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Press and Information

Advocate General's Opinion in Case C-124/20 Bank Melli Iran, Aktiengesellschaft nach iranischem Recht v Telekom Deutschland GmbH

Advocate General Hogan: Iranian undertakings may invoke EU law blocking US secondary sanctions before the courts of the Member States

A decision by an EU undertaking to terminate a contractual relationship with an Iranian undertaking subject to US primary sanctions should be regarded as invalid if it cannot be justified on any ground other than the desire to comply with US legislation providing for secondary sanctions against non-US undertakings trading with such Iranian undertakings which falls under the EU blocking statute

The Iranian bank Bank Melli Iran, which has a branch in Hamburg (Germany), claims before the German Courts that the notice of ordinary termination given by the German telecommunication provider Telekom Deutschland with respect to their contracts for telecommunication services is invalid. The services provided by Telekom Deutschland form the exclusive basis of the internal and external communication structures of Bank Melli Iran in Germany and are therefore indispensable to its business activities.

According to the bank, the notice was motivated solely by Telekom Deutschland's desire to comply with US legislation prohibiting non-US undertakings from trading with Iranian undertakings subject to US primary sanctions [1], and providing for secondary sanctions against such non-US undertakings in case of breach. This legislation was re-applied after the (then) US President Donald Trump decided in 2018 to withdraw from the Iranian nuclear deal [2]. In these proceedings Bank Melli Iran maintains that Telekom Deutschland infringed the EU blocking statute [3], which prohibits EU undertakings from complying with such extraterritorial US measures.

Telekom Deutschland, which belongs to the Deutsche Telekom group that generates approximately 50 % of its turnover in the USA, contends that the EU blocking statute does not change its ordinary right to terminate such a contract without giving reasons for this action. It maintains that the EU blocking statute leaves it free to end its business relationship with Bank Melli Iran at any time, and its motives for doing so are immaterial.

Bank Melli Iran's proceedings are currently before the Hanseatisches Oberlandesgericht Hamburg (Hanseatic Higher Regional Court, Hamburg, Germany). It is this court which has asked the Court of Justice to clarify the scope of the EU blocking statute [4] which was designed to sterilise the intrusive extraterritorial effects of US sanctions within the EU, and thus to protect European

[1] Bank Melli Iran has been included in the Specially Designated Nationals and Blocked Person List maintained by the Office of Foreign Assets Control, reference to which is made by various pieces of the US legislation mentioned in the Annex to the EU blocking statute.
[2] Joint Comprehensive Plan of Action, signed in Vienna on 14 July 2015 by the five Permanent Members of the Security Council (the USA, Russia, China, the United Kingdom and France) along with Germany and the European Union on the one hand and Iran on the other. It was aimed at controlling Iran's nuclear programme and lifting economic sanctions against Iran.
[3] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 1996, L 309, p. 1), as last amended by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 2018 L 199, p. 1).
[4] In particular of the first paragraph of its Article 5.

companies, and indirectly, the national sovereignties of the Member States, against US legislation contrary to international law.

In today's Opinion, Advocate General Hogan states at the outset that EU undertakings find themselves facing impossible – and quite unfair – dilemmas brought about by the application of two different and directly opposing legal regimes. He considers, however, that any review of the manner in which the statute presently operates is not a matter for the Court of justice, but rather for the EU legislature.

The Advocate General finds, first, that the general prohibition contained in the EU blocking statute for EU undertakings [5] which is directed against compliance with certain third country legislation providing for secondary sanctions applies even in the event that such an undertaking complies with that legislation without first having been compelled by a foreign administrative or judicial agency to do so. This is clear from the wording, the objective and the context of the prohibition.

Second, an EU undertaking seeking to terminate an otherwise valid contract with an Iranian entity subject to the US sanctions must demonstrate to the satisfaction of the national court that it did not do so by reason of its desire to comply with those sanctions.

Even though **the EU blocking statute** does not aim at protecting third-country undertakings directly targeted by US measures, it **confers on** such **undertakings**, **like Bank Melli Iran**, **a right of action**. If such a right of action was not acknowledged, the Advocate general considers that the net effect would be that the enforcement of the policy expressed in the EU blocking statute would rely only on the willingness of the Member States and, indirectly, of the Commission. 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 U.S. sanctions regime by terminating the contract with Bank Melli Iran. 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.

For essentially the same reasons, the EU blocking statute must be understood in a way that it imposes an **obligation to give reasons justifying the termination of a commercial relationship with a person subject to primary sanctions**. 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, the major policy objectives of the EU blocking statute would be compromised and set at naught, as seems to have happened here.

Given that Bank Melli Iran and Telekom Deutschland were already in business with each other and that neither of them have changed their business activity, the Advocate General considers 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 – which justified the termination of the contracts at issue, although it was for the Hanseatisches Oberlandesgericht Hamburg to verify the veracity of such grounds. 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.

Economic operators can, however, demonstrate for this purpose in particular that they are actively engaged in a coherent and systematic corporate social responsibility policy which leads them, inter alia, to refuse to deal with any company having links with the Iranian regime.

Third, in the event of non-respect by an EU undertaking of the prohibition contained in the EU blocking statute to comply with US legislation providing for secondary sanctions, the

[5] Or certain other natural or legal person, to which the EU blocking statute applies. For reasons of simplicity, it is referred here to EU undertakings only.

national court seized by its contracting party subject to US primary sanctions is required to order the EU undertaking to maintain their contractual relationship.

According to the Advocate General, the prohibition in question is not as such contrary to the freedom of enterprise as guaranteed by the Charter of the fundamental rights of the European Union, given in particular that economic operators may apply to the Commission for authorisation to derogate from it.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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