

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2021 (*)

(Reference for a preliminary ruling – Commercial policy – Regulation (EC) No 2271/96 – Protection against the effects of the extraterritorial application of legislation adopted by a third country – Restrictive measures taken by the United States of America against Iran – Secondary sanctions adopted by that third country preventing persons from engaging, outside its territory, in commercial relationships with certain Iranian undertakings – Prohibition on complying with such a law – Exercise of the right of ordinary termination)

In Case C 124/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany), made by decision of 2 March 2020, received at the Court on 5 March 2020, in the proceedings

Bank Melli Iran

v

Telekom Deutschland GmbH,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal, K. Jürimäe, C. Lycourgos, E. Regan, S. Rodin (Rapporteur), N. Jääskinen, I. Ziemele and J. Passer, Presidents of Chambers, M. Ilešič, T. von Danwitz and N. Wahl, Judges,

Advocate General: G. Hogan,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 23 February 2021,

after considering the observations submitted on behalf of:

- Bank Melli Iran, by T. Wülfing, P. Plath and U. Schrömbges, Rechtsanwälte,
- Telekom Deutschland GmbH, by T. Fischer and M. Blankenheim, Rechtsanwälte,
- the German Government, by J. Möller and S. Heimerl, acting as Agents,
- the Spanish Government, by S. Centeno Huerta, acting as Agent,
- the European Commission, by J. Roberti di Sarsina, A. Biolan and M. Kellerbauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2021,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 5 of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 1996 L 309, p. 1), as amended by Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 (OJ 2014 L 18, p. 1), and by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 (OJ 2018 L 199 I, p. 1), which amended the Annex to Regulation No 2271/96 ('Regulation No 2271/96').
- 2 The request has been made in proceedings between Bank Melli Iran ('BMI') and Telekom Deutschland GmbH ('Telekom') concerning the validity of the termination of contracts concluded between those two companies and relating to the supply of telecommunication services by Telekom after BMI was included in the list of persons covered by a sanctions regime established by the United States of America in connection with Iran's nuclear programme, which prevented in particular the conduct of commercial relationships, outside the territory of the United States, with those persons ('the secondary sanctions').

Legal context

European Union law

Regulation No 2271/96

- 3 The first to sixth recitals of Regulation No 2271/96 state:

'Whereas the objectives of the [European Union] include contributing to the harmonious development of world trade and to the progressive abolition of restrictions on international trade;

Whereas the [European Union] 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;

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 States;

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 [European Union] and the interests of natural and legal persons exercising rights under the [FEU] Treaty;

Whereas, under these exceptional circumstances, it is necessary to take action at [European Union] level to protect the established legal order, the interests of the [European Union] 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'.

- 4 The first paragraph of Article 1 of the regulation provides:

'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 [European Union] and third countries.’

5 Article 4 of the regulation provides:

‘No judgment of a court or tribunal and no decision of an administrative authority located outside the [European Union] giving effect, directly or indirectly, to the laws specified in the Annex or to actions based thereon or resulting therefrom, shall be recognised or be enforceable in any manner.’

6 Under Article 5 of that same regulation:

‘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 [European Union]. 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.’

7 The first and second paragraphs of Article 6 of Regulation No 2271/96 provide:

‘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.’

8 Article 7(b) and (d) of that regulation 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;

...

(d) publish a notice in the *Official Journal of the [European Union]* on the judgments and decisions to which Articles 4 and 6 apply’.

9 Under Article 8 of that regulation:

‘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 [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. Where reference is made to this paragraph, Article 5 of Regulation [No 182/2011] shall apply.’

10 Article 9 of Regulation No 2271/96 provides:

‘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.’

11 Article 11 of Regulation No 2271/96 reads as follows:

‘This Regulation shall apply to:

1. any natural person being a resident in the [European Union] and a national of a Member State,
2. any legal person incorporated within the [European Union],
3. any natural or legal person referred to in Article 1(2) of [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)],
4. any other natural person being a resident in the [European Union], unless that person is in the country of which he is a national,
5. any other natural person within the [European Union], 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.’

12 In the section relating to the United States the Annex to Regulation No 2271/96, entitled ‘Laws, regulations and other legislative instruments’, reads as follows:

‘...

4. “Iran Freedom and Counter-Proliferation Act of 2012”

Required compliance:

Not to knowingly:

- (i) provide significant support, including by facilitating significant financial transactions, or goods or services, to or on behalf of certain persons operating in the ports, energy, shipping, or shipbuilding sectors in Iran, or any Iranian person included in the list of specially designated nationals and blocked persons;
- (ii) trade with Iran in significant goods and services used in connection with the energy, shipping or shipbuilding sectors of Iran;
- (iii) purchase petroleum and petroleum products from Iran and conduct financial transactions related with them, in specific circumstances;
- (iv) conduct or facilitate transactions for the trade in natural gas to or from Iran (applies to foreign financial institutions);
- (v) trade with Iran in precious metals, graphite, raw or semi-finished metals, or software that may be used in specific sectors or involve certain persons; nor facilitate a significant financial transaction in connection with such trade;

- (vi) provide underwriting services, insurance and reinsurance related to specific activities, including but not limited to those under points (i) and (ii) above, or to specific categories of persons;

...’

Delegated Regulation 2018/1100

- 13 Recital 4 of Delegated Regulation 2018/1100 provides:

‘On 8 May 2018, the United States announced they will no longer waive their national restrictive measures relating to Iran. Some of those measures have extra-territorial application and cause adverse effects on the interests of the Union and the interests of natural and legal persons exercising rights under the [FEU] Treaty.’

Implementing Regulation (EU) 2018/1101

- 14 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 Regulation No 2271/96 (OJ 2018 L 199 I, p. 7) provides:

‘When assessing whether a serious damage to the protected interests as referred to in the second paragraph of Article 5 of Regulation [No 2271/96] would arise, 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 person referred to in Article 11 of Regulation No 2271/96 who applied for authorisation under the second paragraph of Article 5 of that regulation] from, or a prior settlement agreement with, the third country which is at the origin of the listed extraterritorial 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 person referred to in Article 11 of Regulation No 2271/96 who applied for authorisation under the second paragraph of Article 5 of that regulation] 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 extraterritorial legislation or the subsequent actions;
- (d) whether measures could be reasonably taken by [the person referred to in Article 11 of Regulation No 2271/96 who applied for authorisation under the second paragraph of Article 5 of that regulation] to avoid or mitigate the damage;
- (e) the adverse effect on the conduct of economic activity, in particular whether [the person referred to in Article 11 of Regulation No 2271/96 who applied for authorisation under the second paragraph of Article 5 of that regulation] would face significant economic losses, which could for example threaten its viability or pose a serious risk of bankruptcy;
- (f) whether the activity [of the person referred to in Article 11 of Regulation No 2271/96 who applied for authorisation under the second paragraph of Article 5 of that regulation] 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 person referred to in Article 11 of Regulation No 2271/96 who applied for authorisation under the second paragraph of Article 5 of that regulation] would be significantly hindered;

- (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.'

German law

15 Paragraph 134 of the Bürgerliches Gesetzbuch (Civil Code) provides:

'Any legal act contrary to a statutory prohibition shall be void except as otherwise provided by law.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 16 BMI, which has a branch in Germany, is an Iranian bank owned by the Iranian state. It concluded with Telekom, which is the subsidiary of Deutsche Telekom AG, established in Germany and approximately half of the turnover of which is derived from its business in the United States, several contracts with a view to the provision of telecommunication services.
- 17 The parties to the main proceedings are connected by a framework contract that allows BMI to group under one contract all of the telephonic and internet connections concerning its company in its various sites in Germany. Under the various contracts concluded between the parties, Telekom provided BMI with several telecommunications services which have always been paid for by BMI within the prescribed time. The services provided under those contracts are essential to the internal and external communication of BMI in Germany. According to the referring court, without those services, BMI cannot participate in commercial relationships across its establishment situated in Germany.
- 18 In 2018, the United States withdrew itself from the Iranian nuclear deal, signed in Vienna on 14 July 2015, the aim of which was to control Iran's nuclear programme and lift economic sanctions against Iran. Consequently, with effect from 5 November 2018, the United States once again imposed secondary sanctions against Iran.
- 19 Those sanctions affected persons covered by the Specially Designated Nationals and Blocked Persons List ('the SDN list') maintained by the Office of Foreign Assets Control (OFAC), United States, in which BMI was included. Under those sanctions, it is prohibited for any person to trade, outside the territory of the United States, with any person or entity included in the SDN list.
- 20 On 16 November 2018, Telekom notified BMI of the termination of all of the contracts between them, with immediate effect, and proceeded likewise with at least four other companies with links to Iran, which were included in the SDN list and which had their registered office in Germany.

- 21 In one of the sets of interim proceedings brought by BMI before the German courts, the Landgericht Hamburg (Regional Court, Hamburg, Germany) ordered Telekom, by a judgment of 28 November 2018, to perform the contracts until the end of the periods of notice for ordinary termination, which were due to expire between 25 January 2019 and 7 January 2021.
- 22 On 11 December 2018, Telekom notified BMI again of the termination of all of those contracts ‘as of the earliest possible date’. No reasons were provided for that termination.
- 23 BMI therefore brought an action before the Landgericht Hamburg (Regional Court, Hamburg) seeking an order that Telekom leave all the contractually agreed telephone and internet connections active.
- 24 That court ordered Telekom to perform the contracts at issue in the main proceedings pending the expiry of the notice periods for ordinary termination, and dismissed the action as to the remainder. It held that the ordinary termination by Telekom of those contracts was consistent with Article 5 of Regulation No 2271/96.
- 25 BMI appealed against the judgment of the Landgericht Hamburg (Regional Court, Hamburg) to the referring court, submitting that the termination of the contracts at issue in the main proceedings infringed Article 5 of Regulation No 2271/96. BMI alleges that the sole reason for that termination was Telekom’s wish to comply with secondary sanctions adopted by the United States.
- 26 The referring court states, in the first place, that BMI did not submit that the termination of the contracts at issue in the main proceedings by Telekom followed orders, direct or indirect, from administrative or judicial authorities in the United States. By a judgment of 7 February 2020, the Oberlandesgericht Köln (Higher Regional Court, Cologne, Germany) held that, in such a situation, the first paragraph of Article 5 of Regulation No 2271/96 was not applicable.
- 27 However, according to the referring court, the existence of secondary sanctions alone suffices for the first paragraph of Article 5 of Regulation No 2271/96 to apply, since there is no measure that would make it possible effectively to implement the prohibition laid down in that provision.
- 28 In the second place, the order for reference indicates that Telekom, relying on point 5 of the Commission Guidance Note, entitled ‘Questions and Answers: adoption of Update of the Blocking Statute’ of 7 August 2018 (OJ 2018 C 277 I, p. 4), submits that under the first paragraph of Article 5 of Regulation No 2271/96 it retains the commercial freedom to end, at any time, its contracts concluded with BMI, for any reason, as certain German courts held, including the Oberlandesgericht Köln (Higher Regional Court, Cologne), which, by an order of 1 October 2019, confirmed that it was possible to end a contract for ‘reasons related to United States foreign policy’.
- 29 The referring court takes the view that the termination of contracts does not infringe the first paragraph of Article 5 of Regulation No 2271/96 where it is motivated by purely economic reasons that do not have any specific connection with the sanctions imposed by third countries. Consequently, Telekom was required exceptionally to give its reasons for the termination of the contracts at issue in the main proceedings and in any event set out, and even, if necessary, prove that the decision to terminate those contracts was not taken out of fear of possible negative repercussions for Telekom on the US market.
- 30 In the third place, the referring court observes that it follows from Paragraph 134 of the Civil Code that a termination of contracts which breaches the first paragraph of Article 5 of Regulation No 2271/96 is devoid of legal effect. In addition, under German law, any infringement of the first paragraph of Article 5 would be an administrative offence punishable by a fine of up to EUR 500 000.
- 31 Taking into account the risk of economic loss for Telekom, which belongs to a group approximately half of the turnover of which is derived from its business in the United States, it could be regarded as contrary to the principle of proportionality, laid down in Article 9 of Regulation No 2271/96, to impose a fine on

that company and also require it to continue to perform the contracts concluded with BMI, to the extent that the regulation does not have the direct aim of protecting the latter's interests.

32 In the fourth place, the referring court notes that, according to its preamble, Regulation No 2271/96 aims to protect economic operators of the European Union.

33 However, it considers that neither a recovery claim provided for in Article 6 of that regulation, nor the possibility of the issue of an authorisation to comply with the sanctions provided for in the second paragraph of Article 5 of that regulation is sufficient compensation for the risk of economic loss. Having regard to the objective pursued by that regulation, which is to prevent the application of secondary sanctions to EU economic operators, that authorisation would be issued rather restrictively. Consequently, the risk of economic loss alone would not suffice to obtain such authorisation. In those circumstances, the referring court wonders whether, in circumstances where there is a risk of substantial economic loss on the United States market, the general prohibition, laid down in Regulation No 2271/96, on an undertaking separating from a trading partner is compatible with the freedom to conduct a 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 thereof.

34 In those circumstances, the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '(1) Does the first paragraph of Article 5 of Regulation No 2271/96 only apply where the United States issues an administrative or judicial order directly or indirectly against an EU economic operator, within the meaning of Article 11 of that regulation, or does it suffice for that article to apply that the action of the EU economic operator seeks to comply with secondary sanctions, even in the absence of such an order?
- (2) If the answer to the first question is that the second alternative applies, does the first paragraph of Article 5 of Regulation No 2271/96 preclude the interpretation of national law as meaning that the party giving notice of termination may terminate any continuing obligation with a contracting party included in [the SDN list] held by the US Office of Foreign Assets Control, and thus announce a termination owing to wishing to comply with sanctions [imposed by the United States ...], – without having to show and prove in civil proceedings that the reason for termination was not in any event a wish to comply with those sanctions?
- (3) If the second question is answered in the affirmative, must ordinary termination in breach of the first paragraph of Article 5 of Regulation No 2271/96 necessarily be regarded as ineffective or can the purpose of the regulation be satisfied through other penalties, such as a fine?
- (4) If the answer to the third question is that the first alternative applies, having regard to Articles 16 and 52 of [the Charter], on the one hand, and the possibility of granting an exemption under the second paragraph of Article 5 of Regulation No 2271/96, 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)?'

Consideration of the questions referred

Preliminary observations

35 It should be borne in mind that Regulation No 2271/96 aims, as stated in its sixth recital, to protect the established legal order, the interests of the European Union and those of natural and legal persons exercising rights under the FEU Treaty, in particular by removing, neutralising, blocking or otherwise

countering the effects of the laws, regulations and other legislative instruments referred to in the annex of that regulation ('the laws specified in the annex').

36 Article 1 of Regulation No 2271/96 states, in that regard, that the EU legislature seeks, by the measures provided for in that regulation, to provide protection against the extraterritorial application of the laws specified in the annex, and of actions based thereon or resulting therefrom, and to counteract their effects, 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 European Union and third countries.

37 As is clear from the first to fifth recitals of Regulation No 2271/96, the laws specified in the annex to the regulation are included there because they seek to govern activities of natural and legal persons which fall within the jurisdiction of the Member States and have extraterritorial application. In so doing, they adversely affect the established legal order and harm the interests of the European Union, as well as those of the persons referred to, in violating international law and compromising the realisation of the European Union's objectives. Those objectives seek to contribute to the harmonious development of world trade and progressively to remove restrictions on international trade by promoting, to the greatest extent possible, the free movement of capital between the Member States and third countries and to remove any restrictions on direct investment – including investment in real estate – establishment, on the provision of financial services or on the admission of securities to capital markets.

38 One of the laws specified in the annex is the Iran Freedom and Counter-Proliferation Act of 2012, the application of which, as is clear from the fourth recital of Delegated Regulation 2018/1100, the United States no longer waived following its withdrawal from the Iranian Nuclear Deal, as it declared on 8 May 2018.

39 In order to achieve the objectives recalled in paragraphs 35 to 37 of this judgment, Regulation No 2271/96 lays down a variety of rules. Thus, in order to protect the established legal order and the interests of the European Union, Article 4 of the regulation provides, in essence, that no decision external to the European Union giving effect to the laws specified in the annex or to actions based thereon or resulting therefrom, is to be recognised or enforceable. With the same aim, the first paragraph of Article 5 of the regulation essentially prohibits any person referred to in Article 11 thereof from complying with the laws specified in the annex, or actions based thereon or resulting therefrom, while the second paragraph of that Article 5 provides, however, that such a person may be authorised, at any time, to comply fully or partially with those laws, to the extent that non-compliance would seriously damage their interests or those of the European Union. In addition, with the aim of protecting the interests of the persons referred to in Article 11 of Regulation No 2271/96, Article 6 thereof provides that those of them that engage in an activity referred to in Article 1 of that regulation are to be entitled to recover any damages caused to them by the application of those laws or those actions.

40 Article 9 of Regulation No 2271/96 seeks to ensure the effective application of those rules, by requiring the Member States to impose, in the event of breach of the rules, sanctions which must be effective, proportional and dissuasive. Such sanctions must therefore be imposed, in particular, when a person referred to in Article 11 of the regulation infringes the prohibition laid down in the first paragraph of Article 5 thereof.

41 It is in the light of those considerations that it is necessary to answer the questions raised by the referring court.

The first question

42 By its first question, the referring court asks, in essence, whether the first paragraph of Article 5 of Regulation No 2271/96 must be interpreted as prohibiting persons referred to in Article 11 of that regulation from complying with the requirements or prohibitions laid down in the laws specified in the

annex, even in the absence of an order directing compliance issued by the administrative or judicial authorities of the third country which adopted those laws.

- 43 As a preliminary matter, it should be recalled that, according to settled case-law, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part (judgment of 12 May 2021, *Bundesrepublik Deutschland (Interpol red notice)*, C 505/19, EU:C:2021:376, paragraph 77 and the case-law cited).
- 44 As regards the wording of the first paragraph of Article 5 of Regulation No 2271/96, it should be recalled that that provision prohibits any person referred to in Article 11 of that regulation from complying ‘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’.
- 45 It follows from that wording, in particular the phrase ‘any requirement or prohibition ... based on’ and the word ‘including’, that that provision, which is broadly drafted, applies even in the absence of an order or instruction of an administrative or judicial authority.
- 46 As the Advocate General observes, in essence, in point 55 of his Opinion, a requirement or prohibition may, in accordance with the usual meaning of those words, be the result not only of an act of an individual nature or a collection of individual decisions, but also of an act of a general and abstract nature.
- 47 That interpretation of the words ‘requirement’ and ‘prohibition’ is derived also from the context of the first paragraph of Article 5 of Regulation No 2271/96. As the Advocate General observed in essence in point 57 of his Opinion, in Article 4 and Article 7(d) of the regulation, the word ‘decision’ [or ‘judgment’] is used to refer to judicial and administrative acts, understood as ‘orders’, which corroborates the finding that the words ‘requirement’ and ‘prohibition’ used in the first paragraph of Article 5 of the same regulation have a wider scope.
- 48 That interpretation is also supported by the aims of Regulation No 2271/96, which include, as stated in the second and sixth recitals thereof, protecting the established legal order as well as the interests of the European Union and those of natural and legal persons exercising rights under the FEU Treaty system, in order to achieve, to the greatest extent possible, the free movement of capital between the Member States and third countries.
- 49 As regards the aim of Regulation No 2271/96 of protecting the established legal order and the interests of the European Union in general, it must be observed, as the Advocate General noted in essence in points 63 and 64 of his Opinion, that the laws specified in the annex are capable of producing their effects *inter alia* by the mere threat of the legal consequences that could be incurred in the event of a breach of those laws by persons referred to in Article 11 of that regulation. It follows that Regulation No 2271/96 would not be capable of counteracting the effects of those laws and of thus effectively pursuing the abovementioned objective if the prohibition laid down in the first paragraph of Article 5 of the regulation were made subject to the adoption of orders by the administrative or judicial authorities of the third countries which adopted those laws.
- 50 The interpretation of the first paragraph of Article 5 of Regulation No 2271/96 set out in paragraph 45 of this judgment is not, for the remainder, incompatible with the complementary objective of Regulation No 2271/96 consisting of protecting the interests of the persons referred to in Article 11 of the regulation, including their freedom to conduct a business which is a fundamental freedom enshrined in Article 16 of the Charter and which, according to the Court’s case-law, covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition (judgment of 16 July 2020, *Adusbef and Others*, C 686/18, EU:C:2020:567, paragraph 82). It must be observed that those interests, which may be threatened by the measures to which those persons in the third countries concerned are exposed if they do not comply with the laws specified in the annex are duly protected by virtue of the second paragraph of Article 5 of that regulation, which must be interpreted in the light of that objective.

51 Having regard to the foregoing, the answer to the first question is that the first paragraph of Article 5 of Regulation No 2271/96 must be interpreted as prohibiting persons referred to in Article 11 of that regulation from complying with the requirements or prohibitions laid down in the laws specified in the annex, even in the absence of an order directing compliance issued by the administrative or judicial authorities of the third countries which adopted those laws.

The second question

52 By its second question, the referring court asks, in essence, whether the first paragraph of Article 5 of Regulation No 2271/96 must be interpreted as precluding a person referred to in Article 11 of the regulation, who does not have an authorisation within the meaning of the second paragraph of Article 5 of the regulation, from terminating contracts concluded with a person included in the SDN list, without providing reasons for that termination.

53 That question arises in the context of civil proceedings in which BMI challenges, before the referring court, the exercise by Telekom of its right of ordinary termination of contracts concluded between them without having to provide reasons. BMI claims that such a termination infringes the first paragraph of Article 5 of Regulation No 2271/96.

54 It is necessary, at the outset, to ascertain whether the first paragraph of Article 5 of Regulation No 2271/96 may be relied on in civil proceedings such as the dispute in the main proceedings.

55 According to settled case-law, it is for the national courts, whose task it is, in areas within their jurisdiction, to apply the provisions of EU law such as those in Regulation No 2271/96, to ensure that they take full effect (see, to that effect, judgment of 17 September 2002, *Muñoz and Superior Fruiticola*, C 253/00, EU:C:2002:497, paragraph 28).

56 It must be recalled in addition that, pursuant to the second paragraph of Article 288 TFEU, regulations are of general application and are directly applicable in all Member States (judgment of 17 September 2002, *Muñoz and Superior Fruiticola*, C 253/00, EU:C:2002:497, paragraph 27).

57 It must be held that the first paragraph of Article 5 of Regulation No 2271/96 provides that no person referred to in Article 11 thereof is to comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, based on or resulting, directly or indirectly, from the laws specified in the annex. The reason for that prohibition, which is drafted in clear, precise and unconditional terms, lies in the fact that the persons referred to in Article 11, in the exercise of their activities, in particular commercial activities, including by their possible decisions to terminate contacts, are capable of giving extraterritorial effect to the laws specified in the annex, which that regulation seeks specifically to counteract.

58 Moreover, the sole derogation from that prohibition is laid down in the second paragraph of Article 5 of Regulation No 2271/96, which allows persons referred to in Article 11 of the regulation to request an authorisation not to comply with it.

59 Since, as stated in paragraph 55 of this judgment, it is for the national courts to ensure the full effectiveness of Regulation No 2271/96, it must be possible to ensure compliance with the prohibition laid down in the first paragraph of Article 5 of the regulation by means of civil proceedings, such as those of the main proceedings, instituted by a person against a person to whom that prohibition is addressed (see, by analogy, judgment of 17 September 2002, *Muñoz and Superior Fruiticola*, C 253/00, EU:C:2002:497, paragraph 30).

60 It is true that Article 9 of Regulation No 2271/96 entrusts to the Member States the task of determining the sanctions to be imposed in the event of infringement of the regulation, which must be effective, proportional and dissuasive. That competence must not, however, have the effect of altering the scope of the other provisions of Regulation No 2271/96, which lay down clear, precise and unconditional requirements or

prohibitions, the full effectiveness of which, as stated in paragraph 55 of this judgment, the national courts are obliged to ensure in proceedings before them.

- 61 That interpretation of Article 5 of Regulation No 2271/96 cannot be called into question, contrary to Telekom's submissions, by the Commission Guidance Note referred to in paragraph 28 of this judgment. That note does not establish binding rules or legal interpretations. Regulation No 2271/96 alone is binding, as stated in paragraph 5 of the preamble to that note, and only the Court has the power to give legally binding interpretations of the acts of the institutions, as stated in paragraph 6 of the preamble to that same note.
- 62 Those clarifications having been made, it must be held that it is not clear from either the first paragraph of Article 5 of Regulation No 2271/96 or from any other provision of that regulation that a person referred to in Article 11 thereof is required to provide reasons for the termination of a commercial contract with a person included in the SDN list.
- 63 In those circumstances, it must be held that the first paragraph of Article 5 of Regulation No 2271/96 does not preclude a national law pursuant to which a person referred to in Article 11 of that regulation, and who does not have an authorisation within the meaning of the second paragraph of that Article 5, may terminate contracts that it has agreed with a person on the SDN list, and may do so without providing reasons for that termination.
- 64 In the present case, it is apparent from the documents before the Court that, subject to verification by the referring court, Paragraph 134 of the Civil Code applies to the dispute in the main proceedings. That court states in that regard that, if the termination at issue infringes the first paragraph of Article 5 of Regulation No 2271/96, it is rendered null and void, by virtue of that Paragraph 134. Furthermore, in response to a question put by the Court, the German Government clarified the relevant rules on the burden of proof for the purposes of establishing, in civil proceedings, infringement of a statutory prohibition within the meaning of that Paragraph 134. Thus, a party which claims that a legal act, including the termination of a contract, is void on account of the breach of a legal prohibition, such as that laid down in the first paragraph of Article 5 of Regulation No 2271/96, may rely on that nullity before the courts. To that end, it must set out the facts showing the alleged infringement. If the other party to the proceedings disputes the correctness of those facts, the party claiming that the legal act is null and void bears the burden of proving that the conditions of that infringement are met. Thus, in the present case, the burden of proof lies entirely with the person alleging infringement of Article 5 of Regulation No 2271/96.
- 65 It should be noted, however, in that regard, that the application of such a general rule relating to the burden of proof is liable to make it impossible or excessively difficult for the referring court to make a finding that there was an infringement of the prohibition laid down in the first paragraph of Article 5 of Regulation No 2271/96, thereby undermining the effectiveness of that prohibition.
- 66 The evidence capable of showing that conduct on the part of a person referred to in Article 11 of Regulation No 2271/96 is motivated by that person's intention of complying with the laws specified in the annex is not normally available to any other private individual, to the extent that, in particular, as the Advocate General stated in point 95 of his Opinion, such evidence may be covered by business secrecy.
- 67 Therefore, in order to ensure that the first paragraph of Article 5 of Regulation No 2271/96 is fully effective, it must be held that, where, in civil proceedings relating to the alleged infringement of the requirements laid down in that provision, all the evidence available to a national court tends to indicate prima facie that, by terminating the contracts in question, a person referred to in Article 11 of that regulation, who does not have an authorisation within the meaning of the second paragraph of Article 5 of that regulation, complied with the laws specified in the annex, it was for that person to establish to the requisite legal standard this his or her conduct did not seek to comply with those laws.
- 68 It follows from the foregoing that the answer to the second question is that the first paragraph of Article 5 of Regulation No 2271/96 must be interpreted as not precluding a person referred to in Article 11 of that

regulation, who does not have an authorisation within the meaning of the second paragraph of Article 5 of that regulation, from terminating contracts concluded with a person on the SDN list without providing reasons for that termination. Nevertheless, the first paragraph of Article 5 of that regulation requires that, in civil proceedings relating to the alleged infringement of the prohibition laid down in that provision, where all the evidence available to the national court suggests *prima facie* that a person referred to in Article 11 of Regulation No 2271/96 complied with the laws specified in the annex, without having an authorisation in that respect, it is for that person to establish to the requisite legal standard that his or her conduct did not seek to comply with those laws.

The third and fourth questions

- 69 By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Regulation No 2271/96, in particular Articles 5 and 9 thereof, read in the light of Articles 16 and 52 of the Charter, must be interpreted as precluding the annulment of a termination of contracts effected by a person referred to in Article 11 of that regulation in order to comply with the requirements or prohibitions based on the laws specified in the annex, when he or she does not have an authorisation within the meaning of the second paragraph of Article 5 of that regulation, where that person risks suffering substantial economic loss as a result of that annulment.
- 70 At the outset, it should be recalled that the provisions of EU law, such as those of Regulation No 2271/96, must be interpreted in the light of fundamental rights which, according to established case-law, form an integral part of the general principles of law whose observance the Court ensures and which are now set out in the Charter (see, to that effect, judgment of 25 May 2016, *Meroni*, C 559/14, EU:C:2016:349, paragraph 45).
- 71 Article 9 of Regulation No 2271/96 provides that the sanctions which Member States impose in the event of infringements of any relevant provision of that regulation must be effective, proportional and dissuasive.
- 72 Moreover, in the absence of harmonisation at EU level in the field of applicable sanctions, the Member States retain the power to choose the penalties which seem to them to be appropriate. However, the Member States must exercise their powers in accordance with EU law and its general principles (judgment of 11 February 2021, *K. M. (Sanctions imposed on the master of a vessel)*, C 77/20, EU:C:2021:112, paragraph 36), of which fundamental rights and freedoms form part.
- 73 Furthermore, the Court has held that the severity of sanctions must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while respecting the general principle of proportionality (judgment of 5 March 2020, *OPR-Finance*, C 679/18, EU:C:2020:167, paragraph 26).
- 74 It should be added that it is for the national courts, which have sole jurisdiction to interpret and apply national law, to determine whether, having regard to all the circumstances of the particular case, those sanctions meet such requirements and are effective, proportionate and dissuasive (judgment of 5 March 2020, *OPR-Finance*, C 679/18, EU:C:2020:167, paragraph 27).
- 75 The Court, when giving a preliminary ruling, may, however, provide clarification designed to give those national courts guidance in their assessment (judgment of 5 March 2020, *OPR-Finance*, C 679/18, EU:C:2020:167, paragraph 28).
- 76 In the present case, according to the information in the request for a preliminary ruling referred to in paragraph 30 of this judgment, if it were to be established that the ordinary termination by Telekom of the contracts it concluded with BMI was carried out in breach of the first paragraph of Article 5 of Regulation No 2271/96, although, as is common ground, it had not requested authorisation within the meaning of the second paragraph of Article 5 of that regulation, it would follow from Paragraph 134 of the Civil Code that that termination act is null and void and, therefore, devoid of any legal effect.

- 77 However, such an annulment entails a limitation on the freedom to conduct a business enshrined in Article 16 of the Charter.
- 78 It should be recalled in that regard that the right of freedom to conduct a business includes, inter alia, the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it (judgment of 30 June 2016, *Lidl*, C 134/15, EU:C:2016:498, paragraph 27).
- 79 The protection afforded by Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, freedom of contract and free competition (judgment of 16 July 2020, *Adusbef and Others*, C 686/18, EU:C:2020:567, paragraph 82 and the case-law cited) and covers, in particular, the freedom to choose with whom to do business and the freedom to determine the price of a service (judgment of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C 798/18 and C 799/18, EU:C:2021:280, paragraph 57).
- 80 However, the freedom to conduct a business does not constitute an absolute prerogative, but, first, must be viewed in relation to its function in society (judgment of 20 December 2017, *Polkomtel*, C 277/16, EU:C:2017:989, paragraph 50) and, second, be weighed in the balance with other interests protected by the EU legal order (see, to that effect, judgment of 17 October 2013, *Schaible*, C 101/12, EU:C:2013:661, paragraph 60) and the rights and freedoms of others (see, to that effect, judgment of 22 January 2013, *Sky Österreich*, C 283/11, EU:C:2013:28, paragraph 48).
- 81 Having regard to the wording of Article 16 of the Charter, which provides that the freedom to conduct a business is recognised in accordance with EU law and national laws and practices and thus differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter, that freedom may therefore be subject to a broad range of interventions on the part of public authorities which may, in the public interest, limit the exercise of economic activity (see, to that effect, judgment of 22 January 2013, *Sky Österreich*, C 283/11, EU:C:2013:28, paragraph 46).
- 82 That circumstance is reflected, in particular, in the way in which EU legislation and national legislation and practices should be assessed in the light of the principle of proportionality under Article 52(1) of the Charter (see, to that effect, judgment of 22 January 2013, *Sky Österreich*, C 283/11, EU:C:2013:28, paragraph 47).
- 83 In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (judgment of 22 January 2013, *Sky Österreich*, C 283/11, EU:C:2013:28, paragraph 48).
- 84 In the present case, it should be recalled that, although the first paragraph of Article 5 of Regulation No 2271/96 provides that no person referred to in Article 11 thereof is to comply with the laws specified in the annex, the second paragraph of Article 5 provides, however, that a person may be authorised, in accordance with the procedures laid down in Articles 7 and 8 of Regulation No 2271/96, to comply in full or in part with the requirements or prohibitions arising from those laws specified in the annex, in so far as failure to comply with them would seriously harm the interests of that person or those of the European Union. Under those procedures, it is for the Commission to grant such authorisations, with the assistance of the Committee on Extra-territorial Legislation referred to in Article 8 of that regulation. Thus, in accordance with the harmonised system established by that regulation, the Commission is, in principle, responsible for assessing, subject to review by the Court, whether the failure to comply with the laws specified in the annex would seriously harm the interests of that person or those of the European Union, that institution being required to comply with its obligation to respect the fundamental rights, including the freedom to conduct a business.

- 85 Under Article 4 of Implementing Regulation 2018/1101, which lays down, in accordance with Article 1 thereof, criteria for the application of the second paragraph of Article 5 of Regulation No 2271/96, the Commission is required, in particular, in order to assess whether serious harm would be caused to the protected interests referred to in Article 5, to take account of criteria – which are not cumulative – such as whether the protected interest is likely to be specifically at risk, based on the context, the nature and the origin of the damage caused to the protected interest, whether there is a substantial connecting link with the third country which is at the origin of the extraterritorial legislation in question or the subsequent actions, the adverse effect on the conduct of economic activity and, in particular, the risk that the person referred to in Article 11 of Regulation No 2271/96 who applied for authorisation under the second paragraph of Article 5 of that regulation would face significant economic losses, which could for example threaten its viability or pose a serious risk of bankruptcy; or yet the risk that the enjoyment of the individual rights of that person would be significantly hindered.
- 86 It follows that the limitation on the freedom to conduct a business resulting from the need to comply with the first paragraph of Article 5 of Regulation No 2271/96 is provided for by law.
- 87 As regards the condition relating to respect for the essence of the freedom to conduct a business, it must be borne in mind that that requirement is potentially infringed, in particular, where an undertaking is deprived of the opportunity to assert its interests effectively in a contractual process (see, to that effect, judgment of 21 December 2016, *AGET Iraklis*, C 201/15, EU:C:2016:972, paragraph 87).
- 88 In the present case, however, annulling the termination of the contracts at issue in the main proceedings due to infringement of Article 5 of Regulation No 2271/96 would have the effect, not of depriving Telekom of the possibility of asserting its interests generally in the context of a contractual relationship, but rather of limiting that possibility, since such an annulment is justified only to the extent that Telekom effected that termination in order to comply with laws specified in the annex.
- 89 As regards the condition that the limitation on the freedom to conduct a business must actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others, it follows from what has been stated in paragraph 76 of this judgment that that limitation which may result from the annulment of the termination of a contract, such as that at issue in the main proceedings, also satisfies that condition, since it contributes to meeting the objectives of Regulation No 2271/96, recalled in paragraphs 35 to 37 of this judgment.
- 90 That being so, and as regards, lastly, the condition relating to the proportionality of the limitation, in so far as Telekom's economic activity outside the European Union is exposed to the sanctions provided for by the United States against persons who fail to comply with the secondary sanctions taken by that third country against Iran, the referring court is required to assess whether those first-mentioned sanctions are liable to entail disproportionate effects for that undertaking in the light of the objectives of Regulation No 2271/96, which are to protect the established legal order and the interests of the European Union in general, and thus to achieve the objective of free movement of capital between the Member States and third countries.
- 91 In that regard, the limitation on the freedom to conduct a business resulting from the possible annulment of the termination of a contract contrary to the prohibition laid down in the first paragraph of Article 5 of Regulation No 2271/96, would appear, in principle, to be necessary in order to counteract the effects of the laws specified in the annex, thereby protecting the established legal order and the interests of the European Union in general.
- 92 It is nevertheless for the referring court, moreover, to strike a balance when assessing proportionality between, on the one hand, the pursuit of those objectives of Regulation No 2271/96 served by the annulment of a termination in breach of the prohibition laid down in the first paragraph of Article 5 of that regulation and, on the other hand, the probability that Telekom would be exposed to economic losses and the extent of those losses if that undertaking were unable to terminate its commercial relationship with a person included in the SDN list.

- 93 In that assessment of proportionality, it is also relevant that, subject to verification by the referring court, Telekom did not apply to the Commission for derogation from the prohibition laid down in the first paragraph of Article 5 of Regulation No 2271/96 and thus deprived itself of the possibility of avoiding the limitation on its freedom to conduct a business that would result from the annulment of the termination of the contracts at issue with BMI flowing from its possible infringement of that prohibition.
- 94 As regards the administrative fine provided for by German law, it must be observed that the referring court cannot take that into account since the amount of that fine, which must itself be proportionate in accordance with Article 9 of Regulation No 2271/96, is to be determined by taking into consideration the individual situation of the author of the infringement and, therefore, any sanction consisting of the annulment of the termination of the contract in question.
- 95 In the light of all the foregoing, the answer to the third and fourth questions is that Regulation No 2271/96, in particular Articles 5 and 9 thereof, read in the light of Article 16 and Article 52(1) of the Charter, must be interpreted as not precluding the annulment of termination of contracts effected by a person referred to in Article 11 of that regulation in order to comply with the requirements or prohibitions based on the laws specified in the annex, even though that person does not have an authorisation within the meaning of the second paragraph of Article 5 of that regulation, provided that that annulment does not entail disproportionate effects for that person having regard to the objectives of that regulation consisting in the protection of the established legal order and the interests of the European Union in general. In that assessment of proportionality, it is necessary to weigh in the balance the pursuit of those objectives served by the annulment of the termination of a contract effected in breach of the prohibition laid down in the first paragraph of Article 5 of Regulation No 2271/96 and the probability that the person concerned may be exposed to economic loss, as well as the extent of that loss, if he or she cannot terminate his or her commercial relationship with a person included in the list of persons covered by the secondary sanctions at issue resulting from the laws specified in the annex.

Costs

- 96 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 1. The first paragraph of Article 5 of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, as amended by Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014, and by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018, which amended the Annex to Regulation No 2271/96, must be interpreted as prohibiting persons referred to in Article 11 of Regulation No 2271/96, as amended, from complying with the requirements or prohibitions laid down in the laws specified in the annex to that regulation, even in the absence of an order directing compliance issued by the administrative or judicial authorities of the third countries which adopted those laws.**
- 2. The first paragraph of Article 5 of Regulation No 2271/96, as amended by Regulation No 37/2014 and Delegated Regulation 2018/1100, must be interpreted as not precluding a person referred to in Article 11 of that regulation, as amended, who does not have an authorisation within the meaning of the second paragraph of Article 5 of that regulation, as amended, from terminating contracts concluded with a person on the Specially Designated Nationals and Blocked Persons List, without providing reasons for that termination. Nevertheless, the first paragraph of Article 5 of the same regulation, as amended, requires that, in civil proceedings relating to the alleged infringement of the prohibition laid down in that**

provision, where all the evidence available to the national court suggests prima facie that a person referred to in Article 11 of Regulation No 2271/96, as amended, complied with the laws specified in the annex to that regulation, as amended, without having an authorisation in that respect, it is for that same person to establish to the requisite legal standard that his or her conduct was not intended to comply with those laws.

3. Regulation No 2271/96, as amended by Regulation No 37/2014 and Delegated Regulation 2018/1100, in particular Articles 5 and 9 thereof, read in the light of Article 16 and Article 52(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the annulment of the termination of contracts effected by a person referred to in Article 11 of that regulation, as amended, in order to comply with the requirements or prohibitions based on the laws specified in the annex to that regulation, as amended, even though that person does not have an authorisation, within the meaning of the second paragraph of Article 5 of the same regulation, as amended, provided that that annulment does not entail disproportionate effects for that person having regard to the objectives of Regulation No 2271/96, as amended, consisting in the protection of the established legal order and the interests of the European Union in general. In that assessment of proportionality, it is necessary to weigh in the balance the pursuit of those objectives served by the annulment of the termination of a contract effected in breach of the prohibition laid down in the first paragraph of Article 5 of that regulation, as amended, and the probability that the person concerned may be exposed to economic loss, as well as the extent of that loss, if that person cannot terminate his or her commercial relationship with a person included in the list of persons covered by the secondary sanctions at issue resulting from the laws specified in the annex to that regulation, as amended.

[Signatures]

* Language of the case: German.