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Judgment of the General Court in Case T-8/21 | IFIC Holding v Commission

The General Court confirms the Commission's decisions authorising Clearstream Banking AG to comply with US sanctions imposed on Iran

The Court dismisses the action of IFIC Holding, a German company whose shares are held indirectly by the Iranian State

In 2018, the United States of America withdrew from the Iran nuclear deal, signed in 2015, the aim of which was to control the Iranian nuclear programme and lift economic sanctions against Iran. As a result of that withdrawal, on the basis of the Iran Freedom and Counter-Proliferation Act of 2012, the United States again imposed sanctions on Iran and a list of named persons. ¹ From that date, it is once again prohibited for any person to trade, outside the territory of the United States, with any person or entity included in the SDN list.

Following that decision, in order to protect its interests, the European Union adopted Delegated Regulation 2018/1100 ² amending the annex to Regulation No 2271/96 ³ in order to refer in that annex to the abovementioned 2012 US law on freedom and counter proliferation in Iran. That regulation, which aims to provide protection against the extraterritorial application of the laws annexed thereto, in particular prohibits the persons concerned ⁴ from complying with the laws in question or actions resulting therefrom (Article 5, first paragraph), unless authorised by the European Commission where non-compliance with those foreign laws would seriously damage the interests of the persons covered by the regulation or those of the European Union (Article 5, second paragraph). It also adopted Implementing Regulation 2018/1101, laying down the criteria for the application of the second paragraph of Article 5 of Regulation No 2271/96. ⁵

IFIC Holding AG ('IFIC') is a German company whose shares are held indirectly by the Iranian State and which itself has shareholdings in various German undertakings, by virtue of which it has a right to dividends. Clearstream Banking AG is the only securities depository bank authorised in Germany. After the listing of IFIC, in November 2018, on the SDN list by the United States, Clearstream Banking interrupted payment to IFIC of its dividends and blocked those dividends on a separate account. On 28 April 2020, following an authorisation request, within the meaning of

¹ Specially Designated Nationals and Blocked Persons List ('the SDN list').

² Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 2018 L 199I, p. 1).

³ Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 1996 L 309, p. 1), as amended by Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures (OJ 2014 L 18, p. 1) and by Delegated Regulation 2018/1100 ('the regulation').

⁴ The persons referred to in Article 11 of Regulation No 2271/96 are, inter alia, first, natural persons residing in the European Union who are nationals of a Member State and, secondly, legal persons incorporated within the European Union (Article 11(1) and (2)).

⁵ Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 2018 L 199I, p. 7).

the second paragraph of Article 5 of Regulation No 2271/96, from Clearstream Banking, the Commission adopted Implementing Decision C(2020) 2813 final, by which it authorised that bank to comply with certain US laws concerning the applicant's securities or funds, for a period of 12 months ('the contested authorisation'). That authorisation was then renewed in 2021 and 2022 by Implementing Decisions C(2021) 3021 final and C(2022) 2775 final ⁶ ('the contested decisions'). In that context, on the basis of Article 263 TFEU, IFIC requested the Court to annul the decisions adopted by the Commission at the request of Clearstream Banking, that bank having intervened in the proceedings.

The General Court dismisses IFIC's action and at the same time rules on novel questions of law concerning Regulation No 2271/96. It considers in particular that the contested decisions do not have retroactive effect and that the Commission did not err in its assessment by not taking into account the applicant's interests or by failing to examine whether less onerous alternatives existed. It also holds that the limitation of the applicant's right to be heard by the Commission in the context of the adoption of those decisions was, in the light of the objectives pursued by Regulation No 2271/96, necessary and proportionate.

Findings of the General Court

The Court finds, first, that the contested decisions do not have retroactive effect as those decisions state clearly that they take effect from the date of their notification for a period of 12 months. ⁷ As a result, the contested authorisation has no retroactive effect and does not cover conduct that took place before the date on which the contested decisions took effect, but only conduct which took place after that date.

Secondly, concerning the applicant's plea in law based on an error of assessment, according to which the Commission did not, in the first place, take into account the applicant's interests, but only those of Clearstream Banking, the Court held that the Commission was not required to take those interests into account. It observes that Regulation No 2271/96 ⁸ provides that the grant of authorisation to comply with the laws annexed thereto is subject to the condition that non-compliance with those laws would seriously damage the interests of the person seeking the authorisation or those of the European Union, but that that provision does not refer to the interests of third parties covered by the restrictive measures of the third country. The Court made the same finding concerning the non-cumulative criteria, set out in Implementing Regulation 2018/1101, ⁹ which the Commission must take into account when assessing an authorisation request. In addition, none of the criteria in question refer to a balancing of the interests of third parties with those of the applicant or those of the European Union. Moreover, even if the third party referred to in the restrictive measures is covered by Regulation No 2271/96 ¹⁰ and therefore falls within the scope of certain provisions of that regulation, that could not lead, in the context of the application of the exception provided for in the second paragraph of Article 5 of that regulation, to taking into account interests other than those provided for by that regulation. As regards, in the second place, the applicant's argument that the Commission took into account the possibility of having recourse to less onerous alternatives or the possibility for the applicant to claim compensation, the Court notes that Implementing Regulation 2018/1101 ¹¹ does not impose such obligations on the Commission. The Commission's assessment consists in ascertaining whether the evidence submitted by the applicant allows the conclusion, in the light of the criteria laid down by Implementing Regulation 2018/1101, ¹² that, in the event of non-compliance with the laws annexed thereto, the interests of the applicant or of the European Union would be seriously damaged, within the meaning of the second paragraph of Article 5 of Regulation No 2271/96. The Commission, where it concludes that there is sufficient evidence that serious damage to those

⁶ Commission Implementing Decision C(2021) 3021 final of 27 April 2021 and Commission Implementing Decision C(2022) 2775 final of 26 April 2022.

⁷ See Article 3 of each of the contested decisions.

⁸ See Article 5, second paragraph, of Regulation No 2271/96.

⁹ See Article 4 of Implementing Regulation 2018/1101.

¹⁰ See Article 11 of Regulation No 2271/96.

¹¹ See Article 3 of Implementing Regulation 2018/1101.

¹² See Article 4 of Implementing Regulation 2018/1101.

interests has occurred, is not therefore required to examine whether there are alternatives to authorisation.

Thirdly, as regards the plea in law relating to infringement of the right to be heard, the Court finds that the EU legislature chose to establish a system in which the interests of third parties referred to in the restrictive measures are not to be taken into account and those third parties are not to be involved in the procedure under the second paragraph of Article 5 of Regulation No 2271/96. The adoption of a decision under that article meets the general interest objectives of protecting the interests of the European Union or of persons exercising rights under the FEU Treaty system against the serious damage which can result from non-compliance with the laws annexed to the regulation.

In that context, not only is the exercise of a right to be heard by the third parties concerned in the procedure in question not in accordance with the general interest objectives pursued by that legislation, but it also risks jeopardising, through the uncontrolled dissemination of information which could be brought to the attention of the authorities of the third country which enacted the laws annexed to the regulation, the attainment of those objectives. Consequently, those authorities could be aware of the fact that a person sought authorisation and that that person may as a consequence not comply with the extraterritorial legislation of the third country in question, which would entail risks in terms of investigations and sanctions against that person and, therefore, harm to the interests of that person and, as the case may be, to the European Union.

Moreover, no factor inherent in the personal circumstances of such third parties is directly included among the factors which must be included in an application for authorisation¹³ or among the criteria taken into account by the Commission when assessing such an application.¹⁴ Thus, in the system established by Regulation No 2271/96, the third parties targeted by the restrictive measures do not appear to be able to rely, before the Commission, on errors or factors relating to their personal circumstances. Therefore, a limitation of the right to be heard of third parties targeted by restrictive measures in the context of such a procedure does not appear, having regard to the relevant legal framework and the objectives pursued by that framework, to be disproportionate and to fail to respect the essential content of that right. It follows that, in the specific circumstances of the present case, that limitation of the right to be heard is justified, within the meaning of the case-law, and is necessary and proportionate having regard to the objectives pursued by Regulation No 2271/96 and, in particular, the second paragraph of Article 5 thereof. Therefore, the Commission was not required to hear the applicant in the context of the procedure leading to the adoption of the contested decisions.

Furthermore, the applicant claimed that, in order to comply with its right to be heard, the Commission should have published, at the very least, the operative part of the contested decisions. There is, however, no basis on which it can be found that the Commission has such an obligation to publish. First, that alleged obligation has no legal basis in any relevant provision; secondly, the publication of the contested decisions after their adoption is not capable of affecting the exercise of any right of the applicant to be heard in the administrative procedure. Finally, the Court dismisses, for the same reasons, the applicant's argument that, in the alternative, the Commission should have communicated the contested decisions to it after their adoption. In the light of the foregoing, it cannot, therefore, be held that, by failing to publish or communicate the contested decisions to the applicant, the Commission infringed the applicant's right to be heard.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well

¹³ Within the meaning of Article 3(2) of Implementing Regulation 2018/1101: 'applications shall include the name and contact details of the applicants, shall indicate the precise provisions of the listed extra-territorial legislation or the subsequent action at stake, and shall describe the scope of the authorisation that is being requested and the damage that would be caused by non-compliance'.

¹⁴ Within the meaning of the criteria provided for in Article 4 of Implementing Regulation 2018/1101, the objective of which is to assess whether a serious damage to the protected interests as referred to in the second paragraph of Article 5 of Regulation No 2271/96 would arise.

founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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