# ARTICLE

## EXTRATERRITORIALITY OF US LAW | EU GENERAL COURT'S IFIC HOLDING RULING PROVIDES CRUCIAL CLARIFICATIONS ON THE APPLICATION OF THE EU BLOCKING STATUTE

| 25/07/23 | Olivier Attias

**General Court of the European Union, 6th chamber, extended composition, July 12, 2023, T-8/21**

In a landmark ruling, the General Court of the European Union (General Court) has validated the European Commission's decisions to authorize Clearstream Banking AG to block dividends of the German company IFIC Holding, whose shares are indirectly held by the Iranian state. This ruling, which addresses the issues of retroactivity and the right to be heard raised by IFIC Holding, highlights the complexity of the legal and political issues involved in this case.

This judgment is rendered in application of Regulation (EC) no. 2271/96 (the "*EU Blocking Statute*") adopted in 1996 to restrict the application of extraterritorial sanctions imposed by the United States against Cuba and Iran, in the European Union. The Regulation was updated in 2018 following the unilateral withdrawal of the United States from the Iran nuclear agreement, formally known as the Joint Comprehensive Plan of Action (JCPOA) and the reimposition of US economic sanctions against Iran. These sanctions prohibit any individual or organization from maintaining commercial relations with individuals on the "*specially designated nationals"* (SDN) list outside the territory of the United States. The stated aim of the EU Blocking Statute is thus to protect European operators against certain extraterritorial laws of third countries.

To achieve this objective, the EU Blocking Statute prohibits European operators from complying with the laws listed in its annex, unless expressly authorized by the European Commission when *"non-compliance with* [these foreign laws] *would seriously damage* [the interests of the persons covered by the Regulation] *or those of the Community*"[1]. In addition, it requires European operators to notify the European Commission of any impact of the listed extraterritorial laws on their economic or financial interests. The EU Blocking Statute also nullifies in the Union any judicial decision taken by a third country based on these extraterritorial laws and enables European operators to obtain redress before the courts for damages caused by these laws.

Since its update in 2018, the EU Blocking Statute has garnered very little litigation[2].

The first ruling at European level was handed down on December 21, 2021, in the case of *Bank Melli Iran v Telekom Deutschland GmbH*[3]. Asked for a preliminary ruling from the German courts, the Court of Justice of the European Union (CJEU) reaffirmed the European Blocking Statute's prohibition on compliance with annexed laws and provided guidance to national courts on the procedural and substantive aspects of the national application of this instrument. If a contractual termination to comply with extraterritorial legislation were to be annulled, this limitation on freedom of enterprise created by the EU Blocking Statute should not, however, entail disproportionate consequences, particularly economic ones, for the concerned European operator.

In this second judgment, the General Court was sought to rule on the validity of decisions taken by the European Commission which authorized Clearstream Banking AG to block funds belonging to IFIC Holding to comply with US sanctions against Iran.

### The European Commission's disputed decisions

In November 2018, IFIC Holding was designated on the SDN list. Clearstream Banking AG then, firstly, blocked the dividends due to IFIC Holding on a separate account, and refused to pay them to it, and secondly, referred the matter to the Commission to obtain authorization to comply with the US sanctions for a period of twelve months.

On April 28, 2020, the European Commission granted this authorization, in application of article 5, second paragraph of the European Blocking Statute, which was later renewed by decision on April 27, 2021, and April 26, 2022.

IFIC Holding, which had previously brought an action before a German national court to obtain information on the status of its dividends and their payment, filed an action before the General Court on January 10, 2021, seeking the annulment of the European Commission's authorization decisions.

In its July 12, 2023, judgment, the sixth Chamber of the General Court, in its extended composition, dismissed IFIC Holding's claim, in its various grounds, and provided important clarifications on the interpretation of the European Blocking Statute, including **(i)** the absence of any retroactive effect of the Commission's decisions, **(ii)** the absence of consideration for the interests of sanctioned third party, even when European, for the application of article 5 of the Regulation, and **(iii)** the limitation of the right to be heard.

**The Commission authorization decisions have no retroactive effect**

A crucial point addressed in this ruling concerns the absence of retroactive effect of decisions taken by the European Commission. The General Court emphasized that the authorizations granted to Clearstream Banking AG had no retroactive effect and were valid from the date of notification for a period of twelve months. Thus, they cover the blocking of funds carried out only after the date on which the Commission's decisions became valid, and the fact that Clearstream claims to the contrary before the German national courts was deemed irrelevant. Clarifying such absence of retroactive effect allows to temporally define the application of the measures taken by Clearstream.

**The interests of the sanctioned third party are not to be considered when authorizing compliance with extraterritorial laws**

The most significant contribution of this ruling lies above all, in our view, in the confirmation that the interests of the sanctioned third-party do not have to be considered by the European Commission when deciding on an application for an authorization. Indeed, it stems from the Article 5, second paragraph, and the provisions of the 2018 Implementing Regulation[4] that only the interests of the applicant and the European Union are taken into account. The General Court added that this should also be the case when the sanctioned third party is a European person - and therefore likely to fall within the scope of the EU Blocking Statute and hence its protective objectives - this circumstance being irrelevant in this context.

The General Court therefore considers that, contrary to IFIC Holding's argument, the Commission does not have to consider the possibility of having recourse to less restrictive alternatives, or whether IFIC Holding could have availed itself of a right to compensation. The first is explained by the intrinsic binarity of the question put to the Commission: to authorize or refuse a European operator to comply with foreign legislation; the second, by the fact that compensation is a subject distinct from authorization.

Finally, it should be noted that the Court also confirmed that the Commission's consideration of the applicant's interests may include the risk of US sanctions incurred by a "*sister company*".

**The sanctioned third party's right to be heard**

The General Court also considered the relevant question of the right to be heard, raised by IFIC Holding, which the Court weighed up against the objectives of the EU Blocking Statute in the light of the fundamental principles of Union law.

IFIC Holding relied on Article 41 of the Charter of Fundamental Rights of the European Union, which stipulates in 2.a) "*the right of every person to be heard, before any individual measure which would affect him or her adversely is taken*", and considered that if it had been heard by the Commission, the latter could have refused to grant its authorization.

The General Court held that although this right is of general application and must be respected even where the applicable regulations do not provide for such a formality, it may also be subject to limitations under Article 52 of the same Charter. Such restrictions must be provided for by law, respect the essence of such right and, in accordance with the principle of proportionality, be necessary and genuinely meet objectives of general interest recognized by the Union.

At the end of its review, the General Court concluded that this was the case regarding the EU Blocking Statute and the absence of a hearing of the sanctioned third party in the context of a request for authorization, the granting of which is deemed to be "*in line with the objectives of Regulation no. 2271/96, but also with the general policy objectives of the Union*".

On the contrary, the General Court considered that the exercise of the right to be heard by the sanctioned third party would not be consistent with such objectives, that an uncontrolled dissemination of information could jeopardize. It noted that "*this could enable the authorities of the third country which is at the origin of the annexed laws to become aware of the fact that a person has applied for authorization* [...] *and that he is, therefore, likely to comply or not with the extraterritorial legislation of that third country, which would entail risks in terms of investigations and sanctions in respect of that person and, consequently, prejudice to the interests of that person and, where appropriate, of the Union*". This pragmatic approach by the General Court is to be welcomed, given that the position of the European operators - between a rock and a hard place – is bound to be somewhat uncomfortable.

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With its July 12, 2023, ruling, the General Court of the European Union has provided crucial clarification on the application of the EU Blocking Statute and further added to the legal implications of the Commission's decisions.

In addition, this ruling could act as a catalyst for renewed interest in invoking the European Blocking Statute, as its improved legal clarity is likely to encourage an upsurge in its use. In the absence of a revision of the EU Blocking Statute in 2023, this ruling, by validating the authorizations granted to companies by the European Commission, will encourage them to be more transparent, and to systematically inform the Commission of any conflicts of laws or American pressure they may be subject to; although the Commission reserves the right to sanction companies which, unbeknownst to the European authorities, choose to submit to American law.

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[1] Article 5, paragraph 2, of Regulation (EC) no. 2271/96.

[2] In its *Report to the European Parliament and the Council concerning Article 7(a) of Council Regulation (EC) No. 2271/96 (the "Blocking Statute")*, COM/2021/535 final, of September 3, 2021, the Commission states that it received 63 notifications from European operators between August 1st, 2018 and March 1st, 2021, of which only 10 were linked to or were followed by legal proceedings before the courts of the Member States (p. 6-7).

[3] CJEU, Grand Chamber, December 21, 2021, judgment C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*.

[4] Implementing Regulation (EU) 2018/1101, Article 4.

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