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RESEARCH ARTICLE

Building Castles in the Air? The EU Blocking Regulation and the Protection of the Interests of Private Parties

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Abstract
The EU Blocking Regulation intends to exclude the effects of extraterritorial legislation by third countries and, in particular, those of US economic sanctions, to protect the interests of economic actors in the EU. The goals of the Regulation—effective enforcement of EU law and the protection of the interests of EU economic actors—give rise to an enforcement paradox: a lack of enforcement by the Commission and the state authorities. The *Bank Melli* case not only demonstrates a shift in the enforcement of the Blocking Regulation to private parties but also sheds light anew on the doubts about its ability to protect private interests.

Keywords: economic sanctions; blocking statutes; compliance; extraterritoriality; enforcement paradox; clawback; authorisation

I. Introduction

'How the EU Learned to Love Sanctions?' This is the title of an article written by a political scientist, Clara Portela, who describes the increasing use of economic sanctions by the EU.[1] In the current war between Russia and Ukraine, the successive sanction packages of the European Union ('EU') suggest that the EU 'loves' sanctions and is indeed committed to bring about a change in the chain of events.[2] However, even if the EU does love its own sanctions, it does not necessarily like those of other countries. As a consequence, the EU sanctions policy not only embraces restrictive measures imposed by the EU, but also its blocking measures, which aim to exclude the effects of other countries' extraterritorial sanctions, most notably those of the United States of America ('US').

At the moment, these measures are contained in Council Regulation 2271/96/EC protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, the so-called Blocking Regulation.[3] One of the declared objectives of the Blocking Regulation is to protect the interests of EU economic operators. For this reason, the Regulation prohibits compliance with the foreign extraterritorial laws listed in its annex, rules out the recognition of foreign decisions based on them, contains a clawback provision to cover the damage suffered by EU economic operators as a result of the application of the listed extraterritorial legislation and includes an authorisation procedure to allow compliance in exceptional cases.

[1]C Portela, 'How the EU learned to love sanctions' in M Leonard (ed), *Connectivity Wars: The Geo-economic Battlegrounds of the Future* (European Council on Foreign Relations, 2016), p 36, https://ecfr.eu/article/essay_how_the_eu_learned_to_love_sanctions/.

[2]Until the time of writing this article, the EU adopted eleven sanction packages since the outbreak of the war in February 2022.

[3]Council Regulation (EC) No 2271/96 [1996] OJ L309/1.

While the EU regulatory approach has been seen by certain authors as a model for the legislation of other countries,[4] other commentators regard the EU Blocking Regulation as nothing more than a 'paper tiger',[5] they contend that it is 'dysfunctional'[6] and demonstrates the inability of the EU to counter extraterritorial US trade regulation. In relation to the Blocking Regulation, it was even suggested that the addressees are worse off than they would be without it.[7] The European Commission ('Commission') did not conceal the flaws in the Blocking Regulations, and it has recently envisaged modernising it. In the course of the open public consultation on its review, the majority of respondents thought that the Blocking Regulation 'has been unsuccessful in achieving its objective of protecting EU operators' from the extraterritorial enforcement of US sanctions.[8] Undeniably, these statements do not paint a very flattering picture of the Blocking Regulation. Therefore, the question must be posed whether the Blocking Regulation can indeed contribute to the effective enforcement of EU law and policy interests, as well as the simultaneous protection of the interests of the EU economic operators, or it is only a castle in the air built by the EU legislature. In the light of the recent *Bank Melli* judgment of the Court of Justice of the European Union ('CJEU'),[9] and amidst the ongoing review of the EU Blocking Regulation, it is worth reassessing it, in particular from the perspective of protecting private interests. This article can make a contribution to the existing scholarship by addressing the broader policy implications of this judgment, which has been so far less discussed in the legal literature, and the ways for reconsidering the EU's approach to countering foreign extraterritorial sanctions.

It is often overlooked that the Commission and the competent national authorities face the conflicting expectations of ensuring the effective enforcement of EU law and safeguarding the interests of EU economic operators. This gives rise to an enforcement paradox, manifesting in the authorities' reluctance to enforce the EU Blocking Regulation against EU economic operators. In fact, enforcement is shifted to private parties, which often intend to compel their contractual partners to observe the provisions of the Blocking Regulation before the courts of the Member States. *Bank Melli* is an illustration for enforcing the provisions of the Blocking Regulation by a private party, a third-country entity, the target of US sanctions with a view to escape from the effects of those sanctions even if their contractual partner, an EU economic operator, would have tended to observe the US sanctions.

The *Bank Melli* case brings a typical situation to the fore. Since EU companies do not want to lose their access to the US market, they often want to conform to US sanctions, while this is prohibited by the EU Blocking Regulation.[10] EU economic operators are thus exposed to conflicting obligations concerning the application of US sanctions. This article submits that, despite the stated objective of the Blocking Regulation, the EU failed to protect private interests appropriately and, as witnessed by Bank Melli, had largely left the task of enforcing the Regulation to the private sector

[4]D Senz and H Charlesworth, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation' (2001) 2(1) *Melbourne Journal of International Law* 69, pp 118–20.

[5]M Jennison, 'The More Things Change, the More They Stay the Same: The United States, Trade Sanctions, and International Blocking Acts' (2020) 69(1) *Catholic University Law Review* 163, p 174; T Ruys and C Ryngaert, 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions' (2020) *British Yearbook of International Law* 1, pp 98, 115.

[6]J Hackenbroich, 'Reviewing the EU Blocking Statute' in J Hackenbroich (ed), *Defending Europe's Economic Sovereignty: New Ways to Resist Economic Coercion* (European Council of Foreign Relations, 2020), p 14, https://ecfr.eu/publication/defending_europe_economic_sovereignty_new_ways_to_resist_economic_coercion/.

[7]M Lieberknecht, 'Die Blocking-Verordnung: Das IPR als Instrument der Außenpolitik' (2018) 38(6) *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 573, p 579.

[8]European Commission, Amendment of the Blocking Statute – Summary of the Results of the Open Public Consultation on the Review of the Blocking Statute (European Union, 2021), p 3.

[9]*Bank Melli Iran v Telekom Deutschland GmbH*, C-124/20, EU:C:2021:1035.

[10]C Beaucillon, 'An Introduction to Unilateral and Extraterritorial Sanctions: Definitions, State of Practice and Contemporary Challenges' in C Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Elgar, 2021), p 13.

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itself. The measures envisaged by the Blocking Regulation—obligation of non-compliance with the extraterritorial measures, the prohibition of recognising and enforcing foreign decisions giving effect to those measures, the clawback provision and the authorisation procedure—do not provide sufficient safeguards for business actors from the EU against disregarding the extraterritorial sanctions imposed by the US and the threat of serious penalties levied by US authorities.

The above considerations underline the need for an overhaul of the EU policy concerning foreign extraterritorial legislation and economic sanctions in particular. The EU must pursue a holistic approach, in which the synergy between the various regulatory elements (among which the EU Blocking Regulation is only one) can contribute to the effective enforcement of EU law and the protection of private interests at the same time.

II. The EU Blocking Regulation

The EU Blocking Regulation is a reaction to the adoption of extraterritorial legislation, including economic sanctions, by other countries. The goal of blocking statutes is to exclude the effects of foreign legislation claiming application without or based on a weak territorial connection to the factual situation. Using blocking statutes against the extraterritorial legislation of other countries is not an innovation of the EU. Sometimes, it is the target state that adopts countermeasures to exclude the effects of the sanctions imposed against it. For instance, Iraq intended to bar the effects of the international sanctions during the Gulf War.[11] Other countries may similarly enact blocking laws to counter extraterritorial legislation and in particular economic sanctions that are not imposed on them, but nevertheless affect their economic operators trading with the target state or entities from the target state. Among such blocking laws, one can refer to the Canadian Foreign Extraterritorial Measures Act,[12] the Australian Foreign Proceedings (Excess of Jurisdiction) Act[13] and the Mexican Act on the protection of commerce and investment from foreign norms which violate international law.[14] Most recently, China enacted the Anti-Foreign Sanctions Law to exclude the effects of 'discriminatory and restrictive' measures imposed by foreign states against Chinese entities.[15]

The EU Blocking Regulation was inspired by the UK Protection of Trading Interests Act of 1980, which was mainly concerned with the extraterritorial application of US antitrust law.[16] Even though the EU Blocking Regulation is generally tailored and can be invoked against the extraterritorial acts of any state (provided that the act is listed in the Regulation), only US economic sanctions laws and regulations have been its targets since its inception.

The stated objectives of the EU Blocking Regulation include remedying a situation deemed to be violating international law, ensuring the free movement of capital and providing protection against extraterritorial measures for private parties. The latter objective is expressed in Article 1 of the Blocking Regulation, which lays down that the 'Regulation provides protection against and counteracts the effects of the extra-territorial application of the laws specified in the Annex of this Regulation … where such application affects the interests of persons … engaging in international trade and/or the movement of capital and related commercial activities between the Community and third countries'. The recitals also confirm the same when they point out that extraterritorial legislation can 'have adverse effects on the interests of the Community and the interests of natural and legal persons exercising rights under the Treaty establishing the European Community' and

[11]Iraq Act No 57/1990. The text of the Act is reproduced and commented on in German by H Krüger, 'Das irakische Antiboykottgesetz 1990' (1990) 36 *Recht der Internationalen Wirtschaft* (RIW) 934.

[12]Foreign Extraterritorial Measures Act (RSC, 1985, C F-29), S 5.

[13]Foreign Proceedings (Excess of Jurisdiction) Act 1984, S 13. See Senz and Charlesworth, note 4 above.

[14]Ley de protección al comercio y la inversión de normas extranjeras que contravengan el derecho internacional, 23 de octubre de 1996.

[15]Law of the PRC on Countering Foreign Sanctions, 10 June 2021.

[16]Protection of Trading Interests Act 1980, 1980 C 11.

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therefore 'it is necessary to take action … to protect … the interests of the said natural and legal persons, in particular by removing, neutralising, blocking or otherwise countering the effects of the foreign legislation concerned'. The need for protecting the EU economic operators' interests was also underscored at the political level. In 2018, President Trump decided on the withdrawal of the US from the Joint Comprehensive Plan of Action ('JCPOA'), also known as the Iran Nuclear Deal, and the reinstatement of US sanction measures against Iran, some applied extraterritorially. As a response, the EU amended and reactivated the Blocking Regulation to exclude the application of the US sanctions against Iran and to prevent any economic harm to EU economic operators resulting from the application of these sanctions. Following the reactivation of the EU Blocking Regulation, Jean-Claude Juncker, then the president of the Commission, stated that the Commission and the EU have the duty to protect European businesses, especially small and medium-sized enterprises ('SMEs').[17]

The idea of protecting private interests is well-founded. The US measures targeted by the EU Blocking Regulation can impose a considerable burden of compliance on EU economic operators. They require EU companies to terminate business activity with entities sanctioned by the US, even if maintaining the business relations would be permitted under EU law. Although the intention of the EU Blocking Regulation is to mitigate this strain, what in fact it has done is to expose EU business actors to conflicting obligations. From one side, they are expected to comply with US sanctions or be subject to strict penalties, including heavy fines, a prison sentence and exclusion from the US market; from the other side, they cannot comply with the same sanctions due to the Blocking Regulation of the EU (unless they do not obtain an authorisation from the Commission to comply with the US sanctions). As a consequence, they must take a hard business and legal decision: to comply with the US sanctions (even though this is prohibited by the Blocking Regulation) or to yield to the prohibition of compliance in the Blocking Regulation even taking the risk of losing their access to the US market.

III. The Failed Target: The Protection of Private Parties' Interests

We have seen that a *Leitmotiv* of the EU Blocking Regulation is the goal of protecting private parties affected by the listed extraterritorial laws. The question of whether the provisions of the Regulation are indeed capable of promoting this objective must therefore be posed. For this purpose, those provisions of the Blocking Regulation that intend to protect EU economic operators (the prohibition of recognising and enforcing decisions giving effect to extraterritorial legislation, the clawback clause and the authorisation procedure) need to be assessed. The examination must start, however, with the obligation of non-compliance, which is the cornerstone of the Blocking Regulation and which had to be interpreted by the CJEU in the *Bank Melli* case. As explained, the extensive application of economic sanctions by the imposing state and the response of blocking measures drive economic operators to a situation of conflict, but this is only a real conflict if both the imposing state and the blocking state enforce their legislation. The recent *Bank Melli* judgment not only demonstrates the difficulties resulting from conflicting obligations, but also confirms the CJEU's willingness to enforce compliance with the Blocking Regulation.

A. Prohibition of Compliance

1. The content and the enforcement of the prohibition of compliance

Article 5 of the EU Blocking Regulation forbids EU economic actors to comply, directly or indirectly, actively or by deliberate omission, with the laws specified in its annex. This provision can be seen as protective as long as an EU economic operator does not want to comply with the listed

[17]Press release, European Commission Acts to Protect the Interests of EU Companies Investing in Iran as Part of the EU's Continued Commitment to the Joint Comprehensive Plan of Action, IP/18/3861 (18 May 2018).

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extraterritorial legislation. Nevertheless, non-compliance does not depend on the will of EU economic operators, but means an obligation for them.

The obligation of non-compliance can only be actually enforced if the competent authorities learn about the identity of persons and the existence of contracts subject simultaneously to the US sanctions and the EU blocking measures. In order to give teeth to the obligation of non-compliance, the Blocking Regulation attaches an obligation of notification to it. Under it, persons whose economic and/or financial interests are directly or indirectly affected by the listed extraterritorial legislation must inform the Commission.[18] This requirement is not subject to any exception. The notification is to be made to the Commission or the competent authorities of the Member States. In the former case, the Commission shall notify the competent authorities of the Member State of the residence or place of registration of the person concerned without delay.

Even if the obligation of notification intends to boost the chances of the enforcement of the Blocking Regulation, very few cases are known where the authorities in an EU Member State initiated proceedings against private entities for non-compliance with the EU Blocking Regulation.[19] Without doubt, this can be explained by the lack of notifications by operators. This unwillingness can probably be explained by the fear that, once a national authority learns of the exposure of an operator to a listed sanction, it will follow its compliance with the Blocking Regulation with close attention.[20] More importantly, however, the absence of procedures initiated by the competent authorities against EU economic operators can be traced back primarily to an enforcement paradox. Ensuring the *effet utile* of EU law and achieving the foreign and commercial policy objectives of the EU require the enforcement of the Blocking Regulation. Even if these goals make it the task of the Commission and the authorities of the Member States to enforce the obligation of non-compliance, even against EU economic operators, the declared objective of the Blocking Regulation, to protect them may temper the zeal to punish EU companies. The risk of public outcry in the event of proceedings against EU business actors may also discourage enforcement.[21] The tension between the effective enforcement of EU law, as well as foreign and commercial policy considerations and the protection of private parties, is answered in reality by the competent authorities not enforcing the prohibition of compliance. The lack of, or at the best sporadic, enforcement of the prohibition of compliance undermines the credibility of enforcement and the motivation of EU economic actors to observe the Blocking Regulation. This enforcement paradox at the same time highlights the role of the enforcement of the Blocking Regulation by private parties in private law proceedings against other private parties. The number of instances where courts in the Member States have to decide on the application of the Blocking Regulation in contractual disputes between private parties, where typically one of them invokes the need to respect the prohibition of compliance with US sanctions by its contractual partner, is growing. As a matter of fact, the principal enforcers of the EU Blocking Regulation are currently not the Commission or the Member States, but private parties.

In the judicial practice of the Member States, courts had to decide the conflict between US sanctions and the EU Blocking Regulation on several occasions. The *Bank Melli* case provided, however, the first opportunity for the CJEU to interpret its provisions.[22]

[18]EU Blocking Regulation, Art 2.

[19]A rare instance is the proceedings brought by the Austrian government against BAWAG, an Austrian bank, for terminating the bank accounts of Cuban clients in accordance with the US sanctions against Cuba. The intention of the bank was to facilitate its acquisition by a US investor. The US authorities finally exempted BAWAG from the compliance with the sanction. This enabled BAWAG to maintain the bank accounts concerned and the Austrian authorities surrendered further actions and this opened the door for the planned acquisition. See Jennison, note 5 above, p 174.

[20]Ruys and Ryngaert, note 5 above, pp 83–84.

[21]C Van Haute, S Nordin, and G Forwood, 'The Reincarnation of the EU Blocking Regulation: Putting European Companies Between a Rock and a Hard Place' (2018) 13(11/12) *Global Trade and Customs Journal* 496, p 500.

[22]The *Bank Melli* decision has already been discussed by the author in a case comment: T Szabados, 'Nachkommen oder nicht nachkommen, das ist hier die Frage… Das Dilemma der Wahl zwischen der Einhaltung der EU-Blocking-VO oder der US-Sanktionen vor dem Europäischen Gerichtshof' (2023) 31(1) *Zeitschrift für Europäisches Privatrecht (ZEuP)* 213.

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2. The *Bank Melli* judgment and the protection of private interests

Telekom, a subsidiary of Deutsche Telekom, which carries out significant economic activity in the US, terminated its contracts entered into with Bank Melli Iran, an Iranian Bank with an establishment in Hamburg after the latter had been put on the list of specially designated nationals and blocked persons ('SDN') of the Office of Foreign Assets Control ('OFAC'). The US measure was based on the Iran Freedom and Counter-Proliferation Act of 2012, an act listed in the annex to the EU Blocking Regulation and implied a prohibition of trading for any person, even outside the territory of the USA, with Bank Melli. Telekom did not request an authorisation to comply from the Commission under the Blocking Regulation before terminating the contract. The CJEU had to decide essentially whether EU economic operators can terminate their contracts entered into with parties subject to US extraterritorial sanctions or the EU Blocking Regulation rules out such termination and requires the continuation of the contractual relationship.

In answering this question, the CJEU took the objectives of the EU Blocking Regulation into account. Even if the recitals of the Regulation do not make such a distinction, the CJEU treated the protection of the established legal order and the interests of the EU as the 'main aim' of the Regulation, while the protection of the interests of EU economic operators was considered as a 'complementary objective'.[23] This may already indicate that the aim of protecting private interests, including the economic operators' freedom to conduct business and, through the latter, their contractual freedom, is only secondary to other EU policy considerations. The CJEU instead saw a risk in the EU economic operators which, in the course of their economic activity, 'are capable of giving extraterritorial effect to the laws specified in the annex' to the Blocking Regulation.[24]

The CJEU stated that, in principle, Article 5(1) does not exclude the termination of a contract (even without providing reasons for it) with a person subject to US sanctions. The termination of a contract is excluded if its aim is to comply with the US sanctions listed and, in such a case, the contract must be maintained. The obligation of maintaining a contract depends in this way on the motivation of the party who intends to terminate the contract.

The CJEU eased the burden of proof for the party receiving the notice of termination when invoking its unlawfulness under the EU Blocking Regulation. By this, the CJEU intended to solve the problem that only the terminating party is in possession of all means of evidence that enlighten the motivation for termination.[25] At a first stage, the burden of proof is placed on the party invoking a violation of the prohibition of compliance laid down in Article 5(1) to show that the party terminating the contract wanted to comply with the US sanctions. At a second stage, if the available evidence indicates *prima facie* that the termination of the contract served compliance with the US sanctions, it is for the person terminating the contract to establish that their conduct did not seek to comply with those sanctions. With this eased burden of proof, the CJEU gave an advantage to persons, the direct targets of US sanctions, claiming the maintenance of contractual relationships against EU economic operators, the interests of which the EU Blocking Regulation should protect. In the case of the pretence of compliance with the listed extraterritorial laws, the terminating party must provide an alternative explanation for the termination, either when announcing the termination or at the latest in the course of the procedure of adducing evidence before a court.

Establishing the nullity of the termination to the extent that it serves compliance with the sanctions listed in the annex to the Blocking Regulation and requiring the continuation of the contractual relationship constitutes a restriction of the freedom to conduct a business laid down in Article

[23] *Bank Melli*, note 9 above, para 50.

[24] Ibid, para 57.

[25] G Schwendinger and R Rehle, 'Blocking-VO: Kündigung aufgrund drohender US-Sekundärsanktionen ohne Nennung von Gründen gegenüber US-gelisteten Unternehmen' (2022) 33(5) *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 227, p 235.

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16 of the EU Charter of the Fundamental Rights. The possibility of terminating a contract is part of contractual freedom and, as such, the obligation of maintaining a contract based on Article 5(1) of the Blocking Regulation constitutes a restriction of contractual freedom. However, the freedom to conduct a business and contractual freedom are not absolute rights but can be subject to limitations, which are provided for by law, respect the essence of the freedom concerned, pursue objectives of general interest and are proportionate as specified in Article 52(1) of the Treaty on the Functioning of the European Union.

Taking this into account, the CJEU held that the possibility of the annulment of the termination of the contract cannot be excluded if it aims to comply with the laws listed in the annex of the Blocking Regulation unless it would entail disproportionate effects on the person intending to terminate the contract, having regard to the objectives of the Blocking Regulation. This interpretation is not altered by the Commission's statements in its Guidance Note on the application of the EU Blocking Regulation. In the Commission's view, the objective of the EU Blocking Regulation is that 'business decisions remain free i.e., are not forced upon EU operators by the listed extra-territorial legislation' and EU operators 'are free to choose whether to start working, continue, or cease business operations in Iran or Cuba'.[26] This would suggest that the EU Blocking Regulation should exclude the effects of extraterritorial measures by third countries, but does not require them to keep business relations if they do not want to. The Commission's approach, that companies can decide whether to terminate or continue a contract, also appeared in domestic judicial practice.[27] The CJEU followed a different approach and ignored the Commission's guidance simply on the ground that the Regulation alone is binding, but not the Guidance Note. The interpretation of the CJEU confirms that, in fact, it is the Blocking Regulation that compels economic operators to follow a certain conduct, even against their own will.

The proportionality review is left, however, to the referring national court, so it still has a certain leeway to give preference to the freedom to conduct a business and in particular contractual freedom against the prohibition of the Blocking Regulation. The contractual freedom, and in particular the economic operators' freedom to terminate or maintain a contractual relationship, can be restored if the proportionality review confirms that the maintenance of the contract and the penalties thereby imposed by the US authorities can have disproportionate effects on the EU economic actors in comparison with the interests of the EU. Hence, it is required in the individual case to weigh the goals to be achieved by the establishment of the ineffectiveness of the termination of a contract against the probable economic losses and their extent to the terminating party. In this way, the CJEU creates an exception for the party terminating the contract to the prohibition of compliance. When assessing the losses to which the terminating party is exposed, the referring national court also has to evaluate how the US authorities will probably proceed, and whether or not they shall impose a penalty on an EU economic actor that maintains a contractual relationship with a listed entity in violation of the US sanctions. The assessment of the probability of such penalties is without doubt challenging for any court in the EU.[28]

More concretely, in the course of the proportionality review, the national court has to examine whether an authorisation was requested. Obtaining an authorisation from the Commission that enables the EU economic operator to comply with US sanctions constitutes a second exception to the illegality and the potential ineffectiveness of the termination. Telekom did not request an authorisation from the Commission and thereby deprived itself of a means to avoid the establishment of the nullity of the termination of the contract under national law.

[26]Guidance Note — Questions and Answers: Adoption of Update of the Blocking Statute [2018] OJ C277I/4, p 6 (Question 5).
[27]LG Hamburg, Judgment, 318 O 330/18 (15 October 2018).
[28]A Lippert and A-S Ghassabeh, 'US-Sanktionen vs. EU-Recht: Weiterhin die Macht des Faktischen? – Zum EuGH-Urteil in der Rs. Bank Melli Iran' (2022) 7 *Betriebs-Berater (BB)* 329, p 332.

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In its *Bank Melli* judgment, the CJEU tries to strike a balance between the enforcement of the foreign policy interests of the EU, as well as the effective enforcement of EU law, and the interests of the EU economic operators affected by the US sanctions. As a main rule, the CJEU gives priority to the prohibition of compliance laid down in the EU Blocking Regulation. In *Bank Melli*, the business interests of the terminating party were upstaged to let the other party to continue its economic activity, as the telecommunication services provided by Telekom were indispensable for Bank Melli. The CJEU, however, did not question whether the same services could have been available from another service provider. Based on this, it seems that, instead of protecting EU economic operators, the prohibition of compliance puts a means into the hands of third-country economic actors, the direct targets of the US sanctions, to make their European partners respect their agreement, even against their will.[29] However, as we have seen, the decision envisages two escape routes for EU economic operators, which enable compliance with US sanctions.[30] First, economic operators can observe the US sanctions in possession of an authorisation granted by the Commission. Second, the prohibition of compliance can be loosened in the framework of the proportionality review. Nevertheless, access to these escape routes is limited.

3. Failed attempts? Attenuating the prohibition of compliance in the judicial practice of the Member States

Sometimes, the courts of the Member States have intended to mitigate the rigidity of the prohibition of compliance using various means. In particular, for the enforcement of the prohibition of compliance, certain courts required an order by a court or authority of the state imposing the extraterritorial legislation listed in the annex to the EU Blocking Regulation, directing the EU economic operator to comply with that legislation. Following this approach, in the absence of such an order, the prohibition of compliance could not exert its effect. In a similar vein, other courts recognised the possibility of contractual arrangements by the parties to conform to US sanctions, precluding the impact of the Blocking Regulation.

First, in practice, there was uncertainty whether the prohibition of compliance applies only if compliance with US sanctions had been ordered directly or indirectly by a US court or administrative authority, or even in the absence of such an order, when an EU economic operator observes the sanction by itself, worrying about potential penalties imposed by the US authorities. In a case similar to *Bank Melli*, where the defendant availed itself of an ordinary termination concerning a contract on the provision of telecommunications services entered into with a German subsidiary of an Iranian metal concern, the OLG Köln declared that the ineffectiveness or the nullity of an ordinary termination without a direct or indirect order on the part of US authorities or courts cannot be established.[31] In the *Bank Melli* judgment, the CJEU held that the objective of the prohibition of compliance is to counter the effects of extraterritorial legislation in general, and its application does not presuppose the adoption of any order by a court or administrative authority in the third country enacting the extraterritorial law. The mere threat of penalties for breaching the extraterritorial legislation can have a negative impact on the established legal order and the interests of the EU. The CJEU found that this interpretation is also in line with the protection of the interests of private parties from the effects of the listed extraterritorial laws.

Second, certain courts recognised the possibility of including a clause in the parties' contract that enables one or more of them to observe US sanctions. In *Mamancochet Mining v Aegis Managing*

[29]S Solé, *Extraterritorialité du droit: Le lawfare ou l'utilisation du droit comme arme de guerre économique par les États-Unis. Thesis* (Faculté de droit et de criminologie, Université catholique de Louvain, 2021), p 51, http://hdl.handle.net/2078.1/thesis:29348.

[30]Schwendinger and Rehle, note 25 above, p 236; F Scott Kieff and T D Grant, 'China's Sanctions and Rule of Law: How to Respond When China Targets Lawyers' (2022) 55(1) *International Lawyer* 101, pp 115–16.

[31]OLG Köln, Judgment, 19 U 118/19, para 41 (7 February 2020).

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Agency, an insurer denied payment to the insured Iranian person following the theft of the goods insured, because the insurance policy contained a clause under which an insurer is not obliged to satisfy a claim if this would expose the insurer to any sanction of the EU, the UK or the US.[32] The High Court of Justice held that, even after the announcement of the reinstatement of the US sanctions against Iran as a result of the withdrawal of the US from the JCPOA, payment was possible until the date of the commencement of the restoration of the US sanctions. For this reason, the claimant's argument that the EU Blocking Regulation required disregarding the listed US sanctions did not have any relevance for the case. Even so, the court was inclined to accept the defendants' position that the Blocking Regulation is not applicable if payment is denied in accordance with a sanctions clause. Acting in line with the contractual clause does not, in the court's view, constitute compliance with any extraterritorial legislation, but simply reliance on the terms of the parties' agreement on the possibility of denying payment.

In France, the French company Vivéo refused to perform its contracts concluded with Bank Melli, which had an establishment in Paris, having regard to the reinstatement of the US sanctions against Iran.[33] The contract contained a *force majeure* clause that enabled the parties to terminate the contract in the event of the intervention of unexpected and non-foreseeable regulatory, governmental or legal restrictions in the course of the performance of the contract. The Tribunal de commerce de Paris did not accept Bank Melli's argument that the Blocking Regulation excluded compliance with US sanctions. The contractual clause reflected the parties' will. Moreover, Vivéo and its shareholder, a Swiss company, were equally exposed to a real and significant risk of being penalised by US authorities.

It seems, therefore, that the courts in some Member States tended to limit the scope of the Blocking Regulation and ease the rigidity of the prohibition of non-compliance, giving priority to the contractual arrangements of the parties. Nevertheless, such contractual clauses can be considered as indirectly based on the extraterritorial legislation listed in the annex of the Blocking Regulation.[34] In view of the emphasis put by the CJEU in the *Bank Melli* judgment on the need to ensure the full effectiveness of Article 5 of the Blocking Regulation,[35] it is less likely that such an approach would be confirmed by the CJEU.

B. Prohibition of Recognising and Enforcing Decisions

The recognition and enforcement of a foreign decision based on the listed legislation would mean that the courts of the EU Member States would give a hand to the implementation of the extraterritorial legislation. The private international law or the international civil procedure law of most countries provides for the possibility of the denial of the recognition or the enforcement of foreign decisions if they contravene the public policy of the state where the recognition or enforcement is requested. In fact, this general public policy exception would be sufficient to reject the effects of such foreign decisions, but a specific prohibition of recognition and enforcement makes the stance of the EU clear and unequivocally determines the conduct to be followed by all courts in the Member States.

However, the prohibition of recognising and enforcing foreign decisions based on the listed extraterritorial legislation does not prevent the application and the effects of penalties imposed by the US authorities if the European economic operator, which refuses to comply with the listed legislation, has a parent company or a subsidiary in the US, which can be subject to prosecution and

[32] *Mamancochet Mining v Aegis Managing Agency* [2018] EWHC 2643 (Comm). See also *Lamesa Investments v Cynergy Bank* [2019] EWHC 1877; *Lamesa Investments v Cynergy Bank* [2020] EWCA Civ 821.

[33] Tribunal de commerce de Paris, No 2019023091 (23 Janvier 2020).

[34] D Ventura, 'Contemporary Blocking Statutes and Regulations in the Face of Unilateral and Extraterritorial Sanctions' in C Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Elgar, 2021), p 229.

[35] *Bank Melli*, note 9 above, paras 59, 65, 67.

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severe penalties.[36] More generally, the EU Blocking Regulation, and in particular the prohibition of recognising and enforcing foreign decisions, does not remedy the problem when the company subject to penalties or a condemning judgment in the US has assets in the US and enforcement can be pursued against such assets.

C. Clawback Provision

Blocking statutes often contain clawback provisions, under which a person suffering harm resulting from the enforcement of the blocked foreign legislation can claim damages. The harm can be due to a decision rendered in public or public proceedings against an economic operator from the jurisdiction that introduced the blocking legislation. The Blocking Regulation contains such a disposition in its Article 6, too. Damages can be recovered from 'the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary' in accordance with the rules of the Brussels I Regulation.[37] The clawback provision gains practical importance if the defendant has assets in the EU that can be subject to enforcement.

Even so, the application of the clawback provision raises several questions. The first of these is against whom it can be enforced. The injured party cannot claim damages from the state imposing the sanction or its authorities due to state immunity. The scope of application of the Brussels I Regulation covers civil and commercial matters, while 'the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)' is explicitly excluded from its scope. The immunity is not disregarded even if the US extraterritorial sanctions are considered as a violation of international law by the EU.[38] Hence, the provision can be invoked instead against contractual partners who, for example, by complying with the listed extraterritorial legislation refuse to perform a contract. They are, however, very often EU economic operators whom the EU Blocking Regulation should protect.

Notwithstanding the reference to the Brussels I Regulation, establishing jurisdiction can raise questions. In particular, the text of the Blocking Regulation does not give an answer to what happens if the damage resulting from the application of the extraterritorial legislation is suffered in more than one country.[39] They can be all EU Member States or EU Member States and third countries. In such a situation, it is not clear whether the court having jurisdiction under the Brussels I Regulation can hear the case regarding the entire damage or only the damage occurred in the state the court of which has been seized.

Furthermore, even if the clawback provision can be considered as an overriding mandatory norm, the detailed rules of clawback claims are not specified in the Blocking Regulation. To ascertain these rules, it must be established which law applies to the claim. If the extraterritorial legislation is enforced against an EU economic operator present in the US, the damage occurs in this country and thus US law will be applicable under the Rome II Regulation.[40] In accordance with Article 15 of the Rome II Regulation, this law would also govern most issues related to the claim, including prescription or division of liability, even if this is probably not the goal of the

[36]See Van Haute, Nordin, and Forwood, note 21 above, p 499.

[37]The Blocking Regulation refers to the Brussels Convention [1972] OJ L299/32, which has been replaced since then by the Brussels I Regulation, see currently Regulation (EU) No 1215/2012 [2012] OJ L351/1.

[38]See *Jurisdictional Immunities of the States (Germany v Italy: Greece Intervening)*, Judgment, para 91 (Intl Ct Just 3 February 2012). See Lieberknecht, note 7 above, p 578; Ruys and Ryngaert, note 5 above, pp 96–97.

[39]J Basedow, *The Law of Open Societies – Private Ordering and Public Regulation of International Relations. Collected Courses of the Hague Academy of International Law, Vol 360.* (Martinus Nijhoff Publishers, 2013), pp 339–40; J Basedow, 'Blocking Statutes' in J Basedow, G Rühl, F Ferrari, and P de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Elgar, 2017), p 116.

[40]Regulation (EC) No 864/2007 [2007] OJ L199/40.

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EU legislature. This is why, in the legal literature, it was proposed that such questions should be governed by the *lex fori* instead of the *lex loci damni*.[41]

D. Authorisation Procedure

Sanctions regimes are often subject to an exception: an authorisation or licence can be requested and, if granted, the applicant does not have to comply with a sanction. Analogously, the Blocking Regulation exceptionally tolerates the non-observance of the Blocking Regulation and provides for an exemption from the prohibition of compliance with the listed legislation once this is authorised by the Commission. Granting authorisation can, to a certain extent, ease the burden on EU economic operators. However, as the result of the public consultation suggests, the rules of the authorisation procedure and the criteria of the assessment of requests are not clear and it takes too long for the Commission to make a decision.[42] The authorisation procedure enables economic operators to 'comply fully or partially to the extent that non-compliance would seriously damage their interests or those of the Community'.[43] The Regulation, however, does not define what kind of damage can be considered serious. The discretion of the Commission gives rise to uncertainties, but it also indicates that enforcement is not complete, but can be subject to exceptions.[44] The uncertainties were mitigated to a certain extent by adopting the Commission implementing regulation 2018/1101/EU, which determines the assessment criteria used by the Commission.[45] The criteria listed are in connection either with the interests of the applicant or the interests of the EU.

The *Bank Melli* judgment highlights that the CJEU considers the possession of an authorisation as proof that the non-compliance with the listed sanctions would cause damage to the interests of the economic operator or the EU, and this is taken into account in the course of the proportionality review in favour of the party terminating the contract. It can be assumed that, in possession of the authorisation to comply with the US sanctions, the termination is lawful.

In practical terms, however, the submission of a request for authorisation reveals the intention of the applicant to comply with the third-country legislation. In the event of the rejection of the application, the applicant practically loses their chances in the proportionality review. Moreover, the submission of an application for an authorisation does not have a postponing effect, in other words, the applicant cannot comply with the sanctions listed in the annex to the Blocking Regulation until the decision on its application and is in this way exposed to penalties imposed by the US authorities.[46] These factors can discourage EU economic operators from asking for an authorisation.

The Commission's Guidance Note clarifies that even a request for a licence from US authorities submitted for the purpose of obtaining an exemption from compliance with the listed US sanctions is prohibited, because such a procedure involves compliance with the US legislation.[47] Such a request can only be submitted to the US authorities if it has previously been authorised by the Commission.

A further risk for EU economic operators is that persons subject to US sanctions can challenge the Commission's decisions authorising compliance with US sanctions. This can be illustrated by the pending *IFIC Holding v Commission* case.[48] Here, IFIC Holding AG, a wholly owned German subsidiary of the Iran Foreign Investment Company ('IFIC'), an Iranian company

[41]Basedow, *The Law of Open Societies*, note 39 above, p 340.
[42]European Commission, Summary of the Results of the Open Public Consultation, note 8 above, p 3.
[43]EU Blocking Regulation, Art 5(2).
[44]Ventura, note 34 above, pp 224–25.
[45]Commission Implementing Regulation (EU) 2018/1101 [2018] OJ L199I/7.
[46]Guidance Note, note 26 above, p 9 (Question 20); see Schwendinger and Rehle note 25 above, p 236.
[47]Guidance Note, note 26 above, p 10 (Question 23).
[48]*IFIC Holding v Commission*, T-8/21, Action Brought on 10 January 2021.

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owned by the Iranian government, brought an action before the General Court for the annulment of the Commission decision granting authorisation to Clearstream Banking AG.

IV. Towards a Solution: The Need for a Holistic Approach and the Revision of the EU Blocking Regulation

While the goal of the EU legislature by the adoption of the Blocking Regulation was to protect private parties, it in fact drove them to the battlefield of US sanctions and EU countermeasures. The burden of simultaneous compliance with US sanctions and the Blocking Regulation is placed on EU economic operators, not only against the competent authorities in the EU and the US, but also against counterparties wishing to escape from the effects of US sanctions.

Various measures have been proposed to counter the expansive application of the US sanctions: legal and financial support for the EU economic operators affected by the extraterritorial legislation, organisational measures, such as the establishment of an EU agency similar to the OFAC, the creation of special vehicles (such as INSTEX) to bypass the need to rely on the US clearing system, the introduction of trade restrictions by the EU, in particular the exclusion of the operators of the imposing country from the EU financial or public procurement market. The respondents of the open public consultation of the Commission on the review of the Blocking Regulation expressed the view that the toolbox of the Blocking Regulation should be complemented and suggested measures similar to those mentioned above.[49] Most of these measures, however, clearly go beyond a simple revision of the Blocking Regulation.

The EU Blocking Regulation does not stand alone. There is no doubt that the EU has to follow a holistic approach to counter economic coercion by third countries and to protect EU economic operators. Only a combination of various trade measures can ensure the achievement of these goals.

A. Strengthening Political Cooperation and Coordination

Most authors look for a solution outside the EU Blocking Regulation. Indeed, the source of the conflicting legislations and obligations is a political one. Therefore, the solution can also be of a political nature. As broadly accepted in the legal literature, a potential way out of the clash of legislations would be a better coordination of sanction policies. Sanctions could be adopted following bilateral coordination between the EU and the US, or even in a broader multilateral framework.

However, it can be seen that EU and US cooperation is relatively intensive in sanctions policy.[50] In the US, the Office of Sanctions Coordination has provided a formal framework for the alignment of sanction policies with its allies under the Obama and Biden administration, and it happened that the US Secretary of State was invited to the EU Foreign Affairs Council.[51] The responsible authorities of the two sides held meetings to enhance the operation of their sanction policies.[52]

The tensions over the sanctions against Iran demonstrate that existence of formal and informal mechanisms for coordination are not necessarily sufficient by themselves. Coordination must be accompanied by the political will to recognise common values and interests instead of pursuing a unilateral approach. An often evoked political compromise was born in 1998 when the EU and the US entered into an agreement under which the EU withdrew its complaint submitted to the World Trade Organization against the US for the extraterritorial application of the

[49]European Commission, Summary of the Results of the Open Public Consultation, note 8 above, pp 5–6.

[50]L Jianwei, 'US-EU Cooperation on Economic Sanctions: Characteristics, Limitations and Prospects' (2019) 79 *China International Studies*, p 168.

[51]US Department of State, Secretary Blinken's Participation in the EU Foreign Affairs Council (22 February 2021), https://www.state.gov/secretary-blinkens-participation-in-the-eu-foreign-affairs-council/.

[52]European Commission, News, U.S. and EU Sanctions Teams Enhance Bilateral Partnership (16 May 2023), https://finance.ec.europa.eu/news/us-and-eu-sanctions-teams-enhance-bilateral-partnership-2023-05-16_en.

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Helms-Burton Act and, in exchange, the US suspended the application of the most debated Title III of the Act.[53] The latter opened the way for damages actions by US nationals owning a claim to property confiscated by the Cuban government in US courts against any persons (including EU economic operators) trafficking such property.[54]

To promote a mutually acceptable sanctions policy, the EU should make efforts to liaise with the US administration and the Congress, the main shapers of US sanctions policy.[55] Coordination can channel political compromises, which can render the blocking measures unnecessary.

B. Complementary Effects: The Proposal for the EU Anti-Coercion Instrument

In 2021, the Commission proposed the adoption of the EU Anti-Coercion Instrument, the effects of which are intended to complement and strengthen the operation of the EU Blocking Regulation. Based on the Commission's proposal for the Anti-Coercion Instrument, in the event of economic coercion by a third country, the EU could adopt countermeasures in a more flexible way.[56] The response measures target primarily the third states exerting pressure on the Union or a Member State, but legal or natural persons connected or linked to the government of the third country concerned and contributing to the economic coercion can be also designated by the Commission and be subject to response measures. Countermeasures may include, among others, restrictions on trade and investments and restrictions on banking, insurance, access to Union capital markets and other financial service activities and exclusion from public procurement procedures.[57] Accordingly, the countermeasures of the Anti-Coercion Instrument largely correspond to those contemplated in the legal literature and by the respondents of the public consultation in relation to the Blocking Regulation. Moreover, like the Blocking Regulation, the proposal contains a clawback provision, enabling Union natural or legal entities to recover any damage resulting from economic coercion from entities designated by the Commission on the basis of their connection to the third country applying the economic coercion or their involvement.[58]

Nevertheless, certain differences may help to differentiate the two ways of protection. While most of the provisions of the Blocking Regulation take a negative stance, isolating EU economic operators from the extraterritorial effects of the listed foreign legislation by imposing various negative obligations (non-compliance, non-recognition, and non-enforcement), the Proposal on economic coercion instead prepares the ground for a broader range of positive actions by the EU. The measures envisaged by the Blocking Regulation, including the obligation of notification, the prohibition of compliance and the non-recognition of foreign decisions, are to be observed automatically by EU economic operators and courts respectively based on the Regulation. The countermeasures of the Anti-Coercion Instrument are not triggered automatically. They must be preceded by a determination by the Commission that the third-country measure constitutes economic coercion. If so, the Commission must be open to settling the dispute with the third country, among other ways, by negotiations, mediation or international adjudication. And even in the absence of an agreement at this phase, the Commission has a considerable leeway to impose a response measure, since before

[53]'European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act' (1997) 36(3) *International Legal Materials* 529.

[54]Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act), Pub L 104–114. See S Smis and K van der Borght, 'The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts' (1999) 93(1) *American Journal of International Law* 227.

[55]C Portela, 'Creativity Wanted – Countering the Extraterritorial Effects of US Sanctions' (European Union Institute for Security Studies, October 2021), BRIEF 22, p 6, https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_22_2021_0.pdf.

[56]COM(2021) 775 final, 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.

[57]Anti-coercion Proposal, Annex I.

[58]Ibid, Art 8.

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doing this it must ponder whether the countermeasure is necessary to protect the interests and rights of the EU and the Member States and whether the action is in the Union's interest.[59]

Although, as the public consultation highlighted, the co-existence of the two instruments should ideally be characterised by complementarity,[60] there is a risk of incoherence in applying the two instruments due to their overlapping nature. It can be attempted to distinguish the scope of application of the two instruments in accordance with their targets.[61] The Blocking Regulation is intended to counteract foreign extraterritorial laws affecting the interests of EU economic operators. On the contrary, the proposed Anti-Coercion Instrument enables sanctioning interference with the legitimate sovereign choices of the Union or a Member State. From this, it could be inferred that if a third-country measure considered extraterritorial concerns EU economic operators, the Blocking Regulation applies, whereas measures against the EU and the Member States can be counteracted under the Anti-Coercive Instrument. It cannot be, however, overlooked that foreign secondary sanctions against EU economic operators may also cause the EU or its Member States to align their foreign or commercial policy with the imposing state towards another country. This can trigger the simultaneous application of both the Blocking Regulation and the Anti-Coercion Instrument. In its recitals, the Blocking Regulation highlights the adverse impact of foreign extraterritorial laws on the EU legal order and the Union interests and qualifies the protection against such interferences as one of the objectives of the Regulation. Article 2 of the proposed Anti-Coercion Instrument does not specify whether an indirect limitation of sovereign choices suffices for its application, but this is not explicitly excluded either. Even though, concerning foreign extraterritorial laws, it can be argued that the Blocking Regulation applies as a *lex specialis* to the more broadly tailored Anti-Coercion Instrument, the Impact Assessment Report prepared for the latter rejects this interpretation. According to it, just the Blocking Regulation applies if the extraterritorial measure only threatens EU economic operators.[62] Nevertheless, it states that there can be a 'potential partial overlap' between the two instruments if foreign extraterritorial laws have a coercive effect not only on EU economic operators, but also on the EU or its Member States.[63]

C. Amendment of the EU Blocking Regulation

In 2021, a Commission communication envisaged the amendment of the EU Blocking Regulation.[64] It contemplates in particular clarifying the clawback rules, strengthening national measures to block the recognition and enforcement of foreign decisions based on the listed extra-territorial measures, streamlining the processing of authorisation requests and the Commission possibly becoming involved in foreign proceedings to support EU companies and individuals.[65] Even if the details of the planned amendment are not yet known, the ongoing revision of the Blocking Regulation launched by the Commission can evidently contribute to the holistic approach needed. Regarding the revision process, the question must be posed of what sorts of amendments would strengthen the protection of private parties in accordance with the stated objectives of the Blocking Regulation.

[59]T Ruys and F Rodríguez Silvestre, 'The Union Strikes Back – The Proposed EU "Anti-Coercion Instrument" (ACI) Seen Through the Lens of International Law' (Grili Working Paper, December 2022), No 8, pp 3–4, https://www.law.ugent.be/grili/sites/default/files/working-paper/aci_-_the_union_strikes_back.pdf.

[60]European Commission, Summary of the Results of the Open Public Consultation, note 8 above, p 8.

[61]Ruys and Rodríguez Silvestre, note 59 above, p 13.

[62]SWD(2021) 371 final, Commission Staff Working Document Impact Assessment Report, Accompanying the document 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, p 10.

[63]Ibid, pp 6, 10,

[64]COM (2021) 32 final, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, The European economic and financial system: fostering openness, strength and resilience.

[65]Ibid, p 18.

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First, the view appears in the legal literature that the annex of the Regulation should be revised by adding further laws, including certain US sanctions. The US sanctions imposed in relation to the Nord Stream 2 project was mentioned earlier as a potential candidate.[66] Amidst the joint efforts of the EU and the US to maintain effective sanctions against Russia, it is not expected that the EU would add further US laws to the list. Interestingly, it is also advocated that the protection should look beyond the extraterritorial character of the targeted legislation and should have, as its broader object, acts involving a violation of public international law.[67] In this respect, certain Chinese laws, such as the Anti-Secession Law and Hong Kong National Security Law, were referred to in the legal literature.[68]

At the moment, the Blocking Regulation is focused on protection against the effects of the extraterritorial application of the laws specified in its annex. Its targets are now US economic sanctions. The recitals of the Regulation also refer to extraterritoriality as a violation of international law. No other breaches of international law are mentioned. Finally, it can be noted that, for human rights violations, the EU has another means it can apply, the EU Global Human Rights Sanctions Regime, and more specifically the 'EU Magnitsky Act', which can be a basis for measures against both state and non-state actors.[69]

In any case, the extension of the list of targeted legislation is, by itself, only a quantitative change, but certain substantive changes could also be considered. Secondly, therefore, the Blocking Regulation should also make clear in its text the overriding mandatory nature of its most crucial rules, most notably that of the prohibition of compliance, to the effect that they cannot be derogated by the parties' contractual arrangements. This would imply that the listed legislation could not even be observed, even if this would follow from a contractual clause determined by the parties.

Third, even if the Blocking Regulation currently recognises the right of the Member States to determine the legal consequences,[70] the effectiveness of EU law would require the determination of penalties at EU level in the Blocking Regulation. The only requirement imposed by the Regulation is that the penalties 'must be effective, proportional and dissuasive'. Leaving the determination of the sanctions of a breach to the Member States and imposing only these minimum qualitative criteria is typical in EU sanctions and trade legislation. However, the legal consequences applied in the criminal, administrative and private law of the Member States largely differ.[71] The public consultation of the Commission also confirmed that even a significant part of the respondents, including business operators, are in favour of the harmonisation of penalties for the breaches of the Blocking Regulation.[72] Companies would not be treated differently in terms of the application of diverse legal consequences depending on the Member States of the courts or authorities seized and this would contribute to a level playing field in the EU. It must be noted here that, primarily in view of the extensive application of sanctions against Russia for its military aggression in Ukraine, the Commission put forward a proposal on the criminalisation of violations of Union restrictive measures. Due to the Proposal, restrictive measures will be defined and the minimum rules of

[66]S Blockmans, 'Extraterritorial Sanctions with a Chinese Trademark' (CEPS Policy Insights, January 2021), No PI2021-01, p 15, https://www.ceps.eu/download/publication/?id=31956&pdf=CEPS-PI2021-01_Extraterritorial-sanctions-with-Chinese-characteristics.pdf.

[67]Kieff and Grant, note 30 above, p 121.

[68]Blockmans, note 66 above, p 15.

[69]Council Regulation (EU) 2020/1998 [2020] OJ L410I/1.

[70]EU Blocking Regulation, Art 9.

[71]The various sanctions determined by some of the Member States for the event of a breach of the Blocking Regulation are outlined by D Rovetta, G Pandey, and A Smiatacz, 'Don't Wake up the (EU) Bear! The Scope of the EU Blocking Regulation 2271/96 in Light of the Recent Preliminary Ruling Reference in *Bank Melli v Telekom Deutschland* Case, C-124/20' (2021) 16 (2) *Global Trade and Customs Journal* 44, pp 50–51.

[72]European Commission, Summary of the Results of the Open Public Consultation, note 8 above, p 4.

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penalties will be determined at EU level.[73] Once criminal penalties are determined at EU level, it is hard to exclude *a priori* the possibility of adopting certain uniformly determined administrative or private law consequences. The tenor of the *Bank Melli* judgment could be extrapolated to and generalised in the text of the Blocking Regulation. Ineffectiveness of legal acts made by any of the parties in contravention of the prohibition of compliance laid down in the EU Blocking Regulation could be established.

Finally, notwithstanding the current uncertainty around the contractual arrangements of the parties, there is one method that may help economic operators to protect themselves. Pursuant to the *Bank Melli* judgment, companies can protect themselves by more accurately documenting the reasons for their business decisions and actions, in particular termination of contracts, to avoid even the appearance that their conduct was motivated by the intention of complying with US sanctions.[74] The recast of the Blocking Regulation could reflect the ruling of the CJEU by codifying that in civil proceedings relating to the alleged infringement of the prohibition of compliance under Article 5, where all the evidence available to the national court suggests *prima facie* that a person concerned complied with the laws listed in the annex to the Regulation, without having an authorisation in that respect, it is for that same person to establish to the requisite legal standard that their conduct was not intended to comply with those laws.[75]

Despite the concerns about its effectiveness at protecting private interests, the ongoing revision process suggests that the Commission does not want to give up the Blocking Regulation. Relinquishing this much-contested instrument would amount to an unacceptable political surrender. Although the content of its revision is so far unknown, due to the conflicting goals pursued by the Blocking Regulation, it can be expected that its amendment will produce a painkiller rather than a remedy for all its flaws.

V. Conclusions

The EU Blocking Regulation may be praised for making a stand for the respect of international law condemning foreign extraterritorial legislation and in particular for taking a firm political stance against the extensive US sanctions policy.[76] However, the Regulation does not seem to protect the interests of private persons affected by the targeted extraterritorial measures adequately. In fact, the Blocking Regulation exposes EU economic operators to conflicting obligations. EU companies tend to conform to US sanctions in order not to lose their access to the US markets. At the same time, this is prohibited by the EU Blocking Regulation, which excludes compliance with the listed extraterritorial legislation.

However, not only EU economic operators can find themselves in a conflict of obligations, but also the Commission and the competent national authorities. While they are obliged to enforce the provisions of the Blocking Regulation, and in particular the prohibition of compliance, against EU economic operators, one of the stated objectives of the Regulation is to protect the interests of these economic players. This brings to an enforcement paradox, the result of which is the absence of enforcement by authorities. From the competent authorities, enforcement is shifted to private parties, typically third-country entities targeted by US sanctions, which want to compel EU economic actors, their contractual partners, to disregard the US sanctions in question in conformity to the EU Blocking Regulation.

[73]COM(2022) 684 final, Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures. See also COM(2022) 245 final, Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation.

[74]H L Clark, 'Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures' (1999) 20(1) *University of Pennsylvania Journal of International Economic Law* 61, p 95.

[75]*Bank Melli*, note 9 above, paras 67–68.

[76]Ventura, note 34 above, p 238, who at the same time acknowledges that 'blocking statutes fail to provide … an effective remedy for domestic operators facing foreign extraterritorial sanctions regimes'. Ibid, p 237.

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The *Bank Melli* case illustrates this clearly: upon the claim of an Iranian party, the effective enforcement of EU law and EU foreign policy considerations were given priority by the CJEU over the parties' contractual freedom. The case clearly demonstrates how political conflicts appearing at the macro-level are precipitated at the micro-level of private law. The *Bank Melli* case was the first occasion when the CJEU had to interpret the provisions of the EU Blocking Regulation, but certainly not the last. This is demonstrated by the *IFIC Holding v Commission* case mentioned above and the *Pilatus Bank* case, where the withdrawal of the authorisation of a Maltese bank by the European Central Bank ('ECB') was challenged by the Maltese bank, among others, on the grounds that the actions of the sole shareholder of the bank, whose good repute was called into question by the ECB decision, acted in breach of US sanctions and the withdrawal of the authorisation would involve compliance with US sanctions and in this way a violation of the EU Blocking Regulation.[77] The General Court rejected this argument because it examined only the good repute of the company's shareholder but not whether US law or EU law was infringed.

The Blocking Regulation has been widely criticised for not countering in fact the application of the targeted US sanctions and for not being capable of protecting private interests.[78] Despite these criticisms, it cannot be expected that the Commission would give it up as a legal and political instrument. Instead of simply surrendering the application of the Blocking Regulation, a holistic approach is necessary. As often divergences in sanctions policies motivate the adoption of extraterritorial secondary sanctions and the need for blocking measures, an obvious solution is finding political compromises through stronger political cooperation and coordination. The Blocking Regulation (with its negative exclusionary stance towards foreign extraterritorial legislation) and, in the event of its adoption, the Anti-Coercion Proposal (which enables positive measures) have the potential to contribute to synergies in enforcing the foreign and commercial policy interests of the EU.

A reform of the approach towards the application of extraterritorial sanction was called for on both sides of the Atlantic.[79] So far, however, not much has happened on either continent. However, if the EU does not want to build just castles in the air then, in the course of the revision of the Blocking Regulation, it has to find proper means to protect the interests of private parties.

[77] *Pilatus Bank plc and Pilatus Holding Ltd v European Central Bank*, T-27/19, EU:T:2022:46. The decision of the General Court has been appealed and now the case is pending before the Court, *Pilatus Bank v ECB*, C-256/22 P appeal brought on 12 April 2022 by Pilatus Bank plc against the judgment of the General Court (Ninth Chamber, Extended Composition) delivered on 2 February 2022 in Case T-27/19.

[78] See in particular Hackenbroich, note 6 above, p 14; Lieberknecht, note 7 above, p 579; N Maniaci, 'The Helms-Burton Act: Is the U.S. Shooting Itself in the Foot?' (1998) 35(3) *San Diego Law Review* 897, p 917.

[79] Proposals for increasing the resistance of the EU to extraterritorial legislation were outlined, among others, by J Hackenbroich (ed), note 6 above. The need for a reform of US sanctions policy was highlighted by D Meagher, 'Caught in the Economic Crosshairs: Secondary Sanctions, Blocking Regulations, and the American Sanctions Regime' (2020) 89 (3) *Fordham Law Review* 999.

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