 204/2011 is not therefore applicable.
- 93 As a consequence, Article 9 of Regulation No 204/2011 is to be interpreted as not being applicable to payments of costs such as those due under the various agreements at issue in the main proceedings.

#### ***Article 17(1) of Regulation 2016/44***

- 94 The referring court seeks to ascertain, in essence, whether Article 17(1) of Regulation 2016/44 is to be interpreted as being applicable in a situation, such as that at issue in the main proceedings, in which the final calculation of the counter guarantee costs payable by one EU bank to another EU bank is made after the entry into force of that regulation.
- 95 In accordance with Article 26 thereof, Regulation 2016/44 entered into force the day after its publication in the *Official Journal of the European Union*, that is to say on 20 January 2016.
- 96 It should be noted that the provisions of Article 17(1) of Regulation 2016/44 correspond, essentially, to those of Article 12(1) of Regulation No 204/2011, in the version resulting from Regulation No 45/2014.
- 97 In the present case, the payments by TG to Sahara Bank were all made under Regulation No 204/2011 and the provisions of Regulation 2016/44 are not applicable to them.
- 98 On the other hand, the payments relating to the cost arising under the counter guarantee agreement between SH and TG fall within Regulation 2016/44, as the final calculation and subsequent payment of those costs had not yet taken place on the date when that regulation entered into force.
- 99 Accordingly, Article 17(1) of Regulation 2016/44 must be interpreted as being applicable to the counter guarantee costs payable by one EU bank to another EU bank in a situation, such as that at issue in the main proceedings, in which the final calculation of the costs is made after the entry into force of that regulation.

#### **Costs**

- 100 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.



On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 5(2) of Council Regulation (EU) No 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya is to be interpreted as:**
  - being applicable in a situation, such as that at issue in the main proceedings, in which the costs payable under a counter guarantee agreement must be paid by an EU bank to a Libyan bank listed in Annex III to that regulation; and
  - not being applicable, in principle, in a situation, such as that at issue in the main proceedings, in which the costs payable under a counter guarantee agreement must be paid by an EU bank to a Libyan bank whose name is no longer on the list in Annex III to that regulation or by one EU bank to another EU bank, where the bank guarantee granted by the Libyan bank benefits an entity which is on that list, unless such a payment leads, as a result of the legal or financial links that exist between the bank receiving that payment and the entity on that list, to the costs in question being made available indirectly to that entity.
2. **Article 12 of Regulation No 204/2011 is to be interpreted as:**
  - being applicable, in its original version, where costs payable under counter guarantee agreements must be paid by an EU bank to a Libyan bank listed in Annex III to that regulation and by an EU bank to a Libyan bank which is not on that list if the bank guarantee granted by the Libyan bank benefits an entity that is on that list, provided that the Libyan bank is regarded as an entity acting on behalf of the Libyan Government, which is a matter for the referring court to verify;
  - not being applicable, in the version resulting from Council Regulation (EU) No 45/2014 of 20 January 2014, where the costs payable under counter guarantee agreements must be paid by an EU bank to a Libyan bank listed in Annex III to that regulation and by an EU bank to a Libyan bank which is not on that list if the bank guarantee granted by the Libyan bank benefits an entity which is on the list, provided that those costs were paid before the entry into force of that regulation; and
  - not being applicable, either in the original version or in the version resulting from Regulation No 45/2014, where the costs payable under counter agreements must be paid by one EU bank to another EU bank.
3. **Article 9 of Regulation No 204/2011 is to be interpreted as not being applicable to payments of costs such as those due under the various agreements at issue in the main proceedings.**
4. **Article 17(1) of Council Regulation (EU) 2016/44 of 18 January 2016 concerning restrictive measures in view of the situation in Libya and repealing Regulation (EU) No 204/2011 must be interpreted as being applicable to the counter guarantee costs payable by one EU bank to another EU bank in a situation, such as that at issue in the main proceedings, in which the final calculation of the costs is made after the entry into force of that regulation.**

[Signatures]