Navigating the Future Landscape of the EU Blocking Statute

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The European Union Blocking Statute was originally adopted in 1996 to counteract US sanctions on Cuba, Iran and Libya, but following a memorandum of understanding entered into between the EU and the US,[1] it has seldom been enforced by EU member states' authorities. However, on 7 August 2018, the EU amended the annex to the statute in response to the US' withdrawal from the Joint Comprehensive Plan of Action and the re-imposition of US sanctions against Iran. The effect was an expanded scope of the EU Blocking Statute to counteract the re-imposed US primary and secondary sanctions on Iran.

The EU Blocking Statute[2] prohibits EU persons from complying, directly or indirectly, with certain US sanctions listed in its annex, leaving EU companies caught between two opposing regimes.

Since 2018, there has been limited case law interpreting the EU Blocking Statute in the context of civil disputes over commercial agreements, with courts in the UK and EU member states taking differing approaches. A recent judgment by the European Court of Justice (ECJ), *Bank Melli Iran v Telekom Deutschland GmbH (C-124/20)*, has provided some clarity. However, calls for reform have continued, and proposed amendments are expected this year following a recent public consultation by the EU Commission.

Bank Melli Iran v Telekom Deutschland GmbH

- The defendant, Telekom Deutschland GmbH, terminated the telephone and internet access of the claimant, Bank Melli Iran, in 2018 when the US reactivated sanctions against the bank. The claimant challenged this termination before the courts of Hamburg, arguing that it was in breach of the EU Blocking Statute. On 2 March 2020, the Higher Regional Court of Hamburg referred several questions to the ECJ.
- On 21 December 2021, the ECJ concluded there was no general requirement to provide reasons for terminating contracts; however the burden of proof is effectively reversed in civil proceedings on the EU Blocking Statute, such that the EU person must prove that it terminated the contract for reasons other than to comply with US sanctions.[3] The ECJ did not provide any further clarity on the level of proof, although Advocate General Gerard Hogan noted in his 12 May 2021 nonbinding opinion that one example of a company demonstrating that it terminated the contract for reasons other than to comply with US sanctions was for it to show that "it is actively engaged in a coherent and systematic corporate social-responsibility policy (CSR) which requires … [it], inter alia, to refuse to deal with any company having links with the Iranian regime."
- The ECJ also held that **it is possible for non-EU persons to invoke the EU Blocking Statute in the context of civil proceedings** against EU operators.
- The ECJ acknowledged that **the EU Blocking Statute may result in a limitation on the freedom to conduct business** where the termination of a contract contrary to the EU Blocking Statute is considered null and void, and the terminated contract is reinstated. However, the ECJ highlighted that **EU persons may apply for an authorisation** to comply with US sanctions if failure to do so would seriously harm their interests.

[1] European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act.

[2] Council Regulation (EC) No 2271/96 of 22 November 1996, as amended by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018.

[3] In a similar case, the Cologne Higher Regional Court held that the EU Blocking Statute was not applicable to EU persons unless they were bound to comply with US sanctions by a specific order from US courts/authorities (judgment dated 7 February 2020, docket no. 19 U 118/19) — a view that the ECJ discarded in clear terms in *Bank Melli*.

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In addition to the recent ECJ judgment, there have been a number of EU and UK judgments where the EU Blocking Statute has been considered in the context of clauses in deal documentation.

UK Case Law

Mamancochet Mining Ltd v Aegis Managing Agency Ltd & Ors[4]

- The claimant made an insurance claim against the defendant underwriters in relation to the theft of steel billets shipped from Russia to Iran in 2012. The defendant underwriters had attempted to refuse payment by relying on a sanctions clause within the policy, which permitted nonpayment if payment would expose the insurer to United Nations, EU, UK or US sanctions.
- The English High Court rejected the argument that the sanctions clause was drafted to cover exposure to a risk of US primary sanctions rather than actual exposure to sanctions. In *obiter dicta*, the judge noted that he saw "considerable force" in the argument that **the EU Blocking Statute was not engaged where the defendant underwriters' liability to pay a claim was suspended under a sanctions clause**, because the underwriters were not "complying" with a third country's prohibition but simply relying on the terms of the policy to resist payment.

Lamesa Investments Ltd v Cynergy Bank Ltd[5]

- The defendant borrower stopped making interest payments to the claimant lender as a result of the lender's owner being placed on the US Specially Designated Nationals List, therefore causing the claimant to potentially become subject to US secondary sanctions. The defendant relied on a nonpayment clause included within the facility agreement.
- The English Court of Appeal held that the nonpayment clause could be relied on, as US secondary sanctions did constitute a "mandatory provision of law," per the wording of the nonpayment clause. **A risk of breaching US secondary sanctions was sufficient to invoke the clause** on these specific facts. The English Court (contrary to the Netherlands Court of Rotterdam in a similar contractual dispute case)[6] used the EU Blocking Statute to demonstrate that US secondary sanctions could be interpreted as mandatory provisions of law.

Potential Reforms

Advocate General Hogan noted in his opinion relating to *Bank Melli* that the EU Blocking Statute continues to pose challenges for EU persons that may be **best resolved by a review by the EU legislative bodies**.[7] The European Commission issued a report on 3 September 2021 on the application and effects of the EU Blocking Statute, focusing on the extraterritorial effects of the statute that had been notified under Article 2 to the European Commission between 1 August 2018 and 1 March 2021.[8] It received 63 notifications (35 related to US-Cuba sanctions and 28 related to US-Iran sanctions) from individuals and companies based in 12 member states. The report also provided information on EU and national court proceedings on the EU Blocking Statute, confirming different approaches taken by member states to the legislation.

The European Commission also recently concluded its **public consultation on the legislation** with responses from: France (24%), the UK (16%) and Germany (14%).[9] Respondents felt the EU Blocking Statute has been unsuccessful in its objectives, is improperly implemented and is vague in its language. The consultation highlighted a desire for further measures to be added, including a "provision of legal support for operators entangled in foreign legal proceedings, targeted commercial restrictions (including limitations for accessing the EU market or for EU certifications), the possibility to claim punitive damages (including against foreign sovereign assets), and financial compensation to defray the cost of operating in a sanctioned environment."

It remains to be seen what proposals the EU will adopt; its report on the issues is due in the second quarter of this year.

Key Takeaways

- There remains uncertainty around *force majeure* and sanctions clauses in the context of the EU Blocking Statute. There are differing approaches taken by EU member states as well as the UK in relation to the recognition of US secondary sanctions in particular. Concerned companies and their advisers should **continue to monitor case law** in both the EU and UK. Case law has not yet settled. UK operators actively participated in the EU's consultation on legislative reforms, and it is likely that any changes in the EU will also be mirrored (at least in part) in the UK.

[4] [2018] EWHC 2643 (Comm).

[5] [2020] EWCA Civ 821.

[6] *Payesh Gostaran Pishro Ltd v Pipe Survey International CV and P&L Pipe Survey*, Case No. C / 10/572099 / HA ZA 19-352, 1 April 2020.

[7] Case C-124/20, Opinion of the Advocate General Hogan delivered on 12 May 2021, paragraph 5.

[8] Report From the Commission to the European Parliament and the Council Relating to Article 7(a) of Council Regulation (EC) No 2271/96.

[9] Unlawful Extra-Territorial Sanctions – A Stronger EU Response (Amendment of the Blocking Statute).

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- The ECJ judgment in *Bank Melli* demonstrates that EU companies should **carefully document business decisions relating to Iran**. The documentation must show solid reasons for terminating a business, and these reasons must not show an intention to comply with blocked US laws. In some EU jurisdictions, including Germany, management board members are personally and fully liable for fines imposed on the company for breaches of applicable law, including the EU Blocking Statute.[10] Proper documentation protects both board members and the company. The risk of civil proceedings has also increased following the ECJ's confirmation that rights under the EU Blocking Statute extend to non-EU parties.

[10] Under German corporate law, this is referred to as the "legality obligation" of management board members (Legalitätspflicht).

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