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Interpreting an unsatisfactory EU Blocking Statute: *Bank Melli Iran*

Case C-124/20, *Bank Melli Iran* v. *Telekom Deutschland GmbH,* Judgment of the Court of 21 December 2021, EU:C:2021:1035

1. Introduction

In 1996, the EU adopted Regulation 2271/96, known as the Blocking Statute, to protect the EU and EU operators against the effects of a third country's extraterritorial regulations.[1] The Blocking Statute was a direct response to the promulgation of US "extraterritorial" sanctions regulations regarding Cuba, Iran, and Libya. These regulations did not only restrict trade and investment between US persons and sanctioned countries, but also between non-US persons, for example EU economic operators, and such countries.[2] The Blocking Statute was meant to nullify the effects of these regulations in the EU, but it lay dormant for many years, after EU/US differences were settled politically. In 2018, however, following US President Trump's reinstatement of sanctions against Iran, the Blocking Statute was reactivated.[3]

After the reinstatement of US sanctions, in 2018, many EU economic operators terminated contracts with Iranian business partners for fear of falling foul of US sanctions. Thus, in the case that would eventually end up before the ECJ, telecommunications provider Telekom Deutschland, which risked exposure to US sanctions given its sizable US presence, gave notice of termination of all contracts to the Bank Melli, an Iranian bank which has a branch in Hamburg (Germany). Doubts arose, however, as to whether such a termination would be compatible with Article 5.1 of the Blocking Statute, which prohibits EU persons from complying with US sanctions against Iran.

Bank Melli initiated proceedings against Telekom before the Regional Court of Hamburg, claiming infringement of the Blocking Statute. In an interim decision, this Court enjoined Telekom to perform the contracts until

1. Council Regulation (EC) 2271/96 of 22 Nov. 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, O.J. 1996, L 309/1 (Blocking Statute).

2. At length on secondary or extraterritorial sanctions: Ruys and Ryngaert, "Secondary sanctions: A weapon out of control? The international legality of, and European responses to, US secondary sanctions", *British Yearbook of International Law* (2020), available at <doi.org /10.1093/bybil/braa007> (all websites last visited 17 Jan. 2023).

3. Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to [the EU blocking statute], O.J. 2018, L 199/1.

the end of the period of notice for ordinary termination. Shortly after this decision, Telekom sent a notice of ordinary termination of the contracts. Bank Melli applied once more to the Regional Court of Hamburg, which considered the ordinary termination of the contracts by Telekom to be valid. Bank Melli appealed this decision to the Hanseatic Higher Regional Court, in Hamburg, Germany, claiming that also the notice of ordinary termination infringed Article 5.1 of the Blocking Statute.[4] This Court decided to stay the proceedings and to refer a number of questions to the ECJ for a preliminary ruling.

The German Court requested the ECJ to clarify, in essence: (1) whether, for Article 5.1 of the Blocking Statute to apply, an official order issued by a US authority was required; (2) whether the party giving notice of termination was required to provide a reason for its termination, demonstrating that the termination was not motivated by the intention to comply with the US sanctions regime; (3) whether ordinary termination in breach of Article 5.1 of the Blocking Statute was necessarily ineffective in the context of civil proceedings, or whether instead the purpose of the Blocking Statute could also be achieved through public law penalties; and (4) whether the compliance prohibition also applies where maintaining the business relationship with a contracting party subject to US sanctions would expose the EU operator to considerable economic losses on the US market.

In its judgment in *Bank Melli*, which is the first ECJ judgment concerning the scope of the Blocking Statute,[5] the ECJ ruled that: (1) Article 5.1 of the Statute also applies absent an official order issued by a US authority; (2) in civil proceedings, the party giving notice of termination is required to establish that its conduct was not intended to comply with US extraterritorial sanctions regulations; and (3) a balance needs to be struck between the pursuit of those objectives served by the annulment of the termination of a contract, and the probability that the operator may be exposed to economic loss.

The ECJ's judgment in *Bank Melli* is eminently reasonable and pragmatic, insofar as it attempts to accommodate the unenviable position of EU operators who may be caught between the rock of the EU Blocking Statute and the hard stone of US sanctions enforcement. It does so by creating a small window of opportunity for such operators to comply with US regulations, in case US sanctions would result in major economic losses for such operators, for

4. The German proceedings are summarized in the judgment, paras. 16–33, and in the Opinion in Case C-124/20, *Bank Melli Iran*, EU:C:2021:386, paras. 37–48.

5. Another case is currently pending before the General Court, an action for annulment in Case T-8/21, *IFIC Holding* v. *Commission*, in which the Iran Foreign Investment Company challenged the authorization granted by the European Commission to Clearstream Banking AG, which allowed the latter to comply with US extraterritorial sanctions regulations, on the basis of Art. 5.2 of the Blocking Statute.

example severe US penalties or loss of access to US markets. For the ECJ, the freedom to conduct a business may, at least in some circumstances, trump the compliance prohibition laid down in Article 5.1 of the Blocking Statute. But in so ruling, the ECJ lays bare a fundamental weakness of the Blocking Statute; namely the conflicting legal obligations which EU operators face when navigating US sanctions and EU countersanctions. The weaknesses of the Blocking Statute were in fact well-known before the ECJ handed down its judgment. They have led the Commission to explore a possible amendment of the Blocking Statute, but so far it has not made a specific proposal. Instead, at the end of 2021, the Commission unveiled a proposal for an EU Anti-Coercion Instrument, that aims to counter all forms of economic coercion by third countries.[6]

This annotation proceeds as follows. Section 2 summarizes the Opinion of Advocate General Hogan. Section 3 presents the thrust of the ECJ's judgment. Section 4 comments on the judgment, and more generally on the application of the Blocking Statute and on the EU's efforts to counter foreign coercion.

2. The Opinion of the Advocate General

In his Opinion, Advocate General Hogan started out by outlining the reasons for the adoption of the Blocking Statute in 1996, and its reactivation in 2018.[7] Strikingly, before addressing the substance of the case, he flagged up front the limitations of the current Blocking Statute, which catch European companies between a rock and hard place; and he went on to call on the EU to review the Statute.[8] Advocate General Hogan returned to these limitations at the very end of his Opinion, where he lambasted the Blocking Statute as "a very blunt instrument" that "will inevitably bring casualties in its wake" (such as possibly Telekom Deutschland), but he also observed, almost fatalistically, that the Court can only give effect to the law as it currently stands.[9]

In his substantive analysis, Advocate General Hogan followed the order of the reference, but discussed the third and the fourth questions together, on the ground that both concern the relationship between the prohibition of complying with extraterritorial sanctions legislation on the one hand (Art. 5.1

6. Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries, COM(2021)775 final (ACI). See *infra* section 4.5.
7. Opinion, paras. 1–7.
8. Ibid., para 5.
9. Ibid., paras. 136–137.

Blocking Statute), and the freedom to conduct a business on the other (Art. 16 of the Charter of Fundamental Rights of the European Union).[10]

As to the first question, Advocate General Hogan, espousing a combined textual, contextual, and teleological interpretation of Article 5.1 of the Blocking Statute, took the view that the compliance prohibition also applies in case an operator complies with extraterritorial sanctions legislation without being required to do so by a foreign administrative or judicial agency.[11] In so doing, he showed a keen awareness of the business reality that operators will tend to take into account any constraints constituted by the mere adoption of foreign legislation, regardless of any administrative or judicial decisions taken on the basis of such legislation.[12]

As to the second question, Advocate General Hogan first clarified that also foreign entities, like Bank Melli Iran, have a right of action under Article 5.1 of the Blocking Statute, on the ground that this serves to uphold the public policy objectives of the Regulation, in particular to counter illegal extraterritorial legislation.[13] He pointed out that, otherwise, enforcement of Article 5.1 of the Blocking Statute would depend only on the willingness of the Member States to initiate a public enforcement action – which is an undesirable state of affairs.[14] The Advocate General then went on to state that an EU person has to *justify* that its decision to terminate contracts with a party sanctioned by the US was not related to a desire to comply with that State's sanctions legislation.[15] According to the Advocate General, this EU person could also give this justification after a claimant has initiated judicial proceedings.[16] While, in principle, the burden of proof is incumbent on the claimant, the Advocate General was aware that, due to business secrecy, it will be almost impossible for the latter to gather evidence in relation to the reasons for an EU person's decision to discontinue a commercial relationship.[17] Therefore, the claimant can suffice with providing *prima facie* evidence, whereafter the burden shifts to the EU operator (Telekom Deutschland), who is required to establish that it discontinued the relationship on grounds other than the desire to comply with foreign sanctions legislation.[18]

As to the third and fourth questions, Advocate General Hogan opined that Article 5.1 of the Blocking Statute was not contrary to the freedom to conduct

10. Ibid., para 100.
11. Ibid., para 65.
12. Ibid., paras. 61 and 64.
13. Ibid., paras. 76–77, 81.
14. Ibid., paras. 78–80.
15. Ibid., para 90.
16. Ibid., para 92.
17. Ibid., para 95.
18. Ibid., paras. 96 and 98.

a business, guaranteed by Article 16 of the Charter.[19] He considered the compliance prohibition to be both suitable and necessary to achieve a fundamental public policy objective of the EU,[20] and not be disproportionate to the aims pursued. As to proportionality, he pointed out in particular that operators can apply to the Commission for an exemption from the compliance prohibition, on the basis of Article 5.2 of the Blocking Statute.[21]

The upshot of Advocate General Hogan's interpretation of the Blocking Statute was that Telekom Deutschland could not terminate its contractual relationship with Bank Melli Iran, unless it could justify this termination on grounds other than the desire to comply with US extraterritorial sanctions regulations.

3. Judgment of the Court

The ECJ largely agreed with the Advocate General's Opinion, but departed from it in one crucial respect: it left open a window for an operator's valid termination of a contractual relationship with a sanctioned party, in ostensible breach of the compliance prohibition laid down in Article 5.1 of the Blocking Statute, in case the operator would be exposed to major economic losses in case of inability to terminate the relationship. This means that the operator can, at least in some (limited) circumstances, still seek to comply with US extraterritorial sanctions *without* breaching EU law.

As to the first question, just like the Advocate General, the ECJ held that the compliance prohibition pursuant to Article 5.1 of the Blocking Statute also applies in the absence of an administrative or judicial order by a third country authority. According to the ECJ, a third country's extraterritorial sanctions legislation may produce effects by the mere *threat* of legal consequences in case of breach.[22]

As to the second question, unlike the Advocate General, the ECJ dispensed with an analysis of whether foreign entities like Bank Melli Iran have a right of action under Article 5.1 of the Blocking Statute. Instead, for the ECJ it sufficed that proceedings are instituted against a person to whom the compliance prohibition is addressed (Telekom Deutschland in this case).[23] Just like the Advocate General, the ECJ emphasized the importance of reliance on civil proceedings to ensure the full effectiveness of the Blocking

19. Ibid., para 135.
20. Ibid., paras. 130–132.
21. Ibid., para 134.
22. Judgment, para 49.
23. Ibid., para 59.

Statute.[24] Also with respect to the question whether the operator is under an obligation to provide reasons for terminating the contract with a sanctioned party, the ECJ followed the Advocate General: the operator need not as such provide reasons, but in case of civil proceedings initiated against him, as soon as the counterparty has made a *prima facie* claim that he did seek to comply with a third country's extraterritorial legislation, he will bear the burden to establish that, with the termination, he did *not* seek to comply.[25]

Just like the Advocate General, the ECJ treated the third and fourth questions together, but as already indicated above, answered them somewhat differently. While the Advocate General took a rather absolutist view of the compliance prohibition of Article 5.1 of the Blocking Statute (only mitigated by an exemption granted by the Commission), the ECJ created some more leeway, by allowing the referring court – and thus any court hearing this type of contractual disputes – to conduct a more thorough proportionality analysis. Per the ECJ's ruling, Member States' courts are allowed to strike a balance between the objectives of the Blocking Statute on the one hand, and the freedom to conduct a business, enshrined in Article 16 of the Charter, on the other. This means that it may, in some circumstances, be disproportionate for a court to annul an operator's termination of a contract pursuant to Art. 5.1 of the Blocking Statute, if such annulment would expose the operator to major economic losses.[26] Major economic losses could potentially occur if the operator, as a result of complying with the EU Blocking Statute, becomes the subject of enforcement measures taken by US authorities on grounds of violating US sanctions regulations; such measures could range from prohibiting access to US markets to civil or even criminal penalties.

On closer inspection, the window created by the ECJ may be a relatively narrow one, however, as the ECJ thought it relevant for the proportionality assessment that Telekom had not applied to the Commission for a derogation (exemption) from the compliance prohibition; in so doing, according to the ECJ, it "deprived itself of the possibility of avoiding the limitation on its freedom to conduct a business".[27]

4. Comment

In its judgment in *Bank Melli*, the ECJ has, for the first time, clarified a number of key issues concerning the interpretation of the compliance

24. Ibid., para 59.
25. Ibid., para 68.
26. Ibid., para 92.
27. Ibid., para 93.

prohibition laid down in Article 5.1 of the Blocking Statute, in the specific context of civil proceedings involving private contracting parties. First, EU operators who comply with a third country's extraterritorial sanctions legislation and on that basis terminate a contractual relationship, are in breach of Article 5.1, even if there is no formal decision of a third country authority directing them to comply. Second, such operators are under an obligation to provide reasons for the termination of the relationship, at least in civil proceedings initiated by the other party to the contract; such reasons cannot relate to the wish to comply with a third country's extraterritorial sanctions legislation. Mitigating these first two principles, however, thirdly, and perhaps most importantly and surprisingly, EU operators who do comply with such legislation may still escape annulment of the termination of the contractual relationship if such annulment were to entail disproportionate economic effects for them.

This comment is divided into five parts. Section 4.1 reflects on, and cautiously supports the ECJ's pragmatic test balancing the annulment objectives of Article 5.1 of the Blocking Statute and the economic interests of EU operators. Section 4.2 argues that Article 5.1 of the Blocking Statute, as interpreted by the ECJ, does not prohibit EU operators from aligning with US sanctions regulation, short of actual compliance. It is challenging, however, to ascertain the true motivation of EU operators cutting links with US-sanctioned parties. Section 4.3 observes that, unfortunately, the ECJ in *Bank Melli* does little to clarify the relationship between contractual sanctions clauses and the compliance prohibition of Article 5.1 of the Blocking Statute. This is an important issue, as many commercial contracts feature such clauses. Section 4.4 draws attention to the fact that not all US extraterritorial sanctions regulations have been added to the annex of the Blocking Statute. This may be justifiable on geopolitical grounds, although it inevitably means that some EU operators adversely affected by US sanctions may not be "protected" by the Blocking Statute. Section 4.5, finally, discusses the possible amendment of the Blocking Statute, while noting that, for the time being, the EU seems to prioritize the adoption of an EU Anti-Coercion Instrument that may allow the EU to take countermeasures against third-country economic coercion.

4.1. *The ECJ's balancing test*

In its answer to the third and fourth questions put before the ECJ, the Court introduces a proportionality-based balancing test that may tip in favour of an EU operator having no other economic choice than to comply with US sanctions regulations. This test is testament to the ECJ's pragmatism and its awareness of the limitations of the Blocking Statute. As many EU operators

have sizable contacts with, and operations in the US (50% of Telekom Deutschland's turnover is in the US, for instance),[28] a strict application of the compliance prohibition under Article 5.1 of the Blocking Statute may either expose such operators to US penalties, or force them to withdraw from the US markets altogether. In both scenarios, major economic losses for those operators – and ultimately for the EU at large – might ensue.

By interpreting the Blocking Statute in light of the EU Charter of Fundamental Rights, in particular the freedom to conduct a business (Art. 16) and the principle of proportionality (Art. 52), the Court avoids that EU operators are caught between the hammer of US sanctions and the anvil of the EU Blocking Statute. Per the *Bank Melli* dictum, at least in some circumstances, such operators may be allowed to comply with US sanctions, and on that basis terminate a contractual relationship of which the continuance may expose them to US sanctions, without these operators violating EU law – in spite of ostensible breach of Article 5.1 of the Blocking Statute.

Admittedly, the fact that the ECJ considers an operator's application for a derogation from Article 5.1 as a relevant factor in the proportionality analysis, makes it clear that the circumstances where such an analysis will ultimately favour the operator, may be quite limited. Notably, in *Bank Melli*, on remand, the Higher Regional Court of Hamburg, in its judgment of 14 October 2022, after ruling that Telekom's notice of termination violated Article 5.1, cited the company's failure to apply to the Commission as the main reason to uphold the propotionality of this ruling (11 U 116/19, para 98).

Still, the Court does not as such exclude the validity of an operator's termination of a contract that is informed by a willingness to comply with US sanctions legislation – even if that operator has *not* applied to the Commission for a derogation. In fact, an operator may well refrain from filing such an application lest it attract unwelcome attention from the Commission: in case the application is denied, the operator may be concerned that the Commission, alongside the responsible Member States, will monitor its activities to ensure that it does not comply with US sanctions after all. Also, operators may refrain from filing an application because the procedure is considered too lengthy, and requires sizable investment.[29]

In any event, a proportionality assessment will not weed out all cases where operators are caught between the hammer and the anvil. There will be cases where operators complying with US sanctions regulations will be sanctioned under EU law, for example by being enjoined to maintain a contractual

28. Opinion, para 37.

29. Commission, Summary of Results of the Open Public Consultation on the review of the Blocking Statute (Council Regulation (EC) 2271/96), 2021, Ref. Ares(2021)7829130 – 17 Dec. 2021, p. 3.

relationship. Conversely, there will be cases where operators complying with the EU Blocking Statute will be sanctioned by the US. In principle, for the latter category of cases, Article 6 of the Blocking Statute provides for a claw-back right, which entitles EU persons to recover any damages caused to them by the application of extraterritorial laws adopted by third countries, or "by actions based thereon or resulting therefrom". According to the article, "[s]uch recovery may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary". However, it is not clear how and against whom exactly the claw-back right can or should be exercised, as the main entity responsible for the harm caused – the US Government – enjoys immunity from jurisdiction before domestic courts of EU Member States.[30]

4.2. *Alignment with US sanctions short of compliance*

It is important to understand that the compliance prohibition of Article 5.1 of the Blocking Statute, as interpreted by the ECJ in *Bank Melli*, does not apply in case economic operators merely *align* with the US extraterritorial sanctions listed in the annex to the Statute, as long as they do not formally *comply* with them. Indeed, the Blocking Statute does not require that operators maintain contractual relations with a sanctioned party, or with parties that have links with countries sanctioned by the US, such as Iran or Cuba. Most certainly, requiring an operator to maintain a contractual relationship at all costs flies in face of the freedom to conduct a business.

Thus, operators can terminate such a relationship on grounds other than the wish to comply with US sanctions, even if the end result may be the same. For instance, they can end a relationship with a party linked to Iran, because they do not agree with Iran selling drones to Russia for use against Ukraine, or because they do not agree with Iran's treatment of women.[31] The outcome of such a termination may be exactly the same as the outcome of a termination based on compliance with US sanctions, but the motivation differs.

It remains difficult, however, to ascertain the true motivation of an EU operator. Even though the Court's judgment in *Bank Melli* places the burden of proof on operators, they can cover their tracks by limiting or manipulating the corporate paper trail, thereby hiding their true intentions. Ultimately, operators may relatively easily discharge the burden of proof by presenting

30. Ibid., p. 4 (respondents pointing out that "it may prove difficult to identify the defendant and its assets in the EU" and that "sovereign immunity issues arise if a foreign public authority is found to have caused the damage").

31. See also Opinion, paras. 87–88, requiring such an operator "to demonstrate that it is actively engaged in a *coherent* and *systematic* corporate social-responsibility policy" (original emphasis).

divestment decisions simply as decisions informed by business or moral considerations, even if in reality these have been informed by the desire to comply with US extraterritorial sanctions legislation.

4.3. *Sanctions clauses*

The ECJ's judgment in *Bank Melli* does not shed much light on the validity of "sanctions clauses", the use of which is a common practice in international business transactions. Consider, for instance, the following sanctions clause developed in 2022 by BIMCO, the leading global organization for shipowners, charterers, shipbrokers and agent, for contracts of affreightment:[32]

> "(a) For the purposes of this Clause:
>
> 'Sanctioned Activity' means any activity, service, carriage, trade or voyage subject to sanctions imposed by a Sanctioning Authority.
> 'Sanctioning Authority' means the United Nations, European Union, United Kingdom, United States of America or any other applicable competent authority or government.
> 'Sanctioned Party' means any persons, entities, bodies, or vessels designated by a Sanctioning Authority.
>
> (b) The Owners and the Charterers each warrant that at the date of this Contract and throughout its duration they are not a Sanctioned Party.
> (c) If at any time either party is in breach of subclause (b) above then the party not in breach may suspend performance under the Contract, terminate the Contract and/or claim damages resulting from the breach."

Such sanctions clauses are also often used in the financial sector.[33] They are inserted into contracts to help contracting parties navigate conflicting sanctions regulations.

The question arises, however, whether they are compatible with the compliance prohibition of Article 5.1 of the Blocking Statute. Sanctions clauses allow a contractual party to suspend contractual performance or terminate a contract with a sanctioned party, including a party that has been

32. <www.bimco.org/contracts-and-clauses/bimco-clauses/current/sanctions-clause-for-contracts-of-affreightments>.

33. International Chamber of Commerce, "Guidance Paper: The use of sanctions clauses in trade finance-related instruments subject to ICC Rules, including documentary and standby letters of credit, documentary collections and demand guarantees" (2014, as updated).

designated by the US. On the one hand, it may appear that such clauses allow operators to – at least indirectly – comply with US extraterritorial sanctions legislation, whilst Article 5.1 of the Blocking Statute precisely prohibits compliance, including indirect compliance.[34] On the other, it could be argued that giving effect to generally worded sanctions clauses does not amount to – in the words of Article 5.1 of the Blocking Statute – complying "actively or by deliberate omission, with any requirement or prohibition, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom". While contracting parties certainly take the risk that the scope of sanctions clauses also includes extraterritorial sanction regulations, the intention to comply with such regulations may be lacking. Thus, the English High Court in *Mamancochet* (2018), saw "considerable force" in the argument that a sanctions clause suspending a contractual obligation to pay would not breach the Blocking Regulation (although this dictum was only *obiter*).[35]

In any event, regardless of the application of the Blocking Regulation, domestic courts routinely approve of contracting parties' compliance with US extraterritorial sanctions on the basis of sanctions clauses. In *Lamesa* (2019), which concerned US extraterritorial sanctions against Russia, the English High Court considered sanctions as mandatory provisions of law under a contractual sanctions policy and ruled that parties can expressly agree that non-performance of contractual obligations can be excused by a foreign law.[36] In 2020, in a dispute involving corporations controlled by the Russian oligarch Viktor Vekselberg, sanctioned by the US, the Swiss Federal Tribunal ruled that a Swiss bank is allowed to refuse performance of a financial transaction requested by one of Vekselberg's corporations, on the basis of a sanctions clause which provided that "the Bank may refuse orders which do not correspond with the regulations or standard practices in place at exchanges or other trading centres".[37] Also in 2020, the Court of Appeal of Amsterdam (the Netherlands), citing a contractual "ultra high-risk country" clause, approved of the termination by a Dutch commercial bank of its relationship with the oil company Staroil, which was sanctioned by the US for doing business with Syria.[38]

34. Art. 5.1 of the Blocking Regulation: "No person . . . shall comply . . . with any requirement or prohibition . . . based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom."

35. *Mamancochet Mining Limited* v. *Aegis Managing Agency Limited* [2018] EWHC 2643 (Comm).

36. *Lamesa Investments Ltd* v. *Cynergy Bank Ltd* [2019] EWHC 1877 (Comm).

37. Tribunal fédéral suisse, arrêt du 6 août 2021 (4A_659/2020).

38. Court of Appeal Amsterdam*, Staroil,* judgment of 6 Oct. 2020, NL:GHAMS:2020:2621.

4.4. *The Blocking Statute's selectivity in the choice of US sanctions regulations*

In the aforementioned English case of *Lamesa* and the Dutch case of *Staroil*, the EU Blocking Statute could have played a role had US extraterritorial sanctions against Russia and Syria featured in the annex to the Blocking Statute. Currently, however, the annex only lists US regulations with respect to Cuba and Iran, although other US regulations *also* have extraterritorial effects and cause headaches for EU operators.

Advocate General Hogan appears to have been aware of this issue where he observed, in the context of the proportionality principle, "that the Commission must also ensure, when adding legislation enacted by third countries to the annex, that the inclusion serves the objectives of the EU blocking statute and that the consequences produced by this inclusion are justified and proportionate to the effects produced by the EU blocking statute" – but he noted that this question has not been raised by the referring court.[39] Also respondents to a Commission survey voiced concerns over the foreign laws and regulations listed in the annex.[40]

While there may be a certain selectivity regarding the inclusion of US extraterritorial sanctions regulations in the annex, it appears that in case of basic political agreement between the EU and the US on the need to impose sanctions on particular States, for example on Syria and Russia,[41] the EU may well tolerate US extraterritorial sanctions regulations. Such US regulations may create additional burdens for EU operators, but the EU may legitimately claim that adding such regulations to the annex of the Blocking Statute does not serve EU geopolitical interests, and thus may be disproportionate to the objectives pursued by the Blocking Statute. In fact, the EU may even support US extraterritorial sanctions in case the EU and the US have coordinated their sanctions policies. From the EU's perspective, additional US extraterritorial sanctions may serve as a "force-multiplier" that allows the EU to achieve its political goals (e.g. weakening Russia's economic base), even if such sanctions impose costs on EU economic operators. In spite of the Blocking Statute's lofty and principled declaration that the extraterritorial application of sanctions regulations violates international law, it rather appears that the

39. Opinion, para 135.

40. Summary of results cited *supra* note 29, p. 6.

41. Council Decision (CFSP) 2022/849 of 30 May 2022 amending Decision 2013/255/CFSP concerning restrictive measures against Syria, O.J. 2002, L 148/52; Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, O.J. 2014, L 229/1, as amended.

Statute's purpose is only to counter those (US) extraterritorial sanctions that are considered as politically inconvenient.

4.5. *Amending the Blocking Statute*

From the foregoing analysis, it can be gleaned that the Blocking Statute suffers from several weaknesses: it cannot remove EU operators' potential exposure to US sanctions, its (public) enforcement leaves to be desired, its claw-back provision is non-operational, and it only counters US secondary sanctions in a selective fashion.

The ECJ's judgment in *Bank Melli* points at the first and most fundamental defect, and even contradiction inherent to the Blocking Statute. It is recalled that the Blocking Statute was adopted at the time "to protect the established legal order, the interests of the Community and the interests of the [natural and legal persons under the jurisdiction of Member States], in particular by removing, neutralizing, blocking or otherwise countering the effects of the foreign legislation concerned".[42] *Bank Melli*, however, illustrates that the Statute may in reality have the opposite effect, as EU operators rather than the US may end up paying the price of the Statute (even if the ECJ has carved out a narrow exception). For such operators to comply with the Statute means forfeiting lucrative business opportunities in the US. Ultimately, this may also dent the EU's economic competitiveness and undermine its long-term interests.

The weaknesses of the Blocking Statute had in fact been identified well before the ECJ's judgment in *Bank Melli.* As early as 19 January 2021, the Commission indicated in a Communication that it would "consider additional policy options to further deter and counteract the unlawful extra-territorial application of unilateral sanctions by third countries to EU operators, including a possible amendment of [the Blocking Statute]".[43] Among possible measures, the Commission mooted the adoption of clearer procedures and rules for applying the claw-back mechanisms of Article 6, "strengthened national measures to block the recognition and enforcement of foreign decisions and judgments based on the listed extra-territorial measures" pursuant to Article 4, "streamlined processing for authorization requests pursuant to Article 5, second paragraph, including a review of the information requested", and "possible involvement in foreign proceedings to support EU companies and individuals".[44]

42. Blocking Statute, preamble.

43. COM(2021)32 final, Commission Communication, "The European economic and financial system: Fostering openness, strength and resilience", 19 Jan. 2021, p. 19.

44. Ibid., p. 18.

The Commission subsequently launched a public consultation process regarding a possible amendment of the Blocking Statute, which ran from September through November 2021. Results of this consultation were subsequently made public. The majority of respondents were of the view that the Blocking Statute had not been successful in achieving its objectives, in particular given the conflicting obligations which EU economic operators face.[45] Respondents made various suggestions to amend the Blocking Statute, such as the taking of countermeasures against third countries, the provision of legal and financial support to operators, or the exclusion of specific sectors from the compliance prohibition of Article 5.1 of the Blocking Statute.[46]

The Commission has not yet come up with a proposal for an amended Blocking Statute. The urgency for an amendment may no longer be felt in light of the EU's strengthening of its existing Iran human rights sanctions regime in response to Iran's brutal crackdown against anti-government demonstrators in 2022.[47] It would be politically awkward for the EU to oppose US (extraterritorial) sanctions against Iran, while simultaneously strengthening its own sanctions against Iran – even if the latter are based on Iran's human rights violations rather than its development of weapons of mass destruction.

Instead, the Commission has invested in a related proposal for an Anti-Coercion Instrument (ACI), which would enable the EU to respond to a third country's coercion of the EU and its Member States,[48] and thereby defend its strategic autonomy.[49] The ACI, which was unveiled on 8 December 2021, does not just seek to respond to extraterritorial sanctions regulations, but to all forms of economic coercion. The ACI defines coercion as a situation where a third country "interferes in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State – by applying or threatening to apply measures affecting trade or investment".[50] Under the proposal, after determining that a third-country measure is coercive, the Commission may adopt anti-coercive measures, which may consist of restrictions on foreign direct investment or trade in services within the EU.[51]

45. Summary of results cited *supra* note 29, p. 3.

46. Ibid., pp. 5–6.

47. Council Implementing Regulation (EU) 2022/2428 of 12 Dec. 2022 implementing Regulation (EU) 359/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran, O.J. 2022, L318 I/1.

48. ACI, Proposal cited *supra* note 6.

49. See also Hackenbroich, "Defending Europe's economic sovereignty: New ways to resist economic coercion", European Council of Foreign Relations (2020).

50. ACI, Proposal cited *supra* note 6, Art. 2.

51. Ibid., Art. 9(3).

At the time of writing, after the European Parliament's Trade Committee had overwhelmingly backed the ACI, the Parliament took the decision to enter into interinstitutional negotiations with the Council and the Commission.[52] Ahead of these negotiations, Member States were attempting to reach a compromise position that would possibly give Member States more influence over anti-coercion measures,[53] given that some Member States had voiced concerns over the concentration of decision-making power in the hands of the Commission.[54] Going forward, it will also be important to coordinate the application of the ACI with the application of the Blocking Statute, whether or not the latter is amended. Triggering both acts in parallel could be an option in this respect.[55]

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52. EP Trade Committee, 2021/0406(COD) – 13 Oct. 2022 – Committee report tabled for plenary; EP, Negotiations ahead of Parliament's first reading, 18 Oct. 2022.

53. Gijs, "EU countries seek to claw back power from Brussels on upcoming trade bazooka", Politico, 20 Oct. 2022.

54. ACI, Proposal cited *supra* note 6, Arts. 3–7.

55. Summary of results cited *supra* note 29, p. 8.

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