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The EU blocking statute.
Case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH.*

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1. Introduction

1.1 Structure of the thesis: organisation and objectives

The aim of this thesis is to explore Council Regulation (EC) No 2271/96 of 22 November 1996[1], i.e. European Union (EU) blocking statute, in light of the Case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*[2].
In a nutshell, the EU passed the EU blocking statute in 1996 to protect European citizens and companies from secondary sanctions by the United States (US). However, there is a risk that European companies may prefer to comply with US sanctions rather than the EU blocking statute to preserve their own economic interests. This is the accusation made by Bank Melli Iran against Telekom Deutschland GmbH, around which our analysis will develop.
In particular, this thesis will first explore the context in which this case and the EU blocking statute fit in. Starting with the first extraterritorial sanctions against Cuba in 1992, we will analyse the history of the various legislations by which the US has sought to realise its foreign policy objectives by influencing non-US entities. Specifically, we will focus on the secondary sanctions re-imposed on Iran after the US withdrawal from the Joint Comprehensive Plan of Action in 2018 and the European response, which includes the updating of the aforementioned statute.
The EU blocking statute will then be analysed in depth in chapter 2, where we will mainly examine its legal basis and composition, focusing on its most important articles. In addition, we will also discuss the Joint Action adopted by the Council of Europe (CoE) with the aim of allowing member States to intervene for the purposes of the EU blocking statute whenever the latter does not provide sufficient protection[3].
After these first two chapters, chapter 3 will be entirely devoted to our case of interest. We will first analyse the history of the case and assess whether there have been previous cases in which the EU blocking statute has been applied. Particular attention will be paid to the behaviour of national courts towards its application. Furthermore, we will analyse the preliminary ruling procedure through which this case ended up before the Court of Justice of the European Union (CJEU), considering the questions asked by the German Court that initiated the proceedings, i.e. the *Hanseatisches Oberlandesgericht Hamburg*, and the answers given by the CJEU.
Finally, we will reflect on possible developments in the EU, the EU member States and the United Kingdom (UK), as a country outside the EU but fully

[1] The full name reads: 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.
[2] Case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*, Request for a Preliminary Ruling in the Internal Document of the Court.
[3] Thereafter, the Council of Europe will be referred to by the word Council.

engaged in the fight against US secondary sanctions[4], following the response of the Court of Justice of the European Union. We will try to understand whether and how the EU blocking statute may be implemented by member States and the possible consequences for European-US relations. We will also briefly discuss whether there are other possible solutions to the US sanctions, such as the dispute settlement mechanism of the World Trade Organisation or a new agreement that could be reached by the Biden administration on the Iranian situation, bearing in mind the upcoming presidential elections in the United States in just over a year's time.
To sum up, this thesis should thus clarify what the EU's blocking statute is, why it was passed, what the pros and cons are, and what possible future developments its application will have in the European Union and internationally in light of the legal case we will analyse.

1.2 History of US secondary sanctions: the Cuban Democracy Act of 1992, the Cuban Liberty and Democratic Solidarity Act of 1996, and the Iran and Libya Sanctions Act of 1996

Both the approval of the EU's blocking statute in 1996 and its amendment twenty-two years later were aimed at countering the same phenomenon, namely extraterritorial trade measures against third countries approved by the United States. In 1996, the US approved a series of trade measures mainly aimed at restricting trade with Cuba, while in 2018 the target State was Iran. However, in both cases, they extended this ban not only to domestic, but also foreign entities.
This US practice does not date back to the 1990s, but as early as 1917 the US has tried to achieve its foreign policy goals by influencing the policies of third countries. In 1917, the US Congress passed the Trading with the Enemy Act with the aim of banning trade with German companies and those of their allies in order to impose their worldview on other countries by restricting trade on the world market[5]. The most frequently used instruments for this purpose are secondary sanctions, one of the two types of sanctions in the US sanctions regime. The US sanctions regime is in fact based on the nationality principle and include two groups of sanctions, namely primary and secondary sanctions[6]. If both types of sanctions aim to affect the sanctioned country, they differ in the subjects by whom they must be complied with. In fact, primary sanctions are economic restrictions that only require compliance by entities

[4] The UK was the first European State to counter US secondary sanctions with a national law in 1980. It then also strongly advocated a European measure against sanctions in the 1990s. Therefore, we will try to understand the effects of Brexit on European anti-sanctions policy, but also the possible scenarios that could open up between the US and the UK.
[5] Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (codified as amended at 50 U.S.C. §§ 1-44 (2012)).
[6] ROVETTA ET AL. (2021: 45).

within the sanctioning country, whereas secondary sanctions must be observed by every entity, regardless of their nationality. This means that primary sanctions are respected by US citizens and institutions, while secondary sanctions by both national and foreign citizens and institutions[7]. Secondary sanctions can in fact be applied extraterritorially and their main purpose is to channel the choices of non-US entities in a way that reflects US foreign policy objectives. Failure to comply with secondary sanctions is usually punished by a ban on trade with the sanctioning State or restriction of access to its financial system. Not by chance, the power of US secondary sanctions is directly correlated with the dominance of the US in the global market, the significance of its financial system, and the dollar's status as the preferred global reserve currency[8]. Thus, when secondary sanctions against Iran were re-imposed by the US in 2018, entities that did not want their business in the US to be harmed, including European ones, were ready to close their trade relations with Iran, playing into the hands of the United States[9]. Consequently, the European Union decided to counter this interference by the US by updating its blocking status and creating a new system to carry out financial transactions with Iran with the express purpose of preventing European entities from being subservient to US secondary sanctions[10].

One of the most glaring examples of this US policy is surely the set of sanctions and restrictions applied against Cuba. The first US attempt to restrict trade with Cuba by influencing international trade dates back to 1959, when US President Eisenhower decreed a partial blockade against Cuba as a response to the communist government of Fidel Castro and the hypothetical presence of Russian missiles on the island[11]. It was the first of many other sanctions that the US government imposed against the communist State and this policy line was supported by all US Presidents, Republican or Liberal. These sanctions against Cuba became even stricter in 1992, when the Cuban Democracy Act was approved[12]. The main objective of the act was to exploit the weakness of the Castro government in light of the fall of the Soviet Union to overthrow the communist regime and create a democratic government[13]. However, its approval was condemned not only by the Cuban government, but also by the international community, because it was seen as an outrage

[7] For the complete list of entities that must comply with US primary and secondary sanctions against Iran see: Re-imposition of the sanctions on Iran that had been lifted or waived under the Joint Comprehensive Plan of Action (November 4, 2018).

[8] The subject of US secondary sanctions, in particular their extraterritorial nature, will be addressed again in chapter 2, paragraph 2.4.

[9] For secondary sanctions against Iran see: Re-imposition of the sanctions on Iran that had been lifted or waived under the Joint Comprehensive Plan of Action (November 4, 2018).

[10] The blocking statute of the European Union serves to shield EU operators from the extraterritorial implementation of third countries' legislation. In fact, the EU considers the extraterritorial effects of laws enacted by third countries to be in violation of international law and does not recognise their effects. See: DE VRIES (1998: 345).

[11] JENNISON (2020: 165).

[12] Cuban Democracy Act of 1992, Pub. L. No.102-484, 106 Stat. 2575 (codified as amended at 22 U.S.C. §§ 6000-6010 (Supp. V. 1993)).

[13] Cuban Democracy Act of 1992 § 1702(6).

against the sovereignty of other countries. In particular, foreign countries condemned Section 1706(a) of the act because it prohibited all foreign subsidiaries of US companies from trading with Cuba, denying these subsidiaries any kind of licences to trade with the communist island[14]. It was thus argued that on the one hand it violated the authority of third States to follow their own interests if they conflicted with those of the United States, and on the other hand it did not consider the position of those entities that were caught between the conflicting legislations of the United States and another country.

However, the international community reacted to these attempts by the US government to affect its own interests and those of its entities, most notably in 1996, when the Cuban Liberty and Democratic Solidarity Act was passed[15]. Among the countries that have most strongly opposed this law are the European Union, Canada, and Mexico, despite being among the closest allies of the United States. In fact, they argued that their sovereignty had once again been violated because, as in the case of the law passed four years earlier, this new act also aimed to restrict third country trade with Cuba. In particular, they condemned the fact that the law sought to protect the property rights of US citizens by making anyone trafficking in the property of a US citizen confiscated by the Castro government liable before US courts[16].

Furthermore, in 1996 the US Congress also approved another act that was criticised due to the same reasons. It is the Iran and Libya Sanctions Act of 1996[17]. The main aim of the act was to counteract terrorism and the supply of weapons of mass destruction in these two countries. In order to do this, among the other things, the act tried to sanction non-US entities in relation to the energy sector in Libya and Iran. Specifically, the act restricted investments in the Iranian and Libyan energy sector by third countries under penalty of secondary sanctions[18].

Therefore, in light of all these attempts by the United States to overcome the authority of third countries, some of them relied mainly on blocking and claw-back statutes to protect their interests and sovereignty. Although already approved by countries such as Canada and the United Kingdom in the 1980s, most of them were approved in the 1990s following the passage of the three acts mentioned above. However, new approvals or amendments of these statutes followed the election of Donald Trump as US President in 2016, as a response to the more aggressive US foreign policy. Of particular concern was the 2018 withdrawal of the US from the Joint Comprehensive Plan of Action and the reintroduction of secondary sanctions on non-US entities when trading with Iranian entities.

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[14] JENNISON (2020: 167).

[15] Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021-91, 1643, 28 U.S.C. § 1611 (1996)).

[16] WONG (1994: 652).

[17] Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (codified at 50 U.S.C. §1701 (1997)).

[18] DUNNING (1998: 169).

1.3 The Joint Comprehensive Plan of Action and the US withdrawal

The Joint Comprehensive Plan of Action (JCPoA) was signed by China, France, Germany, Iran, Russia, the European Union, the United Kingdom, and the United States on 14 July 2015 and entered into force on 16 January 2016. Its aim was to control and curtail Iran's nuclear programme while removing nuclear-related sanctions previously imposed by these countries. Of all countries, the United States has always been the one that has sanctioned Iran the most since the Iran and Libya Sanctions Act of 1996 was passed. In fact, over the years, if the provisions on Libya were removed in 2006, the number of sanctions imposed by the US on Iran increased, adding not only primary sanctions, but also secondary sanctions[19]. These sanctions mainly concerned Iran's nuclear activities and other questionable activities, such as terrorism and human rights violations[20]. In addition, dozens of Iranian citizens and institutions have been placed on the US Specially Designated Nationals and Blocked Persons (SDN) list. The SDN is a list that includes individuals and institutions accused of carrying out activities that threaten the national security of the United States and are therefore subject to additional restrictions by the US government[21]. However, after the terrorist attacks of 11 September 2001 and the discovery of nuclear facilities in Iran, other countries also decided to take action against the Islamic Republic, including the European Union. Moreover, from 2006 to 2010, the United Nations Security Council (UNSC) adopted a series of resolutions imposing sanctions against Iran, also meeting with the approval of Russia and China, Iran's long-standing allies[22].

The JCPoA thus represented a historic turning point in the history of Iran's relations with the rest of the world, because since the establishment of the Ayatollahs' regime in 1979, no diplomatic solution had been found other than sanctions upon sanctions. Especially, the JCPoA stipulated, on the one hand, the lifting of nuclear-related sanctions imposed by the UNSC, the United States, and the European Union, and on the other hand, Iran's compliance with the agreement's objectives to limit its nuclear activities. In addition, Iran also agreed to allow the International Atomic Energy Agency (IAEA) to periodically inspect its sites[23]. This agreement was welcomed by Iran, because the removal of part of the sanctions that had previously been imposed against the Islamic State allowed for the recovery of its economy. Especially important was the removal of all US secondary sanctions and part of the primary ones.

[19] In 2006 the Iran and Libya Sanctions Act of 1996 was renamed the Iran Sanctions Act (ISA) after the removal of Libya as a sanctioned State.

[20] The scope of sanctions against Iran was dramatically broadened in 2010, when the US Congress approved the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA).

[21] ASLAN (2018: 4).

[22] United Nations resolutions approved against Iran include Resolution 1696 and Resolution 1737 (2006), Resolution 1747 (2007), Resolution 1803 and Resolution 1835 (2008), and Resolution 1929 (2010).

[23] For full text of the JCPoA see: UNSC (2015).

Specifically, the United States terminated all secondary sanctions covering financial and banking measures, insurance measures, shipping, shipbuilding and port sectors, energy and petrochemical sectors, gold and other precious metals, software and metals, and automotive sector. In addition to this, they also removed some individuals and entities from the SDN list[24].

Nevertheless, the JCPoA was approved under Obama's administration, but it was not really supported by his successor Donald Trump, who mainly criticised two aspects of it. Firstly, it condemned the so-called 'sunset clause'. According to this clause, restrictions on Iran's nuclear activities would be removed after 10-15 years, without any provision in the agreement after its expiry. Secondly, the agreement did not provide for any limits on Iran's missile programmes, even though Iran continued to develop long-range ballistic missiles[25]. After Trump's election, there were therefore several meetings mainly between the United States on the one hand and the European Union, UK, France, and Germany on the other to find a compromise, but it was all in vain. For on the one hand, Trump was adamant about his positions, while on the other hand, there were some EU member States, primarily Italy and Greece, who did not want to impose further sanctions on Iran in light of their trade ties with the Islamic country[26]. Therefore, on 8 May 2018, the US announced its withdrawal from the JCPoA, heedless of the fate of the agreement and the reaction of the other parties involved. The Department of the Treasury Office of Foreign Assets Control (OFAC) drew up a two-part settlement period for withdrawal from the JCPoA, to be carried out in 90 and 180 days increments, after which the sanctions previously imposed by the United States against Iran would be re-imposed[27].

As soon as the US withdrew the JCPoA, the international community questioned whether the agreement would survive and most attention was paid to the European Union. As immediately expressed by High Representative Federica Mogherini and the foreign ministers of France, Germany, and the United Kingdom, the European Union was willing to remain a party to the agreement as long as Iran complied with it[28]. At the same time, however, the EU was also ready to cooperate with its transatlantic partner. In fact, shortly afterwards, the US Secretaries of State and the Treasury received a letter from the Foreign and Economic Ministers of France, Germany, the UK, and the EU High Representative asking them not to apply the extraterritorial consequences of the re-imposed sanctions. However, the US responded by rejecting the European argument and emphasising their policy not to make exceptions unless they are necessary for national security or humanitarian reasons[29]. It was thus clear that

[24] Attachment 3 and Attachment 4 to Annex II of the JCPoA.
[25] ASLAN (2018: 10).
[26] ASLAN. (2018: 16).
[27] See *supra*.
[28] Joint Statement by High Representative of the European Union and the foreign ministers of France, Germany and the United Kingdom on the JCPoA. European External Action Service archive, 9 May 2019.
[29] JENNISON (2020: 176).

the EU had to find a solution to deal with the re-imposition of US sanctions, since these sanctions would not only have affected Iran and US entities that traded with the Islamic country, but also, and more importantly, foreign entities, as in 2016 mainly secondary sanctions had been lifted[30]. In the case of the European Union, the reintroduction of these sanctions mainly affected European entities that traded with Iran and at the same time had most of their business in the United States. These companies, not surprisingly, were the first to declare that they were ready to conclude any kind of contract they had with any Iranian entity in order not to violate US sanctions[31]. They feared exclusion from the US market, capital, technology and financial system, rather than fearing the imposition of sanctions. Indeed, US secondary sanctions have always worked exactly because of the strength of the US economy and financial system and its link to the world economy[32]. The EU, therefore, had to make a choice to protect its citizens and businesses, but also its sovereignty. Specifically, the choice to be made was whether to opt for a policy more or less in line with the US one or one in stark contrast. The second option prevailed[33]. In fact, instead of imposing new sanctions against Iran to exempt its companies from US sanctions, the EU preferred to resort to other protective measures, including the blocking statute adopted in 1996, in order to safeguard its interests and not to serve US foreign policy interests. In making this choice, the European Union both took into account the demands of Italy and Greece, but also of Austria, Ireland and Sweden, and distanced itself from a US policy that it did not share, as also shown by the fact that it remained part of the JCPoA.

1.4 The EU blocking statute and the Instrument for Support of Trade Exchanges: the countermeasures taken by the EU to counter US secondary sanctions against Iran

The countermeasures taken by the EU following the US exit from the JCPoA and the re-imposition of secondary sanctions against Iran included the amendment of its blocking statute and the establishment of a new system to carry out financial transactions, i.e. the Instrument for Support of Trade Exchanges (INSTEX).

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[30] See *supra*.

[31] For example, the CEO of Germany's Siemens declared that they would not start any new contracts with Iranian entities. Similar declarations were also released by France's Total, Britain's Vodafone, and others. See: JENNISON (2020: 180).

[32] Secondary sanctions often boil down to a secondary boycott, i.e. a country or its entity is excluded from another country's market if it does not comply with the sanctions imposed by the latter. For example, if a European company trades with an Iranian entity, it will not have access to the US market. See: DUNNING (1998: 171).

[33] ASLAN (2018: 16).

On 6 June 2018 the EU decided to update Council Regulation (EC) No 2271/96 of 22 November 1996, i.e. the EU blocking statute[34]. As in the case of its update, the EU blocking statute was introduced in 1996 to protect European entities from secondary US sanctions when trading with the countries to which the aforementioned sanctions referred[35]. Indeed, it clearly mentions the aforementioned US acts that were aimed at restricting trade with Cuba and with Iran and Libya respectively, namely the Cuban Democracy Act of 1992, the Cuban Liberty and Democratic Solidarity Act of 1996, and the Iran and Libya Sanctions Act of 1996. What was surprising at the time was how quickly the EU passed the EU's blocking statute, demonstrating not only its ability to act as one in the field of Common Foreign and Security Policy (CFSP) but also the need to respond to US extraterritorial practices. Indeed, the EU needed "a purely defensive legal measure"[36] to be used in case a third country exercised its jurisdiction extraterritorially in violation of the EU's authority, as the US had already done on several occasions.

However, whereas in 1996 US secondary sanctions mainly affected entities that traded with Cuba, and also with Iran and Libya when it came to the energy sector, in 2018 the target State was only Iran. Consequently, entities that had business ties with Iran, and even more so, those that had business ties with Iranian entities but conducted most of their business in the US, were the first victims of the re-imposition of US secondary sanctions against Iran. The EU therefore decided to update the EU blocking statute to add to its scope precisely the US sanctions re-imposed following Trump's decision to unilaterally withdraw from the JCPoA[37]. Its update represented a guarantee for all those EU entities that were ready to conclude their contracts with Iranian entities in order not to violate US sanctions. In fact, the statute guarantees that, even if still in force, US sanctions cannot be enforced in the territory of the EU. Moreover, the EU blocking statute is directly applicable and enforceable, no further implementing measures are necessary, and it can also be invoked directly by any natural or legal person in the national courts of the EU[38].

However, although the EU theoretically solved the problems caused by the reintroduction of US sanctions, in practice things are more complex. Among the problems hindering the full implementation of the statute are primarily economic reasons. Indeed, the economic power of the US and the interests that many European companies have in the US lead most of them to comply with US sanctions regardless of the EU's blocking statute and their business with Iranian entities. The point, in fact, is that in economic terms they would lose more by not complying with the US secondary sanctions and continuing

[34] European Commission Daily News MEX/18/4085, Upholding the EU's Commitment to the Iran Nuclear Deal and Protecting the Interests of European Companies – Next Steps (6 June 2018).

[35] See *supra*.

[36] SCHINDLER (2020: 29).

[37] The updated version of the EU blocking statute entered into force on 7 August 2018 and incorporated Regulation 2018/1100.

[38] Based on Article 288 of the Treaty on the Functioning of the European Union.

their business in Iran than by complying with them and renouncing their dealings with Iranian entities[39]. Moreover, as we have already mentioned, the predominant position of the United States in the global market should not be underestimated either. Another important problem is in fact the dominance of the US dollar in the international banking system, which makes transactions with Iran more difficult, since US secondary sanctions also affect the Iranian financial system. The EU therefore also had to think of a way to circumvent the international banking system in order to facilitate transactions between its entities and Iranian ones[40]. Out of this need comes INSTEX, whose aim is to enable payments from and to Iran avoiding the international banking system and the effects of US sanctions[41].

INSTEX is a Paris-based business owned by several European countries, activated on 19 June 2019. Specifically, INSTEX is a closed-loop system that, along with its Iranian counterpart, the Special Trade and Finance Instrument (STFI), allows payment claims to be mutually resolved through forfeiture without the use of the US dollar or the Society of Worldwide Interbank Financial Telecommunication (SWIFT) system[42]. Nevertheless, INSTEX is currently only permitted to transact in humanitarian products, which ensures that it does not violate US sanctions rules. In fact, it falls under the purview of general licences granted by the US Office of Foreign Assets Control that permit humanitarian trade with Iran. Furthermore, INSTEX provides European small and medium-sized businesses with due diligence services regarding their Iranian counterparts in order to guarantee compliance with EU, UK, and United Nations (UN) sanctions provisions against Iran[43].

On the other hand, even if INSTEX might be defined as an initiative "with remarkable political ambition"[44] from the EU, the mechanism failed to stop the decline in trade between Iran and Europe. Not surprisingly, the first test transaction was only reported in March 2020, although INSTEX trading data are not publicly accessible[45]. This highlights the various obstacles the new mechanism had to overcome in order to function. The first of these difficulties are the requirements for diligence and compliance, which both INSTEX and STFI must follow equitably. Secondly, the ownership of STFI by a number of Iranian banks presents vulnerabilities in terms of the exposure of these banks to US sanctions. Furthermore, INSTEX as a quasi-barter mechanism is un-

[39] ROVETTA ET AL. (2021: 54).

[40] Implementation of the Joint Comprehensive Plan of Action: Joint Ministerial Statement (24 September 2018).

[41] European External Action Service, Statement by High Representative/Vice President Federica Mogherini on the Creation of INSTEX, Instrument for Supporting Trade Exchanges, European Commission External Action (31 January 2019).

[42] SWIFT is a messaging system used to transmit and receive information, mainly instructions for money transfers. Its primary objective is to facilitate the transfers of funds between member banks and other financial organisations.

[43] SCHINDLER (2020: 30).

[44] SCHINDLER (2020: 30).

[45] The EU sent medical goods to Iran in trade test (31 March 2020).

likely to be able to operate on a major scale because this would require continuous cross-border transactions to maintain the system's balance since trade between Europe and Iran frequently operates with a significant imbalance. Thirdly, European banks that accept INSTEX-related transactions could also be at risk from indirect sanctions, because these payments are linked to trade with Iran, although not originating from there. INSTEX therefore appears to be most effective at facilitating the maintenance of existing business partnerships rather than the creation of new trading connections. Last but not least, by establishing INSTEX as a separate payment system, the EU runs the risk of promoting the development of other separate payment systems outside of the SWIFT system and may as a result help to lessen the transparency of the global financial system[46]. Hence, despite the fact that INSTEX created a new trading system for EU companies doing business with Iran, its design and functionality are inevitably constrained by a number of logistical and legal issues.

In summary, the EU addressed the reintroduction of US secondary sanctions against Iran mainly by resorting to the EU's blocking statute and the INSTEX system. However, while the INSTEX system was specifically set up to counter the reintroduction of US secondary sanctions against Iran in 2018, the EU's blocking statute had already been passed twenty-two years earlier to counter other US secondary sanctions imposed mainly against Cuba. Moreover, we have seen that the main difficulties stem from the role of the US in the world economy, the importance of the US market for EU companies, and the dominance of the US dollar in international trade. To overcome the dominance of the US dollar and avoid the effects of US sanctions against the Iranian financial system, INSTEX was established. Nevertheless, INSTEX might inspire other economic zones to develop their own unique special-purpose systems, lowering the level of transparency in the world financial system. Furthermore, INSTEX also made clear the difficulties of developing a payment system that complies with penalties in a country like Iran with little corporate openness. Of course, there are also weaknesses in the case of the EU blocking statute to which European companies seem to prefer US sanctions in order to safeguard their interests in the US, but this will be discussed in more detail in chapter two. On the other hand, if one instead takes a look into the near future, one can conclude that while the EU blocking statute could be improved to ensure greater adherence on the part of European companies, INSTEX could begin to play an important role in the current situation to restore relations between the US, the EU and Iran. In fact, given that INSTEX is focused on humanitarian trade, an issue that has gained much importance in the wake of the global COVID-19 pandemic, it might be possible to use it as a means to rapidly increase humanitarian supplies to Iran by granting Iran a loan to be used for the purchase of such goods[47]. Without initially altering the corresponding US or EU sanctions frameworks, the volume of such trade could be increased by

[46] SCHINDLER (2020: 30-31).
[47] SCHINDLER (2020: 32).

using INSTEX and the US-created Swiss Humanitarian Trade Arrangement simultaneously[48]. Thus, if the Biden administration wants to send political signals of openness to the Iranian side without having to resort immediately to the easing of sanctions, it could do so by using INSTEX.

1.5 The case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*

This whole issue of the re-imposed US sanctions against Iran and the related European response with the updated EU blocking statute has gone all the way to the Court of Justice of the European Union. In fact, by judgment of 21 December 2021, the Grand Chamber of the Court of Justice of the European Union ruled in the case *Bank Melli Iran v Telekom Deutschland GmbH*, concerning the interpretation of Regulation (EC) No. 2271/96, i.e. the EU blocking statute[49]. The CJEU acted following the commencement of proceedings for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU) brought by the *Hanseatisches Oberlandesgericht Hamburg*, i.e. Hamburg Higher Regional Court, in the context of a dispute concerning the validity of the unilateral termination by Telekom Deutschland GmbH of the contracts for the provision of telecommunications services concluded with Bank Melli Iran (BMI). BMI is a company named as the addressee of the restrictive measures imposed by the United States of America in relation to Iran's nuclear programme according to the Iran Freedom and Counter Proliferation Act (IFCPA) of 2012[50]. The US legislation, among other things, in fact also prevents operators established outside the territory of the United States from engaging in business or investment relations with the persons named as recipients of the restrictive measures, according to a list drawn up by the US Office of Foreign Assets Control. No longer in force following the entry into force of the JCPoA, this legislation came back into force after the United States unilaterally exited the JCPoA on 8 May 2018[51]. On the other hand, as a response to these extraterritorial US restrictive measures, in 2018 the European Union updated the aforementioned EU blocking statute to also include these US sanctions against Iran that came back into force that same year[52]. The EU blocking statute therefore aims to neutralise, or at least mitigate, the extraterritorial scope of the restrictive measures in question, prohibiting, among other things, European operators from complying with, executing or accepting their legal effects[53]. In other words, the discipline is functional to free such operators from the coercion arising from the effects of the

[48] OFAC, United States and Switzerland Finalize the Swiss Humanitarian Trade Arrangement. Press Releases, 27 February 2020.
[49] See *supra*.
[50] Public Law 112-239, 2 January 2013.
[51] See *supra*.
[52] See *supra*.
[53] CELLERINO (2022: 562).

IFCPA, allowing them the full exercise of the fundamental freedoms provided for in the European Treaties, also in their relations with third countries.
Specifically, the case that allowed the CJEU to rule on the EU blocking statute concerned a German company, i.e. Telekom Deutschland GmbH, accused by an Iranian bank, i.e. Bank Melli Iran, of complying with secondary sanctions against Iran imposed by the United States by violating the aforementioned statute. In more detail, Bank Melli Iran is an Iranian State-owned bank, whose German branch has concluded a framework contract with a subsidiary of Telekom Deutschland GmbH for telephone and internet connections for all of the bank's branches located in Germany. These services provided on the basis of the contracts concluded with the German company are essential for BMI's activities in Germany. However, Telekom Deutschland GmbH has important business interests in the United States, from which it derives about 50% of its total turnover[54]. Thus, following the reactivation of the US secondary sanctions, the German company notified BMI, as well as other of its customer companies affected by the US sanctions, of the termination with immediate effect of all existing contracts. At first, at the outcome of summary proceedings brought by BMI, the German company was ordered to continue the performance of these contracts until their natural expiry. However, in December 2018, BMI was again notified of the possibility of the termination of the contracts with effect from the earliest practicable date. BMI thus brought an action in court to have the German company ordered to maintain the contractually agreed connections. The Court of First Instance upheld BMI's action in part, ordering Telekom Deutschland GmbH to perform the contracts until the expiry of the ordinary termination periods. However, the same Court declared that the termination of the contract was in accordance with the EU blocking statute, in particular Article 5, because it did not occur as a result of instructions, direct or indirect, from the US administrative authorities[55]. On this point, however, BMI appealed to the Hamburg Higher Regional Court, arguing that, although there were no formal acts of the US institutions or courts against the German company, the decision to terminate the contract was clearly dictated by the intention to comply with the US regulations and therefore contrary to the EU blocking statute. The Court hearing the appeal, therefore, turned to the CJEU with four questions in order to obtain some interpretative guidance on the matter[56].
Since its entry into force in 1996, this was the first time the CJEU was called upon to interpret the provisions of the EU blocking statute, and this case deserves an in-depth analysis because the CJEU's response is decisive for the future European approach to be taken not only in relation to these US sanctions, but also to any new secondary sanctions that will be approved by third States.

[54] CELLERINO (2022: 567).
[55] Article 5 of the EU blocking statute provides for the obligation not to comply with any requirement or prohibition based on the above-mentioned US acts. It will be furthered deepened in paragraph 2.3.2 in chapter 2.
[56] CELLERINO (2022: 566-567).

2. The European Union blocking statute

2.1 Brief summary of the history of the European Union blocking statute

As already mentioned in the first chapter, in 1996 the European Union (EU) adopted Council Regulation (EC) No 2271/96, commonly known as the EU blocking statute. The aim of the EU blocking statute is to protect European entities from the consequences of the extraterritorial enforcement of legislation enacted by third countries[57]. At the time, the EU blocking statute was mainly aimed at countering three acts of the United States (US) passed in the 1990s against Cuba, Iran, and Libya, i.e. the Cuban Democracy Act of 1992, the Cuban Liberty and Democratic Solidarity Act of 1996, and the Iran and Libya Sanctions Act of 1996. Indeed, these acts also provided for penalties against non-US entities that would conduct business with the three aforementioned countries. There was thus an attempt by the US to indirectly influence the trade preferences of third country entities to be in line with US foreign interests[58]. As a result, in order to neutralise the extraterritorial effects of US secondary sanctions, on 31 July 1996, the Commission sent to the Council a plan for a council regulation that would provide protection from the application of specific third country legislation. Subsequently, during its session on 28 October 1996, the Council reached a political agreement in Council Regulation 2771/96 after lengthy and intensive discussions by the Committee of Permanent Representatives of the member States (COREPER) and at the ministerial level[59]. Furthermore, a Joint Action was also approved, as it was felt that the EU blocking statute did not adequately safeguard all areas of activity that needed protection[60]. Both the EU blocking statute and the Joint Action entered into force on 25 November 1996.

The EU blocking statute's preamble outlines the rationale for its approval. It makes a clear reference to the US when naming a third country that has passed laws regulating the actions of entities subject to the authority of third States, including member States of the European Union. Due to their extraterritorial nature, the preamble specifically states that these laws are illegal under international law. Additionally, it is emphasised that they have a negative impact on European entities' interests since they constrain the rights these entities enjoy under member States' jurisdiction. Finally, the preamble mentions the Joint Action. In particular, it specifies that the Joint Action's goal is to make sure that member States take action to safeguard entities whose interests are

[57] See *supra*.
[58] See *supra*.
[59] The Committee of Permanent Representatives of the member States serves as an intermediary between the Council and the Commission by organising and carrying out the duties entrusted to it by the Council.
[60] The Joint Action will be furthered explained in section 2.4.

threatened by the aforementioned foreign acts to the extent that the EU blocking statute does not already provide protection for them[61].
Twenty-two years later the EU blocking statute was back in the news following the US withdrawal from the Joint Comprehensive Plan of Action (JCPoA) and the reintroduction of secondary sanctions against Iran. Indeed, as in 1996, so too in 2018, the United States had attempted to make its foreign policy prevail over the entities of third countries, causing the international community to return to discussing secondary sanctions, their legality, and how they could be countered. The EU's position condemning secondary sanctions had been clear since the 1990's and, even in 2018, appeared the same. Indeed, on 6 June 2018, the EU officially began the process of updating the EU blocking statute as a response to the re-imposition of US secondary sanctions against Iran. Entered into force on 7 August 2018, incorporating Regulation 2018/1101, the updated EU blocking statute added to its scope precisely the secondary sanctions re-imposed by the US in 2018 against Iran[62]. Underlying this choice was on the one hand to protect the interests of European entities investing in Iran, and on the other hand to demonstrate the European commitment to the JCPoA[63].
In this chapter we will therefore delve into the EU blocking statute, analysing its most important articles in detail. First, however, I will explain the articles of the European Treaties on which the blocking statute is based in order to better understand what the EU blocking statute provides for. The last paragraph of the chapter is dedicated to the Joint Action.

2.2 Legal basis of the EU blocking statute: Articles 113, 73c, and 235 of the Treaty Establishing the European Community

Council Regulation (EC) No 2271/96 is based on Articles 73c, 113, and 235 of the Treaty Establishing the European Community (EC Treaty)[64]. At the beginning, the proposal for the adoption of the blocking statute, that the Commission presented to the Council on 31 July 1996, was only founded on Articles 113 and 235 of the EC Treaty. Nevertheless, since the Commission's objective was to protect any natural or legal person residing or established in the European Union, this suggestion instantly caused the Council to run into legal issues. Indeed, the Council's primary concerns were whether the European Union was qualified to adopt the suggested measures and, if so, what scope the blocking statute might have under community law[65]. It was in fact evident right away that the suggested measures went far beyond the scope of Article

[61] HUBER (1996: 701-702).
[62] JENNISON (2020: 177).
[63] European Commission Daily News MEX/18/4085, Upholding the EU's Commitment to the Iran Nuclear Deal and Protecting the Interests of European Companies, June 6, 2018.
[64] Articles 113, 73c, and 235 of the EC Treaty correspond respectively to Articles 207, 64(2), and 352 of the Treaty on the Functioning of the European Union.
[65] HUBER (1996: 708).

113, which was limited to the common commercial policy. Article 113, in fact, read as follows:

> The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies[66].

It was therefore clear that, on the one hand, Article 113 specifically concerned international trade, whereas, on the other hand, the Commission's proposal intended to protect all individuals affected by the aforementioned US acts, not only those involved in international trade[67]. Furthermore, the fact that the Commission had also referred to Article 235 as a legal basis did not improve the situation. In fact, according to the jurisprudence of the Court of Justice of the European Union (CJEU), Article 235 could not be used as a justification for expanding the application of the EC Treaty[68]. Indeed, it read as follows:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures[69].

It therefore follows that Article 235 of the EC Treaty could be the basis for action only in situations over which the EU had jurisdiction or where the European Treaties had not granted the necessary powers to achieve an objective recognised by them[70]. Consequently, on the basis of this first Commission proposal, with Articles 113 and 235 as the legal basis, the blocking statute should have been limited to protecting only those engaged in international trade who were affected by US secondary sanctions. In the light of this, it was necessary to rethink the legal basis of the blocking statute in order to respect the powers conferred by the Treaties and the principles of legality, subsidiarity, and proportionality. The first concern was whether the EC Treaty contained any other specific authority that would have permitted the adoption of the Commission's initial proposal. It was put forward that Article 228a of the EC Treaty be taken into consideration, but the idea was quickly dropped because it would have been necessary to end or minimise economic ties with a third country, in this case the United States, in order to apply Article 228a. However, the Commission did not have this as its goal. Article 228a, in fact, read as follows:

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[66] Article 113 of the Treaty Establishing the European Community.
[67] HUBER (1996: 708).
[68] See: The Accession of the Community to the European Human Rights Commission (Opinion 2/94), 1996.
[69] Article 235 of the Treaty Establishing the European Community.
[70] HUBER (1996: 708).

> Where it is provided […] for an action by the Community to interrupt or reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission[71].

The Council therefore looked for alternatives. The first of the options it considered was to limit the blocking statute's application to the common commercial policy's goal, which was the EU's only competence under Article 113 of the EC Treaty. They would have thus restricted protection only to people doing international trade. However, this strategy was deemed to be far too constrained to adequately respond to the three US acts. In fact, it would have been the responsibility of each individual member State to provide coverage for any other parties affected by the aforementioned US legislative acts while engaging in activities other than international trade. Furthermore, it is no coincidence that, when it presented its first proposal, the Commission had tried to use Article 235 to extend the purpose of the statute beyond what was laid down in Article 113[72].

A second option was therefore considered. It was thought that a solution for the European Union would be to pursue not only those objectives related to the common commercial policy, but also those related to other areas, potentially subject to the influence of the aforementioned US sanctions and contained in other articles of the EC Treaty. Article 57, Article 59, Article 73, and Article 100a would have thus been added as legal basis of the blocking statute[73]. However, this strategy was unfavourable since it would have had significant procedural repercussions, delaying the approval of the blocking statute by months. Indeed, on the one hand, the addition of Articles 57, 59, and 100a would have required the use of the co-decision procedure with the European Parliament, while, on the other hand, the addition of Article 75 would have required the use of the cooperation procedure with the European Parliament[74].

Therefore, a third option was taken into account. This third option was a kind of compromise taken by the Council. Indeed, instead of limiting its action to the objectives contained in Article 113 of the EC Treaty, i.e. those relating to the common commercial policy, the Council decided to base the blocking statute also on Article 73c, concerning the free movement of capital between the member States and third countries. Article 73c read as follow:

> Whilst endeavouring to achieve the objective of free movement of capital between member States and third countries […] the Council may, acting by a qual-

[71] Article 228a of the Treaty Establishing the European Community.
[72] HUBER (1996: 709).
[73] Article 57 referred to the right of establishment, Article 59 to the provision of services other than cross-border services, Article 73 to transport, and Article 100a allowed for the approximation of legislation where necessary for the establishment and functioning of the internal market. In connection with Article 73, Articles 73b and 73c were mentioned, as they related to the free movement of capital.
[74] HUBER (1996: 710).

> ified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services, or the admission of securities to capital markets[75].

Compared to the second option, this one added only one more article to Article 113 as legal basis of the blocking statute instead of four, thus reducing procedural repercussions. At the same time, however, all areas that could not be protected by the blocking statute would be safeguarded by the Joint Action. The Joint Action was therefore approved as complementary to the blocking statute, as it protects all those areas left uncovered by the latter[76]. Nevertheless, as to the remedies provided by the blocking statute, neither Article 73c nor Article 113 justified them[77]. Therefore, it was discussed whether Article 235 could serve as a valid legal basis to approve them. In order to refer to Article 235 as a basis for action, three conditions had to be met. The action must aim to achieve an objective of the European Union, must relate to the operation of the common market, and be necessary. In this regard, it was observed that the blocking statute aimed to achieve the objectives covered by Articles 113 and 73c[78] and, therefore, an objective of the European Union, plus the functioning of the common market clearly appeared to be at stake[79], and, finally, action appeared to be necessary for the proper functioning of the market[80]. Therefore, it was concluded that the three prerequisites were met and, in the light of these considerations, the EU blocking statute was based on Articles 73c, 113, and 235 of the EC Treaty[81].

At this point, having established the articles on which the blocking statute would be based, it was important to clearly delineate the areas protected by the blocking statute and those protected by the Joint Action. This search primarily pertained to the provision of services. In this regard, the Court of Justice of the European Union determined in its Opinion 1/94 that cross-border service provision falls under the common commercial policy and is thus a subject under the sole jurisdiction of the European Union under Article 113 of

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[75] Article 73c of the Treaty Establishing the European Community.

[76] See *supra*.

[77] The remedies referred to are those contained in Articles 4, 5, and 6 of the blocking statute.

[78] The preamble and Article 1 of the blocking statute clearly mention that the purpose is to achieve the objectives of Articles 73c and 113.

[79] For example, the fact that nationals of member States who invest or trade with countries sanctioned by the United States are subject to US sanctions, while those citizens who invest in other countries are not, results in an unbiased practice because the former are more penalised than the latter, enjoying fewer rights.

[80] HUBER (1996: 711-712).

[81] The Commission's original proposal to base the blocking statute only on Articles 113 and 235 of the EC Treaty was not approved, because the Commission wanted to use Article 235 as a legal basis to extend the scope of the blocking statute to activities not covered by Article 113. On the contrary, it was ultimately decided to extend the scope of the blocking statute to activities protected by Articles 73c and 113, while Article 235 was simply used in order to legitimise the remedies provided by the statute and not to extend the powers of the European Union.

the EC Treaty[82]. Therefore, the blocking statute applies to those citizens involved in this form of business just as it does to those involved in the trade of goods. As for the other modes of the provision of services, they are only covered by the blocking statute to the degree that they qualify as related commercial activities in regard to international trade or the movement of capital[83]. In fact, since Articles 113 and 73c serve as the blocking statute's legal basis, these two articles' goals are the only ones that fall under its scope. As a result, the related commercial activities the blocking statute refers to can only be those that are intimately connected to international trade or the movement of capital and can thus be viewed as incidental to the activities covered by Articles 73c and 113 of the EC Treaty[84]. Consequently, the Joint Action aims to protect all those persons affected by the three US acts who engage in activities that are not protected by the blocking statute. In other words, it safeguards persons who engage in activities that are not protected by Articles 113 and 73c, because they cannot be defined as related commercial activities, as they are not closely linked to international trade and movement of capital[85]. Furthermore, as will be explained below, the Joint Action does not specify what measures member States can or must take to protect these persons. Each member State can in fact adopt the measures it considers most appropriate, regardless of whether they are similar or not to the EU blocking statute[86].
We have thus seen that the blocking statute was based on Articles 73c, 113, and 235 in order to provide protection from US secondary sanctions to all actions directly or indirectly related to international trade and the movement of capital. On the other hand, the Joint Action was passed to protect all those citizens who, even if they do not engage in activities related to trade or the movement of capital, are nevertheless penalised by the aforementioned US sanctions.

2.3 Composition of the EU blocking statute: its articles

Having seen on which articles of the European Treaties the EU blocking statute is based, we can now elaborate on its content. Composed of twelve articles, it was created to act as a defensive instrument against the extraterritorial exercise of jurisdiction by third countries to the detriment of the sovereignty of the EU and its member States[87]. In its articles, the EU blocking statute addresses the legislative acts to be opposed, the persons and companies affected

[82] Opinion of the Court of 15 November 1994. Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228 (6) of the EC Treaty. Opinion 1/94.
[83] Article 1 Council Regulation (EC) No 2271/96.
[84] For example, with regard to transport, the blocking statute covers transport services only insofar as they are connected to international trade or to a movement of capital.
[85] HUBER (1996: 715).
[86] HUBER (1996: 715).
[87] DE VRIES (1998: 346).

by its application, the penalties imposed in the event of violation, and the obligations and rights it confers.
In particular, Articles 1 and 11 determine the scope of application of the blocking statute. On the one hand, Article 1 specifies the activities that the blocking statute protects against the legislative acts that it opposes[88]. The protected activities must concern either international trade or the movement of capital. On the other hand, Article 11 specifies the categories of persons and companies protected by the statute. It clearly establishes a link between those who are covered by the blocking statute and the European Union, whether through nationality, residence, physical presence, incorporation or control[89]. Article 11, in fact, reads as follows:

> This Regulation shall apply to:
> 1. any natural person being a resident in the Community (4) and a national of a Member State,
> 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 (5),
> 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 any vessel under the jurisdiction or control of a Member State, acting in a professional capacity[90].

For the meaning of the blocking statute, a person is deemed to be a resident if they have been legally based in the European Union for at least six months in the 12-month period preceding the date on which they become subject to a duty or exercise a right under the blocking statute[91]. The residence criterion was added for two reasons. On the one hand, it was created to avoid the extraterritorial application of the blocking statute outside of what is deemed appropriate. On the other hand, the residence criterion, specifically its duration, is used to prevent citizens of the member States who typically live within the EU from changing their residence for a brief period in order to get around the blocking statute's requirements. In contrast, to avoid applying the statute to tourists, the prerequisite of acting in a professional capacity has been added[92].
As regards the other articles, Article 2 contains the so-called obligation to inform the Commission. Indeed, it imposes on any person referred to in Article 11, whose interests are affected by any of the acts mentioned in the annex, an obligation to inform the Commission within thirty days. Furthermore, Article

[88] In the annex it is specified that the blocking statute addresses the Cuban Democracy Act of 1992, the Cuban Liberty and Democratic Solidarity Act of 1996, and the Iran and Libya Sanctions Act of 1996. Then, in 2018 the EU blocking statute was updated to also include the secondary sanctions re-imposed by the US against Iran, since it is established that it may also be extended to other legislation that, like the legislative acts originally mentioned in the annex, result in extraterritorial practices.
[89] HUBER (1996: 703).
[90] Article 11, Council Regulation (EC) No 2271/96 of 22 November 1996.
[91] DE VRIES (1998: 346).
[92] DE VRIES (1998: 346).

3 imposes the principle of confidentiality, because it specifies that the Commission is obliged to treat the information it receives as confidential[93]. Article 4 on the other hand forbids the recognition and enforcement of any court rulings as well as any administrative authority decisions made outside of the European Union that carry out laws that are in conflict with the blocking statute. In other words, its goal is to stop US court rulings founded on the aforementioned acts from being enforced in the European Union[94]. Additionally, it offers legal recourse for people or businesses within the EU.
Article 5 reiterates that any obligation or prohibition based on the aforementioned acts must be disregarded. However, it specifies that in some cases European entities are exempt from complying with the blocking statute. This is the case of entities whose economic interests would be seriously damaged in the event of violation of the acts to which the statute is opposed, in this case US secondary sanctions. Only in this circumstance is the Commission authorised to grant a non-compliance authorisation, following the procedures specified in Articles 7 and 8 of the blocking statute[95]. In contrast, Article 6 is the cornerstone of the entire regulation as it contains the so-called clawback clause, which enables the natural and legal entities covered by Article 11 who take part in the activities covered by Article 1 to seek compensation for losses, including expenses incurred as a result of the aforementioned legislative acts' implementation[96].
Finally, Article 9 specifies the procedure to be followed in the event of a breach of the blocking statute, leaving it up to the member States to decide on the sanctions to be imposed, while Article 10 imposes an obligation on member States to communicate decisions taken on the basis of the blocking statute, such as those taken in the event of a breach of the statute by a national entity. Article 12, on the other hand, concerns the entry into force of the statute[97].

2.3.1 Article 2: obligation to inform the Commission

Among the most important articles of the blocking statute, Article 2 must be mentioned as it explains the procedure to be followed in the case of interference of the laws opposed by the statute with the interests of an EU entity. Its first paragraph reads as follows:

> Where the economic and/or financial interests of any person referred to in Article 11 are affected, directly or indirectly, by the laws specified in the Annex or by actions based thereon or resulting therefrom, that person shall inform the Commission accordingly within 30 days from the date on which it obtained such information; insofar as the interests of a legal person are affected, this obligation

[93] DE VRIES (1998: 348).
[94] HUBER (1996: 704).
[95] HUBER (1996: 705).
[96] HUBER (1996: 705-706).
[97] For full text of Council Regulation (EC) No 2271/96 of 22 November 1996.

applies to the directors, managers and other persons with management responsibilities[98].

When analysing Article 2, the first problem arises with the word 'affected', since it is not clear whether reference is made to a mere interference of the aforementioned acts with the interests of the European entity or whether, on the contrary, it is necessary that the interests of the affected party are seriously impacted. In general, there is a tendency to prefer the first broader interpretation to the second narrower one[99]. Another problem is determining what should be reported to the Commission. In this regard, the article suggests that at first one must simply report the interference of the act of a third country with the interests of the entity. Thereafter, the Commission could contact the entity involved to receive more information, which must be provided within 30 days from the date of the request[100].
The objective of Article 2 is to protect the economic and financial interests of the European Union and its natural and legal entities. However, in addition to these interests, it also protects the legal order of the EU from legislation that undermines its sovereignty, such as the US legislation in this case. Therefore, the statute has a strong defensive connotation, as it also protects the autonomy and independence of the individual member States and the European Union in general[101]. The problem, however, is that sometimes the interest of the EU and the member States in defending their independence and autonomy does not coincide with the economic and financial interests of individual entities. Indeed, in a situation where there are two conflicting legislations, the legal and natural entities involved in international economic and financial affairs tend to respect the one that is least burdensome to their interests[102]. Consequently, even if the blocking statute is intended to protect the interests of European entities from the interference of the aforementioned US acts, these entities may experience greater economic loss by complying with the statute and violating the US sanctions than vice versa. This is especially the case for all those companies that have most of their business in the United States, not to mention US influence on the global market[103]. It is therefore legitimate to assume that some companies would have no interest in notifying the Commission of any interference of US acts with their business. Aware of this, the Commission therefore decided that it was an obligation and not an act of voluntary cooperation for the entities involved to notify the Commission in the event of interference with their interests by the laws to which the blocking statute is opposed. For this reason, Article 2 is called 'the obligation to inform the Com-

[98] Article 2(1), Council Regulation (EC) No 2271/96 of 22 November 1996.
[99] DE VRIES (1998: 348).
[100] Article 2(2), Council Regulation (EC) No 2271/96 of 22 November 1996.
[101] DE VRIES (1998:348).
[102] In this case, the clash is clearly between the US secondary sanctions and the blocking statute. Complying with one would in fact mean breaking the other.
[103] DE VRIES (1998: 348).

mission'. Nevertheless, there is one case in which European entities may legitimately comply with the acts to which the statute is opposed, namely when their economic and financial interests would be seriously harmed in the event of non-compliance with the aforementioned foreign acts. This exception is regulated in Article 5, as we shall see in the following section.

2.3.2 Article 5: prohibition of compliance and authorisation of compliance

Article 5 consists of two paragraphs. On the one hand, the prohibition to comply with legislative acts to which the blocking statute is opposed, on the other hand, the authorisation to comply with these acts under certain conditions. Article 5(1) reads as follows:

> No person referred to in Article 5 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 of from actions based thereon or resulting therefrom[104].

Its aim is clearly to curb the extraterritorial effects of third country legislation within the EU. In fact, there is a prohibition to comply with any prohibition or demand coming from the laws opposed by the EU blocking statute or originating from them. Nevertheless, this prohibition, together with Article 2's obligation to notify the Commission in the event of interference with the interests of European entities by acts to which the statute objects, could put some European entities in a very difficult position. Indeed, as we have already pointed out, for many European companies it might be more advantageous to comply with US sanctions than with the EU blocking statute in the face of the economic losses they would face if they did not comply with the aforementioned US acts[105]. This circumstance, however, was considered by the Commission, which proposed to include the possibility of respecting the legislative acts to which the statute is opposed without infringing it[106]. For this reason, paragraph 5(2) was inserted, which reads as follows:

> Persons may be authorized, 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[107].

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[104] Article 5(1), Council Regulation (EC) No 2271/96 of 22 November 1996.
[105] DE VRIES (1998: 349).
[106] See *supra*.
[107] Article 5(2), Council Regulation (EC) No 2271/96 of 22 November 1996.

Article 5(2) gives the possibility to balance costs and benefits in the case of the application of the blocking statute to the detriment of the legislation it opposes. In fact, it states that if the application of the former would seriously harm the interests of the European entity involved or of the EU in general, the Commission may grant an authorisation of non-compliance with the blocking statute. Consequently, the involved entity could legitimately comply with the extraterritorial acts instead of the European blocking statute. However, there are no criteria as to when one can speak of harm that would seriously affect the interests of the EU or the entity involved, and ambiguous situations may arise as a result. For example, one might ask whether the damage should exceed a certain percentage of a company's turnover. Or, one might wonder what might happen if the EU company is a subsidiary of a US company and the damage is suffered solely by the US-based company. In this wake, many other similar situations could occur that Article 5(2) would fail to clearly regulate. However, despite these unclear situations, it must be said that, even if the existence of criteria to be met would provide more legal clarity, this would not allow the Commission to find ad-hoc solutions for each case to be addressed. Therefore, neither in 1996 nor in 2018 did it seem urgent to formulate such criteria[108].

On the other hand, another issue that has always been more pressing is the timeframe within which a decision should be made on whether or not to grant a non-compliance authorisation. Indeed, if we consider the case of the sanctions against Iran, the violation of US sanctions could result in severe economic losses for the European entities involved. Moreover, if we also consider that US courts tend to impose very short deadlines that companies must meet in order not to violate US acts, it seems very important that the relevant European entities act with all the speed that the case requires[109]. In particular, it is the Commission that must do so.

To decide whether to grant a non-compliance authorisation, the Commission is supported by a committee headed by a member of the Commission and composed of representatives of the member States. The Commission is required to provide the committee with a detailed draft of the proposed measures. The Commission shall issue a final opinion if a qualified majority of the committee, representing two thirds of the total votes, approves its proposal. On the other hand, the Commission must submit a proposal of measures to the Council if the committee does not deliver an opinion or if a qualified majority does not agree with the draft. If the Council does not respond within two weeks with a qualified majority, the Commission will take the suggested actions. In urgent cases, if there is no blocking minority in the committee, the Commission can take a decision within two working days[110].

Finally, it is worth underlining that Article 5 of the blocking statute offers the so-called foreign sovereign compulsion defence. This defence has been used

[108] DE VRIES (1998: 349).
[109] DE VRIES (1998: 349).
[110] DE VRIES. (1998: 349).

in US courts to shield private entities from legal responsibility in the US for actions taken overseas when those actions are required by foreign governments[111]. In this case, however, even if Article 5 fulfils the conditions of the foreign sovereign compulsion defence, this might be jeopardized if, on the one hand, member States fail to bolster the EU blocking statute with credible penalties for the violation of its rules[112] and if, on the other hand, the exemption from the obligation to comply with the blocking statute is easily accessible both *de facto* and/or *de jure*[113].
In conclusion, while the first paragraph of Article 5 prohibits actions and decisions based on legislative acts challenged by the blocking statute, the second paragraph aims both to protect European companies and to encourage them to report cases of interference between their interests and the aforementioned acts by recognising the possibility of exempting European entities from compliance with the blocking statute in certain circumstances. Indeed, the Commission wanted to demonstrate the protective nature of the blocking statute, the purpose of which is not only to protect the sovereignty and independence of the member States and the Commission, but also the interests of the natural and legal entities of the European Union.

2.3.3 Article 6: clawback clause

Another important article of the EU blocking statute is Article 6, referred to as the 'clawback clause'. Indeed, its purpose is to provide protection to European natural and legal entities by guaranteeing them compensation for any damage suffered as a result of the legislative acts mentioned in the annex. Its first paragraph reads as follows:

> 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[114].

Obviously, those who can avail themselves of this right are those who are protected by the blocking statute, i.e. the natural and legal entities named in Article 11 who engage in activities directly or indirectly related to international trade or the free movement of capital and who are harmed by the acts to which the statute objects[115]. Furthermore, as specified by the second paragraph, any entity inflicting the damages, whether it be a natural or legal person, a person working on its behalf or as a mediator, may be held liable by the

[111] The foreign sovereign compulsion defence is a doctrine that permits a US judge to justify breaking US law on the grounds that it was required by another country's law.
[112] Article 9 addresses the issue of punishment in the event of violation of the EU blocking statute. It will be deepened in paragraph 2.3.4.
[113] DE VRIES (1998: 351).
[114] Article 6(1), Council Regulation (EC) No 2271/96 of 22 November 1996.
[115] See *supra*.

claimant. Nevertheless, it is important to note that, if the harm is caused by a US-based corporation, of which the EU company is a subsidiary, this clause does not allow for any compensation, because, under community law, such a subsidiary is an EU-based business that must be legally separated from the US-based business[116].
Paragraph 3, on the other hand, reads as follows:

> The Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgements in civil and commercial matters shall apply to proceedings brought and judgments given under this Article. Recovery may be obtained on the basis of the provisions of Sections 2 to 6 of Title II of that Convention, through judicial proceeding instituted in the Courts of any Member State where that person, entity, person acting on its behalf or intermediary holds assets[117].

Insofar as it permits legal action to be brought in the courts of any member State where the defendant holds assets, Article 6(3) thus establishes a new special jurisdiction, which is not even provided for in the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters[118]. According to this paragraph, a natural or legal person in any EU member State that falls under the purview of Article 1 and 11 of the blocking statute and that has sustained damages as a result of the aforementioned US acts may initiate proceedings in the courts of its own State or in any other member State to recover these damages.
Finally, paragraph four of Article 6 states that:

> Without prejudice to other means available and in accordance with applicable law, the recovery could take the form of seizure and sale of assets held by those persons, entities, persons acting on their behalf or intermediaries within the Community, including shares held in a legal person incorporated within the Community[119].

Therefore, pursuant to Article 6(4), without limiting other possible remedies, the defendant's assets located inside the European Union, including shares held in a legal entity formed within the EU, may be seized and sold as part of the recovery. According to these provisions one may argue that, for instance, any damage caused by General Motors to an EU-based company could not be recovered from Opel, Germany, because that company is a separate legal entity incorporated in the EU, but the shares held by General Motors in the Opel company could be seized if held within the EU[120].

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[116] HUBER (1996: 706).
[117] Article 6(3), Council Regulation (EC) No 2271/96 of 22 November 1996.
[118] The Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters provides general rules with respect to jurisdiction. See: 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.
[119] Article 6(4), Council Regulation (EC) No 2271/96 of 22 November 1996.
[120] HUBER (1996: 706).

Article 6 thus ranks among the articles of the European blocking statute that guarantee rights, as it establishes compensation for damages suffered by natural and legal European entities as a result of legislative acts to which the statute is opposed. In addition, in order to better protect European entities, it also presupposes the possibility of instituting legal proceedings in compliance with what it stipulates.

2.3.4 Article 9: remedies for breach of the EU blocking statute

The last article of the EU blocking statute that we will address in detail is Article 9, since it contains the directions to be followed in the event of a breach of the statute. It reads as follows:

> 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[121].

Article 9, therefore, provides that in the event of an infringement of the statute, the member States will determine the sanctions to be imposed on the entities involved. There is, in fact, no list of sanctions to be imposed, but the article simply states that sanctions should be effective, proportionate, and dissuasive. Nevertheless, the idea of what is effective, proportionate and dissuasive varies from member State to member State and this becomes clear when comparing the different sanctions member States would impose in the event of a breach of the blocking statute[122].
First of all, it must actually be emphasised that not all member States have fully implemented Article 9. Indeed, States such as France, Greece, and Luxembourg have not yet approved the sanctions to be imposed in case of violation of the blocking statute[123]. In this case, the Commission, as guardian of the European Treaties whose task is also to ensure the proper functioning and application of the European Union's laws, could take action against these States that have not yet implemented Article 9. This would be of particular urgency as the lack of sanctions by these States undermines the credibility of the EU blocking statute[124].
On the other hand, as for those member States that have fully implemented Article 9, some of them have decided to impose administrative penalties or criminal offences in the event of an infringement of the blocking statute. For example, in countries like Germany, Italy or Spain, the penalties imposed correspond to a maximum fine of EUR 500,000, EUR 92,962, and EUR 601,012

[121] Article 9, Council Regulation (EC) No 2271/96 of 22 November 1996.
[122] DE VRIES (1998: 347).
[123] ROVETTA ET AL. (2021: 50).
[124] DE VRIES (1998: 348).

respectively[125]. In contrast, countries such as Ireland, the Netherlands and Sweden preferred to adopt criminal offences as sanctions. Breaching the blocking statute is equivalent to a maximum imprisonment of 12 months in Ireland, 2 years in the Netherlands, and 6 months in Sweden. Nevertheless, in addition to criminal offences, these countries have also decided to impose a fine to be paid. For example, in Ireland the fine can be up to EUR 1,900, in the Netherlands up to EUR 450,000, and in Sweden there is no upper limit[126]. Already these first six countries have thus shown the differences between the EU countries in the case of violation of the blocking statute. In fact, from Italy's sanctions that correspond to a maximum fine of EUR 92,962, one goes to Sweden's sanctions that correspond to a fine that has no limit and a maximum of 6 months imprisonment.

In contrast, in the other member States, sanctions imposed for infringements of the EU blocking statute are part of their legal systems' more general framework, therefore it was not necessary to make an explicit mention of the EU blocking statute by passing a law as the aforementioned six countries did. For example, in Estonia there is a penalty of up to EUR 32,000 under Section 372 of the Criminal Code, while in Cyprus a maximum fine of EUR 878, or two years sentence under Section 136 of the Criminal Code[127].

Finally, it is worth underlining that, since the blocking statute is an EU regulation, it is self-enforceable in its entirety under Article 288 of the Treaty on the Functioning of the European Union (TFEU), even if the national legislation does not include the relevant sanctions. Indeed, Article 288(1)(2) reads as follows:

> To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States[128].

Therefore, according to Article 288, EU natural and legal entities are allowed to invoke the EU blocking status and rely on it directly before the national courts of EU member States irrespective of whether the member State has implemented Article 9 by approving the sanctions to be imposed for infringe-

[125] The sanctions imposed by Germany, Italy, and Spain are regulated respectively by: Article 82 of the German Foreign Trade Ordinance; *Decreto Legislativo* 26 *agosto* 1998, n. 346; *Ley 27/1998, de 13 de julio, sobre sanciones aplicables a las infracciones de las normas establecidas en el Reglamento (CE) número 2271/96, del Consejo, de 22 de noviembre, relativo a la protección frente a la aplicación extraterritorial de la legislación de un país tercero*. See: ROVETTA ET AL. (2021: 50-51).

[126] The sanctions imposed by Ireland, the Netherlands, and Sweden are regulated respectively by: S.I. No 217/1997 – European Communities (Extraterritorial Application of Legislation Adopted by a Third Country) Regulations, 1997; *Wet uitvoering antiboycotverordening en Wet economische delicten; Lag* (1997: 825) *om EG:s förordning om skydd mot extraterritoriell lagstiftning som antas av ett tredje land*. See: ROVETTA ET AL. (2021: 50-51).

[127] ROVETTA ET AL. (2021: 50).

[128] Article 288(1)(2) TFEU.

ment of the statute. Indeed, should the member State not have fully implemented Article 9, it would be up to the national court to determine whether the imposition of any sanctions is necessary, and if so, their potential level[129]. One can thus conclude that Article 9 recognises the task of member States to impose sanctions in case of violation of the EU blocking statute. However, some member States have not yet approved the sanctions to be imposed in case of violation of the statute, but this problem, even if it undermines the credibility and authority of the statute, can be overcome. In fact, on the one hand the Commission could urge these States, on the other hand the statute is binding in its entirety, directly applicable in the member States, and can thus be invoked in national courts independently of the implementation of Article 9. In contrast, the real sticking point is the different types of sanctions approved by the member States that have fully implemented Article 9. Indeed, penalties vary from member State to member State and, as we have seen, a violation of the blocking statute by an Italian entity would result in much less severe consequences than the same violation committed by a Swedish entity. This, one might conclude, does not guarantee equal treatment of European entities, but, at the same time, was to be expected, as each member State has a different idea of what effective, proportionate, and dissuasive sanctions are.

2.4 The Joint Action

On the same day that the EU blocking statute came into force, the Joint Action was also adopted. Named Joint Action of 22 November 1996 adopted by the Council on the basis of Articles J.3 and K.3 of the Treaty on European Union concerning measures protecting the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, its main purpose is to provide protection to all European entities affected by the acts to which the EU blocking statute objects, but which are not protected by the statute because their activities do not fall within its scope, i.e. the activities listed in Article 1 of the EU blocking statute[130]. Indeed, the first article of the Joint Action reads as follows:

> Each Member State shall take the measures it deems necessary to protect the interests of any person referred to in Article 11 of Regulation (EC) No 2271/96 and affected by the extraterritorial application of laws including regulations and other legislative instrument referred to in Annex to Regulation (EC) No 2271/96, and actions based thereon or resulting therefrom, insofar as these interests are not protected under that Regulation[131].

It is therefore clear that the Joint Action is complementary to the EU blocking statute, as also specified in the preamble of the Joint Action itself. Indeed, the

[129] ROVETTA ET AL. (2021: 50).
[130] See *supra*.
[131] Article 1, Joint Action of 22 November 1996.

preamble says that the blocking statute and the Joint Action together constitute an integrated system that concerns the European Union and the member States in order to protect European entities from laws of third countries that have extraterritorial effects[132].

Nevertheless, the adoption of the Joint Action was a matter of debate between the Commission and the Council, as the Commission believed that it was unnecessary because the blocking statute would protect all persons and activities that needed to be protected from the aforementioned US acts[133]. However, the Commission had to revise its positions because of the problems that arose in legally justifying, thus under the European Treaties, the blocking statute. In other words, under the powers conferred on the EU by the European Treaties, it would have been impossible to protect all European entities that needed protection from the acts to which the statute is opposed without also resorting to the Joint Action. Indeed, as we have already seen, the Commission's initial proposal to base the EU blocking statute only on Articles 113 and 235 of the EC Treaty would have limited the protection of the statute only to those entities engaged in activities related to international trade. On the contrary, using Articles 57, 59, 75 and 100a of the same Treaty as legal bases in order to extend the protection of the statute also to areas protected by these articles would have meant procedural delays as well as general confusion as to the true purpose of the statute[134]. Furthermore, we also know that Article 235 could not be used to extend the purpose of the statute to areas not protected by Article 113, as Article 235 did not create new competences, but simply allowed the EU to choose the means by which it would achieve the objectives of the European Treaties[135]. In the end, therefore, it was decided to approve the Joint Action with the aim of ensuring that member States would protect those European entities that were not protected by the blocking statute, but were nevertheless affected by the legislative acts to which the statute was opposed.

Furthermore, another reason why the EU blocking statute was passed concerns the nature of the US sanctions. In fact, most of the sanctions contained in the three acts to which the statute originally objected, as well as those reintroduced in 2018, are sanctions whose effects predominantly unfold in US territory rather than in the territory of third countries. In fact, rather than secondary sanctions, it would be more correct to speak of border-measures[136]. However, the point is that their objective is still to influence the choices of foreign entities to respect US interests and, for this reason, they are defined as sanctions with an extraterritorial character. Indeed, leaving aside the State where the effects of these sanctions take place, the European Union condemns exactly the US attempt to influence, even indirectly, the choices of foreign entities in

[132] Preamble, Joint Action of 22 November 1996.
[133] HUBER (1996: 707).
[134] See *supra*.
[135] DE VRIES (1998: 351).
[136] DE VRIES (1998: 352).

order to serve its own interests[137]. Therefore, in light of this, the Joint Action was also necessary to allow member States to take measures they could never have taken under the blocking statute, since their purpose falls outside the European Treaties, but which were necessary to counteract the indirect influence of US sanctions on their domestic entities. An example of these measures is the denial of access to the territory of member States[138].

In addition, it should be noted that the Joint Action does not list specific actions to be taken by member States to counter the legislative acts to which the EU blocking statute is opposed, but leaves them free to choose the measures they deem most appropriate depending on the specific case[139]. Consequently, in order not to limit the measures that member States could use, it was decided to base the Joint Action on both Articles J.3 and K.3 of the Treaty on European Union (TEU)[140].

Finally, when it was decided to approve the EU blocking statute and the Joint Action, both the Commission and the Council and the member States had already considered the possibility of resorting to other measures if these two were insufficient. For instance, there was much support for the idea of resorting to the World Trade Organisation's dispute settlement procedure[141]. However, the possible new means that could be used can only be imagined and much will also depend on the development of EU-US relations[142].

In conclusion, the Joint Action was passed to protect all European natural and legal entities affected by the legislative acts to which the EU blocking statute is opposed, but which are not protected by the statute because their activities do not fall within its scope, i.e. international trade or the movement of capital. Moreover, the Joint Action, by leaving it up to the member States to decide how to counter any interference of these legislative acts with the interests of European entities, allows them to better counter the effects of US sanctions. For these reasons, therefore, the Joint Action can be said to be complementary to the EU blocking statute.

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[137] As we mentioned in paragraph 1.2, violating US secondary sanctions would mean, among other things, not being able to access or having limited access to the US market and its financial system. This, especially for companies that conduct most of their business in the United States, would result in very serious economic losses that must be avoided at all costs. Consequently, the companies involved have no choice but to comply with the US will, thus serving its foreign policy interests. This is why we speak of extraterritorial sanctions, even though their effects are mainly related to the US.

[138] DE VRIES (1998: 351).

[139] HUBER (1996: 715).

[140] Treaty of Maastricht on European Union (7 February 1992).

[141] The question of whether there are other possible solutions to counter US sanctions will be addressed in Chapter 4. In particular, section 4.2.1 is devoted precisely to the World Trade Organisation's dispute settlement procedure.

[142] See chapter 4, paragraph 4.2.2.

3. The case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*

3.1 Brief summary of the history of the case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*

In addition to the re-imposition of secondary sanctions against Iran by the United States (US), the European Union (EU) blocking statute is back in the news because of a court case brought before the Court of Justice of the European Union, i.e. the case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*. This case concerns a German company, i.e. Telekom Deutschland GmbH, accused by an Iranian bank, i.e. Bank Melli Iran (BMI), of complying with secondary sanctions against Iran imposed by the United States by violating the aforementioned statute[143]. Specifically, Telekom Deutschland GmbH provided telephone and internet connections to all Bank Melli Iran branches located in Germany. However, following the reactivation of the US secondary sanctions, the German company notified BMI of the termination of all existing contracts with immediate effect. BMI then filed an appeal invoking the German company's violation of the EU blocking statute in order to comply with US sanctions. The Court of First Instance upheld BMI's action in part, ordering Telekom Deutschland GmbH to perform the contracts until the expiry of the ordinary termination deadlines. Nevertheless, the same judges held that the termination of the contract was in compliance with the EU blocking statute, in particular Article 5, because it had not occurred as a result of instructions, direct or indirect, from US administrative authorities[144]. On this point, however, BMI appealed to the Hamburg Higher Regional Court, arguing that although there were no formal acts of the US institutions or courts against the German company, the decision to terminate the contract was clearly dictated by an intention to comply with US regulations and therefore contrary to the EU blocking statute. This accusation made by BMI was based on the fact that the German company conducts more than 50% of its business in the US and, therefore, a violation of US sanctions would have severely undermined its business[145]. The Court hearing the appeal at this point turned to the Court of Justice of the European Union with four questions in order to obtain clarity on the implementation of the provisions of the EU blocking statute.
This was the first time since the entry into force of the EU blocking statute in 1996 that European judges are invited to give their opinion on the implementation of the EU blocking statute. Therefore, this case must be examined in detail because the decision of the Court of Justice of the European Union

[143] See *supra*.
[144] See *supra*.
[145] CELLERINO (2022: 567).

(CJEU) will have a significant impact on the future European approach towards not only these US sanctions, but also any future secondary sanctions that third States might approve[146].
However, before analysing this case in detail, we will analyse the national proceedings that have concerned the EU blocking statute. In particular, we will focus on the only case in which an attempt was made to apply the statute.

3.2 Previous cases: the EU blocking statute in national proceedings

Although the case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*, was the first time the Court of Justice of the European Union was asked about the implementation of the EU blocking statute, its invocation in national proceedings of the member States has increased considerably in recent years[147].
Among the most important cases was an appeal in the United Kingdom (UK) on the interpretation of a facility agreement between Cynergy Bank Ltd[148] and Lamesa Investments Ltd[149], a wholly owned subsidiary of Mr. Vekselberg[150].
More in detail, the case concerned the interests Cynergy would have to pay on the EUR 30 million borrowed by Lamesa according to the facility agreement they had signed. Nevertheless, Mr. Vekselberg was included on the Specially Designated Nationals and Blocked Persons (SDN) list and therefore subject to US sanctions. Based on this, even though Lamesa as a company was not subject to US sanctions, Cynergy refused to pay the interests due in order not to violate the US secondary sanctions that prohibit the payment of any interest for the benefit of an entity subject to US sanctions, as it is considered an act to benefit the sanctioned entity. Furthermore, those who violate the prohibition are themselves subject to US sanctions, as feared by Cynergy[151]. In order to defend itself in the national proceedings at the UK Court, Cynergy resorted to a clause contained in the aforementioned facility agreement according to which any provision of law, regulation or order of a court must be respected. In particular, Cynergy claimed that paying the interest would result in a violation of the US sanctions, as Lamesa was indirectly sanctioned by the latter. At the first instance, it was decided that Cynergy had not violated the facility agreement by not paying the interests due, as Lamesa could be considered a US-sanctioned entity. Furthermore, on 30 June 2020, the Court of Appeal of England and Wales upheld the ruling of the first instance and dismissed Lamesa's appeal, thus agreeing with Cynergy. In addition to recognising Cynergy's compliance with the agreement, the English Court of Appeal also recognised that Cynergy had to comply with US sanctions necessarily, since, in

[146] ROVETTA ET AL. (2021: 58).
[147] ROVETTA ET AL. (2021: 47).
[148] Thereafter it will be called Cynergy.
[149] Thereafter it will be called Lamesa.
[150] *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 281 on 30 June 2020.
[151] ROVETTA ET AL. (2021: 47).

its particular case, not doing so would result in very serious economic damage[152]. Therefore, applying this court ruling to the case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*, we could infer that the German company has the right not to trade with Iranian entities. Indeed, the European blocking statute must also counteract the negative effects of US sanctions on European entities and certainly not restrict their freedom to conduct business[153]. Moreover, in both cases, on the one hand there is no direct request from a US entity to comply with US sanctions and on the other hand there is no doubt that the economic interests of the two European companies are at stake. It therefore seems that the English Court preferred to safeguard the interests of the European entity involved rather than condemn the extraterritorial influence exercised by the United States[154].

Another ruling worth mentioning is that of a German Court of 15 October 2018. The case concerned the closure of a bank account by a German bank against an Iranian citizen on the US list of Specially Designated Nationals and Blocked Persons[155]. The bank had justified this decision by referring to the damage it would suffer if it violated US sanctions, i.e. if it did not close the account in question. For the German Court, the bank's justification was legitimate and in line with the EU blocking statute. In fact, the German Court stated that the purpose of the statute is to allow European entities to trade with sanctioned Iranian entities if they wish, but, conversely, there is no obligation to continue trading with them if they do not wish to, especially if it would harm their interests. For the German Court, therefore, European entities can simply do what best benefits their interests and only resort to the statute if they wish to continue trading with the sanctioned Iranian entities. However, based on this judgement, the question should be asked when European entities should seek the Commission's authorisation under Article 5(2) of the EU's blocking statute, if they can also lawfully terminate contracts not to violate US sanctions[156].

Finally, we can consider a legal case that also occurred in Germany. In 2016, the District Court in Dortmund had to interpret the application of the EU blocking statute in relation to the US sanctions against Cuba[157]. Specifically, the applicant ran online ticket sales and offered software solutions for both advance booking offices and bookable performances for the end customers. On the other hand, the respondent was a credit institution in charge of managing services related to the sale of tickets that involved e-money. In 2015, the respondent blocked the applicant's account and prevented it from making a deposit in favour of end customers in connection with the sale of tickets for

[152] ROVETTA ET AL. (2021: 48).
[153] In particular, the EU blocking statute cannot oppose Article 16 of the Charter of Fundamental Rights, which protects the freedom to conduct business.
[154] This view stems from the idea that the EU blocking statute does not safeguard the interests of European companies and, therefore, applying it would harm the latter.
[155] LG Hamburg 18. *Zivilkammer, Urteil vom* 15 October 2018, 318 O 330/18.
[156] See *infra.*
[157] District Court Dortmund, 3 O 610/15, judgment of 15 January 2016.

the show *Soy de Cuba*. The respondent believed that, as a wholly owned subsidiary of the US parent company, it was not permitted to offer payment services in Germany in relation to goods or services from Cuba and that, in the event of a breach, the parent company would face various criminal and civil penalties from the US Office of Foreign Assets Control (OFAC). However, the Court agreed with the applicant. In fact, it held that there was no reason to prohibit the sale of tickets for the performance in question. Furthermore, it also recognised that the EU blocking statute is directly applicable in all member States of the European Union, including of course Germany[158].
These three cases have thus shown us various interpretations given by national courts of member States to the EU blocking statute. Among the various considerations that could be made, two seem particularly important. On the one hand, only secondary sanctions imposed by one country, i.e. the US, have always been involved, confirming not only the practice, but also the US ability to influence third country entities[159]. In addition, all three cases occurred from 2015 onwards, which shows that the interest in the blocking statute has intensified in recent years. However, there is one more case to mention, as it is the only example where an attempt was made to implement the EU blocking statute, albeit in vain. This case took place in Austria in 2007 and will be discussed in more detail in the next section.

3.2.1 The first attempt to enforce the EU blocking statute: the Austrian government and the BAWAG P.S.K. bank

In 2007, there was the only attempt so far to apply the EU blocking statute, but it did not materialise because it was not necessary. The case involved the Austrian government and the country's fifth largest bank, i.e. BAWAG P.S.K., which was accused by the former of violating the EU blocking statute. In fact, the bank had closed the bank accounts of one hundred Cuban nationals just as it was about to be acquired by a US investor. This decision had been necessary because, otherwise, the operation would not have been possible due to US sanctions against Cuba, in particular due to the Cuban Liberty and Democratic Solidarity Act of 1996[160]. This very event convinced the Austrian government that measures had to be taken, even though this decision was vehemently criticised by Austrian citizens.
In accordance with the EU blocking statute, the Austrian government itself was instructed to punish the bank in question, since Article 9 of the statute provides that in the event that a European entity breaches the statute, it is the member State of the entity involved that takes the necessary measures[161]. These measures must be effective, proportional, and dissuasive and in the case

[158] ROVETTA ET AL. (2021: 49).
[159] See *supra*.
[160] See *supra*.
[161] See *supra*.

of Austria there is an administrative penalty of up to EUR 72,600[162]. However, in the end, it was not necessary to apply the administrative sanction. In fact, the United States decided to make an exception, ensuring that the takeover of the bank by the US investor took place without closing the accounts of the Cuban citizens involved. Thus, the bank reopened the accounts of the hundred Cuban citizens and the acquisition went through without the need to impose the administrative sanction[163].
Therefore, the only time a member State tried to implement the EU blocking statute, it was not necessary, because the United States decided not to apply the sanctions in full. On the contrary, more interesting is the case involving the Iranian bank and the German company, since for the first time the Court of Justice of the European Union was involved and, as already mentioned, the answer given will certainly have a bearing on the approach that the European Union will have from now on in the world of international economic sanctions. In the following paragraphs we will therefore first examine individually the questions put to the CJEU and then the answers provided by the latter.

3.3 The four questions referred by the Higher Regional Court of Hamburg to the Court of Justice of the European Union

As already explained, Bank Melli Iran had appealed to the Hamburg Higher Regional Court after the Court of First Instance had ruled that Telekom Deutschland GmbH had not violated the EU blocking statute. In particular, BMI had appealed the point in which the Court of First Instance had ruled that the German company had not violated Article 5 of the EU blocking statute because it had not acted on the instructions, direct or indirect, of the US administrative authorities[164]. According to BMI, however, the German company's decision had been influenced by US sanctions, since the company conducted an important part of its business in the United States[165]. The Hamburg Higher Regional Court thus decided to turn to the CJEU with four questions in order to clarify the provisions of the EU blocking statute involved in the case[166]. It therefore resorted to the so-called preliminary ruling procedure.
A preliminary ruling procedure is a discretionary act of a national court asking for interpretative help from the Court of Justice of the European Union. Specifically, "where national courts encounter problems relating to the interpretation of European law, they can ask 'preliminary questions' to the European

[162] ROVETTA ET AL. (2021: 50).
[163] JENNISON (2020: 174).
[164] Article 5 of the blocking statute prohibits European entities from complying with extraterritorial measures imposed by third countries, such as the US secondary sanctions in this case. In the second part, however, it recognises that the only exception could come from an authorisation granted by the European Commission.
[165] See *supra*.
[166] Thereafter, we will refer to the Hamburg Higher Regional Court as the German Court.

Court"[167]. The procedure for preliminary rulings is defined in Article 267 of the Treaty on the Functioning of the European Union (TFEU), that reads as follows:

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of the Treaties;
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court to give a ruling thereon.
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to person in custody, the Court of Justice of the European Union shall act with the minimum of delay[168].

As specified by Article 267 TFEU, the preliminary ruling procedure only refers to judicial authorities, i.e. courts and tribunals, whereas administrative authorities are excluded. Furthermore, preliminary references may be made in relation to two different judicial functions. On the one hand, they can concern the validity of acts adopted by European institutions, on the other hand they can concern the interpretation of European law, as in the legal case we are analysing. However, they cannot concern national laws, because the Court of Justice of the European Union has no jurisdiction over them. In addition, "national courts are entitled to request a preliminary ruling for a pending case, where there is a 'question' that they consider 'necessary' to give judgment"[169]. Nevertheless, if such a question raises before a national court of last resort, Article 267(3) TFEU imposes a constitutional obligation to submit the case before the CJEU. Indeed, the CJEU specified that this obligation should not only concern the courts of last resort, but all national courts if they have doubts about the validity or interpretation of a EU act[170]. In other words, given the aforementioned conditions, there is an obligation to use the preliminary ruling procedure only when a case is before a court of last resort. However, the CJEU encourages all national courts to use this procedure whenever they have doubts about the validity or interpretation of EU acts. Finally, it must be underlined that once the Court of Justice of the European Union gives a preliminary ruling, it is binding on the national court[171].

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[167] SCHÜTZE (2021: 391).
[168] Article 267 TFEU.
[169] SCHÜTZE (2021: 396).
[170] Case C-344/04, *The Queen on the Application of International Air Transport Association et al. v Department for Transport,* 2006.
[171] SCHÜTZE (2021: 402).

To conclude, this is the procedure that the Hamburg Higher Regional Court followed to submit to the CJEU the four questions concerning the EU blocking statute that will be presented in the following paragraphs.

3.3.1 The first question

The first question addressed by the Hamburg Higher Regional Court to the Court of Justice of the European Union asked essentially whether the EU blocking statute would only enter into force if an EU entity complied, directly or indirectly, with an order based on the legal acts that the statute contradicts, or whether it was sufficient that the actions of the EU entity were influenced by the aforementioned acts[172]. The first question reads as follows[173]:

> Does the first paragraph of Art.5 of Regulation No 2271/96 only apply where the acting EU operator within the meaning of Art.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?

The first question thus concerns Article 5 of the blocking statute, which, on the one hand, prohibits compliance with the legislative acts that the EU blocking statute opposes and, on the other hand, recognises the possibility of obtaining an authorisation from the Commission to comply with the aforementioned acts without violating the blocking statute. This possibility is recognised when, in the event of non-compliance with the legislative acts in question, there would be irreversible damage to the EU or the entity involved[174]. With the first question, the German Court seeks to understand what compliance with sanctions means, whether it only occurs when there is a specific order based on the acts in question or whether, instead, it is sufficient that there is a situation involving broader compliance issues. In other words, the German Court is trying to determine whether the 'narrow' or the 'broad' interpretation of the EU blocking statute should be adopted[175]. In this regard, it is important to note that the Commission in Implementing Regulation 2018/1101 defined non-compliance as the failure to comply with obligations or prohibitions, including requests from foreign courts, based on or deriving, directly or indirectly, from the aforementioned extra-territorial legislation or

[172] In the case at hand, BMI accused the German company of terminating the contract they had in light of US sanctions. This is therefore an example of a 'hidden' influence of US sanctions on a decision of a European company.
[173] Case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*, Request for a Preliminary Ruling in the Internal Document of the Court.
[174] See *supra*.
[175] ROVETTA ET AL. (2021: 52).

subsequent actions. This includes both direct actions and deliberate omissions[176]. The Commission thus takes a broad interpretation of protection under the EU blocking statute and it means that the EU economic operators should not rely on the measures listed in Annex I to the EU blocking statute as the indirect or direct basis for their actions. However, this interpretation does not seem to be the one preferred by the courts of the member States so far and the German Court itself seems to opt for the 'narrow' interpretation[177]. That is, to limit the application of the blocking statute in cases where there are specific orders based on the legislative acts the statute opposes that affect the activities of European entities[178]. Nevertheless, the adoption of the 'narrow' interpretation entails a problem, namely the blocking statute would only apply in the event that there is a US judgment based on the legislative acts contained in Annex I of the EU blocking statute. This would incentivise European entities to comply with US sanctions by circumventing the blocking statute itself. In fact, the US Office of Foreign Assets Control's decision to sanction a European entity is not classifiable as a judgement, but as an administrative act. Thus, adopting the 'narrow' interpretation, the European entity would have to appeal to a US court and obtain an adverse judgment for the EU blocking statute to take effect. However, this process would result in a waste of time that European entities could not afford, as their interests may already have been damaged in the meantime. Therefore, the question of which of the two interpretations is to be preferred becomes even more serious when one considers that on the one hand there is the sovereignty of the European Union and the member States to be protected, but on the other hand the interests of European companies that could be seriously jeopardised[179].
To sum up, we have thus seen that the first question put to the Court of Justice of the European Union concerns the interpretation of Article 5 of the blocking statute, in particular what is meant by non-compliance with US sanctions. There are two possible interpretations, one that would considerably narrow the scope of the statute and one that would require more careful compliance with it. In any case, it will be the European Court of Justice's response that will bring clarity to one of the less clear, but more important, points of the EU blocking statute.

3.3.2 The second question

[176] Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom C/2018/5247.
[177] In section 3.2 we saw, for example, this 'narrow' interpretation being adopted by an English Court in the case between Cynergy Bank Ltd. and Lamesa Investment Ltd.
[178] ROVETTA ET AL. (2021: 52).
[179] ROVETTA ET AL. (2021: 53).

With the second question, the German Court asks how an EU economic operator can terminate a contract with a sanctioned entity without violating the EU blocking statute. In particular, the question aims to highlight the burden of proof that such economic operators would have to satisfy in order to disprove the claim of a violation of the EU blocking statute. It reads as follows[180]:

> If the answer to Question 1 is that the second alternative [i.e. the 'broad' interpretation of the blocking statute] applies: Does the first paragraph of Art.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 proceeding that the reason for termination was not to comply with US sanctions?

Underlying this second question was certainly the German Court's awareness that since the re-imposition of US sanctions against Iran, many European entities had decided to terminate their business activities with Iranian counterparts. Needless to say, this decision, rather than being motivated by any problems European entities might have with Iranian entities, was most likely motivated by the fear these entities had of seeing their business ruined by a breach of the aforementioned sanctions. Among these companies, some of them had justified the termination of contracts by referring to problems strictly related to the contract with the Iranian entities. In contrast, others had made a clear reference to US sanctions, and it was precisely these companies that could most easily be accused of violating the EU blocking statute[181]. In light of this situation, of which this case is only one of many examples, the German Court therefore wanted to find out what was the correct method to terminate a contract with an entity subject to US sanctions without violating the statute and without the aforementioned Commission authorisation. The answer might seem obvious. Without the Commission's authorisation, the contract can be terminated if the European entity's choice is dictated by reasons related to the contract in question and not by US sanctions. Nevertheless, it must also be said that European entities enjoy the right of freedom of contract, recognised by the Rome I Regulation, which, among other things, would allow them not to enter into or terminate a contract with an entity subject to US sanctions[182]. However, at the same time, the latter could invoke the EU blocking statute to denounce a violation of it by the European entity, at which point the reasons behind the European entity's choice would have to be considered. In other words, European entities may decide to terminate or not enter into a contract with an entity sanctioned by US sanctions, but this choice should not depend

[180] Case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*, Request for a Preliminary Ruling in the Internal Document of the Court.
[181] ROVETTA ET AL. (2021: 54).
[182] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

on sanctions, but on other reasons. Therefore, the German Court's second question sought to shed light on precisely these dynamics that have been created with increasing frequency since the reintroduction of US sanctions against Iran.

In the present case, the German Court could be deemed to have thought that the German company was entitled to violate the EU blocking statute by complying with US sanctions in light of the fact that it conducted more than half of its business in the United States[183]. Consequently, a violation of the sanctions would have resulted in a very serious economic loss for the German company[184]. However, it could be countered that the German company could have asked for the Commission's permission according to the second paragraph of Article 5 of the blocking statute. Instead, not only did the company not even consider asking for it, but the German Court seemed to go along with it. This shows how little awareness there is of the blocking statute in the member States, especially if we consider that some States have not even approved the sanctions to be imposed in case of its violation[185]. It seems that even the member States do not know how to apply the EU blocking statute or understand its benefits, despite the fact that there are studies showing that US sanctions harm the interests of European companies and, above all, that this situation could be partly solved by the blocking statute itself. For instance, Figure 1 shows how much US sanctions cost European companies, while Figure 2 gives an overview of the sanctions applied by OFAC depending on the relevant sanction regime. It should jump out at you not only the losses European companies face due to US sanctions, but especially the fact that, as Figure 2 shows, 55% of US sanctions fall under the acts that the blocking statute opposes[186]. Therefore, a proper use of the latter could benefit not only the EU, but the companies themselves, which, so far, seem to be actually disadvantaged rather than helped by the blocking statute[187].

In conclusion, the second question addressed to the CJEU concerns a uniform way to conclude contracts with entities sanctioned by third countries without the risk of violating the blocking statute. However, in addition to the CJEU's answer, attention should also be paid to the way in which the blocking statute is implemented, as a proper implementation of it would benefit all members of the EU. In fact, while US sanctions harm the interests of European companies, the very blocking statute may be the best means to counteract this problem, even if for now it is more seen as an obstacle to be avoided.

[183] See *supra*.
[184] ROVETTA ET AL. (2021: 54).
[185] See *supra*.
[186] See *supra*.
[187] ROVETTA ET AL. (2021: 56).

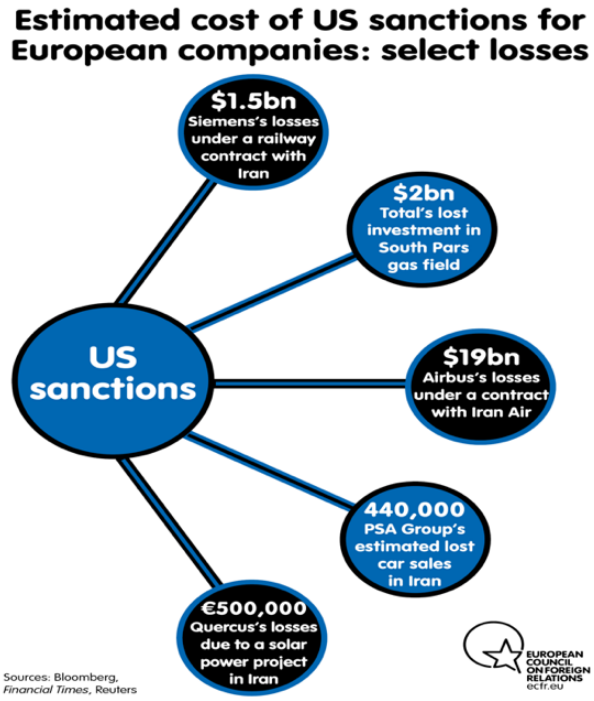

Figure 1 Examples of Impact of US Sanctions on the Decision-Making Process Among the EU Companies, Geranmayeh E., Rapnouil M.L., 25 June 2019, *Estimated cost of US sanctions for European companies: select losses.*

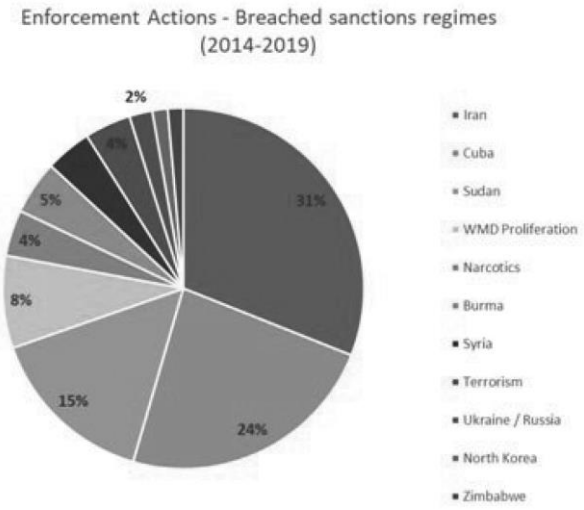

Figure 2 The Overview of the OFAC Enforcement, Depending on the Relevant Sanctions Regime, Association of certified sanctions specialists, 2019, *Enforcement Actions – Breached sanctions regime (2014-2019).*

3.3.3 The third question

The third question addressed to the CJEU could be defined as the most concrete of the four, as the Hamburg Higher Regional Court asked for clarification on the most appropriate means to be used in the case of disputes such as the court case we are analysing. It reads as follows[188]:

> If Question 2 is answered in the affirmative: Must ordinary termination in the breach of the first paragraph of Art.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?

As the other questions, the third question also shows the German Court's inclination towards the German company rather than the Iranian bank. Indeed, the German Court speaks of ordinary termination, although at the same time it seems to recognise that there are no conditions for invoking extraordinary circumstances to justify the termination of the contract. It thus asks how one should act in case of a violation of the blocking statute, in particular whether the terminated contract should be reactivated or whether the sanction provided by the member State concerned is sufficient to reinstate the violation of the blocking statute. In the case we are analysing, it is clear that the Iranian bank has every interest in not terminating the contract, as the services offered by the German company are necessary for its operation[189]. On the other hand, instead, it is possible that the German company, rather than providing these services to the Iranian bank and thus violating US sanctions, may prefer to pay the fine for violating the EU blocking statute. In fact, the risk is that there will be more economic damage by violating the US sanctions than by violating the blocking statute, and this is a clear example of how US sanctions influence the choices of third-country companies, even in the absence of orders issued on the basis of the legislative acts to which the statute is opposed[190].
Obviously, the CJEU's answer will influence relations between the US and the EU. Indeed, assuming the CJEU declares that, in a case like this, the contract should be reactivated, the European company would have to provide a service to an entity that is sanctioned by the United States. This would then be a clear signal to show the US that although the EU is an ally, it is not willing to serve its interests. Therefore, once again, everything will depend on the interpretation that the CJEU adopts, i.e. the 'broad' or the 'narrow one'. Even one might suggest that, in light of the supremacy and direct application of EU law and in light of the circumstances of the case, it would be logical for the Court of Justice of the European Union to order that the contract not be terminated[191].

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[188] Case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*, Request for a Preliminary Ruling in the Internal Document of the Court.
[189] See *supra*.
[190] ROVETTA ET AL. (2021: 56).
[191] ROVETTA ET AL. (2021: 56).

In conclusion, we have seen that the third question concerns what to do in the event of a violation of the blocking statute. In particular, whether a terminated or non-activated contract should be reactivated or whether the payment of the prescribed penalty is sufficient to rectify the violation of the statute. The Court's answer will be decisive, but it must be taken into account that, in light of the influence of the US sanctions, a more serious commitment by the member States to enforce the statute is also necessary. Indeed, many European companies may in any case prefer to comply with US sanctions rather than the blocking statute if member States continue to be negligent in enforcing the latter[192].

3.3.4 The fourth question

With its fourth and final question, the German Court asked the Court of Justice of the European Union whether the Charter of Fundamental Rights of the European Union[193] could justify a violation of the EU blocking statute. It reads as follows[194]:

> If the answer to Question 3 is that the first applies: Considering Arts 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 Art.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]?

The fourth question also underlines the German Court's bias towards the German company, but it also highlights, even more than the third question, the German Court's awareness that the German company probably violated the EU blocking statute by not seeking authorisation from the Commission. Indeed, the German Court wants to understand whether the Charter of Fundamental Rights of the European Union and the business the German company conducts in the United States were sufficient justifications to which the latter could refer to explain its decision. In particular, the German Court referred to Articles 16 and 52 of the Charter of Fundamental Rights of the European Union.
Article 16 reads as follows:

> The freedom to conduct a business in accordance with Union law and national law and practices is recognised[195].

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[192] See *supra*.
[193] Thereafter, we will refer to the Charter of Fundamental Rights of the European Union as the Charter.
[194] Case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*, Request for a Preliminary Ruling in the Internal Document of the Court.
[195] Article 16, Charter of Fundamental Rights of the European Union.

To better understand the content and purpose of Article 16, we can also consider the explanatory notes to this article. It reads as follows:

> This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity […] and freedom of contract […] and Article 119(1) and (3) of the Treaty on the Functioning of the European Union, which recognises free competition. Of course, this right is to be exercised with respect for Union law and national legislation. It may be subject to the limitations provided for in Article 51(1) of the Charter[196].

Article 16 thus grants European entities not only the right to conduct business, but more generally the freedom to engage in economic or commercial activity, freedom of contract, and free competition. However, it should be remembered that the Charter of Fundamental Rights of the European Union applies in conjunction with any other laws of the European Union[197]. This means that, in this case, the Charter, and consequently Article 16, are sufficient legal bases to which a European company could only appeal when combined with the interpretation and application of the EU blocking statute. This is why Article 16 is said to be a residuary provision[198]. In addition, as the explanatory note also specifies, the freedom to conduct a business, like the other rights contained in the Charter, is not absolute, which means that it may be subject to proportionate limitations. These limitations are regulated in Article 52(1) of the Charter of Fundamental Rights of the European Union, that reads as follows:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others[199].

Article 52(1) thus explains that limitations to the fundamental freedoms contained in the Charter of Fundamental Rights of the European Union are authorised when they are provided for by law, do not alter the essence of the right in question, are necessary, and respect the general objectives of the European Union.
In the case we are analysing, to hold that the German company's right to conduct business has been violated and that this limitation does not meet the criteria listed in Article 52(1) would render the EU blocking statute useless and inapplicable. On the contrary, to recognise no interference of the blocking statute with Article 16 of the Charter would be to encourage the use of the former. As always, everything depends on the CJEU's answer and, above all,

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[196] Explanatory notes to Article 16 of the Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 3030/17, 14 December 2007.
[197] Judgement of the Court, Grand Chamber, 26 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson.*
[198] ROVETTA ET AL. (2021: 57).
[199] Article 52(1), Charter of Fundamental Rights of the European Union.

on the answer to the first question, as this will influence all other answers. Nevertheless, we can already anticipate that the blocking statute does not violate the essence of Article 16, simply because it recognises the possibility of obtaining the Commission's authorisation to deviate from it without violating it[200]. It thus gives companies the possibility to protect their interests, in addition to the fact that, as mentioned above, it does not oblige companies to enter into contracts with sanctioned entities, but prohibits them from complying with US sanctions with the exception of the aforementioned authorisation[201]. Consequently, European entities are free to manage their affairs as they wish. To sum up, the fourth question concerns the relationship between the EU blocking statute and the Charter of Fundamental Rights of the European Union, in particular Articles 16 and 52. The German Court wanted to find out whether there was an interference by the former with the latter, but, if for the other questions the CJEU's answer is not a foregone conclusion, in this case it seems so, since an affirmative answer would invalidate the blocking statute. However, everything will also depend on the other answers, so even this one cannot be considered completely certain.

3.4 The answer of the Court of Justice of the European Union

On 21 December 2021 the Court of Justice of the European Union ruled on the Case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*. The CJEU answered the four questions put to it by the Hamburg Higher Regional Court, which respectively concerned the purpose of Article 5 of the EU blocking statute, a possible way to conclude a contract with an entity subject to the sanctions of a third country without violating the statute, how to act in the event of a violation of the statute, i.e. only by imposing the sanction provided for by the member State of the entity concerned or by also reactivating the concluded contract, and whether the blocking statute interfered with the freedom to conduct business recognised for European companies by Article 16 of the Charter of Fundamental Rights of the European Union[202]. In this last paragraph, we will thus examine the respective answers of the CJEU in detail[203].

3.4.1. The scope of the protection under the EU blocking statute

As to the first question, the Court of Justice of the European Union considers that even in the absence of requests or instructions from an administrative or judicial authority to the EU operator, the restriction in Article 5 of the EU blocking statute still applies. This interpretation not only follows from literal

[200] ROVETTA ET AL. (2021: 57).
[201] See *supra*.
[202] See *supra*.
[203] The first and second answers will be analysed separately, while the third and fourth answers will be analysed together.

elements relating to the broad wording of the provision, but is also in line with the purpose of the statute[204]. In fact, the purpose of the blocking statute is to safeguard the legal order of the European Union, as well as its interests and those of natural or legal persons exercising their rights under the TFEU, also in relations with third parties. Furthermore, the statute is supported in this respect by the idea that the extraterritorial scope of the foreign legislative acts to which it applies means that they not only infringe international law, but also make the pursuit of the objectives of the EU legal order more difficult[205]. Hence, the need to prevent their effects through a broad interpretation of the prohibition of Article 5 of the statute.
The CJEU's answer thus seems to prefer the 'broad' interpretation rather than the 'narrow' one. In fact, the CJEU held that in order to apply Article 5 of the blocking statute it is sufficient to establish an influence on the European entity by the legislative acts to which the statute objects, thus excluding the hypothesis that an order issued by a judicial or administrative body is a *conditio sine qua non*. This is in light of the fact that the purpose of the statute is to protect the sovereignty of the EU and its member States, as well as the interests of European entities, and, therefore, accepting any kind of interference by the aforementioned acts would imply a violation of the blocking statute as a whole[206].

3.4.2 How to conclude a contract with a sanctioned entity without violating the EU blocking statute

The second question is whether there is an obligation to provide justification for a contractual termination carried out against an entity sanctioned by the acts to which the blocking statute objects. Before the Hamburg Higher Regional Court, BMI had in fact argued that a termination without justification would be contrary to the blocking statute's prohibition in Article 5[207]. The CJEU, therefore, first examined whether Article 5 of the statute qualifies as a rule with direct effect and can, therefore, be immediately invoked before the national court to render the contractual termination ineffective. In this regard, the CJEU considers the prohibition in Article 5 to be clear, precise, and unconditional. Moreover, it is written in a legal document, i.e. a regulation, which is directly applicable in the member States as set out in Article 288

[204] See *supra*.
[205] A European company that invests predominantly in the United States would be at a disadvantage compared to one that does not, as it would feel the weight of US sanctions influencing its choices unlike the other that would have no pressure. In addition, these sanctions mean giving up business, in this case the German company's business with the Iranian bank, which is a loss both for the entity concerned and for the whole European Union. Thus, on the one hand, European entities would not be protected equally, on the other hand, there would be economic losses at company and community level.
[206] CELLERINO (2022: 568).
[207] See *supra*.

TFEU[208]. Therefore, there is no doubt that the contested rule has direct effect in domestic judgments. Furthermore, it should also be noted that a clause such as Article 9 of the regulation, which instructs the member States to determine the sanctions to be imposed in the event of a breach of its rules, cannot in itself invalidate the prohibition in Article 5 of the regulation. On the contrary, the main method of ensuring the effectiveness of the rules is precisely this direct effect[209].

At this point, to understand what the CJEU means, a distinction must be made between the concept of direct effect and direct applicability. "A European norm has direct effect when it can be directly enforced; that is, when the legal norm is so clear and precise that it can be applied in a specific case"[210]. On the other hand, "direct applicability […] means that no 'validating' national act is needed for European law to have effects within the domestic legal orders"[211]. For example, if a European norm requires member States to legislate in order to be enforceable, leaving it up to the member States themselves to decide how to achieve the goal of that norm, this norm is not directly applicable and therefore has no direct effect. In fact, direct effect requires direct applicability, whereas the reverse is not true. In conclusion, "whereas the former [direct applicability] refers to the *internal* effect of a European norm within national legal orders, the latter [direct effect] refers to the *individual* effect of a norm in specific cases"[212]. In the case we are analysing, the CJEU recognised Article 5 as having direct effect because it is clear, precise, and unconditional. Furthermore, the blocking statute is a regulation and, therefore, it is binding in its entirety and directly applicable in the member States.

Therefore, after recognising the direct applicability and effect of the blocking statute, the CJEU gave an answer as to how to act in the event that a European entity terminates a contract with an entity sanctioned by the legislative acts to which the statute is opposed. In this regard, the CJEU recognised that no provision of the blocking statute imposes an obligation to state reasons on a European operator who decides to terminate a contractual relationship with an entity affected by the aforementioned sanctions regime. However, the CJEU added that, in the absence of a statement of reasons and where the conditions are met to show that the choice was intended to comply with the acts to which the blocking statute is opposed, the company in question must prove the opposite, i.e. that the choice was not intended to comply with the aforementioned foreign acts. Thus, even if the blocking statute does not provide for a duty to state reasons, in situations such as those in the case described above, the terminating company is required to prove that its choice did not violate the blocking statute, but merely reflected strictly contractual reasons[213]. Obviously, another necessary condition for such justification to be required is the absence

[208] See *supra*.
[209] CELLERINO (2022: 568).
[210] SCHÜTZE (2021: 154).
[211] SCHÜTZE (2021: 165).
[212] SCHÜTZE (2021: 154).
[213] CELLERINO (2022: 568).

of the Commission's authorisation as provided for in the second paragraph of Article 5[214]. One could, however, counter that European companies could justify the splitting of a contract with reasons that conceal their true desire to comply with US sanctions. However, to avoid this, national courts are called upon to check the veracity of the reasons presented by the European company. Furthermore, in the event that the company refers to the economic losses it would incur if it violated the US sanctions, it is plausible that the national court would have to find that the blocking statute had been violated, since such a justification is only acceptable with the authorisation of the commission to comply with the sanctions in question without violating the blocking statute[215]. Thus, for the second question, the CJEU, after recognising the direct applicability and direct effect of the blocking statute, stated that formally no justification is required for the conclusion of a contract by a European entity with one sanctioned by the acts to which the statute is opposed. However, should the conditions exist for which it seems plausible that the choice of the European company was influenced by the aforementioned acts, the latter would have to prove otherwise. Furthermore, it does not seem possible to invoke as justification the economic losses that the European company would suffer if it did not comply with the US sanctions, since for such a case the EU blocking statute requires an authorisation by the Commission.

3.4.3 Violation of the EU blocking statute and the relationship between the EU blocking statute and Article 16 of the Charter of Fundamental Rights of the European Union

The CJEU's third and fourth answers concern how to act in the event of a violation of the blocking statute and whether the statute interferes with the freedom of European companies to conduct business, recognised by Article 16 of the Charter of Fundamental Rights of the European Union. First of all, the CJEU recognised that a violation of the statute would require not only the imposition of the prescribed sanction, but also the reactivation of the concluded contract, because otherwise compliance with the legislative acts to which the statute is opposed would continue to be ensured. Nevertheless, at the same time, the Court of Justice of the European Union considered it appropriate for the national court to review whether or not the continuation of the contractual relationship would result in economic damages that are disproportionate to the objectives of the statute[216]. Moreover, national courts will also have to verify whether there is a disproportionate restriction of Article 16

[214] See *supra*.
[215] CELLERINO (2022: 569).
[216] The objectives of the EU blocking statute are to protect the existing legal order and the interests of the EU in general. Should the continuation of the contract result in too great an economic loss for the European entity involved, it is plausible that the breach of the blocking statute only entails the payment of the sanction provided for by the member State of the European entity.

of the Charter of Fundamental Rights of the European Union in that specific case[217]. Article 16 recognises the freedom to conduct business, including freedom of contract, but this freedom is not absolute, but may be subject to limitations. However, these limitations must meet the criteria laid down in Article 52, i.e. they must be provided for by law, not alter the essence of the freedom in question, necessary, and respect the general objectives of the European Union[218]. Thus, the national court will have to verify compliance with the two articles, as well as ascertain the extent of the harm that European society would suffer in the event of a breach of these sanctions. This introduces an element of flexibility, because while the CJEU considers that in general Article 5 and the blocking statute as a whole do not disproportionately restrict the Charter of Fundamental Rights of the European Union, it also recognises the uniqueness of each individual case[219]. At the same time, however, the national court will also have to understand why the European entity did not seek the Commission's authorisation with which it could have complied with the US sanctions without violating the blocking statute. For this question, however, one answer seems almost obvious. Indeed, many European companies might not apply for the aforementioned authorisation because of the uncertainty of receiving it. Thus, instead of risking receiving a negative response from the Commission and violating US sanctions, they prefer to directly violate the blocking statute. In addition, a kind of conflict may also arise between the Commission and national courts, as the latter may be more inclined to recognise the companies' motives. As a result, European companies would prefer to violate the European blocking statute without seeking the Commission's authorisation, not only because of the economic harm they would suffer and the uncertainty of obtaining the aforementioned authorisation, but also because of the possibility that, in the event of an appeal by the sanctioned entity, the national court would be more inclined than the Commission to hear their arguments and safeguard their interests. Once again, therefore, the vision of the blocking statute emerges as an instrument that hinders rather than furthers the interests of European entities[220].

In conclusion, the CJEU's responses emphasised the obligation to prefer the 'broad' rather than the 'narrow' interpretation of the blocking statute. In particular, the CJEU stated that an administrative or judicial order based on the acts to which the statute is opposed is not necessary to register a violation of the statute, in particular of Article 5, as the influence exercised by the aforementioned acts on the European entity also results in a violation of the statute.

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[217] Article 52 concerns the limits that may be imposed on the rights the Charter of Fundamental Rights of the European Union recognises.

[218] See *supra*.

[219] The CJEU considers that the blocking statute does not restrict the freedom of an undertaking to assert its interests in a contract, but only limits its powers in relation to Article 5 of the blocking statute. Nevertheless, as an objective of the European Union, this limitation is legitimate. At the same time, however, it considers that this general consideration may not be true in specific cases.

[220] CELLERINO (2022: 570).

Moreover, the CJEU also held that in the event that a European entity terminated a contract with an entity subject to the sanctions imposed by the acts to which the statute is opposed and there were conditions under which the choice was determined by the aforementioned acts, the European entity could be required to prove that its choice did not have as its purpose to comply with the sanctions in question. Finally, in relation to the third and fourth questions, the CJEU stated that a violation of the blocking statute must be remedied by applying the sanction provided for and reactivating the contract concluded, unless the reactivation of the contract would have disproportionate effects on the entity involved with respect to the objectives of the EU blocking statute. This proportionality check will be carried out by national courts, which will also have to clarify whether, in the specific case they are working on, the blocking statute disproportionately restricts Article 16 of the Charter. On a general level, however, the Court has already specified that the limitations imposed by the EU blocking statute on Article 16 of the Charter comply with the criteria laid down in Article 52 of the Charter and are therefore perfectly legitimate.
If we now apply the CJEU's answers to the case we have analysed, we could say that the Hamburg Higher Regional Court will have to consider the reasons why the German company decided to terminate the contract with the Iranian entity. Indeed, on the one hand there are grounds for the German company's choice to have been influenced by US sanctions, on the other hand, the lack of an order from the US entities is not a valid reason to say that the German company's choice was not a consequence of the re-imposition of the aforementioned sanctions. Moreover, should the German company be accused of violating the statute, not only will it have to pay the penalty stipulated by Germany according to Article 9 of the EU blocking statute, but it will also have to continue the contract with the Iranian bank until its natural termination, assuming that the economic damage it would face would not be disproportionate to the objectives of the statute. Finally, with regard to the limits imposed on its freedom to conduct business, it will be up to the German Court to consider the particularities of the case, although the CJEU has been clear that the blocking statute in itself does not disproportionately restrict Article 16 of the Charter of Fundamental Rights of the European Union.
In conclusion, it is worth saying that, after these clarifications by the Court, it would be appropriate for the perspective one has of the blocking statute to change. It should no longer be seen as a 'punitive' instrument, but as a 'protective' one. The Court has left it to the national courts to consider all the particularities of the case they face by giving them general guidance as a sign of openness. Nevertheless, it is important that the view of national judges and the Commission on the interpretation of the statute is similar, i.e. currently it seems that it is easier for a European entity to be acquitted in front of the former than to obtain non-compliance authorisation from the latter, and this is one of the causes that encourages violations of the statute. In addition, the Commission needs to clarify the criteria to be met in order to obtain the authorisation granted by the second paragraph of Article 5 of the statute, as only

then would companies have an incentive to comply with the blocking statute instead of US sanctions[221].

[221] CELLERINO (2022: 571-572).

4. Possible developments on the European Union blocking statute, the European Union, and the United States

4.1 What can happen? Possible developments

After the response of the Court of Justice of the European Union (CJEU) to the Hamburg Higher Regional Court, one could expect changes in the application of the European Union (EU) blocking statute and probably also in the relationship between the EU and the United States (US).
A first change had already emerged when the United States announced its exit from the Joint Comprehensive Plan of Action and the European Union condemned this decision. In fact, the High Representative Federica Mogherini had immediately announced that the European Union would not follow in the footsteps of the United States, but would commit itself to the pact as long as Iran did the same. However, the EU, especially France, Germany and the United Kingdom (UK), had also tried to talk to the Trump administration to seek a compromise, but in vain[222]. Consequently, this lack of dialogue with the US government led the EU to resort to other avenues in order to protect European companies from the reintroduction of US secondary sanctions against Iran.
In particular, in its press release of May 2018, the European Union announced that it would pursue four fronts in order to prevent European companies from being harmed by the US choice[223]. First of all, the EU updated its blocking statute to include the aforementioned US sanctions among the acts it opposes. Secondly, the European Union worked on the possibility of the European Investment Bank investing in assets outside the European Union. This would allow the European Investment Bank to finance European companies doing business in Iran. Furthermore, the European Union assured that it would pledge its support to Iran in particularly important fields, such as energy. Finally, on 31 January 2019, the Instrument for Supporting Trade Exchanges (INSTEX) was announced to allow member States to continue to trade legitimately with Iranian industries and government[224].
To these measures must be added the response of the CJEU on the blocking statute, which seems to have taken a hard line against the US. Indeed, the CJEU has ruled that the statute does not apply only in the case of direct or indirect orders by US authorities, but also when the influence exercised by the latter on European entities is evident. At the same time, however, it is necessary for the Commission to clarify the criteria for obtaining the authorisation that would allow European companies to comply with US sanctions. This would encourage the use of the statute, which would no longer be seen as an

[222] See *supra*.
[223] European Commission Press Release IP/18/3861.
[224] See *supra*.

instrument that harms European companies, but one that protects them. In addition, member States that have not yet approved sanctions for violating the statute should hurry to do so[225].
Therefore, to understand how things might evolve, in the next paragraphs we will look at the behaviour of the European Union and the member States. We will also focus on the United Kingdom, as a former EU member State, but at the forefront of the fight against US extraterritorial sanctions. Finally, we will consider other solutions to the blocking statute, including the World Trade Organisation's dispute settlement mechanism and possible steps that the Biden administration might take to remedy the situation created by Trump.

4.1.1 The European Union and its member States

When it comes to the relationship between the European Union and its member States with the EU blocking statute, the main problem seems to be the mistrust with which the latter is approached. In fact, a proper implementation of the statute also depends on a change of attitude on the part of the European Union and the member States. Indeed, on the one hand, the Commission should clarify the criteria for obtaining authorisation to comply with US sanctions without violating the statute, in case of serious economic losses for the European entities involved. This would provide an incentive for European companies not to violate the statute for fear of not obtaining the Commission's authorisation, but to follow the procedure established by the statute[226]. On the other hand, all member States should approve, according to Article 9 of the blocking statute, the sanctions to be applied in case of violation of the latter. Indeed, the fact that some States have not yet approved these sanctions calls into question the authority of the statute and, above all, may suggest that it is not considered an effective instrument. Furthermore, it would also be advisable for the sanctions approved by the States to be more homogeneous so as to avoid that there are derisory fines in some States and larger fines in others. However, this is almost impossible because it is up to the member States to determine the sanctions to be imposed and, as we have seen, the concept of what constitutes a proportionate, effective, and dissuasive sanction depends from State to State[227].
This attitude towards the blocking statute should lead us to believe that it is the least preferred instrument of the European Union and its member States to oppose US sanctions. Instead, they might look with more interest to the World Trade Organisation's dispute settlement mechanism. However, the CJEU's ruling in the Case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*, on 21 December 2021 should not go unnoticed. In fact, the CJEU clearly rejected the restrictive use of the blocking statute that had been made up to that

[225] JENNISON (2020: 168).
[226] See *supra*.
[227] See *supra*.

point. On the contrary, it emphasised that the statute applies whenever US sanctions influence the choices of European companies. Consequently, the CJEU opted for a very broad use of the statute, which is not limited only to cases where there are direct or indirect orders from the US authorities. In addition, the CJEU also denied the assumption that the statute disproportionately restricts Article 16 of the Charter of Fundamental Rights of the European Union and demanded that European entities explain the reasons for terminating a contract if it appears to have been dictated by the sanctions the statute opposes[228].

Therefore, we can conclude that as far as the European Union and the member States are concerned, despite the reluctance of the latter towards the statute, the CJEU's ruling could change the way the statute is applied by member States and national courts. In fact, the CJEU ruling has clarified the doubts that existed about the blocking statute and that were often used as excuses to avoid its proper application. Obviously, though, much will also depend on the possibility of other solutions, such as the World Trade Organisation's dispute settlement mechanism or an agreement reached with the Biden administration, but in the meantime, there seems to be no doubt that the Court of Justice of the European Union has made it clear that the EU already has a tool to oppose US sanctions.

4.1.2 The United Kingdom

Another country to consider is the United Kingdom. The main reasons are the fact that it was a member of the European Union and its assiduous battle against US extraterritorial sanctions.

As early as 1980, the UK took the first steps to protect British trade from US interference. Indeed, the Protection of Trading Interests Act had been passed, the aim of which was clearly to counter any attempt by third countries, first and foremost the United States, to control the commercial activities of the UK and its entities. Regarding its application, entities affected by these measures had to report to the UK Secretary of State which demands or prohibitions hindered their commercial affairs. The UK Secretary of State would then assess whether there was indeed interference from the extra-territorial act in question[229].

After the passing of the Protection of Trading Interests Act, there was also a court battle between the US and the UK over the extraterritorial imposition of US antitrust laws. In particular, in 1982, the liquidator of Laker Airways, a British low-cost airline, brought a number of airlines to the District Court of Columbia on charges of violating US antitrust statutes. Some of these companies were British and they sought an injunction from the English courts to block Laker Airways' court action. The British Court of Appeals granted the

[228] See *supra*.
[229] JENNISON (2020: 170).

injunction, giving reasons to the British companies accused by Laker Airways[230]. By granting the injunction, the British Court of Appeals thus clearly showed the UK's determination to oppose any kind of extraterritorial interference with UK entities, regardless of whether that interference comes from extraterritorial sanctions or from the US court system[231].
Given the UK's commitment to countering these US interferences, it is legitimate to wonder how the EU's attitude will change. In fact, the UK has always been the least reluctant European member State to condemn US interference with other countries' interests. Therefore, one answer might be that now the European attitude will be even more cautious, since the State that had fought the hardest for this battle is no longer a member State. However, it should not be forgotten that until now the Court of Justice of the European Union had never ruled on the blocking statute, whereas now the member States have clearer guidance on how to apply it. Therefore, Brexit may have been compensated by this CJEU's ruling, which is certainly more important than the influence that one member State could exert on the others.
On the other hand, it is also important to think about the measures the UK will adopt from now on. Looking back, it could be said that again it will be at the forefront of opposing this US practice. However, the real question is who between the EU and the UK will lead the fight against US sanctions, but this will only become apparent with time.
This is what, albeit hypothetically, might change in the EU, the member States and the UK after Brexit and the CJEU's ruling. In the next chapters, we will instead examine alternatives to the EU blocking statute and what might change in the United States.

4.2 The World Trade Organisation and its dispute settlement mechanism

The most plausible alternative to the use of the EU blocking statute is the dispute settlement mechanism of the World Trade Organisation. This alternative had already been used by the European Union in 1996 with regard to the Cuban Liberty and Democratic Solidarity Act of 1996, but the dispute process had been activated and then not concluded. In fact, in 1996, the European Union had challenged the extraterritorial aspects of the aforementioned legislative act before the World Trade Organisation. The EU had requested the creation of a dispute settlement panel to analyse the consistency of the US act with the General Agreement on Tariffs and Trade 1994 (GATT) and the General Agreement on Trade in Services (GATS)[232]. However, the United States had justified the measures condemned by the European Union by referring to

[230] JENNISON (2020: 171).
[231] The British Court of Appeals allowed British airlines to circumvent the jurisdiction of US courts without directly challenging it.
[232] Both GATT and GATS are treaties of the World Trade Organisation. The former covers trade in goods, while the latter covers trade in services. All members of the WTO are parties to the GATT and GATS, including the US and the EU.

the 'national security exception' clause, recognised by both the GATT and the GATS. This clause is used by a State when it considers that certain actions are necessary to protect its security interests, just as they might be necessary in the event of war or other emergencies. Furthermore, the State can decide for itself whether a situation is dangerous enough to justify the use of the clause, but, for this very reason, it is difficult to object to its use. However, there are at least two objective criteria that could be kept in mind. First of all, the State resorting to the 'national security exception' clause would have to demonstrate that the use of the clause is a proportionate response to the problem it faces. In the case of the Cuban Liberty and Democratic Solidarity Act of 1996, the US would have to prove that the embargo against Cuba was a proportionate response to the communist State's threat to the US. Second, the State would also have to prove that the clause was adopted in a situation of war or other international emergency in which its security interests are truly at risk. Obviously, however, due to the discretion with which this clause can be used, such checks are not made[233].

In any case, in 1996 the process initiated by the European Union was never finished, because in 1997 the United States and the European Union reached a series of agreements that did not move the dispute settlement mechanism of the World Trade Organisation forward. It is still unclear whether this was due to the fact that the World Trade Organisation had only recently been established and therefore States did not place much trust in it, as it had not undertaken many dispute resolutions. Or, whether this was due to the European desire not to challenge a partner like the United States. In general, one tends to think that there is not just one reason, but several reasons. These include the US threat not to participate in the WTO challenge, the EU's fear that the WTO would accept the US justification to use the 'national security exception' clause, and the uncertainty on both sides of the actual applicability of the clause[234].

Almost thirty years later, however, the situation may have changed considerably. Indeed, the WTO is no longer a new organisation with little experience, but, on the contrary, has already dealt with more than 400 disputes. In addition, there is also the fact that the WTO dispute settlement mechanism has a much shorter time frame than the national courts, to which one would have to resort if one invoked the blocking statute. In fact, in the former case, we are talking about 10 months, while in the latter case it could take years. At the same time, however, a problem has arisen that was not there in the 1990s. Already the Trump administration had threatened to leave the WTO, because in its view it went against US interests. Therefore, the EU's use of the WTO's challenge mechanism could increase the discontent of the United States even further. However, it is also true that there is now the Biden administration, which has calmed the disagreements between the US and the EU. Neverthe-

[233] JENNISON (2020: 182).
[234] JENNISON (2020: 183).

less, we should not forget that in a little over a year there will be a new presidential election in the US and it is not clear who between Liberals and Republicans will win[235].
In conclusion, we have thus seen that the World Trade Organisation's dispute settlement mechanism could be a solution to which the European Union could resort. Compared to the 1990s, when the European Union had activated this mechanism in vain in connection with the US secondary sanctions against Cuba, today the WTO seems to be a more authoritative body on which States can rely. However, such a choice could increase the US administration's discontent with the organisation, should it support the EU's condemnation of the US secondary sanctions against Iran. This seems unlikely to happen under the Biden administration, but the odds could increase should the Republicans win the 2024 presidential election. Therefore, in the next section we will try to find out whether it is possible for the EU to reach an agreement with the Biden administration on secondary sanctions against Iran before then, so as to already try to remedy possible future squabbles between the European Union and a possible Republican-led US.

4.3 Biden administration and US-EU relations

An agreement between the European Union and the Biden administration on secondary sanctions against Iran would be the best way to heal the rift between the two allies created by Trump in 2018, when the US withdrew the Joint Comprehensive Plan of Action[236]. The main reason Trump referred to was Iran's failure to fulfil its obligations under the agreement, despite the fact that it had been ascertained that Iran had hitherto complied with everything that had been agreed. For his part, on the other hand, Biden was immediately in favour of resuming dialogue with Iran, although the US President's enthusiasm was not reciprocated by the Islamic republic, which said it was ready to refuse to restart negotiations with the United States[237]. It is therefore important to understand which paths Biden could or could have taken, while also considering the positions of Iran and the European Union.
After exiting the Joint Comprehensive Plan of Action (JCPoA), the Trump administration did nothing but weaken the Iranian economy and push Iran to destabilise the situation in the Middle East again and resume its nuclear plans. Indeed, it should not be forgotten that the purpose of the JCPoA was to prevent Iran from becoming a nuclear power and continuing to destabilise the political situation in the Middle East. Goals that had been achieved until before the Trump administration's decision. Indeed, not only has Iran now considerably increased its uranium enrichment levels, but, among other things, it also tried to influence the elections of the Iraqi prime minister and supported the Assad

[235] JENNISON (2020: 183).
[236] See *supra*.
[237] SHILO ET ROSENBLUM (2021: 3).

regime in Syria. In short, we are back to the situation before the JCPoA, when Iran was an uncontrollable and unpredictable power. The least convenient choice for Biden would therefore be to remain in the current situation, where Iran has once again become a problem for the US. From this point of view, it would seem logical for the US to re-join the JCPoA, also considering the support of US citizens in this regard. Indeed, when Obama signed the agreement in 2015, most citizens said they were satisfied, while three years later more than 60 per cent did not support Trump's choice. Also not to be forgotten was the disapproval that had come from the European Union regarding the US decision, which had helped to ruin relations between the two powers[238].

Therefore, the reasons why Biden should think about reopening negotiations with Iran as soon as possible are many more than one. However, not only would the rancour shown by the Islamic republic not be conducive to such a rapprochement, but also the imminent arrival of the US elections would seem not to be conducive to a resumption of the US-Iran deal. Indeed, it seems clear that for this term the Biden administration will solve neither the geopolitical problem of Iran nor that of sanctions and, consequently, it is plausible that the situation will remain in the balance until the next elections, from which the Biden administration could win and perhaps resolve this situation. Nevertheless, if this were not the case, not only the situation with Iran, but also with the European Union could suffer, because it is rather unlikely that a Republican administration would be willing to revise its position on the Iran agreement and the secondary sanctions that cause so many problems for European entities.

[238] SHILO ET ROSENBLUM (2021: 6).

5. Conclusion

5.1 Final remarks

We have thus come to the end of this thesis, in which we have seen the role that the European Union (EU) blocking statute has had and will have both within the European Union and its member States and internationally.
Approved in 1996 by the European Union to counter the secondary sanctions of the United States (US) against Cuba, Iran and Libya, the EU blocking statute was updated following US exit from the Joint Comprehensive Plan of ActionA (JCPoA) and the re-imposition of secondary sanctions against Iran. The re-imposition of these sanctions was the reason for a legal case between an Iranian bank and a German company, accused by the latter of violating the European blocking statute in order to comply with the aforementioned sanctions, i.e. the Case C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*. The significance of this case lies above all in the fact that for the first time a national court, i.e. the Hamburg Higher Regional Court, referred to the Court of Justice of the European Union (CJEU) through the preliminary ruling procedure for clarification of certain provisions of the blocking statute. From the analysis of the four questions asked and the four answers given, it was clear to us that the CJEU seemed to encourage member States and national courts to make wider and more careful use of the blocking statute in order to implement it correctly. However, there are situations that need to be resolved for a proper implementation of the blocking statute to be possible. For example, the Commission should clarify the criteria for granting European entities authorisation not to comply with the blocking statute, while those member States that have not yet approved the sanctions to be applied in case of violation of the statute should do so.
On the other hand, at the international level we analysed the possible role that the United Kingdom (UK) will play as a former EU member and at the forefront of the fight against US extraterritorial practices. In the future, it will be interesting to see who between the UK and the EU will oppose US extraterritorial practices more strongly and whether another EU member State will take the UK's place, i.e. whether it will establish itself in the EU as the leading State in the fight against these practices. At present, we might think that this role will fall to one between France and Germany, or it will be shared by both.
Finally, we considered the use of the WTO dispute settlement mechanism and a possible agreement with the Biden administration as an alternative to the blocking statute. However, two considerations must be made. First, it must be acknowledged that Biden will most likely fail to redress the situation with Iran, and consequently that of secondary sanctions, by the end of his first term. Second, as long as Biden is in office it seems unlikely that the EU will decide to use the WTO dispute settlement mechanism in order to avoid souring its newfound relationship with the US. Consequently, it seems clear that the blocking statute still remains the best solution. In particular, if we consider

that the outcome of the US presidential election could also lead to a Republican victory, it would be appropriate for the EU and its member States to start using the blocking statute according to the CJEU's indications, seeing it not as an instrument that weakens European companies, but as one that protects them. Certainly, a 'broader' use of the statute might upset the US, but it would also be a sign of the EU's clear will to no longer accept interference from its transatlantic partner. In addition, we must remember that as of today the blocking statute is the only guarantee with which the European Union and all its entities can protect themselves from US secondary sanctions.

Therefore, in light of the CJEU's indications and the looming international situation, it would seem that the EU blocking statute will be much more talked about in the future than it has been so far.

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Riassunto

Questo elaborato ha analizzato lo statuto di blocco dell'Unione europea alla luce del Caso C-124/20, *Bank Melli Iran v Telekom Deutschland GmbH*. In particolare, si è cercato di far luce sia sulla situazione antecedente la sentenza della Corte di giustizia dell'Unione europea sia sui possibili scenari futuri.
Lo statuto di blocco dell'Unione europea fu approvato nel 1996 in risposta a tre atti legislativi statunitensi, i.e. *the Cuban Democracy Act of 1992*, *the Cuban Liberty and Democratic Solidarity Act of 1996, and the Iran and Libya Sanctions Act of 1996*. L'obiettivo dello statuto di blocco europeo è quello di proteggere le entità europee dalla legislazione di paesi terzi con effetti extraterritoriali. La critica rivolta agli Stati Uniti dall'Unione europea e dalla comunità internazionale in generale era infatti quella di cercare di influenzare gli interessi delle entità di stati terzi attraverso gli atti soprammenzionati. Infatti, questi tre atti imponevano sanzioni secondarie contro Cuba, l'Iran e la Libia. A differenza delle sanzioni primarie, che devono essere rispettate solo dalle entità dello Stato che le approva, le sanzioni secondarie devono essere rispettate da ogni entità, indipendentemente dalla sua nazionalità. Le entità che infrangono questo secondo tipo di sanzioni, generalmente, non possono commerciare, o se possono in maniera limitata, con lo Stato sanzionatore oppure hanno un accesso limitato al suo sistema finanziario. Considerata l'importanza degli Stati Uniti nel mercato globale, tutte le entità di Stati terzi non hanno alcun interesse a violare queste sanzioni al fine di non danneggiare i loro affari. In particolare, tutte quelle entità che svolgono la maggior parte dei loro affari negli Stati Uniti, vedrebbero i loro profitti svanire se non dovessero allinearsi con le scelte del governo statunitense. A questo tentativo da parte degli Stati Uniti di influenzare gli interessi delle entità straniere, diversi Stati della comunità internazionale hanno reagito approvando i soprammenzionati statuti di blocco, dei quali quello europeo è un esempio.
Quasi trent'anni dopo, nel 2018, il tema delle sanzioni secondarie statunitensi è tornato a far parlare di sé a causa della decisione di Donald Trump di uscire unilateralmente dal Piano d'azione congiunto globale. Il Piano d'azione congiunto globale è un accordo firmato il 14 luglio 2015 da Cina, Francia, Germania, Iran, Regno Unito, Russia, Unione europea e Stati Uniti con l'obiettivo di controllare e limitare il programma nucleare iraniano. In cambio, questi Stati si impegnano a rimuovere le sanzioni precedentemente imposte contro l'Iran per via dei suoi progetti di sviluppo di armi nucleari. Tuttavia, l'uscita degli Stati Uniti non solo ha minato i rapporti tra la potenza atlantica e la repubblica islamica, ma ha anche determinato la re-imposizione delle sanzioni statunitensi contro l'Iran, soprattutto quelle secondarie. Questa scelta è stata fortemente criticata dall'Unione Europea che da un lato ha confermato di voler rimanere parte dell'accordo, dall'altro ha aggiornato lo statuto di blocco europeo per includere, tra gli atti ai quali si oppone, le sanzioni secondarie appena reimpostate dagli Stati Uniti contro l'Iran. Inoltre, l'Unione Europea ha anche approvato un nuovo sistema per l'esecuzione di transazioni finanziarie, i.e. *INSTEX*. L'obiettivo di *INSTEX* è quello di facilitare le

transazioni finanziarie tra entità iraniane ed europee, eludendo il sistema bancario internazionale e gli effetti delle sanzioni secondarie statunitensi, le quali limitano pesantemente il sistema finanziario iraniano.
Nel caso che abbiamo analizzato, una compagnia tedesca, i.e. *Telekom Deutschland GmbH*, è stata accusata da una banca iraniana, i.e. *Bank Melli Iran*, di aver violato lo statuto di blocco per rispettare le sanzioni statunitensi reimpostate contro l'Iran. Infatti, secondo la banca iraniana, la compagnia tedesca avrebbe deciso di non fornirle più i suoi servizi perché non voleva infrangere le soprammenzionate sanzioni. Il caso è finito di fronte alle corti tedesche e, infine, alla Corte di giustizia dell'Unione europea. Infatti, il Tribunale distrettuale di Amburgo attraverso il procedimento pregiudiziale ha interrogato la Corte di giustizia dell'Unione europea sulla corretta interpretazione dello statuto di blocco. È stata la prima volta che la Corte di giustizia dell'Unione europea è stata interpellata sullo statuto di blocco e, per questo, questo caso risulta uno dei più rilevanti degli ultimi tempi. Tuttavia, prima di analizzare nel dettaglio il caso, ci siamo soffermati sullo statuto di blocco dell'Unione europea, in particolare sui suoi articoli più importanti.
Innanzitutto, abbiamo analizzato gli articoli dei Trattai europei sui quali è stato basato lo statuto di blocco. Lo statuto di blocco è stato basato sugli articoli 113, 73c e 235 del Trattato che istituisce la Comunità europea, che corrispondono agli articoli 207, 64(2) e 352 del Trattato sul funzionamento dell'Unione europea. Questa scelta è stata giustificata dalla necessità di proteggere dalle sanzioni secondarie statunitensi tutte le azioni di entità europee legate direttamente o indirettamente al commercio internazionale e al movimento di capitale. Inoltre, per tutte quelle attività che non sono collegate né al commercio internazionale né al movimento di capitale, ma che sono ugualmente influenzate da queste sanzioni, l'Unione europea ha firmato il *Joint Action*, i.e. Azione comune.
Per quanto riguarda gli articoli dello statuto di blocco europeo, essi sono dodici. Gli Articoli 1 e 11 specificano rispettivamente le attività e le categorie di persone e imprese che vengono tutelate dallo statuto di blocco. L'Articolo 2, invece, obbliga i cittadini e le compagnie europee ad avvisare la Commissione europea in caso di interferenza da parte degli atti legislativi ai quali lo statuto si oppone con i loro interessi, mentre l'Articolo 3 impone alla Commissione europea il principio di confidenzialità nel trattamento delle informazioni ricevute. L'Articolo 4 proibisce il riconoscimento e l'esecuzione di qualsiasi sentenza di tribunale e di qualsiasi decisione di autorità amministrativa presa al di fuori dell'Unione europea che applichi leggi in conflitto con lo statuto di blocco. Di particolare importanza è l'Articolo 5, poiché vieta il rispetto degli atti legislativi ai quali lo statuto si oppone. Tuttavia, riconosce anche la possibilità di ottenere un'autorizzazione da parte della Commissione europea per rispettare tali atti qualora, in caso contrario, gli interessi dell'entità coinvolta fossero danneggiati considerevolmente. Il procedimento che la Commissione deve seguire per garantire tale autorizzazione è specificato negli Articoli 7 e 8. Altro articolo fondamentale è l'Articolo 6, poiché permette alle entità tutelate dallo statuto di essere

risarcite in caso di danni dovuti agli atti legislativi in contrasto con quest'ultimo. Infine, l'Articolo 9 specifica la procedura da seguire in caso di violazione dello statuto, in base alla quale sono gli Stati membri ad approvare le sanzioni da applicare nel caso in cui si verificasse tale violazione. L'Articolo 10 impone agli Stati membri l'obbligo di riferire alla Commissione qualsiasi decisione presa relativa allo statuto di blocco, mentre l'Articolo 12 riguarda la sua entrata in vigore.
Tra gli articoli più importanti abbiamo menzionato gli Articoli 2, 5, 6 e 9. In particolare, per quanto riguarda l'Articolo 2 abbiamo ragionato su come, a volte, gli interessi dell'Unione e quelli delle entità europee potrebbero non coincidere. Ciò vuol dire che per quest'ultime potrebbe essere più vantaggioso violare lo statuto di blocco che le sanzioni statunitensi. Tuttavia, proprio per evitare che lo statuto fosse visto dalle entità europee come uno strumento deleterio piuttosto che protettivo, l'Articolo 5 riconosce la possibilità di ottenere un'autorizzazione da parte della Commissione per rispettare gli atti ai quali lo statuto si oppone senza violarlo. Il problema, però, è che non sono chiari i criteri in base ai quali tale autorizzazione viene concessa e, per questo, le entità europee nella maggior parte dei casi preferiscono direttamente violare lo statuto senza rivolgersi alla Commissione. L'articolo 6, invece, è definito la clausola di *claw-back* dello statuto, poiché garantisce alle entità europee di essere risarcite qualora i loro interessi fossero danneggiati dagli atti legislativi ai quali lo statuto si oppone. Infine, l'Articolo 9 impone agli Stati membri l'obbligo di approvare le sanzioni da applicare in caso di violazione dello statuto. Tuttavia, abbiamo notato non solo che le sanzioni approvate dagli Stati membri differiscono notevolmente tra loro per severità della pena, ma anche che ci sono Stati che non hanno ancora provveduto alla loro approvazione.
Dopo quest'analisi degli articoli più importanti dello statuto di blocco, nel capitolo 3 abbiamo analizzato il caso giudiziario tra la banca iraniana e la compagnia tedesca. Come già menzionato, la compagnia tedesca era stata accusata dalla banca iraniana di aver violato lo statuto di blocco europeo terminando il contratto che le due entità avevano. La Corte di prima istanza tedesca, però, aveva ritenuto che non fosse stata commessa alcuna violazione dello statuto di blocco da parte della compagnia tedesca, poiché la decisione non era stata frutto di un ordine da parte delle autorità statunitensi. Tuttavia, la compagnia tedesca non avrebbe potuto chiudere il contratto con effetto immediato, ma avrebbe dovuto aspettare il termine di scadenza previsto da quest'ultimo. La banca iraniana, però, ha fatto appello al Tribunale distrettuale di Amburgo sul primo punto sostenendo che la scelta della compagnia tedesca era stata chiaramente influenzata dalle sanzioni statunitensi, anche se non vi era stato alcun ordine da parte delle autorità statunitensi. A questo punto il Tribunale distrettuale di Amburgo attraverso il procedimento pregiudiziale ha posto quattro domande alla Corte di giustizia dell'Unione europea in merito alla corretta interpretazione dello statuto di blocco.
L'importanza di questo caso sta nel fatto che per la prima volta la Corte di giustizia dell'Unione europea sia stata chiamata ad esprimersi sullo statuto di blocco. A livello nazionale, invece, era già capitato che i giudici si

occupassero di casi riguardanti lo statuto di blocco, come nei casi in Inghilterra e Germania che abbiamo analizzato. Un elemento comune che abbiamo riscontrato in tutti e tre i casi è stata la tendenza delle corti nazionali a prediligere più l'interesse delle entità europee che un rispetto rigoroso dello statuto. Infine, abbiamo anche analizzato l'unico caso in cui si è cercato di applicare lo statuto di blocco. Il caso è avvenuto in Austria, dove una banca aveva deciso di chiudere i conti a dei cittadini cubani prima che fosse acquisita da un investitore statunitense. Il governo austriaco aveva quindi invocato l'utilizzo dello statuto di blocco, ma la sua applicazione non era stata necessaria, poiché gli Stati Uniti avevano permesso l'acquisizione della banca senza dover far chiudere i conti dei cittadini cubani.

Dopo questo breve excursus, ci siamo concentrati sulle domande poste dal Tribunale distrettuale di Amburgo alla Corte di giustizia dell'Unione europea e sulle risposte date da quest'ultima. Il Tribunale distrettuale di Amburgo ha fatto ricorso al procedimento pregiudiziale, che consente alle corti nazionali degli Stati membri di interrogare la Corte di giustizia dell'Unione europea sull'interpretazione dei Trattati dell'Unione europea o sulla validità di atti delle istituzioni europee, secondo l'articolo 267 del Trattato sul funzionamento dell'Unione europea.

La prima domanda che è stata posta alla Corte di giustizia dell'Unione europea riguarda l'interpretazione dell'articolo 5 dello statuto, in particolare quando si può stabilire che un'entità europea abbia rispettato le sanzioni violando lo statuto di blocco. In altre parole, la Corte di giustizia dell'Unione europea ha dovuto specificare se una violazione dello statuto avviene o meno solo nel caso in cui ci sia un ordine, diretto o indiretto, da parte delle autorità statunitensi. Con la seconda domanda, invece, la Corte tedesca ha voluto un chiarimento sul modo in cui un'entità europea possa terminare un contratto con un'entità sanzionata senza violare lo statuto di blocco. In questo caso, la Corte di giustizia dell'Unione europea ha dovuto chiarire come un'entità europea possa smentire l'accusa di aver concluso un contratto per rispettare le sanzioni statunitensi, come nel caso in questione. La Corte tedesca ha anche chiesto se, in caso di violazione dello statuto di blocco, fosse sufficiente imporre le sanzioni previste dallo Stato membro dell'entità europea coinvolta o se fosse anche necessario annullare l'azione che ha violato lo statuto di blocco, in questo caso la terminazione del contratto con la banca iraniana. Infine, la Corte di giustizia dell'Unione europea ha dovuto chiarire se lo statuto limiti in maniera sproporzionata l'articolo 16 della Carta dei Diritti Fondamentali dell'Unione Europea, che riconosce il diritto alla libertà d'impresa.

Sulle seguenti domande la Corte di giustizia dell'Unione Europea si è espressa il 21 dicembre 2021. Per quanto riguarda la prima domanda, la Corte di giustizia dell'Unione europea ha espressamente detto che una violazione dell'articolo 5 si registra ogniqualvolta gli atti legislativi ai quali lo statuto si oppone influenzino un'entità europea. Ha così escluso che tale violazione avvenga solo in presenza di un ordine da parte delle entità del Paese terzo. Ha poi aggiunto che un'entità europea non deve giustificare la sua scelta di

terminare un contratto con un'entità sanzionata a meno che non ci siano le condizioni per pensare che la scelta dell'entità europea sia stata influenzata dagli atti legislativi contrastati dallo statuto di blocco. Infine, in risposta alla terza e alla quarta domanda, la Corte di giustizia dell'Unione europea ha specificato che una violazione dello statuto implicherà non solo l'imposizione delle sanzioni previste, ma anche l'annullamento dell'azione che ha determinato la violazione dello statuto. Ciò vuol dire che se, per esempio, la compagnia tedesca fosse accusata di aver violato lo statuto di blocco, oltre a pagare la sanzione prevista dallo Stato tedesco, dovrà anche rispettare il contratto firmato con la banca iraniana fino alla data prevista da quest'ultimo. Tuttavia, la Corte di giustizia dell'Unione europea ha aggiunto che la Corte tedesca dovrà verificare che i danni economici che registrerebbe la compagnia tedesca qualora fosse riattivato il suddetto contratto non siano sproporzionati rispetto agli obiettivi perseguiti dallo statuto di blocco. Infine, è stato anche affermato che lo statuto di blocco e in particolare l'articolo 5 non limitano in modo sproporzionato l'articolo 16 della Carta dei Diritti Fondamentali dell'Unione Europea, poiché il diritto alla libertà d'impresa non è assoluto, ma può essere limitato. Tuttavia, queste limitazioni devono rispettare i criteri stabiliti dall'articolo 52 della Carta dei Diritti Fondamentali dell'Unione Europea. Questo controllo potrà essere svolto dalle singole corte nazionali in base ai diversi casi, ma, in generale, le limitazioni alla libertà d'impresa imposte dallo statuto di blocco sono legittime e in linea con i criteri dell'articolo 52.

Infine, dopo l'analisi delle risposte della Corte di giustizia dell'Unione europea, abbiamo esaminato i possibili scenari futuri che potrebbero delinearsi. Da un lato abbiamo ragionato su come il comportamento dell'Unione europea e degli Stati membri potrebbe cambiare dopo la sentenza del 21 dicembre 2021. Infatti, è stata fatta chiarezza su questioni spesso utilizzate come giustificazioni per non implementare lo statuto di blocco correttamente. Tuttavia, affinché ci sia una corretta implementazione dello statuto, è anche necessario che la Commissione chiarisca i criteri per ottenere l'autorizzazione a rispettare le sanzioni statunitensi senza violare lo statuto di blocco e che gli Stati membri che non hanno ancora approvato le sanzioni da applicare in caso di violazione di quest'ultimo si adoperino in tal senso. Ciò, infatti, darebbe allo statuto di blocco maggiore credibilità, oltre al fatto che non sarebbe più percepito come strumento che danneggia le entità europee, ma come strumento che le protegge.

Abbiamo poi parlato del Regno Unito, in quanto ex-Stato dell'Unione europea, ma sempre in prima linea nella lotta alle pratiche extraterritoriali statunitensi. Nel 1980, infatti, il Regno Unito era stato uno dei primi Stati ad approvare una legge che proteggesse il commercio britannico dall'interferenza statunitense ed era stato il maggior sostenitore dello statuto di blocco europeo. Dopo la sua uscita dall'Unione, sarà interessante vedere non solo quale Stato membro guiderà la lotta contro le pratiche extra-territoriali statunitensi, ma anche chi tra Unione europea e Regno Unito si batterà con maggior forza contro tali pratiche.

Poi, abbiamo analizzato quali potrebbero essere le alternative allo statuto di blocco europeo per contrastare le sanzioni statunitensi. La prima alternativa che abbiamo analizzato è il meccanismo di risoluzione delle controversie commerciali dell'Organizzazione Mondiale del Commercio (OMC). Già nel 1996, l'Unione europea voleva attivarlo in risposta all'atto legislativo statunitense del 1996 contro Cuba, ma il processo non fu mai terminato poiché furono raggiunti una serie di accordi tra Stati Uniti e Unione europea. Secondo molti, il raggiungimento di questi accordi fu determinato dalla poca fiducia che si riponeva nell'Organizzazione Mondiale del Commercio, poiché creata solo l'anno prima. Tuttavia, a distanza di quasi trent'anni, le dispute che sono state affrontate dall'OMC sono più di quattrocento e la fiducia che gli Stati vi ripongono è sicuramente più alta. Quindi, sarebbe plausibile aspettarsi che l'Unione europea ricorra a questa soluzione, anche se è difficile che avvenga sotto l'amministrazione Biden per evitare di creare nuove tensioni con il governo statunitense, che potrebbero poi peggiorare nel caso in cui i Repubblicani vincessero le elezioni nel 2024.
La seconda alternativa allo statuto di blocco potrebbe invece essere un accordo tra l'amministrazione Biden e l'Iran. Nonostante il Presidente statunitense avesse da subito espresso il suo desiderio di riprendere le relazioni con lo Stato iraniano, quest'ultimo aveva categoricamente rifiutato la proposta e, per questo, non si sono mai fatti passi avanti in tal senso. Inoltre, tra poco più di un anno ci saranno le elezioni presidenziali e sembra quindi difficile che Biden possa raggiungere un nuovo accordo con l'Iran proprio adesso. Non resta, quindi, che aspettare l'esito delle elezioni del 2024, dove la vittoria di Biden potrebbe consentire all'attuale Presidente statunitense di raggiungere questo accordo durante il suo secondo mandato, ma una vittoria dei Repubblicani non solo renderebbe ancora più difficili le relazioni statunitensi con l'Iran, ma, probabilmente, anche quelle con gli alleati europei.
A questo punto, l'elaborato si conclude con un breve riepilogo di tutto ciò che è stato analizzato, ponendo particolare enfasi sulle risposte della Corte di giustizia dell'Unione europea in merito all'interpretazione dello statuto di blocco, che sembra essere, almeno per il momento, lo strumento più efficace a disposizione dell'Unione europea per contrastare le pratiche extraterritoriali statunitensi.