Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 12 May 2021 [1]

Case C-124/20

Bank Melli Iran, Aktiengesellschaft nach iranischem Recht
v
Telekom Deutschland GmbH

(Request for a preliminary ruling from the Hanseatisches Oberlandesgericht Hamburg (Hanseatic Higher Regional Court, Hamburg, Germany))

(Request for a preliminary ruling – Trade policy – Protection against the effects of the extraterritorial application of legislation adopted by a third country – Restrictive measures against Iran – Secondary sanctions adopted by the United States – Prohibition of compliance with such legislation – Exercise of an ordinary right of termination of a contract)

I. Introduction

1. The present reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom ('the EU blocking statute'), [2] as last amended by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018. [3] It arises directly from the May 2018 decision of the (then) US President, Donald Trump, on behalf of the United States of America to withdraw from what is popularly known as the Iranian nuclear weapons deal, an agreement that had previously been reached in July 2015. The effect of that decision was to trigger the re-application of certain US sanctions against Iranian companies and other Iranian entities, the application of which had previously been suspended in 2015.

2. For reasons of foreign policy and national security, particularly in the fight against terrorism, the United States of America has imposed various types of economic sanctions against States and individuals or legal entities. Some of those sanctions are long-standing, such as the embargo on Cuba, which was authorised by the Foreign Assistance Act of 1961 and codified, in 1996, by the Cuban Liberty and Democratic Solidarity (Libertad) Act. Since 11 September 2001 and the intensification of the fight against terrorism, the US economic-sanctions programme has grown.

[1] Original language: English.

[2] OJ 1996 L 309, p. 1.

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

3. While these sanctions apply mainly to US persons and non-US persons within US jurisdiction who trade or invest with the countries concerned (primary sanctions), some of the provisions also target activities outside of the US jurisdictions, primarily by foreign companies (secondary sanctions). Indeed, much of the US legislation implementing these sanctions seeks either to impose penalties on third-State entities that trade with the target State or by prohibiting those third-State entities in turn from trading with the US. [4]

4. These attempts at US extraterritorial jurisdiction have historically been criticised at EU level, [5] as such endeavours typically amount to a form of exorbitant jurisdiction which some think is not easily reconciled with general principles of public international law. [6] Here it may be observed that

[4] See Redding, B., 'The Long Arm of the Law or the Invasive Reach of the American Legal System', *Int'l Bus. L. J.*, 2007, p. 659. In his dissenting opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) 280-281, Brennan, J. stated that 'the enormous expansion of federal criminal jurisdiction outside our Nation's boundaries has led one commentator to suggest that our country's three largest exports are now "rock music, blue jeans, and United States law"' (quoting Grundman, V.R., 'The New Imperialism: The Extraterritorial Application of United States Law', *The International Lawyer*, vol. 14, 1980, p. 257).

[5] The challenges posed to EU law by the extraterritoriality of certain legislation should also be raised with acuteness in the forthcoming years in an area dear to the Court, namely that of personal data protection. Indeed, the US Clarifying Lawful Overseas Use of Data Act 2018, which amended the 1986 Stored Communications Act, gives American law-enforcement authorities the power to request data stored by most major cloud providers, even if stored outside the United States. However, the data-storage market is largely dominated by US companies, at more than 85%.

[6] According to a French parliamentary report, the US administration rarely bothers to justify its jurisdiction. In practice, it seems that the European companies convicted of violating US sanctions, mainly banks, have been so found under primary sanctions. The settlement agreements that they conclude rely on an extensive conception of the traditional general principles of territorial jurisdiction on the grounds that the transactions in question were made to or through US financial institutions or that they transited through the United States, because they are carried out in United States dollars (USD) and therefore necessarily involve US clearing houses. See Lellouche, P. and Berger, K., *L'extraterritorialité de la législation américaine*, Rapport d'information, Assemblée Nationale, France, 2016, pp. 49-53. Concerning the potential justification, or lack thereof, of the US legislation under international law, see, among others, Ryngaert, C., 'Extraterritorial Export Controls (Secondary Boycotts)', *Chin. J. Int'l L.*, vol. 7, 2008, p. 625, esp. p. 642 et seq.; Meyer, J.A., 'Second Thoughts on Secondary Sanctions', *U. Pa. J. Int'l L.*, 30, 2009, p. 905, p. 932 et seq.; and Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to US Secondary Sanctions', *British Yearbook of International Law*, 2020, pp. 9-65.

Article 21(1) and Article 21(2)(h) TEU enjoin the Union to protect and promote this system of international law. In addition, the European business community has objected to this type of legislation on the grounds that, in practice, it affects almost exclusively foreign companies.[7]

5. For all of these reasons, the existence of such legislation with potentially considerable extraterritorial effect did not go unnoticed. In 1996, the EU blocking statute was adopted by the Union, the first paragraph of Article 5 of which prohibits European companies from complying with US measures.[8] Nevertheless, the tensions between the two legal regimes which are at the core of this reference for a preliminary ruling present potential geopolitical problems, not only in terms of conflict of sovereignty, but also in terms of the competing regulatory barriers in the EU and US markets. As the facts of this case graphically show, the operation of the EU blocking statute gives rise to a series of hitherto unresolved legal issues and a variety of intensely practical problems, not least of which is that European companies find themselves facing impossible – and quite unfair – dilemmas brought about by the application of two different and directly opposing legal regimes.[9] I cannot avoid observing that the nature of these dilemmas, together with the failure to provide clear guidance on important legal issues which directly arise from the operation of the EU blocking statute, is such that the EU legislature might with advantage review the manner in which that statute presently operates.

7 According to Hubert de Vauplane, 'what is most shocking in the way the OFAC [(Office of Foreign Asset Control), which is in charge of enforcing those sanctions,] operates is a certain tropism to sanction mainly foreign banks, even when the only legal link with the United States is the use of the dollar as a payment currency'. De Vauplane, H., 'Iran: Sanctions américaines contre les banques européennes, hypocrisie ou arnaque?', *Les Échos*, 23 August 2012. See also Stratmann, K., Koch, M. and Brüggmann, M., 'Deutsche Firmen leiden unter US-Sanktionen – Amerikanische Konkurrenten werden geschont', *Handelsblatt*, 12 February 2019, and 'Wie hart Amerikas Forderung deutsche Unternehmen trifft', *Frankfurter Allgemeine Zeitung*, 10 May 2018 (source: https://www.faz.net/aktuell/wirtschaft/schutz-deutscher-unternehmen-vor-us-sanktionen-schwierig-15583846.html). In a related area, the fight against corruption, The New York Times also noted that in 2012 'a list of the top companies making these settlements is notable in one respect: its lack of American names' (Wayne, L., 'Foreign Firms Most Affected by a US Law Barring Bribes', *The New York Times*, 3 September 2012). See also Jakobeit, C., 'Große Schmiergeldzahler', *Welt-sichen*, No 9, 2010 (source: https://www.welt-sichten.org/artikel/3103/grosse-schmiergeldzahler), who comments on the fact that US companies have decades of experience in avoiding the stipulations of the Foreign Corrupt Practices Act (FCPA) and of the Organisation for Economic Co-operation and Development (OECD) by pointing out the political pressure exercised by the US Government on the basis of knowledge gained by its secret service which has led to the re-tendering of lucrative projects on several occasions as well as the possibility to apply to the US Department of Justice for an exemption from the FCPA in the interest of national security. In addition, the very broad scope of this legislation is compounded by problems of cost to defend such proceedings due to certain procedural mechanisms, requests for information within the framework of these same procedures that may relate to sensitive economic, financial or industrial data, and judicial uncertainty. Some authors have criticised the use of certain pieces of legislation by the authorities in charge of their enforcement as a way of opening direct negotiations with companies to force them to cooperate. See Garapon, A., 'Une justice "très" économique', in Garapon, A. and Servan-Schreiber, P. (eds), *Deals de justice: le marché américain de l'obéissance mondialisée*, Puf, 2015, pp. 119-120. See also Lohmann, S., *Extraterritoriale US-Sanktionen*, SWP-Aktuell No 31, May 2019. Others considered that these measures were indicative of a new manifestation of the United States' claim to hegemony. See Szurek, S., 'Le recours aux sanctions', in Gherari, H., and Szurek, S. (eds), *Sanctions unilatérales, mondialisation du commerce et ordre juridique international*, Cedin-Parix X Nanterre, Montchrestien 1998, p. 36, as well as *Nord Stream 2 Schwesig empört über amerikanische Drohung gegen Ostseehafen*, Frankfurter Allgemeine Zeitung, 7 August 2020 (source: https://www.faz.net/aktuell/wirtschaft/klima-energie-und-umwelt/nord-stream-2-schwesig-empoert-ueber-drohung-gegen-hafen-16894385.html). Finally, even though this situation is more in relation to anti-corruption legislation, some were alarmed by the fact that certain US sanctions based on legislation with extraterritorial effect had the effect of destabilising several European companies and were then followed by takeovers by US companies. See Laïdi, A., *Le droit, nouvelle arme de guerre économique: Comment les États-Unis déstabilisent les entreprises européennes*, Acte Sud, 2019, p. 156 et seq.

8 While the EU blocking statute is not the first act taken to counter the extraterritoriality of US law, it has nonetheless served as a model for the People's Republic of China, which has adopted similar rules very recently with the major difference that those rules do not target specific sanction measures from a third country, but provide that those rules generally apply,, 'where the extra-territorial application of foreign legislation and other measures, in violation of international law and the basic principles of international relations, unjustifiably prohibits or restricts the citizens, legal persons or other organisations of China from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons or other organisations'. See Wang, J., 'Can China's New "Blocking Statute" Combat Foreign Sanctions?', *Conflict of Laws .net*, 30 January 2021.

9 See to this effect, Truyens, L., and Loosveld, S., 'The EU Blocking Regulation: navigating a diverging sanctions landscape', *I.C.C.L.R.*, 30(9), 2019, pp. 490-501, at p. 501, and, referring to a 'Catch-22 situation', de Vries, A., 'Council Regulation (EC) No 2271/96 (the EU Blocking Regulation)', *Int'l Bus. Lawyer*, 26(8), 1998, p. 345, at p. 348.

6. In particular, many of these difficulties have been brought sharply back into focus following the May 2018 decision of the then US President, Donald Trump, to withdraw from the Iranian nuclear deal (formally known as the Joint Comprehensive Plan of Action) reached by the Islamic Republic of Iran and the informally called 'P5 plus 1' in Vienna in July 2015. [10] This does not appear to have been a formal treaty as such but rather a political agreement between the five Permanent Members of the Security Council (the United States of America, the Russian Federation, the People's Republic of China, the United Kingdom and the French Republic) along with the Federal Republic of Germany and the European Union, on the one hand, and the Islamic Republic of Iran, on the other. That agreement envisaged, inter alia, that the Islamic Republic of Iran would reduce its stockpiles of enriched uranium and centrifuges and agree to a programme of routine inspection in return for the gradual lifting of certain economic sanctions. The whole object of this agreement was to ensure that the Islamic Republic of Iran would not realise any ambition it might have had to achieve the capacity to manufacture and produce nuclear weapons.

7. President Trump's decision to withdraw from that agreement led in turn to fresh US sanctions. This posed considerable difficulties for certain major European companies. [11] Therefore, in order to forestall the effects of this reactivation of US sanctions against Iranian entities following the withdrawal of the United States of America from the Joint Comprehensive Plan of Action, the European Union has added the US legislation related to the Iran sanctions programme to the items of foreign legislation covered by the EU blocking statute.

8. Before turning to address these issues, it is first necessary to lay out the relevant provisions.

II. Legal framework

A. EU law

1. The EU blocking statute

9. The first to seventh recitals of the EU blocking statute provide:

'Whereas the objectives of the Community include contributing to the harmonious development of world trade and to the progressive abolition of restrictions on international trade;

Whereas the Community endeavours to achieve to the greatest extent possible the objective of free movement of capital between Member States and third countries, including the removal of any restrictions on direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets;

[10] The EU blocking statute laid dormant for a long time as successive US presidents suspended the controversial Title III of the Helms-Burton Act and as the EU and US sanctions regarding the Islamic Republic of Iran tended to converge after 2006. Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to US Secondary Sanctions', *British Yearbook of International Law*, 2020, p. 81.

[11] The most best-known of these cases is that concerning BNP Paribas, which was fined USD 8.9 thousand million for having transited money through the United States from 2004 to 2012 on behalf of Sudanese (USD 6.4 thousand million), Cuban (USD 1.7 thousand million) and Iranian (USD 650 million) clients. In addition, that bank was barred from US dollar-clearing operations for one year for its oil and gas commodity-finance business, and several executives, including its group chief operating officer, were required to leave BNP Paribas.

Whereas a third country has enacted certain laws, regulations, and other legislative instruments which purport to regulate activities of natural and legal persons under the jurisdiction of the Member State;

Whereas by their extra-territorial application such laws, regulations and other legislative instruments violate international law and impede the attainment of the aforementioned objectives;

Whereas such laws, including regulations and other legislative instruments, and actions based thereon or resulting therefrom affect or are likely to affect the established legal order and 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;

Whereas, under these exceptional circumstances, it is necessary to take action at Community level to protect the established legal order, the interests of the Community and 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;

Whereas the request to supply information under this Regulation does not preclude a Member State from requiring information of the same kind to be provided to the authorities of that State'.

10. The first paragraph of Article 1 of the EU blocking statute states:

'This Regulation provides protection against and counteracts the effects of the extra-territorial application of the laws specified in the Annex of this Regulation, including regulations and other legislative instruments, and of actions based thereon or resulting therefrom, where such application affects the interests of persons, referred to in Article 11, engaging in international trade and/or the movement of capital and related commercial activities between the Community and third countries.'

11. Article 4 of the EU blocking statute provides:

'No judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly or indirectly, to the laws specified in the Annex or to actions based thereon or resulting there from, shall be recognised or be enforceable in any manner.'

12. Article 5 of the EU blocking statute states:

'No person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom.

Persons may be authorised, in accordance with the procedures provided in Articles 7 and 8, to comply fully or partially to the extent that non-compliance would seriously damage their interests or those of the Community. The criteria for the application of this provision shall be established in accordance with the procedure set out in Article 8. When there is sufficient evidence that non-compliance would cause serious damage to a natural or legal person, the Commission shall expeditiously submit to the committee referred to in Article 8 a draft of the appropriate measures to be taken under the terms of the Regulation.'

13. Article 6 of the EU blocking statute provides:

'Any person referred to in Article 11, who is engaging in an activity referred to in Article 1 shall be entitled to recover any damages, including legal costs, caused to that person by the application of the laws specified in the Annex or by actions based thereon or resulting therefrom.

Such recovery may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary.

…'

14. Article 7 of the EU blocking statute provides:

'For the implementation of this Regulation the Commission shall:

…

(b) grant authorisation under the conditions set forth in Article 5 and, when laying down the time limits with regard to the delivery by the Committee of its opinion, take fully into account the time limits which have to be complied with by the persons which are to be subject of an authorisation;

…'

15. Article 8 of the EU blocking statute states:

'1. For the purpose of implementing Article 7(b), the Commission shall be assisted by the Committee on Extra-territorial Legislation. Those implementing acts shall be adopted in accordance with the examination procedure referred to in paragraph 2 of this Article. That Committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council [12].

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.'

16. Article 9 of the EU blocking statute reads:

'Each Member State shall determine the sanctions to be imposed in the event of breach of any relevant provisions of this Regulation. Such sanctions must be effective, proportional and dissuasive.'

17. Article 11 of the EU blocking statute provides:

'This Regulation shall apply to:

1. any natural person being a resident in the Community … and a national of a Member State,

[12] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

2. any legal person incorporated within the Community,

3. any natural or legal person referred to in Article 1(2) of Regulation (EEC) No 4055/86, [13]

4. any other natural person being a resident in the Community, unless that person is in the country of which he is a national,

5. any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity.'

2. Commission Implementing Regulation (EU) 2018/1101

18. Article 4 of the 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 [the EU blocking statute], [14] provides:

'When assessing whether a serious damage to the protected interests as referred to in the second paragraph of Article 5 of [the EU blocking statute] would arise, the Commission shall consider, inter alia, the following non-cumulative criteria, where appropriate:

(a) whether the protected interest is likely to be specifically at risk, based on the context, the nature and the origin of a damage to the protected interest;

(b) the existence of an ongoing administrative or judicial investigation against the applicant from, or a prior settlement agreement with, the third country which is at the origin of the listed extra-territorial legislation;

(c) the existence of a substantial connecting link with the third country which is at the origin of the listed extraterritorial legislation or the subsequent actions; for example the applicant has parent companies or subsidiaries, or participation of natural or legal persons subject to the primary jurisdiction of the third country which is at the origin of the listed extra-territorial legislation or the subsequent actions;

(d) whether measures could be reasonably taken by the applicant to avoid or mitigate the damage;

(e) the adverse effect on the conduct of economic activity, in particular whether the applicant would face significant economic losses, which could for example threaten its viability or pose a serious risk of bankruptcy;

(f) whether the applicant's activity would be rendered excessively difficult due to a loss of essential inputs or resources, which cannot be reasonably replaced;

(g) whether the enjoyment of the individual rights of the applicant would be significantly hindered;

[13] Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, (OJ 1986 L 378, p. 1).

[14] OJ 2018 L 199 I, p. 7.

(h) whether there is a threat to safety, security, the protection of human life and health and the protection of the environment;

(i) whether there is a threat to the Union's ability to carry out its humanitarian, development and trade policies or the external aspects of its internal policies;

(j) the security of supply of strategic goods or services within or to the Union or a Member State and the impact of any shortage or disruption therein;

(k) the consequences for the internal market in terms of free movement of goods, persons, services and capital, as well as financial and economic stability or key Union infrastructures;

(l) the systemic implications of the damage, in particular as regards its spill over effects into other sectors;

(m) the impact on the employment market of one or several Member States and its cross-border consequences within the Union;

(n) any other relevant factor.'

B. US law

1. Measures related to Iran

19. The US has enacted legislation providing for the sanctioning of violations in respect of its embargoes with other countries. Initially, however, the EU blocking statute mentioned only three items of legislation in its annex, namely, the 'National Defense Authorization Act for Fiscal Year 1993', the requirements of which are consolidated in Title I of the 'Cuban Liberty and Democratic Solidarity Act 1996', and the 'Iran and Libya Sanctions Act 1996'.

20. The Cuban Liberty and Democratic Solidarity (Libertad) Act 1996 (commonly called 'the Helms-Burton Act') was enacted in order to strengthen and continue the US embargo on Cuba. It prohibits the exportation to the United States of any goods or services of Cuban origin or containing materials or goods originating in Cuba either directly or through third countries, dealing in merchandise that is or has been located in or transported from or through Cuba, re-exporting to the United States sugar originating in Cuba without notification by the competent national authority of the exporter, or importing into the United States sugar products without assurance that those products are not products of Cuba. In addition, this act freezes Cuban assets, and financial dealings with the Republic of Cuba.

21. In particular, the provisions of Title III of that act provide both a means to discourage investment in Cuba, and a remedy for those who have had their property expropriated. In particular, it provides a remedy for US citizens who are victims of the Republic of Cuba's expropriation practices by granting them a right to sue in US courts any foreign nationals who 'traffic' in property 'confiscated' by the Cuban Government on or after 1 January 1959. The Helms-Burton Act defines 'trafficking' broadly, encompassing a wide range of activities connected to the expropriated property, including selling or managing it, as well as profiting

through the trafficking of another person. [15]

22. The Iran and Libya Sanctions Act 1996 (also known as 'the d'Amato-Kennedy Act') provides that economic actors covered by the embargo on Iran or Libya may not invest in either of those countries any amount greater than USD 40 million during a period of 12 months 'that directly and significantly contributes to the enhancement of the Iranian or Libyan ability to develop their petroleum resources'. The term 'investment' covers the entering into a contract for that development, or the provision of guarantees, or the profiting therefrom or the purchase of a share of ownership therein.

23. In reaction to the adoption of this legislation, in addition to issuing political reprimands and enacting the EU blocking statute, the EU filed a claim with the World Trade Organisation Dispute Settlement Mechanism, seeking to have a piece of US legislation declared illegal pursuant to Article XXI of the General Agreement on Tariffs and Trade . [16] This was later withdrawn after the EU concluded an Understanding with the United States of America on US extraterritorial legislation on 11 April 1997.

24. As I have already observed, in May 2018 the United States of America withdrew from the Joint Comprehensive Plan of Action (also known as 'the Iran deal') signed in Vienna on 14 July 2015. The Joint Comprehensive Plan of Action was aimed at controlling Iran's nuclear programme and lifting economic sanctions against Iran. As a result, the US Iran Transactions and Sanctions Regulations ('the ITSR') were revived. In response to these new measures, the annex to the EU blocking statute was amended in 2018 [17] in order to include more US legislation, principally, legislation aimed at enforcing sanctions on Iran. The reference for a preliminary ruling specifies that the applicant has been included in the Specially Designated Nationals and Blocked Person List (SDN) maintained by the Office of Foreign Assets Control ('OFAC'), reference to which is made by various pieces of the legislation mentioned in the annex to the EU blocking statute.

25. One such piece of legislation is the Iran Threat Reduction and Syria Human Rights Act of 2012. Section 220(c) of that act provides that in the event a person continues knowingly and directly to provide specialised financial messaging services to, or knowingly enable or facilitate direct or indirect access to such messaging services for, the Central Bank of Iran or a financial institution, the US President may impose sanctions.

26. The other relevant piece of legislation added to the annex to the EU blocking statute is the ITSR.

27. Paragraph 560.211 of the ITSR, entitled 'Prohibited transactions involving blocked property', provides:

'(a) All property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

[15] See Arendt, M., 'The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996: Isolationist Obstacle to Policy of Engagement', *Case Western Reserve Journal of International Law*, 30(1), 1998, p. 262.

[16] OJ 1994 L 336, p. 11. See Lesguillons, H., 'Helms-Burton and D'Amato Acts: Reactions of the European Union', *I.B.L.J.*, vol. 1, 1997, pp. 95-111, esp. pp. 97-103, and Smis S., Van Der Borght, K., 'The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts', *American Journal of Int'l Law*, 93, 1999, p. 227, esp. pp. 231-235.

[17] See Regulation 2018/1100.

(b) All property and interests in property of any Iranian financial institution, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(c)(1) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) Any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to paragraphs (a) through (c)(1)(i) of this section …

…

(d) The prohibitions in paragraphs (a) through (c) of this section include, but are not limited to, prohibitions on the following transactions:

(1) The making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to paragraphs (a) through (c) of this section; and

(2) The receipt of any contribution or provision of funds, goods, or services from any person whose property and interests in property are blocked pursuant to paragraphs (a) through (c) of this section.'

28. Paragraph 560.325 of those regulations, entitled 'Property; property interest', states:

'The terms *property* and *property interest* include, but are not limited to, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.'

29. Paragraph 560.410 of those regulations, entitled 'Provision of services', provides:

'…

(c) The prohibitions on transactions involving blocked property contained in §560.211 apply to services performed in the United States or by U.S. persons, wherever located, including by an overseas branch of an entity located in the United States:

…

(2) With respect to property interests of the Government of Iran, an Iranian financial institution, or any other person whose property and interests in property are blocked pursuant to §560.211.

…'

30. In the present case, neither the referring court in its reference, nor any of the parties in their observations, have specified exactly which piece of legislation and the provisions thereof would be likely to apply to Deutsche Telekom GmbH if that company did not terminate its contracts with Bank Melli Iran. In my view, the two pieces of the US legislation mentioned above seem to be the only ones likely to have this effect, albeit that this will depend on the circumstances of the case.

31. In regards to monetary penalties, both the d'Amato-Kennedy Act and the ITSR make reference to Section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705). That latter act provides that a civil penalty for violations of its provisions (and thus for violations of the provisions of the two other acts cited above) shall be an amount not exceeding the greater of either USD 250 000 or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed. The International Emergency Economic Powers Act also provides, in regards to criminal penalties, that a person convicted of any violation of the relevant provisions of that act (and thus of the relevant provisions of the d'Amato-Kennedy Act and the ITSR) shall, upon conviction, be fined not more than USD 1 000 000, or if a natural person, may be imprisoned for not more than 20 years, or both. [18]

2. The Foreign Sovereign Compulsion Doctrine in US law

32. The foreign sovereign compulsion doctrine is a means of defence recognised by the US Supreme Court in 1958 in *Société Internationale v. Rogers* 357 U.S. 197 (1958). [19] This doctrine is rooted in the principle of due process, as well as in the doctrine of international comity, that is to say, respect for the legal system of another sovereign State. [20] According to that doctrine, which has been applied in particular in relation to antitrust laws, [21] a state or the federal administration is precluded from requiring a person (i) to do an act in another State that is prohibited by the law of the State of which he or she is a national, or (ii) to refrain from doing an act in another State that is required by the law of that State or by the law of the State of which he or she is a national.

[18] It might be noted, regarding Article 6 of the EU blocking statute (known as 'the claw-back provision'), that in so far as the United States of America benefits in principle from immunity from jurisdiction under the current state of customary international law, this provision is likely to apply principally to private enforcers. However, the US legislation relating to Iran mentioned in the annex to that statute does not seem to provide for a private enforcement mechanism as in Title III of the Helms-Burton Act.

[19] In *Société Internationale v. Rogers*, the US Supreme Court had reversed an original US District Court finding that there had been a breach of a US discovery order on the basis that the threat of prosecution in Switzerland for a breach of that jurisdiction's non-disclosure rules prevented the applicant in that case from complying with the order.

[20] See, Wallace Jr., D., 'The Restatement and Foreign Sovereign Compulsion: A Plea for Due Process', *International Lawyer*, vol. 23, ABA, 1989, p. 593, esp. pp. 595-596.

[21] In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc*, 307 F. Supp. 1291 (D. Del. 1970), the United States District Court for Delaware recognised that the defendant's refusal to sell oil had been compelled by the Venezuelan Government.

33. However, with respect to its application in the context of the blocking statutes adopted by Canada, the United Kingdom and the European Union, the US District Court for the Eastern District of Pennsylvania found in *United States v. Brodie*, 174 F. Supp. 2d 294 (E.D. Pa. 2001), that the defendants in that case, who had engaged in transactions with the Republic of Cuba that were prohibited by US law, could not rely on the foreign sovereign compulsion doctrine as a defence for two reasons.[22] First, if the rationale for the doctrine is deference to the acts of a foreign sovereign, there is no place for the doctrine in a criminal case since the violation of the US public order outweighed any considerations of international comity. Secondly, without holding that the doctrine could never raise due-process concerns in the criminal context, the US District Court ruled that there were no due-process issues raised in that case on the ground that the various national blocking statutes which were in force at that time in Canada, in the United Kingdom and in the EU did not create an obligation for a company to trade with the Republic of Cuba. Indeed, in previous cases where that doctrine was held to apply, particular orders had been issued by the foreign jurisdictions directed at defendants, specifically ordering them to do something. Without such orders, the threat of prosecution did not exist. Such orders were absent in *United States v. Brodie*. Perhaps most importantly, in that case, there was no evidence supplied that the blocking statutes at issue *obliged* the defendants to *sell* their product to the Republic of Cuba. The element of compulsion required by the foreign sovereign compulsion doctrine was accordingly missing.

C. German law

34. According to the German Government, in the case of open-ended service contracts (to which contracts for the provision of telecommunications services belong), where the latter are concluded for an indefinite period, each party has, under Paragraph 620(2) of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'), an ordinary right of termination, meaning it has the possibility of terminating the contract without any particular reason. The applicable periods of notice and due dates are defined by Paragraph 621 of the BGB, which provides for different periods depending on the due date of the remuneration (daily, weekly, monthly, quarterly or other). Conversely, for service contracts concluded for a fixed term, no 'ordinary' right of termination is provided by law. These contracts are terminated at the end of the contract, pursuant to Paragraph 620(1). As those rules are default provisions, the parties may deviate from them. In addition, all contracts with continuing performance, which is the case with many service contracts, can be terminated for serious reasons at any time in accordance with Paragraph 314 of the BGB.

35. Paragraph 134 of the BGB provides:

'A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.'[23]

[22] It should be noted, however, that in *Societe Nationale Aéronautique v. District Court*, 482 U.S. 522 (1987), Stevens J, delivering the judgment of the US Supreme Court mentioned, but in a footnote, that 'it is well settled that [blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute'. See footnote 29. Stevens J pointed out nonetheless that 'American courts should … take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state'.

[23] According to the information provided by the German Government, the concept of 'legal transaction' used in Paragraph 134 of the BGB does not only refer to contracts but also unilateral legal acts, such as an act of termination of a contract.

36. Infringement of the first paragraph of Article 5 of the EU blocking statute may be prosecuted in Germany as an administrative offence under Paragraph 19(4), first sentence, point 1 of the Außenwirtschaftsgesetz (Foreign Trade Act; 'the AWG'), read in conjunction with Paragraph 82(2) of the Außenwirtschtsverordnung (Foreign Trade Regulation) and is punishable by a fine of up to EUR 500 000 (Paragraph 19(6) of the AWG). [24]

III. The facts of the main proceedings and the reference for the preliminary ruling

37. The applicant, Bank Melli Iran, is an Iranian bank, in the form of a public limited company incorporated under Iranian law. It has a branch in Hamburg (Germany) and its core business is to settle foreign trade transactions with Iran. The defendant, Telekom Deutschland GmbH, is a subsidiary of Deutsche Telekom, one of the leading German telecommunication service providers. The group has over 270 000 employees worldwide, of whom over 50 000 are in the United States, where approximately 50% of its turnover is generated.

38. The applicant and the defendant entered into a framework contract that allows the applicant to group all its company connections at various sites in Germany under one contract. In the context of this contractual relationship, the applicant ordered different services which the defendant made available and invoiced monthly for an amount of approximately EUR 2 000, which sum was always paid without delay. The services governed by these contracts form the exclusive basis of the internal and external communication structures of the applicant in Germany and are therefore, as the referring court found, indispensable to its business activities.

39. Following the decision of President Trump in May 2018 by which the United States withdrew from the Joint Comprehensive Plan of Action, the ITSR were accordingly revived. In particular, following the adoption of Executive Order 13846 of 6 August 2018, Reimposing Certain Sanctions With Respect to Iran, Bank Melli Iran was again placed on a list of sanctions prepared by OFAC: the SDN. Bank Melli Iran had previously been on that list since 2007, after being designated as a blocked person by the OFAC pursuant to Executive Order 13382 of 28 June 2005, entitled Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters, [25] before those sanctions were lifted by the Joint Comprehensive Plan of Action. These new sanctions came into effect on 5 November 2018.

40. By letter of 16 November 2018, the defendant gave notice of termination of all contracts with the applicant, with immediate effect. It sent identical notices of termination on the same date to at least four other clients with connections to Iran who were based in Germany. The applicant initiated proceedings against the defendant claiming the infringement of the EU blocking statute and, on 28 November 2018, the court of first instance, the Landgericht Hamburg (Regional Court, Hamburg, Germany) granted an interim junction ordering the defendant to perform the contracts until the end of the period of notice for ordinary termination.

41. By letter dated 11 December 2018, the defendant sent another notice of termination. That letter read, inter alia, as follows: '… by letter of 16 November 2018, we gave notice of termination of the services listed below with immediate effect. As a purely precautionary measure, we hereby also give notice of ordinary termination as of the earliest possible date'.

[24] The initiation of administrative proceedings for the purpose of a fine is, unlike criminal proceedings, subject to the principle of discretionary prosecution, which means that the prosecution of an offence by an administrative authority is discretionary in view of the circumstances of the individual case.

[25] See Federal Register / vol. 72, No 213 / Monday, 5 November 2007 / Notices.

42. The period of notice for ordinary termination of the contracts ended respectively on 25 January 2019, 10 February 2019, 13 March 2019, 10 and 25 September 2019, 30 January 2020, 22 August 2020 and 7 January 2021. In response, the applicant requested the Landgericht Hamburg (Regional Court, Hamburg) to order the defendant to leave all contractually agreed lines active.

43. The court of first instance ordered the defendant to perform the contracts until the expiry of the ordinary notice periods. It held that the ordinary termination by the defendant of the disputed contracts was valid and, in particular, did not infringe Article 5 of the EU blocking statute. That court dismissed the action as to the remainder.

44. The applicant appealed against the decision of the Landgericht Hamburg (Regional Court, Hamburg) to the referring court, the Hanseatisches Oberlandesgericht Hamburg (Hanseatic Higher Regional Court, Hamburg, Germany), claiming that the notice of ordinary termination given by the defendant infringes the first paragraph of Article 5 of the EU blocking statute and should therefore be considered as inoperable and ineffective, since it was motivated solely by the defendant's desire to comply with one of the items of legislation listed in the annex to that statute. The defendant, relying on the Commission Guidance Note, contends that the first paragraph of Article 5 of the EU blocking statute does not change its right of ordinary termination, which did not depend upon a reason for termination, as that article leaves it free to end its business relationship with the applicant at any time, and its motives are immaterial.

45. In this context, the referring court noted, first, that the applicant has not shown that the termination of the contracts was preceded by a direct or indirect official or court order from the United States of America. As it happens, another German court of appeal, the Oberlandesgericht Köln (Higher Regional Court, Cologne, Germany), took the position, in a judgment of 7 February 2020, that, in such a situation, the first paragraph of Article 5 of the EU blocking statute would not be applicable. For its part, the referring court considers that the mere existence of secondary sanctions is sufficient to establish infringement of the first paragraph of Article 5 of the EU blocking statute, since that is the only way of effectively implementing the obligation laid down.

46. Secondly, the referring court observes that the (ordinary) termination of a contract infringes the first paragraph of Article 5 of the EU blocking statute where its decisive motive is compliance with US sanctions. However, the ordinary termination of contracts would not infringe the first paragraph of Article 5 of the EU blocking statute where it is motivated by purely economic reasons with no concrete link to the US sanctions. Consequently, the referring court would have to decide whether, in order to ensure the effectiveness of that article, it would not be appropriate to consider that the defendant should exceptionally have to explain the reasons for the termination, or even, as the case may be, demonstrate that the decision to terminate the contract was not taken for fear of possible negative repercussions on the US market.

47. Thirdly, the referring court considers that under Paragraph 134 of the BGB, a termination of a contract which infringes the first paragraph of Article 5 of the EU blocking statute is devoid of legal effect. That being so, that court wonders whether, in view of the risk of economic damage to the defendant, which earns 50% of its turnover on the US market, it could be considered contrary to the principle of proportionality of penalties laid down in Article 9 of the EU blocking statute to require the defendant to continue the contractual relationship with the applicant in addition to imposing a pecuniary fine.

48. Fourthly, the referring court points out that, according to its preamble, the EU blocking statute is intended to protect economic operators. However, that court considers that this objective would not be achievable since the risk of economic damage on the US market resulting from the application of the first paragraph of Article 5 of that statute is not sufficiently countervailed by the recovery claim regulated in Article 6 of the EU blocking statute and by the possibility of obtaining an authorised exemption under the second paragraph of Article 5 of that statute in so far as imminent economic losses alone might not provide sufficient grounds for an exemption. In those circumstances, the referring court wonders whether a measure prohibiting an undertaking from separating from a trading partner is compatible with the freedom to conduct business protected by Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter') and the principle of proportionality enshrined in Article 52 of the Charter.

49. In these circumstances, the Hanseatisches Oberlandesgericht Hamburg (Hanseatic Higher Regional Court, Hamburg) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the first paragraph of Article 5 of [the EU blocking statute] only apply where the acting EU operator within the meaning of Article 11 of that [statute] is issued directly or indirectly with an official or court order on the part of the United States of America or does it suffice for its application that the action of the EU operator is predicated on compliance with secondary sanctions without any such order?

(2) If the answer to Question 1 is that the second alternative applies:

Does the first paragraph of Article 5 of [the EU blocking statute] preclude an understanding under national law that the party giving notice of termination is also able to terminate a continuing obligation with a contracting party named on the [SDN] held by the [OFAC], including where termination is motivated by compliance with US sanctions, without the need to give a reason for termination and therefore without having to show and prove in civil proceedings that the reason for termination was not to comply with US sanctions?

(3) If Question 2 is answered in the affirmative:

Must ordinary termination in breach of the first paragraph of Article 5 of [the EU blocking statute] necessarily be regarded as ineffective or can the purpose of the [statute] be satisfied through other penalties, such as a fine?

(4) If the answer to Question 3 is that the first alternative applies:

Considering Articles 16 and 52 of the Charter of Fundamental Rights of the European Union, on the one hand, and the possibility of an exemption being authorised under the second paragraph of Article 5 of [the EU blocking statute], on the other, does that apply even where maintaining the business relationship with the listed contracting party would expose the EU operator to considerable economic losses on the US market (in this case: 50% of group turnover)?'

IV. Analysis

50. As a preliminary remark, I would like to point out that, although some parties have referred to the Commission Guidance Note – Questions and Answers: adoption of Update of the Blocking Statute of 7 August 2018,[26] that document has no binding normative value, as it was not adopted under a procedure provided for in the Treaties, nor can it have binding interpretative value, in so far as the competence to interpret an act taken by the institutions of the Union, such as the EU blocking statute, is conferred by the Treaties on the Court only.[27] In these circumstances, I consider that this document cannot be taken into account in consideration of the questions raised.

51. Similarly, in so far as Implementing Regulation 2018/1101 is a lower-ranking norm, its provisions cannot be taken into account in order to interpret the provisions of the EU blocking statute.[28]

52. Consequently, it is therefore exclusively in the light of the EU blocking statute and the primary law that the questions referred by the referring court should be examined.

A. On the first question

53. By its first question, the referring court asks whether the first paragraph of Article 5 of the EU blocking statute is to be interpreted as only applying where an administrative or judicial authority of a country whose laws and regulations are listed in the annex to that statute has addressed, directly or indirectly, some instructions to a person referred to in Article 11 of that same statute, or whether it is sufficient that the first paragraph of Article 5 of the EU blocking statute applies where the economic operator who is within the territory of the European Union spontaneously complies with the foreign extraterritorial legislation in question in order to forestall the potential application of such legislation.

54. In this regard, it should be recalled that the first paragraph of Article 5 of the EU blocking statute provides that 'no person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom'.

55. As it appears from that wording, the first paragraph of Article 5 of the EU blocking statute refers to the 'requests of foreign courts' only as one of a multiplicity of 'requirements or prohibitions' under the laws listed in the annex thereto and which any person within the

[26] C/2018/5344 (OJ 2018 C 2771, p. 4).

[27] According to the Court's case-law, first, outside the procedures laid down in the Treaties, the Commission may only adopt rules of practice about the manner in which this institution intends to exercise a discretionary power conferred on it by the Treaties, from which, moreover, it cannot depart without giving the reasons which led it to do so. See, to this effect, judgments of 9 October 1984, *Adam and Others* v *Commission* (80/81 to 83/81 and 182/82 to 185/82, EU:C:1984:306, paragraph 22), and of 18 May 2006, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* (C-397/03 P, EU:C:2006:328, paragraph 91). In addition, even when it fulfils that obligation, an institution may never entirely renounce the exercise of such a discretionary power. See, for example, judgment of 10 October 2019, *Société des produits Nestlé* v *EUIPO – European Food (FITNESS)* (T-536/18, not published, EU:T:2019:737, paragraph 38). Secondly, the scope of the provisions laid down in legal acts can never depend on the conduct or statements of the institutions. See judgment of 10 December 2013, *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraph 53).

[28] Any contrary solution would be tantamount to admitting that a lower norm may modify the scope of a rule of higher rank.

meaning of Article 11 of that statute is forbidden to comply with.[29] This implies that, at least, Article 5 of the EU blocking statute does *not* apply *only* where a request or an instruction has in fact been issued by a judicial authority. One might also observe that that article forbids compliance with any 'requirement' laid down in one of the laws specified in the annex to the EU blocking statute whereas the term 'requirement' refers, in law, to a duty imposed by any type of legal act, irrespective of whether it is a treaty, a convention, a statute, a regulation or a judicial decision. In the light of those two elements, it is clear that the wording of the first paragraph of Article 5 of the EU blocking statute supports the interpretation according to which this provision applies even in the absence of instructions or requests by an administrative or judicial authority.[30]

56. According to the Court's established case-law, the interpretation of a provision of EU law requires that consideration must also be given to its context and the objectives pursued by the rules of which it is part.[31]

57. So far as the *context* in which the first paragraph of Article 5 of the EU blocking statute is concerned, it may be noted that each time that statute lays down a provision requiring the existence of an administrative or judicial decision in order to apply, that statute expressly refers to this type of act and not to more general concepts such as those of 'requirement' or 'prohibition'. Accordingly, since, in comparison, Article 5 thereof is broadly worded, I believe that this provision does not apply only where an administrative or judicial authority of a country whose laws and regulations are listed in the annex to the EU blocking statute has addressed, directly or indirectly, some instructions to a person referred to in Article 11 of that statute. Moreover, since Article 4 of the EU blocking statute excludes the possibility that instructions given by an administrative or a judicial authority located outside the Union might produce effects within it, the first paragraph of Article 5 of the EU blocking statute would be devoid of any autonomous scope if that provision required that the persons referred to in Article 11 of that statute have received such instructions before that provision needs to be applied.[32]

58. The objective pursued by the EU blocking statute also tends to confirm the broad scope that must be recognised in regard to Article 5 thereof.

59. First, it flows from the fourth to sixth recitals thereof that the EU blocking statute was enacted in reaction to the *effects* produced by the laws specified in the annex thereto. In particular, it can be inferred from the fifth recital of that statute that it is those laws in themselves, and not only the actions taken on their ground, that are likely to affect the established international legal order, which the Union has made it its mission to defend, and that have adverse effects on its interests or on those of natural and legal persons exercising rights under EU law.

[29] Since, regarding companies, Article 11(2) of the EU blocking statute refers to legal persons 'incorporated within the [Union]', Article 5 of that statute applies to European subsidiaries of US companies, but not to US companies trading in Europe or to US subsidiaries of European companies. Regarding the European Central Bank and the European Investment Bank, since their legal personality derives from the Treaties, respectively in Articles 282 and 308 TFEU, and, therefore, they are not 'incorporated', Article 5 of the EU blocking statute does not apply to them as such. However, both are, in principle, required to apply Article 4 of that statute.

[30] Admittedly, that provision refers to 'any requirement or prohibition … [which is] *based on* or resulting … from the laws specified in the Annex or from actions based thereon or resulting therefrom' (emphasis added), which may give the impression that those requirements or prohibitions are distinct from the obligations contained in those laws. However, I consider that the term 'resulting from' used in the alternative is broad enough to include the obligations set out directly in those laws.

[31] See, to that effect, for example, judgment of 10 September 2014, *Holger Forstmann Transporte* (C-152/13, EU:C:2014:2184, paragraph 26), and of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 47).

[32] This provision implies in particular a duty for Member States not to honour any extradition request from the United States based on one of the pieces of legislation listed in the annex to the EU blocking statute.

60. Secondly, it follows from its seventh recital that the EU blocking statute aims at protecting those natural and legal persons whose interests are affected *by the aforementioned laws*, which is supposed to be done, according to the sixth recital, 'by removing, neutralising, blocking or otherwise countering *the effects of the foreign legislation concerned*'.[33] It is thus clear from that latter recital that the objective is to counteract the effect of the foreign legislation itself and not simply the effects of decisions giving effect to the obligations provided for in these laws.

61. Thirdly, Article 1 of the EU blocking statute, which summarises the objectives pursued by that statute, also indicates that those objectives are to counter and to protect European operators against the *effects* of the laws specified in its annex, and not only their *application* when an administrative or judicial authority issues an instruction, as claimed by the defendant. Such objectives could not be achieved if that statute and, in particular, the first paragraph of Article 5 thereof, were to be interpreted as only covering the situation where an economic operator has received a formal instruction from a court or an administrative authority.[34] Indeed, as economic operators are generally considered to be risk averse, those which are diligent will tend to comply spontaneously with any legal constraint resulting from their legal environment.[35] If it were otherwise, there would be a real risk that, even in the absence of a formal instruction to cease trading, entities could nonetheless cite the *potential* application of the US sanctions legislation in order to justify the non-performance or the repudiation of their contractual obligations. In those circumstances, any party affected in this way would be left without a remedy under the EU blocking statute simply because they could not point to a formal instruction for this purpose, even if the concerns about the potential application of the sanctions was simply contrived.

62. In any event, as Article 4 of the EU blocking statute clearly applies to prevent the enforcement of any award made by a judicial or administrative body based on the existence of the sanctions legislation even in the absence of an instruction to that effect from any such foreign or administrative body, the first paragraph of Article 5 of the EU blocking statute would be deprived of any autonomous scope if its application was made contingent on a requirement that the persons referred to in Article 11 thereof had received such an instruction.

63. Moreover, the laws listed in the annex do not in fact oblige the administrative or judicial authorities in charge of enforcing those laws to address instructions to give formal notice to any contracting partner of an undertaking subject to the first sanctions to comply with those same laws before being entitled to impose a sanction on them. Accordingly, those laws generate a judicial risk for the persons referred to in Article 11 of the EU blocking statute from the moment that they become fully applicable. It is therefore from that moment that these operators will have to decide whether they should try to avoid that risk by disengaging themselves from (or by

[33] Emphasis added.

[34] In this respect, I disagree with the argument put forward by Telekom Deutschland according to which an instruction from a US judicial or administrative authority would be necessary in order for the first paragraph of Article 5 of the EU blocking statute to apply in so far as any law adopted abroad would, as a matter of principle, produce its effect only on the adopting State's territory. Indeed, it is obvious that the problem raised by this legislation concerns first and foremost companies which, like Telekom Deutschland, have interests in the United States. In reality, the difficulty that exists in combatting the extraterritoriality of certain laws is simply related to the interconnectedness of economies.

[35] The fact that a company complies is closely linked to the perception of risk. Some authors define legal risk as arising 'from the conjunction of a legal norm and an event, with either one or the other (or both) being characterised by a degree of uncertainty. This conjunction of a legal norm and an event in a context of uncertainty will have consequences likely to affect the value of the company'. Collard, C. and Roquilly, C., *Proposals for a Definition and Map of Legal Risk*, EDHEC Business School, research paper, 2011, p 7. Consequently, the greater the links between an operator and its market, the greater its propensity to comply with the legislation in question. Conversely, an operator with no ties to the US market and whose managers are prepared to agree never to travel to that country or to a State that has extradition agreements with it can afford to ignore the laws in question. On the question of legal risk management, see Masson, A., Shariff, M., 'Through the Legal Looking Glass : Exploring the Concept of Corporate Legal Strategy', *EBLR*, vol. 22(1), Wolters Kluwer, 2011, p.64 et seq; as well as Masson, A., Bouthinon-Dumas, H., 'L'approche Law & Management', *RTD Com*, N°2, Dalloz, 2011, p.238.

avoiding) the markets concerned (avoidance strategy) or whether they try to reduce that risk by complying with that legislation by adequate resources, which, in practice, will at least require those companies to monitor their transactions (reduction strategies). [36]

64. In practice, many large companies have already set up compliance departments to ensure that their actions are in line with such constraints. [37] As a result, these companies, when operating in the countries potentially affected by the legislation set out in the annex to the EU blocking statute will tend to comply with it even in the absence of any instruction to this effect. Consequently, in order to counter the effects of such legislation and in order to protect EU companies, it is necessary that the first paragraph of Article 5 of the EU blocking statute should be able to apply even in the absence of such a formal instruction from the administrative or judicial arms of the third party State to cease trading. Admittedly, as noted by the defendant, Article 1 of the EU blocking statute summarises the objectives pursued by this statute as being to 'provide protection against and counteract the effects of the extraterritorial *application* of the laws specified in the Annex'. However, I do not think that the term 'application' used in Article 1 should be understood in the context of the EU blocking statute as meaning that this statute requires, in order to be applied, a concretisation of the obligations provided for by the laws listed in the annex in the form of a judicial or administrative instruction from a foreign state. Indeed, that provision also specifies that the protection that this statute seeks to establish applies to actions based on or resulting from such legislation too, which implies, a fortiori, that this protection is expected to operate in respect of the provisions of those laws in the first place. Accordingly, I believe rather that this term is used by reference to what the EU legislature seems to see as an issue, namely, as flows from the third and fourth recitals of the statute, not the very principle of the prohibitions which they lay down, but their extraterritorial scope.

65. In view of the above, I propose to answer the first question to the effect that the first paragraph of Article 5 of the EU blocking statute is to be interpreted as not applying only where an administrative or judicial authority of a country whose laws and regulations are listed in the annex to that statute has addressed, directly or indirectly, some instructions to a person referred to in Article 11 thereof. The prohibition contained in that provision accordingly applies even in the event that an operator complies with such legislation without first having been compelled by a foreign administrative or judicial agency to do so.

[36] A number of firms commercialise IT solutions for screening and monitoring transactions in order to detect any risk of violation of the legislation in question. Most often, those solutions are modules of anti-money-laundering software.

[37] See in Paine, L.S., 'Law, Ethics, and Managerial judgment', Journal of Legal Studies, 1994, pp. 153-169; Weinstein, S. and Wild, C. (eds), Legal risk management, governance and compliance: a guide to best practice from leading experts, Globe Law and Business, 2013; Verdun F., Le management stratégique des risques juridiques, LexisNexis, 2nd, 2013, p. 133 et seq. According to Hugues Bouthinon-Dumas, the term 'compliance' refers to the way in which companies organise themselves in order to manage their legal constraints and on which their economic performance partly depends. It is based on a proactive approach aimed at ensuring the effective application of standards within an organisation by internalising the standards to which it is subject. In concrete terms, compliance takes the form of a series of coordinated actions ranging from regulatory monitoring to the internal sanctioning of any deviation that is observed, through the mapping of legal risks, monitoring of administrative and legal practices in the sector, raising the awareness of company teams of legal risks and their damaging consequences, employee training, participation in the definition of a risk policy, monitoring of compliance with standards, and the organisation of the detection of transgressions. These practices are nowadays implemented by specialised professionals, belonging to the organisations themselves or acting as external service providers (for example, lawyers or consulting firms). More and more companies are equipping themselves with a compliance officer and their teams are growing. Bouthinon-Dumas, H., 'La compliance: une inflation normative au carré', Management & Avenir, 2019/4, No 110, p. 110 (informal translation). According to Marie-Anne Frison-Roche, 'compliance law' refers to legislation requiring certain 'crucial' private operators to internalise general interest objectives, because of their position and the means at their disposal, in order to satisfy these objectives. Frison Roche, M. A., L'apport du droit de la compliance à la gouvernance d'internet, Rapport commandé par Monsieur le Ministre en charge du Numérique, April 2019, pp. 13-16.

B. On the second question

66. By its second question, the referring court asks, in essence, whether the first paragraph of Article 5 of the EU blocking statute must be interpreted as precluding an interpretation of national law under which a person referred to in Article 11 of that statute may terminate a continuing obligation with a contracting party named on the (SDN held by the OFAC, without giving reasons for its decision to terminate those contracts.

67. While it is accepted that German contract law (in common with the legal systems of many Member States) generally allows traders to terminate contractual relations with any other economic operators without giving reasons for that decision, the argument here is that unless the decision to terminate Bank Melli Iran's contractual relationship can be justified in some way by Telekom Deutschland, the referring court cannot ascertain whether that company terminated those relations for a reason that does not infringe the EU blocking statute.

68. Before proceeding to discuss whether the first paragraph of Article 5 of the EU blocking statute should be interpreted as laying down an obligation in respect of a natural or legal person referred to in Article 11 thereof to give reasons when terminating a contract with a party named on the SDN or otherwise to justify such a termination, it is first necessary to raise the question of whether, in circumstances such as those at issue in the main proceedings, the first paragraph of Article 5 of the EU blocking statute can be invoked by a co-contracting party of such a person. [38]

1. Does the EU blocking statute apply to a situation such as that at issue in the main proceedings?

69. The question here is whether the first paragraph of Article 5 of the EU blocking statute should be understood as having conferred upon a person the right to rely on that provision to prevent a European operator from infringing that provision so that, in the main proceedings, Bank Melli Iran could invoke that article to challenge the termination of the contracts at issue.

70. The first thing to note is that the first paragraph of Article 5 of the EU blocking statute must be interpreted restrictively inasmuch as it severely affects freedom of enterprise. If, for example, that article could be enforced at the suit of a private entity such as Bank Melli Iran, it would have indeed the effect of *obliging* another European undertaking such as Telekom Deutschland to do business with it. This would be a far-reaching interference with ordinary commercial freedoms.

71. Secondly, there is no express reference in the EU blocking statute to any rights that this regulation would confer on persons other than those referred to in Article 11 thereof. In particular, it may be observed that, with regard to the first paragraph of Article 5 of the EU blocking statute, that provision seeks to prohibit generalised conduct required of the undertakings referred to in Article 11 of that regulation, namely to comply with one of the laws listed in the annex thereto. Given the general nature of this prohibition and the choice of the EU legislature to adopt a regulation rather than a directive, if that provision was intended to confer individual rights, one might have expected that the latter would have addressed the specific

[38] In this respect, it is worth recalling that not all the rules laid down by EU law, including those in the Treaties, are intended to be invoked by individuals against other individuals. For example, the free movement of goods, although guaranteed by the Treaties, hasonly a direct vertical reverse effect, in that it creates obligations for the States alone. See judgments of 29 February 1984, *REWE-Zentrale* (37/83, EU:C:1984:89, paragraph 18); of 17 May 1984, *Denkavit Nederland* (15/83, EU:C:1984:183, paragraph 15); and of 24 November 1982, *Commission* v *Ireland* (249/81, EU:C:1982:402, paragraph 21).

circumstances in which a party affected by one of the pieces of legislation mentioned in that annex could rely on the prohibition contained in the first paragraph of Article 5 of the EU blocking statute in order to defend its own private interests. This, however, is not the case.

72. Thirdly, Article 9 of the EU blocking statute (which is the only provision devoted to the consequences of the violation of the EU blocking statute) imposes an obligation on the Member States to provide for effective, proportionate and dissuasive sanctions in the event of a breach of that statute. This terminology – in particular, the use of the adjective 'dissuasive' – usually refers to public rather than private enforcement. [39]

73. Fourthly, the second paragraph of Article 5 of the EU blocking statute, which gives the Commission the power to authorise persons to comply wholly or partly with the requirements or prohibitions laid down or resulting from that legislation, does not provide that, in deciding whether to grant such an exemption, that institution should take into account the interests of third parties, as might have been expected if the EU blocking statute were to recognise the rights of persons likely to be addressed by the legislation listed in the annex to the EU blocking statute. [40]

74. Apart from these arguments drawn from wording and the context of the first paragraph of Article 5 of the EU blocking statute, perhaps the strongest argument in favour of interpreting it simply as laying down a rule of economic policy and not as conferring rights on contracting parties, lies in the objectives of the EU blocking statute. [41] Indeed, those objectives are, after all, *not* to protect third-country companies directly targeted by the US measures, but rather, as Article 1 of that statute states, to counter the effects of the targeted laws and to protect European companies, and indirectly, the national sovereignties of the Member States, against that legislation contrary to international law. [42] If Bank Melli Iran could enforce the first paragraph of Article 5 of the EU blocking statute by private enforcement action of the kind at issue here, this could be seen as contravening the objectives of that statute, which are to protect European companies (and *not* the companies targeted by the primary sanctions) because it puts them in an unenviable and almost impossible position. [43]

[39] In the context of the EU blocking statute, the adjective 'dissuasive' implies that the penalties provided for be potentially equivalent to the penalties provided for by the legislation listed in the annex. It is indeed only on this condition that the trade-off is likely to lean in favour of that statute and thus, for the prohibition laid down in the first paragraph of Article 5 of that statute to be respected.

[40] In addition, the Commission does not publish its exemption decisions whereas publication is, in principle, a condition which must be fulfilled in order for laws to be relied on as against third parties. One can, however, understand why, namely that it would allow the foreign authorities concerned to know which company has not applied for an exemption and is therefore supposed not to comply with the legislation in question.

[41] Regarding the second objective – which is to protect European companies against the effects of that legislation – at the time when the EU blocking statute was adopted in 1996, the state of the US case-law seemed to suggest that by prohibiting EU companies from complying with US law, the EU blocking statute would then provide them with a means of defence before the US courts. However, it can also be argued that, in order to achieve such protection, it was sufficient to provide that such a prohibition be publicly enforced only.

[42] See Article 1 of the EU blocking statute.

[43] Indeed, the EU blocking statute offers little help to EU entities with assets in the US against which US authorities can simply take territorial enforcement action. Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions', *British Yearbook of International Law*, 2020, p. 85. According to the report commissioned by the European Parliament, 'the cumulative effect of firms to avoid fines from the US side while simultaneously not being seen as complying with the sanction may create massive costs (and headaches) for European firms worried about both their overseas and domestic markets. In this sense, the US sanctions will have achieved a desired effect, as they will make it very difficult for any firm to willingly take on political risk from the two directions'. Stoll, T., Blockmans, S., Hagemejer, J., Hartwell, A., Gött, H., Karunska, K. and Maurer, A., *Extraterritorial Sanctions on Trade and Investments and European responses*, Study requested by the Committee on International Trade (INTA) of the European Parliament, 2020, p. 33. See also to this effect, Truyens, L. and Loosveld, S., 'The EU Blocking Regulation: navigating a diverging sanctions landscape', *I.C.C.L.R.*, 30(9), 2019, pp. 490-501, p. 501, and, referring to a 'Catch-22 situation', de Vries, A., 'Council Regulation (EC) No 2271/96 (the EU Blocking Regulation)', *Int'l Bus. Lawyer*, 26(8), 1998, p. 345, p. 348.

75. While recognising the force of these considerations, for my part, I nonetheless feel obliged to conclude that the first paragraph of Article 5 of the EU blocking statute must be interpreted as conferring such rights on third parties such as Bank Melli Iran.

76. The starting point here is the imperative language of the opening words of the first paragraph of Article 5 of the EU blocking statute itself ('No person referred to in Article 11 shall comply … with any requirement or prohibition … based on … the laws specified in the Annex.'). As if this stark and uncompromising language was not enough, the EU legislature reached deep into its armoury of legal language in order to ensure that full force and effect was given to this prohibition ('whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission … based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom').

77. Those policy objectives of those provisions are further set out in the recitals. These include the conviction (set out in the third to fifth recitals) that this type of extraterritorial legislation violates international law and compromises the effective operation of the internal market. The sixth recital states that in these exceptional circumstances it is necessary in order to protect the 'established legal order, the interests of the [Union] and the interests of natural and legal persons exercising' Treaty rights by 'removing, neutralising, blocking or otherwise countering the effects of the foreign legislation'.

78. It accordingly behoves this Court to give effect to the policy choice which is reflected in the recitals and the substantive provisions of the EU blocking statute which the EU legislature has mandated in the most uncompromising and stark terms.[44] Yet, if a right of action in favour of Bank Melli Iran was not acknowledged, the net effect would be that the enforcement of policy expressed in the first paragraph of Article 5 of the EU blocking statute would rely only on the willingness of the Member States[45] and, indirectly, of the Commission.

79. It would mean, in turn, that, in certain Member States reluctant to enforce the blocking statute, for example, a large economic operator such as Telekom Deutschland could decide actively to comply with the US sanctions regime by terminating the contract with Bank Melli Iran.

[44] According to Anthonius de Vries, 'the Commission had, in its proposal for a Blocking Statute, already foreseen, that in certain circumstances the prohibition could lead to serious injury to the interests of persons and companies involved or to the interests of the European [Union] itself. It therefore proposed a waiver possibility which the Council, with certain modifications, maintained in the Regulation'. See de Vries, A., 'Council Regulation (EC) No 2271/96 (the EU Blocking Regulation)', *Int'l Bus. Lawyer*, 26(8), 1998, p. 345, p. 349. See, also supporting this position, Lesguillons, H., 'Helms-Burton and D'Amato Acts: reactions of the European Union', *I.B.L.J.*, vol. 1, 1997, pp. 95-111, p. 108, and Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions', *British Yearbook of International Law*, 2020, p. 86.

[45] According to a report by the French Parliament, until 2019, there was only one case in which this regulation would have been successfully invoked, namely in Austria, in April 2007, on the occasion of the closure of Cuban bank accounts by the Austrian bank BAWAG PSK. See, Gauvain, R., d'Urso, C., Damais, A. and Jemai, S., 'Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extraterritoriale, rapport de l'Assemblée nationale (France)', 2019, p. 26. Subsequently, the Rechtbank Den Haag (District Court, The Hague, Netherlands) granted an application for summary proceedings in a case relating to the breach of a contract by a European company with a Cuban company for fear of US sanctions and ordered the continuation of the contract. Although this decision was not expressly based on the EU blocking statute, that court nevertheless noted that it could not rule out the possibility that the said termination also violates the latter. Rb Den Haag, 25 June 2019, ECLI:NL:RBDHA:2019:6301. It also seems that, in 2020, Cuban customers obtained the unblocking of their accounts from the ING bank, having filed a lawsuit against the bank based on the EU blocking statute. See Rechtbank Amsterdam, Claimant v. ING Bank NL: RBAMS:2020:893 (District Court Amsterdam, the Netherlands) 6 February 2020. Nevertheless, the examples of the application of the EU blocking statute remain limited. This has led some authors to say that 'the Blocking Statute has proved to be mostly a paper tiger – a mere symbol of the EU's disagreement with the wide reach of US sanctions'. Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions', *British Yearbook of International Law*, 2020, pp. 98 and 115, and, to this effect, Bonnecarrère, Ph., *Sur l'extraterritorialité des sanctions américaines*, Rapport d'Information, No 17 (2018-2019), Sénat, France, pp. 20-22.

80. Where they led, others would surely follow, and the entire public policy behind the EU blocking statute could be quickly undermined by a state of affairs in which many European entities quietly decide to comply (even indirectly) with those sanctions. In these circumstances, the threat of 'dissuasive' sanctions in the laws of the Member States envisaged by Article 9 of that statute would likely be a hollow one and the Union and its Member States would be reduced, like Shakespeare's King Lear, to protesting that they would 'do such things … I know not [what], but they shall be the terrors of the earth'.

81. It is true that one consequence of this interpretation is that a foreign entity – such as Bank Melli Iran – will collaterally obtain the benefit of this right of action at the expense of a European entity – such as Telekom Deutschland – which would then be obliged to remain contractually bound to a customer whose custom it no longer desires. Yet, unsatisfactory as it may seem to some, I see no other alternative if the Court is to uphold the public-policy objectives to which the first paragraph of Article 5 of the EU blocking statute is designed to give effect.

82. This can perhaps be tested another way. Suppose, for example, that a US company had obtained a judicial award in the United States against Bank Melli Iran and that this judicial decision was based 'directly or indirectly' on the US sanctions regime. Let us further suppose that the US company then sought to enforce that award before the German courts. Could it be suggested that Bank Melli Iran would not have the right to apply to those courts to halt those enforcement proceedings in view of Article 4 of the EU blocking statute, even if (as is the case) that provision also said nothing about the right of non-European entities to make an application of this kind?

83. I think that that question answers itself and that much the same can equally be said about third-party rights in respect of the first paragraph of Article 5 of the EU blocking statute.

2. Can the first paragraph of Article 5 of the EU blocking statute be interpreted as imposing an obligation for the persons referred to in Article 11 of that statute to give reasons ab initio when they terminate a contractual relationship with a person subject to primary sanctions?

84. From the outset, it should be noted that this question is to be seen in the context of German law, which allows persons in the position of the parties to the main proceedings, to exercise on the basis of freedom of contract the ordinary right to terminate any open-ended contract which requires neither the existence nor the identification of a ground for termination. The second question should therefore be understood as essentially concerning whether the first paragraph of Article 5 of the EU blocking statute *obliges* the Member States to acknowledge an exception to that freedom of contract where the contract has been entered into with a person subject to primary sanctions, by virtue of which, in that particular circumstance, a reason should be put forward in order to ascertain whether the termination is motivated by the existence of the laws listed in the annex thereto and, therefore, confer to that provision an *effet utile*.

85. It is true that there is nothing in the specific text of either the first paragraph of Article 5 of the EU blocking statute, in particular, or in that statute, in general, to support the view that this statute imposes an obligation to give reasons justifying the termination of a commercial relationship with a person subject to primary sanctions. I nevertheless consider that such an obligation must necessarily be inferred from the objectives pursued by this statute, essentially for all the reasons I have just given in respect of the existence of a right of action to enforce the first paragraph of Article 5 of the EU blocking statute. If it were otherwise, an entity could quietly decide to give effect to the US sanctions legislation and, by maintaining an obscuring silence,

impenetrable as to its reasons and (effectively) unreviewable as to its methods,[46] the major policy objectives enunciated in the recitals and the first paragraph of Article 5 of the EU blocking statute would be compromised and set at naught.

86. This is essentially what appears to have happened here. The fact that Telekom Deutschland sought to terminate its contract with Bank Melli Iran (and, as the referring court observed, wrote a letter in more or less identical terms to four other customers, each of whom had significant Iranian connections) within two weeks of the coming into force of the renewed US sanctions may be thought to tell its own tale, although the appropriate inference which might perhaps be drawn in that regard is of course ultimately a matter for the referring court to determine. Certainly, in the absence of justification, it suggests that Telekom Deutschland decided that, rather than risk being exposed to the application of the US sanctions (with the appurtenant risks of large fines, business disruption and considerable reputational damage), it would in fact give effect to those sanctions, irrespective of whatever the first paragraph of Article 5 of the EU blocking statute provided to the contrary.

87. One must acknowledge, of course, that there are many companies and individuals who would have ethical qualms and reservations about doing business with countries such as the Islamic Republic of Iran (and, by extension, major Iranian entities such as Bank Melli Iran which are effectively controlled by the Iranian Government): its nuclear ambitions; its endeavours to destabilise other governments in the region; its willingness to conduct proxy wars, often by means of financing and supporting terrorist groups for this purpose; its religious fundamentalism and general intolerance of dissent; its discriminatory treatment of women and minorities and its promiscuous use of the death penalty often following summary and – by our standards, at least – deeply unfair trials are all features of that State which many understandably find disagreeable and highly objectionable. The right of a business to decide according to its own ethical sense of business values that it will not do business with regimes of that kind is, of course, a core element of the freedom of conscience protected by Article 10(1) of the Charter and the freedom to conduct business within the meaning of Article 16 of the Charter.

88. In order, however, to establish that the reasons given in respect of any decision to terminate a contract on this ground were in fact sincere, the person referred to in Article 11 of the EU blocking statute in question – in the present case Telekom Deutschland – would need, in my view, to demonstrate that it is actively engaged in a *coherent* and *systematic* corporate social-responsibility policy (CSR) which requires them, inter alia, to refuse to deal with any company having links with the Iranian regime.[47]

89. In any case, it nevertheless follows from the uncompromising terms of the first paragraph of Article 5 of the EU blocking statute that – in principle, at least – an undertaking seeking to terminate an otherwise valid contract with an Iranian entity subject to the US sanctions must demonstrate to the satisfaction of the referring court that it did not do so by reason of its desire to comply with those sanctions.

90. In this respect, as I have already indicated, the defendant's obligation is not simply to give reasons for the decision, but also to justify it. Indeed, for all the reasons I have mentioned, the *effet utile* of the first paragraph of Article 5 of the EU blocking statute would be compromised if the persons concerned were allowed to hide behind any vaguely credible reason for their

[46] To adapt the words of the Irish Supreme Court in *Garvey v. Ireland* [1981] IR 75.

[47] See, by analogy, judgment of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203, paragraph 40).

decision.[48] In particular, in my view, a person referred to in Article 11 of that statute should not be able to invoke a termination clause for *force majeure* to justify the termination of the contractual relationship without at least demonstrating that the event constituting *force majeure* is unrelated to the US sanctions legislation listed in the annex to that statute.[49] Any other conclusion would undermine the capacity of an entity affected by the contract termination to avail itself of the rights conferred by the EU blocking statute.

91. In saying this, I do not overlook the fact that, first, for certain types of contracts, personal contact between the contracting parties (*intuitu personae*) can be important, but this cannot *in itself* exclude the requirement that a justification for the termination must be given. On the contrary, the specificity of these contracts and the relationship they apply between the parties may precisely constitute a legitimate reason to justify, in the event of changes in circumstances unrelated to the primary sanctions, the termination of the said contracts. In the present case, it would be quite unreal to suppose that the contracts at issue between the parties should be regarded in this manner: it was, on the contrary, an impersonal contract negotiated between two business entities providing for the supply of essential public-utility services by a major telecommunications entity which, for all practical purposes, occupied a dominant position in the relevant market for the supply of such services.

92. However, that obligation to justify the termination of a contract is not, however, distinct from the obligation under the first paragraph of Article 5 of the EU blocking statute for persons covered by Article 11 of that statute not to comply with the sanctions legislation listed in the annex thereto. It rather relates to the burden of proof and, consequently, this justification does not necessarily have to be given at the time of termination but could, for example, also be advanced by way of defence following the commencement of judicial proceedings seeking the enforcement of the first paragraph of Article 5 of the EU blocking statute.

93. Admittedly, according to the Court's case-law, in the absence of harmonisation, Member States are free to set up their own procedural rules which govern the enforcement of EU law. However, I do not think that the principle of procedural autonomy may be applied where, as in the present case, the need to ensure an '*effet utile*' imposes a certain distribution of burden of

[48] Some lawyers recommend to their clients 'to seek alternative commercial reasons to discontinue business with Iran or Cuba' in order to circumvent the application of the EU blocking statute. See Doussin, A., Catrain, L. and Dukic, A., *How to Mitigate sanctions risks*, Hogan Lovells, 2020, slides available on the firm's website.

[49] In this regard, I respectfully consider that, contrary to what the Tribunal de Commerce de Paris (Commercial Court, Paris, France) held in a case also concerning the termination of a contract entered into with Bank Melli Iran, the fact that the EU blocking statute already existed at the date on which the contract in question was concluded cannot exclude the application of the first paragraph of Article 5 of that statute on the ground that the *force majeure* clause used to terminate the contract was agreed in consideration of the provisions of that regulation. Indeed, the first paragraph of Article 5 represents a fundamental public policy of the Union and its Member States so that the parties may not derogate from it. See Tribunal de Commerce de Paris (Commercial Court, Paris), 23 January 2020, *SC Bank Melli Iran Banque Nationale c SAS Viveo France*, No 2019023091.

proof.[50] Indeed, even to consider that the burden of proof is a matter of procedural law[51] and not, as seems to be the case in some Member States, of substantive law, the requirement to ensure the effectiveness of EU law would prevent this burden from being shifted in a way that would make it difficult to apply EU law to a dispute.

94. In EU law, if the prevailing principle is that the burden of proof weighs on the person who brings the claims,[52] it is also recognised that, in certain specific circumstances, a reversal of the burden of proof might be necessary.[53] This is the approach adopted, for example, by the EU anti-discrimination directives, an area where it is well known that proof of discriminatory behaviour can be difficult to provide.[54]

95. Regarding the first paragraph of Article 5 of the EU blocking statute, third parties will obviously have the greatest difficulty in gathering evidence that the decision not to enter into or not to continue a commercial relationship is the consequence of the will of a person referred to in Article 11 of that statute to comply with US law. Apart from the unlikely event that a person referred to in that latter article would ever, for example, publicly admit its willingness to comply with the legislation listed in the annex to that statute, I do not see what evidence could be provided by the applicants. A concomitance of decisions terminating business relations or refusing to enter into relations with persons subject to primary sanctions? However, in practice, business secrecy makes it extremely difficult for a company to know the real decisions taken by a supplier with regard to other companies.[55]

96. In these circumstances, I consider that where the claimant has simply provided prima facie evidence, on the one hand, that the person falling under the scope of Article 11 of the EU blocking statute with whom that claimant wishes to enter into or remain in a business relationship may feel concerned by one of the pieces of legislation mentioned in the annex thereto and, on the other hand, that it fulfilled the expected conditions for becoming or remaining a

[50] Indeed, the Court distinguishes the *taking of evidence* from the *burden of proof*. See, in relation to appeals, judgments of 19 December 2013, *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 38), and of 28 June 2018, *EUIPO* v *Puma* (C-564/16 P, EU:C:2018:509, paragraph 57). Apart from appeals, see, for example, to this effect, judgment of 21 June 2017, *W and Others* (C-621/15, EU:C:2017:484, paragraph 24).

[51] The procedural autonomy of the Member States is, however, limited by the obligation, for the Member States, not to render impossible in practice or excessively difficult the exercise of the rights conferred by EU law (principle of effectiveness), to apply, with regard to the enforcement of EU law, the same rules as those governing similar situations subject to national law (principle of equivalence) and to comply with the general principles of EU law. See, for example, judgment of 27 June 2018, *Turbogás* (C-90/17, EU:C:2018:498, paragraph 43). In addition, if the taking of evidence is clearly a matter of procedural law, some legal traditions connect the distribution of the burden of evidence to substantive law. For example, in French Law, the rules of presumptions and of burden of proof are provided for in the Civil Code and not in the Code of Civil Procedure. In German law, according to the norm theory (*Normenbegünstigungstheorie*), the legislature takes account of the distribution of the burden of proof when formulating a norm. Accordingly, judges infer the distribution of the burden of proof by interpreting the substantive law. See *Prütting Münchener Kommentar zur ZPO*, 3. Aufl. 2008, § 286, No 113-115. To my knowledge, the Court has never clearly ruled on this question since EU law very often specifies what this distribution of the burden of proof actually is.

[52] See, for example, judgments of 28 April 1966, *ILFO* v *High Authority* (51/65, EU:C:1966:21); of 26 January 1989, *Koutchoumoff* v *Commission* (224/87, EU:C:1989:38); or of 21 May 2015, *Schräder* v *CPVO* (C-546/12 P, EU:C:2015:332, paragraph 78).

[53] See judgment of 29 September 2011, *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 56).

[54] See Article 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000, L 180, p. 22), Article 10 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) and Article 19 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006, L 204, p. 23).

[55] Other elements, such as the fact that the company organises in-house training of its staff on the legislation in question, that it has a policy related to these regulations or that it uses or has recourse to monitoring tools appear to constitute evidence that it is difficult for third parties to provide for.

customer of that undertaking,[56] the effect of the first paragraph of Article 5 of the EU blocking statute is that the person referred to in Article 11 of that statute must justify its business decision to terminate the contract at issue or to refuse that claimant as a client.[57]

97. One may accept that such a reversal of the burden of proof may seem to some to be contrary to the freedom to contract. However, as the Court has pointed out, the exercise of the freedoms referred to in the Charter are only guaranteed within the limits of the liability that each national incurs for its own acts.[58] Moreover, one might note that the Court has already held, at least in the context of competition law, that under certain conditions, a company can be obliged to contract with third parties.[59] In these particular circumstances, the overwhelming public-policy reasons, the upholding of international law and the general distaste on the part of the Union for intrusive extraterritorial legislation of this kind which, as we have already seen, are all reflected here in the recitals and the provisions of Article 4 and of the first paragraph of Article 5 of the EU blocking statute require no less.[60]

98. Accordingly, so far as the procedure in the national courts is concerned, given that Bank Melli Iran and Telekom Deutschland were already in business and that it seems that neither of them have changed their business activity (a matter which, however, it is for the national court to verify), I consider that it is for Telekom Deutschland to establish that there was an objective reason, *other* than the fact that Bank Melli Iran was subject to primary sanctions, to terminate the contracts at issue and for the referring court to verify the veracity of such grounds. It is clear from the wording of the first paragraph of Article 5 of the EU blocking statute that what matters is the intention of the economic operator to comply with the said sanctions, irrespective of whether it is actually concerned by their application.

99. In the light of the above, I propose to answer the second question to the effect that the first paragraph of Article 5 of the EU blocking statute must be interpreted as precluding an interpretation of national law under which a person referred to in Article 11 of that statute may terminate a continuing contractual obligation with a contracting party named on the SDN held by the OFAC, without ever having to justify its decision to terminate those contracts..

[56] In this respect, some argue that it could be inferred from the objectives pursued by the EU blocking statute that the application of this provision would further require demonstration that the situation at issue involves an extraterritorial application of the laws in question. See, for example, Financial Markets law committee, *U.S. Sanctions and the EU blocking statute Regulation: Issues of legal uncertainty*, 2019, paragraphs 3.5 and 3.12. However, while the wording of Article 5 is peremptory, there is nothing in it to support the existence of such a condition. In addition, if, as I suspect, the EU blocking statute has been conceived as a countermeasure in the sense of international law, it must be considered that it aims at blocking in general the effects of that legislation.

[57] These justifications may be economic or commercial, or may relate to EU sanctions, EU rules on money laundering and terrorist financing, or even US sanctions, but as long as those sanctions are not part of one of the pieces of legislation listed in the annex.

[58] Judgment of 27 March 2014, *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraph 49).

[59] See, for example, judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569, paragraph 41); and, to that effect, judgment of 25 March 2021, *Deutsche Telekom v Commission* (C-152/19 P, EU:C:2021:238, paragraph 49).

[60] Admittedly, in matters having a penal flavour, as is, in my opinion, the case of the application of the EU blocking statute, the Court has ruled that EU law precludes the Member States from penalising as such the refusal of a natural person, in an investigation carried out to provide the competent authority with answers that are capable of establishing their liability for an offence. See, to that effect, judgment of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84, paragraph 58). However, the Court has nonetheless accepted that a national jurisdiction or administrative authority may rely on a body of corroborating evidence to establish the infringement of certain rules of EU law (see, to that effect, judgment of 26 January 2017, *Maxcom* v *Chin Haur Indonesia* (C-247/15 P, C-253/15 P and C-259/15 P, EU:C:2017:61, paragraph 64)) or, simply, to effect a reversal of the burden of proof, as in the case of the principle of non-discrimination. See, for example, judgment of 10 July 2008, *Feryn* (C-54/07, EU:C:2008:397, paragraph 32).

C. The third and fourth questions

100. By its third and fourth questions, the referring court asks, in essence, whether the first paragraph of Article 5 of the EU blocking statute is to be interpreted as meaning that, in the event of a failure to comply with the provisions of that article, the courts seised by a contracting party subject to primary sanctions are required to order a person referred to in Article 11 of that statute to maintain that contractual relationship, even though, first, the second paragraph of Article 5 thereof should be interpreted restrictively, secondly, such an injunction measure is liable to infringe Article 16 of the Charter and, thirdly, such a person is liable to be severely penalised by the authorities responsible for applying one of the laws referred to in the annex.

101. Here, it should be recalled that it is for the national courts responsible for applying, within the framework of their jurisdiction, the provisions of EU law having direct effect to ensure that they are fully effective.[61] Since, according to Article 288 TFEU, a regulation, such as the EU blocking statute, is directly applicable in any Member State, this obligation is imposed on those courts even in the absence of a provision in the national legislation transposing that regulation.

102. With regard to the first paragraph of Article 5 of the EU blocking statute, it may be observed that this provision does not specify what consequences are to be drawn from the fact that a person referred to in Article 11 of that statute decides, in breach of the first paragraph of Article 5 thereof, not to enter into or to terminate a commercial relationship with a person subject to primary sanctions in order to comply with the legislation listed in the annex thereto.

103. Admittedly, Article 9 of the EU blocking statute provides that it is for the Member States to lay down the rules on penalties applicable to infringements of the national provisions adopted, provided that they are effective, proportionate[62] and dissuasive.[63] Accordingly, if the Court were to consider, as I propose, that the first paragraph of Article 5 of the EU blocking statute is to be understood as conferring rights on persons subject to primary sanctions, then the term 'sanction'

[61] Judgment of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 16).

[62] As regards the proportionality condition, it should be emphasised that this condition is not contrary to the one of dissuasion in so far as it simply presupposes that the penalty *actually* imposed is proportionate to the seriousness of the facts in question, where dissuasion is ensured by the threat of punishment, that is to say, the extent of possible sanctions. In the case of the EU blocking statute, the seriousness of the facts will, for example, depend on the more or less continuous nature of the conduct of the undertaking referred to in Article 11 of that statute, as well as on the nature of the legislation and the cost of the penalties provided for therein, to which that person has complied.

[63] These requirements are simply those required by the case-law of the Court in the event of a breach of EU law. See judgments of 10 April 1984, *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 28); of 21 September 1989, *Commission* v *Greece* (68/88, EU:C:1989:339, paragraph 24); and, to that effect, regarding the common system of VAT, of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 34 to 35).

should necessarily be understood in a broad sense, as encompassing both criminal or administrative sanctions and civil sanctions whose purpose is not necessarily punitive, but may simply be to ensure the *effet utile* of the provision in question. [64]

104. This, however, does not mean that it would be entirely up to the Member States to decide on the nature of the sanctions. Indeed, it should be recalled that, where a norm refers the task of determining the sanctions to be adopted in the event of a breach of an obligation under EU law back to the Member States, this power of determination is limited by the obligation on the Member States, and in particular on the national courts, to ensure the full effect of EU law. This obligation requires the national courts to redress the situation resulting from the unlawfulness committed and, in particular, to put right-holders in the situation they would have been in in the absence of that unlawfulness.

105. It follows that, in the event of a breach of a provision of a regulation, a distinction must be drawn, among the measures to be adopted by States in order to punish that breach, between measures having a punitive purpose, which are necessary to ensure the requisite level of deterrence, and measures taken to redress the situation resulting from the unlawfulness committed, the adoption of which is necessary in order to ensure the full effect of EU law. [65] While, in the case of the former, the Member States have a relatively wide margin of discretion in deciding what measures to adopt, provided that those measures are, as indicated, effective, proportionate and dissuasive, [66] in so far as the latter give effect to the Member States' obligation to ensure the full effect of EU law, that margin may be limited or even non-existent. [67]

[64] As regards the dissuasive nature of the penalties, this condition logically implies that the penalties that may be imposed must be at least equivalent to those that may be imposed on the basis of the legislation listed in the annex. Otherwise, the trade-off between compliance with the legislation listed in the annex and the EU blocking statute would systematically be in favour of the former, with the sanctions provided for in the latter then being considered as a simple additional compliance cost. See, for example, Wils, W.P.J., 'Optimal Antitrust Fines: Theory and Practice', *World Competition*, vol. 29(2), 2006, p. 15: 'For deterrence to work, it is required that, from the perspective of the company (or the individual decision-maker deciding for the company) contemplating a possible antitrust violation, the expected fine exceeds the expected gain. What thus counts is the potential offender's subjective estimate of the gain, of the probability of detection and punishment, and of the amount of the fine in case of detection and punishment'. In the case of the EU blocking statute, as the report ordered by the European Parliament notes, 'only if enterprise must expect that the blocking state will be enforced as vigorously as US sanctions legislations, they will be inclined to align their conduct with the Blocking statute and disobey US law'. Stoll, T., Blockmans, S., Hagemejer, J., Hartwell, A., Gött, H., Karunska, K. and Maurer, A., *Extraterritorial Sanctions on trade and investments and European responses, Study requested by the INA committee of the European Parliament*, 2020, p. 65. This does not mean, however, that the maximum sanctions must always be imposed, as the threat of such sanctions, as long as it remains credible, is sufficient to create a deterrent effect. Moreover, in so far as Article 9 of the EU blocking statute refers to the 'regime' of applicable sanctions, it must be inferred that it is the various sanctions provided for, whether criminal, administrative or civil, which, taken as a whole, must be effective, proportionate and dissuasive.

[65] See, for example, in VAT matters, as regards the obligation to provide for punitive sanctions in case of fraud, judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 19), and, as regards the obligation to redress the situation, judgment of 21 November 2018, *Fontana* (C-648/16, EU:C:2018:932, paragraphs 33 to 34). While the same measure may pursue both objectives, conversely, it is not required that both objectives be achieved by the same measure. Accordingly, to consider that the first paragraph of Article 5 of the EU blocking statute confers rights on persons subject to primary sanctions, the measures which national courts are obliged to adopt from a civil-law point of view should certainly be effective and proportionate, but not necessarily dissuasive, since such a dissuasive effect can be achieved separately by means of administrative sanctions.

[66] Thus, in the case of the EU blocking statute, several European countries have adopted legislation providing for criminal sanctions (Ireland, the Kingdom of the Netherlands and the Kingdom of Sweden), while others have preferred administrative sanctions (the Federal Republic of Germany, the Kingdom of Spain and the Italian Republic). See Bonnecarrère, Ph., *Sur l'extraterritorialité des sanctions américaines*, Rapport d'information du Sénat (France), No 17, 2018, p. 20.

[67] See, inter alia, judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 16); of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257, paragraph 19); of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraph 25); and of 17 September 2002, *Muñoz and Superior Fruiticola* (C-253/00, EU:C:2002:497, paragraph 28).

106. In particular, in the case of an infringement of a provision laid down in a regulation [68] conferring rights on third parties, given that a regulation is directly enforceable, even in the absence of any specification as to the procedural arrangements for actions designed to safeguard the rights conferred on certain persons by that provision, the national courts are nevertheless bound by the obligation to ensure the full effect of that provision. [69] All of this necessarily places an obligation on such national courts to (re-)establish the status quo ante that would have prevailed in the absence of the illegality committed.

107. In that regard, I would add that, unlike measures designed to punish, this obligation to ensure that the legal entitlements of the persons or entities concerned are preserved and the status quo ante is restored cannot, in so far as it touches on the very substance of the rights conferred by EU law, lead to a result which differs from one Member State to another. In other words, while the procedural arrangements for implementation by national courts may vary, the result must, in principle, be the same throughout the European Union. It is indeed not enough to proclaim the existence of rights for them to become a reality in the daily lives of EU citizens; they must also be effectively sanctioned, especially when they derive from a regulation that is supposed to be directly applicable.

108. Accordingly, I consider that, in the event of a breach of a provision prescribing a rule of conduct which must be complied with on a continuing basis (such as here), the national courts are required to order the infringer to put an end to the breach, on pain of a periodic penalty payment or other appropriate sanction, since only then can the continuing effects of the unlawfulness committed be brought to an end and compliance with EU law fully guaranteed.

109. Here, one may observe that the first paragraph of Article 5 of the EU blocking statute prohibits the persons referred to in Article 11 of that statute from *complying with* the legislation listed in the annex thereto. In the present case, the legislation in question prohibits any non-US company from trading with a person subject to primary sanctions. It is therefore a general prohibition. Failure to comply with it therefore implies that at no time may a person referred to in Article 11 of that statute refuse to maintain a commercial relationship for a reason derived from the existence of the US sanctions legislation.

110. In this context, to admit that any infringement of this provision may be sanctioned only by the payment of lump-sum damages would be tantamount to admitting the possibility that a person referred to in Article 11 of the EU blocking statute could comply with one of the pieces of US sanctions legislation listed in the annex thereto, outside of the mechanism provided for in the second paragraph of Article 5 of that statute merely by compensating the contractual right-holders. If that were indeed the case, then the prohibition set out very clearly in the first

[68] The situation is different in the case of a directive. Since a directive has to be transposed in order to be invoked either by a State against a person or, horizontally, between two private persons, the Member States have more room for manoeuvre. The latter only ensure that, in accordance with the principle of loyal cooperation enshrined in Article 4(3) TEU, any infringement of a directive is sanctioned under substantive and procedural conditions, which are analogous to those applicable to infringements of national law of a similar nature and importance. See judgment of 27 March 2014, *LCL Le Crédit Lyonnais* (C-565/12, EU:C:2014:190, paragraph 44).

[69] In my opinion, the principle of procedural autonomy is not directly applicable here, in so far as this principle concerns 'the procedural details of legal proceedings designed to safeguard the rights which individuals derive from [EU] law'. See judgments of 11 July 2002, *Marks & Spencer* (C-62/00, EU:C:2002:435, paragraph 34); of 3 September 2009, *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506, paragraph 24); and of 21 January 2010, *Alstom Power Hydro* (C-472/08, EU:C:2010:32, paragraph 17). However, the measures that national courts must adopt in order to remedy the consequences of the infringement of EU law are not procedural law, but substantive law. Thus, for example, with regard to measures to remedy the consequences of the infringement of the prohibition on the implementation of aid projects, laid down in the last sentence of Article 108(3) TFEU, the national administrative and judicial authorities are obliged to ensure the full effect of those provisions, thus obliging them to recover unlawfully granted aid on their own initiative. Only the practical arrangements for such recovery are subject to procedural autonomy. See, for example, judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 92).

paragraph of Article 5 of the EU blocking statute would thus be distorted and the public-policy objectives which I have already identified, namely to counteract and to neutralise the effects of the US sanctions legislation, could not be achieved.

111. As I am of the view that the first paragraph of Article 5 of the EU blocking statute confers rights on persons subject to primary sanctions, the logical consequence of it is that any decision by a person referred to in Article 11 of that statute to terminate a contractual relationship with a person subject to primary sanctions which cannot be justified on any ground, other than the desire to comply with one of the pieces of legislation listed in that statute, should be regarded as invalid and ineffective, with the consequence that national courts are obliged to treat the contractual relationship as having continued on the same commercial terms as those previously existing.[70] Such an obligation therefore implies that, where appropriate, the national courts must order any person referred to in Article 11 of the EU blocking statute to continue the contractual relationship in question, on pain of a periodic penalty payment or other appropriate sanction.

112. In that regard, it is irrelevant whether the national legislation at issue in the main proceedings provides for administrative penalties in the form of a monetary fine. Since it must be accepted that the first paragraph of Article 5 of the EU blocking statute confers rights on the persons subject to the primary sanctions, the existence of administrative sanctions does not make it possible to remedy the obligation incumbent directly on the national courts, in the event of infringement of that provision, to take all necessary measures to ensure the full effect of those rights.[71]

113. This conclusion is not called into question, in my view, by Article 16 of the Charter.

114. Admittedly, the Charter applies to sanctions adopted by Member States to enforce EU law,[72] and there is no doubt that the adoption of such an injunction is likely to affect the right to freedom of enterprise of the undertaking concerned, as guaranteed by Article 16 of the Charter, in a far-reaching way. Indeed, it is common ground that freedom of enterprise includes the freedom to contract[73] and therefore, necessarily, also the freedom not to contract.

115. However, as I have already explained, if one accepts – as I think that we must – that the first paragraph of Article 5 of the EU blocking statute confers rights on undertakings subject to primary sanctions, the need to ensure the full effect of those rights will result in an obligation being imposed on the national courts, in the event of a breach of those rights, to order any person referred to in Article 11 of that statute to maintain the contractual relationship in question.

116. It follows, therefore, that the infringement of the freedom to conduct a business guaranteed by the Charter is not the consequence of the exercise by the referring court in question of any discretion, but rather of its *obligation* to ensure the full effect of EU law. It is therefore at the level of EU law only that the question of a possible unjustified infringement of Article 16 of the Charter should be examined.

[70] It should be recalled that, according to the Court's case-law, considerations relating to the domestic law of the Member States, including those of a constitutional nature, cannot be invoked to limit the *effet utile* of EU law. See judgments of 17 December 1970, *Internationale Handelsgesellschaft* (11/70, EU:C:1970:114, paragraph 3), or of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 59).

[71] In the present case, the question is rather whether fines of up to EUR 500 000 really serve as a deterrent, given that the US sanctions can be up to twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed and, accordingly, might run into thousands of millions.

[72] Judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraphs 32 to 42).

[73] Judgments of 12 July 2018, *Spika and Others* (C-540/16, EU:C:2018:565, paragraph 34), and of 17 October 2013, *Schaible* (C-101/12, EU:C:2013:661, paragraph 25).

117. Before examining whether the first paragraph of Article 5 of the EU blocking statute constitutes an unjustified infringement of Article 16 of the Charter, the question arises as to whether the Court may carry out such an examination procedurally. Indeed, the referring court did not formulate its question as relating to the validity of the first paragraph of Article 5 of the EU blocking statute (or of the decision to include the US legislation at issue in the annex to that statute), but rather to the interpretation of that article, as well as of Article 16 of the Charter.

1. On the possibility for the Court to examine ex officio *the compatibility of the first paragraph of Article 5 of the EU blocking statute and the decision to include the US legislation at issue in the annex to that statute*

118. According to the Court's case-law, where the compatibility of an act of the Union has not been expressly called into question by the referring court in its questions, the Court is under no obligation to examine the validity of that act,[74] since it is for the national court alone, which is seised of the case and which must assume responsibility for the judicial decision to be taken, to assess, in the light of the particular features of the case pending before it, both the need for a preliminary ruling in order to be able to give judgment and the relevance of the questions which it puts to the Court.[75] However, if the Court is not required to examine the validity of an act of its own motion when making a reference for a preliminary ruling on the interpretation of EU law, can it do so of its own motion?

119. In this respect, two arguments against this solution could be made. First, according to the case-law, in the context of an action for annulment, the infringement of a higher norm does not constitute a plea of public policy liable to be raised *ex officio* by the EU judicature.[76] Secondly, the justification of the preliminary-ruling procedure is not for the formulation of advisory opinions on general or hypothetical questions, but rather for the resolution of a dispute relating to EU law.[77] However, according to the Court's case-law, it is only when national law confers on a court the power to apply a binding rule of law of its own motion that this power becomes an obligation for that court to raise of its own motion the infringement of a rule of EU law.[78] Consequently, a finding that a rule of EU law is invalid in the absence of a challenge to it by the parties is not necessarily likely to have an impact on the effective resolution of a dispute, the existence of such an impact varying according to the nature of the pleas which may be raised of the national court's own motion.

120. Nonetheless, in several judgments, the Court has recognised its right to examine *ex officio* the validity of the provision at stake in a reference for a preliminary ruling in two particular situations, namely, first, where, despite the wording of the question, it is apparent from the reference for a preliminary ruling that the doubts expressed by the referring court are in fact linked to the validity of the act whose interpretation is formally sought and, secondly, where the

[74] See, for example, in this sense, judgment of 13 December 2001, *DaimlerChrysler* (C-324/99, EU:C:2001:682, paragraph 30).

[75] Judgments of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 33), and of 5 November 2014, *Herbaria Kräuterparadies* (C-137/13, EU:C:2014:2335, paragraph 50). Thus, in particular, the Court is not required to examine the validity of an EU act on a ground raised before it by one of those parties. See judgments of 4 September 2014, *Simon, Evers & Co.* (C-21/13, EU:C:2014:2154, paragraphs 27 and 28), and of 28 January 2016, *CM Eurologistik and GLS* (C-283/14 and C-284/14, EU:C:2016:57, paragraph 45 and 46).

[76] Judgment of 10 December 2013, *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraphs 27 to 29 and 36).

[77] See, for example, judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 28).

[78] Judgments of 14 December 1995, *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:441, paragraph 14); of 12 February 2008, *Kempter* (C-2/06, EU:C:2008:78, paragraph 45); and of 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 54).

validity of that act has been raised in the main proceedings.[79] Indeed, in these two scenarios, the fact of examining the validity of the provision in question *ex officio* does not appear to be totally at odds with the case-law recalled above, in so far as the question of validity is already, in some ways, a part of the dispute so that it may also reasonably be considered that such an examination could be useful to the referring court.

121. An *ex officio* examination of the validity of the provision whose interpretation is requested requires, however, respect for the right to be heard enjoyed by the institutions which have adopted that provision and for the procedural rights enjoyed by the Member States. Indeed, as the Court once more pointed out very recently that, 'to answer additional questions [not raised by the referring court] would be incompatible with the Court's duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, bearing in mind the fact that, under that provision, only the decision of the referring court is notified to the interested parties'.[80] In particular, it is quite obvious that, in view of the effects produced by a finding of invalidity, the decision of the Member States or of the institutions concerned whether or not to intervene in the preliminary ruling is likely to differ depending on whether the question referred must be understood as concerning the interpretation or the validity of an act.

122. It follows that, even though the questions asked only formally relate to the interpretation of a provision, the Court may nonetheless of its own motion examine the validity of an act in the context of a reference for a preliminary ruling if it is *sufficiently clear* from that reference, as notified to the Member States in their official language or in the summary thereof, that the referring court's doubts relate to the validity of the act whose interpretation has been formally requested only, or that the validity of that act constitutes the central subject matter of the dispute in the main proceedings. If not, compliance with the prerogatives of the authors of the act in question and of those Member States requires that the Court notify them in advance of its intention to examine of its own motion the validity of the act in question.

123. In the present case, it is clear, however, from the reference for a preliminary ruling that it is sufficient in law to understand that the doubts expressed by the referring court justifying the fourth question are linked to the existence of a 'general ban', which is the result of the adoption of the EU blocking statute and the decision to include the ITSR in the annex thereto. The referring court in particular observed as follows: 'It is the understanding of the chamber that, as a result of the ban on compliance with secondary sanctions, EU operators like the defendant (the very persons who, according to its preamble, the Regulation is designed to protect) face a dilemma … The chamber is of the opinion that that risk is inadequately countervailed by the recovery claim regulated in Article 6 of [the EU blocking statute]. The same applies to the possibility of obtaining an authorised exemption under the second paragraph of Article 5 of [the EU blocking statute] … That being so, the chamber has doubts, where there is a risk of considerable economic losses on the US market, as to whether a *general ban* on severing relations with a business partner, let alone an insignificant business partner, in order to avoid those risks is compatible with the freedom to conduct a business protected under Article 16 of the Charter … and the principle of proportionality anchored in Article 52 of that Charter' (emphasis

[79] See, in particular, judgment of 17 September 2020, *Compagnie des pêches de Saint-Malo* (C-212/19, EU:C:2020:726, paragraphs 28 and 38).

[80] Judgment *Welmory* of 17 December 2020, *BAKATI PLUS* (C-656/19, EU:C:2020:1045, paragraph 33). Before that, see of 16 October 2014, *Welmory* (C-605/12, EU:C:2014:2298, paragraph 34); of 6 October 2015, *T-Mobile Czech Republic and Vodafone Czech Republic* (C-508/14, EU:C:2015:657, paragraphs 28 to 29); and order of 21 April 2016, *Beca Engineering* (C-285/15, not published, EU:C:2016:295, paragraph 24).

added). Moreover, it flows from the observations of the various parties to the proceedings at issue that they have fully understood the doubts of the referring court as relating to the validity of the EU blocking statute.

124. Accordingly, I consider that the validity of the EU blocking statute and the decision to include the ITSR in the annex thereto under Article 16 of the Charter can be examined *ex officio* by the Court without the latter having to notify Member States of its intention to carry out this examination. [81]

2. On the compatibility of Article 5 of the EU blocking statute with Article 16 of the Charter

125. In this regard, it should be recalled that, in accordance with Article 52(1) of the Charter, an infringement of any of the freedoms guaranteed by the Charter may be permitted if it is provided for by law and if it respects the essential content of those rights and freedoms. Moreover, in accordance with the principle of proportionality, limitations may be made only if they are necessary and actually meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

126. As regards the first of these conditions, it is common ground that it is satisfied in so far as the infringement of the freedom of enterprise by reason of the prohibition on compliance with the Charter by persons referred to in Article 11 of the EU blocking statute must be regarded as provided for by law, in so far as it results from the first paragraph of Article 5 of that statute.

127. As regards the second condition relating to respect for the essential content of freedom of enterprise, of which the freedom to contract is only one aspect, it should be recalled that, like any freedom mentioned in the Charter, with the exception of human dignity guaranteed in Article 1 thereof, the wording of which expressly states that it is inviolable –, and perhaps also all the provisions contained in Title 1 –, [82] the freedom of contract does not constitute an absolute right, [83] but may rather be subject, in the general interest, to a wide range of interventions by the public authorities, provided, [84] from an institutional perspective of the said freedoms, that these interventions target specific situations.

128. In particular, so far as freedom of contract is concerned, the Court has already acknowledged that EU law may impose an obligation on an operator to contract, in particular for reasons relating to competition law. [85] By a parity of reasoning, one may therefore conclude that while the freedom not to contract is generally part of the essential content of the freedom to conduct a business, there are also circumstances where this right may be overborne. Just as equal status legislation provides, for example, that undertakings are not free to discriminate in their contractual dealings with the public on grounds of race or gender, there may also be other circumstances where public

[81] In my view, there is no need, however, to examine the validity of the decision, contained in Regulation 2018/1100, to include the US legislation at issue in the annex to the EU blocking statute, since that decision has not even been mentioned by the referring court.

[82] Lenaerts, K., 'Exploring the limits of the EU Charter of fundamental rights', *European Constitutional Law Review*, vol. 8(3), 2012, p. 388.

[83] Judgment of 6 September 2012, *Deutsches Weintor* (C-544/10, EU:C:2012:526, paragraph 54).

[84] Judgments of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28 paragraph 46); of 30 June 2016, *Lidl* (C-134/15, EU:C:2016:498, paragraph 34); and of 16 July 2020, *Adusbef and Federconsumatori* (C-686/18, EU:C:2020:567, paragraphs 82 and 83).

[85] See judgments of 6 April 1995, *RTE and ITP* v *Commissio*n (C-241/91 P and C-242/91 P, EU:C:1995:98, paragraphs 49 to 57); of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569, paragraphs 38 to 47); and of 29 April 2004, *IMS Health* (C-418/01, EU:C:2004:257, paragraph 38); and Opinion of Advocate General Kokott in *Pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:167, point 133).

considerations may outweigh this freedom to conduct a business. This, accordingly, is a right which may therefore be restricted, provided that the other conditions mentioned in Article 52 of the Charter are respected.

129. Consequently, the question that remains to be examined is whether the first paragraph of Article 5 of the EU blocking statute is to be regarded as a measure proportionate to the attainment of an objective of general interest recognised by the Union, which, according to Article 52 of the Charter, presupposes that such a measure is necessary and that it actually meets such an objective. In so far as the case-law interprets these two conditions as referring to the usual conditions for a proportionality test, this presupposes that such measures must be suitable for achieving the objective which they pursue, in the sense that they must at least contribute to the attainment of that objective, and that they must not go beyond what is appropriate and necessary for that purpose. [86]

130. In that regard it should first be noted that, as already indicated, the first paragraph of Article 5 of the EU blocking statute aims at protecting the Union, its Member States and natural and legal persons exercising fundamental freedoms within the Union against the extraterritorial application of the laws cited in the annex, and at counteracting the effects of those laws. As it flows from the sixth recital, this objective forms part of the more general goal, which is to preserve the established legal order and safeguard the Union's interests and those of the Member States against the extraterritorial effects of foreign legislation whose reach is considered to be exorbitant and which operates in a manner contrary to international law. Since, in particular, Article 21(2)(a), (b), (e) and (h) TEU assigns to the Union the objective of safeguarding its fundamental interests, supporting the principles of international law, encouraging the removal of obstacles to international trade and promoting good global governance, such objectives should be considered as belonging to the objectives of general interest recognised by the Union. [87] These are also fundamental public-policy objectives which all serve to protect the core national sovereignties of the Member States of the Union.

131. Secondly, the first paragraph of Article 5 of the EU blocking statute appears to be *suitable for achieving* those objectives. In this regard, it should be recalled that, as already explained, that article merely defines the consequences that attach to the inclusion of legislation in the annex thereto. Admittedly, the EU blocking statute does not expressly specify on the basis of which criteria the Commission may decide to include legislation in the annex. [88] However, it may be inferred from the objectives of the said statute that the main criterion is that the foreign sanctions legislation has an extraterritorial effect, at least within the meaning of that statute. In

[86] See, for example, in this sense, judgments of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:1114, paragraph 52), or of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 50). The case-law also refers at times to another criterion, that when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued. , However, these criteria can be considered as already contained in the two mentioned previously mentioned. See, for example, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 64).

[87] In this regard, it should be emphasised that the adoption of countermeasures is permitted under international law. As to the conditions under which such measures are permitted, see Article 49 et seq. of the Draft articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its 53rd session and approved, on 28 January 2002, by a resolution of the General Assembly of the United Nations, and, also, Leben, Ch., 'Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale', *Annuaire Français de Droit International*, vol. 28, 1982, pp. 9-77, and Sicilianos, L.A., 'La codification des contre-mesures par la Commission du droit international', *Revue belge de droit international*, vol. 38, 2005, pp. 447-500. In any case, some authors consider that, technically, the EU blocking statute comes under the concept of retorsion measures, that is to say, unfriendly measures which are not internationally wrongful as such, since they do not violate the rules of jurisdiction recognised by international law. See Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to US Secondary Sanctions', *British Yearbook of International Law*, 2020, p. 82.

[88] This absence of explicit criteria for the inclusion of legislation in the annex could raise some concerns. However, as the questions posed in this case do not address these aspects, I am not going to examine this issue further.

the light of that criterion, a measure prohibiting European companies from complying with the pieces of legislation listed in the annex to that statute appears to be capable of achieving the objectives mentioned above. [89]

132. Such a provision also appears to be necessary since there does not seem to be any less restrictive means of achieving the abovementioned objectives while also being, at the same time, as effective. [90]

133. Finally, as far as the need for the measure in question not to produce disadvantages disproportionate to the aims pursued, to which the Court's case-law refers intermittently, it may be noted that the Court has already accepted that measures taken by the Union for Common Foreign and Security Policy purposes may 'have consequences which affect rights to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanction'. [91]

134. Moreover, in accordance with the second paragraph of Article 5 of the EU blocking statute, economic operators may apply to the Commission for authorisation to derogate from the first paragraph of that article to the extent that, in particular, other conduct would seriously harm their interests or those of the Union. According to the Court's case-law, the existence of such an exemption mechanism is sufficient to ensure that the prohibition in question does not unduly infringe a substantive freedom. [92] Indeed, under that circumstance, an infringement of the freedom of enterprise is most likely to result from an unjustified refusal by the Commission to grant such an exemption. [93]

135. Consequently, I consider that the first paragraph of Article 5 of the EU blocking statute is not, as such, contrary to Article 16 of the Charter. This, however, does not mean that the same necessarily applies to the decision to include legislation in the annex. It is clear, however, that the Commission must also ensure, when adding legislation enacted by third countries to the annex, that the inclusion serves the objectives of the EU blocking statute and that the consequences produced by this inclusion are justified and proportionate to the effects produced by the EU blocking statute. However, this question has not been raised by the referring court or by the parties and, as it happens, this issue has not even been mentioned by the referring court or by the parties and, in any case, there was no such suggestion in the present case that the inclusion of the US sanctions legislation in the annex was inappropriate.

[89] Admittedly, the first paragraph of Article 5 of the EU blocking statute may seem somehow obsolete since the US Federal District Court for the Eastern District of Pennsylvania in *United States v. Brodie* dismissed the application of the Foreign Sovereign Compulsion Doctrine in relation to the blocking statute. However, the US Supreme Court has never expressly ruled on the opposability of the Foreign Sovereign Compulsion Doctrine in the context of the EU blocking statute. In addition, it is not excluded that that article may, on the basis of this doctrine or similar doctrines, serve as a defence in the context of a legislation other than those at issue in the present case. In any event, this provision remains relevant from the point of view of the objective of countering the effects of this legislation.

[90] In this respect, I would stress that the first paragraph of Article 5 of the EU blocking statute merely envisages the possibility of prohibiting the persons referred to in Article 11 of that statute from complying with legislation where that legislation fulfils the conditions laid down in that statute or deriving from the objectives of that statute for being added to the annex. The question whether, in a given case, the decision to include a given piece of legislation in the annex constitutes a proportionate measure is a matter for review of the validity of such a decision and not for review under the first paragraph of Article 5 of the EU blocking statute.

[91] Judgments of 25 June 2020, *VTB Bank* v *Council* (C-729/18 P, not published, EU:C:2020:499, paragraphs 80 to 81), and of 24 September 2020, *NK (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:753, paragraph 89).

[92] See, by analogy, judgment of 6 October 2020, *État luxembourgeois (Judicial protection against requests for information in tax law)* (C-245/19 and C-246/19, EU:C:2020:795, paragraph 92).

[93] According to Tom Ruys and Cedric Ryngaert, by mid-2019, there had been only 15 requests for authorisation. The Commission has not, however, communicated the success ratio of those requests. Ruys, T. and Ryngaert, C., 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to US Secondary Sanctions', *British Yearbook of International Law*, 2020, p. 87.

V. Conclusion

136. In conclusion, I cannot avoid observing that it gives me no particular pleasure to arrive at this particular result. As the facts of this case have highlighted, the EU blocking statute is a very blunt instrument, designed as it is to sterilise the intrusive extraterritorial effects of US sanctions within the Union. This sterilisation method will inevitably bring casualties in its wake and many may think that Telekom Deutschland will be among the first to suffer, not least given its large US operations. As I have already hinted, these are matters which the EU legislature may well wish to ponder and consider.

137. This Court is nevertheless simply a court of law and our duty is to give effect to the language of the duly enacted legislation. For the reasons that I have given, I consider that the first paragraph of Article 5 of the EU blocking statute has these far-reaching effects even if in the circumstances such legislative provisions may also be thought to override ordinary business freedoms in an unusual and intrusive manner. I would accordingly propose that the questions posed by the referring court be answered as follows:

1) The first paragraph of Article 5 of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, is to be interpreted as not applying only where an administrative or judicial authority of a country whose laws and regulations are listed in the annex to that regulation has addressed, directly or indirectly, some instructions to a person referred to in Article 11 of that regulation. The prohibition contained in this provision accordingly applies even in the event that an operator complies with such legislation without first having been compelled by a foreign administrative or judicial agency to do so.

2) The first paragraph of Article 5 of Regulation No 2271/96 is to be interpreted as precluding an interpretation of national law under which a person referred to in Article 11 of that regulation may terminate a continuing contractual obligation with a contracting party named on the Specially Designated Nationals and Blocked Persons List held by the US Office of Foreign Assets Control, without ever having to justify its decision to terminate those contracts.

3) The first paragraph of Article 5 of Regulation No 2271/96 is to be interpreted as meaning that, in the event of a failure to comply with the provisions of that article, the national court seised by a contracting party subject to primary sanctions is required to order a person referred to in Article 11 of that regulation to maintain that contractual relationship, even though, first, the second paragraph of Article 5 should be interpreted restrictively, secondly, such an injunction measure is liable to infringe Article 16 of the Charter of Fundamental Rights of the European Union and, thirdly, such a person is therefore liable to be severely penalised by the authorities responsible for applying one of the laws referred to in the annex to that regulation.