

Guidance on Targeted Financial Sanctions Imposed Pursuant to European Union Regulations and The National Interest (Enabling Powers) Act under UN Security Council Resolutions Related to Terrorism and Terrorist Financing, and Proliferation

1. Background and Objectives

1.1. Targeted Financial Sanctions Related to Terrorism and Terrorist Financing

In 1999, the United Nations (UN) elaborated an International Convention for the Suppression of the Financing of Terrorism, which Malta ratified. In addition to this convention, the UN Security Council adopted resolutions aimed at blocking terrorists' and terrorist organizations' disposal of their financial assets.

Resolution 1267 (1999), obligates jurisdictions to freeze funds and other financial assets or economic resources owned or controlled by persons or organizations connected to Al-Qaida and the Taliban. Resolution 1373, adopted in 2001, obliges all member states to freeze funds and financial assets or economic resources used to finance terrorism. In 2011 the UN Security Council adopted resolutions 1988 (2011) and 1989 (2011). With the adoption of these resolutions two separate Sanctions Committees, dealing with Al-Qaida and Taliban respectively, were established. In 2015 the UN Security Council adopted Resolution 2253 (2015) to expand the listing criteria to include individuals and entities supporting the so-called Islamic State in Iraq and the Levant (ISIL or Da'esh).

1.2. Targeted Financial Sanctions Related to Proliferation

The sanctions regimes imposed by the UN Security Council include sanctions relating to the prevention, suppression and disruption of proliferation of weapons of mass destruction (WMD) and its financing.

UN Security Council Resolutions 1718 (2006) and 1373 (2006) and their respective successor resolutions¹ obligate jurisdictions to implement targeted financial sanctions against persons or entities engaged in or providing support for proliferation-sensitive activities and programmes of the Democratic People's Republic of Korea (DPRK) and Iran.

2. Legal Basis

Malta is under an obligation under Chapter VII of the UN Charter to freeze, without delay, all funds and other financial assets or economic resources of any person, group or entity designated by the UN Security Council or a relevant UN Security Council Sanctions Committee pursuant to the relevant UN Security Council Resolutions.

¹ UNSCR 1747 (2007), 1803 (2008), 1874 (2009), 1929 (2010), 2231 (2015), 2270 (2016) and 2321 (2016)

Any restriction of the free movement of capital within the European Union (EU) falls within the ambit of the EU, which is responsible for the implementation of relevant UN Security Council Resolutions via EU Regulations², which in turn are directly binding in Malta.

As of 2016, the Council of the EU can furthermore apply restrictive measures autonomously to persons and entities associated with ISIL/Da'esh and Al-Qaida. Before that, the restrictive measures could be applied only to those listed by the UN Security Council.

In order to ensure the swift implementation of UN listings and to prevent asset flight, Malta, by amending the The National Interest (Enabling Powers) Act in 2018, provided for the direct applicability into the Maltese law of financial sanctions issued by the EU and UN Security Council.

3. Obligations

3.1 Who is subject to asset freezes under the targeted financial sanctions regime?

Persons, groups or entities designated by the UN Security Council, a relevant Security Council Sanctions Committee or the Council of the EU.

Lists of designated persons, groups and entities can be accessed under the following web-links as provided for in clause 2 of the National Interest (Enabling Powers) Act:

Link to the Official Journal of the European Union in which new restrictive measures are published;

<https://eur-lex.europa.eu/oj/direct-access.html>

Link to the EEAS web-site which has a consolidated list of designated persons, groups and entities;

https://eeas.europa.eu/topics/sanctions-policy/8442/consolidated-list-of-sanctions_en

Link to the UN web-site which has a consolidated list of designated persons, groups and entities;

<https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list>

Link to the press releases page of the UN which would document any changes to the different sanctions regimes, including new additional listings;

<https://www.un.org/press/en>

² UN resolutions 1267, 1988 and 1989 were transposed into EU law by Council Regulation (EC) No 881/2002, Regulation (EU) No 2016/1686 and Regulation (EU) 753/2011. Autonomous EU targeted financial sanctions relating to combatting terrorism are based on Council Regulation (EC) 2580/2001.

3.2 Who needs to comply with freezing obligations under the targeted financial sanctions regime?

Any and all natural or legal persons in Malta are under a direct obligation to freeze pursuant to the relevant EU Regulations and UN Security Council Resolutions, which are binding in their entirety in Malta pursuant to The National Interest (Enabling Powers) Act.

3.3 What assets are subject to a freezing obligation?

Targeted financial sanctions require the freezing of “*all funds and other financial assets and economic resources*”.

“*Funds and other financial assets*” should be understood to include, but not limited to:

- cash, cheques, claims on money, drafts, money orders, bearer instruments, internet - based payment instruments such as virtual currencies and other payment instruments;
- deposits with financial institutions or other entities and balances on accounts, including but not limited to: (1) fixed or term deposit accounts, (2) balances on share trading accounts with banks, brokerage firms or other investment trading accounts;
- debts and debt obligations, including trade debts, other accounts receivable, notes receivable, and other claims of money on others;
- equity and other financial interest in a sole trader or partnership;
- publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts;
- interest, dividends or other income on or value accruing from or generated by assets;
- credit, right of set - off, guarantees, performance bonds or other financial commitments;
- letters of credit, bills of lading, bills of sale; notes receivable and other documents evidencing an interest in funds or financial resources and any other instruments of export - financing;
- insurance and reinsurance.

“*Economic resources*” should be understood to include assets of every kind, whether tangible or intangible, movable or immovable, actual or potential, which potentially may be used to obtain funds, goods or services, such as:

- land, buildings or other real estate;

- equipment, including computers, computer software, tools, and machinery;
- office furniture, fittings and fixtures and other items of a fixed nature;
- vessels, aircraft and motor vehicles;
- inventories of goods;
- works of art, cultural property, precious stones, jewellery or gold;
- commodities, including oil, minerals, or timber;
- arms and related materiel, including all items mentioned in the arms embargo at paragraph 1 (c) of resolution 2161 (2014);
- raw materials and components that can be used to manufacture improvised explosive devices or unconventional weapons, including but not limited to chemical components, detonating cord, or poisons;
- patents, trademarks, copyrights, trade names, franchises, goodwill, and other forms of intellectual property;
- internet hosting or related services;
- any other assets.

3.4 Who`s assets need to be frozen?

Targeted financial sanctions extend to, not only assets that are directly owned by designated persons, groups or entities, but all assets that, either directly or indirectly, are owned or controlled by them or by persons acting on their behalf, and also includes any funds or negotiable benefits arising from this property.

The freezing obligation thus also applies for example to companies that are directly or indirectly controlled but not formally owned by a designated person. They also apply where ownership is maintained indirectly, for example via a complex or opaque ownership structure, aimed at concealing the true ownership of the company. Where such a company produces benefits, for example in the form of dividends, the relevant portion of such a benefit must also be frozen.

In line with EU guidance³, the criterion of ownership in a legal person or entity is met where a person, group or entity has more than 50% of the proprietary rights of a legal person or entity or has a majority interest in it.

³ <http://data.consilium.europa.eu/doc/document/ST-10254-2015-INIT/en/pdf>

It is also important to note that assets that are jointly owned, held or controlled by a designated person, group or entity and a person, group or entity that has not been designated are subject to the freezing obligation in their entirety, where the interest owned or controlled by the party that is not designated cannot be segregated - thus including the part that is owned, held or controlled by the person group or entity that has not been designated.

When determining control of a legal person or entity, the satisfaction of at least one of the following criteria, in line with EU guidance, is sufficient to establish whether a legal person or entity is controlled by another legal person or entity, alone or pursuant to an agreement with another shareholder or other third party.

The criteria to be taken into account when assessing whether a legal person or entity is controlled by another person or entity, alone or pursuant to an agreement with another shareholder or other third party, could include, inter alia:

- having the right or exercising the power to appoint or remove a majority of the members of the administrative, management or supervisory body of such legal person or entity;
- having appointed solely as a result of the exercise of one's voting rights a majority of the members of the administrative, management or supervisory bodies of a legal person or entity who have held office during the present and previous financial year;
- controlling alone, pursuant to an agreement with other shareholders in or members of a legal person or entity, a majority of shareholders' or members' voting rights in that legal person or entity;
- having the right to exercise a dominant influence over a legal person or entity, pursuant to an agreement entered into with that legal person or entity, or to a provision in its Memorandum or Articles of Association, where the law governing that legal person or entity permits its being subject to such agreement or provision;
- Having the power to exercise the right to exercise a dominant influence referred to in the point above, without being the holder of that right (including by means of a front company)

The above list is intended to be indicative of the factors leading to control being established and should not be seen as exhaustive.

Furthermore, the freezing obligation also extends to any funds owned, held or controlled by any person who acts on behalf or at the direction of or is owned or controlled directly or indirectly by a designated person, group or entity.

Finally, the freezing obligation requires that no funds, financial assets or economic resources are made available for the benefit of a listed party, whether directly or indirectly, for so long as the party remains subject to the sanctions measures.

3.5 How can I determine whether I am in possession of targeted assets?

While any and all persons in Malta are under a direct obligation to freeze assets attributed to a designated person, group or entity, legal or natural persons conducting a relevant activity or relevant financial business as defined in the Prevention of Money Laundering Act must:

- regularly check the list of designations by the UN, EU, and the Board, and to screen their client databases against those lists on a regular basis and immediately after a change to any of these lists occurs;
- have in place and effectively implement internal controls and procedures to ensure compliance with the obligations arising from The National Interest (Enabling Powers) Act and any relevant UN or EU Resolutions or regulations; and

Some financial institutions and designated non-financial businesses and professions rely on services such as *World Check* to verify that their clients are not subject to any targeted financial sanctions. It is important to note in this regard that such online services are useful but should not be viewed as an absolute guarantee of compliance with the obligations pursuant to the relevant EU Regulations and UN Security Council Resolutions. Additional periodic checks against the designations made by the Council of the EU and UN Sanctions Committees must be carried out.

3.6 What needs to be done if targeted assets are detected?

Anyone in possession of targeted assets as defined in the sections above must immediately:

- freeze them;
- not deal with them or make them available to, directly or indirectly, or for the benefit of, the designated person.

EU regulations require natural and legal persons or any entity to supply the Sanctions Monitoring Board (“the Board”) as soon as practicable with any information that would “facilitate compliance” with the regulations. Any information provided will only be used for the purposes.

Moreover, any legal or natural person conducting a relevant activity or relevant financial business as defined in the Prevention of Money Laundering Act must immediately notify the Board in case targeted assets are identified, and of the actions taken in relation to such property in compliance with the requirements under The National Interest (Enabling Powers) Act, including in relation to any attempted transactions.

Legal or natural person conducting a relevant activity or relevant financial business as defined in the Prevention of Money Laundering Act are prohibited from informing the customer or any third party in advance about the freezing measure.

3.6.1 How to report

Reports of frozen property, information regarding a designated person and any other relevant information or accompanying documents may be sent to the Board on the following address:

The Chairman
Sanctions Monitoring Board
Ministry of Foreign Affairs and Trade Promotion
Palazzo Parisio
Merchants Street,
Valletta.

Additionally a copy and documents may be sent in writing on sanctions.mftp@gov.mt .

3.6.2 Cooperation with the Board

Notwithstanding the general requirement to report to the Board relevant information pursuant to The National Interest (Enabling Powers) Act, any natural or legal person and any authority or entity, must comply with requests from the Board for any information it deems necessary, relevant and useful for the purpose of pursuing its functions.

3.7 Are there any exemptions to the freezing obligation, and what are my obligations with respect to those exemptions?

Freezing obligations are subject to certain exemptions in limited circumstances. The relevant UN Security Council Resolutions and EU Regulations list specific circumstances in which exemptions may be granted. The Board may grant exemptions upon request where the frozen property is:

- necessary for basic expenses. Such expenses include payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;
- intended exclusively for the payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services;
- intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources; or
- necessary for extraordinary expenses (such expenses must be extraordinary in nature, i.e. not recurring or easily anticipated).

Furthermore, exemptions apply where the frozen property is:

- subject of an arbitral decision rendered prior to the date of the listing, or of a judicial or administrative decision rendered prior to, on or after that date; and
- the property is used exclusively to satisfy claims secured by such a decision or recognised as valid in such a decision; and

- the decision is not for the benefit of the designated person.

Requests from petitioners for the unfreezing of funds or other financial assets or economic resources may be submitted to the Board on the following address:

The Chairman
Sanctions Monitoring Board
Ministry of Foreign Affairs and Trade Promotion
Palazzo Parisio
Merchants Street,
Valletta.

Additionally a copy of the petition and documents may be sent in writing on sanctions.mftp@gov.mt .

3.8 May I permit transfers to be made into frozen account?

Financial institutions may credit frozen accounts with interest or other earnings on those accounts; or with payments due under contracts, agreements or obligations, provided that any additions to such accounts shall also be frozen. Financial institutions shall inform the Board about such transactions without delay after the frozen account has been credited.

4. Liability

4.1 Can I be held liable by any person, including the customer, for freezing his or her assets pursuant to the relevant targeted financial sanctions?

Any person is exempted from criminal or civil liability if a freezing measure is carried out in good faith and for the purpose of complying with the provisions of The National Interest (Enabling Powers) Act, relevant EU Regulations or UN Security Council Resolutions. Thus, as long as the freezing measures was taken based on the believe that assets are targeted assets, the person, financial institution or designated non-financial business or profession is exempted from any liability resulting from this freezing measure even if it later turns out that the frozen funds are in fact not funds that are targeted under the relevant sanctions regime.

5. Sanctions

5.1 What possible sanctions do I face in case of failure to comply with the freezing obligations?

Any person who acts in violation of regulations made under The National Interest (Enabling Powers) Act or of a EU Regulation or of a UN Security Council Resolution shall be guilty of an offence and shall, on conviction, be liable to:

- imprisonment for a term from twelve months to twelve years; or
- to a fine (*multa*) of not less than €25,000 and not exceeding €5,000,000; or
- to both such imprisonment and fine.

A body corporate found guilty of an offence shall be liable to payment of a fine (*multa*) of not less €80,000 and not exceeding €10,000,000. Furthermore, the Court may, at the request of the prosecution, order:

- the suspension or cancellation of any licence, permit or other authority to engage in any trade, business or other commercial activity;
- the temporary or permanent closure of any establishment which may have been used for the commission of the offence;
- the compulsory winding up of the body corporate;
- exclusion from entitlement to public benefits or aid.

Directors, managers, secretaries or other similar officers of body corporate found guilty of the commission of an offence, shall be guilty of an offence unless proven that the offence was committed without their knowledge and that he or she exercised all due diligence to prevent the commission of the offence.