Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 28 May 2020[1]

Case C-134/19 P

Bank Refah Kargaran
v

Council of the European Union

(Appeal — Action for damages — Restrictive measures taken against Iran — Article 29 TEU — Article 215 TFEU — Jurisdiction of the Court to hear an action seeking compensation — Compensation for the damage allegedly suffered by the applicant as a result of the inclusion of its name in various lists of restrictive measures — Possibility of obtaining compensation for a breach of the obligation to state reasons)

I. Introduction

1. The proliferation of nuclear weapons is one of the greatest threats facing humanity. In the context of the Middle East, over the past few years, this threat has become especially acute. To that end, the Member States of the European Union and the European Union itself have sought by means of certain restrictive measures (or sanctions) to dissuade the Islamic Republic of Iran from taking steps such as might enable that State to develop nuclear weapons systems. That is the general background of the present case.

2. By its appeal, Bank Refah Kargaran seeks partial annulment of the judgment of 10 December 2018, *Bank Refah Kargaran* v *Council* (T-552/15, 'the judgment under appeal', not published, EU:T:2018:897), by which the General Court dismissed its action seeking compensation for the damage it allegedly suffered as a result of the inclusion of its name in various lists of restrictive measures. This appeal raises difficult questions of Treaty interpretation with regard to the jurisdiction of this Court to review decisions taken in respect of common security and foreign policy matters and, specifically, the question of whether damages can be awarded where a decision providing for restrictive measures against a natural or legal person, which has been adopted by the Council on the basis of Chapter 2 of Title V TEU, has been annulled by this Court pursuant to Article 275 TFEU.

II. Background to the dispute

3. The background to the dispute, as set out in paragraphs 1 to 13 of the judgment under appeal, may be summarised as follows.

1 Original language: English.

4. As I have just indicated, the dispute takes place in the context of restrictive measures adopted by the European Union in respect of the Islamic Republic of Iran. These measures were, and are, designed to put pressure on the Islamic Republic of Iran to halt certain activities that might pose a real risk of nuclear proliferation and to stop the development by that State of nuclear weapons delivery systems.

5. On 26 July 2010, the name of the applicant, an Iranian bank, was included in the list of entities engaged in nuclear proliferation contained in Annex II to Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran.[2] These measures were taken on the ground that that bank had allegedly taken over certain financial transactions of another major Iranian financial institution, Bank Melli, following the adoption of restrictive measures against the latter financial institution.

6. For the same reasons, the applicant's name was also included in the list in Annex V to Council Regulation (EC) No 423/2007 concerning restrictive measures against Iran (OJ 2007 L 103, p. 1). These restrictive measures against Bank Refah were maintained by Council Implementing Regulation (EU) No 668/2010 of 26 July 2010 implementing Article 7(2) of Regulation No 423/2007 concerning restrictive measures against Iran (OJ 2010 L 195, p. 25).

7. After Regulation No 423/2007 was repealed by Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran,[3] the name of the applicant was included in the list contained in Annex VIII to the latter regulation.

8. By Decision 2010/644/CSFP[4] the Council of the European Union maintained the applicant's name on the list set out in Annex II to Decision 2010/413.[5]

9. The name of the applicant was also maintained in the list in Annex VIII to Regulation No 961/2010 by Council Implementing Regulation (EU) No 1245/2011 of 1 December 2011 implementing Regulation No 961/2010 on restrictive measures against Iran (OJ 2011 L 319, p. 11).

10. Since Regulation No 961/2010 was repealed by Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran (OJ 2012 L 88, p. 1), the name of the applicant was included by the Council in Annex IX of the latter regulation. The reason for listing the applicant is the same as that set out in Decision 2010/413.

11. By application lodged at the Registry of the General Court on 19 January 2011, the applicant brought an action for, inter alia, annulment of Decision 2010/644 and Regulation No 961/2010 in so far as these acts concerned it. Subsequently, the applicant adapted its heads of claim to seek the annulment of Decision 2011/783, Implementing Regulation No 1245/2011 and Regulation No 267/2012, in so far as those acts concern the applicant.

12. In paragraph 83 of the judgment of 6 September 2013, *Bank Refah Kargaran* v *Council* (T-24/11, EU:T:2013:403, 'the annulment judgment'), the General Court upheld the second plea raised by the applicant, in so far as it relied on a breach of the obligation to state reasons. Consequently, the General Court annulled the applicant's listing, first, in Annex II as resulting from Decision 2010/644

2 Council Decision concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 195, p. 39).

3 Regulation on restrictive measures against Iran and repealing Regulation No 423/2007 (OJ 2010 L 281, p. 1).

4 Council Decision 25 October 2010 amending Decision 2010/413 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 281, p. 81).

5 Council Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413 concerning restrictive measures against Iran (OJ 2011 L 319, p. 71) did not amend that list as far as the applicant was concerned.

and subsequently from Decision 2011/783, second, in Annex VIII of Regulation No 961/2010 (as amended in particular by Implementing Regulation No 1245/2011) and, third, in Annex IX of Regulation No 267/2012. In arriving at this decision, the General Court did not consider it necessary to examine the other arguments and pleas in law put forward by the applicant.

13. According to the second paragraph of Article 60 of the Statute of the Court of Justice of the European Union, decisions of the General Court declaring a regulation to be void are to take effect only as from the date of expiry of the period for bringing an appeal referred to in the first paragraph of Article 56 of that Statute or, if an appeal has been brought within that period, as from the date of dismissal of the appeal. The General Court therefore decided that, in order for the dates of effect of the annulment of each listing to be the same, the effects of Annex II to Decision 2010/413, as resulting from Decision 2010/644 and subsequently from Decision 2011/783, had to be maintained in relation to the applicant until the annulment of the applicant's listing in Annex IX to Regulation No 267/2012 also took effect at the same time.

14. At a later stage, the applicant's name was then re-entered in the list of restrictive measures contained in Annex II to Decision 2010/413 by Council Decision 2013/661/CFSP of 15 November 2013.[6] Article 2 of that decision specified that it would enter into force on the day of its publication in the *Official Journal of the European Union*, which was on 16 November 2013.

15. The applicant's name was subsequently included in the list in Annex IX to Regulation No 267/2012 by Council Implementing Regulation (EU) No 1154/2013 of 15 November 2013.[7] That implementing regulation entered into force on the day of its publication in the Official Journal , which also took place on 16 November 2013. In Annex IX, the following reason was stated in respect of the applicant:

'Entity providing support to the Government of Iran. It is 94 per cent owned by the Iranian Social Security Organisation, which in turn is controlled by the Government of Iran, and it provides banking services to government ministries.'

16. By application lodged at the Registry of the General Court on 28 January 2014, the applicant brought an action seeking, inter alia, the annulment of Decision 2013/661 and Implementing Regulation No 1154/2013, in so far as those measures concerned it. That action was dismissed by the judgment of 30 November 2016, *Bank Refah Kargaran* v *Council* (T-65/14, not published, EU:T:2016:692). This second judgment of the General Court was not the subject of an appeal.

III. Procedure before the General Court and the judgment under appeal

17. By application lodged at the Registry of the General Court on 25 September 2015, the applicant brought an action seeking compensation. It asked the General Court to order the European Union to compensate it for the damage resulting from the adoption and maintenance of the restrictive measures concerned until they were annulled by the judgment under appeal, by paying it the sum of EUR 68 651 318, together with statutory interest, in respect of material damage, and the sum of EUR 52 547 415, together with statutory interest, in respect of non-material damage. In the alternative, the applicant asked the General Court to consider that all or part of the sums claimed for non-material damage should be regarded as material damage.

6 Council Decision amending Decision 2010/413 concerning restrictive measures against Iran (OJ 2013 L 306, p. 18).

7 Council Regulation implementing Regulation No 267/2012 concerning restrictive measures against Iran (OJ 2013 L 306, p. 3).

18. By notice lodged at the Registry of the General Court on 6 January 2016, the Commission applied to intervene in the proceedings in support of the form of order sought by the Council. By decision of 3 February 2016, the President of the First Chamber of the General Court allowed that intervention. The Commission filed its statement in intervention and the main parties lodged their observations on that statement within the prescribed periods. [8]

19. By a measure of organisation of procedure dated 19 September 2018, the applicant was invited to submit its observations, in particular on the Council's argument, set out in paragraph 4 of the rejoinder, that the General Court would not have jurisdiction to hear the present action seeking compensation in respect of Decisions 2010/413, 2010/644 and 2011/783. Answers to the applicant's questions were received at the Registry of the General Court on 4 October 2018.

20. In the judgment under appeal, the General Court ruled, in paragraphs 25 to 32, in respect of its jurisdiction to examine an action seeking compensation for harm allegedly suffered as a result of restrictive measures. Following an examination of the relevant Treaty provisions, it concluded that the combined effect of Article 24(1) TEU, Article 40 TEU and the first paragraph of Article 275 TFEU meant that it did not have jurisdiction to hear an action for damages relating to compensation for loss allegedly suffered as a result of the adoption of decisions taken within the framework of the common foreign and security policy (CFSP) under Article 29 TEU, such as Decisions 2010/413, 2010/644 and 2011/783. However, the General Court found that it had jurisdiction to hear a claim for compensation for damage allegedly suffered by a person or entity as a result of restrictive measures adopted on the ground of Article 215 TFEU, such as the individual measures contained in Regulations No 961/2010 and No 267/2012, as well as in Implementing Regulation No 1245/2011, taken against the applicant.

21. As regards the substance of the claim, the General Court recalled, in paragraphs 34 and 35 of the judgment under appeal, that three conditions must be satisfied in order for the European Union to incur non-contractual liability: unlawful conduct consisting in a sufficiently serious breach of a rule of law 'intended to confer rights on individuals' is to be established, actual damage must have been suffered by the applicant and there must be a causal link between the conduct complained of and the alleged damage.

22. The General Court considered, in paragraph 42 et seq., the applicant's three arguments put forward in order to establish the existence of such a breach.

23. Regarding the first argument, alleging the existence of a serious breach of a rule of law due to the infringement of the duty to state reasons, found in the annulment judgment, the General Court rejected it on the basis that the breach of the obligation to state reasons was not likely to constitute a ground for liability on the part of the Union.

24. Concerning the second argument, which was identified by the General Court as alleging that, in the annulment judgment, the General Court found that the Council had infringed its rights of defence and of its right to effective judicial protection, the General Court dismissed it on the ground that, in that judgment, the decisions at issue were annulled on the sole ground of the existence of a breach of the duty to state reasons, without examining the pleas raised by the appellant alleging a breach of its rights of defence and of its right to effective judicial protection.

8 By decision of 7 October 2016 of the President of the First Chamber of the General Court, the proceedings were, in accordance with Article 69(b) of the Rules of Procedure of the General Court, suspended until the Court of Justice's decision terminating the proceedings in Case C-45/15 P, *Safa Nicu Sepahan* v *Council*. By judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402), the Court dismissed the appeals brought by Safa Nicu Sepahan and by the Council. By a way of a measure of organisation of procedure dated 27 February 2018, the parties were invited to inform the General Court of the consequences for the present case of this judgment. The Commission replied to the question on 13 March 2018, the Council and the applicant replied on 15 March 2018.

25. By its third argument, the applicant contends that the Council did not apply the criterion which it claims to have applied in justifying the applicant's inclusion. The General Court dismissed this complaint as inadmissible, since it was raised out of time. Indeed, according to the General Court, the arguments mentioned in the application were based solely on the illegality found by the General Court in the annulment judgment, so that this third argument, which was mentioned for the first time in the applicant's rejoinder, cannot be regarded as expanding on the arguments set out in the application.

26. The General Court concluded that the first condition required to engage the non-contractual liability of the Union relating to the existence of unlawful conduct on the part of the Council was not satisfied in the present case. The General Court thus dismissed the action without examining the two other conditions necessary to engage the Union's non-contractual liability for the purposes of the second paragraph of Article 340 TFEU.

IV. The Appeal

A. Procedure and forms of order sought by the parties

27. The applicant claims that the Court should:

– set aside in part the judgment under appeal;

– in the main proceedings, award it damages for material damage in the amount of EUR 68 651 318 and for non-material damage in the amount of EUR 52 547 415;

– in the alternative, refer the case back to the General Court;

– order the Council to pay the costs of the proceedings at both instances.

28. The Council and the Commission contend that the Court should:

– dismiss the appeal and

– order the applicant to pay the costs.

B. Summary of the applicant's pleas

29. In support of its appeal, the applicant raises seven pleas which can be summarised as alleging in substance that the General Court committed:

– an error of law when it stated that an infringement of the duty to state reasons was not likely to constitute a ground for liability on the part of the Union (first plea);

– an error of law when it held that the fact that an applicant who has been the victim of an unlawful sanction adopted by the Council, has brought an action, and has secured the annulment of that sanction, cannot then invoke the existence of a sufficiently serious breach of the right to effective judicial protection (second plea);

– an error of law when it dismissed a plea set out by the applicant in its reply without determining, as required by the case-law, whether the plea set out in the rejoinder was a result of the normal development of arguments stemming from the application in the legal proceedings (third plea);

– an error of law by misinterpreting the annulment judgment, and by holding that the finding that the Council breached its obligation to disclose to the applicant the evidence adduced against it as regards the grounds for the measures relating to the freezing of funds does not amount to a sufficiently serious breach of EU law giving rise to the liability of the European Union (fourth and fifth pleas);

– a misrepresentation of the application when, in order to find the applicant's argument inadmissible, it considered that the applicant did not, at the stage of its application, allege the unlawfulness of the fact that the grounds for the inclusion of its name in the list of persons targeted by the restrictive measures failed to comply with the criterion applied by the Council (sixth plea);

– a misrepresentation of the application by restricting the grounds of illegality relied on by the applicant solely to a breach of the obligation to state reasons (seventh plea).

30. At the request of the Court of Justice I propose to focus my Opinion in the first instance on the jurisdictional issue, that is to say, whether the General Court erred in law in ruling, as it did, on its jurisdiction in respect of restrictive measures. As for the rest, I will examine only the first plea by which the applicant claims that the General Court erred in law in holding, in the present case, that a breach of the duty to state reasons is not capable of giving rise to a right to damages, the other pleas aiming, in essence, to circumvent this finding of the General Court.

V. Analysis

A. On the jurisdiction of the European Union judicature to award compensation for restrictive measures

1. On whether the Court may raise that issue ex officio

31. At the outset, it should be noted that in its appeal the applicant has not challenged the findings of the General Court in relation to its jurisdiction. Since, however, the question of the Court of Justice's jurisdiction to hear a dispute is a matter of public policy, such a question may be examined at any stage of the proceedings by the Court of Justice, even of its own motion.[9]

32. As the European Union judicature is bound by the principle of adversarial proceedings, such an examination requires, however, that the parties have been informed that the Court was considering raising such a question of its own motion and that they had the opportunity to discuss it. These requirements have been satisfied in the present case.

33. By a letter dated 10 December 2019, the parties were invited to comment at the hearing on the question of whether the Courts of the European Union have jurisdiction to hear the applicant's request for compensation in respect of the damage allegedly suffered as a result of the restrictive measures provided for by decisions falling within the scope of the CFSP. They were also invited to take a position on whether the Court has jurisdiction to raise this issue *ex officio*.

34. It follows that the Court, should it deem this step to be appropriate, may of its own motion examine the question of whether the Courts of the European Union have jurisdiction to decide on an action for damages seeking compensation for loss allegedly suffered as a result of a decision imposing restrictive measures adopted in the context of the CFSP.

9 See, judgments of 12 November 2015, *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753, paragraphs 36 to 38), and of 26 February 2015, *Planet* v *Commission* (C-564/13 P, EU:C:2015:124, paragraph 20).

2. On the substance

35. Before considering the merits of the matter, it seems first opportune to describe what appears to be the general practice of the Council with regard to the adoption of restrictive measures, as well as to examine the case-law of the General Court in respect of its jurisdiction in relation to these matters.

36. Restrictive measures are adopted by the Council, acting unanimously, by virtue of Article 29 TEU. These measures, such as those at issue in this case, contain general provisions which might, for example, seek to restrain the import and export of certain goods to and from specified states. Such measures might also take the form of specific prohibitions directed at a category of addressees which are designed, in effect, to prevent such persons trading or receiving goods or services within the territory of the European Union.

37. To this aim, restrictive measures specify the conditions under which a person may be included and maintained in those annexes. These decisions taken based on Article 29 may also contain bundles of individual decisions which take the form of an annex containing a list of identifiable persons, bodies or entities and the reasons why the Council considers they fulfil the conditions established by the general criteria for being so listed. [10]

38. Restrictive measures adopted by virtue of an Article 29 TEU decision have, therefore, a particular nature since they resemble both measures of general application (in that they impose on a category of addressees determined in a general and abstract manner a prohibition on, inter alia, making available funds and economic resources to persons and entities named in the lists contained in their annexes), and also a bundle of individual decisions affecting those designated persons and entities. [11]

39. These decisions taken based on Article 29 apply, however, only to the Member States and do not have effect so far as third parties are concerned. Consequently, in order to ensure their uniform application by economic operators in all Member States, [12] the Council's practice is also to adopt regulations in parallel by virtue of Article 215 TFEU. Those regulations generally reproduce the text of the decisions based on Article 29 TEU. [13] To that end, the Council acts by a qualified majority on a joint proposal from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy, and informs the European Parliament. In the event, for example, of a change in the list of the persons concerned by the restrictive measures, parallel amendments to the decision based on Article 29 and to the regulation made pursuant to Article 215 TFEU are made.

40. It is to be noted, however, that there is no doubt that the individual decisions which mention and which maintain certain persons in the lists contained in the annexes to these regulations made on the basis of Article 215 TFEU may be the subject of an action for damages in accordance with the second paragraph of Article 340 TFEU, where that regulation has itself either been annulled or where it has been found to have been improperly applied.

41. To date, with regard to the jurisdiction of the EU judicature to hear an action seeking compensation for loss allegedly suffered as a result of the adoption of decisions based on Article 29 TEU, the General Court has concluded in this and other similar cases that it has no jurisdiction in the matter. [14]

10 See, for example, judgment of 21 April 2016, *Council* v *Bank Saderat Iran* (C-200/13 P, EU:C:2016:284, paragraph 119).

11 Judgment of 23 April 2013, *Gbagbo and Others* v *Council* (C-478/11 P to C-482/11 P, EU:C:2013:258, paragraph 56).

12 See, for example, recital 3 of Regulation No 423/2007 and recital 4 of Regulation No 961/2010, which are at issue in the present case.

13 Article 215(2) TFEU states that where a decision adopted in accordance with Chapter 2 of Title V TEU so provides, the Council may adopt restrictive measures against natural or legal persons, groups or non-State entities.

14 The General Court had previously avoided taking a position in this issue: see, to this effect, judgments of 11 June 2014, *Syria International Islamic Bank* v *Council* (T-293/12, not published, EU:T:2014:439, paragraphs 70 and 83), and of 24 September 2014, *Kadhaf Al Dam* v *Council* (T-348/13, not published, EU:T:2014:806, paragraph 115).

42. According to the current line of case-law of the General Court, which was summarised in paragraphs 30 and 31 of the judgment under appeal, by virtue of the sixth sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, the EU Courts do not, in principle, have jurisdiction in respect of provisions of primary law relating to the CFSP and legal acts adopted on the basis thereof.[15] It is only exceptionally, in accordance with the second paragraph of Article 275 TFEU, that the Courts of the European Union have any jurisdiction in the field of the CFSP. That jurisdiction includes, on the one hand, the monitoring of compliance with Article 40 TEU and, on the other hand, actions for annulment brought by persons or entities, under the conditions laid down in the fourth paragraph of Article 263 TFEU, in respect of restrictive measures adopted by the Council in the framework of the CFSP.

43. Critically, however, the General Court interprets the second paragraph of Article 275 TFEU as not conferring any jurisdiction on the EU Courts to hear and determine any action for damages.[16] Therefore, an action for damages seeking compensation in respect of the damage allegedly suffered as a result of an act adopted in the field of the CFSP falls outside that court's jurisdiction.[17] The EU judicature has only jurisdiction to hear a claim for compensation for damage allegedly suffered by a person or entity as a result of the operation of restrictive measures adopted in respect of that person or entity, in accordance with Article 215 TFEU since this latter provision does not fall within the CSFP provisions of the Treaties.[18]

44. In other words, the General Court considers that although it *does not* have jurisdiction to hear an application for compensation from a person or entity in respect of any alleged damage suffered as a result of the restrictive measures adopted in respect of that person or entity in a decision adopted pursuant to the provisions relating to the CFSP (such as Article 29 TEU), it *does have* jurisdiction to hear that very same application, in so far as it seeks compensation for the damage which that person or entity has allegedly suffered as a result of the implementation of those same decisions, where this has been done by regulation pursuant to Article 215 TFEU.[19]

45. In any consideration of this important jurisdictional issue, it is first necessary to examine the relevant Treaty provisions.

46. Although Article 19 TEU confers on the Courts of the European Union the task of '[ensuring] that in the interpretation and application of the Treaties the law is observed', both the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, also expressly state that, in matters of common foreign and security policy, the Court does not, in principle, have jurisdiction either with respect to the provisions relating to the CFSP or 'with respect to acts adopted on the basis of those provisions'.[20]

47. In this respect, as Advocate General Wahl observed in his Opinion in *H* v *Council and Commission* (C-455/14 P, EU:C:2016:212, point 2), these Treaty provisions reflect well established practices of the national courts in respect of foreign policy decisions taken by the governments of the respective Member States. This traditional deference to the executive in relation to judicial review of such decisions can be justified on a variety of different grounds. Many of these decisions — involving, for

15 Judgments of 13 December 2018, *Iran Insurance* v *Council* (T-558/15, EU:T:2018:945) paragraphs 53 and 55), and of 13 December 2018, *Post Bank Iran* v *Council* (T-559/15, EU:T:2018:948, paragraphs 23 to 55).

16 Judgment of 18 February 2016, *Jannatian* v *Council* (T-328/14, not published, EU:T:2016:86, paragraph 30).

17 Judgment of 18 February 2016, *Jannatian* v *Council* (T-328/14, not published, EU:T:2016:86, paragraph 31).

18 See, to that effect, judgments of 11 July 2007, *Sison* v *Council* (T-47/03, not published, EU:T:2007:207, paragraphs 232 to 251), and of 25 November 2014, *Safa Nicu Sepahan* v *Council* (T-384/11, EU:T:2014:986, paragraphs 45 to 149), confirmed on appeal by judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402).

19 See, to that effect, judgments of 13 December 2018, *Iran Insurance* v *Council* (T-558/15, EU:T:2018:945, paragraph 57), and of 13 December 2018, *Post Bank Iran* v *Council* (T-559/15, EU:T:2018:948, paragraph 57).

20 Judgment of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569, paragraph 39). For an explanation of the origins of these provisions, see View of Advocate General Kokott in Opinion 2/13 (*Accession of the European Union to the ECHR*) (EU:C:2014:2475, paragraph 90).

example, questions of State recognition or the appropriate response to the unfriendly actions of a foreign State, not to speak of matters such as the deployment of military personnel — involve questions of high-level politics and diplomacy, which by their nature are inapt for judicial resolution. Decisions in relation to such matters not infrequently involve the exercise of political discretion by the governments of the Member States and in respect of which it is important that the executive and judicial branches do not speak with discordant voices. The questions presented, moreover, in the realm of foreign affairs frequently cannot readily be resolved by means of the application of conventional legal principles or the use of standard judicial methods of fact-finding, proof and legal evaluation of the evidence. [21]

48. This, however, is *not* true in respect of *all* decisions involving foreign policy issues. Specifically, any decision to enter the name of a natural or legal person on a restrictive measures list *is* susceptible to review on standard legal grounds, such as respect for the rights of defence, the obligation to state reasons and the principle of proportionality. Indeed, the earlier annulment judgment which forms the basis of the present proceedings is in its own way testament to the manner in which such specific and particular types of foreign policy decisions can actually be the subject of judicial review.

49. As I have just indicated, this line of thinking clearly explains these Treaty provisions in relation to CFSP decisions. Indeed, it should be borne in mind that acts adopted on the basis of the CFSP provisions are, in principle, solely intended to translate decisions of a purely political nature connected with the implementation of the CFSP in relation to which it is difficult to reconcile judicial review with the separation of powers. Accordingly, as Advocate General Wahl pointed out in *H* v *Council and Commission*, the Court of Justice of the European Union's exercise of judicial review with regard to CFSP matters arises 'only in exceptional circumstances'. [22]

50. It is, however, equally important to recall that not all the acts taken in the context of the CFSP are excluded from the ambit of the Court's review by the relevant Treaty provisions.

51. First, as flows from the wording of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, the express exclusion provided for by these provisions relates only to acts adopted on the basis of one of the provisions set out in Articles 23 to 46 TEU or pursuant to an act itself adopted on the basis of those provisions.

52. Second, irrespective of their legal basis, the Court has held that certain acts are, by their very nature, not excluded from the scope of judicial review by the provisions contained in the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU. The Court has held, for example, that it has jurisdiction to review the validity of acts of staff management, which are similar to decisions adopted by the EU institutions in the exercise of their competences, such as redeployment measures. [23]

53. Third, since the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a derogation from the rule of general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, those provisions must, therefore, be interpreted narrowly. [24] As a result, where an act is subject to the application of rules laid down in the TFEU, such as the provisions of the Financial Regulation with regard to public procurement, the Court retained jurisdiction to interpret and apply those rules. [25]

21 See generally, Butler, G., *Constitutional Law of the EU's Common Foreign and Security Policy*, Hart Publishing, Oxford, 2019, pp. 202-213.

22 C-455/14 P, EU:C:2016:212, point 2.

23 Judgment of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569, paragraphs 54 and 59).

24 See judgment of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569, paragraph 40).

25 Judgment of 12 November 2015, *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753, paragraph 49).

54. Fourth, the Treaties themselves identify two situations in relation to CSFP in which the jurisdiction of the EU Courts has been expressly recognised. Indeed, both the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU provide that the Court has jurisdiction to monitor compliance with Article 40 TEU, namely, to review whether an act has been adopted in compliance with the procedures and powers of the institutions laid down by the Treaties. [26]

55. In addition, by virtue of the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU, the Treaties have expressly conferred on the Court the jurisdiction to review the legality of Council decisions providing for the imposition of restrictive measures on natural or legal persons.

56. With regard to this second exception, while the last sentence of the second subparagraph of Article 24(1) TEU confers on the Court jurisdiction to review the legality of certain decisions referred to in the second paragraph of Article 275 TFEU, the latter provision also specifies that the Court has jurisdiction to review the legality of Council decisions providing for the imposition of restrictive measures on natural or legal persons in the context of proceedings brought 'in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU]'.

57. In this regard, the Court ruled in paragraph 70 of the judgment in *Rosneft* that this reference to the 'conditions laid down in the fourth paragraph of Article 263' is to be understood as referring not to the 'type of procedure under which the Court may review the legality of certain decisions, but rather [to] the type of decisions whose legality may be reviewed by the Court, within any procedure that has as its aim such a review of legality'. [27] Accordingly, since the same kind of decisions might be subject to a reference for a preliminary ruling on validity or an action for annulment [28] and since these two procedures have as their aim a review of the legality of that decision, the Court concluded that it does have jurisdiction, under Article 267 TFEU, to give preliminary rulings on the validity of restrictive measures against natural or legal persons. [29]

58. It is thus clear from the wording of the second paragraph of Article 275 TFEU that the Court's jurisdiction in respect of the legality of restrictive measures is simply in respect of proceedings 'brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU]'.

59. From one viewpoint, the Court's jurisdiction is, by virtue of the second paragraph of Article 275 TFEU, confined *simply* to reviewing the legality of the restrictive measures imposed on natural or legal persons in the context of an action for annulment under the second paragraph of Article 263 TFEU. From this perspective, this jurisdiction does *not* extend to any consequential or related damages claim. After all, it is settled case-law to the effect that an action for damages is not, as such, part of the system of review of the legality of EU acts. [30] As the Court pointed out in *Lütticke* v *Commission*, [31] 'the action for damages … was established … as an *independent form* of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use'. [32]

26 See judgments of 14 June 2016, *Parliament* v *Council* (C-263/14, EU:C:2016:435, paragraph 42), and of 5 March 2015, *Ezz and Others* v *Council* (C-220/14 P, EU:C:2015:147, paragraph 42).

27 Judgment of 28 March 2017 (C-72/15, EU:C:2017:236).

28 Provided, in the latter case, that the person concerned is not the addressee of that decision, in which case the TWD case-law would apply. See judgment of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90, paragraph 18).

29 Judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraphs 66, 68, 76 and 81).

30 Judgment of 12 September 2006, *Reynolds Tobacco and Others v Commission* (C-131/03 P, EU:C:2006:541, paragraph 83).

31 Judgment of 28 April 1971 (4/69, EU:C:1971:40, paragraph 6).

32 Emphasis added.

60. More explicitly, the General Court stated that 'the action for damages … differs from an application for annulment in that its end is not the abolition of a particular measure but compensation for damage caused by an institution … The principle of the independent character of the action for damages is thus explained by the fact that the purpose of such an action differs from that of an action for annulment'.[33] To this one might add that the European Union's non-contractual liability under the second paragraph of Article 340 TFEU is subject to conditions that are different from those laid down in Article 263 TFEU. In particular, for the European Union to incur liability, not only does the applicant need to establish the existence of a breach of a rule of law, but also that this breach is a serious one which involves a rule intended to confer rights on individuals and furthermore that he, she or it suffers loss and damage arising from that breach.[34] In other words, even where an illegality has been clearly established following a successful action for annulment under Article 263 TFEU, there is no automatic entitlement to damages.

61. At the same time, while fidelity to the actual text of the Treaty is especially important — not least in the context of jurisdictional constraints such as the present one — Article 275 TFEU cannot nevertheless be interpreted literally, without deviation. The entire Treaty must, after all, be read in a holistic and harmonious fashion so that its interlocking parts produce a result which ensures, to adapt slightly the words of the Court in *Rosneft*, in paragraph 78, 'the necessary coherence'[35] which is inherent in any system of effective judicial protection.

62. In that regard, it may be observed that in so far as the Council acts by regulation in such matters pursuant to Article 215 TFEU, then in those instances where the relevant portions of the regulation have either been annulled or misapplied, damages may be awarded, pursuant to the second paragraph of Article 340 TFEU, where there has been a sufficiently serious breach of a rule of law which in turn has directly caused loss and damage. That, after all, is what happened in *Safa Nicu Sepahan*, where damages were awarded, pursuant to the second paragraph of Article 340 TFEU, following the failure of the Council to prove that the applicant company had fulfilled at least one of the conditions specified in the relevant regulations providing for the restrictive measures, and where in the circumstances this was found to be a sufficiently serious breach of a rule of law such as to cause loss and damage to the applicant.

63. One may therefore ask: why should the Court have no jurisdiction to award damages where the relevant CSFP restrictive measures decision has been adopted pursuant to Chapter 2 of Title V TEU, yet at the same time enjoy such jurisdiction where the Council has also adopted a regulation (as it invariably does) pursuant to Article 215 TFEU, which, to all intents and purposes, has simply reproduced the original restrictive measures decision? It is hard to avoid the conclusion that such a state of affairs would simply result in indefensible anomalies which would be impossible to justify. All of this would lead to a situation such that the system of remedies envisaged by the Treaties in respect of judicial review of restrictive measures would lack the necessary coherence.

64. In this regard, one cannot, I think, agree with the view expressed by the Council to the effect that the absence of jurisdiction on the part of either the General Court or this Court to hear an action for annulment against an individual decision taken on the basis of Article 29 TEU is counterbalanced by the existence of other avenues of recourse, specifically, the possibility of bringing a *Francovich*-style[36] action against individual Member States by reason of the national measures adopted pursuant to that decision. The most obvious answer to this argument is that by virtue of the second sentence of

33 Judgment of 24 October 2000, *Fresh Marine* v *Commission* (T-178/98, EU:T:2000:240, paragraph 45).

34 See, for example, judgment of 30 May 2017, *Safa Nicu Sepahan v Council* (C-45/15 P, EU:C:2017:402, paragraphs 29-32 and 61-62 and the case-law cited).

35 Judgment of 28 March 2017 (C-72/15, EU:C:2017:236).

36 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428).

Article 29 TEU, Member States are *obliged* to enforce any decisions adopted by virtue of that provision. On any view of the *Francovich* doctrine, individual Member States cannot be held liable for damage caused by a national measure taken in order to comply with such a decision, since any possible illegality, causing damage, cannot be imputed to them.

65. In this regard, it is also important to recall what the Court said in *Rosneft* in paragraphs 72 to 74 of the judgment. The Court stressed that the Union was based on the rule of law and that the very existence of effective judicial review 'designed to ensure compliance with the provisions of EU law is of the essence of the rule of law'. The Court went on to say that while Article 47 of the Charter of Fundamental Rights of the European Union 'cannot confer jurisdiction on the Court where the Treaties exclude it', the principle of effective judicial review 'nonetheless implies that the exclusion of the Court's jurisdiction in the field of CSFP should be interpreted strictly'.

66. Turning to the wording of the second paragraph of Article 275 TFEU, I consider that the better interpretation of these exclusionary provisions is that the drafters intended — for very understandable reasons - simply to exclude the jurisdiction of the Court of Justice in respect of the generality of the CSFP acts, *with the exception of these decisions pertaining to restrictive measures*. Since an action for damages has not been excluded with regard to the acts adopted on the basis of Article 215 TFEU in relation to the same matter, one must doubt whether it was, in fact, the intention of the drafters to exclude an action for damages resulting from or closely related to the action for annulment under Article 263 TFEU in respect of such restrictive measures. Specifically, it was scarcely the intention of the drafters to prevent an applicant, who succeeded in an annulment claim, from claiming damages in respect of what may possibly have been a very serious breach of a rule of law.

67. Any other conclusion would, as I have indicated, lead to indefensible anomalies which would not only be at odds with fundamental principles relating to the protection of the rule of law — itself a founding principle of EU law — but would also impair the effectiveness, as well as the necessary coherence of the system of remedies provided for in the Treaties.

68. It follows, therefore, that in these circumstances the Court is not, I believe, obliged to interpret the bare words of the second paragraph of Article 275 TFEU in a resolutely literal and uncompromising fashion. It is, I think, permitted to interpret the Treaties in a holistic and harmonious manner, with, if necessary, particular regard to the operation of Article 215 TFEU.

69. It is true that both Article 24 TEU and Article 275 TFEU mention the review of the legality of certain decisions, but as far as the reference to the conditions laid down in the fourth paragraph of Article 263[37] is concerned, these terms must be understood in a general sense, by referring to the types of decisions which may be subject to judicial review by the EU judicature and not to a *particular procedure* of judicial review.

37 Paragraph 70 of the *Rosneft* judgment might give the impression that the Court intended to exclude an action which does not have as its aim such a review of legality. However, that paragraph must be seen in the particular context of the *Rosneft* case, which concerned whether the Court had jurisdiction to rule under Article 267 TFEU, and must not be seen as a rule of general application. In so far as the Court had previously held that the action for annulment and the reference for a preliminary ruling on validity both had as their object such a review of legality, this paragraph should be read indeed as seeking solely to emphasise that the reference made by Article 275 TFEU, to Article 263 TFEU, must be understood as including, in particular, any procedure which has as its aim such a review of legality in so far as an act referred to in Article 263 TFEU is concerned.

70. In any case, even if the action for annulment and the action for liability do not pursue the same objectives so that, in the context of the latter, 'a breach of a rule of law' is not in itself sufficient to incur liability, the fact remains that a review of legality of the decision causing the alleged damage is nonetheless necessary as a procedural step in assessing the merit of any action for liability.[38] Admittedly, the existence of an illegality is in itself not sufficient for the European Union to incur non-contractual liability, but as in an action for annulment, certain defects may not result in the annulment of the decision.[39]

71. Accordingly, I consider that the Court does have jurisdiction to hear an action for damages which is directly related to or ancillary to an action for annulment, pursuant to Article 263 TFEU, taken in respect of the legality of restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V TEU and that, given this interpretation, such jurisdiction is not excluded by the second paragraph of Article 275 TFEU.

72. I now propose to consider the merits of the applicant's first plea.

B. On the first plea

73. In accordance with the conditions developed in *Francovich*[40] - which applies by analogy[41] - in order for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU in respect of the unlawful conduct of its institutions, three conditions must be satisfied. These are, first, the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals, second, the fact of damage and, third, the existence of a causal link between the breach of the obligation resting on the perpetrator of the act and the damage sustained by the injured parties.[42]

74. As far as the first condition is concerned, which is the one at issue in the present appeal, the Court has already stated that a sufficiently serious breach of a rule of law intended to confer rights on persons or entities is established where the breach is one that implies that the institution concerned manifestly and gravely disregarded the limits set on its discretion. In this regard, the factors to be taken into consideration are, inter alia, the complexity of the situations to be regulated, the clarity and precision of the rule breached and the measure of discretion left by that rule to the EU institution.[43] A breach can be considered as established when an irregularity is found that would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence.[44]

75. In the judgment under review, in dismissing the action brought by the applicant, the General Court relied on a line of case-law according to which a breach of the duty to state reasons is not sufficient to give rise to non-contractual liability. Since, in its application, the applicant based its action only on the annulment judgment by which the General Court annulled the decisions to include the applicant's name in the lists on grounds of insufficient reasoning, the General Court concluded that the first condition for the European Union to incur non-contractual liability was not satisfied.[45]

38 See, by analogy, judgment of 9 September 2008, *FIAMM and Others* v *Council and Commissio*n (C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 120).

39 This is the case in a situation of circumscribed powers or when the defect is not likely to have affected the content of the decision. See, for example, judgment of 8 May 2014, *Bolloré* v *Commission* (C-414/12 P, not published, EU:C:2014:301, paragraph 84).

40 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 40).

41 Judgment of 4 July 2000, *Bergaderm and Goupil* v *Commission* (C-352/98 P, EU:C:2000:361, paragraph 41).

42 See, for example, judgment of 4 July 2000, *Bergaderm and Goupil* v *Commission* (C-352/98 P, EU:C:2000:361, paragraph 42).

43 See, to that effect, judgment of 10 September 2019, *HTTS* v *Council* (C-123/18 P, EU:C:2019:694, paragraph 42).

44 Ibid., paragraph 43.

45 Paragraphs 42 and 43 of the judgment under appeal.

76. In its first ground of appeal, the applicant argues that the General Court misapplied that line of case-law since it applies only to regulatory measures and that in the present case there were exceptional circumstances which should have led that court to refrain from applying it.

77. For my part, I cannot agree. Considering the general formulation used and the '*raison d'être*', this line of case-law applies to any decision, whether administrative or regulatory in character. Indeed, as the Council has pointed out in its written observations, while in certain judgments the Court has employed this line of case-law in relation to regulatory acts,[46] it has also applied it in the context of individual decisions listing the name of a specific person among those concerned by restrictive measures.[47] Although the applicant rather vaguely invoked exceptional circumstances, there would not appear to have been any basis on which, in the present case, the General Court could properly have departed from this line of case-law.

78. This line of case-law might nonetheless be further clarified in order that any persons or entities concerned might understand how to obtain compensation.

79. This endeavour to provide clarification is of considerable importance when one considers that, first, the right to effective judicial protection implies that, even in circumstances such as those in the main proceedings, where an institution caused damage by adopting an individual decision without proper justification, the person concerned must be able to obtain appropriate compensation for that damage.[48] As the applicant's representative pointed out during the hearing, the existence of this kind of remedy is of far more fundamental importance for that entity than the question of whether the Court has jurisdiction to hear an action seeking compensation for the adoption of a decision based on Article 29 TEU, since, as I have already indicated, in practice the Council systematically adopts two identical decisions, one based on Article 29 TEU and the other on Article 215 TFEU.

80. Second, it may be observed that any infringement of the duty to state reasons will in itself constitute a sufficiently serious breach of a rule of law intended to confer rights on individuals. As Article 296 TFEU tacitly recognises, the right to a statement of reasons is the surest protection against arbitrary decision-making and is a fundamental ingredient of a society founded on the rule of law. More specifically, as one purpose of a statement of reasons is to enable the addressee of the act at issue to ascertain the grounds for its adoption and, accordingly, to decide whether or not it should be challenged,[49] it must be considered as conferring rights on individuals.

81. In this particular context, however, there are two separate aspects of the right to a statement of reasons which merit attention. On the one hand, while the duty to state reasons constitutes an essential procedural requirement which must be observed in all cases,[50] the question of whether the reasons actually given are well founded — which is concerned with the substantive legality of the measure at issue — is a slightly different one.

82. On another hand, in matters of CFSP, the Council may admittedly encounter certain difficulties in terms of the availability of information, but this fact is not such as to excuse any failure to state reasons. Indeed, as the Court ruled: 'the obligation to state reasons laid down in Article 296 TFEU, entails in all circumstances … that that statement of reasons identifies the individual, specific and

46 Judgments of 15 September 1982, *Kind* v *EEC* (106/81, EU:C:1982:291, paragraph 14), and of 6 June 1990, *AERPO and Others* v *Commission* (C-119/88, EU:C:1990:231, paragraph 20).

47 Judgment of 10 September 2019, *HTTS v Council* (C-123/18 P, EU:C:2019:694, paragraph 103).

48 See, to this effect, judgment of 12 September 2006, *Reynolds Tobacco and Others v Commissio*n (C-131/03 P, EU:C:2006:541, paragraphs 80 to 83).

49 See, for example, judgment of 15 November 2012, *Council v Bamba* (C-417/11 P, EU:C:2012:718, paragraph 50).

50 In French, 'une formalité substantielle'.

concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures'.[51] Accordingly, any breach of the duty to state reasons should generally be regarded as an irregularity that any administrative authority exercising ordinary care and diligence should not have committed.

83. Although the Court has never had occasion to date to state why a breach of the duty to state reasons is not *in itself* sufficient to give rise to non-contractual liability, the answer is, I think, nonetheless clear. When an applicant seeks compensation for damage caused by the legal consequences produced by a decision, that damage cannot result exclusively from the absence of a statement of reasons. Rather, such damage is caused only by the absence of a well-founded basis for that decision.[52]

84. Given that the existence of a statement of reasons is required to ensure that the courts may properly review the lawfulness of the decision in question,[53] then in the absence of such a statement of reasons, it is not possible to determine whether or not that decision was well founded, and, by extension, whether the condition of the existence of a causal link is satisfied.[54]

85. This does not mean, however, that in circumstances such as the present case, where, in order to implement and to give effect to an annulment judgment an institution decides to adopt a new decision having effects for the future only, the addressee of that decision is deprived of any possibility of obtaining damages in respect of the substantial negative impact of that original decision.[55]

86. An infringement of the obligation to state reasons, enshrined in Article 296 TFEU, is accordingly not in *itself such as to* engage the European Union's non-contractual liability. The addressee of an unreasoned decision can, however, go further and argue that the decision is not, in fact, well founded and that it was not substantiated by any relevant information or evidence.[56]

87. Admittedly, in the absence of a statement of reasons, the addressee of a decision cannot be expected to do more than state that the merits of that decision are also challenged. Nonetheless, the applicant must at least raise such a plea, relating to what might be termed the internal legality of the contested decisions, in particular that they lack any proper evidential foundation. The Court is, after all, bound by the submissions of the parties. It is not sufficient, therefore, for this purpose that the applicant simply point to the fact that it had challenged the failure to state reasons.

51 See judgments of 18 July 2013, *Commission and Others* v *Kadi* (C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 116 to 118), and of 18 February 2016, *Council* v *Bank Mellat* (C-176/13 P, EU:C:2016:96, paragraph 76).

52 Admittedly, the failure to state reasons may cause damages due to the uncertainty that the addressee of the decision concerned might have suffered because of it, but this damage is non-material. Where a person claims to have suffered damage as a result of the legal effects produced by a decision, that damage is certainly material, but this may only result from the absence of a well-founded basis for that decision.

53 See judgment of 18 July 2013, *Commission and Others* v *Kadi* (C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 100).

54 While some judgments seem to link this line of case-law to the first condition, namely the existence of a breach of a rule of law, in the first judgment where the Court reached that solution, the latter seems to have attributed it to the inability of this kind of illegality to generate damage of this type, which rather relates to an absence of a causal link. See, to that effect, judgment of 15 September 1982, *Kind* v *EEC* (106/81, EU:C:1982:291, paragraphs 14 and 34).

55 See, by analogy, judgment of 18 July 2013, *Commission and Others* v *Kadi* (C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 132). The addressee of an unreasoned decision should suffer neither the consequences of the negligence of the institution concerned, nor of the choice of the General Court to annul a decision without, for reasons of procedural economy, examining all the pleas raised by the applicant. In addition, it should be pointed out that when a judgment annuls a decision for an infringement of the duty to state reasons, the applicant cannot bring an appeal against that judgment on the ground that the General Court improperly qualified the defect found as an infringement of the duty to state reasons.

56 It could be considered that when a decision is annulled, it is, in principle, premature to rule on the non-contractual liability of the European Union, since it is for the institution having adopted that decision to decide how to implement that judgment. It is thus only after the adoption of the measures implementing the judgment that the extent of the damage for which compensation is claimed might be determined, since adopting certain of those measures might have resulted in the negative consequences of that decision being remedied. See, for example, judgment of 14 December 2018, *FV* v *Council* (T-750/16, EU:T:2018:972, paragraphs 176 and 177). However, in the present case, in implementing the annulment judgment, the Council did not retroactively adopt new properly reasoned decisions but decided to adopt decisions for the future only, without compensating the disadvantage suffered by the applicant concerned as a result of the past effects of the annulled measures. See, with regard to the obligation to remedy the past effects of an annulled decision, judgment of 14 May 1998, *Council* v *De Nil and Impens* (C-259/96 P, EU:C:1998:224, paragraph 16). Yet, in the present case, the applicant did not allege that the Council breached its obligation, pursuant to Article 266 TFEU, to take the measures necessary to comply with the judgment annulling the decision.

88. In the event that the addressee of a decision contends that not only has there been a failure to provide reasons, but that no such well-founded reasons exist, it is for the institution concerned, in this instance, the Council, to demonstrate that this decision was in fact well founded.[57] If it fails, at this stage, to provide any explanation as to the reasons which led to the adoption of that act, then, at least, the first conditions for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU must be considered as established.

89. It is true that, in the context of an action for annulment, reasons must, in principle, be stated at the same time as the adoption of that decision and, only exceptionally, at a later stage, at the request of the person concerned. However, it should be borne in mind that an action for damages is an autonomous remedy which is not directed at the annulment of a particular measure, but rather at obtaining compensation for the damage caused by an institution.[58]

90. Consequently, whereas in the context of an action for annulment, the General Court must annul any decision for which no statement of reasons has been provided prior to the bringing of that action, in the case of an action seeking compensation, the Council can still provide that statement at the stage of the statement of defence in order to demonstrate that the decision was in fact well founded and, therefore, that the European Union should not be held liable.[59]

91. In the present case, the applicant relied exclusively, so far as its claim for damages was concerned, on the finding of the General Court in the annulment judgment in respect of the absence of any statement of reasons.

92. Admittedly, in paragraph 82 of that annulment judgment, the General Court stated that the Council had infringed its obligation to state reasons and to disclose to the applicant, as the entity concerned, the evidence used against it, thereby, perhaps, giving the impression that two distinct defects had been identified by that Court.

93. However, as the General Court correctly stated in paragraph 49 of the judgment under appeal, this reference to a breach of the failure to disclose the evidence used against the applicant was referred to in the annulment judgment in response to a plea alleging, not a manifest error of assessment, but rather a breach of the duty to state reasons.[60] Therefore, in the view of the General Court, this did not constitute a separate ground for setting aside the judgment under appeal, but rather supported the finding that the reasons for the contested decisions had not been properly justified since the Council was not even able to disclose to the applicant, as the entity concerned, the evidence used against it. This does not mean, however, that the General Court has found that the Council had not gathered any evidence substantiating the restrictive measures or that adequate and well-founded reasons were not capable of being advanced in respect of the inclusion of the applicant on the restrictive measures list.

57 Judgment of 26 July 2017, *Council* v *Hamas* (C-79/15 P, EU:C:2017:584, paragraph 49).

58 See, judgment of 2 December 1971, *Zuckerfabrik Schöppenstedt* v *Council* (5/71, EU:C:1971:116, paragraph 3). That conclusion is not called into question by the solution reached by the Court in paragraph 46 of the judgment of 10 September 2019, *HTTS* v *Council* (C-123/18 P, EU:C:2019:694), which concerns the possibility for the Council to rely on facts subsequent to a decision in order to justify that decision retroactively, and not the question whether, in the context of an action for liability, the Council may still give reasons justifying the adoption of a decision.

59 One might add in passing, of course, that in these circumstances the late nature of the statement of reasons would have to be taken into account in respect of any order for costs that might be made. The applicant would also have to be permitted to adapt his arguments according to the explanation thus far provided.

60 See paragraph 70 of the annulment judgment.

94. It follows that, contrary to the contentions made by the applicant in its fourth ground of appeal, the General Court did not misinterpret the original annulment judgment on which the applicant had exclusively relied in its first-instance application for compensation, in holding that, in that judgment, the General Court had found only a breach of the duty to state reasons, as distinct from finding that no well-founded reasons could have been advanced.

95. It is also true that, in paragraphs 24, 31 and 33 of its first-instance application for compensation, the applicant stated that, in its view, the Council, on one hand, had infringed the regulatory provisions of the texts it allegedly relied upon by applying them without any justification and, on the other hand, disregarded the rights of the defence and erred in law by failing to establish the merits of the measures adopted. However, it should be borne in mind that, under Article 76(d) of the Rules of Procedure of the General Court, an application must make clear reference to the pleas in law on which the applicant relies. These elements must be sufficiently clear and precise to enable the defendant to prepare its defence and for the General Court to rule on the action, if necessary without further information. [61]

96. In its application, the applicant referred to those circumstances in a subheading of its application, the title [62] and first paragraph thereof stating that its purpose was not to identify the conduct alleged against the Council, but rather to demonstrate that the unlawful behaviour identified in the previous part satisfied the conditions laid down in the Court's case-law in order to render the European Union liable. In the previous part of the first-instance application the applicant had, however, limited itself to the failure to provide reasons in the original annulment judgment when identifying the alleged unlawful conduct.

97. In view of the choice made by the applicant not to refer to these potentially wider arguments in the relevant part of its application, the General Court cannot be criticised for failing to infer from the content of that second subheading that the applicant also intended to rely on those unlawful acts. As the General Court pointed out in paragraphs 52 to 58 of the judgment under appeal, it was only in the course of the proceedings that the applicant made clear that it intended to rely on the absence of the internal legality of the contested decisions.

98. It is this fact which, in my view, distinguishes the present case from the judgment of 25 November 2014, *Safa Nicu Sepahan* v *Council* (T-384/11, EU:T:2014:986) upon which the applicant relies in its appeal. Although the facts of those two cases are quite similar, it is apparent from paragraph 26 of that judgment, confirmed on appeal by the Court, that, in that case, the applicant had expressly relied on an error of assessment — and not (as here) *simply* on a failure to state reasons — in order to support its claim for damages. [63]

99. Consequently, narrow though the distinction between the present case and *Safa Nicu Sepahan* may appear to be, the rejection in the present case by the General Court of the applicant's claim for compensation must be regarded, taking into account the manner in which the applicant had formulated it, as being perfectly justified in the circumstances.

100. I would therefore propose that the Court of Justice dismiss the first ground of appeal.

61 See, for example, order of 21 January 2016, *Internationaler Hilfsfonds* v *Commission* (C-103/15 P, not published, EU:C:2016:51, paragraph 33).

62 That sub-heading was entitled: 'B. This unlawfulness gives rise to Union liability'.

63 Indeed, as I mentioned earlier, the breach of the duty to state reasons and the failure to fulfil the obligation to gather the information or evidence substantiating the restrictive measures are two completely different things. See, to that effect, judgments of 26 July 2017, *Council* v *Hamas* (C-79/15 P, EU:C:2017:584, paragraph 48), and of 26 July 2017, *Council* v *LTTE* (C-599/14 P, EU:C:2017:583, paragraph 70) which use 'first' and 'second' to distinguish each duty. A breach of the first duty is a defect in what may be termed the external legality, whereas a breach of the second duty affects the internal legality of the decision at issue.

VI. Conclusion

101. In the light of the foregoing, my principal conclusions are as follows:

The Court of Justice has jurisdiction to hear an action for damages which is directly related to or ancillary to an action for annulment, pursuant to Article 263 TFEU, taken in respect of the legality of restrictive measures against natural or legal persons adopted by the Council of the European Union on the basis of Chapter 2 of Title V TEU and that, given this interpretation, such jurisdiction is not excluded by the second paragraph of Article 275 TFEU.

The first ground of appeal should be rejected.