



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

15 December 2022*

(Reference for a preliminary ruling – Common foreign and security policy – Regulation (EC) No 1210/2003 – Specific restrictions applicable to economic and financial relations with Iraq – Article 4 – Freezing of funds and economic resources belonging to the persons, bodies and entities associated with the regime of the former President Saddam Hussein – Article 6 – Transfer to the successor arrangements of the Iraq Development Fund – Ownership of frozen funds and economic resources)

In Joined Cases C-753/21 and C-754/21,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decisions of 2 December 2021, received at the Court on 8 December 2021, in the proceedings

Instrubel NV

v

Montana Management Inc.,

BNP Paribas Securities Services (C-753/21),

and

Montana Management Inc.

v

Heerema Zwijsdrecht BV,

BNP Paribas Securities Services (C-754/21),

THE COURT (Eighth Chamber),

composed of M. Safjan (Rapporteur), President of the Chamber, N. Piçarra and N. Jääskinen,
Judges,

Advocate General: N. Emiliou,

* Language of the case: French.

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Instrubel NV and Heerema Zwijndrecht BV, by S. Bonifassi and F. Boucard, avocats,
- Montana Management Inc., by D. Célice and B. Périer, avocats,
- BNP Paribas Securities Services, by J. Martinet, avocat,
- the French Government, by R. Bénard and J.-L. Carré, acting as Agents,
- the European Commission, by J.-F. Brakeland and M. Carpus Carcea, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 These requests for a preliminary ruling concern the interpretation of Article 4(2) to (4) and Article 6 of Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96 (OJ 2003 L 169, p. 6), as last amended by Council Regulation (EU) No 85/2013 of 31 January 2013 (OJ 2013 L 32, p. 1) ('Regulation No 1210/2003').
- 2 The requests have been made in two sets of proceedings between, respectively, Instrubel NV and Montana Management Inc. and BNP Paribas Securities Services ('BNP Paribas') (C-753/21) and Montana Management and Heerema Zwijndrecht BV ('Heerema') and BNP Paribas (C-754/21) concerning the validity of the preventive measures and seizures carried out by Instrubel and Heerema against frozen assets, due to claims those undertakings have against the State of Iraq.

Legal framework

International law

- 3 Paragraph 12 of Resolution 1483 (2003), adopted on 22 May 2003 by the United Nations Security Council, states that that council 'notes the establishment of a Development Fund for Iraq to be held by the Central Bank of Iraq'.
- 4 Paragraph 14 of that resolution states:

'... the Development Fund for Iraq shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq'.

5 Paragraph 23 of that resolution is worded as follows:

‘Decides that all Member States in which there are:

- (a) funds or other financial assets or economic resources of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq as of the date of this resolution, or
- (b) funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction,

shall freeze without delay those funds or other financial assets or economic resources and, unless these funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative, or arbitral lien or judgement, immediately shall cause their transfer to the Development Fund for Iraq, it being understood that, unless otherwise addressed, claims made by private individuals or non-government entities on those transferred funds or other financial assets may be presented to the internationally recognised, representative government of Iraq ...’

6 On 15 December 2010, the United Nations Security Council adopted Resolution 1956 (2010), paragraph 5 of which provides:

‘[The Security Council hereby directs] the transfer of the full proceeds from the Development Fund for Iraq to the Government of Iraq’s successor arrangements account or accounts and the termination of the Development Fund for Iraq no later than 30 June 2011 and requests written confirmation to the Council once the transfer and termination are completed’.

European Union law

Regulation (EC) No 1210/2003

7 Recital 5 of Regulation No 1210/2003 is worded as follows:

‘In order to allow the Member States to effect the transfer of frozen funds, economic resources and proceeds of economic resources to the Development Fund for Iraq, provision should be made for such funds and economic resources to be unfrozen.’

8 Under Article 1(4) and (5) of that regulation:

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

...

- 4. “freezing of funds” means preventing any move, transfer, alteration, use of 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 use of the funds, including portfolio management;

5. “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;’
- 9 Article 4(2) to (4) of that regulation provides:
- ‘2. All funds and economic resources belonging to, or owned or held by the following persons, identified by the Sanctions Committee and listed in Annex IV, shall be frozen:
- (a) former President Saddam Hussein;
 - (b) senior officials of his regime;
 - (c) immediate members of their families; or
 - (d) legal persons, bodies or entities owned or controlled directly or indirectly by the persons referred to in (a), (b) and (c) or by any natural or legal person acting on their behalf or at their direction.
3. No funds shall be made available, directly or indirectly to, or for the benefit of, a natural or legal person, body or entity listed in AnnexIV.
4. No economic resources shall be made available, directly or indirectly to, or for the benefit of, a natural or legal person, body or entity listed in AnnexIV, so as to enable that person, body or entity to obtain funds, goods or services.’
- 10 Article 6 of Regulation No 1210/2003 provides:
- ‘1. By way of derogation from Article 4, the competent authorities indicated in the websites listed in Annex V, may authorise the release of frozen funds or economic resources, if all of the following conditions are met:
- (a) the funds or economic resources are the subject of a judicial, administrative or arbitral lien established prior to 22 May 2003 or other judicial, administrative or arbitral judgment rendered prior to that date;
 - (b) the funds or economic resources will be used exclusively to satisfy claims secured by such a lien or recognised as valid in such a judgment, within the limits set by applicable laws and regulations governing the rights of persons having such claims;
 - (c) satisfying the claim is not in breach of [Council] Regulation (EEC) No 3541/92 [of 7 December 1992 prohibiting the satisfying of Iraqi claims with regard to contracts and transactions, the performance of which was affected by United Nations Security Council Resolution 661 (1990) and related resolutions (OJ 1992 L 361, p. 1)]; and
 - (d) recognising the lien or judgment is not contrary to public policy in the Member State concerned.
2. In all other circumstances, funds, economic resources and proceeds of economic resources frozen pursuant to Article 4 shall only be unfrozen for the purpose of their transfer to the

successor arrangements to the Development Fund for Iraq put in place by the Government of Iraq under the conditions set out in UNSC Resolutions 1483 (2003) and 1956 (2010).’

- 11 Montana Management was included, by Commission Regulation (EC) No 785/2006 of 23 May 2006 amending Regulation No 1210/2003 (OJ 2006 L 138, p. 7), on the list, set out in Annex IV to Regulation No 1210/2003, of natural and legal persons, bodies and entities associated with the regime of the former President Saddam Hussein referred to in Article 4(2) to (4) of that regulation.

Regulation (EC) No 1799/2003

- 12 Recital 4 to Council Regulation (EC) No 1799/2003 of 13 October 2003 amending Regulation No 1210/2003 (OJ 2003 L 264, p. 12) is worded as follows:

‘Resolution 1483 (2003) presents the freezing of funds and economic resources as the first step in a process leading to the transfer thereof to the Development Fund for Iraq. It also exempts funds and economic resources being the subject of a lien or judgment established or rendered prior to 22 May 2003 from that process. Maintaining the freezing measures is, therefore, not suitable, if the funds and economic resources concerned are explicitly exempt from the requirement to cause their transfer to that Fund.’

French law

- 13 Article R. 523-3 of the code des procédures civiles d’exécution (Code of Civil Enforcement Proceedings) provides:

‘The debtor shall be notified of the preventive attachment order by instrument of a judicial officer within eight days, failing which the attachment shall lapse.

That instrument shall contain, failing which it shall be null and void:

...

- 2) A copy of the attachment report and the reproduction of the information communicated by the third party if the document has been served on him by electronic means;
- 3) The reference, in very obvious terms, to the right of the debtor, if the conditions for validity of the attachment are not met, to apply to the court of his place of domicile to have the attachment lifted;

...’

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-753/21

- 14 Following two arbitration awards made on 6 February 1996 and 22 March 2003 respectively, which had in the meantime become definitive, by which the State of Iraq was ordered to pay an amount to Instrubel, a company incorporated under Netherlands law, two orders for enforcement were issued by the tribunal de grande instance de Paris (Regional Court, Paris, France) on 20 March 2013.
- 15 On 20 January 2014, for the purposes of enforcement of those two arbitral awards, Instrubel proceeded with preventive attachment orders against BNP Paribas ‘in respect of the Republic of Iraq and its entities whose funds belong to Iraq pursuant to UN resolutions, namely Montana [Management]’. The State of Iraq was notified of those attachments on 28 July 2014, and did not challenge them.
- 16 On 26 December 2017, Montana Management brought proceedings against Instrubel before the enforcement court of the tribunal de grande instance de Bobigny (Regional Court, Bobigny, France), seeking to have the attachments lifted, claiming both the lapse and the nullity of those attachments, on the ground that it had not been notified of them although it was the owner of the funds referred to in those attachments.
- 17 By judgment of 24 July 2018, that court declared the attachments lapsed and ordered them to be lifted. It took the view that, since the attachment report designated as debtor the State of Iraq and its entities, including Montana Management, the latter had to be regarded as a debtor within the meaning of Article R-523-3 of the Code of Civil Enforcement Proceedings. Therefore, according to the enforcement court, Montana Management had to be notified of that report and, since that had not been done, the attachments had lapsed and an order had to be issued ordering that they be lifted. By judgment of 24 October 2019, the cour d’appel de Paris (Court of Appeal, Paris, France) upheld that judgment.
- 18 Instrubel brought an appeal on a point of law before the Cour de cassation (Court of Cassation, France), the referring court, and argued that a preventive attachment order should be notified only to the debtor referred to in the instrument permitting enforcement on which that attachment is based, which was the case here, since the instrument permitting enforcement was directed at the State of Iraq and was served on that State.
- 19 In that regard, the referring court raises the question of ownership of the assets in respect of which preventive measures were taken. In order for those preventive measures to be lawful and produce their effects, French law requires the assets affected by those measures to belong to the debtor referred to in the enforcement order, in this case the State of Iraq.
- 20 In the present case, those assets are frozen because of the designation of Montana Management by Regulation No 1210/2003. Moreover, the purpose of freezing assets under that regulation is to transfer them to the successor arrangements of the Development Fund for Iraq (‘the Development Fund’), with the effect of transferring ownership of those assets to the State of Iraq.
- 21 Thus, the referring court queries whether the frozen assets remain the property of the persons designated by that regulation, in this case Montana Management, pending a decision to transfer by the competent national authority, or whether the frozen funds belong to that Development

Fund, that is to say, the State of Iraq, upon entry into force of that regulation since, having regard to the transfer provided for by that regulation, the frozen assets are not intended to revert to the estate of the persons designated by that regulation.

22 In those circumstances, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Are Article 4(2), (3) and (4) and Article 6 of [Regulation No 1210/2003] to be interpreted as meaning that:

- the frozen funds and economic resources remain, pending the decision to transfer them to the successor arrangements to the [Development Fund], the property of the natural and legal persons, bodies and entities associated with the regime of former President Saddam Hussein covered by the freezing of funds and economic resources?
- or those frozen funds are the property of the successor arrangements to the [Development Fund] upon the entry into force of the regulation identifying, in Annexes III and IV, the natural and legal persons, bodies and entities associated with the regime of former President Saddam Hussein covered by the freezing of funds and economic resources?

(2) Should the answer to Question 1 be that the funds and economic resources are the property of the successor arrangements to the [Development Fund], are [Article 4(2), (3) and (4) and Article 6] of [Regulation No 1210/2003] to be interpreted as meaning that attachment of the frozen assets is subject to the prior authorisation of the competent national authority? Or are those provisions to be interpreted as requiring the authorisation of that national authority only at the moment the frozen funds are released?’

Case C-754/21

23 By judgment of the Gerechtshof's-Gravenhage (Court of Appeal, The Hague, Netherlands) of 31 October 2000, enforceable in France by order of the President of the tribunal de grande instance de Paris (Regional Court, Paris) of 31 August 2011, the State of Iraq and the Central Bank of Iraq were ordered jointly and severally to pay a certain amount to Heerema, a company incorporated under Netherlands law.

24 On 28 July 2011, Heerema served preventive attachments on BNP Paribas concerning transferable securities held by Montana Management. Those attachment orders were converted into an attachment of receivables and attachment for sale in June and September 2014.

25 On 12 December 2014, Montana Management brought proceedings against Heerema before the enforcement court of the tribunal de grande instance de Bobigny (Regional Court, Bobigny) seeking a declaration that the attachments were null and void and had lapsed and asking to have them lifted.

26 By judgment of 12 May 2015, that court dismissed Montana Management's application on procedural grounds. By judgment of 28 February 2019, the cour d'appel de Paris (Court of Appeal, Paris) set aside that judgment and upheld the attachment of receivables on the ground that frozen funds were presumed to belong to the State of Iraq.

- 27 Having lodged an appeal on a point of law before the referring court, Montana Management disputes, first, the application of a presumption that the frozen funds belong to the State of Iraq. It maintains that those funds remain its property pending the decision to transfer funds to the Development Fund, since the freezing of funds involves a temporary measure which does not infringe the right to property.
- 28 Second, Montana Management submits that Heerema was required to obtain prior authorisation from the competent national authority pursuant to Article 6 of Regulation No 1210/2003, since service of the instrument of conversion would entail immediate payment of the claim to the creditor.
- 29 The referring court questions whether the frozen assets remain the property of the legal persons subject to the freezing pending the decision to transfer by the competent national authority to the Development Fund, or whether those assets belong to that fund as from the entry into force of the regulation designating those persons.
- 30 If the frozen assets were to belong to the fund upon entry into force of the regulation which included, in this case, Montana Management on the list of companies covered by the freeze in question, the question would arise as to the validity of the attachments, in view of the lack of prior authorisation from the national authority for the use of the frozen assets.
- 31 In those circumstances, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Are Articles 4(2), (3) and (4) and Article 6 of [Regulation No 1210/2003] to be interpreted as meaning that:
- the frozen funds and economic resources remain, pending the decision to transfer them to the successor arrangements to the [Development Fund], the property of the natural and legal persons, bodies and entities associated with the regime of former President Saddam Hussein covered by the freezing of funds and economic resources?
 - or those frozen funds are the property of the successor arrangements to the [Development Fund] upon the entry into force of the regulation identifying, in Annexes III and IV, the natural and legal persons, bodies and entities associated with the regime of former President Saddam Hussein covered by the freezing of funds and economic resources?
- (2) Should the answer to Question 1 be that the funds and economic resources are the property of the successor arrangements to the [Development Fund], are Articles 4 and 6 of [Regulation No 1210/2003] to be interpreted as meaning that attachment of the frozen assets is subject to the prior authorisation of the competent national authority? Or are those provisions to be interpreted as requiring the authorisation of that national authority only at the moment the frozen funds are released?’

Procedure before the Court

- 32 By order of the President of the Court of 20 January 2022, Cases C-753/21 and C-754/21 were joined for the purposes of the written and oral procedures and of the judgment.

The requests to open the oral procedure

- 33 By requests submitted on 25 July and 7 November 2022, Instrubel and Heerema requested the opening of the oral part of the procedure pursuant to Article 83 of the Rules of Procedure of the Court of Justice, claiming that there were certain new facts liable to have a decisive influence on the Court's decision.
- 34 Those new facts consist, first, in the removal of Montana Management's name from the list of persons and entities to which the freezing of assets should apply, which occurred after the written observations of the parties and interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union were lodged.
- 35 If the Court were to answer the first questions in Cases C-753/21 and C-754/21 to the effect that frozen assets remain, pending the decision to transfer them to the Development Fund, the property of the entities affected by the freezing measure, that would mean, as a result of that removal, that those assets, which would still not have been transferred to the Development Fund, would be returned to that company. Such a consequence would be contrary to the objectives pursued by Regulation No 1210/2003.
- 36 Secondly, the opening of the oral part of the procedure is motivated by the fact that Montana Management no longer has standing to bring proceedings following the death of its chairman and legal representative in 2020.
- 37 Thirdly, it is necessary to discuss the influence on the Court's preliminary ruling of Decree No 2015-1134 of 11 September 2015 laying down detailed rules for the transfer of funds and economic resources to the successor arrangements of the Development Fund for Iraq and the judgment of 12 January 2021 of the tribunal judiciaire de Grasse (Court of Grasse, France).
- 38 In that regard, it should be noted that, in accordance with Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information, or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not yet been debated.
- 39 In the present case, the Court, after hearing the Advocate General, considers, on the basis of the requests for a preliminary ruling and the written observations, that it has all the information necessary to deal with the present reference for a preliminary ruling and that the facts relied on by Instrubel and Heerema in their requests of 25 July and 7 November 2022, the scope of which for the main proceedings must be assessed by the referring court, do not constitute new facts of such a nature as to be a decisive factor for the preliminary ruling of the Court.
- 40 Accordingly, there is no need to reopen the oral part of the procedure.

Consideration of the questions referred

The first questions in Cases C-753/21 and C-754/21

- 41 By its first questions in the present cases, which it is appropriate to examine together, the referring court asks, in essence, whether Article 4(2) to (4) and Article 6 of Regulation No 1210/2003 must be interpreted as meaning that the frozen funds and economic resources remain, pending the decision to transfer them to the Development Fund, the property of the natural and legal persons, bodies and entities associated with the regime of the former President of Saddam Hussein covered by the freezing of funds, or whether those funds and those economic resources belong to the fund upon the entry into force of the regulation designating the persons, bodies and entities covered by the freezing.
- 42 In that regard, Article 4(2) of Regulation No 1210/2003 provides for the freezing of funds and economic resources belonging to, in the possession of or held by persons designated by the Sanctions Committee and listed in Annex IV to that regulation.
- 43 Article 6(1) of that regulation provides for derogations allowing, under the conditions set out in that paragraph, the use of certain frozen funds and economic resources to be authorised by the competent authorities. The second paragraph of that article provides that, in all cases not referred to in paragraph 1, funds and economic resources are to be subject to the lifting of the freezing only for the purposes of their transfer to the Development Fund. The consequence of that transfer is that the State of Iraq becomes the owner of the assets transferred.
- 44 Thus, a combined reading of Article 4(2) and Article 6 of that regulation reveals two separate stages consisting, first, in a freezing of assets and, second, in a transfer of those assets to the Development Fund.
- 45 More specifically, Article 6(1)(a) of Regulation No 1210/2003 provides, in accordance with paragraph 23 of Resolution 1483 (2003), that the competent national authorities may authorise the use of certain frozen funds and economic resources which are the subject of a judicial, administrative or arbitral lien established prior to 22 May 2003 or other judicial, administrative or arbitral judgment rendered prior to that date. In other words, and as is also apparent from recital 4 of Regulation No 1799/2003, in the event that frozen funds or economic resources are the subject of such a lien or judgment, that fact could suffice to remove the freeze on those funds or economic resources in order to allow their use and thus exempt them from the obligation to have them transferred to the Development Fund.
- 46 On the other hand, if it were to be considered that the transfer to the Development Fund automatically takes place at the time of the freezing, Article 6(1) of Regulation No 1210/2003 would be deprived of all practical effect.
- 47 That conclusion is not invalidated by paragraph 23 of Resolution 1483 (2003). Although that paragraph provides for the immediate transfer of the assets to the Development Fund, its very wording does, however, make that transfer conditional on the absence of any judicial, administrative or arbitral lien or judgment capable of leading to the postponement or annulment of that transfer.

- 48 In addition, recital 5 of Regulation No 1210/2003 also shows the two stages referred to in paragraph 44 above, since it states, first, that it is the Member States which transfer funds and economic resources to the Development Fund following the freezing of those assets and, second, that, in order to enable them to carry out that transfer, provision should be made to lift the freezing. Thus, the transfer takes place as an active measure on the part of the Member States after the freezing and is made only after that freezing has been lifted in accordance with the detailed rules laid down for that purpose by that regulation.
- 49 Consequently, the very existence of provisions governing the procedure for transfer to the Development Fund shows that such a transfer does not automatically take effect simply by freezing the assets concerned. Although the transfer is mandatory under Regulation No 1210/2003, the fact remains that it takes place after the freezing and constitutes a separate stage in relation to the freezing.
- 50 As regards, more specifically, the concept of ‘freezing’, as defined in Article 1(4) and (5) of that regulation, and the question whether the freezing per se is capable of entailing a change in the ownership of frozen assets, the Court has already held that the freezing measure is a preventive measure which is not supposed to deprive the persons affected by the measure of their property (see, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 358), which is by nature temporary and reversible (see, to that effect, judgment of 5 March 2015, *Ezz and Others v Council*, C-220/14 P, EU:C:2015:147, paragraph 113).
- 51 It follows that the freezing measure does not, in itself, affect the ownership of the assets which are the subject of that measure.
- 52 In that regard, it must be stated that the fact that Regulation No 1210/2003 is aimed at transferring frozen assets to the Development Fund cannot justify, as regards the preliminary stage of that transfer, a different interpretation of the concept of ‘freezing’ than that adopted in the context of other regulations relating to restrictive measures which do not provide for such a transfer, particularly since that concept is defined in the same way in most of those regulations.
- 53 In the light of the foregoing, the answer to the first questions in Cases C-753/21 and C-754/21 is that Article 4(2) to (4) and Article 6 of Regulation No 1210/2003 must be interpreted as meaning that the frozen funds and economic resources remain, pending the decision to transfer them to the Development Fund, the property of the natural and legal persons, bodies and entities associated with the regime of the former President Saddam Hussein covered by the freezing.

The second questions in Cases C-753/21 and C-754/21

- 54 In view of the answer given to the first questions in the present cases, there is no need to answer the second questions.

Costs

- 55 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 (Eighth Chamber) hereby rules:

Article 4(2) to (4) and Article 6 of Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96, as last amended by Council Regulation (EU) No 85/2013 of 31 January 2013,

must be interpreted as meaning that the frozen funds and economic resources remain, pending the decision to transfer them to the successor arrangements to the Development Fund for Iraq, the property of the natural and legal persons, bodies and entities associated with the regime of former President Saddam Hussein covered by the freezing.

[Signatures]