Case C-124/20

Request for a preliminary ruling

Date lodged:

5 March 2020

Referring court:

Hanseatisches Oberlandesgericht Hamburg (Germany)

Date of the decision to refer:

2 March 2020

Applicant:

Bank Melli Iran, a public limited company under Iranian law

Defendant:

Telekom Deutschland GmbH

Hanseatisches Oberlandesgericht (Hanseatic Higher Regional Court)

[…]

O R D E R

In the case of

Bank Melli Iran, a public limited company under Iranian law […] Hamburg

– **Applicant, Appellant and Respondent in the cross-appeal** –

[…]

v

Telekom Deutschland GmbH, […] Bonn

– **Defendant, Respondent and Appellant in the cross-appeal** –

[…]

[…] the Hanseatic Higher Regional Court (11th Civil Chamber) made the following order […] on 2 March 2020:

I. The proceedings are stayed.

II. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling for the purposes of interpretation of 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 (OJ 1996 L 309, p. 1), as amended by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 (OJ 2018 L 199I, p. 1): **[Or. 2]**

1. Does the first paragraph of Article 5 of Regulation No 2271/96 only apply where the acting EU operator within the meaning of Article 11 of that Regulation 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 Regulation No 2271/96 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 Specially Designated Nationals and Blocked Persons List held by the US Office of Foreign Assets Control, 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 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 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 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)?

G r o u n d s:

The applicant is an Iranian bank incorporated under Iranian law. It has a branch in Germany, seated in Hamburg, which employs 36 persons. The applicant's core business is to settle foreign trade transactions with Iran. **[Or. 3]**

The defendant, a subsidiary of Deutsche Telekom AG, is one of the leading German telecommunication service providers seated in Bonn. The group has over 270 000 employees worldwide, of whom over 50 000 are in the USA, where approximately 50 percent of turnover is generated.

A framework contract exists between the parties that allows the applicant to group all its company connections at various sites in Germany under one contract. The applicant has ordered numerous products from the defendant under that contract, which the defendant has then supplied and invoiced. These contracts provide the sole basis for the applicant's internal and external communication structures in Germany. Without the defendant's services, the applicant is unable, at present at least, to conduct business through its German branch.

The defendant generates turnover of just over EUR 2 000 per month from the applicant. The applicant has always paid its bills to the defendant on time and in full.

In 2018, the USA withdrew from the Iran deal of 14 July 2015 (Joint Comprehensive Plan of Action, 'the JCPA'), thereby reviving the original Iran Transactions and Sanctions Regulations ('the ITSR'), since when the applicant has been listed on the Specially Designated Nationals and Blocked Persons List ('the SDN list') of the Office of Foreign Assets Control ('the OFAC'). The sanctions regime includes secondary sanctions prohibiting non-US citizens from engaging in any business with Iranian persons and companies on the SDN list.

New US sanctions against Iran, directed primarily at the financial, banking and oil sectors, entered into force on 5 November 2018. As those sanctions apply to the applicant, it was suspended from the telecommunications network of the Society for Worldwide Interbank Financial Telecommunication (SWIFT), a cooperative under Belgian law, as of 12 November 2018.

By letter of 16 November 2018, the defendant gave notice of termination of all contracts with immediate effect […]. The defendant sent identical notices of termination of the same date to at least four other clients with connections to Iran seated in Germany. **[Or. 4]**

All those companies are likewise listed on the US SDN list. Overall, the defendant cancelled contracts with ten companies with links to Iran.

By judgment delivered on 28 November 2018 in interim injunction proceedings initiated by the applicant, […] the Landgericht Hamburg (Regional Court, Hamburg) granted an interim junction ordering the defendant to perform the

current contracts pending expiry of the period of notice for ordinary termination. […] […]

The defendant sent another notice of termination under cover of a letter dated 11 December 2018 […]. 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'.*

The period of notice for ordinary termination of certain contracts had already ended on 25 January 2019, 10 February 2019, 13 March 2019, 10 and 25 September 2019 and 30 January 2020. The remaining contracts do not expire until 22 August 2020 or 7 January 2021.

The applicant requested that the court of first instance order the defendant to leave all contractually agreed lines active.

The Regional Court ordered the defendant to perform the contracts pending expiry of the period of notice for ordinary termination and dismissed the action as to the remainder. It held that ordinary termination of the contested contracts by the defendant was effective and, in particular, that it does not infringe Article 5 of Regulation No 2271/96.

The applicant lodged an appeal against the part of the judgment dismissing the remainder of the action. It abides by its contention that the notice of ordinary termination given by the defendant infringes Article 5 of Regulation No 2271/96 and is therefore ineffective.

After the Regional Court had pronounced judgment, the defendant deactivated one of the contested lines on 10 February 2019 on the grounds that the period of notice for ordinary termination had expired. All other lines are still active at present. **[Or. 5]**

II.

Judgment in this dispute depends on the interpretation of 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 (OJ 1996 L 309, p. 1), as amended by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 (OJ 2018 L 199I, p. 1). Therefore, the proceedings have to be stayed and a preliminary ruling requested from the Court of Justice of the European Union pursuant to the first paragraph, point (b), and the third paragraph of Article 267 TFEU before judgment is delivered on the applicant's appeal.

The parties are in dispute over the effectiveness of the notice of ordinary termination given on 11 December 2018 […], by which the defendant seeks to end its business relationship with the applicant. It is common ground that the right of ordinary termination of the contracts, to which German law applies, arises out of the defendant's general terms of business.

The applicant argues that the termination infringes the first paragraph of Article 5 of Regulation No 2271/96 and is therefore ineffective. The defendant contends that the first paragraph of Regulation No 2271/96 has not been infringed.

1. a) The first question referred:

The applicant argues that the defendant's sole motivation in terminating the contracts was to comply with the secondary sanctions imposed by the United States of America. However, it has not shown that the notice of termination was preceded by a direct or indirect official or court order from the USA. The Oberlandesgericht Köln (Higher Regional Court, Cologne) held in a judgment delivered on 7 February 2020 […] that the first paragraph of Article 5 of Regulation No 2271/96 simply does not apply in such an eventuality. The Chamber does not share that view; it is of the opinion that the mere existence of secondary sanctions suffices, as only then can the ban on compliance with such sanctions pursued under the first paragraph of Article 5 of Regulation No 2271/96 be implemented effectively.

b) The second question referred:

The right of ordinary termination relied upon by the defendant does not depend upon a reason for termination. The defendant contends that the first paragraph of Article 5 of Regulation No 2271/96 does not change that, as that provision leaves it free to end its business relationship with the applicant **[Or. 6]** at any time. Its motives are immaterial.

It cites in support of that contention the Commission Guidance Note — Questions and Answers: adoption of update of the Blocking Statute of 7 August 2018 (C/2018/5344, OJ 2018 C 277I, pp. 4-10).

Section 5 reads as follows:

> *'Does the Blocking Statute oblige EU operators to do business with Iran or Cuba? How are they expected to position themselves between the listed extra-territorial legislation and the Blocking Statute?*
>
> *EU operators are free to conduct their business as they see fit in accordance with EU law and national applicable laws. This means that they are free to choose whether to start working, continue, or cease business operations in Iran or Cuba, and whether to engage or not in an economic sector on the*

basis of their assessment of the economic situation. The purpose of the Blocking Statute is exactly to ensure that such business decisions remain free, i.e., are not forced upon EU operators by the listed extra-territorial legislation, which the Union law does not recognise as applicable to them.'

Several German courts concur with the defendant's understanding of this answer, that is that it may exercise its contractually agreed right of ordinary termination of the contracts at any time without giving a reason. The Higher Regional Court, Cologne expressly held in an indicative ruling made on 1 October 2019 […] that termination of the contract thus can also 'be motivated by US foreign policy'.

The chamber holds that this understanding of the first paragraph of Article 5 of Regulation No 2271/96 is possible in light of the Commission's answer, but also considers at this point that the provision would then fail to achieve its purpose. Therefore, the interpretation that would appear to make better sense is that termination infringes the first paragraph of Article 5 of Regulation No 2271/96 where its decisive motive is compliance with US sanctions. However, if the decision were based on purely financial considerations, with no particular relation to the sanctions, it would not infringe the first paragraph of Article 5 of Regulation No 2271/96, as otherwise no one **[Or. 7]** would be able to end a business relationship with Iran. That opinion is shared by German commentators.

The consequence of that opinion is that the defendant would, by way of exception, have to explain its motives for termination or at least show and, if necessary, prove that the decision to terminate the contract was not taken out of fear of reprisals on the US market. Without that explanation, it is not possible to establish whether termination infringes the first paragraph of Article 5 of Regulation No 2271/96.

c) The third question referred:

The chamber is of the opinion that termination in breach of the first paragraph of Article 5 of Regulation No 2271/96 is ineffective. That would follow in German civil law from Paragraph 134 of the Bürgerliches Gesetzbuch (Civil Code). That provision is worded as follows:

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

The Senate regards the first paragraph of Article 5 of Regulation No 2271/96 as a statutory prohibition in that sense.

However, Article 9 of Regulation No 2271/96 stipulates that each Member State shall determine the effective, proportional and dissuasive sanctions to be imposed in the event of breach of any relevant provisions of the Regulation. The Federal Republic of Germany has qualified infringement of the first paragraph of Article 5 of Regulation No 2271/96 as an administrative offence subject to a fine of up to

EUR 500 000 under Paragraph 82(2), first sentence, of the Außenwirtschaftsverordnung (Foreign Trade and Payment Ordinance, 'the AWV'), read in combination with Paragraph 19(4), first sentence, point 1, and (6) of the Außenwirtschaftsgesetz (Law on Foreign Trade and Payments, 'the AWG).

In light of the economic losses to which the defendant is exposed if it is excluded from the US market, it might be considered disproportionate to prevent it from terminating its contractual relationships with the applicant rather than (only) imposing a fine. Moreover, it is the chamber's understanding that it is not the direct purpose of the Regulation to protect the applicant. **[Or. 8]**

d) The fourth question referred:

The fourth question referred follows on from that last statement.

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. If they comply with EU law, they are at risk of exclusion from the US market; if they comply with the sanctions, they are in breach of EU law. In light of the clout which US sanctions have in fact, EU operators which comply with EU law may be exposed to considerable economic losses. The Telekom Group generates 50 percent of its turnover on the US market. The chamber is of the opinion that that risk is inadequately countervailed by the recovery claim regulated in Article 6 of Regulation No 2271/96. The same applies to the possibility of obtaining an authorised exemption under the second paragraph of Article 5 of Regulation No 2271/96. Given the purpose of the Regulation, that is to prevent enforcement of secondary sanctions against EU operators, authorised exemptions would have to be granted on a somewhat restricted basis; that suggests that imminent economic losses alone might not provide sufficient grounds for an exemption. 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 avert those risks is compatible with the freedom to conduct a business protected under Article 16 of the Charter of Fundamental Rights of the European Union and the principle of proportionality anchored in Article 52 of that Charter.

2. Relevance of the questions referred to the main proceedings:

The answers to the questions referred for a preliminary ruling are relevant to the determination of the case before the chamber as they will enable the chamber to decide whether ordinary termination by the defendant is effective or ineffective. The first sentence of Paragraph 7 of the AWV also cited by the applicant does not serve as a basis for determining the dispute. **[Or. 9]**

Paragraph 7(1) AWV reads as follows:

The issuing of a declaration in foreign trade and payments transactions whereby a resident participates in a boycott against another country (boycott declaration) shall be prohibited.

Irrespective of whether the notice of termination even qualifies as a boycott declaration within the meaning of that provision, it is the understanding of the chamber that its scope does not go beyond that of the first paragraph of Article 5 of Regulation No 2271/96, meaning that, if the defendant's notice of ordinary termination is ineffective under the first paragraph of Article 5 of Regulation No 2271/96, it would not infringe the first sentence of Paragraph 7 AWV either.

Lauenstein Senior Judge of the Higher Regional Court	Dr Büßer Judge of the Higher Regional Court	Dr Brauer Judge of the Higher Regional Court