Pérez-Llorca

Legal Briefing

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EXTRATERRITORIAL SANCTIONS IN CIVIL PROCEEDINGS IN LIGHT OF THE CJEU JUDGMENT OF 21 DECEMBER 2021, C-124/20, BANK MELLI IRAN

On 21 December 2021, the Court of Justice of the European Union ("**CJEU**") issued its judgment in Case C-124/20, Bank Melli Iran, interpreting for the first time Council Regulation (EC) No. 2271/96 of 22 November 1996 on protection against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom ("**Blocking Statute**").

The purpose of this Legal Briefing is to analyse the possible implications of this judgment for European Union ("**EU**") companies.

1. THE BLOCKING STATUTE. REGULATORY CONTEXT

The Blocking Statute was adopted in 1996 to protect EU operators, whether individuals or companies, from the extraterritorial application of third country laws.

The EU does not recognise the extraterritorial application of laws adopted by third countries and considers such effects to be contrary to international law. Specifically, this regulation was adopted in the political context of the measures adopted by the United States in relation to Cuba, Iran and Libya, and was updated in 2018, including new laws in its annex (the annex lists those laws that impose sanctions, the extraterritorial effect of which is intended to be avoided or counteracted).

The Blocking Statute sets out a number of prohibitions and the obligation for Member States to provide for sanctions in their national legislation in the event of non-compliance with these prohibitions. Among the prohibitions is Article 5(1), which is the subject of the question referred for a preliminary ruling. Article 5(1) prohibits the laws listed in the Annex from being complied with or respected. Article 5(2) provides for the option of requesting authorisation from the European Commission to comply with or observe the laws in the Annex, when failure to do so would seriously harm the interests of EU operators.

Until now, the practical application of the Blocking Statute has been limited and its effectiveness questioned. Currently, at EU level, the public consultation procedure has been completed and a legislative proposal to amend the Blocking Statute is expected to be presented in the European Commission's 2022 work programme in the second quarter to address the problems identified.

2. THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED FOR A PRELIMINARY RULING

The case before the CJEU arises in the context of a dispute between Bank Melli Iran (**"BMI"**), an Iranian bank owned by the Iranian State with a branch in Germany, and Telekom Deutschland GmbH (**"Telekom"**), a company with its registered office in Germany. The dispute relates to the termination of a contract for the provision of telecommunications services by Telekom to BMI. It should be noted that Telekom is a company that generates approximately 50% of its revenue from its US business.

The most relevant facts of the case are as follows:

(i) In November 2018, following the reimposition by the US of sanctions on Iran, BMI was placed on a list of persons (*Specially Designated Nationals and Blocked Persons List* or **"SDN"**) under which any person is prohibited from maintaining, outside the territory of the US, business relations with persons or entities appearing on that list.

(ii) On 16 November 2018, Telekom notified BMI of the termination, with immediate effect, of all contracts with BMI. Telekom acted similarly with a number of companies that were also on the list and based in Germany.

BMI issued civil proceedings in Germany against Telekom, claiming that the termination of the contracts in question was contrary to Article 5 of the Blocking Statute, as the basis of the termination was the European company's interest in complying with the US sanctions. It also argued that the termination is contrary to Article 134 of the German Civil Code (nullity of any act contrary to a statutory prohibition).

The Hamburg Higher Regional Court for Civil and Criminal Matters referred the question to the CJEU for a preliminary ruling on the interpretation of Article 5 of the EU Blocking Statute, in order to determine whether the termination of the contract could be considered valid.

3. ANALYSIS OF THE JUDGMENT

(i) The scope of Article 5 of the Blocking Statute

In the first question, the CJEU was asked whether Article 5.1 of the Blocking Statute must be interpreted as prohibiting the persons referred to in Article 11 (in this case, European companies) from complying with the requirements or prohibitions provided in the laws of the Annex, even in the absence of direct or indirect instructions or orders to that effect from the administrative or judicial authorities of the third countries (in this case, the USA) that have adopted those laws.

The CJEU, after analysing the literal wording of the provision, its context and the object or purpose of the Blocking Statute, stated that the prohibition established in Article 5 must be respected, even in the absence of a requirement or instruction from an administrative

or judicial authority, since a more restrictive interpretation would jeopardise the effectiveness of the regulation itself.

(ii) Proof of the European company's breach of the Blocking Statute in civil proceedings

In the second question, the CJEU was asked about the effects on the civil proceedings between the European and Iranian companies of the European Commission's failure to authorise the termination of the contract. It also asked whether a European company may terminate a contract with a company affected by sanctions without providing the reason for the decision to terminate the contract.

The Court of Justice did not give a conclusive answer, leaving the final decision to the individual case and the assessment of the national court, although it did provide several relevant criteria.

Firstly, the CJEU stated that Article 5 may be invoked by a non-European company in civil proceedings against a European company that has infringed it.

Secondly, the CJEU noted that, in principle, it is not contrary to Article 5 to terminate a contractual relationship with a listed entity without giving reasons for the decision to terminate the contract. However, the CJEU held that, if in the context of civil proceedings there is *prima facie* evidence that such termination of the contract may be due to the imposition of an extraterritorial sanction by a third State, it is then for the European company to prove that the termination of the contract was not intended to comply with or respect the sanctions imposed by that third State.

Thus, in order to ensure the application of Article 5 of the Blocking Statute, the burden of proof would be reversed, so that it is for the European company to prove that its decision to terminate the contract was not motivated by compliance with the sanctions imposed by the third State.

(iii) The contractual consequences of non-compliance with the Blocking Statute. The principle of proportionality

Finally, the CJEU was asked whether the annulment of the termination of the contract could be contrary to the freedom to conduct business as enshrined in Article 16 of the Charter of Fundamental Rights of the EU, insofar as the European company is at risk of suffering considerable financial loss as a result of such annulment.

The CJEU noted that the freedom to conduct business is not absolute, and stated that the freedom to conduct business may be limited where there are grounds of public interest. The CJEU held that it would be possible to annul the termination of the contract, provided that such annulment is not disproportionate, and that the proportionality test is a matter for the national court.

In order to carry out this proportionality test, the CJEU highlighted a series of elements that the national court must consider: the magnitude of the European company's economic losses, the achievement of the objectives of the Blocking Statute, as well as whether or not the authorisation provided for in Article 5.2 has been requested from the Commission.

4. GENERAL CONCLUSION

With this judgment, the CJEU has dispelled doubts about the scope of the interpretation of Article 5 of the Blocking Statute by clearly stating that it must be interpreted broadly. Thus, businesses may fall within the scope of that prohibition, even in the absence of direct or indirect orders or instructions. It has also confirmed that the regulation can be invoked by non-European companies in civil proceedings and that, in such cases, the burden of proof could be reversed.

However, concerning its actual application, the CJEU has interpreted the Blocking Statute in such a way as to reconcile the objective of not applying extraterritorial sanctions of third states in the EU with the fundamental right to freedom to conduct business, for which it has established certain criteria to be used by national courts in this type of litigation.

5. USEFUL LINKS

(i) Judgment of the CJEU of 21 December 2021, C-124/20, *Bank Melli Iran*

(ii) CJEU Press Release of 21 December 2021

(iii) Public consultation for the reform of the Blocking Statute

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