

NON-PAPER : COMMISSION SERVICES' INFORMATION NOTE

in relation to certain listings under Council Decision 2013/184/CFSP and Council Regulation (EU) No 401/2013 of 2 May 2013 concerning restrictive measures in respect of Myanmar/Burma

1. Objectives and value of this note

The Commission, in its role as a guardian of the EU Treaties, monitors the implementation of Union law by Member States, under the control of the Court of Justice of the European Union. The purpose of this document is to provide information on the consequences of the listings of certain entities mentioned in Annex I designated under the EU sanctions regimes in view of the situation in Myanmar, in particular the import into the EU of specific products produced and marketed by these state-owned enterprises. This non-paper was prepared on the basis of information available in the evidence packages of the respective entities and open-source information. It seeks to support Member States in the application of the relevant measures and thereby ensure that EU sanctions are applied consistently across the territory of the Union. It does so by recalling the grounds for designation and providing indicative CN codes relevant for Member States' national competent authorities in charge of implementing sanctions.

2. Sectors concerned following the designations of certain entities

TIMBER

Myanmar Timber Enterprise ('MTE') is a state-owned enterprise operating under the control of the Ministry of Natural Resources and Environmental Conservation. It is responsible for harvesting, sawmilling, downstream processing and marketing timber. MTE is the unique state-owned enterprise operating in the forestry sector in Myanmar and has exclusive rights on the production, sale, and export of timber in the country (monopoly). Forest Products Joint Venture Corporation (FPJVC) is a subsidiary of MTE, which was also listed on 21 June 2021. FPJVC operates in the timber industry in Myanmar processing teak and hard wood.

Accordingly, MTE generates revenues for the Myanmar State through sales of timber, operating an auctions system with local and foreign bidders, particularly for teak in high demand for the luxury yachting sector. FPJVC supports these sales and generates revenues from its processing activities.

Furthermore, since, according to Myanmar law, all timber for export must be sold from MTE timber depots and economic transactions with MTE are subject to the sanctions, all timber exported from Myanmar to the EU will be regarded as illegal according to the EU Timber Regulation¹.

¹ Article 6b and Guidance Document for the EU Timber Regulation: Consideration of prevalence of armed conflict and sanctions in due diligence systems).

MINING

The Myanmar state has the sole right to export minerals, hence it is also a monopoly. The State's intervention in the mining sector is made primary through the No. 1 Mining Enterprise ('ME1') and No. 2 Mining Enterprise ('ME2'). These two state-owned enterprises operate under the control of the Ministry of Natural Resources and Environment, on behalf of the Myanmar State.

Mining projects are usually carried out by private companies (local and foreign) on the basis of production-sharing or profit-sharing agreements, or joint ventures with ME1 or ME2. The application for an award of a mining permit is subject to the signing of any such agreement.

Accordingly, ME1 and the ME2 receive revenue from the sale of the state's share of production (production split in-kind), product split from mineral companies (cash payment) and application fees. ME1 and ME2 would also be responsible to collect part of the tax on profits made under the agreement. In addition, the holder of a mineral production permit must pay royalties to the government via ME1 and ME2.

GEMS

The State's intervention in the gems sector is made primary through the Myanmar Gems Enterprise ('MGE'). MGE is a state-owned enterprise operating in the gemstone sector under the control of the Ministry of Natural Resources and Environmental Conservation, on behalf of the Myanmar State. It supervises and grants permits to produce gems, participates in all joint ventures for their production on behalf of the state, and organises emporiums and special sales. Joint ventures with MGE are legally required to market Myanmar production during these jade and gemstone emporiums.

Accordingly, MGE receives revenue from the sale of the state's share of production (production split in-kind), product split from mineral companies (cash payment), application fees as well as other services fees. In addition, companies report their gemstone product to MGE that collects royalty payments.

3. Consequences of the designation for competent authorities and EU operators: asset freeze and prohibition to make economic resources available

As a result of their designation by the EU, the entities MTE, ME1, ME2 and MGE are subject to financial sanctions that consist of an asset freeze and a prohibition to make funds and economic resources available to them. It follows that there is an obligation on EU operators to ensure that they do not make any funds or economic resources available, directly or indirectly to these entities (Article 4a Council Regulation 401/2013).

These companies are all state-owned enterprises which operate as state monopolies in the timber, mining, and gems sector respectively. As a consequence of this monopolistic position, they necessarily receive direct and indirect proceeds from sales and exports. In the cases of ME1, ME2 and MGE, they utilise private operational capacities for production via different sorts of contractual agreement.

Accordingly, and subject to the necessary case-by-case assessments of the competent national authorities, the imports into the EU of the goods specified in Annex II to this paper should no longer be possible since the date of designation of the relevant entity under EU sanctions, as such imports would necessarily involve the making available of funds to the listed entities.

Intermediaries: any purchase of these goods from Myanmar can be mapped back to one of these entities. EU operators should exercise additional care to ensure that any goods which they acquire from an intermediary was bought by the latter and paid to the entity before the date of designation. With regards to MTE, particular attention should be paid to intermediaries based in Thailand, UAE, Singapore, India and China which are at higher risk of trading Myanmar timber.

If an intermediary has purchased these products after their date of designation, the purchase of these goods by EU operators through a third party would amount to making indirectly available funds or economic resources to one of these entities in breach of Article 4a(2) of the Regulation.

Ownership and control: EU operators must be very careful when engaging with an entity that is owned or controlled by one of these entities. While these are directly targeted by the EU sanctions, if an entity is owned or controlled by them, EU operators are also prohibited from making available any funds or economic resources to this entity. This would be considered as making them indirectly available.

Circumvention: It is prohibited to participate, knowingly and intentionally, in the circumvention of these sanctions (Article 4g of the Regulation).

Date of payment: Even if a contract was signed before the date of designation, any subsequent payment of the goods to the entity amounts to making funds available to these listed entities, hence it would be in breach of Article 4a(2) of the Regulation.

Imports into the EU may occur if the payment was made prior to the listing. However, extensive due diligence should be carried out by customs authorities in verifying the authenticity of the supporting documents. Operators may be tempted to falsify the date of payments of the goods to ensure their import into the EU. Such falsification would constitute circumvention of EU sanctions.

Exceptional payments into EU frozen account: Exceptionally, under Article 4d(3), payments due to one of these entities under a contract concluded before their date of designation may be credit into frozen accounts in the EU of the listed person so they can equally be frozen. This provision is only available for the listed entities, and not entities which they own or control.

Framework contracts: Where framework contracts do not specify the exact quantities, precise price or delivery date, they cannot benefit from Article 4d(3) of the Regulation. Usually, framework agreements do not contain all the necessary elements for the execution of a transaction (such as price, quantities, deliver dates, modalities of execution etc.). This means that their implementation requires subsequent signature of new and specific contracts.

ANNEX I

<i>Entity</i>	<i>Listing number</i>	<i>Date of designation</i>
Myanmar Timber Enterprise	Listing no. 4	21 June 2021
Myanmar Gems Enterprise	Listing no. 3	21 June 2021
Mining No. 1	Listing no. 9	21 February 2022
Mining No. 2	Listing no. 19	20 July 2023

ANNEX II

[Separate document]

This list contains CN codes provided for indicative purposes only. It is non-exhaustive and subject to review. It has been compiled on the basis of open-source information on the products produced and marketed by MTE, ME1, ME2 and MGE.