The Practice and Inspiration of EU Blocking Legislation from the Perspective of International Law

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Abstract: United States economic sanctions have affected global economic and trade exchanges, and countries have responded by enacting laws to achieve political objectives through unilateral sanctions. Among them, the European Union introduced the blocking law as a representative, its core system is to block the effectiveness and implementation of the United States law in the European Union, prohibit the relevant subjects to comply with the United States sanctions law. The EU blocking law has been interrupted and restarted, which reflects the political game between the big powers. The EU blocking law in the implementation of the subject of application, damage relief and other issues, China as a victim of the U.S. economic sanctions, can learn from and absorb the experience and lessons of the EU blocking law, to better improve the anti-sanctions legal system that has been established, to safeguard China's sovereignty, and to protect the legitimate rights and interests of Chinese enterprises and individuals.

1. Problem statement

The international situation is constantly changing, and in recent years, the United States has actively implemented economic sanctions to obstruct normal economic and trade exchanges among countries around the world. The United States has imposed unilateral economic sanctions, extending the reach of U.S. sanctions laws to third countries.[1] Each country has taken actions to cope with it, such as enterprises compliance investigation, establishment of anti-sanction and blocking laws, searching for international dispute resolution mechanisms, and reduction of their close ties to the U.S. financial settlements. In 1996, the European Union enacted *the Regulation on the Protection against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country* (Regulation 2271/96, hereinafter referred to as *the Blocking Statute*). This article provides an analysis of the evolution and establishment of the EU Blocking Statute, along with relevant case studies, to offer reasonable recommendations for the improvement and implementation of China's future anti-sanction legislation.

2. Legislative evolution of EU Blocking Statute

2.1 Legislative background

In 1996, the United States Congress passed the *Helms-Burton Act*, which provided a legal basis for adjusting U.S. foreign strategy and formulating U.S. foreign policy. [2]In the same year, the United States also enacted *the D'Amato Amendment*, which specified that the United States could apply its domestic laws extraterritorially, compelling third countries to comply with its sanctions' laws. In response, the European Union introduced *the Blocking Statute* in 1996, which explicitly reaffirmed the fundamental principle that "all extraterritorial laws and regulations must comply with international law when applied within the European Union's territory."

2.2 Legislative evolution

Following the enactment of the EU's *Blocking Statute*, the European Union accused the United States' *Helms-Burton Act* and its embargo on Cuba of infringing upon the EU's freedom of trade

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rights[3]. Eventually, through political negotiations, both sides facilitated the suspension of *the Helms-Burton Act*. However, in May 2018, then-U.S. President Trump announced the United States' withdrawal from "the Iran Nuclear Deal" and the reinstatement of economic sanctions against Iran, which the European Union strongly opposed. In response, the European Council issued Regulation 2018/1100 in August of the same year, updating the laws and regulations in the annex while also amending the EU's *Blocking Statute* Implementation Regulation(hereinafter referred to as *the Implementation Regulation*) [4] and the EU's *Blocking Statute* Guidelines(hereinafter referred to as *the Guidelines*). [8]

2.3 The significance of *the Blocking Statute* on the European Union

The EU's *Blocking Statute* provides a legal basis and legal protection for businesses within its jurisdiction. Furthermore, U.S. courts, based on the "the Principle of Foreign Sovereignty Compulsion Doctrine," may impose reduced penalties on involved businesses to safeguard their domestic enterprises, potentially delivering a significant blow to foreign businesses. This approach holds practical value in preserving normal economic and trade exchanges for domestic companies.

3. The legal system analysis of the EU's *Blocking Statute*

3.1 The content construction of *the Blocking Statute*

1) Applicable subjects

Article 11 of the EU's *Blocking Statute* stipulates that the applicable subjects of this law are natural persons and legal entities within the jurisdiction of the European Union. Concerning the determination of legal entities, this law uses the legal concept of "EU operators" and explicitly lists the scope of operators. This approach is designed to maximize the protection of the rights and interests of European Union economic entities from the perspective of applicable subjects.

2) Applicable objects

The purpose of the EU's *Blocking Statute* is to prevent the extraterritorial application of U.S. sanctions laws within its jurisdiction. The subject matter it applies to consists of the laws and regulations with extraterritorial effects listed in the annex and related measures. Currently, in the interpretation of the applicability of the annex, national courts within EU member states have narrowed down the jurisdictional issues of *the Blocking Statute*. [5]

3) Right and obligation of *the Blocking Statute*

(a) Prompt report obligation

Under Articles 2 and 3 of the EU's Blocking Statute, when subjects covered by the law are harmed by the laws and measures listed in the annex, they are required to report this to the European Commission within 30 days. The European Commission, in turn, is expected to promptly inform the competent authorities in the subject's member state, and it establishes the obligation for these authorities to provide regular investigation reports and maintain confidentiality.

(b) Non-compliance obligation

Article 5 of *the Blocking Statute* prohibits the subjects covered by the law from complying with the requirements or prohibitions set forth in the annexed laws. [6] This provision places private entities in a "dilemma". Businesses naturally seek to maximize their interests while avoiding harm, and when confronted with the significant financial losses associated with U.S. sanctions, they face a difficult dilemma. In effect, this shifts the consequences of political maneuvering onto private entities.

(c) Right to claim for compensation

The Blocking Statute upholds the principle that without a remedy, there is no right. Article 6 of the law grants the right to seek compensation to entities that suffer harm as a result of compliance with their own national laws. The compensation may include the attachment or sale of assets located within the European Union. However, the determination of the parties eligible for compensation is subject to case-specific considerations by the courts, taking into account the type of harm, the actual cause of the harm, and the degree of responsibility. In practice, seeking compensation for the harmed parties may encounter challenges related to the coordination of EU laws.

(d) Injunction immunity

The Blocking Statute has established a licensing exemption system for EU enterprises that suffer "serious harm." Both *the Implementation Regulation* and *the Guidelines* provide provisions and explanations for this, with the former listing certain situations that may constitute "serious harm" in Article 4. The latter, however, clarifies that such situations must be exceptional, requiring that EU enterprises' compliance with foreign laws align with the principle of proportionality and that they provide relevant evidence to demonstrate the clarity and sufficiency of their application reasons. Currently, the core criteria for defining "serious harm" remain unclear.

3.2 The case that Melli Bank filed a lawsuit to Deutsche Telekom

1) Basic information

The plaintiff, Iran's Melli Bank, entered into a framework contract with Germany's Deutsche Telekom. On May 8, 2018, the United States unilaterally withdrew from *the Joint Comprehensive Plan of Action (JCPOA)* and reinstated sanctions against Iran. On November 5, Melli Bank was added to the SDN list. Subsequently, Deutsche Telekom sent a letter to Melli Bank notifying the termination of all their contracts without providing any reasons. Melli Bank, alleging that Deutsche Telekom violated the EU's *Blocking Statute*, filed a lawsuit against Deutsche Telekom in the Hamburg Regional Court. The Hamburg Regional Court issued a temporary injunction on November 28, agreeing to terminate the contracts between the two parties. Melli Bank appealed to the Hamburg Higher Regional Court, which, citing the need for an interpretation of *the Blocking Statute*, requested a preliminary ruling from the European Court of Justice on the issues involved in the case.

2) Points of court decision

On December 21, 2021, the European Court of Justice issued a judgment on this case.[7]

(a) The European Court of Justice has interpreted Article 5(1) of the law, stating that the purpose of the law is to counteract the effects of foreign legislation itself and to uphold the EU legal order and overall interests, regardless of whether EU businesses have received formal instructions from U.S. authorities.

(b) The European Court of Justice has pointed out that Article 5(1) of the law allows EU natural persons or legal entities to unilaterally terminate contracts without authorization. However, according to Article 134 of the German Civil Code, if the termination of the contract violates the provisions of Article 5(1) of *the Blocking Statute*, the termination is considered invalid. Additionally, the burden of proof rules in civil litigation will make it difficult for the court to establish the facts in this case. This results in a situation where the burden of proof is reversed, implying that it is up to Deutsche Telekom to prove that its termination was not for compliance with sanctions laws.

(c) The European Court of Justice believes that the decision to revoke Deutsche Telekom's termination of the contract applied the proportionality principle, aligning with the overall interest objectives recognized by the EU and adhering to EU law.

3) Reflection of this case

According to the explanation by the Adjudicator of the Court of Justice of the European Union, *the Blocking Statute* prohibits the subjects covered by the law from complying with the requirements or prohibitions set forth in the annex. Melli Bank, a foreign entity sanctioned by the United States, has filed a lawsuit against EU businesses based on *the Blocking Statute* in this case. After all, the legislative purpose of this law is not primarily intended to protect sanctioned third-country entities. Does this interpretation conflict with the litigants in this case?

While there is opposition within the EU regarding granting foreign entities the right to sue, the Advocate General, in the legal opinion, still believes that Iran's Melli Bank has the right to sue. The reasoning is that if the bank's right to sue is not recognized, the enforcement of the provisions of *the Blocking Statute* will be left to the discretion of the member states, which may lead some member states and businesses to voluntarily comply with U.S. sanctions. This could potentially undermine the public policy underlying the EU's *Blocking Statute*.

In this case, the Advocate General adopted a stringent enforcement approach to uphold the legislative objectives of the European Union. This landmark case serves as a guiding precedent for

member states and other countries in matters related to anti-sanction legislation. Nevertheless, despite this, it is crucial for us to deeply reflect upon the shortcomings inherent in *the Blocking Statute*.

4. Enlightenment on China

The Chinese Ministry of Commerce issued *the Provisions on the Unreliable Entity List* in September 2020 and *the Measures for Blocking Improper Extraterritorial Application of Foreign Laws and Measures* (referred to as *the Blocking Measures*) in January 2021. In June 2021, the Standing Committee of the National People's Congress issued *the Anti-Foreign Sanctions Law*. The enactment of anti-sanction laws provides legal protection for countering foreign sanctions. China faces a severe sanctions situation compared to other countries, with an increasing number of entities affected by U.S. sanctions. By drawing on the practices of the European Court of Justice and learning from valuable experiences, China can take a clear stance to better protect national sovereignty and core development interests.

4.1 Strictly Limit Applicability

Article 9 of the Blocking Measures stipulates that Chinese citizens, legal entities, or other organizations can initiate lawsuits against parties violating the blocking laws, indicating that the scope of plaintiffs does not include foreign entities. However, both the legal judgment and legal opinion in the Melli case acknowledge the right of foreign entities to participate in the lawsuit. The European Court of Justice, in pursuit of the legislative objectives and public policy of the EU's *Blocking Statute*, granted foreign companies the right to sue regional companies, despite internal opposition within the EU. This could put regional economic entities in a "dilemma", potentially resulting in a "chilling effect" and undermining the effective implementation of *the Blocking Statute* within the EU. Therefore, China should strictly limit the applicability of its laws and not allow foreign entities to file lawsuits against domestic companies under its *Anti-Foreign Sanctions Law*.

4.2 Reasonably specified applicable objects

The EU's *Blocking Statute* expressly enumerates the U.S. sanctions-related laws to be blocked in its annex. Article 3 in China's *Anti-Foreign Sanctions Law* defines the subject matter as "discriminatory restrictive measures," and Article 7 in *the Blocking Measures* defines it as "prohibitions related to foreign laws and measures." Both laws stipulate that the discriminatory restrictive measures to be included in the countermeasure lists will be determined by relevant departments of the State Council. So, how should the scope of application of China's anti-sanction laws be defined?

Some scholars advocate for an interpretation that combines both laws, restricting the applicability of the anti-sanction law to the restrictive measures identified by the relevant State Council authorities. The researcher also supports this perspective. Firstly, such an interpretation would maintain legal consistency and align with Article 9(1) of *the Blocking Measures*, then accurately define the scope of application aids in the practical implementation of the law, providing clear legal guidelines. Thirdly, a specific and well-defined scope helps businesses conduct compliance checks, minimizing the potential for them to be caught in a "dilemma". Finally, this flexible approach in handling practical issues can promote multiple avenues to counter U.S. extraterritorial sanctions effectively when combined with anti-sanction measures.

4.3 Incorporation and improvement on the exemption system

The EU's *Blocking Statute* contains provisions for an exemption system, which plays an indispensable role in alleviating the "dilemma" faced by the entities involved. However, to prevent the abuse of this remedy, the EU requires that applying for an exemption from compliance must be based on the premise of serious harm. In my opinion, it is necessary for China's *Anti-Foreign Sanctions Law* to incorporate an exemption system.

Using the Melli Bank case as an example, the European Court of Justice, in pursuit of the legislative objectives and public policy of *the Blocking Statute*, upheld the proportionality principle

and systemic thinking to implement the exemption system, granting Deutsche Telekom the right to seek exemptions. The proportionality principle embodies the values of modern public interest and the protection of private rights, and therefore, it will increasingly apply in Chinese judicial judgments. [8] In light of this, the relevant authorities, when deciding whether to approve exemption applications, can comprehensively consider the motivations of businesses, their interests, as well as national sovereignty and development interests. They should calibrate the extent of exemptions to strive for a balance between legislative objectives and the reasonable interests of businesses.

5. Conclusion

As China's comprehensive national strength continues to grow, competitive Chinese enterprises are facing economic sanctions from Western countries in the international arena. Currently, China has enacted *the Blocking Measures* and *the Anti-Foreign Sanctions Law*, reflecting the establishment of its own legal framework for anti-sanction systems. Through comparative analysis with the shortcomings of the EU's *Blocking Statute*, China should impose strict limitations at the level of applicability, reasonably regulate the scope of application, while also balancing the legitimate rights of Chinese businesses. It should incorporate and regulate an exemption application system, continuously improve the interpretation, understanding, and supplementation of the rules related to anti-sanctions, and promote the development of its foreign-related legal system. China should closely monitor the changing international landscape and make adjustments that align with its own interests. It should make effective use of the legal tool of anti-sanctions to better safeguard its national interests.

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