

ECLI:NL:HR:2024:922

Agency	Supreme Court
Date of pronouncement	21-06-2024
Date of publication	21-06-2024
Case number	23/00717
Formal relations	Conclusion: ECLI:NL:PHR:2023:1169
Areas of law	Corporate law
Special features	Cassation
Content indication	Corporate law. Union law. EU sanctions against Russia. Regulation (EU) No. 269/2014. Can a holder of share certificates who is subject to sanctions exercise meeting and voting rights attached to certificates? Supreme Court asks ECJ questions about the interpretation of Article 1, opening words and under f of Regulation (EU) No. 269/2014.
Locations	Rechtspraak.nl NJB 2024/1483 NJ 2024/206 RvdW 2024/646 JOR 2024/189 with annotation by mr. drs. SM Peek JONDR 2024/555 OR-Updates.nl 2024-0145 SEW 2024/135, p. 447

 [Enriched pronunciation](#)

Pronunciation

SUPREME COURT OF THE NETHERLANDS

CIVIL CHAMBER

Number 23/00717
Date June 21, 2024

JUDGMENT

In the case of

SBK ART LIMITED LIABILITY COMPANY,
located in Moscow, Russian Federation,
PLAINTIFF in cassation,
hereinafter: SBK,
attorney: EJH Zandbergen,

in return for

FORTENOVA GROUP BRANCHES FOUNDATION,
established in Amsterdam,
DEFENDANT in cassation,
hereinafter: STAK,
attorneys: BTM van der Wiel and LV van Gardingen,

and

OPEN PASS LIMITED,
established in Sliema, Malta,
DEFENDANT in cassation,
hereinafter: Open Pass,
did not appear.

1 Process flow

- 1.1 For the course of the proceedings in the factual instances, the Supreme Court refers to its judgment of 19 April 2024 (ECLI:NL:HR:2024:642).
- 1.2 In that judgment, the description of the course of the proceedings states: "The case was explained for SBK and STAK by their lawyers, and for SBK also by T. van Tatenhove and HAA Essebai." This is a typo, as the case was explained for STAK by its lawyers and also by T. van Tatenhove and HAA Essebai.
In a message dated 24 April 2024, STAK requested the Supreme Court to rectify this. SBK agreed to this request.
The Supreme Court will correct this error, which lends itself to simple correction, pursuant to Article 31 of the Code of Civil Procedure by determining that the sentence quoted above in the judgment of 19 April 2024 should be read as follows:

"The case was explained to SBK and STAK by their lawyers, and to STAK also by T. van Tatenhove and HAA Essebai."
- 1.3 In the judgment of 19 April 2024, the Supreme Court gave the parties the opportunity to respond to the Supreme Court's intention to submit preliminary questions and to the intended questions.

SBK has proposed a number of adjustments to the intended questions. STAK believes that there is no need to ask preliminary questions and, in case the Supreme Court does ask questions, has made a number of comments on the formulation of question 1.

The statements made by the parties have prompted the Supreme Court to amend paragraph 3.4.5 in relation to the same consideration in the interlocutory judgment.

2 Principles and facts

2.1 This case concerns the question whether a Russian company subject to EU sanctions against Russia can exercise the meeting and voting rights attached to share certificates held by it in a Dutch capital company.

2.2 The Supreme Court will submit preliminary questions to the Court of Justice of the European Union (hereinafter: CJEU) regarding the interpretation of Regulation 269/2014 **1**.

2.3 In cassation the following can be assumed.

The corporate relationships in the Fortenova group

(i) In 2017, the Croatian Agrokor group, active in retail, food production and agriculture, ran into financial difficulties. A *settlement plan* was agreed with its creditors, on the basis of which the group was restructured and relaunched. As a result, Fortenova Grupa dd, based in Zagreb, Croatia, was created in mid-2018 (hereinafter: Fortenova Grupa). Fortenova Grupa is one of the largest companies in South-East Europe, has more than 47,000 employees and an annual turnover of more than €5 billion.

(ii) Part of the restructuring and restart was the establishment of a holding structure in the Netherlands. In that context, STAK was established on 14 May 2018. STAK holds the shares in Fortenova Group TopCo BV (hereinafter: Fortenova TopCo). Fortenova TopCo in turn indirectly holds the shares in Fortenova Grupa.

(iii) STAK holds the shares in Fortenova TopCo on a management basis, exercises the voting rights on those shares, has issued certificates of shares in Fortenova TopCo and pays dividends to the certificate holders. TMF Netherlands BV is the director of STAK.

(iv) SBK holds 41.82% of the certificates of shares in Fortenova TopCo issued by STAK. SBK is an indirect subsidiary of Sberbank of Russia (hereinafter: Sberbank) and acquired its stake in the Fortenova group from Sberbank on April 5, 2022.

(v) Open Pass holds 27.52% of the certificates of shares issued by STAK in Fortenova TopCo. Open Pass is part of the Energia Naturalis Group, which is active in the energy sector, the food industry and transport in South-East Europe.

(vi) VTB Bank (Europe) SE (hereinafter: VTB) holds 7.27% of the share certificates issued by STAK in Fortenova TopCo.

(vii) The exercise of the voting rights on the shares in the capital of Fortenova TopCo by STAK is subject to the prior approval of the meeting of certificate holders pursuant to art. 11 of STAK's articles of association and art. 16 of its administrative conditions for the *Reserved Matters* referred to therein. In summary, the following applies:

- the *Reserved Matters* concerning *business* matters require a decision within the meeting of certificate holders with a simple majority of more than fifty percent (50%+) of all issued and outstanding certificates with voting rights (*Simple Majority*);

- the *Reserved Matters* concerning financing matters require a decision within the meeting of certificate holders with a qualified majority of at least sixty percent (60%) of all issued and outstanding certificates with voting rights (*Qualified Majority*);

- the *Reserved Matters* concerning *corporate governance* matters (such as amending the articles of association) require a decision-making process within the meeting of certificate holders with a super qualified majority of at least sixty-six two-thirds percent (66 2/3%) of all issued and outstanding certificates with voting rights (*Super Qualified Majority*).

(viii) Art. 14.6 of the STAK administrative conditions states that if the majority required for a decision to be taken (see (vii) above) has not been achieved in two consecutive meetings of certificate holders, the decision in question can be taken in a third meeting with the approval of 75% of the votes, regardless of the number of certificate holders present.

(ix) Pursuant to Articles 14.1 and 14.2 of the STAK Terms and Conditions of Administration, all certificate holders with voting rights are permitted, in person or through an authorised representative, to attend and address the meeting of certificate holders, and each certificate entitles it to one vote.

The EU sanctions

(x) By Council Implementing Regulation (EU) 2022/1270 of 21 July 2022 implementing 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, Sberbank was added to the list of natural and legal persons, entities and bodies subject to restrictive measures in Annex I to Regulation 269/2014 (hereinafter: the List).

(xi) By Council Implementing Regulation (EU) 2022/2476 of 16 December 2022, SBK was added to the list. This Implementing Regulation entered into force immediately on 16 December 2022.

(xii) VTB is also subject to restrictive measures under Regulation 269/2014.

The proposed decisions and the exclusion of SBK

(xiii) On August 9, 2022, the board of STAK invited the certificate holders to the meeting of certificate holders on August 18, 2022 in Amsterdam. The board announced that sanctioned certificate holders are excluded from exercising their rights attached to the certificates, including voting at the meeting of certificate holders, and that the voting rights of sanctioned parties will therefore be disregarded.

(xiv) The agenda of that meeting included a proposal put on the agenda by Open Pass to amend the administrative conditions and articles of association of STAK (agenda items 3 and 4). The amendments relate to a change in the *governance* of STAK. These agenda items read as follows:

"3. Approval of the amendment of the administrative conditions of STAK (Resolution), in order to, inter alia:

a. increase the voting threshold for resolutions requiring either a Simple Majority, a Qualified Majority or a Super Qualified Majority, to the affirmative vote cast in a meeting in which 70% of the Depositary Receipts are present or represented;

b. create an exception to the main rule as set out above, which is that resolutions are adopted by the affirmative vote cast in a meeting in which 70% of the Depositary Receipts are present or represented. In case at least 35% of the Depositary Receipts are held by sanctioned parties, resolutions shall be adopted by a majority of 60% of the votes cast in favor of a proposed resolution, irrespective of the amount of Depositary Receipts present or represented in a meeting; and

c. enable the DR Holder Meeting to adopt resolutions by a majority of 75% of the votes cast in favor of a proposed resolution, irrespective of the amount of Depositary Receipts present or represented at that meeting, at the second meeting regarding such resolution, instead of at the third meeting regarding such resolution, which is the case under the existing administrative conditions.

4. Approval of the amendment of the articles of association of STAK (Resolution), in order to align the articles of association with the amended administrative conditions of STAK."

(xv) On August 16, 2022, SBK informed (the board of) STAK that it did not agree with STAK's position that sanctioned certificate holders are not allowed to vote, nor with the decision to disregard the votes cast by sanctioned certificate holders.

(xvi) On 17 August 2022, SBK announced that it would appear by representative at the meeting of certificate holders. SBK attempted to exercise its voting rights attached to its certificates both electronically and physically at the meeting of 18 August 2022. It had intended to cast its vote against the proposed change to *corporate governance* as set out in agenda items 3 and 4 (see (xiv) above). The representative of SBK was subsequently denied access to the meeting and after the meeting, SBK's access to the electronic voting environment was blocked.

(xvii) On August 18, 2022, STAK informed SBK that STAK is required to comply with European and American sanctions, that SBK is therefore not allowed to vote and that a vote cast by SBK may not be recognized.

(xviii) In connection with the failure to achieve the required majority (of all issued and outstanding certificates with voting rights) to be able to take decisions at the meeting of August 18, 2022, the STAK board invited the certificate holders on August 19, 2022 to a second meeting of certificate holders on August 30, 2022. At that meeting, the board again announced that the voting rights of sanctioned parties will not be taken into account.

(xix) Pursuant to Article 13.5 of STAK's administrative conditions, a meeting of certificate holders may be held at least eight days after the announcement thereof, so that any third meeting of certificate holders could have been held on 7 September 2022 at the earliest.

(xx) By letter dated 26 August 2022, STAK's lawyer informed SBK's lawyer (also its authorised representative) that and explained why the STAK board would also deny him access to the meeting of 30 August 2022.

(xxi) On 7 September 2022 (following the judgment of the interim relief judge in this case of 6 September 2022, see below in 2.5), STAK withdrew the invitation to a third certificate holders' meeting on 8 September 2022.

(xxii) By letter dated 3 November 2022, a private investor from the United Arab Emirates informed STAK that he had acquired all shares in SBK and had thus become the *ultimate beneficial owner* of the certificates held by SBK. STAK has initiated an enhanced investigation into this investor as part of its *know your customer policy*.

2.4 In these summary proceedings, SBK claims, among other things:

- primarily: to order STAK to admit SBK to any meeting of certificate holders during the period up to and including 31 December 2022 and to accept and count its voting rights attached to its certificates in the vote on the proposal referred to in agenda items 3 and 4 (see 2.3 under (xiv) above), and any other proposal aimed at amending the administrative conditions, the articles of association of STAK or comparable agenda items that affect the *corporate governance* of STAK;

- alternatively: to prohibit STAK from changing its administrative conditions and/or its articles of association and/or from convening any meeting of certificate holders for that purpose during the period up to and including 31 December 2022; and

- more subsidiarily: to prohibit STAK from amending its administrative conditions and/or its articles of association and/or from convening any meeting of certificate holders for that purpose, until the competent authority has decided, pursuant to art. 4 of Regulation 269/2014, on SBK's request to grant it permission to release its voting rights attached to its certificates, intended exclusively for the holding or management of those frozen certificates.

2.5 The interim relief judge **2** granted the primary claim and considered – in short – as follows.

A vote on a change in *corporate governance* as in this case does not undermine the purpose of the sanctions. Voting against or not voting against the proposed changes will not lead to funds or resources flowing to Russia as a result of that vote. (paragraph 4.11)

By not allowing SBK to exercise its meeting and voting rights, the right to impose sanctions is being used in an improper manner. (paragraph 4.12)

A weighing of interests cannot lead to the conclusion that SBK would not be allowed to exercise its meeting and voting rights in this case. (paragraph 4.17)

2.6 The Court of Appeal **3** quashed the judgment of the interim relief judge and dismissed the claims. In that regard, it considered the following – insofar as relevant here.

The European Commission has indicated in the *Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014* (hereinafter: FAQ) **4** updated on 9 November 2022:

"Either way, since they can be used to obtain funds, goods or services, voting rights as such can be considered an intangible economic resource. This means they should be frozen, ie prevented from being used to obtain funds, goods or services in any way. Therefore under no circumstance nor for any purpose may listed shareholders exercise directly or their voting rights in a company or fund. Voting rights must be fully frozen."

The guidance given in the FAQ by the European Commission constitutes a

authoritative source for the interpretation of the sanctions rules. The guidance provided by the European Commission on this point is in line with what the competent authority in the Netherlands stated in Addendum I of 17 August 2022 to the Financial Sanctions Legislation Guidelines:

"(...) Apart from this, the minority interests of the sanctioned shareholders must be frozen, which means that, for example, no dividends can be paid to them and they are also not allowed to exercise voting rights with regard to the Dutch company."

The guidance provided by the European Commission is also consistent with the principle that sanctions should have maximum effect and should be clear and predictable (cf. also Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)* of 7 June 2004, 10198/1/04 REV 1, under 6, and ECJ 29 April 2010, C-340/08, ECLI:EU:C:2010:232, point 65). A system in which it must be determined for each agenda item whether voting rights may be exercised in view of the sanctions legislation or whether an exemption must be requested from the competent authorities is also not in line with the desired effectiveness of the sanctions legislation. It does follow from the answer to question 14 of the FAQ that (*to avoid worsening its business condition*) disproportionate damage to the persons on the list must be avoided. It has not been made plausible that this situation occurs here. (rov. 4.8 and 4.9)

It is sufficiently plausible that the sanction rules prevent SBK from being admitted to a meeting of certificate holders of STAK and from exercising the voting rights attached to its certificates. STAK's refusal to admit SBK to certificate holder meetings and to allow SBK to exercise voting rights is therefore in accordance with STAK's obligation to comply with the sanction rules. By complying with the sanction rules, STAK does not act contrary to the reasonableness and fairness that it must observe towards its certificate holders. (paragraph 4.10)

3 Assessment of the remedy

3.1.1 Part 1 of the appeal directs several complaints against paragraphs 4.9 and 4.10, in which the court rules that it is sufficiently plausible that the sanction rules prevent SBK from being admitted to a meeting of STAK certificate holders and from exercising the voting rights attached to its share certificates.

Section 1.1 complains, inter alia, that the Court's judgment is incorrect, or at least incomprehensible, because the Court does not judge on the basis of a literal interpretation of the text of Regulation 269/2014 and in accordance with the general scheme and purpose of the Regulation, and does not provide reasons why a literal interpretation may be deviated from.

Part 1.2 complains that the court of appeal fails to recognise that freezing of voting rights on share certificates pursuant to Article 1, opening words and under f, in conjunction with Article 2 Regulation 269/2014 only concerns the prevention of any act "resulting in a change" in the assets. Insofar as the court of appeal did not fail to recognise this, its judgment is incomprehensible according to the part because the interim relief judge ruled that voting on a change in *corporate governance* does not in itself entail a change in relation to or with regard to the frozen share certificates and that SBK wanted to vote against the proposed changes in *corporate governance*, which judgments were not contested on appeal. In addition, the part complains that the judgment is insufficiently motivated because the court of appeal left unaddressed SBK's argument that freezing is only possible to prevent a change in the assets.

Section 1.3 complains, among other things, that the Court of Appeal, in its judgment, also fails to recognise that the requirement of an act "resulting in a change" (Article 1, opening words and under f, in conjunction with Article 2 of Regulation 269/2014) only concerns a change "which enables the use of the assets in question, including the management of an investment portfolio". According to the section, the Court of Appeal should have assessed how plausible it is in this case that assets are converted into resources that can be used to support activities against which the sanctions are directed. To the extent that the court does not disregard this, its judgment is incomprehensible, according to the ground for appeal, given the uncontested judgments of the interim relief judge that (i) voting on *corporate governance* does not entail a change of or in relation to the frozen share certificates, (ii) SBK wanted to vote against the agenda items and therefore did not want to change anything, (iii) the change in *corporate governance* is to the detriment of SBK and it is not clear why this could result in the use of a credit or the acquisition of a credit, good or service by SBK and (iv) the purpose of Regulation 269/2014 is to increase pressure on the Russian government and economy and to limit its means of aggression, and it is not clear why a change in *corporate governance* could lead to this. Finally, the ground for appeal complains that the court's judgment is insufficiently motivated because the court left undiscussed SBK's argument that freezing is only possible to prevent a sanctioned party from obtaining a financial advantage.

3.1.2 Part 2 also raises various complaints against paragraphs 4.9 and 4.10, including the following.

- It is incomprehensible that the court bases its judgment partly on the quoted answer of the European Commission in the FAQ, because the text, context and purpose of Regulation 269/2014 prevail over this answer. (section 2.1)

- The Court's judgment on that answer is incomprehensible, because the Court's interpretation of the concept of *frozen* does not correspond to the interpretation given to it by the European Commission (namely, preventing the right to vote from being used to obtain assets, goods or services in any way). (section 2.2)

- To the extent that the Court finds that the European Commission's answer (also) implies that voting rights may not be exercised by a sanctioned party under any circumstances, that judgment is incomprehensible, because the European Commission's answer is internally contradictory. (section 2.3)

- The Court's judgment that the European Commission's answer is in line with what the competent authority in the Netherlands determined in its Guideline is incomprehensible because the addendum to the Guideline stipulates that the European Commission's answer is leading. To the extent that the Court partly bases its interpretation of Regulation 269/2014 on the Guideline, this is incorrect or incomprehensible, because this case concerns the interpretation of a directly applicable European regulation and not of Dutch legislation or regulations. To the extent that national guidance is relevant to an assessment of the European Commission's guidance, it is incomprehensible that the Court does not take the national guidance of other EU Member States into account in its assessment. (section 2.4)

- To the extent that the Court has held that the principle that sanctions should have maximum effect means that Regulation 269/2014 may be interpreted more broadly than what the text and purpose of that Regulation entail, its judgment is incorrect and in breach of the proportionality requirement. (section 2.5)

- To the extent that the Court, with its judgment that the European Commission's guidance is in line with the principle that sanction measures must be clear and predictable, means that the requirement of clarity and predictability means that SBK cannot exercise its voting rights in any situation, this judgment is incorrect because a restriction under the regulation is only possible to prevent an act that leads to a change in a credit and therefore not every situation falls under it. The Court fails to appreciate that the requirement of clarity and precision actually opposes an extensive interpretation of a European regulation. (section 2.6)

- The Court's judgment that a system in which it must be assessed for each agenda item whether voting rights may be exercised in view of the sanctions legislation or whether an exemption must be requested from the competent authorities is not consistent with the desired effectiveness of the legislation is incorrect because this is not a rule of applicable law. At the very least, the judgment is incomprehensible, since the Court has only assessed whether or not a system for each agenda item is consistent with the desired effectiveness of the sanctions legislation, while it has not (at least not noticeably) assessed to what extent this is consistent with the text and purpose of Regulation 269/2014 and with the proportionality requirement. (section 2.7)

- The court's judgment that disproportionate damage must be avoided but that it is not plausible that this situation occurs here is incomprehensible in light of the court's judgment that the effectiveness of the sanction rules is paramount and that a system in which it must be examined for each agenda item whether voting rights can be exercised is not consistent with this. The judgment is also incomprehensible because in this case SBK, as the holder of 41.82% of the share certificates, was excluded from meetings in which it was decided to change the *corporate governance* (against its will and to its disadvantage). (section 2.8)

Regulation 269/2014; freezing of assets

3.2.1 Regulation 269/2014 was adopted in response to the violation of Ukraine's sovereignty and territorial integrity by the Russian Federation and entered into force on 17 March 2014.

According to recital 4 in its preamble, the regulation also provides for the freezing of funds and economic resources of certain persons responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, as well as of natural or legal persons, entities or bodies involved in such actions. These restrictive measures are intended to put pressure on the Russian authorities to put an end to their actions and policies which destabilise Ukraine. **5**

3.2.2 Art. 2 paragraph 1 Regulation 269/2014 provides that all funds and economic resources belonging to, owned, held or controlled by all natural persons listed in Annex I, or natural or legal persons, entities or bodies associated with them, shall be frozen.

Article 1, introductory phrase and point (f), of Regulation 269/2014 provides that, for the purposes of the Regulation, "freezing of funds" means preventing any movement, transfer, modification, use or deployment of funds or any dealing with them, in any way whatsoever, resulting in a change in their volume, amount, location, ownership, possession, distinguishing features, purpose or other change which would enable the use of the funds in question, including the management of an investment portfolio.

Article 1, introductory phrase and (g), of Regulation 269/2014 provides that for the purposes of the Regulation, "funds" means: financial assets and benefits of every kind, including, but not limited to: (i) publicly and privately traded securities and debt instruments, including shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts.

3.2.3 Annex I to Regulation 269/2014 contains a list of natural persons who, in accordance with Article 2 of Decision 2014/145/CFSP, have been identified by the Council of the European Union as being responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, and of natural or legal persons, entities and bodies

associated with them (Article 3(1) of Regulation 269/2014). Where the Council of the European Union decides to subject a natural or legal person, entity or body to the measures referred to in Article 2, it shall amend Annex I accordingly (Article 14(1) of Regulation 269/2014).

SBK share certificates; frozen assets

- 3.3.1 By Council Implementing Regulation (EU) 2022/1270 **6** of 21 July 2022, Sberbank was added to the list in Annex I (see 2.3 under (x)). As an (indirect) subsidiary of Sberbank, SBK is affiliated with Sberbank within the meaning of Article 2 paragraph 1 of Regulation 269/2014, which means that all assets belonging to, owned, held or controlled by SBK are also frozen. By Council Implementing Regulation (EU) 2022/2476 **2** of 16 December 2022, SBK itself was added to the list (see 2.3 under (xi)).

- 3.3.2 It follows from Article 1, opening sentence and under g (iii), of Regulation 269/2014 that the share certificates in Fortenova TopCo held by SBK are “assets” within the meaning of the Regulation. These share certificates have therefore been frozen pursuant to Article 2 paragraph 1 of Regulation 269/2014.

- 3.3.3 The central question in this case is whether this freeze means that SBK cannot exercise the meeting and voting rights associated with these share certificates. The question also arises whether the nature and content of the agenda resolution are relevant in this regard, and whether the sanctioned certificate holder wishes to vote for or against this resolution. The present case concerns the vote on the proposal in agenda items 3 and 4 (see 2.3 under (xiv) above) and any other proposal aimed at changing the *corporate governance* of the Fortenova group by changing the administrative conditions and/or the articles of association of STAK, and SBK has indicated that it is against the proposals for amendment.

Consequences of freezing share certificates; exercising meeting and voting rights?

- 3.4.1 Regulation 269/2014 must be interpreted uniformly and autonomously. The meaning of the terms used in that regulation cannot depend on the interpretation of national law. **8** According to settled case-law of the CJEU, when interpreting a provision of EU law, account must be taken not only of its wording but also of the context and objectives of the rules of which it forms part and, where appropriate, of its legislative history. **9**

- 3.4.2 According to Article 1, introductory phrase and point (f), of Regulation 269/2014, freezing of funds means, inter alia, preventing the use of funds, in whatever manner, resulting in a change in their size, amount, location, ownership, possession, distinguishing features, purpose or other change which would enable the use of the funds in question. It follows from this definition that the purpose of freezing funds is to limit as far as possible the actions that can be carried out in relation to frozen funds. **10** It follows that the concept of “freezing of funds” is defined very broadly in Regulation 269/2014. **11**

Prevention of the exercise of meeting and voting rights attached to (share certificates) is not explicitly included in the description of “freezing of assets” in Article 1, opening words and under f, of Regulation 269/2014. The text of Article 1, opening words and under f, of Regulation 269/2014 therefore does not provide clarity on the question of whether a freezing of assets in the case of share certificates means that the meeting and voting rights attached to the share certificates may not be exercised.

- 3.4.3 The freezing of assets under Regulation 269/2014 is a restrictive measure (sanction). The basic principle is that restrictive measures must be imposed in such a way as to have the greatest possible impact on the person whose behaviour is intended to be affected. **12** However, the disadvantages caused by the restrictive measures must not be disproportionate to the objectives pursued. **13** Furthermore, such measures must be clear and precise. **14**

The sanction of freezing is, according to the 'EU Best Practices for the effective implementation of restrictive measures', primarily to be regarded as a legal basis for comprehensive prevention with regard to the use of frozen funds and economic resources and of transactions by a person or entity designated by a competent authority. **15** Regarding the freezing of funds as a sanction, the European Commission noted in the FAQ:

“Sanctions in general and asset freezes in particular do not entail expropriation and are of a temporary nature. Furthermore, EU operators and institutions holding frozen assets should avoid outcomes causing a disproportionate prejudice to the listed person, which would go beyond the objectives of restrictive measures. It is for the national competent authority to determine how to fulfill and monitor this objective, on a [case-by-case] basis.” **16**

- 3.4.4 In the FAQ, the European Commission has also commented on whether freezing voting rights attached to shares is an appropriate or required measure. Its answer is:

“Shares qualify as ‘funds’ and therefore must be frozen if belonging to, owned, held or controlled by a listed person. Accordingly, this means that it is prohibited for the listed person to exercise any voting rights which could lead to any change in relation to these shares (eg in their volume, amount, location, ownership, possession, character, destination etc.). Either way, since they can be used to obtain funds, goods or services, voting rights as such can be considered an intangible economic resource. This means they should be frozen, ie prevented from being used to obtain funds, goods or services in any way. Therefore under no circumstance nor for any purpose may listed shareholders exercise directly or indirectly their voting rights in a company or fund. **17**

- 3.4.5 Addendum I to the Guidelines on Financial Sanctions Legislation **18** of the competent authority in the Netherlands was amended on 6 March 2023, whereby (among other things) the passage cited by the court (see 2.6 above) was deleted. Since the amendment, the Guidelines refer to the FAQ with regard to the exercise of voting rights under Article 2 Regulation 269/2014 and thus to the position of the European Commission set out in 3.4.4 above.

Interim conclusion

- 3.5.1 It follows from the foregoing that the text and context of Article 1, opening words and under f, of Regulation 269/2014 leave room for reasonable doubt as to the answer to the question whether the meeting and voting rights attached to (certificates of) shares belonging to a sanctioned person or entity have been frozen, and if so, whether that freezing is complete or whether the possibility to exercise the meeting and voting rights depends on certain circumstances, such as the nature or content of the agenda decision and the position thereon of the sanctioned holder of the (certificates of) shares. Other available sources do not provide the necessary clarity either.

- 3.5.2 On the one hand, there are starting points for a broad interpretation of Article 1, opening words and under f, of Regulation 269/2014, in the sense that freezing of (certificates of) shares always results in the meeting and voting rights attached to those certificates or shares not being able to be exercised.

The effect of the restrictive measure is then clear. Furthermore, this interpretation is consistent with the broad definition of “freezing of assets” as included in Regulation 269/2014 and with the principle that sanctions should be imposed in such a way that they have the greatest possible effect on the person whose behaviour is to be influenced. A broad interpretation also results in general prevention with regard to the use of the frozen (certificates of) shares, as mentioned in the 'EU Best Practices for the effective implementation of restrictive measures'. A broad interpretation is also in line with the statement of the European Commission in the FAQ that “ *voting rights must be fully frozen* “. However, this statement of the European Commission is not binding. **19**

- 3.5.3 On the other hand, there are starting points for a limited interpretation of Article 1, opening words and under f, Regulation 269/2014, in the sense that freezing of (certificates of) shares does not, or does not in all cases, prevent the exercise of the associated meeting and voting rights. This interpretation is consistent with the principle that the disadvantages caused by the sanctions may not be disproportionate to the objectives pursued.

The purpose of the sanction may possibly be achieved by completely or partially blocking the execution of or completely or partially withholding legal effect from decisions reached at a meeting or by a vote in which a sanctioned holder of (certificates of) shares has participated.

It is also conceivable that the sanctions only prevent the exercise of the associated meeting and voting rights if the exercise of those rights relates to a decision that could result in a change in the size, amount, location, owner, possession, distinguishing features, destination or other changes for assets that would enable the use of the assets in question, including the management of an investment portfolio. In that case, the answer to the question of whether the sanction prevents the exercise of meeting and voting rights may depend on the nature and content of the agenda decision, the position of the sanctioned holder of the (certificates of) shares and the possible consequences of the agenda decision for the relevant (certificates of) shares. A starting point for this view is the statement of the European Commission in the FAQ cited above in 3.4.4 that it is prohibited for persons included on the list to exercise voting rights “ *which could lead to any change in relation to these shares (eg in their volume, amount, location, ownership, possession, character, destination etc.)* ” and “ *This means they should be frozen, ie prevented from being used to obtain funds, goods or services in any way.* ” This view, however, does not correspond to the passage added later, on 9 November 2022, in the same answer with the conclusion: “ *Voting rights must be fully frozen* “. An interpretation that implies that it must always be determined in the specific case – depending on the possible consequences of exercising the meeting and voting rights – whether meeting and voting rights may be exercised, may further undermine the intended clarity and effectiveness of the sanction as a restrictive measure.

Reason for asking the question

- 3.6 In view of the considerations set out above in 3.2.1-3.5.3, reasonable doubt may arise as to the answer to the question of whether SBK, as a result of the freezing of its share certificates, may exercise the meeting and voting rights associated with the share certificates it holds.

The answer to that question is necessary in order to be able to judge parts 1 and 2. Furthermore, the correct application of sanctions is of great importance. The Supreme Court therefore intends – although there is no obligation to do so in these summary proceedings **20** – to submit preliminary questions to the ECJ on this matter.

4. Description of the principles and facts to which the interpretation to be given by the CJEU must be applied

The Supreme Court refers to the principles and facts mentioned above in 2.3-2.6, which must be assumed in these proceedings.

5 Questions for explanation

1. Should "freezing of assets" within the meaning of Article 1, introductory phrase and point (f), of Regulation 269/2014, in the case of share certificates belonging to, owned, held or controlled by natural persons listed in Annex I to Regulation 269/2014 or natural or legal persons, entities or bodies associated with them, be interpreted as meaning that the meeting and voting rights attached to share certificates cannot be exercised, at least as long as this does not lead to disproportionate damage for the certificate holder concerned?

2. Does it make a difference to the answer to question 1 whether, in the specific case, also taking into account the nature and content of the agenda decision and the position thereon of the certificate holder concerned, the exercise of the meeting and voting rights can lead to a change, transfer, modification, use or deployment of or dealing with assets, in whatever way, resulting in a change in their size, amount, location, owner, possession, distinguishing features, destination or other changes that make the use of the assets in question, including the management of an investment portfolio, possible within the meaning of Article 1, opening words and under f, of Regulation 269/2014?

6 Decision

The Supreme Court:

- corrects the sentence referred to in 1.2 above in the judgment of 19 April 2024 in the manner stated in 1.2 above and sets the correction at the date of that judgment;
- requests the Court of Justice of the European Union to rule on the questions formulated under 5 above;
- stays any further decision and suspends the proceedings until the CJEU has given judgment on this request.

This judgment was rendered by Vice-President MJ Kroeze as chairman and Councillors CH Sieburgh, HM Wattendorff, FR Salomons and GC Makkink, and pronounced in public by Councillor AEB ter Heide on 21 June 2024.

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- 1 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, OJ 2014, L 78/6.
- 2 Amsterdam District Court, 6 September 2022, ECLI:NL:RBAMS:2022:5466.
- 3 Amsterdam Court of Appeal, 29 December 2022, ECLI:NL:GHAMS:2022:3691.
- 4 'Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014', issued on 22 June 2022 and last updated on 12 April 2024, without any changes to the quoted text, p. 27.
- 5 See also General Court of the European Union 30 November 2016, Case T-720/14, ECLI:EU:T:2016:689 (Rotenberg v Council of the European Union), paragraph 176.
- 6 Council Implementing Regulation (EU) 2022/1270 of 21 July 2022 implementing 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, OJ 2022, L 193/133.
- 7 Council Implementing Regulation (EU) 2022/2476 of 16 December 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ 2022, L 322 I/318.
- 8 Cf. ECJ 6 October 2021, case C-561/19, ECLI:EU:C:2021:799 (Consorzio Italian Management), paragraph 45.
- 9 ECJ 18 October 2022, Case C-677/20, ECLI:EU:C:2022:800 (IG Metall), paragraph 31.
- 10 Cf. CJEU 11 November 2021, Case C-340/20, ECLI:EU:C:2021:903 (Bank Sepah v Overseas Financial Limited and Others), paragraph 43.
- 11 Cf. CJEU 11 November 2021, Case C-340/20, ECLI:EU:C:2021:903 (Bank Sepah v Overseas Financial Limited and Others), paragraph 45.
- 12 Council of the European Union, Fundamental Principles for the Use of Restrictive Measures (Sanctions) 7 June 2004, 10198/1/04 REV 1, at 6.
- 13 Cf. General Court of the European Union 27 February 2014, Case T-256/11, ECLI:EU:T:2014:619 (Ezz and Others v Council of the European Union), paragraph 209.
- 14 Cf. ECJ 29 April 2010, Case C-340/08, ECLI:EU:C:2010:232 (M and others v Her Majesty's Treasury), paragraph 65.
- 15 EU Best Practices for the Effective Implementation of Restrictive Measures, Brussels, 27 June 2022, 10572/22, point 28.
- 16 'Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014', issued on 22 June 2022 and last updated on 12 April 2024, Chapter B ('Individual financial matters'), under 1 ('Asset freeze and prohibition to make funds and economic resources available'), question 14.
- 17 'Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014', issued on 22 June 2022 and last updated on 12 April 2024, Chapter B ('Individual financial matters'), under 1 ('Asset freeze and prohibition to make funds and economic resources available'), question 15.
- 18 Addendum I to the Financial Sanctions Legislation Guidelines, Frequently asked questions regarding the territorial integrity of Ukraine, version 6 March 2023, Question J, available at: <https://www.rijksoverheid.nl/documenten/rapporten/2020/08/12/leidraad-financiele-sanctieregelgeving>.
- 19 Cf. ECJ 21 December 2021, Case C-124/20, ECLI:EU:C:2021:1035 (Bank Melli Iran v Telekom Deutschland GmbH), paragraph 61.
- 20 ECJ 27 October 1982, joined cases 35 and 36/82, ECLI:EU:C:1982:368 (Morson v. State of the Netherlands and Others and Jhanjan v. State of the Netherlands), paragraphs 8-9.
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