



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 12 November 2014¹

Case C-585/13 P

Europäisch-Iranische Handelsbank AG

v

Council of the European Union

(Appeal — Restrictive measures taken against Iran — List of persons and entities to which the freezing of funds and financial resources applies — Inclusion of the appellant's name — Designation criteria — Prohibition of circumventing restrictive measures — Conditions for the lawfulness of financial transactions involving designated Iranian banks — Release of funds — Prior authorisation procedures — Authorisation issued by the competent national authority — 'Third Way' procedure — General approval)

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¹ — Original language: French.

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1. This appeal, brought by Europäisch-Iranische Handelsbank (‘EIH’), seeks to have set aside the judgment of the General Court of the European Union in *Europäisch-Iranische Handelsbank v Council*,² (‘the judgment under appeal’), by which the General Court dismissed in part the appellant’s action for annulment of a number of measures resulting in its inclusion and retention in the lists of persons, entities and bodies (‘persons and entities’) whose assets must be frozen in the context of the campaign against nuclear proliferation in Iran.

2. The Council of the European Union gave as the reason for its decision to freeze the appellant’s funds the fact that EIH had carried out certain financial transactions involving designated entities, that is to say, entities subject to restrictive measures, notwithstanding the fact that their funds had to be frozen. The most salient legal issue raised by this appeal is whether the approval or authorisation allegedly given to EIH by the Bundesbank — the national authority competent under European Union

² — T-434/11, EU:T:2013:405.

(‘EU’) law to authorise the release of funds held by designated entities or to authorise financial transactions to or from non-designated Iranian persons and entities — was sufficient to protect the entity which actually carried out those transactions from being included in the lists and, therefore, to prevent the Council deciding to freeze the appellant’s funds.

I – Background to the case and judgment under appeal

3. It is apparent from paragraph 1 et seq. of the judgment under appeal that the appellant is a German bank specialising in services and businesses relating to or in Iran.

4. The case brought before the General Court falls within the context of the application of restrictive measures introduced in order to apply pressure on Iran to end proliferation-sensitive nuclear activities and the development of nuclear weapon delivery systems (‘nuclear proliferation’).

5. Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP,³ on the one hand, and Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007,⁴ on the other, are, in this case, the framework measures laying down the principle of freezing of the funds and economic resources of the persons and entities whose names appear on the lists in Annex II to Decision 2010/413 and Annex VIII to Regulation No 961/2010, and establishing the conditions for those measures.

6. On 23 May 2011, the Council adopted Decision 2011/299/CFSP amending Decision 2010/413,⁵ and also Implementing Regulation (EU) No 503/2011 implementing Regulation No 961/2010⁶ (together, ‘the measures of 23 May 2011’).

7. By those two measures, the Council entered the appellant’s name for the first time in the lists in Annex II to Decision 2010/413 and in Annex VIII to Regulation No 961/2010, giving the following reasons: ‘EIH has played a key role in assisting a number of Iranian banks with alternative options for completing transactions disrupted by [European Union] sanctions targeting Iran. EIH has been noted acting as the advising bank and intermediary bank in transactions with designated Iranian entities. For example, EIH froze the accounts of [European Union]-designated bank Saderat Iran and Bank Mellat located at EIH Hamburg [(Germany)] in early August 2010. Shortly afterwards, EIH resumed Euro-denominated business with Bank Mellat and Bank Saderat Iran using EIH accounts with a non-designated Iranian bank. In August 2010, EIH was setting up a system to enable routine payments to be made to Bank Saderat London and Future Bank Bahrain, in such a way as to avoid [European Union] sanctions. As of October 2010, EIH was continuing to act as a conduit for payments by sanctioned Iranian banks, including Bank Mellat and Bank Saderat. These sanctioned banks are to direct their payments to EIH via Iran’s Bank of Industry and Mine. In 2009, EIH was used by Post Bank in a sanctions evasion scheme which involved handling transactions on behalf of UN-designated Bank Sepah. [European Union]-designated Bank Mellat is one of EIH’s parent banks.’

8. Following this initial listing, between May and July 2011 the appellant sent several requests to the Council for information and for disclosure of documents, and a request for a hearing and for reconsideration of the listing decision as well. It also submitted observations. In reply to those requests, the Council informed the appellant that the reasons for its listing were set out in a proposal from a Member State, but that the Council did not have any further information. The Council also sent the appellant a copy of the listing proposal.

3 — OJ 2010 L 195, p. 39.

4 — OJ 2010 L 281, p. 1.

5 — OJ 2011 L 136, p. 65.

6 — OJ 2011 L 136, p. 26.

9. By Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413⁷ and Implementing Regulation (EU) No 1245/2011 implementing Regulation No 961/2010,⁸ of even date, the Council retained the appellant's name in the lists. On 5 December 2011, the Council sent the appellant a letter, attaching a copy of the abovementioned decision and implementing regulation, informing it that, following a review of the initial lists and after considering the appellant's observations set out in the correspondence exchanged between May and July 2011, the appellant's name would remain in the lists because it had provided prohibited financial services to designated entities, which constituted, in the Council's view, support for Iran's nuclear proliferation-sensitive activities. Following receipt of that letter, the appellant repeated its request for a hearing, confirmed its observations and again requested a review of the listing.

10. It is apparent from the various letters sent by EIH to the Council⁹ that EIH always acted with the authorisation or approval, and under the supervision, of the Bundesbank, in respect of all transactions involving designated Iranian banks. EIH also provided the Council with details of the 'Third Way' procedure, under which it stated that it had carried out transactions relating to the former activities of designated Iranian banks. That procedure 'gives a designated entity the opportunity to discharge a debt, arising from an obligation pre-dating its designation, due to a creditor established within the European Union, by transferring assets for the attention of that creditor via a non-designated entity'.¹⁰

11. By application lodged at the Registry on 3 August 2011, after twice amending the form of order sought,¹¹ the appellant brought an action for annulment in which it claimed that the General Court should annul, with immediate effect, the measures of 23 May 2011, Decision 2011/783, Implementing Regulation No 1245/2011 and Regulation No 267/2012, in so far as they concerned it, declare Articles 20(1)(b) of Decision 2010/413, 16(2) of Regulation No 961/2010 and 23(2) of Regulation No 267/2012 inapplicable¹² and order the Council to pay the costs.

12. In support of its form of order so amended, the appellant relied on four pleas in law. The first plea alleged infringement of the obligation to state reasons, of the rights of the defence and of the right to effective judicial protection. The second plea alleged a manifest error of assessment on account of the fact that, first, the Council did not adduce evidence of the transactions referred to in the grounds of the measures against which the action before the General Court was directed, second, the conditions for entering and retaining EIH's name on the lists were not met and, third, the Council did not carry out an adequate assessment and review of the listing decision. The third plea alleged infringement of the principle of protection of legitimate expectations, of the principle of legal certainty and of the right to good administration. Lastly, the fourth plea alleged infringement of the principle of proportionality, of the right to property and of the freedom to conduct a business. The appellant also raised a plea of illegality against Article 20(1)(b) of Decision 2010/413, Article 16(2)(b) of Regulation No 961/2010 and Article 23(2) of Regulation No 267/2012.

13. In the judgment under appeal, the General Court upheld the second plea in law so far as concerns the measures of 23 May 2011. In its consideration of the complaint regarding the Council's assessment of the initial listing proposal,¹³ the General Court held that, since the proposal to freeze the appellant's funds came from a Member State, it was for the Council to examine the relevance and the validity of

7 — OJ 2011 L 319, p. 71.

8 — OJ 2011 L 319, p. 11.

9 — See paragraph 167 of the judgment under appeal.

10 — Paragraph 51 of the judgment under appeal.

11 — First, following the adoption of the measures of 1 December 2011 (see point 9 of this Opinion), and second, following the adoption of Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation No 961/2010 (OJ 2012 L 88, p. 1). Article 23(2)(a) and (b) of Regulation No 267/2012 provides for the freezing of the funds of the persons, entities and bodies listed in Annex IX thereto, which includes the appellant's name.

12 — These provisions lay down the criteria that a person or entity must meet in order for its funds to be frozen. In particular, they provide for the freezing of the funds of persons who assist a designated entity to evade or violate restrictive measures taken against it.

13 — See paragraph 163 et seq. of the judgment under appeal.

the information and evidence submitted to it. However, as the Council admitted, the only information in its possession was the proposal and it had no other evidence. The General Court therefore held that, as regards the initial listing of the appellant, the Council was not in a position to verify the validity of the matters raised against the appellant in the listing proposal when the measures of 23 May 2011 were adopted. Consequently, it annulled only the measures of 23 May 2011 relating to the initial listing of the appellant, in so far as they concerned it.

14. The remainder of the action was dismissed.

II – Procedure before the Court of Justice and forms of order sought by the parties

15. On 19 November 2013, EIH lodged an appeal against the judgment of the General Court. The appellant claims that the Court of Justice should set aside the judgment under appeal in the respects indicated, annul the three measures not annulled by the General Court, that is to say, Decision 2011/783, Implementing Regulation No 1245/2011 and Regulation No 267/2012 (together, ‘the contested measures’)¹⁴ with immediate effect, in so far as they apply to EIH, and order the Council to pay the costs of both sets of proceedings.

16. In its response, the Council claims that the Court of Justice should dismiss the appeal in its entirety and order the appellant to pay the Council’s costs.

17. In its response, the United Kingdom of Great Britain and Northern Ireland, intervener in support of the Council at first instance, contends that the Court of Justice should dismiss the appeal.

III – Legal analysis

18. In its appeal, the appellant puts forward four pleas in law. The first plea seeks to challenge the error of law allegedly committed by the General Court in wrongly finding that the appellant admitted carrying out the transactions relied on by the Council to justify its designation. The second alleges an error of law, in that the General Court wrongly held that the substantive criteria for including the appellant in the lists had been met. The third seeks to challenge the General Court’s error of law in dismissing the plea alleging breach of the principles of the protection of legitimate expectations and of legal certainty. Lastly, the fourth alleges an error of law, in that the General Court held that the appellant could not rely on Article 32(2) of Regulation No 961/2010.

A – The first plea in law and the first part of the second plea in law alleging an error of law, in that the General Court wrongly found that the appellant admitted carrying out the transactions relied on by the Council in the grounds of the contested measures

1. Arguments of the appellant

19. In its first plea in law, the appellant claims that the General Court wrongly found that it had raised out of time the argument that it had not carried out the transactions referred to in the grounds of the decisions to include and retain EIH in the lists of persons and entities covered by the restrictive measures in question, even though this objection had already been raised in the application and then again in the reply — as shown in the report for the hearing — and, at all events, in full accordance

¹⁴ — Only one of the contested measures — Regulation No 267/2012 — expressly reproduces the grounds referred to when the initial listing took place (in other words, in the measures of 23 May 2011). However, as Decision 2011/783 and Implementing Regulation No 1245/2011 appear to be measures confirming the measures of 23 May 2011, I shall consider them, for the purpose of the arguments to follow, to have implicitly reproduced the grounds set out in the measures of 23 May 2011 and will therefore refer to ‘the grounds of the contested measures’.

with Article 48(2) of the Rules of Procedure of the General Court. Indeed, the Council itself had not challenged the admissibility of the argument, which, in those circumstances, should have been held to be admissible. The appellant therefore claims that the first and second pleas raised before the General Court must be re-examined by the Court of Justice, taking due account of the fact that the appellant did not admit carrying out the transactions in question, contrary to the General Court's starting premiss.

20. This initial premiss therefore invalidates the General Court's entire reasoning in relation to, first, the adequacy of the statement of reasons and observance of the rights of the defence (first plea raised at first instance) and, second, the manifest error of assessment by the Council, which failed to adduce evidence of the transactions referred to in the grounds of the contested measures (first part of the second plea raised at first instance).

21. Against that background, EIH maintains, on the one hand, that the statement of reasons for the contested measures did not allow it to establish a link with the transactions carried out under the Third Way procedure, the Council itself having never been able to establish a link between those transactions and the transactions relied on in the grounds. EIH simply disclosed all the transactions it had carried out and stated that some of them, in its opinion, fell outside the scope of the restrictive measures, while some were approved by the Bundesbank and yet others were authorised by it. None the less, EIH was unable to identify the actions of which it was accused in the second example,¹⁵ read in conjunction with the first¹⁶ and fourth¹⁷ examples.

22. EIH also claims that the Council's review of the listing was inadequate, for at no point in time did the Council produce any evidence even though EIH denied the existence of the transactions referred to in the grounds of the contested measures. The succinct reply sent by the Council to EIH after the latter had submitted observations on its listing cannot constitute a review of the listing decision. In contrast to its finding in paragraph 99 of the judgment under appeal, the General Court could not conclude that the Council had expressly refuted the arguments put forward by the appellant, for refutation must be based on evidence relating to the transactions themselves.

23. Precisely because the Council did not, at any time, adduce evidence relating to those transactions, and having regard to the fact that EIH has never admitted carrying them out, none of the claims set out in the grounds can be regarded as proved, contrary to the requirements of the case-law.¹⁸ The contested measures must therefore be annulled.

2. Analysis

24. At the end of a sometimes convoluted line of argument, the appellant alleges an error of law which it has not, however, categorised in legal terms.

25. It must be recalled from the outset that '[t]he Court of Justice ... has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been

15 — That is to say, the fact that, in August 2010, EIH set up a system to enable routine payments to be made to Bank Saderat London and Future Bank Bahrain, in such a way as to avoid European Union sanctions.

16 — That is to say, the fact that, in early August 2010, EIH first froze the accounts of Bank Saderat Iran and Bank Mellat before resuming Euro-denominated business with these two designated entities using its accounts with a non-designated Iranian bank.

17 — That is to say, the fact that, in 2009, EIH was used by Post Bank in a sanctions evasion scheme which involved handling transactions on behalf of UN-designated Bank Sepah.

18 — In this respect, the appellant cites the judgments in *Fulmen v Council*, T-439/10 and T-440/10, EU:T:2012:142, paragraphs 95 to 104, and *Commission and Others v Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 119 to 121.

observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice'.¹⁹

26. I am rather inclined to construe the argument put forward by EIH in the first plea and in the first part of the second plea as meaning that it seeks a finding from the Court of Justice that the evidence was clearly distorted, in that the General Court — in EIH's view — wrongly considered that the information contained in its pleadings, particularly in the annex to its application, was tantamount to an admission of the existence of the transactions referred to by the Council in the grounds of the contested measures.

27. While it is settled case-law that distortion of the evidence produced before the court at first instance falls within the review of the Court of Justice hearing and determining an appeal, it should be noted that such a distortion 'must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence'.²⁰ Furthermore, it is for the party alleging distortion to prove it and the appeal must state the legal arguments specifically advanced in support of the claim.²¹

28. Even if those two conditions could be said to be met, EIH's arguments are not such as clearly to indicate a distortion of the evidence; rather, they seemingly seek a fresh assessment of the evidence by the Court of Justice, which does not, however, fall within the latter's jurisdiction.

29. In particular, the wording alone of the annexes to the application initiating proceedings, which contain, inter alia, lists of transactions carried out by EIH, mainly in the years 2010 and 2011,²² with the entities mentioned in the contested measures, namely: Bank Mellat, Bank Sepah, Bank Saderat Iran, Bank Saderat plc, Future Bank of Bahrain and Postbank of Iran, could legitimately lead the General Court to consider that the existence of the transactions was not disputed. Furthermore, it is clear from the appellant's pleadings that its principal argument challenging the grounds of the contested measures, before both the General Court and the Court of Justice, involves claiming that the transactions with designated entities which it does not deny carrying out — at least in its pleadings before the General Court — were lawful, in that they were either authorised or approved by the Bundesbank, or fell outside the scope of the restrictive measures.

30. Indeed, it is apparent from the judgment under appeal that the General Court considered that EIH had admitted in its pleadings that it had carried out transactions involving the designated banks, explaining, however, that those transactions were lawful and that it was only during the hearing that EIH denied its involvement in transactions such as those referred to in the grounds of the contested measures and disputed the existence of links between those transactions and the transactions actually carried out. The General Court was therefore right to find that this latter argument was a new argument and was, on that basis, inadmissible, EIH having maintained, at the stage of the written procedure, that the transactions it referred to, carried out with the same partners as those identified in the grounds of the contested measures and covering the same period as that indicated therein, were unrelated to the transactions mentioned in the grounds. The General Court therefore held that the only matter in dispute between the parties was whether or not the transactions were lawful, not

19 — *Trubowest Handel and Makarov v Council and Commission*, C-419/08 P, EU:C:2010:147, paragraph 31 and the case-law cited.

20 — *Trubowest Handel and Makarov v Council and Commission*, EU:C:2010:147, paragraph 32 and the case-law cited.

21 — See point 53, and the case-law cited therein, of my Opinion in *Trubowest Handel and Makarov v Council and Commission*, C-419/08 P, EU:C:2009:678.

22 — Namely, the period referred to in the grounds of the contested measures (except for the fourth example, which refers to 2009).

whether they existed at all. The alleged facts — the transactions mentioned in the grounds of the contested measures — not being denied and only their lawfulness disputed, the Council cannot be criticised for never having produced evidence of the existence of those transactions and for focusing solely on demonstrating that they were unlawful under the relevant EU legislation.²³

31. Given that the analysis above does not reveal any distortion by the General Court, the first plea in law and the first part of the second plea in law of the appeal should be rejected. There are, therefore, at this stage of the analysis, no grounds for the Court of Justice to reverse the reasoning of the General Court in the context of the first and second pleas raised before the latter.

B – The second part of the second plea in law, alleging an error of law in that the General Court wrongly considered that EIH met the criteria for designation

1. Arguments of the appellant

32. By the second part of its second plea in law, the appellant claims that the General Court wrongly held, in paragraphs 121 to 159 of the judgment under appeal, that EIH had failed to prove that all of the transactions carried out with the banks subject to sanctions were authorised or approved by the Bundesbank or fell outside the scope of the sanctions regime. Accordingly, those transactions could not justify the inclusion of the appellant's name in the lists of persons and entities whose assets must be frozen.

33. The arguments put forward by the appellant in this part of the second plea relate to, first, transactions allegedly excluded from the scope of the restrictive measures, second, allegedly authorised transactions and, third, transactions carried out under the Third Way procedure.

a) Transactions allegedly excluded from the scope of the restrictive measures

34. EIH disputes the General Court's finding of inadmissibility, pursuant to Article 44(1) of its Rules of Procedure, in respect of the argument that some transactions, particularly payments to frozen accounts held by designated entities, were excluded from the scope of the restrictive measures and could not, therefore, justify the inclusion of the appellant in the list of persons and entities whose assets must be frozen.

b) Allegedly authorised transactions

35. The appellant submits that the General Court erred in law by holding that it had not adduced sufficient evidence as regards the authorisations issued under Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran²⁴ and, for transactions post-dating the entry into force of that regulation, under Regulation No 961/2010.²⁵ In essence, the appellant claims that the General Court misunderstood the content of one of the annexes to its application initiating proceedings, the amended version of which contained authorisations issued under Article 9 of Regulation No 423/2007 (for transactions carried out between 2 September and 27 October 2010) and under Article 18 of Regulation No 961/2010 (for subsequent transactions). The General Court could not criticise the appellant for failing to produce authorisations for the transactions carried out before 2 September 2010, referred to in the contested measures, because the Bundesbank itself had stated

²³ — See paragraphs 114 to 118 of the judgment under appeal.

²⁴ — OJ 2007 L 103, p. 1.

²⁵ — Since the transactions referred to in the grounds of the contested measures took place in 2009 and 2010, their lawfulness must be examined in the light of Regulation No 423/2007 and Regulation No 961/2010, which came into force on 27 October 2010.

that no such authorisation was necessary for transactions carried out under the Third Way procedure relating to former activities. The General Court having held at the outset²⁶ that the Council could not base the adoption of restrictive measures on transactions authorised in accordance with Regulation No 423/2007 or Regulation No 961/2010, the specific purpose of the annex provided by EIH is to show that the transactions referred to by the Council in the grounds of the contested measures and which concern the period after 2 September 2010 were authorised, the Council having, moreover, neither maintained nor proved that it relied on transactions other than the authorised transactions. If it relied solely on authorised transactions, it could not decide to list the appellant on those grounds alone. Furthermore, EIH simply provided examples of authorisations under Article 21 of Regulation No 961/2010 for transactions after 2 September 2010, but all the transactions carried out under the Third Way procedure requiring authorisation under that article were duly authorised. Neither the Council nor the General Court called for any additional evidence and EIH was not required by any principle or rule of law to prove every authorisation. The General Court was therefore wrong to hold that the examples of authorisations provided by EIH were insufficient to substantiate the argument that all transactions carried out after 2 September 2010 were lawful.

c) Transactions carried out under the Third Way procedure

36. Lastly, the appellant submits that the General Court committed an error of law by holding that the transactions carried out under the Third Way procedure were unlawful. It puts forward three sets of arguments in that regard.

37. First, EIH claims that the General Court erred in law by finding that the approval by the Bundesbank of the transactions carried out by EIH under the Third Way procedure and relating to former activities with the banks subject to sanctions was not lawful because the Bundesbank's action was generalised, even though only case-by-case authorisations might be issued in accordance with Regulations Nos 423/2007 and 961/2010. EIH complains that the General Court raised this point on its own initiative, the question whether case-by-case authorisation was necessary not being in dispute between the parties, the Council having simply maintained that there was nothing to prevent it relying on actions, even authorised actions, in order to include the appellant on the list of persons and entities whose assets must be frozen. In the alternative, EIH claims that general approvals of transactions are not expressly precluded by the relevant provisions of Regulations Nos 423/2007 and 961/2010 and relies on practical examples taken from the UK Treasury, which both conducts case-by-case assessments and issues general approvals. At all events, the power to decide that an authorisation is not necessary lies with the national authorities. When deciding on a request for authorisation under Articles 7 and 9 of Regulation No 423/2007 or Articles 18 and 21 of Regulation No 961/2010, the national authorities must, first, determine whether an authorisation is necessary, second, assess whether that authorisation should be granted and, third, decide whether conditions should be attached to the authorisation. In fact, national authorities were given the power to assess beforehand whether, for example, Article 7 of Regulation No 423/2007 applied, and if one of those national authorities decided that it did not, this meant that no authorisation was required and the authority must be regarded as having given its approval. The national authority would then inform the economic operator, which then had to have the same protection as if it had received authorisation, that is to say, no longer risk being listed for the transaction in question. The Council might not, therefore, impose restrictive measures based on transactions carried out in accordance with a procedure approved by a national authority where that approval fell within the scope of the authority's powers, under either Regulation No 423/2007 or Regulation No 961/2010. In addition, neither the Council nor the Commission ever stated that the Bundesbank was at fault or called for it to withdraw its authorisation. The Bundesbank acted of its own free will when, in consequence of the judgment under appeal, it changed its practices and required requests for authorisation to be made in the future for

26 — See paragraph 129 of the judgment under appeal.

transactions carried out under the Third Way procedure. Therefore, the listing of EIH on the basis of transactions carried out under the Third Way procedure is unlawful. The General Court committed a serious error of law by reaching the opposite conclusion on the basis of the alleged unlawfulness of general approvals and by holding that such assessments could not bind the Council.

38. Second, EIH maintains that the General Court erred in finding that the authorisations issued by the Bundesbank under Article 21 of Regulation No 961/2010 did not confirm the lawfulness of the transactions carried out according to the Third Way procedure. While it is correct to state, as the General Court did, that non-designated entities must satisfy themselves as to the lawfulness of transactions carried out under the Third Way procedure by requesting, where appropriate, the necessary authorisations under Articles 16 to 19 and 21 of Regulation No 961/2010, and that authorisations obtained under Article 21, which constitutes tempering of the principle of the freezing of funds, give an economic operator an assurance that the proposed transaction is in accordance with the regulation, transfers carried out on that basis are not to facilitate the circumvention of the restrictive measures, as prohibited under Article 16(4) of Regulation No 961/2010. Nevertheless, an economic operator who has disclosed the full details of a proposed transaction to the national authority with competence to issue authorisations, and who has obtained the necessary authorisation, cannot be accused of ‘participati[ng] knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent ... measures’ to freeze funds. The Council could not, therefore, rely on the transactions authorised under Article 21 of Regulation No 961/2010 in order to adopt restrictive measures against the appellant, and since the Council has not shown that it acted on the basis of transactions other than the authorised transactions, the first to third examples in the grounds must be considered to be vitiated by unlawfulness.

39. Third, the appellant essentially objects, on the one hand, to the General Court’s finding that it had ‘knowingly and intentionally’ participated in an activity the object or effect of which was to circumvent the restrictive measures. It submits that this matter was raised by the General Court on its own initiative and was not in dispute between the parties. In the alternative, it maintains that since the transactions, in the first place, did not need authorisation, in the second, had been approved or, in the third, had been authorised under Article 21 of Regulation No 961/2010, the General Court could not hold that EIH was ‘knowingly and intentionally’ involved in a scheme to circumvent the restrictive measures, as required, however, by Article 16(4) of Regulation No 961/2010 for the purposes of listing, particularly because EIH had received assurances from the Bundesbank that the transactions in question were lawful. EIH cannot be required to prove that it did not infringe Article 16(4) of that regulation. Nor can EIH be criticised for not requesting more detailed information from the Bundesbank on the proposed transactions. Indeed, that criticism, put forward for the first time in the judgment under appeal, was raised by the General Court of its own motion without being argued by the parties. Furthermore, EIH had received the expert opinion of a competent national authority, in this case the Bundesbank, which repeated its view on several occasions. EIH was in regular contact with the Bundesbank, which it indeed proved, but the General Court’s assessment of the timing of the correspondence exchanged with the Bundesbank is plainly incorrect. The duty of vigilance incumbent on the appellant applied in relation to Iranian natural and legal persons, but certainly not to information and assurances given by the Bundesbank. The appellant complains, on the other hand, that the General Court wrongly rejected as evidence three letters from the Austrian national bank produced by EIH, even though they confirmed the Bundesbank’s view with regard to transactions carried out under the Third Way procedure relating to former activities and showed that that view was shared by the Council itself, the Member States and the Legal Service of the European Commission. Lastly, the appellant disputes the conclusions drawn by the General Court from the audit reports the appellant relied on. Thus, the General Court could not place limits on the evidential value of those reports on the grounds that they are based only on an analysis of transaction samples, when this is common practice in the field. The General Court also failed to take account of the fact that two Bundesbank supervisors were *in situ* at EIH, in order to report regularly to the federal financial supervision authority. In addition, the General Court merely observed that one of the reports expressly noted that the transactions carried out under the Third Way procedure were capable of

counteracting the objectives of the European Union's sanctions policy,²⁷ even though that same report also stated that 'in consideration of the following findings and recommendations and subject to the possibility of further verification in individual cases, we consider that the procedures and processes carried out by [EIH] to observe sanction regulations meet the legal requirements'.²⁸ The General Court's factual conclusions on the audit reports should therefore be set aside, for they are inconsistent with the documents in the file and are therefore shown to be fundamentally incorrect. The General Court erred in law by holding that the Third Way procedure contravenes the prohibition of circumventing restrictive measures laid down in Article 16(4) of Regulation No 961/2010.

40. In the light of all the foregoing reasons, the appellant claims that the General Court was wrong to hold that it met the conditions set out in Article 16 of Regulation No 961/2010 enabling restrictive measures to be imposed on it.

2. Analysis

a) Transactions allegedly excluded from the scope of the restrictive measures

41. It is apparent from paragraphs 145 and 146 of the judgment under appeal that the General Court, taking the view that the appellant merely contended that some transactions were excluded from the scope of the restrictive measures, without substantiating its reasoning in that regard, held that that argument was inadmissible under Article 44(1) of its Rules of Procedure. Furthermore, after receiving information from the appellant during the hearing, the General Court held that the argument that the approval issued by the Bundesbank was based on the Bundesbank's view that the transactions carried out under the Third Way procedure fell outside the scope of the restrictive measures had to be considered in the course of the examination of the transactions allegedly approved and carried out under that procedure.

42. I agree with the General Court.

43. The Court of Justice has consistently held that, in accordance with Article 44(1)(c) of the Rules of Procedure of the General Court, the subject-matter of the proceedings and the summary of the pleas in law on which the application is based constitute two essential elements that must be included in the application initiating proceedings and that statements regarding the subject-matter of the dispute and the summary of the pleas in law contained in that application must be sufficiently precise to enable the EU judicature to rule on the application.²⁹ Thus, as a rule, a plea in law going to the substantive legality of the contested decision can be examined only if it has been raised.³⁰

44. In that regard, I would simply note that it is only in a footnote that the application submitted to the General Court raises the case of payments made to the frozen accounts of designated entities.³¹ Unless I am mistaken, Article 11 of Regulation No 423/2007, on which EIH appears to base its argument in the appeal, is not mentioned either in the application or in the reply filed by the appellant in the proceedings at first instance. Its equivalent in Regulation No 961/2010, namely,

27 — See paragraph 156 of the judgment under appeal.

28 — The appellant relies on paragraph 151 of the report drawn up on 23 December 2010 by a firm of consultants (see paragraph 85 of the appeal).

29 — *France v Commission*, C-559/12 P, EU:C:2014:217, paragraphs 38 and 39.

30 — *Rousse Industry v Commission*, C-271/13 P, EU:C:2014:175, paragraph 18.

31 — See footnotes 6 and 37 of the application initiating proceedings.

Article 20,³² is cited only in the section of the application describing the relevant EU legislation.³³ At all events, EIH has not identified the transactions that could, in its view, fall within the ambit of these two provisions. It merely referred to transactions ‘excepted from the legislation concerning restrictive measures against Iran’ in paragraph 42 of its application, without providing any further details.³⁴

45. In those circumstances, it must be found that the application which EIH submitted to the General Court did not contain any properly substantiated plea in law, subdivision of a plea or argument on the theory that the transactions carried out involving the frozen accounts of the designated entities fell outside the ambit of the restrictive measures.

46. The General Court was therefore fully entitled to hold that the argument was inadmissible under Article 44(1) of its Rules of Procedure.

b) Allegedly authorised transactions

47. In the first place, the appellant’s line of argument in this respect calls in question the General Court’s assessment of Annex A19 to the application initiating proceedings, provided by the appellant and which, as a reminder,³⁵ lists the transactions carried out by EIH between 2010 and 2011 with the banks mentioned in the grounds of the contested measures,³⁶ and its assessment of Annex A20 thereto, which sets out, inter alia, 10 examples of authorisations granted to EIH on the basis of Article 21(4) of Regulation No 961/2010.³⁷

48. According to the case-law principles noted above,³⁸ distortion of the evidence may be declared unlawful in the context of an appeal only if such distortion is obvious from the documents on the file and if there is no need to carry out a new assessment of the facts.

49. I would thus simply note that the two earliest transactions, allegedly authorised and appearing in the annex, are dated 27 July and 6 October 2010, the other transactions having all taken place after 27 October 2010, the date on which Regulation No 961/2010 came into force. However, at least one of the examples mentioned by the Council in the grounds of the contested measures relates to transactions which took place in 2009 and those grounds also refer to transactions taking place not only in ‘2009’ but also in ‘early August 2010’, in ‘August 2010’ and in ‘October 2010’, periods in respect of which details of only one transaction are provided. In addition, it is obvious, upon reading Annex A20, that, as the General Court rightly pointed out, all the authorisation examples provided by EIH postdate 1 July 2011.³⁹

50. The General Court was therefore entitled to hold that this partial offer to prove was insufficient to prove that *all* the transactions referred to in the grounds of the contested measures dating from the years 2009 and 2010 were lawful.

32 — It follows, in essence, from Article 11 of Regulation No 423/2007 and Article 20 of Regulation No 961/2010 that the obligation to freeze the funds of designated persons and entities does not prevent financial institutions from crediting frozen accounts when they receive funds from third parties, provided that those credited sums are also frozen. That also applies to the addition to frozen accounts of interest, earnings on those accounts and payments to the designated person or entity made under contracts, agreements or obligations that were concluded before the designation of that person or entity. By contrast, when a payment is due by a designated person or entity under a contract, agreement or obligation that was concluded prior to designation, the release of the funds may be authorised under the strict conditions set out in Article 9 of Regulation No 423/2007 and Article 18 of Regulation No 961/2010.

33 — See paragraph 15 of the application.

34 — For the sake of completeness, reference is also made thereto in paragraph 7 of the application, which simply lists the headings of the different pleas in law.

35 — See point 29 of this Opinion.

36 — See point 29 of this Opinion.

37 — On that article, see point 61 et seq. of this Opinion.

38 — See points 25 and 27 of this Opinion.

39 — See paragraph 147 of the judgment under appeal.

51. In the second place, the appellant's line of argument is founded on a misreading of the judgment under appeal. The appellant's reasoning can be summarised as follows: since the General Court held that the Council could not base the adoption of restrictive measures on authorised transactions, it would be enough for EIH to adduce evidence that the transactions referred to in the grounds were authorised in order for it to be found that its inclusion in the list of persons and entities whose assets must be frozen was unlawful. However, the General Court's position is more nuanced for, in its opinion, an authorised transaction may serve as a basis for the adoption of restrictive measures only in so far as the authorisation was granted *in full accordance* with the relevant regulation.⁴⁰ Therefore, the mere production of authorisations is not, on any view, sufficient to confer a stamp of lawfulness on the transactions in question. I shall return to this point when I come to examine the appellant's arguments on the transactions carried out under the Third Way procedure.

c) Transactions carried out under the Third Way procedure

i) Lawfulness of general approvals

52. The appellant's complaint that the General Court raised, of its own motion and without hearing argument from the parties, the question whether case-by-case authorisation was necessary for every one of the proposed transactions, instead of a general approval, is to be rejected from the outset. EIH itself admits in its pleadings that it replied in writing to a question put to it by the General Court in the following terms: '[i]n the light of [Regulation No 423/2007], what, in your view, is the legal value of the approval, by a competent national authority, of a procedure such as the "Third Way" procedure ...?' The wording used clearly shows that the General Court was drawing attention to the fact that in issue was the approval of a procedure, not the approval of individual, isolated transactions. As the Council pointed out, the parties had complete freedom to state their views in that respect. In addition, the answers to the written question were received by the General Court and notified to the parties in January 2013, while the hearing took place before it on 20 February 2013. In other words, EIH was again in a position to take the opportunity offered by that forum of debating the legal status of an approval and discussing specifically whether an 'approval' could be regarded as an individual decision of the national authorities in terms of Regulation No 423/2007, something the Council had denied in its written answer to the question put by the General Court.

53. On the substance of the issue, it must be stated that the analysis of the General Court is without any error of law. Let me return for a moment to the letter and spirit of Regulations Nos 423/2007 and 961/2010.

54. These two regulations lay down the principle that the funds of designated persons and entities must be frozen⁴¹ and thereafter make provision by way of derogation, and thus exceptionally, for the different situations in which those funds may be released.⁴² These derogations 'may'⁴³ be authorised by the competent national authorities,⁴⁴ whose task is to check that all the conditions required in order for the release to be authorised have been met.

40 — See paragraph 129 of the judgment under appeal. Indeed, the appellant considered this statement in the judgment under appeal to be obviously correct (see paragraph 44 of the appeal).

41 — Articles 7 of Regulation No 423/2007 and 16 of Regulation No 961/2010.

42 — Articles 8 to 10 of Regulation No 423/2007 and 17 to 19 of Regulation No 961/2010.

43 — Articles 8 to 10(1) of Regulation No 423/2007 and 17 to 19(1) and (2) of Regulation No 961/2010.

44 — Annex III to Regulation No 423/2007 lists the national websites containing information on the competent authorities referred to, inter alia, in Articles 8 to 10 of that regulation. Annex V to Regulation No 961/2010 provides the same information on the authorities responsible for issuing the necessary authorisations under, inter alia, Articles 17 to 19 and 21 of that regulation.

55. In essence, the competent national authority may authorise release if funds are due under an administrative, judicial or arbitral lien or judgment established before a certain date,⁴⁵ if payment is due under a contract, agreement or obligation concluded by the entity in question before its designation,⁴⁶ or if the release is necessary to satisfy the basic needs of a person or to pay professional fees, fees for routine holding or maintenance of accounts, or extraordinary expenses.⁴⁷ It is apparent from this body of provisions that the EU legislature intended to make each of the envisaged transactions subject to individual authorisation, the provisions referring to 'the' payment⁴⁸ or 'the' authorisation.⁴⁹ Furthermore, the issuing of an authorisation, which constitutes an exception to the principle of freezing, requires the competent national authority to satisfy itself that the proposed release meets all the conditions necessary under the regulation. A case-by-case assessment is obviously essential.

56. The General Court was therefore right to hold, in paragraph 128 of the judgment under appeal, that Articles 8 to 10 of Regulation No 423/2007 and Articles 17 to 19 of Regulation No 961/2010 'do not ... allow the competent national authorities to give general approval to a certain category of transactions in respect of which the entities concerned would accordingly be relieved of the need to request authorisation on a case-by-case basis'.

57. Nevertheless, EIH submits that general approvals are not expressly precluded by the two regulations in question and that the grant of such approvals is common practice among other national authorities besides the Bundesbank, in particular, the UK Treasury. However, on the one hand, since what is in issue is an exception to the principle of the freezing of funds which, by its very nature, must be interpreted strictly, it cannot be argued that what is not expressly precluded is permitted. On the other, in addition to the fact that the argument and the offer of supporting evidence concerning the practices of the UK Treasury are out of time, as they were not submitted to the General Court even though EIH had complete freedom to do so, particularly in its written answer to the question put to it by the General Court,⁵⁰ national practices cannot be relied on as a basis for interpreting an EU measure. I also note that, in its pleadings, the United Kingdom itself questioned whether the practices of its own Treasury, as relied on by the appellant, had the same legal basis as the practices of the Bundesbank in question in this appeal.

58. Although there is nothing to prevent the competent national authorities from issuing general approvals for, if necessary, certain procedures under which financial transactions are carried out, these approvals do not fall within the scope of Regulations Nos 423/2007 and 961/2010 or the tasks conferred on those authorities within that framework by the EU legislature. As the General Court rightly pointed out, only an authorisation issued by a competent national authority *in full accordance* with the two regulations concerned is, as a rule, capable of preventing the Council from relying on the transaction thus authorised in order to adopt restrictive measures against the entity which carried out that transaction.⁵¹ I would also add, as the General Court did, that this does not provide an absolute guarantee, for the decision of the national authority does not automatically confer a stamp of lawfulness on the authorised transaction in the light of the regulations laying down the legal framework of the restrictive measures system. Sight must not be lost of the fact that the national authorities, when deciding on a request for authorisation, may have only limited information at their disposal and it is easily conceivable that an entity making such a request might conceal certain information about the planned transaction in order to secure authorisation.

45 — Articles 8 of Regulation No 423/2007 and 17 of Regulation No 961/2010.

46 — Articles 9 of Regulation No 423/2007 and 18 of Regulation No 961/2010.

47 — Articles 10 of Regulation No 423/2007 and 19 of Regulation No 961/2010.

48 — Articles 9(a)(iii) of Regulation No 423/2007, and 18 *ab initio* and 18(a)(i) and (iii) of Regulation No 961/2010.

49 — Articles 10(1)(b) and (2)(a) and (b) of Regulation No 423/2007, and 19(1)(b) and (2)(a) and (b) of Regulation No 961/2010.

50 — See point 52 of this Opinion.

51 — See paragraph 129 of the judgment under appeal.

59. For that reason in particular, but also in view of the issues involved — the campaign against nuclear proliferation in Iran — the Council's power to decide to impose restrictive measures, that is to say, the power to decide whether the conditions laid down in Article 7 of Regulation No 423/2007 or Article 16 of Regulation No 961/2010 are met, cannot depend entirely on the national authorities' exercise of their power to authorise the release of funds under Articles 8 to 10 of Regulation No 423/2007 and Articles 17 to 19 of Regulation No 961/2010.

60. Accordingly, EIH cannot claim that the General Court erred in law by failing to find that the transactions carried out under the Third Way procedure were lawful simply because the Bundesbank had generally and generically approved them, and by holding that the Council was entitled to base the adoption of restrictive measures against the appellant on the transactions so approved.

ii) Article 21 of Regulation No 961/2010

61. As for Article 21 of Regulation No 961/2010, a provision having no equivalent in Regulation No 423/2007, its adoption fits within the aim of strengthening financial supervision, as announced in United Nations Security Council Resolution 1803 (2008) and implemented in Security Council Resolution 1929 (2010), which established more stringent measures. Article 21 of Regulation No 961/2010 makes all transfers of funds to and from Iranian persons and entities subject to a general supervision mechanism. Depending on the amount transferred and its final use, those transfers will require a straightforward notification or a prior authorisation issued by the competent national authority. In contrast to Articles 17 to 19 of Regulation No 961/2010, the procedure for requesting authorisation under Article 21 thereof refers to an entity established in the European Union and intending to transfer funds to non-designated entities, that is to say, entities whose assets have not been frozen under Article 16 of Regulation No 961/2010, or to receive funds from such entities.

62. Transactions carried out under that Third Way procedure could, owing to its wholly exceptional nature, form the subject-matter of a request for authorisation under Article 21 of Regulation No 961/2010, especially if the involvement in the process of the designated entity in question is not demonstrated. However, at all events, Article 21 of Regulation No 961/2010 cannot be used to circumvent the strict exceptions to the principle of fund freezing provided for in Articles 17 to 19 of that regulation. It is apparent from the very nature of the Third Way procedure that it has 'the aim of carrying out financial transactions concerning *designated* entities, in so far as they were intended to ensure, inter alia, that the *designated* Iranian banks' earlier obligations were satisfied'.⁵² EIH does not dispute that definition, as it was provided to the General Court by none other than EIH itself, which pointed out several times in the appeal that the transactions related to the designated entities' former activities. Accordingly, it was not Article 21 of Regulation No 961/2010 that had to be used for such transactions, but rather one of the provisions dealing with the release of designated entities' frozen funds — in this case, in view of the subject-matter of the proposed transfer, Article 18 of Regulation No 961/2010. The General Court was therefore right to hold that the transactions allegedly carried out under the Third Way procedure, in so far as their aim was to remove a number of transactions from the scope of the rules laid down in Articles 17 to 19 of Regulation No 961/2010, rules far more restrictive than the system established by Article 21 of that regulation, infringe Article 16(4) of Regulation No 961/2010 because they make it possible to circumvent the freezing of funds held by designated entities.⁵³

52 — Paragraph 150 of the judgment under appeal. Emphasis added. Also see the definition of the Third Way procedure provided by the appellant in paragraph 51 of the judgment under appeal, which is recalled in point 10 of this Opinion.

53 — See paragraph 150 of the judgment under appeal.

63. The Court of Justice has indeed held that the prohibition of circumvention provided for in Article 7(4) of Regulation No 423/2007 — which is the exact equivalent of Article 16(4) of Regulation No 961/2010 — ‘must ... be understood as covering activities in respect of which it appears, on the basis of objective factors, that, under cover of a formal appearance which enables them to avoid the constituent elements of an infringement of [the prohibition on making funds available], none the less they have, as such or by reason of their possible link to other activities, the aim or result, direct or indirect, of frustrating the prohibition [on making funds available]’.⁵⁴

64. In those circumstances, for the same reasons as those put forward above,⁵⁵ an economic operator may not take refuge behind an authorisation issued by a national authority under Article 21 of Regulation No 961/2010 when the procedure set out in that article has been diverted from its original purpose, thereby rendering the authorisation inconsistent with the regulation.

65. EIH denies that it could, at the stage of the appeal, be considered to have ‘knowingly and intentionally’, within the meaning of Article 16(4) of Regulation No 961/2010, participated in activities the object or effect of which was, directly or indirectly, to circumvent measures to freeze funds.

66. I consider this argument relating to ‘the psychological element’⁵⁶ or ‘the mental element of the participation referred to’ in that article⁵⁷ to be out of time, since EIH did not appear to have specifically contested that aspect before the General Court even though, despite claiming that it did not know why it had been included in the list of persons and entities whose assets must be frozen, the grounds of the contested measures clearly show that it is accused of having ‘assist[ed] a number of Iranian banks with alternative options for completing transactions disrupted by EU sanctions’, of having helped ‘to avoid EU sanctions’ and of having been used ‘in a sanctions evasion scheme’, information which shows that what EIH was accused of was the circumvention of the freezing of designated entities’ funds. On the substance, I would simply observe, as the General Court did, that EIH is a financial institution, situated in the European Union, specialising in services and businesses relating to or in Iran, and, in these two respects, is well acquainted with the different measures adopted at EU level and is fully aware of its duty of vigilance and of supervision of its activities with its Iranian partners,⁵⁸ particularly when they have been designated. Furthermore, the fact that EIH specifically acted as an intermediary shows that it was perfectly aware of the identities of the initial debtor and of the final creditor, the designation of the former generally being common knowledge. EIH was therefore ‘aware ... of the fact that, notwithstanding the freezing of funds principle, the Third Way procedure enabled transactions concerning designated banks to be carried out’.⁵⁹ The elements of knowledge and intent implied by the words ‘knowingly’ and ‘intentionally’⁶⁰ are therefore certainly present in EIH’s case, *a fortiori* because the Court of Justice has held that these two cumulative requirements are met where the entity in question ‘is aware that his participation in such an activity can have that object or effect and accepts that possibility’.⁶¹ By continuing to have financial relations with designated entities in an atypical set-up — the Third Way procedure — EIH must be considered to have indeed accepted that possibility.⁶²

54 — *Afrasiabi and Others*, C-72/11, EU:C:2011:874, paragraph 62.

55 — See point 58 of this Opinion.

56 — See point 78 of the Opinion of Advocate General Bot in *Afrasiabi and Others*, C-72/11, EU:C:2011:737.

57 — *Afrasiabi and Others*, EU:C:2011:874, paragraph 63.

58 — See paragraph 140 of the judgment under appeal.

59 — Paragraph 150 of the judgment under appeal.

60 — *Afrasiabi and Others*, EU:C:2011:874, paragraph 66.

61 — *Afrasiabi and Others*, EU:C:2011:874, paragraph 67.

62 — I would also state that EIH’s conduct might be capable of justifying the adoption of restrictive measures under Article 16(2)(b) of Regulation No 961/2010, which provides that persons or entities that have ‘assisted a listed person, entity or body to evade or violate the provisions of this Regulation’ may also have their funds frozen. In such a case, the conscious and intentional nature of the conduct complained of is of secondary importance, as it is enough for the assistance provided to the evasion or violation to be clear cut.

67. It follows from the foregoing that the Council was entitled to rely on the transactions thus improperly authorised under Article 21 of Regulation No 961/2010 in order to justify the adoption of the contested measures against the appellant.

iii) Third Way procedure and prohibition of circumventing restrictive measures

68. EIH again seeks to return to the General Court's interpretation of the mental element of Article 16(4) of Regulation No 961/2010, that is to say the requirement to have 'knowingly and intentionally' participated in an activity to circumvent the restrictive measures. In that regard, I repeat in full the view expressed in point 66 of this Opinion.

69. The reference made by EIH to the various assurances it received from the Bundesbank, which reportedly confirmed its position on several occasions stating that some of the proposed transactions did not require authorisation, or that it approved the use of the Third Way procedure, is not, on any view, sufficient to demonstrate that the General Court erred in law by holding that the designation criteria had been met — which is exactly the issue forming the subject-matter of the second plea in law. The assurances that the Bundesbank may have given and the Council's assessment of the expediency of including EIH's name on the list of persons and entities whose assets must be frozen come under two different, autonomous procedures, *a fortiori* because — as I have shown — the assurances, approval and authorisations given have not been shown to be consistent with Regulations Nos 423/2007 and 961/2010.

70. Even if the General Court's assertion that 'a reasonably diligent financial institution ought to have requested more information about the "approval" received'⁶³ might seem particularly demanding, it was not the deciding factor in the Court's reasoning when it held that the Council could indeed consider EIH to have met the listing criteria. In addition, if that does indeed fall within the Court of Justice's review in the context of an appeal, it is not necessary to go on to address the timing of the correspondence exchanged between the Bundesbank and the appellant, for no conclusion that could be of assistance to the appellant in its demonstration could be inferred therefrom.

71. As regards the letters from the Austrian national bank, the General Court held that they were issued by a national authority other than that competent for the transactions in question, since EIH is answerable only to the Bundesbank.⁶⁴ Therefore, at best, those letters simply put forward that national authority's individual understanding of the rules governing financial transactions in the context of the implementation of an EU measure, which cannot bind the institutions of the European Union.⁶⁵ The fact that one of the letters allegedly sets out the conclusions of a meeting of the RELEX/sanctions group could not assist EIH further in its argument, the Council having pointed out that this group is simply one of its preparatory bodies and that an official Council position is not to be inferred from the minutes of a meeting of that group.

72. Lastly, the appellant seeks to demonstrate that the General Court distorted the audit reports it produced. In accordance with the principles that should guide the Court of Justice's review in such a case,⁶⁶ I shall simply note that it is entirely logical that the General Court held that the conclusions of an audit report, which by its very nature is prepared on the basis of transaction samples, cannot be extended automatically to all of the transactions actually carried out. In addition, EIH does not deny that the audit report of 23 December 2010 expressly states that 'the transactions carried out in 2010 using the Third Way procedure were capable of counteracting the objectives of the European Union's

63 — Paragraph 154 of the judgment under appeal.

64 — See paragraph 155 of the judgment under appeal.

65 — See point 57 of this Opinion.

66 — Principles recalled in points 25 and 27 of this Opinion.

sanctions policy'.⁶⁷ Moreover, the other section of the report, emphasised by the appellant in its appeal and which it claims the General Court omitted, seems to me to go in exactly the same direction for, in concluding that a final assessment of those transactions could be achieved only through extensive manual analysis of individual transactions and their underlying transactions,⁶⁸ the authors of the report again stressed the relative nature of the conclusions that could be drawn from it immediately. That also applies to the assertion that, subject to further verification in individual cases, the authors of the report considered that the procedures followed by EIH in order to observe sanction regulations met the legal requirements.⁶⁹ The General Court was therefore not in a position to hold as a matter of fact that the audit reports provided an absolute, definitive assurance that EIH acted at all times in full accordance with Regulations Nos 423/2007 and 961/2010.

C – The third plea in law, alleging an error of law as regards the interpretation and application of the principles of the protection of legitimate expectations and of legal certainty

1. Arguments of the appellant

73. In paragraph 174 et seq. of the judgment under appeal, the General Court rejected the appellant's argument that it entertained a legitimate expectation that it would not be subject to sanctions in respect of the transactions it had carried out based on authorisations or approvals given by the Bundesbank, on the grounds that a prudent, alert economic operator must be capable of foreseeing the adoption of a European Union measure likely to affect his interests and cannot plead that principle if the measure is actually adopted. EIH denies that it was in a position to foresee the adoption of the restrictive measures against it precisely because the disputed transactions had been approved or authorised by the competent national authority.

74. Furthermore, the General Court held that the Bundesbank's powers were limited to the grant of authorisations based on a case-by-case assessment and that, accordingly, no legitimate expectation could arise from the general approval of transactions carried out under the Third Way procedure.⁷⁰ EIH disputes that finding by recalling the arguments it put forward in that regard in the context of the second plea in law. It also states that, although it has been held that, as a rule, legitimate expectations may be invoked only if assurances in accordance with the applicable rules have been given, an economic operator may rely on a representation of a national authority not in accordance with EU law provided that the law is ambiguous,⁷¹ which is the case here, given the differing views on the lawfulness of the Third Way procedure. At all events, the General Court has previously held that even a representation or a national decision not entirely in accordance with EU law may, in exceptional circumstances, support a legitimate expectation on the part of the economic operator concerned,⁷² and the Court of Justice, for its part, has held that national competition authorities may exceptionally decide not to impose a fine even though an undertaking has infringed the prohibition of cartels laid down in Article 101 TFEU.⁷³ Thus, if EIH's conduct ultimately constitutes infringement of

67 — Paragraph 156 of the judgment under appeal.

68 — See paragraph 85(5) of the appeal.

69 — See paragraph 85(5) of the appeal.

70 — See paragraphs 176 and 177 of the judgment under appeal.

71 — In this connection, the appellant relies on the judgments in *Maizena*, 5/82, EU:C:1982:439, paragraphs 22; *Sony Supply Chain Solutions (Europe)*, C-153/10, EU:C:2011:224, paragraph 47; and *Regione autonoma della Sardegna and Others v Commission*, T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493, paragraph 273.

72 — In this connection, the appellant cites the judgment in *Regione autonoma della Sardegna and Others v Commission*, EU:T:2011:493, paragraph 274.

73 — Here, the appellant relies on the judgment in *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraphs 40 and 41.

Article 16(4) of Regulation No 961/2010, *quod non*, clear, precise and repeated assurances were given to it by the Bundesbank and preclude the imposition of sanctions against it, both at national and EU level, and the Council must be regarded as bound by the expectation engendered by the assurances given by the Bundesbank.⁷⁴

75. Finally, EIH contests the General Court's finding in paragraph 179 of the judgment under appeal that the various disputed measures were clear enough for their application to be foreseeable by the appellant.

2. Analysis

76. I should state from the outset that the consideration of this plea in law is a continuation of the analysis conducted in the context of the second part of the second plea in law relating to, in particular, the legal effect of the Bundesbank's authorisations and approvals in respect of the transactions carried out by EIH, and in my examination of the third plea in law I shall bear in mind my conclusions in that respect.

77. According to the settled case-law of the Court of Justice, to which reference is made in the judgment under appeal,⁷⁵ 'the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the European Union. ... [T]hat right applies to any individual in a situation in which an EU institution, body or agency, by giving that person precise assurances, has led him to entertain well-founded expectations. Precise, unconditional and consistent information, in whatever form it is given, constitutes such an assurance'.⁷⁶

78. That case-law calls for two comments.

79. First, if the conduct of the Bundesbank is indeed capable of supporting a legitimate expectation on the part of the appellant, the appellant could rely on such expectation only against the national authority in question. In other words, the hypothetical legitimate expectation arising from the conduct of the Bundesbank cannot be relied on against the Council when the latter decides to impose restrictive measures on EIH. There is no apparent difference between the case-law invoked by the appellant and that observation, for the case-law merely states that national competition authorities *may* decide not to impose a fine on an undertaking even though that undertaking has infringed Article 101 TFEU intentionally or negligently, provided that they have caused the undertaking to entertain a legitimate expectation that its conduct does not infringe that provision,⁷⁷ which implies nothing more than that it is possible, *for the authority which created the legitimate expectation*, to adjust its own power to impose penalties, depending on the circumstances.

80. Second, it is apparent from the arguments put forward in the examination of the second plea in law that the alleged assurance given by the national authority in question is not consistent with EU law, because only case-by-case authorisations in accordance with the procedures laid down in the relevant regulations could be issued by national authorities.⁷⁸ The case-law invoked by the appellant makes it clear that 'a legitimate expectation that aid granted is lawful cannot, barring exceptional circumstances, be entertained unless it has been granted in compliance with the procedure'.⁷⁹ To

74 — In this connection, the appellant refers to point 87 of the Opinion of Advocate General Kokott in *Schenker & Co. and Others*, C-681/11, EU:C:2013:126.

75 — See paragraph 174 of the judgment under appeal.

76 — *HGA and Others v Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 132 and the case-law cited.

77 — See judgment in *Schenker & Co. and Others*, EU:C:2013:404, paragraph 40 et seq.

78 — See point 54 et seq., and point 64 of this Opinion as well.

79 — *HGA and Others v Commission*, EU:C:2013:387, paragraph 134.

examine whether there are, in this case, exceptional circumstances on which EIH could rely would be, at all events, irrelevant for want of the factors necessary to support a legitimate expectation and, in particular, precise, unconditional and consistent assurances that EIH would not be subject to restrictive measures on account of the disputed transactions it carried out.

81. The argument alleging an error of law in the General Court's assessment regarding the infringement of the principle of protection of legitimate expectations must therefore be rejected.

82. As for the principle of legal certainty, it must also be stated that the analysis of the General Court is without any error of law.

83. That principle means that EU legislation must be certain and its application foreseeable by those subject to it.⁸⁰ At the time when EIH requested the authorisations and approvals from the Bundesbank, Regulation No 423/2007 applied, followed by Regulation No 961/2010. Neither regulation states that an approval or authorisation issued by a national authority has the effect of depriving the Council of its power to adopt restrictive measures or offers any guarantee whatsoever that the Council itself will automatically consider the transactions thus approved or authorised to be lawful. The provisions of those regulations concerning authorisation procedures are thus clearly separate from those relating to the principle of the freezing of funds in general and the prohibition of circumventing restrictive measures in particular.⁸¹ Likewise, the wording of these two regulations unequivocally shows that each and every authorisation of a national authority had to be issued on the basis of a case-by-case assessment of each proposed transfer — whether a request for release⁸² or for a transfer of funds⁸³ was involved.

84. In those circumstances, the appellant was fully in a position to anticipate not only that the general approval issued by the Bundesbank was inconsistent with EU law,⁸⁴ but also that the Council could, at all events, impose restrictive measures on it in the circumstances clearly laid down in the abovementioned regulations.

85. The General Court was therefore right to reject as unfounded the argument alleging an infringement of the principle of legal certainty. Therefore, the third plea in law of the appeal too must be rejected in its entirety as unfounded.

D – The fourth plea in law, alleging an error of law in the interpretation of Article 32(2) of Regulation No 961/2010 and of the principle of proportionality

1. Arguments of the appellant

86. By its fourth plea in law, the appellant essentially objects, on the one hand, to the General Court's finding, in paragraphs 204 and 205 of the judgment under appeal, that it could not rely on Article 32(2) of Regulation No 961/2010, which is intended to protect undertakings that have unwittingly infringed the prohibitions set out in that regulation, as would be the case of EIH should the Court of Justice also take the view that the disputed transactions are unlawful.

80 — See, in an extensive body of case-law, *Nuova Agricast and Cofra v Commission*, C-67/09 P, EU:C:2010:607, paragraph 77 and the case-law cited, and *Alcoa Trasformazioni v Commission*, C-194/09 P, EU:C:2011:497, paragraph 71.

81 — See Article 7(4), on the one hand, and Articles 8 to 10, on the other, of Regulation No 423/2007, and also Article 16(4), on the one hand, and Articles 17 to 19 and 21, on the other, of Regulation No 961/2010.

82 — Under Articles 8 to 10 of Regulation No 423/2007 and Articles 17 to 19 of Regulation No 961/2010.

83 — Under Article 11 of Regulation No 423/2007 and Article 21 of Regulation No 961/2010.

84 — The argument alleging that differing interpretations were adopted by national authorities and by some EU institutions as well is thus irrelevant, for ultimately the issue is not whether the transactions carried out under the Third Way procedure were, in principle, consistent with EU law, but rather whether a national authority could, on the basis of Regulations Nos 423/2007 and 961/2010, grant a general authorisation for proposed transactions without conducting a case-by-case assessment.

87. On the other hand, the appellant objects to the General Court's rejection of the plea in law raised before it concerning the principle of proportionality. The Council's decision to freeze EIH's funds is a disproportionate measure.

88. In the first place, EIH recalls that it has always complied with the decisions of the competent national authority and submits that the Bundesbank could have, for example, stopped approving the use of the Third Way procedure or refused the authorisations requested by EIH under Article 21 of Regulation No 961/2010. The General Court was wrong to hold that such measures, escaping review by the Council, did not ensure the same protective effect as a decision to freeze funds and that that decision was therefore shown to be appropriate and necessary. If the Council had considered the German system of supervision to be inadequate, it could have ordered Germany to improve the effectiveness of the system, which that Member State would have been required to do under its duty of sincere cooperation. The General Court failed to take account of this factor in its analysis. At all events, it is disproportionate to offset a possible error by a national authority by imposing restrictive measures, when the responsibility for avoiding differing interpretations of EU legislation lies with the EU institutions.

89. In the second place, the General Court made another error of law by holding that the authorisation system established by Article 21 of Regulation No 961/2010 did not ensure a preventative effect equivalent to that of the inclusion in the list of the persons and entities whose assets must be frozen. It is true that an infringement of Article 21 would necessarily be uncovered after the event, but the same is also true of any infringement of measures freezing the funds of a designated entity. Article 21 of Regulation No 961/2010 therefore has the same preventative effect as the designation of EIH, but is considerably less restrictive. Thus, EIH's request relating to the Third Way procedure was sent to the Bundesbank before EIH began its transactions, and requests sent on the basis of Article 21 also have to be made before a transaction is carried out. EIH recalls that a change in the Bundesbank's guidelines would have been enough to make the appellant withdraw from its transactions, since it has always followed the instructions of this national authority. There is therefore no reason to think that such a change would not have ensured a preventative effect equivalent to that of freezing EIH's funds. In addition, EIH relies on the letter from the Austrian national bank, which it claims demonstrates that the Council was aware of, and had approved, the Bundesbank's position concerning the Third Way procedure before designating EIH.⁸⁵

90. Consequently, the designation of EIH by the Council is disproportionate and the General Court wrongly characterised the factual position in law and drew fundamentally incorrect conclusions from the file.

2. Analysis

91. It follows from Article 32(2) of Regulation No 961/2010 that '[t]he prohibitions set out in the present Regulation shall not give rise to liability of any kind on the part of the natural or legal persons or entities concerned, if they did not know, and had no reasonable cause to suspect, that their actions would infringe these prohibitions'. Article 32 of Regulation No 961/2010 acts as a clause excluding liability for persons or entities which, in good faith or unaware of the context surrounding the restrictive measures, have infringed that regulation.

92. Suffice it to note that EIH, by helping designated Iranian banks to complete transactions suspended by the freezing measures, when it is active on the financial market, specialises in services and businesses relating to or in Iran, and is partly owned by a designated entity, cannot claim that it did not know or had no reasonable cause to suspect that it was infringing, in particular, the prohibition of circumventing restrictive measures set out in Article 16(4) of Regulation No 961/2010. There is

⁸⁵ — See point 39 of this Opinion.

nothing to be gained, in that regard, by invoking possible approvals or authorisations issued by the Bundesbank⁸⁶ or the letter from the Austrian national bank.⁸⁷ Just as these authorisations and approvals cannot support a legitimate expectation, as shown in my analysis of the previous plea in law, they are no more useful for assessing whether EIH could rely on the exemption from liability under Article 32 of Regulation No 961/2010, in view of the fact that the authorisations and approvals were not, on any view, issued in accordance with the regulation. Finally, as the Council rightly pointed out, even if EIH had been able to rely on Article 32(2) of Regulation No 961/2010, this would not have precluded its listing since it satisfied the conditions laid down in Article 16 of that regulation, a restrictive measure such as that, inherently a temporary precautionary measure,⁸⁸ not necessarily having to be construed as penalising EIH's liability for the infringements of the regulation it committed. It is settled case-law that the importance of the aims pursued by acts of the European Union establishing restrictive measures is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights.⁸⁹

93. The General Court's analysis in relation to Article 32(2) of Regulation No 961/2010 appears therefore to be free of any error of law.

94. As to the proportionality of the Council's decision to include the appellant in the list of persons and entities whose assets must be frozen, it is settled case-law that 'the principle of proportionality is one of the general principles of EU law and requires measures implemented through provisions of EU law to be appropriate for attaining the legitimate objectives pursued by the legislation at issue and not to go beyond what is necessary to achieve them'.⁹⁰ The Court of Justice has also acknowledged that 'the EU legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments'.⁹¹

95. It should be noted that the appellant does not dispute the legitimacy of the objective pursued by the sanctions regime against Iran established by Regulation No 961/2010, or yet the proportionality of the criteria for inclusion on the lists of persons and entities whose assets must be frozen, as such, but objects only to the application, in its own case, of the restrictive measure decided by the Council. However, it must be borne in mind that every listing decision aimed at combating nuclear proliferation in Iran pursues objectives linked to international peace and security.⁹²

96. As I have already pointed out, the system established by Article 21 of Regulation No 961/2010 — involving the supervision by national authorities of transfers requiring authorisation before they are carried out — is completely different from the system of restrictive measures set out in Article 16 of Regulation No 961/2010. That regulation lays down, on a precautionary basis, the principle that the funds of persons and entities which satisfy the conditions for inclusion on the lists must be frozen. This freezing of funds is accompanied by various possibilities for release, by way of derogation.

86 — I recall that those approvals or authorisations are, at all events, issued by the national authorities on the sole basis of information supplied by the person or entity which requests them, although no investigation is carried out and this information may mislead those authorities.

87 — With respect to that letter and the conclusions that may be drawn from it regarding the Council's position on the Third Way procedure, I refer to point 71 of this Opinion.

88 — *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 358; *Afrasiabi and Others*, EU:C:2011:874, paragraph 45; and *Commission and Others v Kadi*, EU:C:2013:518, paragraphs 130 and 132.

89 — *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 361.

90 — *Melli Bank v Council*, C-380/09 P, EU:C:2012:137, paragraph 52.

91 — *Council v Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776, paragraph 120.

92 — *Bank Melli Iran v Council*, C-548/09 P, EU:C:2011:735, paragraph 115, and *Council v Manufacturing Support & Procurement Kala Naft*, EU:C:2013:776, paragraph 124. Also see recital 15 in the preamble to Regulation No 961/2010.

97. On the contrary, Article 21 of Regulation No 961/2010 falls within the scope of general financial supervision and applies to all Iranian persons or entities that have ordered, or are the recipients of, a transfer of funds and continue to have unrestricted use of their funds. Thus, the listing of the appellant under Article 16 of Regulation No 961/2010 comes under a specific, targeted aim and scheme which are unrelated to the aim and scheme of Article 21 of that regulation, much broader in scope, so that the one article cannot be regarded as alternative to the other.

98. In the light of the legitimate objective pursued, which is not in dispute, the application of Article 16 of Regulation No 961/2010 to the appellant seems to be an appropriate measure as its effect is to freeze all of the funds in EIH's possession and to authorise the making available of such funds — their release — only in exceptional circumstances. In that way, the Council ensures that EIH's funds will not or will no longer be used by designated entities in a way not consistent with the regulation, in accordance with the General Court's findings in paragraph 202 of the judgment under appeal. It follows naturally from that finding that the preventative effect ensured by the application of Article 16 of Regulation No 961/2010 bears no comparison to the effect produced by Article 21 of that regulation because, I would recall, in such a case the entity concerned remains in control of its funds.

99. I would add that the *raison d'être* of including the appellant in the list of persons and entities whose assets must be frozen is not to be sought in possible flaws in the German system of financial supervision. Therefore, it cannot be inferred from the alleged alternative measures put forward by the appellant, involving a change in the Bundesbank's guidelines or improvements to the system at national level, even improvement made in the name of sincere cooperation, that those measures could offer a suitable alternative to the freezing measure imposed on EIH. Furthermore, EIH's line of argument is based not on existing alternative measures, but on *potential* alternative measures. For the most part, the measures put forward by EIH are of a purely prospective, not to say hypothetical, nature, of which the Court of Justice cannot satisfy itself when it rules on the General Court's assessment of the proportionality of using a fund-freezing measure against EIH.

100. In the light of these arguments, the General Court was right to hold that none of the measures put forward by the appellant could be regarded as an alternative to the freezing of EIH's funds, offering, for that purpose, the same level of effectiveness whilst interfering to a lesser degree with the rights and freedoms of the appellant.

101. For all of the reasons set out above, I consider that the fourth plea in law must be rejected.

IV – Costs

102. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. According to Article 138(1) of those rules, which applies to the appeal procedure pursuant to Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Council has applied for costs and the appellant must, in my view, be unsuccessful, the appellant should be ordered to pay the costs of the appeal. As the United Kingdom has taken part in the proceedings before the Court of Justice on the basis of Article 172 of its Rules of Procedure, it must bear its own costs, pursuant to Article 140(1) of those rules.

V – Conclusion

103. In the light of all the foregoing considerations, I propose that the Court should:

- (1) dismiss the appeal;
- (2) order Europäisch-Iranische Handelsbank AG to pay the costs incurred by the Council of the European Union;
- (3) order the United Kingdom of Great Britain and Northern Ireland to bear its own costs.