



Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 31 May 2016¹

Case C-72/15

Rosneft Oil Company OJSC

v

**Her Majesty's Treasury,
The Secretary of State for Business, Innovation and Skills,
The Financial Conduct Authority
(Request for a preliminary ruling**

from the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court)
(United Kingdom))

(References for a preliminary ruling — Common foreign and security policy — Validity of certain provisions of Decision 2014/512/CFSP and of Regulation (EU) No 833/2014 — Restrictive measures in view of Russia's actions destabilising the situation in Ukraine)

I – Introduction

1. This request for a preliminary ruling concerns the validity of, and the interpretation of, Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine² ('Decision 2014/512') and of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine³ ('Regulation No 833/2014').

2. This request for a preliminary ruling is of great significance, since it will require the Court to rule on its own jurisdiction to review the validity of, and to give a preliminary ruling interpreting acts adopted by the European Union in the sphere of its common foreign and security policy ('CSFP'), even though the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU appear to rule out that possibility.

3. The present case thus presents the Court with an opportunity to identify which acts (according to paragraph 252 of Opinion 2/13 of the Court (EU:C:2014:2454)), 'as EU law now stands ... fall outside the ambit of judicial review by the Court of Justice'.

¹ — Original language: French.

² — OJ 2014 L 229, p. 13. The decision has been amended several times. Since the action in the main proceedings concerns only the amendments made up to December 2014, I shall refer in this Opinion to the version of Decision 2014/512 in force in December 2014, which includes the amendments made by Council Decision 2014/659/CFSP of 8 September 2014 (OJ 2014 L 271, p. 54) and Council Decision 2014/872/CFSP of 4 December 2014 (OJ 2014 L 349, p. 58).

³ — OJ 2014 L 229, p. 1. The regulation has been amended several times. Since the action in the main proceedings concerns only the amendments made up to December 2014, I shall refer in this Opinion to the version of Regulation No 833/2014 in force in December 2014, which includes the amendments made by Council Regulation (EU) No 960/2014 of 8 September 2014 (OJ 2014 L 271, p. 3) and Council Regulation (EU) No 1290/2014 of 4 December 2014 (OJ 2014 L 349, p. 20).

II – Legal framework

A – *The EU Treaty*

4. Article 19(1), within Title III, entitled ‘Provisions on the institutions’, of the EU Treaty provides:

‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’

5. Within Title V of the EU Treaty, entitled ‘General provisions on the Union’s external action and specific provisions on the common foreign and security policy’, the first subparagraph of Article 21(1), which falls in Chapter 1, entitled ‘General provisions on the Union’s external action’, provides:

‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.’

6. Chapter 2, entitled ‘Specific provisions on the common foreign and security policy’, of Title V of the Treaty, provides as follows:

‘Section 1

Common provisions

Article 23

The Union’s action on the international scene, pursuant to this Chapter, shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1.

Article 24

1. The Union’s competence in matters of [CFSP] shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.

The [CSFP] is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 [TFEU].

...

3. The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. ...

Article 29

The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions. ...

Article 40

The implementation of the [CFSP] shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 [TFEU].

Similarly, the implementation of the policies listed in those articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

...'

B – *The FEU Treaty*

7. Title I, entitled 'General provisions on the Union's external action', within Part Five of the FEU Treaty, entitled 'the Union's external action', provides as follows:

'Article 205

The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the [EU] Treaty.'

8. Title IV, entitled 'Restrictive measures', of Part Five of the FEU Treaty, provides as follows:

'Article 215

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the [EU] Treaty, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the [EU] Treaty so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this article shall include necessary provisions on legal safeguards.'

9. Article 275, which falls in Section 5, entitled ‘The Court of Justice of the European Union’, of Chapter 1, entitled ‘The institutions’, of Title I, entitled ‘Institutional provisions’, of Part Six of the FEU Treaty, entitled ‘Institutional and financial provisions’, provides:

‘The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the [CFSP] nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the [EU] Treaty and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the [EU] Treaty.’

C – The partnership and cooperation agreement

10. The Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, signed in Corfu on 24 June 1994⁴ (‘the Partnership Agreement’) provides, in Title III thereof, which is entitled, ‘Trade in goods’, as follows:

Article 10

1. The Parties shall accord to one another the general most-favoured-nation treatment described in Article I, paragraph 1 of the GATT.
2. The provisions of paragraph 1 shall not apply to:
 - (a) advantages accorded to adjacent countries in order to facilitate frontier traffic;
 - (b) advantages granted with the aim of creating a customs union or a free-trade area or pursuant to the creation of such a union or area; the terms “customs union” and “free trade area” shall have the same meaning as those described in paragraph 8 of Article XXIV of the GATT or created through the procedure indicated in paragraph 10 of the same GATT article;
 - (c) advantages granted to particular countries in accordance with the GATT and with other international arrangements in favour of developing countries.

...

Article 12

1. The Parties agree that the principle of freedom of transit is an essential condition of attaining the objectives of this Agreement.

In this connection each Party shall provide for freedom of transit through its territory of goods originating in the customs territory or destined for the customs territory of the other Party.

2. The rules described in Article V, paragraphs 2, 3, 4 and 5, of the GATT are applicable between the Parties.

⁴ — OJ 1997 L 327, p. 3. The agreement was approved in the name of the European Communities by Council and Commission Decision 97/800/ECSC, EC, Euratom of 30 October 1997 (OJ 1997 L 327, p. 1).

...

Article 19

The Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection [of the] health and life of humans, animals or plants, the protection of natural resources, the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property or rules relating to gold and silver. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.'

11. In Chapter III, entitled 'Cross-border supply of services', of Title IV of the Partnership Agreement, entitled 'Provisions on business and investment', Article 36 provides:

'For the sectors listed in Annex 5 to this Agreement, the Parties shall grant each other treatment no less favourable than that accorded to any third country with regard to the conditions affecting the cross-border supply of services, by Community or Russian companies into the territory of Russia or the Community respectively, pursuant to the legislation and regulations applicable in each Party.'

12. In Title V of the Partnership Agreement, entitled 'Payments and capital', Article 52 provides:

'...

2. The free movement of capital between residents of the Community and of Russia in the form of direct investment made in companies formed in accordance with the laws of the host country and investments made in accordance with the provisions of Chapter II of Title IV, and the transfer abroad of this investment, including any compensation payments arising from measures such as expropriation, nationalisation or measures of equivalent effect, and of any profit stemming therefrom shall be ensured.

...

5. Without prejudice to paragraphs 6 and 7, after a transitional period of five years as from entry into force of this Agreement, the Parties shall not introduce any new restrictions on the movement of capital and current payments connected therewith between [residents] of the Community and Russia and shall not make the existing arrangements more restrictive. However, the introduction of restrictions during the transitional period referred to in the first sentence of this paragraph shall not affect the rights and obligations of the Parties under paragraphs 2, 3, 4 and 9 of this article.

...

9. The Parties shall accord to one another most-favoured-nation treatment in respect of freedom of current payments and capital movements and in respect of methods of payment.'

13. In Title XI of the Partnership Agreement, entitled 'Institutional, general and final provisions', Article 99 provides:

'Nothing in this Agreement shall prevent a Party from taking any measures:

1. which it considers necessary for the protection of its essential security interests:

...

- (d) in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security;

...'

D – Decision 2014/512

14. The following provisions of Decision 2014/512 are the subject of the present request for a preliminary ruling:

'Article 1

...

2. The direct or indirect purchase or sale of, the direct or indirect provision of investment services for, or assistance in the issuance of, or any other dealing with bonds, equity, or similar financial instruments with a maturity exceeding 30 days, issued after 12 September 2014 by

...

- (b) entities established in Russia which are publicly controlled or with over 50% public ownership which have estimated total assets of over 1 trillion Russian Roubles and whose estimated revenues originate for at least 50% from the sale or transportation of crude oil or petroleum products as of 12 September 2014, as listed in Annex III [namely, Rosneft, Transneft and Gazprom Neft];
- (c) any legal person, entity or body established outside the Union owned for more than 50% by an entity referred to in [point] (b); or
- (d) any legal person, entity or body acting on behalf, or at the direction, of an entity within the category referred to in point (c) or listed in Annex ... III [namely, Rosneft, Transneft and Gazprom Neft],

shall be prohibited.

3. It shall be prohibited to directly or indirectly make or be part of any arrangement to make new loans or credit with a maturity exceeding 30 days to any legal person, entity or body referred to in paragraph 1 or 2, after 12 September 2014 except for loans or credit that have a specific and documented objective to provide financing for non-prohibited direct or indirect imports or exports of goods and non-financial services between the Union and Russia or any other third State, or for loans that have a specific and documented objective to provide emergency funding to meet the solvency and liquidity criteria for legal persons established in the Union, whose proprietary rights are owned for more than 50% by an entity referred to in Annex I [namely, Sberbank, VTB Bank, Gazprombank, Vnesheconombank and Rosselkhozbank].

...

Article 4

1. The direct or indirect sale, supply, transfer or export of certain equipment suited to the following categories of exploration and production projects in Russia, including its Exclusive Economic Zone and Continental Shelf, by nationals of Member States, or from the territories of Member States, or using vessels or aircraft under the jurisdiction of Member States, shall be subject to prior authorisation by the competent authority of the exporting Member State:

- (a) oil exploration and production in waters deeper than 150 metres;
- (b) oil exploration and production in the offshore area north of the Arctic Circle;
- (c) projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing; it does not apply to exploration and production through shale formations to locate or extract oil from non-shale reservoirs.

The Union shall take the necessary measures in order to determine the relevant items to be covered by this paragraph.

2. The provision of:

- (a) technical assistance or other services related to the equipment referred to in paragraph 1;
- (b) financing or financial assistance for any sale, supply, transfer or export of the equipment referred to in paragraph 1 or for the provision of related technical assistance or training,

shall also be subject to prior authorisation by the competent authority of the exporting Member State.

3. The competent authorities of the Member States shall not grant any authorisation for any sale, supply, transfer or export of the equipment or the provision of the services, as referred to in paragraphs 1 and 2, if they determine that the sale, supply, transfer or export concerned or the provision of the service concerned is destined for one of the categories of exploration and production referred to in paragraph 1.

4. Paragraph 3 shall be without prejudice to the execution of contracts concluded before 1 August 2014 or ancillary contracts necessary for the execution of such contracts.

5. An authorisation may be granted where the sale, supply, transfer or export of the items or the provision of the services, as referred to in paragraphs 1 and 2, is necessary for the urgent prevention or mitigation of an event likely to have a serious and significant impact on human health and safety or the environment. In duly justified cases of emergency, the sale, supply, transfer or export or the provision of services, as referred to in paragraphs 1 and 2, may proceed without prior authorisation, provided that the exporter notifies the competent authority within five working days after the sale, supply, transfer or export or the provision of services has taken place, providing detail about the relevant justification for the sale, supply, transfer or export or the provision of services without prior authorisation.

Article 4a

1. The direct or indirect provision of associated services necessary for the following categories of exploration and production projects in Russia, including its Exclusive Economic Zone and Continental Shelf, by nationals of Member States, or from the territories of Member States, or using vessels or aircraft under the jurisdiction of Member States shall be prohibited:

- (a) oil exploration and production in waters deeper than 150 metres;
- (b) oil exploration and production in the offshore area north of the Arctic Circle;
- (c) projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing; it does not apply to exploration and production through shale formations to locate or extract oil from non-shale reservoirs.

2. The prohibition set out in paragraph 1 shall be without prejudice to the execution of contracts or framework agreements concluded before 12 September 2014 or ancillary contracts necessary for the execution of such contracts.

3. The prohibition set out in paragraph 1 shall not apply where the services in question are necessary for the urgent prevention or mitigation of an event likely to have a serious and significant impact on human health and safety or the environment.

...

Article 7

1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this decision, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:

- (a) entities referred to in point (b) or (c) of Article 1(1) and in point (c) or (d) of Article 1(2), or listed in Annex ... III ...;
- (b) any other Russian person, entity or body; or
- (c) any person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in points (a) and (b) of this paragraph.

2. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the person seeking the enforcement of that claim.

3. This article is without prejudice to the right of the persons, entities and bodies referred to in paragraph 1 to judicial review of the legality of the non-performance of contractual obligations in accordance with this decision.

...'

E – Regulation No 833/2014

15. The following provisions of Regulation No 833/2014 are referred to in the present request for a preliminary ruling:

Article 3

1. A prior authorisation shall be required for the sale, supply, transfer or export, directly or indirectly, of items as listed in Annex II, whether or not originating in the Union, to any natural or legal person, entity or body in Russia, including its Exclusive Economic Zone and Continental Shelf or in any other State, if such items are for use in Russia, including its Exclusive Economic Zone and Continental Shelf.

2. For all sales, supplies, transfers or exports for which an authorisation is required under this article, such authorisation shall be granted by the competent authorities of the Member State where the exporter is established and shall be in accordance with the detailed rules laid down in Article 11 of Regulation (EC) No 428/2009. The authorisation shall be valid throughout the Union.

3. Annex II shall include certain items suited to the following categories of exploration and production projects in Russia, including its Exclusive Economic Zone and Continental Shelf:

- (a) oil exploration and production in waters deeper than 150 metres;
- (b) oil exploration and production in the offshore area north of the Arctic Circle; or
- (c) projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing; it does not apply to exploration and production through shale formations to locate or extract oil from non-shale reservoirs.

4. Exporters shall supply the competent authorities with all relevant information required for their application for an export authorisation.

5. The competent authorities shall not grant any authorisation for any sale, supply, transfer or export of the items included in Annex II, if they have reasonable grounds to determine that the sale, supply, transfer or export of the items are destined for any of the categories of exploration and production projects referred to in paragraph 3.

The competent authorities may, however, grant an authorisation where the sale, supply, transfer or export concerns the execution of an obligation arising from a contract concluded before 1 August 2014, or ancillary contracts necessary for the execution of such a contract.

The competent authorities may also grant an authorisation where the sale, supply, transfer or export of the items is necessary for the urgent prevention or mitigation of an event likely to have a serious and significant impact on human health and safety or the environment. In duly justified cases of emergency, the sale, supply, transfer or export may proceed without prior authorisation, provided that the exporter notifies the competent authority within five working days after the sale, supply, transfer or export has taken place, providing detail about the relevant justification for the sale, supply, transfer or export without prior authorisation.

6. Under the conditions set out in paragraph 5, the competent authorities may annul, suspend, modify or revoke an export authorisation which they have granted.

7. Where a competent authority refuses to grant an authorisation, or annuls, suspends, substantially limits or revokes an authorisation in accordance with paragraphs 5 or 6, the Member State concerned shall notify the other Member States and the Commission thereof and share the relevant information with them, while complying with the provisions concerning the confidentiality of such information in Council Regulation (EC) No 515/97.

8. Before a Member State grants an authorisation in accordance with paragraph 5 for a transaction which is essentially identical to a transaction which is the subject of a still valid denial issued by another Member State or by other Member States under paragraphs 6 and 7, it shall first consult the Member State or States which issued the denial. If, following such consultations, the Member State concerned decides to grant an authorisation, it shall inform the other Member States and the Commission thereof, providing all relevant information to explain the decision.

Article 3a

1. It shall be prohibited to provide, directly or indirectly, associated services necessary for the following categories of exploration and production projects in Russia, including its Exclusive Economic Zone and Continental Shelf:

- (a) oil exploration and production in waters deeper than 150 metres;
- (b) oil exploration and production in the offshore area north of the Arctic Circle; or
- (c) projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing; it does not apply to exploration and production through shale formations to locate or extract oil from non-shale reservoirs.

For the purpose of this paragraph, associated services shall mean:

- (i) drilling;
- (ii) well testing;
- (iii) logging and completion services;
- (iv) supply of specialised floating vessels.

2. The prohibitions in paragraph 1 shall be without prejudice to the execution of an obligation arising from a contract or a framework agreement concluded before 12 September 2014 or ancillary contracts necessary for the execution of such a contract.

3. The prohibitions in paragraph 1 shall not apply where the services in question are necessary for the urgent prevention or mitigation of an event likely to have a serious and significant impact on human health and safety or the environment.

The service provider shall notify the competent authority within five working days of any activity undertaken pursuant to this paragraph, providing detail about the relevant justification for the sale, supply, transfer or export.

Article 4

...

3. The provision of the following shall be subject to an authorisation from the competent authority concerned:

- (a) technical assistance or brokering services related to items listed in Annex II and to the provision, manufacture, maintenance and use of those items, directly or indirectly, to any natural or legal person, entity or body in Russia, including its Exclusive Economic Zone and Continental Shelf or, if such assistance concerns items for use in Russia, including its Exclusive Economic Zone and Continental Shelf, to any person, entity or body in any other State;
- (b) financing or financial assistance related to items referred to in Annex II, including in particular grants, loans and export credit insurance, for any sale, supply, transfer or export of those items, or for any provision of related technical assistance, directly or indirectly, to any natural or legal person, entity or body in Russia, including its Exclusive Economic Zone and Continental Shelf or, if such assistance concerns items for use in Russia, including its Exclusive Economic Zone and Continental Shelf, to any person, entity or body in any other State.

In duly justified cases of emergency referred to in Article 3(5), the provision of services referred to in this paragraph may proceed without prior authorisation, on condition that the provider notifies the competent authority within five working days after the provision of services.

4. Where authorisations are requested pursuant to paragraph 3 of this article, Article 3, and in particular paragraphs 2 and 5 thereof, shall apply *mutatis mutandis*.

Article 5

...

2. It shall be prohibited to directly or indirectly purchase, sell, provide investment services for or assistance in the issuance of, or otherwise deal with transferable securities and money-market instruments with a maturity exceeding 30 days, issued after 12 September 2014 by:

...

- (b) a legal person, entity or body established in Russia, which are publicly controlled or with over 50% public ownership and having estimated total assets of over 1 trillion Russian Roubles and whose estimated revenues originate for at least 50% from the sale or transportation of crude oil or petroleum products, as listed in Annex VI [namely, Rosneft, Transneft and Gazprom Neft];
- (c) a legal person, entity or body established outside the Union whose proprietary rights are directly or indirectly owned for more than 50% by an entity listed in point (a) or (b) of this paragraph; or
- (d) a legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a), (b) or (c) of this paragraph.

3. It shall be prohibited to directly or indirectly make or be part of any arrangement to make new loans or credit with a maturity exceeding 30 days to any legal person, entity or body referred to in paragraph 1 or 2, after 12 September 2014. The prohibition shall not apply to:

- (a) loans or credit that have a specific and documented objective to provide financing for non-prohibited imports or exports of goods and non-financial services between the Union and any third State, including the expenditure for goods and services from another third State that is necessary for executing the export or import contracts; or
- (b) loans that have a specific and documented objective to provide emergency funding to meet solvency and liquidity criteria for legal persons established in the Union, whose proprietary rights are owned for more than 50% by any entity referred to in Annex III [namely, Sberbank, VTB Bank, Gazprombank, Vnesheconombank and Rosselkhozbank].

...

Article 8

1. Member States shall lay down the rules on penalties applicable to infringements of the provisions of this regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

2. Member States shall notify the rules referred to in paragraph 1 to the Commission without delay after the entry into force of this regulation and shall notify it of any subsequent amendment.

...

Article 11

1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:

- (a) entities referred to in points (b) and (c) of Article 5(1) and points (c) and (d) of Article 5(2), or listed in [Annex] ... VI [namely, Rosneft, Transneft and Gazprom Neft];
- (b) any other Russian person, entity or body;
- (c) any person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in points (a) and (b) of this paragraph.

2. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the person seeking the enforcement of that claim.

3. This article is without prejudice to the right of the persons, entities and bodies referred to in paragraph 1 to judicial review of the legality of the non-performance of contractual obligations in accordance with this regulation.'

III – The dispute in the main proceedings and the questions referred for a preliminary ruling

16. On 6 March 2014, the Heads of State or Government of the Union's Member States strongly condemned the 'unprovoked violation of Ukrainian sovereignty and territorial integrity by the Russian Federation'.⁵ They called upon the Russian Federation immediately to withdraw its armed forces to the areas of their permanent stationing, in accordance with relevant agreements. They also decided to suspend bilateral talks with the Russian Federation on visa matters as well as on the global agreement intended to replace the Partnership Agreement. However, they emphasised that a solution to the crisis should be found through negotiation between the governments of Ukraine and the Russian Federation.

17. The Heads of State or Government of the Union's Member States added that if the negotiations did not produce results within a limited timeframe travel bans and asset freezes would be imposed on those responsible for actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

18. In order to give effect to that statement, the Council adopted Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine,⁶ which imposed the abovementioned measures on certain persons listed in Annex I to the regulation.

19. On 31 July 2014, taking the view that the Russian Federation had failed to respond to the European Union's demands and that the territorial integrity, sovereignty and independence of Ukraine were continuing to be undermined, the Council adopted a package of further substantial restrictive measures, namely Decision 2014/512 and Regulation No 833/2014, which targeted certain Russian undertakings including Rosneft Oil Company OJSC ('Rosneft'), whose activities include hydrocarbon exploration, production and refining and crude oil and gas marketing in Russia and abroad.

20. Rosneft conducts its exploration and production activities in the key hydrocarbon provinces of Russia and the Russian Continental Shelf. Its exploration activities include operations in waters deeper than 150 metres and in shale formations.

21. The majority (69.5%) of Rosneft shares are held by Rosneftegaz OJSC, a limited company wholly owned by the Russian Federation. A minority of its shares (19.75%) are held by BP Russian Investments Ltd., a subsidiary of BP plc, the British oil company. The remaining 10.75% of the issued share capital is publicly traded.

22. Her Majesty's Treasury and the Secretary of State for Business, Innovation and Skills are the authorities responsible in the United Kingdom for implementing the EU legislation imposing the restrictive measures adopted in response to the actions of the Russian Federation in Ukraine.

23. The Financial Conduct Authority ('the FCA') is also bound by Decision 2014/512 and Regulation No 833/2014 and is required to consider their effect upon its own statutory duties and objectives. Consequently, if it appears that there is a risk that prohibited securities might be issued and that this might adversely affect the integrity of the markets regulated by the FCA or consumer protection, the FCA would be required to consider what actions, if any, it must take to pre-empt or address that risk.

24. By application lodged at the Registry of the General Court on 9 October 2014, Rosneft brought an action under the fourth paragraph of Article 263 TFEU for the annulment of Decision 2014/512 and Regulation No 833/2014.⁷

5 — Statement of the Heads of State or Government on Ukraine, Brussels, 6 March 2014.

6 — OJ 2014 L 78, p. 6.

7 — *NK Rosneft and Others v Council*, T-715/14, pending before the General Court.

25. In an application for judicial review which it brought before the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court) (United Kingdom), on 20 November 2014, Rosneft challenges the legality of Decision 2014/512 and Regulation No 833/2014 and of certain measures adopted by the United Kingdom authorities to implement certain aspects of Regulation No 833/2014, in particular the criminal penalties laid down for infringement of that regulation,⁸ certain of the FCA's interpretations of the concept of 'financial assistance' and the FCA's interpretation and application of the regulation to certain transferable securities.⁹

26. By judgment of 9 February 2015,¹⁰ the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), held that, in order to resolve the dispute before it, it needed to determine whether certain provisions of Decision 2014/512 and Regulation No 833/2014 were invalid and that it could not do so without referring questions to the Court of Justice for a preliminary ruling, in accordance with the judgment in *Foto-Frost* (314/85, EU:C:1987:452).

27. Moreover, it considers that, even if the provisions in question are valid, it is not certain that other courts in the Member States will reach the same conclusions regarding their interpretation and application. It has also pointed to significant differences in interpretation on the part of the competent authorities of the various Member States in relation to certain essential points.

28. It was in that context that the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- '1. Having regard in particular to Article 19(1) TEU, Article 24 TEU, Article 40 TEU, Article 47 [of the Charter of Fundamental Rights of the European Union] and the second paragraph of Article 275 TFEU, does the Court of Justice have jurisdiction to give a preliminary ruling under Article 267 TFEU on the validity of Article 1(2)(b) to (d) and (3), Article 4, Article 4(a) and Article 7 of, and Annex III to ... Decision [2014/512]?
- 2 (a) Are one or more of the following provisions ("the Relevant Measures") of the ... regulation and, to the extent that the Court has jurisdiction, the decision invalid:
 - (i) Articles 4 and 4a of ... Decision [2014/512];
 - (ii) Articles 3, 3a, 4(3) and (4) of, and Annex II to ... Regulation [No 833/2014];
(together, "the Oil Sector Provisions");
 - (iii) Article 1(2)(b) to (d) and (3) of, and Annex III to ... Decision [2014/512];
 - (iv) Articles 5(2)(b) to (d) and (3) of, and Annex VI to ... Regulation [No 833/2014];
(together, "the Securities and Lending Provisions");
 - (v) Article 7 of ... Decision [2014/512], and
 - (vi) Article 11 of ... Regulation [No 833/2014].

8 — See the Ukraine (European Union Financial Sanctions) (No. 3) Regulations 2014, SI 2014/2054, subsequently amended by the Ukraine (European Union Financial Sanctions) (No. 3) (Amendment) Regulations 2014, SI 2014/2445, and the Export Control (Russia, Crimea and Sevastopol Sanctions) Order 2014, SI 2014/2357, subsequently amended by the Export Control (Russia, Crimea and Sevastopol Sanctions) (Amendment) Order 2014, SI 2014/2932.

9 — The securities in question are issued in the form of Global Depository Receipts ('GDRs'), which relate to Rosneft shares and are officially listed and traded on the London Stock Exchange.

10 — *R (OJSC Rosneft Oil Company) v Her Majesty's Treasury and ors* [2015] EWHC 248 (Admin).

- 2 (b) In so far as the Relevant Measures are valid, is it contrary to the principles of legal certainty and *nulla poena sine lege certa* for a Member State to impose criminal penalties, pursuant to Article 8 of ... Regulation [No 833/2014], before the scope of the relevant offence has been sufficiently clarified by the Court of Justice?
3. In so far as the relevant prohibitions or restrictions referred to in Question 2(a) are valid:
- (a) Does the term “financial assistance” in Article 4(3) of ... Regulation [No 833/2014] include the processing of a payment by a bank or other financial institution?
 - (b) Does Article 5 of the ... regulation prohibit the issuing of, or other dealings with, [GDRs], issued on or after 12 September 2014 under a deposit agreement with one of the entities listed in Annex VI, in respect of shares in one of those entities which were issued before 12 September 2014?
 - (c) If the Court considers that there is a lack of clarity which can appropriately be resolved by the Court providing further guidance, what is the correct interpretation of the terms “shale” and “waters deeper than 150 metres” in Article 4 of the Decision and Articles 3 and 3a of the ... regulation? In particular, if the Court considers it necessary and appropriate, can it provide a geological interpretation of the term “shale” to be used in implementing the regulation, and clarify whether the measurement of “waters deeper than 150 metres” is to be taken from the point of drilling or elsewhere?

29. By order of 26 March 2015, the President of the General Court stayed the proceedings in the action for annulment in *NK Rosneft and Others v Council* (T-715/14) until the Court has delivered its judgment in the present case, in accordance with the third paragraph of Article 54 of the Statute of the Court of Justice of the European Union.

IV – Procedure before the Court

30. This request for a preliminary ruling was lodged at the Court on 18 February 2015. Rosneft, the FCA, the United Kingdom, Czech, German, Estonian and French Governments and the Council and Commission have lodged written observations.

31. A hearing was held on 23 February 2016 at which Rosneft, the FCA, the United Kingdom, Czech, German, Estonian, French and Polish Governments and the Council and Commission made oral submissions.

V – Assessment

A – Question 1

32. By its first question, the referring court asks the Court of Justice whether it has jurisdiction to give a preliminary ruling on the validity of Article 1(2)(b) to (d) and (3), Article 4, Article 4(a) and Article 7 of, and Annex III to Decision 2014/512, having regard to Articles 19, 24 and 40 TEU, Article 275 TFEU and Article 47 of the Charter.

1. Admissibility

33. The Estonian Government and the Council dispute the admissibility of the first question, in that the referring court does not need an answer to that question in order to resolve the dispute in the main proceedings.

34. I suggest that the Court dismiss this objection of inadmissibility, since the Court's jurisdiction to reply to the present request for a preliminary ruling is obviously a necessary prerequisite for its analysis of the other questions which the referring court asks (the relevance of which is disputed by none of the parties concerned). Moreover, this question is, according to settled case-law, 'a matter of public policy [and] may be considered by the Court at any stage in the proceedings, even of its own motion'.¹¹

35. Moreover, the referring court must have the question of the Court's jurisdiction settled so that it may know whether or not it is bound by the Court's monopoly on the review of the legality of acts of secondary legislation of the European Union.¹²

2. The Court's jurisdiction to give a preliminary ruling on the validity of and the interpretation of CFSP acts

(a) The general rule: judicial review (Articles 19 TEU, 263 TFEU, 277 TFEU and 267 TFEU)

36. In paragraph 23 of its well-known judgment in *Les Verts v European Parliament* (294/83, EU:C:1986:166), the Court stated that 'the European [Union] is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the [Treaties]'. The Court thus allowed that an action for annulment could be brought against an act of the European Parliament, even though that institution was not expressly referred to in the first paragraph of the former Article 173 EEC (now Article 263 TFEU) as one of the institutions whose acts could be the subject of judicial review.¹³

37. 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' and imposes on the Member States an obligation to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

38. Indeed, it is settled case-law that 'the FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union'.¹⁴

11 — Judgment in *Elitaliana v Eulex Kosovo* (C-439/13 P, EU:C:2015:753, paragraph 37). See also, to that effect, the judgments in *Sahlstedt and Others v Commission* (C-362/06 P, EU:C:2009:243, paragraph 22) and *Commission v Cyprus* (C-340/10, EU:C:2012:143, paragraph 20).

12 — See the View of Advocate General Kokott in Opinion 2/13 (EU:C:2014:2475, point 100).

13 — Parliament's capacity to be sued, in an action for annulment, was followed by the confirmation, in the judgment in *Parliament v Council* (C-70/88, EU:C:1990:217), of its capacity to sue. In that judgment, the Court held that, although the EEC Treaty did not include the Parliament among the institutions which could bring an action for annulment, that could constitute 'a procedural gap [which could not] prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities' (paragraph 26).

14 — Judgment in *Inuit Tapiriit Kanatami and Others v Parliament and Council* (C-583/11 P, EU:C:2013:625), paragraph 92. See also, to that effect, the judgments in *Les Verts v Parliament* (294/83, EU:C:1986:166, paragraph 23); *Unión de Pequeños Agricultores v Council* (C-50/00 P, EU:C:2002:462, paragraph 40); *Telefónica v Commission* (C-274/12 P, EU:C:2013:852, paragraph 57); and *T & L Sugars and Sidul Açúcares v Commission* (C-456/13 P, EU:C:2015:284, paragraph 45); and the order in *Pesquerias Riveirenses and Others v Council* (C-164/14 P, EU:C:2015:111, paragraph 40).

(b) ‘Carve-out’: the unreviewable nature of certain acts adopted in the context of the CFSP (the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU)

39. At first sight, it appears that the Court’s jurisdiction in the sphere of the CFSP is excluded by the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU.

40. Before considering those provisions, it is appropriate to observe that, although the Court had an opportunity to consider questions relating to its jurisdiction in CFSP matters on the occasion of each of its judgments in *Parliament v Council* (C-130/10, EU:C:2012:472), *Council v Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776), *Parliament v Council* (C-658/11, EU:C:2014:2025) and *Gbagbo and Others v Council* (C-478/11 P to C-482/11 P, EU:C:2013:258), it stated in paragraph 251 of Opinion 2/13 (EU:C:2014:2454) that ‘[it had] not yet had the opportunity to define the extent to which its jurisdiction [was] limited in CFSP matters as a result of [the second subparagraph of Article 24(1) TEU and Article 275 TFEU]’. Accordingly, the Court stated in paragraph 252 of its Opinion: ‘it is sufficient to declare that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice’, without, however, clarifying which acts they were.¹⁵

41. Moreover, since review of the legality of European Union acts is the rule (Articles 19 TEU, 263 TFEU, 277 TFEU and 267 TFEU) and the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a ‘carve-out’ provision derogating from the jurisdiction of the European Union Courts, or in other words ‘a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court ..., they must ... be interpreted narrowly’.¹⁶

42. I would also point out that there is a difference in wording between the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU.

43. According to the last sentence of the second subparagraph of Article 24(1) TEU, ‘the Court of Justice of the European Union shall not have jurisdiction with respect to *these provisions*’,¹⁷ whereas the first paragraph of Article 275 TFEU provides that ‘the Court of Justice of the European Union shall not have jurisdiction with respect to *the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions*’.¹⁸

44. The use in the first paragraph of Article 275 TFEU of the words ‘provisions relating to the [CFSP]’ might create the false impression that the European Union Courts have no jurisdiction in relation to any provisions of the FEU Treaty that, while not falling within the scope of the CFSP, may relate to it.

45. The Court has never adopted such a broad interpretation of the first paragraph of Article 275 TFEU. On the contrary, it has held that an act based on Article 37 TEU, which is one of the CFSP provisions of the EU Treaty, and Article 218(5) and (6) TFEU cannot escape judicial review, since Article 218 TFEU, which is undeniably a provision that relates to the CFSP, ‘is of general application and is therefore intended to apply, in principle, to all international agreements negotiated and concluded by the European Union in all fields of its activity, including the CFSP’.¹⁹

15 — The Court nevertheless did not adopt the position that was very clearly expressed by Advocate General Kokott, which was that the Court has no jurisdiction to give preliminary rulings on the validity of CFSP acts and that, notwithstanding their obligation to apply EU law, the courts and tribunals of the Member States may therefore assess for themselves whether acts of that type are lawful and may refrain from applying them where they regard them as unlawful (see points 82 to 103 of Advocate General Kokott’s View in Opinion 2/13, EU:C:2014:2475).

16 — Judgments in *Parliament v Council* (C-658/11, EU:C:2014:2025, paragraph 70) and in *Elitaliana v Eulex Kosovo* (C-439/13 P, EU:C:2015:753, paragraph 42).

17 — My emphasis.

18 — My emphasis.

19 — Judgment in *Parliament v Council* (C-658/11, EU:C:2014:2025, paragraph 72).

46. Since the last sentence of the second subparagraph of Article 24(1) TEU excludes the Court's jurisdiction only 'with respect to *these provisions*',²⁰ it seems to me that, as the Commission submits in paragraph 40 of its written observations, the reference thus made is to Chapter 2 of Title V of the EU Treaty, entitled 'Specific provisions on the common foreign and security policy', of which Article 24 forms part.

47. The 'carve-out' provision contained in the second subparagraph of Article 24(1) and the first paragraph of Article 275 TFEU therefore relates solely to Articles 23 to 46 TEU and European Union acts adopted on the basis of those provisions.²¹

48. Therefore, regulations adopted by the Council on the basis of Article 215 TFEU fall outside the ambit of the 'carve-out' provision. The parties to the main proceedings and all the other parties that have intervened in the present case are agreed that regulations adopted by the Council on the basis of Article 215 TFEU, such as Regulation No 833/2014, fall within the ambit of the general powers of judicial review of the European Union Courts under Article 19 TEU. Where they disagree is on the extent of such review and on the breadth of the discretion that the Council is to be allowed. Moreover, the Court has already given a preliminary ruling on the interpretation of Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus,²² the legal basis for which was the former Article 301 of the EC Treaty, now Article 215 TFEU.²³

49. Furthermore, in order for a CFSP act to benefit from the immunity from review afforded by the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, not only must its legal basis lie in Articles 23 TEU to 46 TEU, but its substantive content must also fall within the sphere of CFSP implementation.

50. Accordingly, in an action for the annulment of measures adopted by the Mission established on the basis of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO,²⁴ as amended by Council Decision 2011/752/CFSP of 24 November 2011,²⁵ the Court held, in paragraphs 48 and 49 of its judgment in *Elitaliana v Eulex Kosovo* (C-439/13 P, EU:C:2015:753): '... the measures at issue, whose annulment was sought on the basis of an infringement of the rules of EU public procurement law, related to the award of a public contract which gave rise to expenditure to be charged to the European Union budget. Accordingly, the contract at issue is subject to the provisions of the Financial Regulation. Having regard to the specific circumstances of the present case, the scope of the limitation, by way of derogation, on the Court's jurisdiction, which is provided for in the final sentence of the second subparagraph of Article 24(1) TEU and in Article 275 TFEU, cannot be considered to be so extensive as to exclude the Court's jurisdiction to interpret and apply the provisions of the Financial Regulation with regard to public procurement'.

20 — My emphasis.

21 — See the judgments in *Council v Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776, paragraph 99, which refers to paragraphs 36 to 38 of the judgment in *Manufacturing Support & Procurement Kala Naft v Council* (T-509/10, EU:T:2012:201); *Parliament v Council* (C-658/11, EU:C:2014:2025, paragraph 73); and *National Iranian Oil Company v Council* (T-578/12, EU:T:2014:678, paragraph 35), which was confirmed by the judgment in *National Iranian Oil Company v Council* (C-440/14 P, EU:C:2016:128).

22 — OJ 2006 L 134, p. 1.

23 — See the judgment in *Peftiev* (C-314/13, EU:C:2014:1645).

24 — OJ 2008 L 42, p. 92.

25 — OJ 2011 L 310, p. 10.

(c) ‘Claw-back’: limited judicial review of CFSP acts (the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU)

i) Scope

51. If, and only if, a CFSP act fulfils the two conditions referred to in points 47 and 49 of this Opinion, it then becomes necessary to consider whether, on the basis of the ‘claw-back’ provision introduced by the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU, it nevertheless falls within the ambit of the general jurisdiction which Article 19(1) TEU confers on the European Union Courts.

52. I would point out that the reason for the limitation of the Court’s jurisdiction in CFSP matters brought about by the ‘carve-out’ provision is that CFSP acts are, in principle, solely intended to translate decisions of a purely political nature connected with implementation of the CFSP, in relation to which it is difficult to reconcile judicial review with the separation of powers.²⁶

53. However, the ‘claw-back’ provision deprives CFSP acts of their immunity from review where they go beyond the bounds of the CFSP, which is the case for CFSP decisions which, although adopted on the basis of Chapter 2 of Title V of the EU Treaty, encroach upon the powers conferred on the European Union by the FEU Treaty and for CFSP decisions which provide for restrictive measures against natural or legal persons.

54. Indeed, as early as 1998, the Court held, in paragraphs 14 to 18 of its judgment in *Commission v Council* (C-170/96, EU:C:1998:219) that, on the basis of Article M of the EU Treaty (the predecessor of Article 40 TEU), it had power to ‘ensure that acts which, according to the Council, fall within the scope of Article K.3(2) of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community’.²⁷

55. Similarly, according to the settled case-law of the Court on the judicial review of restrictive measures against natural or legal persons contained in acts predating the entry into force of the Lisbon Treaty, ‘it has to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act’,²⁸ because ‘the right to make a reference to the Court for a preliminary ruling must ... exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties’.²⁹

56. The ‘claw-back’ provision laid down in the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU has not substantially altered the position from that which existed before the adoption of the Lisbon Treaty.

57. I would observe that, as in the case of the ‘carve-out’ provision, there is a difference in drafting between the relevant provisions. However, in this case Article 275 TFEU uses narrower terms than are used in the last sentence of the second subparagraph of Article 24(1) TEU.

26 — In the legal systems of several Member States questions concerning the government’s implementation of foreign policy are not amenable to judicial review, either in accordance with the ‘actes de gouvernement’ (governmental acts) theory (see, for example, Conseil d’État (France), 19 February 1875, Prince Napoléon, *Recueil Lebon*, p. 155) or the doctrine of ‘justiciability’ (see, for example, *R (Abbasi and Anor.) v Secretary of State for Foreign & Commonwealth Affairs and Anor.* [2002] EWCA Civ 1598, paragraphs 99 and 106 (Court of Appeal (England and Wales) (Civil Division)).

27 — Paragraph 16 of the judgment. See also, to that effect, the judgments in *Commission v Council* (C-176/03, EU:C:2005:542, paragraph 39), *Commission v Council* (C-440/05, EU:C:2007:625, paragraph 53) and *Commission v Council* (C-91/05, EU:C:2008:288, paragraph 33).

28 — See the judgments in *Gestoras Pro Amnistía and Others v Council* (C-354/04 P, EU:C:2007:115, paragraph 54) and *Segi and Others v Council* (C-355/04 P, EU:C:2007:116, paragraph 54).

29 — See the judgments in *Gestoras Pro Amnistía and Others v Council* (C-354/04 P, EU:C:2007:115, paragraph 53) and *Segi and Others v Council* (C-355/04 P, EU:C:2007:116, paragraph 53).

58. Indeed, the last sentence of the second subparagraph of Article 24(1) TEU provides that the European Union Courts have jurisdiction ‘to monitor compliance with Article 40 [TEU] and to *review the legality* of certain decisions as provided for by the second paragraph of Article 275 [TFEU]’.³⁰

59. The second paragraph of Article 275 TFEU, on the other hand, provides that the European Union Courts have jurisdiction ‘to monitor compliance with Article 40 [TEU] and *to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU]*, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the [EU] Treaty’.

60. In so far as concerns monitoring compliance with Article 40 TEU, the two provisions are identical. Any CFSP act covered by the ‘carve-out’ provision may be reviewed by the European Union Courts in order to ensure its compliance with Article 40 TEU. This aspect of the ‘claw-back’ provision therefore relates, *inter alia*, to acts adopted on the basis of Article 215(1) and (2) TFEU, which contain both measures providing for the interruption or reduction, in part or completely, of economic or financial relations with one or more third countries and restrictive measures against natural or legal persons.

61. However, there is a significant difference in drafting between the two provisions, inasmuch as the second paragraph of Article 275 TFEU limits judicial review of the legality of decisions providing for restrictive measures against natural or legal persons to actions for annulment brought by such persons in accordance with the fourth paragraph of Article 263 TFEU, whereas the last sentence of the second subparagraph of Article 24(1) TEU re-establishes the jurisdiction of the Court to review, generally, the legality of ‘certain decisions as provided for by the second paragraph of Article 275 [TFEU]’, that is to say, ‘decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the [EU] Treaty’.

62. However, it is clear from the case-law cited in point 38 of this Opinion that the review of legality mentioned in the last sentence of the second subparagraph of Article 24(1) TEU includes not only actions for annulment brought on the basis of the fourth paragraph of Article 263 TFEU, but also, and in particular, the preliminary ruling procedure provided for in Article 267 TFEU.

63. Indeed, according to the long-standing and consistent case-law of the Court, ‘requests for preliminary rulings, *like actions for annulment*, constitute means for reviewing the legality of acts of the [European Union] institutions’.³¹ As the Court held in paragraph 15 of its judgment in *Foto-Frost* (314/85, EU:C:1987:452), ‘the main purpose of the powers accorded to the Court by Article [267 TFEU] is to ensure that [EU] law is applied uniformly by the national courts [since] divergences between courts in the Member States as to the validity of [EU] acts would be liable to place in jeopardy the very unity of the ... legal order [of the European Union] and detract from the fundamental requirement of legal certainty’.³²

30 — My emphasis.

31 — Judgment in *Foto-Frost* (314/85, EU:C:1987:452, paragraph 16). My emphasis. See also, to that effect, the judgments in *Les Verts v Parliament* (294/83, EU:C:1986:166, paragraph 23); *Unión de Pequeños Agricultores v Council* (C-50/00 P, EU:C:2002:462, paragraph 40); *Gaston Schul Douane-expéditeur* (C-461/03, EU:C:2005:742, paragraph 22); *Reynolds Tobacco and Others v Commission* (C-131/03 P, EU:C:2006:541, paragraph 80); *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 54); *A* (EU:C:2014:2195, paragraph 41); and *Schrems* (C-362/14, EU:C:2015:650, paragraph 62).

32 — The judgment in *Foto-Frost* (314/85, EU:C:1987:452) is based on the fact that ‘Article [263 TFEU] gives the Court *exclusive* jurisdiction to declare void an act of a [European Union] institution’ (paragraph 17 of the judgment; my emphasis). See also, to that effect, the judgments in *Lucchini* (C-119/05, EU:C:2007:434, paragraph 53), *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 54); *Otis and Others* (C-199/11, EU:C:2012:684, paragraph 53), *A* (EU:C:2014:2195, paragraph 41); and *Schrems* (C-362/14, EU:C:2015:650, paragraph 62). That principle must apply to all Union acts that fall either within the ambit of the Court’s general jurisdiction (see points 36 to 38 of this Opinion) or within that of the ‘claw-back’ provision. If, on the other hand, proceedings relate to a CFSP act which falls within the scope of the ‘carve-out’ provisions but not within the scope of the ‘claw-back’ provision, any review of its legality will fall not within the jurisdiction of the Court of Justice but within the jurisdiction of the courts of the Member States, which, in accordance with Article 19 TEU, must ensure that individuals have effective legal protection. Indeed, as is stipulated in the last sentence of the second subparagraph of Article 24(1) TEU and in the first paragraph of Article 275 TFEU, it is then ‘the Court of Justice of the European Union [that does] not have jurisdiction’, not the courts of the Member States.

64. Moreover, since, according to the case-law of the Court,³³ the ‘carve-out’ provision introduced by the first paragraph of Article 275 TFEU must, like any derogation, be interpreted narrowly, and since the scope of the ‘claw-back’ provision cannot be broader than that of the ‘carve-out’ provision,³⁴ the ‘claw-back’ provision in the second paragraph of Article 275 TFEU, which re-establishes the basic rule, must be interpreted broadly, with account being taken of the broader terms of the last sentence of the second subparagraph of Article 24(1) TEU.

65. I therefore consider that the ‘claw-back’ provision in the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU enables the European Union Courts to review the compliance with Article 40 TEU of all CFSP acts (either in an action for annulment or in preliminary ruling proceedings)³⁵ as well as to review the legality of CFSP decisions adopted by the Council in accordance with Chapter 2 of Title V of the EU Treaty which provide for restrictive measures against natural or legal persons (again, either in an action for annulment or in preliminary ruling proceedings).³⁶

66. The contrary view, expressed by Advocate General Kokott in her View in Opinion 2/13 (EU:C:2014:2475) and supported in the present case by the United Kingdom, Czech, German, Estonian, French and Polish Governments and by the Council, according to which ‘the Treaties ... specifically do not provide for the Court of Justice to have *any* jurisdiction to give preliminary rulings in relation to the CFSP’,³⁷ would, in my opinion, be difficult to reconcile with Article 23 TEU, which provides that ‘the Union’s action on the international scene ... shall be guided by the principles ... laid down in Chapter 1’, which include the rule of law and the universality and indivisibility of human rights and fundamental freedoms,³⁸ which unquestionably include the right of access to a court and effective legal protection.

ii) The ‘claw-back’ provision and Council decisions adopted on the basis of Chapter 2 of Title V of the EU Treaty and providing for restrictive measures against natural or legal persons

67. I would emphasise that, while the ‘carve-out’ provision introduced by the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU covers all CFSP acts, the ‘claw-back’ provision introduced by the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU relates solely to compliance with Article 40 TEU and to the review of the legality of *decisions* providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty.

68. As regards compliance with Article 40 TEU, it is clear that the ‘claw-back’ provision relates to all CFSP acts covered by the ‘carve-out’ provision.

33 — See the judgments in *Parliament v Council* (C-658/11, EU:C:2014:2025, paragraph 70) and *Elitaliana v Eulex Kosovo* (C-439/13 P, EU:C:2015:753, paragraph 42).

34 — Indeed, it is not possible for the second paragraph of Article 275 TFEU to re-establish the jurisdiction of the European Union Courts in relation to matters that have not first been excluded from its jurisdiction by the first paragraph of Article 275.

35 — See, to that effect, Lenaerts, K., Maselis, I., and Gutman, K., *EU Procedural Law*, Oxford University Press, 2014, paragraph 6.05.

36 — I would add that the present case solely concerns the jurisdiction of the Court to give a preliminary ruling on the validity of, and the interpretation of CFSP acts. Actions for failure to act and actions for damages which relate to a CFSP act are covered by the ‘carve-out’ provision in the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, but not by the ‘claw-back’ provision in the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU.

37 — Point 100 of the View. In point 101, the Advocate General added that ‘there is no doubt that it is highly regrettable from the aspect of integration policy that, in matters relating to the CFSP, the Court of Justice has no jurisdiction to give preliminary rulings or a monopoly on ruling on validity as in *Foto-Frost* [(EU:C:1987:452)], because, as a result, the uniform interpretation and application of EU law in the context of the CFSP cannot be ensured’.

38 — See Article 21(1) TEU.

69. By contrast, in so far as the review of legality is concerned, the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU, and also Article 215(2) TFEU, refer to *decisions* providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty. That, in my view, does not encompass regulations, such as Regulation No 833/2014, adopted by the Council on the basis of Article 215(2) TFEU.

70. That supports the argument, which I set out in points 47 and 48 of this Opinion, that the ‘carve-out’ provision relates solely to CFSP acts whose legal basis is to be found in Articles 23 to 46 TEU and consequently does not refer to acts adopted by the Council on the basis of Article 215 TFEU.

71. If it were otherwise, that would result in the paradoxical situation in which the Court would have jurisdiction to review CFSP decisions providing for measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty, but not regulations adopted on the basis of such decisions.

72. Moreover, by contrast with the case of restrictive measures providing for the interruption or reduction, in part or completely, of economic and financial relations with one or more non-member States,³⁹ the adoption of a regulation on the basis of Article 215(2) TFEU is not mandatory in so far as restrictive measures against natural or legal persons are concerned. Indeed, according to that provision, ‘where a [CFSP] decision so provides, the Council *may* adopt [such measures]’.⁴⁰ It is therefore possible to adopt restrictive measures against natural or legal persons simply by way of a CFSP decision. It is precisely in view of that sort of decision that the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU lay down the ‘claw-back’ provision.

iii) The Court’s power of interpretation

73. Since the ‘claw-back’ provision introduced by the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU limits the Court’s jurisdiction to *reviewing the legality* of CFSP decisions providing for measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty, the Court’s power of interpretation, conferred by point (b) of the second paragraph of Article 267 TFEU, appears to be excluded from its jurisdiction in relation to those acts.

74. However, in a similar legal context, in which Article 41 of the ECSC Treaty enabled the Court to ‘give preliminary rulings on the *validity* of acts of the High Authority and the Council’,⁴¹ the Court held that ‘appraisal of the validity of a measure necessarily presupposes its interpretation’.⁴² On that basis, it held that ‘it would ... be contrary to the objectives and the coherence of the Treaties if the determination of the meaning and scope of rules deriving from the EEC and EAEC Treaties were ultimately a matter for the Court of Justice, as is provided in identical terms by Article 177 of the EEC Treaty [now Article 267 TFEU] and Article 150 of the EAEC Treaty [now repealed], thereby

39 — Article 215(1) TFEU implies that any interruption or reduction, in part or completely, of economic and financial relations with one or more non-member States provided for by a CFSP decision must be followed by the adoption of a Council act on the basis of that same Article 215 TFEU, or in other words intervention under what, prior to the Lisbon Treaty, was referred to as ‘the Community pillar’. Indeed, Article 215(1) TFEU expresses an imperative: ‘the Council ... shall adopt the necessary measures’.

40 — My emphasis.

41 — My emphasis.

42 — Judgment in *Bussoni* (C-221/88, EU:C:1990:84, paragraph 14).

enabling those rules to be applied in a uniform manner, but such jurisdiction in respect of rules deriving from the ECSC Treaty were to be retained exclusively by the various national courts, whose interpretations might differ, and the Court of Justice were to have no power to ensure that such rules were given a uniform interpretation'.⁴³

75. For those reasons, I take the view that, if the European Union Courts can perform the broader task, that is to say, review the legality of decisions providing for measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty, then they can certainly perform the narrower task, which is to interpret the terms of such decisions, in particular so that they can avoid annulling or declaring invalid an act relating to the CFSP which they could otherwise have preserved by giving it a different interpretation.

76. Indeed, that is particularly necessary since, as the referring court indicates in paragraphs 30 to 34 of its request for a preliminary ruling, the competent authorities of the various Member States already hold diverging views on certain essential points, in particular in so far as concerns their interpretations of the concept of financial assistance referred to in Article 4(2)(b) of Decision 2014/512 and Article 4(3) of Regulation No 833/2014, as is apparent from the written observations lodged by the United Kingdom, German, Estonian and French Governments.

3. Decision 2014/512 in relation to the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU

77. *Prima facie*, Decision 2014/512 benefits from the immunity from review stipulated in the 'carve-out' provision introduced by the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU because it fulfils the two conditions stated in points 47 and 49 of this Opinion.

78. Indeed, the legal basis of Decision 2014/512 is Article 29 TEU, which falls within Chapter 2 of Title V of the EU Treaty, entitled 'Specific provisions on the common foreign and security policy', and its substantive content manifestly falls within the scope of the CFSP, given that, by that decision, the Council introduced restrictive measures 'in view of Russia's actions destabilising the situation in Ukraine'.⁴⁴

79. However, applying the 'claw-back' provision introduced by the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU, it seems to me that the Court has jurisdiction to give a preliminary ruling on the compatibility of Decision 2014/512 with Article 40 TEU, given that, in paragraphs 21 and 22 of its written observations, Rosneft disputes the decision's lawfulness with regard to that provision.

80. In order for the Court to have jurisdiction also to review the legality of Decision 2014/512 in so far as concerns the possible infringement of rules other than Article 40 TEU, it must be established that Decision 2014/512 is a decision 'providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the [EU] Treaty', as stipulated in the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU.

81. In this connection, the United Kingdom, French and Estonian Governments, the Council and Commission dispute that Decision 2014/512 contains restrictive measures against natural or legal persons, since, in their view, the measures which it contains apply to situations that are determined objectively and a category of persons that is defined generally.

⁴³ — Judgment in *Bussoni* (C 221/88, EU:C:1990:84, paragraph 16).

⁴⁴ — As the title of the decision states.

82. Indeed, Articles 4 and 4a⁴⁵ of Decision 2014/512 do not refer to Rosneft, although Article 1(2)(b) to (d) and (3)⁴⁶ and Article 7⁴⁷ do, their scope of application extending to three Russian undertakings, including Rosneft (see Annex III to the decision).

83. It must be remembered, in this connection, that, according to settled case-law, restrictive measures ‘at the same time 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 persons and entities’.⁴⁸ According to the Court, ‘it is the individual nature of those measures which ... permits access to the Courts of the European Union’.⁴⁹

84. Accordingly, the action for annulment which gave rise to the judgment in *Manufacturing Support & Procurement Kala Naft v Council* (T-509/10, EU:T:2012:201) was dismissed on the ground that the General Court had no jurisdiction under Article 275 TFEU since the action concerned Article 4 of Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP⁵⁰ (‘Decision 2010/413’), which did not specifically refer to the applicant.⁵¹ In paragraph 99 of its judgment in *Council v Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776), the Court of Justice confirmed the dismissal of the action for the same reasons.

85. Since the drafting of Articles 4 and 4a of Decision 2014/512 is very similar to that of Article 4 of Decision 2010/413,⁵² I share the Commission’s view that those provisions do not contain restrictive measures against Rosneft. Consequently, the Court does not have jurisdiction to review their legality (or to interpret them), since the ‘claw-back’ provision in the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU does not apply.

45 — Articles 4 and 4a of Decision 2014/512 relate to the Russian oil sector and establish a regime of prior authorisation for the direct or indirect sale, supply, transfer or export by nationals of the Member States or from the territories of Member States of certain equipment suitable, essentially, for oil exploration and production in the Russian Federation, and prohibit the direct or indirect provision, by nationals of the Member States or from the territories of Member States, of associated services necessary for oil exploration and production in Russia.

46 — Article 1(2)(b) to (d) and Article 3 of Decision 2014/512 lay down a general prohibition, applicable to all European Union financial institutions, on providing any of a series of capital market services to the Russian entities listed in Annex III to the decision, which include Rosneft.

47 — Article 7 of Decision 2014/512 contains a prohibition on the compensation of economic operators which, pursuant to Article 7(1)(a), applies, inter alia, to the entities listed in Annex III, which include Rosneft.

48 — Judgment in *Gbagbo and Others v Council* (C-478/11 P to C-482/11 P, EU:C:2013:258, paragraph 56). See also, to that effect, the judgments in *Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 241 to 244) and *Council v Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776, paragraph 99, which refers to paragraphs 36 to 38 of the judgment in *Manufacturing Support & Procurement Kala Naft v Council* (T-509/10, EU:T:2012:201)).

49 — Judgment in *Gbagbo and Others v Council* (C-478/11 P to C-482/11 P, EU:C:2013:258, paragraph 57).

50 — OJ 2010 L 195, p. 39.

51 — ‘First, the prohibition measures laid down by Article 4 of Decision 2010/413 are of a general nature, their scope being determined by reference to objective criteria and not by reference to identified natural or legal persons. Consequently, as the Council and the Commission claim, Article 4 of Decision 2010/413 is not a decision providing for restrictive measures against natural or legal persons within the meaning of the second paragraph of Article 275 TFEU’ (paragraph 37 of the judgment).

52 —

‘1. The sale, supply or transfer of key equipment and technology for the following key sectors of the oil and natural gas industry in Iran, or to Iranian or Iranian-owned enterprises engaged in those sectors outside Iran, by nationals of Member States, or from the territories of Member States, or using vessels or aircraft under the jurisdiction of Member States shall be prohibited whether or not originating in their territories:

(a) refining;
(b) liquefied natural gas;
(c) exploration;
(d) production.

The Union shall take the necessary measures in order to determine the relevant items to be covered by this provision.

2. It shall be prohibited to provide the following to enterprises in Iran that are engaged in the key sectors of the Iranian oil and gas industry referred to in paragraph 1 or to Iranian, or Iranian-owned enterprises engaged in those sectors outside Iran:

(a) technical assistance or training and other services related to key equipment and technology as determined according to paragraph 1;
(b) financing or financial assistance for any sale, supply, transfer or export of key equipment and technology as determined according to paragraph 1 or for the provision of related technical assistance or training.

86. Nevertheless, I do not share the view of the United Kingdom, Czech, French, Estonian and Polish Governments, the Council and Commission that Article 1(2)(b) to (d) and (3) and Article 7 of Decision 2014/512 (which, by means of Annex III, expressly refer to Rosneft) do not lay down restrictive measures against Rosneft because the measures which they contain apply to objectively determined situations and a category of persons envisaged in a general manner and because Annex III's inclusion of Rosneft is purely declaratory in nature.

87. The Commission relies, in this connection, on paragraph 39 of the judgment in *Sina Bank v Council* (T-67/12, EU:T:2014:348) and paragraph 32 of the judgment in *Hemmati v Council* (T-68/12, EU:T:2014:349), in which the General Court held, in relation to Article 20(1)(b) of Decision 2010/413, that 'the "decision providing for restrictive measures against natural or legal persons" within the meaning of the second paragraph of Article 275 TFEU [lay] in the measure by which the listing of the applicant's name was maintained, after review, in Annex II to Decision 2010/413, as amended by Decision 2010/644, with effect from 1 December 2011', not in the fact that the applicant's name appeared in the original version of that same Annex II to Decision 2010/413. For that reason, the General Court held that it had no jurisdiction, holding that Article 20(1)(b) of Decision 2010/413 did not introduce restrictive measures against persons, but measures of general application.

88. Moreover, in paragraph 42 of the judgment in *Sina Bank v Council* (T-67/12, EU:T:2014:348) and paragraph 35 of the judgment in *Hemmati v Council* (T-68/12, EU:T:2014:349), the General Court interpreted the criterion of being 'individually' concerned by Article 16(2) of the regulation which the Council adopted on the basis of Decision 2010/413⁵³ and which set out, as measures of general application, the same measures as Article 20(1)(b) of Decision 2010/413 in the same way as a 'decision providing for restrictive measures against natural or legal persons'. On that basis the General Court declared the applicant's action for the annulment of Article 16(2) inadmissible.

89. In my opinion, that ruling by the General Court is not consistent with the Court of Justice's finding in paragraph 99 of its judgment in *Council v Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776).⁵⁴ Indeed, as a different Chamber of the General Court held in paragraph 36 of the judgment in *National Iranian Oil Company v Council* (T-578/12, EU:T:2014:678), confirmed by the Court of Justice in its judgment in *National Iranian Oil Company v Council* (C-440/14 P, EU:C:2016:128), 'the fourth paragraph of Article 263 TFEU confers on all natural and legal persons standing to institute proceedings against acts of the EU institutions, provided that the conditions laid down in Article 263 TFEU are fulfilled, which is the case in this instance [since the European Union acts in question include the applicant in the list of measures at issue]'.

90. Moreover, according to the same paragraph of the judgment in *National Iranian Oil Company v Council* (T-578/12, EU:T:2014:678), the approach taken by the General Court in its judgments in *Sina Bank v Council* (T-67/12, EU:T:2014:348) and *Hemmati v Council* (T-68/12, EU:T:2014:349), which in reality identifies the concept of a restrictive measure against persons with the criterion of being individually concerned by the measure in question, 'would infringe the provisions of Article 263 and the second paragraph 275 TFEU and would therefore be contrary to the system of judicial protection instituted by the FEU Treaty and the right to an effective legal remedy enshrined in Article 47 of the Charter'.

3. It shall be prohibited to participate, knowingly or intentionally, in activities the object or effect of which is to circumvent the prohibitions referred to in paragraphs 1 and 2.'

53 — Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 (OJ 2010 L 281, p. 1).

54 — See also paragraphs 36 to 38 of the judgment in *Manufacturing Support & Procurement Kala Naft v Council* (T-509/10, EU:T:2012:201), in which the General Court concluded that the measure at issue was not a restrictive measure against a person because it did not list any individual entity.

91. Having said that, I would add for the sake of completeness that so severe an interpretation would render the ‘claw-back’ provision chimeric in very many cases if, contrary to what I have suggested, provisions of CFSP decisions which, like Article 1(2)(b) to (d) and (3) and Article 7 of Decision 2014/512, specifically target certain natural or legal persons did not constitute ‘restrictive measures against persons’ within the meaning of the ‘claw-back’ provision, with the consequence that that provision did not admit of the possibility of a preliminary ruling on validity.

92. I therefore propose that the Court’s answer to the first question should be that, in accordance with the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, the Court has jurisdiction to give a preliminary ruling, under Article 267 TFEU, on the validity of Decision 2014/512 with regard to Article 40 TEU and to interpret and review the legality of Article 1(2)(b) to (d) and (3) and Article 7 of that decision and of Annex III thereto.

93. I would nevertheless like to clarify that, despite the fact that the restrictive measures introduced by Articles 4 and 4a of Decision 2014/512 fall within the scope of the ‘carve-out’ provision but not within the scope of the ‘claw-back’ provision, there is no lacuna of judicial protection since, as I have explained in points 47, 49, 69 and 70 of this Opinion, Regulation No 833/2014 falls squarely within the jurisdiction of the Court and repeats those provisions, almost word for word, in Articles 3, 3a and 4(3) and (4). Should the Court decide to annul those provisions of Regulation No 833/2014, the Council will be required to take the necessary measures to make the equivalent provisions of Decision 2014/512 compatible with the Court’s judgment. That, as the Council accepted at the hearing, follows from Article 266 TFEU.

B – Question 2(a)

94. By question 2(a), the referring court asks the Court about the validity of Article 1(2)(b) to (d) and (3), Article 4, Article 4a and Article 7 of, and Annex III to Decision 2014/512 and of Article 3, Article 3a, Article 4(3) and (4), Article 5(2)(b) to (d) and (3) and Article 11 of, and Annexes II and VI to Regulation No 833/2014.

95. Given the answer which I propose to question 1, I shall examine whether Decision 2014/512 and Regulation No 833/2014 comply with Article 40 TEU and consider the validity of Article 1(2)(b) to (d) and (3) and Article 7 of, and Annex III to Decision 2014/512 and Article 3, Article 3a, Article 4(3) and (4), Article 5(2)(b) to (d) and (3) and Article 11 of, and Annexes II and VI to Regulation No 833/2014.

1. Do Decision 2014/512 and Regulation No 833/2014 comply with Article 40 TEU?

96. According to Rosneft, by adopting a CFSP decision that, in substance, is legislative in character, the Council misused its powers. In accordance with Article 29 TEU, the Council’s role is to ‘define the approach of the Union to a particular matter of a geographical or thematic nature’. The adoption of legislative acts in the sphere of the CFSP, however, is prohibited by Article 31(1) TEU. Therefore, by adopting highly detailed provisions in Decision 2014/512, and repeating them in essentially identical terms in Regulation No 833/2014, the Council infringed the clause that the implementation of the CFSP must not affect the Union’s competences in respect of other Union policies, laid down in Article 40 TEU, and encroached upon the power of the Commission and the High Representative to submit joint proposals, provided for in Article 215 TFEU.

97. In my opinion, Decision 2014/512 and Regulation No 833/2014 are not legislative acts.

98. Even though ‘legislative acts’ are generally understood to be measures of general application which apply to objectively determined situations and a category of persons envisaged in a general and abstract manner, it is only in Article 289(3) TFEU that we find a definition of this expression as it is used in Article 24 TEU. That provision defines this category of acts as ‘legal acts adopted by legislative procedure’, that is to say, the ordinary legislative procedure referred to in Article 289(1) TFEU or the special legislative procedure referred to in Article 289(2) TFEU.

99. Thus, by prohibiting the adoption of legislative acts, the second sentence of the second paragraph of Article 24(1) TEU and Article 31 TEU have the effect of excluding the broader role which the provisions of Article 289(1) and (2) TFEU confer on the Parliament and the Council.⁵⁵

100. Moreover, the procedure laid down in the second paragraph of Article 24(1) TEU for the adoption of decisions and that laid down in Article 215 TFEU for the adoption of ‘the necessary measures’ such as Regulation No 833/2014 are different from the procedures laid down in Article 289 TFEU which makes a legal act a legislative act.

101. Since Rosneft does not allege that Decision 2014/512 and Regulation No 833/2014 should have been adopted on any legal basis other than Article 29 TEU and Article 215 TFEU, its arguments must be rejected.

2. The validity of Article 1(2)(b) to (d) and (3) and Article 7 of, and Annex III to Decision 2014/512 and Article 3, Article 3a, Article 4(3) and (4), Article 5(2)(b) to (d) and (3) and Article 11 of, and Annexes II and VI to Regulation No 833/2014

(a) The scope of the Court’s review

102. In paragraphs 64, 108 and 115 of its observations, the Council maintains that the Court does not have jurisdiction to review the legality of the provisions of Regulation No 833/2014 at issue, since, by the pleas of invalidity which Rosneft puts forward, it is seeking essentially to challenge the decisions of principle adopted by the Council in Decision 2014/512, which fall entirely within the sphere of the CFSP.

103. I do not share that view, inasmuch as, in my opinion, the adoption of a regulation on the basis of Article 215 TFEU, even if it merely repeats verbatim, or adds to, or further specifies measures laid down in a CFSP decision, as is the case here with Decision 2014/512 and Regulation No 833/2014, implies the loss of immunity from review which those measures enjoyed under the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU.⁵⁶

104. The contrary view would result in a broad interpretation of the exclusion of the Court’s jurisdiction in this field, whereas that exclusion is an exception rather than the rule.

55 — It would, moreover, be impossible to interpret the second sentence of the second paragraph of Article 24(1) TEU and Article 31 TEU as making it compulsory to use the legislative procedure in order to adopt restrictive measures providing for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, which are by definition measures of general application that apply to objectively determined situations and a category of persons envisaged in a general and abstract manner, because such an interpretation would be contrary to the express wording of Article 215(1) TFEU, which provides that ‘the Council [shall act] by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission [and] shall inform the European Parliament thereof’, and that is neither the ordinary nor the special legislative procedure.

56 — That is clear from the description of Article 215 TFEU as ‘a bridge ... constructed between the actions of the [Union] involving economic measures ... and the objectives of the EU Treaty’ (judgment in *Parliament v Council*, C-130/10, EU:C:2012:472, paragraph 59). CFSP acts which cross that ‘bridge’ become measures that are dependent on compliance with the FEU Treaty.

105. Having said that, I consider that, in this particular sphere, which involves diplomacy and foreign and security policy, the Council must be allowed a broad discretion.⁵⁷

(b) The plea of invalidity based on the alleged infringement of the Partnership Agreement

106. According to Rosneft, Article 1(2)(b) to (d) and (3) of, and Annex III to Decision 2014/512 and Article 3(1), (3) and (5), Article 3a(1) and Article 5(2)(b) to (d) and (3) of, and Annexes II and VI to Regulation No 833/2014 infringe Article 10(1) (grant of most-favoured-nation treatment in relation to trade in goods), Article 12 (freedom of transit for goods), Article 36 (grant of no less favourable treatment in relation to the cross-border supply of services) and Article 52(2), (5) and (9) (free movement of capital) of the Partnership Agreement.

107. The United Kingdom, Estonian and French Governments, the Council and Commission argue that the measures at issue are justified because they are ‘necessary for the protection of [the] essential security interests [of the Parties] in time of war or serious international tension constituting threat of war’, in accordance with Article 99(1)(d) of the Partnership Agreement, and that, in any event, the provisions of the Partnership Agreement on which Rosneft relies have no direct effect.

108. Since Article 99 presupposes the existence of a measure that is contrary to the substantive provisions of the Partnership Agreement, it is first necessary to consider whether Article 1(2)(b) to (d) and (3) of, and Annex III to Decision 2014/512 and Article 3(1), (3) and (5), Article 3a(1) and Article 5(2)(b) to (d) and (3) of, and Annexes II and VI to Regulation No 833/2014 do indeed infringe Article 10(1), Article 12, Article 36 and Article 52(2), (5) and (9) of the Partnership Agreement.

i) The direct effect of Articles 10(1), 12, 36 and 52(2), (5) and (9) of the Partnership Agreement

109. It must be remembered that, according to consistent case-law, an agreement concluded by the European Union and one or more non-member States is, as far as the Union is concerned, an act of one of the EU institutions within the meaning of point (b) of the first subparagraph of Article 267 TFEU, and, as from its entry into force, the provisions of such an agreement form an integral part of the Union legal system and, within the framework of that system, the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement.⁵⁸

57 — See the judgments in *Sison v Council* (C-266/05 P, EU:C:2007:75, paragraph 33) and *Council v Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776, paragraph 120).

58 — See the judgments in *Haegeman* (181/73, EU:C:1974:41, paragraphs 3 to 6) concerning the Agreement establishing an Association between the European Economic Community and Greece, signed in Athens on 9 July 1961, concluded in the name of the Community by Council Decision 63/106/EEC of 25 September 1961 (OJ, English Special Edition, Series II, Volume I(1), p. 3, ‘the EEC-Greece Association Agreement’); *Demirel* (12/86, EU:C:1987:400, paragraph 7) concerning the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963, concluded in the name of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1977 L 361, p. 29, ‘the EEC-Turkey Association Agreement’); *Andersson and Wåkerås-Andersson* (C-321/97, EU:C:1999:307, paragraphs 26 and 27); *Ospelt and Schlössle Weissenberg* (C-452/01, EU:C:2003:493, paragraph 27); and *Établissements Rimbaud* (C-72/09, EU:C:2010:645, paragraph 19) concerning the Agreement on the European Economic Area, signed on 2 May 1992 (OJ 1994, L 1, p. 3, ‘the EEA Agreement’) and approved by Decision 94/1/EC, ECSC of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation (OJ 1994 L 1, p. 1). See also points 32 to 35 of my Opinion in *SECIL* (C-464/14, EU:C:2016:52).

110. In addition, in paragraph 37 of its judgment in *Commission v Rusal Armenal* (C-21/14 P, EU:C:2015:494), the Court held that ‘the provisions of an international treaty to which the European Union is a party can be invoked in support of ... a plea that such an act is unlawful only where the nature and broad logic of the treaty in question do not preclude this and where the treaty’s provisions appear, as regards their content, to be unconditional and sufficiently precise. It is therefore only when both those conditions are met that such provisions may be relied upon before the EU Courts as a criterion in order to assess the legality of an EU act’.⁵⁹

111. Since Articles 10(1) and 12 of the Partnership Agreement refer to specific provisions of the GATT, the Council and the Commission rely on the settled case-law of the Court relating to WTO agreements, according to which, ‘given their nature and purpose, those agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the EU institutions’.⁶⁰

112. However, the Partnership Agreement is not an agreement that solely concerns trade in goods, to which that case-law might be applied.⁶¹

113. Indeed, as the Court held, in relation to the Partnership Agreement, in paragraph 27 of its judgment in *Simutenkov* (C-265/03, EU:C:2005:213), ‘the purpose of the agreement is to establish a partnership between the parties with a view to promoting, inter alia, the development between them of close political relations, trade and harmonious economic relations, political and economic freedoms, and the achievement of gradual integration between the Russian Federation and a wider area of cooperation in Europe’.

114. The Court went on to state, in paragraph 28 of that judgment, that ‘the fact that the agreement is thus limited to establishing a partnership between the parties, without providing for an association or future accession of the Russian Federation to the [European Union], is not such as to prevent certain of its provisions from having direct effect. It is clear from the Court’s case-law that when an agreement establishes cooperation between the parties, some of the provisions of that agreement may [if, regard being had to its wording and to the purpose and nature of the agreement, those provisions contain clear and precise obligations which are not subject, in their implementation or effects, to the adoption of any subsequent measure], directly govern the legal position of individuals’.

115. Accordingly, the Court acknowledged, in paragraph 22 of the judgment, the direct effect of Article 23(1) of the agreement, concerning labour conditions.

116. Notwithstanding the points raised by the United Kingdom and French Governments, the Council and Commission, I fail to see in what way the wording of the provisions of the Partnership Agreement at issue in the present case do not satisfy the criteria for direct effect as expressed by the Court in paragraph 21 of its judgment in *Simutenkov* (C-265/03, EU:C:2005:213) and again in paragraph 37 of its judgment in *Commission v Rusal Armenal* (C-21/14 P, EU:C:2015:494).

⁵⁹ — See also, to that effect, the judgment in *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (C-401/12 P to C-403/12 P, EU:C:2015:4, paragraph 54 and the case-law cited).

⁶⁰ — Judgment in *Commission v Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraph 38). See also, to that effect, the judgments in *Portugal v Council* (C-149/96, EU:C:1999:574, paragraph 47), *Van Parys* (C-377/02, EU:C:2005:121, paragraph 39) and *LVP* (C-306/13, EU:C:2014:2465, paragraph 44).

⁶¹ — Indeed, in paragraph 39 of its judgment in *Commission v Rusal Armenal* (C-21/14 P, EU:C:2015:494), the Court explained the reasons for which WTO agreements are not among the rules in the light of which the legality of acts of the EU institutions may be reviewed: ‘To accept that the Courts of the European Union have the direct responsibility for ensuring that EU law complies with the WTO rules would deprive the European Union’s legislative or executive bodies of the discretion which the equivalent bodies of the European Union’s commercial partners enjoy. It is not in dispute that some of the contracting parties, which are amongst the most important commercial partners of the European Union, have concluded from the subject matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law. Such lack of reciprocity, if accepted, would risk introducing an anomaly in the application of the WTO rules.’

117. Article 10(1) of the Partnership Agreement provides that ‘the Parties shall accord to one another the general most-favoured-nation treatment described in Article I, paragraph 1, of the GATT’.⁶² The second subparagraph of Article 12(1) provides that ‘each Party shall provide for freedom of transit through its territory of goods originating in the customs territory or destined for the customs territory of the other Party’. Article 36 provides that ‘the Parties shall grant each other treatment no less favourable than that accorded to any third country with regard to the conditions affecting the cross-border supply of services’. Lastly, under Article 52, the parties to the Partnership Agreement guarantee ‘the free movement of capital between residents of the [Union] and of Russia in the form of direct investment’ (paragraph 2), will not introduce any new restrictions after a transitional period of five years from the entry into force of the agreement (paragraph 5) and ‘shall accord to one another most-favoured-nation treatment in respect of freedom of current payments and capital movements and in respect of methods of payment’ (paragraph 9).

118. In my opinion, the wording of those provisions is no different, in so far as concerns unconditionality, from that of Article 23(1) of the Partnership Agreement, which the Court has already held to have direct effect.⁶³ That wording therefore constitutes more than a mere ‘agreement to agree’.⁶⁴

ii) The existence of restrictions on the rights conferred by Articles 10(1), 12, 36 and 52(2), (5) and (9) of the Partnership Agreement

119. It therefore falls to be examined whether the measures introduced by Article 1(2)(b) to (d) and (3) of, and Annex III to Decision 2014/512 and Article 3(1), (3) and (5), Article 3a(1), Article 5(2)(b) to (d) and (3) of, and Annexes II and VI to Regulation No 833/2014 entail restrictions on Articles 10(1), 12, 36 and 52(2), (5) and (9) of the Partnership Agreement.

– Article 10(1) and Article 12 of the Partnership Agreement (trade in goods)

120. In so far as concerns the alleged infringement of Article 10(1) of the Partnership Agreement by Article 3(1), (3) and (5) and Article 3a(1) of Regulation No 833/2004, it must be emphasised that the sole effect of Article 10(1) of the agreement was to extend the application of Article I:1 of the GATT to relations between the European Union and the Russian Federation at a time when Russia was not yet a member of the World Trade Organisation (WTO).

121. The scope of Article I:1 of the GATT is nevertheless limited to ‘customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III’.

122. Since the provisions of Article 3(1), (3) and (5) of Regulation No 833/2014 in no way concern customs tariffs applicable to exports of the goods referred to in those provisions, but make the export of such goods to the Russian Federation subject to prior authorisation and specify the circumstances under which the Member States must refuse such authorisation, it is clear that those provisions do not fall within the scope of Article 10(1) of the Partnership Agreement.

62 — Article I, paragraph 1, of the GATT defines the general most-favoured-nation treatment as follows: ‘With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties’.

63 — See paragraphs 20 to 29 of the judgment in *Simutenkov* (C-265/03, EU:C:2005:213).

64 — See point 79 of my Opinion in *SECIL* (C-464/14, EU:C:2016:52).

123. *A fortiori*, Article 3a(1) of Regulation No 833/2014, which prohibits the provision of associated services necessary for certain categories of exploration and production projects in Russia also falls outside the scope of Article 10(1) of the Partnership Agreement.

124. The second subparagraph of Article 12(1) of the Partnership Agreement requires the European Union and the Member States to provide for freedom of transit⁶⁵ through the European Union of goods originating in the customs territory or destined for the customs territory of the Russian Federation.

125. The European Union and the Member States are therefore under an obligation to guarantee the unhindered passage through their territory of goods destined for or originating in the Russian Federation.

126. Article 3(1) of Regulation No 833/2014 makes the sale, supply, transfer or export of the items listed in Annex II, whether or not originating in the European Union, subject to prior authorisation if such items are for use in the Russian Federation. In addition, Article 3(5) of the regulation prohibits the grant of such authorisation where the sale, supply, transfer or export in question includes items destined for any of the categories of exploration and production projects referred to in paragraph 3 of Article 3.

127. In my opinion, those provisions have no effect on the freedom of transit guaranteed by the second subparagraph of Article 12(1) of the Partnership Agreement.

128. Even though Article 3(1) of Regulation No 833/2014 refers, *inter alia*, to the transfer of the items listed in Annex II, ‘whether or not originating in the Union’, paragraphs 2 and 4 of Article 3 nevertheless relate only to exports.

129. Those provisions stipulate that, ‘for all sales, supplies, transfers or exports for which an authorisation is required ... such authorisation shall be granted by the competent authorities of the Member State *where the exporter is established*’⁶⁶ and that ‘*exporters* shall supply the competent authorities with all relevant information required for their application for an *export* authorisation’.⁶⁷

130. It therefore seems clear to me that those provisions of Regulation No 833/2014 relate not to the transit of items listed in Annex II but to their sale, supply, transfer or export *from the territory of the Member States*.

131. Consequently, the freedom of transit of relevant items originating in non-member States and destined for the Russian Federation is in no way affected.

132. In any event, even if the Court should find that there is a restriction of Article 10(1) and the second subparagraph of Article 12(1) of the Partnership Agreement, such a restriction would, as the Commission states, be justified on grounds of public policy and public security, in accordance with Article 19 of the Partnership Agreement.

65 — Transit is the passage across the territory of a State, with or without trans-shipment, warehousing, breaking bulk or a change in the mode of transport, which is only a portion of a complete journey beginning and terminating beyond the borders of that State across whose territory the traffic passes. See, to that effect, Article V:1 of the GATT.

66 — Article 3(2) of Regulation No 833/2014. My emphasis.

67 — Article 3(4) of Regulation No 833/2014. My emphasis.

– *Article 36 of the Partnership Agreement (the cross-border supply of services)*

133. In accordance with Article 36 of the Partnership Agreement, the European Union and the Member States are required to grant treatment no less favourable than that accorded to any third country with regard to the conditions affecting the cross-border supply of services by EU companies in the territory of the Russian Federation, pursuant to the legislation and regulations applicable in the latter.

134. According to Annex 5 to the Partnership Agreement, the services covered by Article 36 include engineering services (CPC 8672)⁶⁸ and technical testing and analysis services (CPC 8676).⁶⁹

135. However, contrary to Rosneft's allegation, none of the services included under CPC 8672 and CPC 8676 relate to drilling, well testing, logging and completion, or the supply of specialised floating vessels, which are the associated services referred to in Article 3a(1) of Regulation No 833/2014.⁷⁰

– *Article 52(2), (5) and (9) of the Partnership Agreement (free movement of capital)*

136. Paragraph 2 of Article 52 guarantees the free movement of capital between the European Union and the Russian Federation 'in the form of direct investment made in companies formed in accordance with the laws of the host country'.

137. In addition, Paragraph 9 of Article 52 provides that the Union must grant the Russian Federation 'most-favoured-nation treatment in respect of freedom of ... capital movements'.

138. According to the Joint Declaration in relation to Article 52 (definitions), 'direct investment' is defined as:

'... an investment for the purpose of establishing lasting economic relations with an enterprise such as investments which give the possibility of exercising an effective influence on the management thereof, in the country concerned by non-residents or abroad by residents, by means of:

...

2. participation in a new or existing enterprise;

3. a loan of five years or longer.'

139. It is very clear from those provisions that the purchase, sale or direct or indirect provision of investment services for, or assistance in the issuance of, bonds, equity or similar financial instruments⁷¹ cannot constitute direct investment unless they lead to participation in an undertaking for the purpose of establishing lasting economic relations.

68 — Available on the website of the United Nations Statistics Division (<http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl= 9&Lg= 1&Co= 8672>). The CPC (Central Product Classification) number is from the United Nations Statistical Commission's international product classification system.

69 — Available on the website of the United Nations Statistics Division (<http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl= 9&Lg= 1&Co= 8676>).

70 — The only services mentioned under CPC 8676.1 that might be relevant are 'testing and analysis services of the chemical and biological properties of materials such as ... fuels'. However, the services of drilling, well testing, logging and completion, and the supply of specialised floating vessels are not mentioned.

71 — See Article 1(2)(b) to (d) of Decision 2014/512 and Article 5(2)(b) to (d) of Regulation No 833/2014.

140. It is also clear from those provisions that making or being part of any arrangement to grant, after 12 September 2014, new loans or credit to Rosneft with a maturity exceeding 30 days⁷² can only constitute direct investment if the term of the loan or credit is five years or more and it is granted for the purpose of establishing lasting economic relations.

141. It follows that Article 1(2)(b) to (d) and (3) of, and Annex III to Decision 2014/512 and Article 5(2)(b) to (d) and (3) of, and Annex VI to Regulation No 833/2014 do not constitute a restriction of the free movement of capital safeguarded by Article 52(2), (5) and (9) of the Partnership Agreement, except to the extent that they prohibit direct investments as described in points 139 and 140 of this Opinion.

iii) Justification

142. By contrast with the case of trade in goods, in relation to which Article 19 of the Partnership Agreement provides for the possibility of justifying restrictions in terms almost identical to those of Article 36 TFEU, that agreement does not provide for the possibility of justifying restrictions on the free movement of capital.

143. For the same reasons as I gave in points 123 to 125 of my Opinion in *SECIL* (C-464/14, EU:C:2016:52),⁷³ I consider that it is possible to justify restrictions on the free movement of capital safeguarded by Article 52 of the Partnership Agreement by reference to overriding reasons in the public interest.

144. Even though the Council does not allege any overriding reason in the public interest, I consider that it is possible to infer from the arguments which it bases on Article 99 of the Partnership Agreement that, in its view, a restriction on the free movement of capital would be justified on grounds of public policy and public security.

145. Indeed, since the restrictive measures introduced by Article 1(2)(b) to (d) and (3) of, and Annex III to Decision 2014/512 and Article 5(2)(b) to (d) and (3) of, and Annex VI to Regulation No 833/2014 were adopted ‘in response to [the Russian Federation’s] actions destabilising the situation in Ukraine’⁷⁴ and ‘with a view to increasing the costs of Russia’s actions to undermine Ukraine’s territorial integrity, sovereignty and independence and to promoting a peaceful settlement of the crisis’,⁷⁵ it seems to me that they are capable of being justified on grounds of public policy and public security.

146. It is clear from the recitals of Decision 2014/512 and of Regulation No 833/2014 that the European Union and the Member States first publicly announced the adoption of restrictive measures against the Russian Federation, and then adopted the measures and gradually extended them only in view of the Russian Federation’s failure to react.

⁷² — See Article 1(3) of Decision 2014/512 and Article 5(3) of Regulation No 833/2014.

⁷³ — That case concerned restrictions on the free movement of capital contrary to the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Tunisia, of the other part, signed in Brussels on 17 July 1995 and approved on behalf of the European Community and the European Coal and Steel Community by Decision 98/238/EC, ECSC of the Council and the Commission of 26 January 1998 (OJ 1998 L 97, p. 1) and the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States of the one part, and the Republic of Lebanon, of the other part, signed in Luxembourg on 17 June 2002 and approved on behalf of the European Community by Council Decision 2006/356/EC of 14 February 2006 (OJ 2006 L 143, p. 1).

⁷⁴ — Recital 8 of Decision 2014/512.

⁷⁵ — Recital 2 of Regulation No 833/2014.

147. Since the objective of the restrictive measures is ‘to [increase] the costs of Russia’s actions to undermine Ukraine’s territorial integrity, sovereignty and independence and to [promote] a peaceful settlement of the crisis’,⁷⁶ and since Rosneft has the largest oil reserves and the highest production levels of all oil companies whose shares are quoted on the Russian stock exchange (accounting for more than 40% of Russian oil production⁷⁷) and the Russian State holds 69.5% of its share capital, I consider the restrictions imposed by Article 1(2)(b) to (d) and (3) of, and Annex III to Decision 2014/512 and Article 5(2)(b) to (d) and (3) of, and Annex VI to Regulation No 833/2014 to be necessary so that sufficient pressure can be applied to achieve the objective of the decision and the regulation, which is ‘to [increase] the costs of Russia’s actions to undermine Ukraine’s territorial integrity, sovereignty and independence and to [promote] a peaceful settlement of the crisis’.⁷⁸ Consequently, the restrictive measures comply with the principle of proportionality.

iv) Article 99 of the Partnership Agreement

148. In the event that the Court should find that there is an unjustified restriction on Articles 10(1), 12, 36 and 52(2), (5) and (9) of the Partnership Agreement, I, like the United Kingdom, Estonian and French Governments, the Council and Commission, consider that such a restriction could be justified by reference to Article 99(1)(d) of the Partnership Agreement, which permits the European Union to take ‘any measures which it considers necessary for the protection of its essential security interests ... in time of war or serious international tension constituting threat of war’.⁷⁹

149. If, as I mentioned in point 105 of this Opinion, the Council enjoys a broad discretion in the field of foreign and security policy, that must also apply whenever it concludes that there is serious international tension constituting a threat of war.

150. First of all, it must be remembered that, in adopting the restrictive measures at issue in the present case, the Council relied on the ‘unprovoked violation of Ukrainian sovereignty and territorial integrity by the Russian Federation’,⁸⁰ the ‘downing of Malaysian Airlines Flight MH17 in Donetsk’⁸¹ and the ‘illegal annexation of Crimea and Sevastopol’.⁸²

151. Secondly, it must be emphasised that the Russian Federation has a power of veto within the United Nations Security Council and there is therefore no point in looking for any declaration as to the existence of a threat to peace in the Security Council’s resolutions⁸³ or even in the draft resolutions not adopted by the Security Council, given the (actual or potential) exercise by the Russian Federation of its right of veto.⁸⁴

152. On the basis of the foregoing, I consider that the Council made no manifest error in its assessment of the seriousness of the international tension that existed at the time when Decision 2014/512 and Regulation No 833/2014 were adopted.

76 — Recital 2 of Regulation No 833/2014.

77 — See Rosneft’s website (<http://www.rosneft.com/about/>).

78 — Recital 2 of Regulation No 833/2014.

79 — The French language version of the agreement, which is supported by the Romanian language version, refers to ‘cas de guerre ou de grave tension internationale *menaçant de déboucher sur un conflit armé*’, while the English language version, supported by all the other language versions, including the Russian, refers to ‘time of war or serious international tension *constituting threat of war*’. My emphasis.

80 — Recital 1 of Decision 2014/512. At the hearing, the Council referred to the Association Agreement which the European Union signed with Ukraine in 2014 and to the fact that Ukraine came within the European Neighbourhood Policy. The Council emphasised that the international tension constituting a threat of war did not necessarily have to relate to the territory of the European Union. It was also clearly established that armed conflict was taking place in the territory of a State neighbouring the EU.

81 — Recital 5 of Decision 2014/512.

82 — Recital 1 of Regulation No 833/2014.

83 — See Resolution 2166(2014) adopted by the United Nations Security Council, available on the United Nations Security Council website (http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2166.pdf).

84 — See Resolutions S/2014/189 and S/2015/562, available on the United Nations Security Council website (<http://www.securitycouncilreport.org/un-documents/ukraine/>).

(c) The plea of invalidity based on an alleged breach of the duty to state reasons (Article 296 TFEU)

153. According to Rosneft, Articles 3, 3a and 4(3) and (4) of, and Annex II to Regulation No 833/2014 breach the duty to state reasons which Article 296 TFEU imposes on the Council, in that the regulation fails to explain how or why the targeting of the Russian oil industry or the targeting of itself in the manner chosen in those provisions will help achieve the objective of the measures in question, as described in recitals 2⁸⁵ and 4⁸⁶ of the regulation.

154. Rosneft also alleges infringement of Article 296 TFEU in connection with Article 1(2)(b) to (d) and (3) of, and Annex III to Decision 2014/512 and Article 5(2)(b) to (d) and (3) of, and Annex VI to the regulation, in that those provisions, while expressly targeting it, do not enable it to understand why the mere fact that the Russian State is its majority shareholder might contribute to the attainment of the objective of the measures in question, as described in recitals 2⁸⁷ and 5⁸⁸ of Regulation No 833/2014.

155. In my opinion, there is in this case no breach of the duty to state reasons.

156. As the Court held in paragraph 53 of its judgment in *Council v Bamba* (C-417/11 P, EU:C:2012:718), ‘the statement of reasons required by Article 296 TFEU must ... be appropriate to the act at issue and the context in which it was adopted. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question’.

157. Moreover, in so far as concerns restrictive measures against natural or legal persons, such as the freezing of funds, as was the subject of the case which gave rise to the judgment in *Council v Bamba* (C-417/11 P, EU:C:2012:718), the Court held, in paragraph 54 of that judgment, that ‘the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him’.

158. Rosneft is the largest Russian oil company and is 69.5% owned by the Russian State.⁸⁹ Its total assets are estimated at more than a trillion Russian Roubles and at least 50% of its estimated revenue is derived from the sale or transportation of crude oil and petroleum products.⁹⁰ It is, therefore, well able to appreciate the importance of the oil sector in terms of revenue for the budget of the Russian

85 — ‘It is therefore considered appropriate to apply additional restrictive measures with a view to increasing the costs of Russia’s actions to undermine Ukraine’s territorial integrity, sovereignty and independence and to promoting a peaceful settlement of the crisis.’

86 — ‘It is also appropriate to apply restrictions on the sale, supply, transfer or export, directly or indirectly, of certain technologies for the oil industry in Russia in the form of a prior authorisation requirement.’

87 — See footnote 85.

88 — ‘It is also appropriate to apply restrictions on access to the capital market for certain financial institutions, excluding Russia-based institutions with international status established by intergovernmental agreements with Russia as one of the shareholders.’

89 — See point 147 of this Opinion. I would add that, according to its financial statements for 2013, Rosneft paid its shareholders dividends amounting to 85 billion Russian Roubles and paid, in Russia, more than a billion Russian Roubles in taxes other than income tax (see Rosneft’s website, http://www.rosneft.com/attach/0/02/90/Rosneft_FS_2013_ENG_SIGNED_FINAL.pdf).

90 — See Article 5(2)(b) of, and Annex VI to Regulation No 833/2014.

Federation⁹¹ and the reason for which it is being targeted by the restrictive measures provided for in Article 1(2)(b) to (d) and (3) of, and Annex III to Decision 2014/512 and Article 5(2)(b) to (d) and (3) of, and Annex VI to Regulation No 833/2014 may have the effect of ‘*increasing the costs of Russia’s actions* to undermine Ukraine’s territorial integrity, sovereignty and independence and ... promoting a peaceful settlement of the crisis’.⁹²

159. The same applies to the measures provided for in Articles 3, 3a and 4(3) and (4) of, and Annex II to Regulation No 833/2014, which are not restrictive measures against Rosneft,⁹³ but target the Russian oil industry in general.

(d) The plea of invalidity based on alleged infringement of the rights of the defence, of the right to effective judicial protection and the right of access to the file

160. According to Rosneft, the Council’s refusal to grant it privileged access to information and evidence relating to such fundamental questions as the reason for which Rosneft was mentioned in Decision 2014/512 and Regulation No 833/2014, or why certain sectors of the oil industry were targeted and others were not, infringed its rights of defence, its right to effective judicial protection and its right of access to the file.

161. It is apparent from the documents annexed to Rosneft’s written observations and those of the Council that, on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents,⁹⁴ Rosneft attempted to obtain privileged access to Council documents with the intention of using them in its action for annulment, pending before the General Court, in *Rosneft and Others v Council* (T-715/14).

162. On reading those documents it appears that Rosneft used the means of public access to documents introduced by Regulation No 1049/2001 as a sort of ‘document discovery’ process of the kind found in common law legal systems and international arbitration.⁹⁵

163. While Regulation No 1049/2011 is not, in my opinion, an appropriate instrument for granting privileged access to documents that are needed in a dispute,⁹⁶ it is apparent from the documents annexed to Rosneft’s written observations and those of the Council that the Council did not reject Rosneft’s requests for the production of documents, but rather dealt with those requests on the basis of Regulation No 1049/2001.

164. Since, by this plea, Rosneft alleges that the Council wrongly refused it access to most of the documents which it asked to be produced, I consider the plea to be inadmissible, in accordance with the case-law arising from the judgment in *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90), in which the Court held that ‘it follows from the ... requirements of legal certainty that it is not possible

91 — According to President Vladimir Putin, revenue paid into the budget of the Russian Federation by the oil industry in 2013 amounted to between 191 and 194 billion US dollars (see http://rbth.com/news/2014/04/17/russia_had_revenues_of_191-194_bln_from_oil_28_bln_from_gas_in_2013_-_pu_35970.html).

92 — Recital 2 of Regulation No 833/2014. My emphasis.

93 — See points 82 to 85 of this Opinion.

94 — OJ 2001 L 145, p. 43.

95 — Whilst, as a general rule, in codified civil law systems, the parties bear the burden of producing their own evidence, in common law systems the parties may request from each other, or apply to court for the production of documents.

96 — For example, Article 4(1)(a) of the regulation enables the EU institutions to refuse access to a document where disclosure would undermine the protection of the public interest as regards international relations (which corresponds to the concept of ‘Crown privilege’ or ‘public-interest immunity’), whereas a document discovery process may result in a court ordering the production of a document falling within that category, subject to the preservation of its confidentiality, if it transpires that the document is necessary to enable the party requesting its production to protect its rights.

for a recipient of aid ... who could have challenged [a] decision and who allowed the mandatory time limit laid down in this regard by the [sixth] paragraph of Article [263 TFEU] to expire, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision’.⁹⁷

165. I would point out in this connection that it is clear from the letters which the Council sent Rosneft that it advised Rosneft, in accordance with Article 8(1) of Regulation No 1049/2001, of the possibility of bringing an action for annulment against the partial rejection of its application for the production of documents, in accordance with Article 263 TFEU.

166. Since the Council’s decisions granting Rosneft partial access to the documents it had requested concerned Rosneft directly and individually, any action it brought would undoubtedly have been admissible.⁹⁸

167. In any event, on reading the requests for privileged access to the documents which Rosneft sent to the Council it is apparent that:

- in many cases, the request did not contain a description in sufficient detail of a narrow and specific category of documents that might reasonably, in Rosneft’s view, exist,
- the requests were accompanied by no explanation as to how the requested documents are relevant to the dispute and material to its outcome, and that
- the requests were accompanied neither by any declaration that the documents were not already in Rosneft’s possession or custody or under its control nor by any explanation of the reasons for which it supposed that they were in the possession or custody or under the control of the Council.

168. Nevertheless, the Council produced a list of documents which it regarded as being covered by Rosneft’s requests and partially refused it access to another series of documents, stating the reasons for that refusal.

169. Moreover, since the United Kingdom Government is a party to the main proceedings, there is nothing to prevent Rosneft from asking it, in accordance with the rules of English law on the production of documents, to produce the documents which, in its capacity as a member of the Council, it has in its possession or custody or under its control. The national court will be required to ensure that the rules of English law which apply to the production of documents are consistent with the principles of effectiveness and equivalence.⁹⁹

170. Given those circumstances, I do not consider that the Council responded to Rosneft’s request for privileged access in such a way as to compromise its rights of defence, its right to effective judicial protection or its right of access to the case file.

97 — Paragraph 17. See also, to that effect, the judgments in *Nachi Europe* (C-239/99, EU:C:2001:101, paragraphs 29 and 30) and *National Farmers’ Union* (C-241/01, EU:C:2002:604, paragraph 26).

98 — See the judgments in *Accrington Beef and Others* (C-241/95, EU:C:1996:496, paragraph 15); *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 40); and *Bavaria and Bavaria Italia* (C-343/07, EU:C:2009:415, paragraph 40).

99 — See, to that effect, the judgment in *Pfleiderer* (C-360/09, EU:C:2011:389, paragraphs 24, 30 and 31).

(e) The plea of invalidity based on alleged breach of the principle of equal treatment

171. According to Rosneft, in targeting the Russian oil sector with the restrictive measures in question, the Council failed to observe the principle of equal treatment inasmuch as, if the stated aim of the restrictive measures at issue in the main proceedings was, as recital 2 of Regulation No 833/2014 states, to promote a peaceful settlement of the crisis in Ukraine, that can hardly explain, still less justify, the difference in treatment between undertakings which, like it, are part of the Russian oil sector and undertakings operating in other sectors.

172. The Court has consistently held that ‘the principle of non-discrimination requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified’.¹⁰⁰

173. In my opinion, Rosneft cannot validly claim to be the victim of discrimination.

174. First of all, the Russian oil sector is not the only sector of the Russian economy to be target by the restrictive measures at issue. Decision 2014/512 and Regulation No 833/2014 also contain provisions relating to the arms industry, the nuclear energy sector, the aerospace industry and the banking sector.¹⁰¹

175. Moreover, Rosneft has not furnished any evidence to show that there are other Russian oil companies that fulfil the criteria set out in Article 1(2)(b) to (d) of Decision 2014/512 and Article 5(2)(a) to (d) of Regulation No 833/2014 and which should, on that basis, have been targeted by the restrictive measures but have not been targeted, or are not targeted.

176. As the Commission observes, following Rosneft’s reasoning, whenever the Council wished to impose restrictive measures in respect of a third country, it would have no choice but to break off economic and financial relations with that country entirely, which, moreover, would be contrary to the wording of Article 215(1) TFEU, which refers to ‘a [Council] decision ... adopted in accordance with Chapter 2 of Title V of the [EU] Treaty [which] provides for the interruption or reduction, *in part or completely*, of economic and financial relations with one or more third countries’.¹⁰²

177. This plea should therefore be rejected.

(f) The plea of invalidity based on an alleged misuse of power

178. Rosneft alleges that, in stating, in recital 2 of Regulation No 833/2014, that the objective of the restrictive measures is ‘to [increase] the costs of Russia’s actions to undermine Ukraine’s territorial integrity, sovereignty and independence and to [promote] a peaceful settlement of the crisis’,¹⁰³ the Council misused its powers, since its real intention was to limit the ability of Russian companies to continue to grow and to cause lasting damage to the Russian energy sector.

179. According to the case-law of the Court, ‘a misuse of powers exists when an institution exercises its powers with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case’.¹⁰⁴

100 — Judgment in *National Farmers’ Union and Others* (C-354/95, EU:C:1997:379, paragraph 61). See also, to that effect, the judgments in *SCAC* (C-56/94, EU:C:1995:209, paragraph 27) and *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 31).

101 — See Article 1(1) and (2)(a) and Article 3a of Decision 2014/512 and Article 2a and Article 5(1)(a) and (2)(a) of Regulation No 833/2014.

102 — My emphasis.

103 — See also recitals 4 and 5 of the regulation and recital 8 of Decision 2014/512.

104 — Judgment in *Dalmine v Commission* (C-407/04 P, EU:C:2007:53, paragraph 99). See also, to that effect, paragraph 50 of the judgment in *Bank Melli Iran v Council* (T-390/08, EU:T:2009:401), confirmed in paragraph 74 of the judgment in *Bank Melli Iran v Council* (C-548/09 P, EU:C:2011:735).

180. Rosneft relies, in this connection, on a Commission working document¹⁰⁵ according to which the restrictive measures against the Russian oil companies ‘aim to cut strategic State-owned Russian companies off from EU and international financing sources, thus imposing an indirect financial cost to the State and limiting their ability to grow in the future’.¹⁰⁶

181. However, that document in no way supports the allegation that ‘the Council’s *sole* intention was to limit the ability of Russian companies to continue to grow’.¹⁰⁷ On the contrary, the stated aim of the restrictive measures at issue was to ‘[increase] the costs of Russia’s actions to undermine Ukraine’s territorial integrity, sovereignty and independence’,¹⁰⁸ which corresponds to the aim stated in the Commission working document.

182. In any event, a single document, classified as a ‘working document’ and emanating from an institution other than the institution which adopted the act in question, cannot suffice to establish a misuse of power.

183. This plea should therefore be rejected.

(g) The plea of invalidity based on an alleged contradiction between Decision 2014/512 and Regulation No 833/2014

184. Rosneft maintains that there is a contradiction between the wording of Article 4(4) of Decision 2014/512 and the wording of the second subparagraph of Article 3(5) of Regulation No 833/2014: while the first of those provisions allows the Member States no discretion as regards the prohibition on refusing to authorise the execution of contracts concluded before 1 August 2014, the latter permits them to authorise, and thus also permits them to refuse to authorise, the performance of an obligation arising under such a contract.

185. I would reiterate that Regulation No 833/2014 is a European Union act adopted on the basis of Article 215 TFEU, which enables the Council to adopt ‘the necessary measures’, in this case, restrictive measures, ‘where a decision, adopted in accordance with Chapter 2 of Title V of the [EU] Treaty ... provides’ for the interruption or reduction of economic and financial relations with a third country or the adoption of restrictive measures against natural or legal persons.

186. On this point, the Court has held that, ‘because of the adoption of [a CFSP] act, the [Union] is bound to take, under the [FEU] Treaty, the measures necessitated by that act’.¹⁰⁹ Consequently, as the French Government observes, where it adopts a regulation on the basis of Article 215 TFEU, the Council is bound by the terms of the CFSP decision which preceded the regulation.

187. I do not share the Council’s view that a regulation adopted on the basis of Article 215 TFEU is independent of the CFSP decision adopted on the basis of Chapter 2 of Title V of the EU Treaty and may even contradict it.

188. At the hearing, the Council relied on paragraph 70 of the judgment in *Bank Melli Iran v Council* (C-548/09 P, EU:C:2011:735), in which the Court held that, ‘as regards the need ... to include Common Position 2007/140 among the legal bases, it is sufficient to note that that need is contradicted by the very wording of Article 301 EC, which provides for the possibility of adopting Community measures

105 — Commission Staff Working Document on the movement of capital and the freedom of payments, 5 March 2015 (SWD(2015) 58 final) available on the Council’s website at <http://data.consilium.europa.eu/doc/document/ST-6902-2015-INIT/en/pdf>.

106 — *Ibid.*, p. 36.

107 — My emphasis.

108 — Recital 2 of Regulation No 833/2014.

109 — Paragraph 296 of the judgment in *Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461).

when a common position or Community action adopted under the provisions of the EU Treaty, *in the version prior to the Treaty of Lisbon*, on the CFSP [provides] for Community action. The wording of that article indicates that the common position or joint action must exist in order for Community measures to be adopted, but not that those measures must be based on that common position or joint action.’¹¹⁰

189. Precisely as the Court indicated in the passage of its judgment which I have highlighted, the wording of Article 215 TFEU is not the same as that of Article 301 EC, which referred to the situation in which ‘it [was] provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries’.

190. On the contrary, in so far as concerns restrictive measures accompanying the interruption or reduction, in part or completely, of economic and financial relations with a third country, such as Article 4 of Decision 2014/512 in this case,¹¹¹ Article 215(1) TFEU requires the Council to adopt a regulation implementing the necessary measures.¹¹²

191. Consequently, since Decision 2014/512 introduced restrictive measures to make the interruption or reduction, in part or completely, of economic and financial relations with a third country operational, it was necessary for that decision to be given, along with Article 215 TFEU, as the legal basis for Regulation No 833/2014, which indeed it was.¹¹³

192. It follows that the provisions of Regulation No 833/2014 cannot contradict the provisions of Decision 2014/512 without breaching the principle of legality with which that regulation, like any EU act, must comply.

193. The two provisions here at issue are worded differently. Article 4(4) of Decision 2014/512 provides that the prohibition on granting an authorisation for the sale, supply, transfer or export of the equipment or the provision of the services referred to in paragraphs 1 and 2 of Article 4 ‘*shall be without prejudice to the execution of contracts concluded before 1 August 2014*’,¹¹⁴ whereas Article 3(5) of Regulation No 833/2014 provides that ‘the competent authorities *may*, however, grant’¹¹⁵ such authorisation where the sale, supply, transfer or export concerns the execution of an obligation arising from a contract concluded before 1 August 2014.

194. In other words, Decision 2014/512 does not affect contracts concluded before 1 August 2014, while Regulation No 833/2014 allows the Member State authorities to decide whether or not to authorise a sale, supply, transfer or export in performance of an obligation arising from a contract concluded before 1 August 2014.

195. In my opinion, that constitutes an irreconcilable contradiction between the two provisions and, for the reasons which I have given in points 185 to 192 of this Opinion, I consider the second subparagraph of Article 3(5) of Regulation No 833/2014 to be invalid.

110 — My emphasis.

111 — See point 85 of this Opinion.

112 — See point 72 of this Opinion.

113 —
‘... Having regard to the [FEU] Treaty, and in particular Article 215 thereof,
Having regard to ... Decision [2014/512] ...’.

114 — My emphasis.

115 — My emphasis.

(h) The plea of invalidity based on alleged breach of the principle of proportionality and infringement of Rosneft's fundamental rights

196. Rosneft argues that Article 1(2)(b) to (d) and (3) and Article 7 of, and Annex III to Decision 2014/512 and Article 3, Article 3a, Article 4(3) and (4), Article 5(2)(b) to (d) and (3) and Article 11(1) of, and Annexes II and VI to Regulation No 833/2014 are invalid because they are disproportionate to their stated aim and constitute an infringement of Article 16 (freedom to conduct a business) and Article 17(1) (right to property) of the Charter.

197. Referring, in particular, to the judgments in *Bank Melli Iran v Council* (T-390/08, EU:T:2009:401) and *Council v Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776), Rosneft submits that the measures adopted by the Council are neither necessary nor proportionate, inasmuch as there is no reasonable relationship between the means employed and the aim pursued by those measures.

198. Rosneft maintains that Article 7(1)(a) of Decision 2014/512 and Article 11(1) of Regulation No 833/2014 authorise the confiscation of its assets and interference with its acquired contractual rights, that is to say, its rights to property, safeguarded by Article 17(1) of the Charter. Article 11(1) of Regulation No 833/2014 goes beyond what is necessary by providing, in substance, that non-Russian contracting parties may be freed of any obligation under a contract concluded with an entity designated by the regulation, even where that obligation is to provide an entire range of equipment of which only a small part relates to the technologies referred to in Annex II to the regulation.

199. I do not agree with those arguments.

200. Like the United Kingdom, Estonian and French Governments, the Council and Commission, I consider that the interference which Rosneft describes is merely the inevitable consequence of the Council's decision to reduce economic and financial relations with the Russian Federation and to impose restrictive measures against Rosneft.

201. As the Court stated in paragraph 113 of its judgment in *Bank Melli Iran v Council* (C-548/09 P, EU:C:2011:735), 'the fundamental rights at issue in the present case are not absolute, and ... their exercise may be subject to restrictions justified by objectives of public interest pursued by the [Union]'.¹¹⁶

202. On this point, the Court held in paragraphs 22 and 23 of its judgment in *Bosphorus* (C-84/95, EU:C:1996:312) that 'any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions' and that 'the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators'.¹¹⁷

203. In this instance, the provisions in question are specifically aimed at restricting the supply of equipment and the provision of financing to the Russian oil sector and they are thus carefully circumscribed. Consequently, they do not affect all Russian economic operators indiscriminately and without regard to their strategic importance to the Russian economy.

¹¹⁶ — See also, to that effect, the judgment in *Bosphorus* (C-84/95, EU:C:1996:312, paragraph 21 and the case-law cited therein).

¹¹⁷ — See also, on this point, the judgment in *Bank Melli Iran v Council* (C-548/09 P, EU:C:2011:735, paragraph 114).

204. As the French Government points out with reference to the context in which the contested provisions were adopted and to their objective of increasing the costs of the action taken by the Russian Federation by targeting strategic sectors of the Russian economy, including the oil sector, the Council was able to adopt those provisions without overstepping the bounds of what was appropriate and necessary to attain the objective pursued.

205. For those reasons, I propose that the Court's answer to question 2(a) should be that:

(a) consideration of this question has revealed nothing of such a kind as to affect the validity of:

- Article 1(2)(b) to (d) and (3) and
- Article 7 of, and
- Annex III to Decision 2014/512

or of

- Article 3(1) to (4), (5), first and third subparagraphs, and (6) to (8),
- Article 3a,
- Article 4(3) and (4),
- Article 5(2)(b) to (d) and (3) and
- Article 11 of, and
- Annexes II and VI to Regulation No 833/2014;

(b) the second subparagraph of Article 3(5) of Regulation No 833/2014 is invalid.

C – Question 2(b)

206. By question 2(b), the referring court asks the Court of Justice whether, in so far as the restrictive measures which Rosneft contests are valid, it would be contrary to the principles of legal certainty and *nulla poena sine lege certa* for a Member State to impose criminal penalties, pursuant to Article 8 of Regulation No 833/2014, before the scope of the relevant offence has been sufficiently clarified by this Court.

1. Admissibility

207. According to the Council, this question is inadmissible because it concerns not the validity or the interpretation of European Union acts, but the validity of national rules with respect to the principles of legal certainty and *nulla poena sine lege certa*.

208. The United Kingdom Government and the Council also argue that the question is hypothetical, since it does not relate to any specific case in which the criminal penalties laid down by the United Kingdom legislation in question have been applied, which would in any case be impossible in so far as Rosneft is concerned, since the criminal penalties attaching to infringement of the provisions of Decision 2014/512 and Regulation No 833/2014 apply only to persons established in the United Kingdom.

209. I do not agree with those arguments. In my opinion, it is clear from the request for a preliminary ruling that the referring court is not asking the Court of Justice questions concerning the validity of the United Kingdom legislation adopted in implementation of Article 8(1) of Regulation No 833/2014 with respect to principles of national law.¹¹⁸ It is, in substance, seeking to ascertain whether the principles of legal certainty¹¹⁹ and *nulla poena sine lege certa* (Article 49 of the Charter) are to be interpreted in such a way as to preclude the creation of criminal penalties when the terms describing the relevant infringement or offence have not been sufficiently clarified by the Court of Justice.

210. Nor do I regard question 2(b) as hypothetical. First of all, even though Article 3 of Regulation No 833/2014 relates only to sales, supplies, transfers and exports from the territory of the Member States,¹²⁰ it seems to me that the penalties created under the Export Control (Russia, Crimea and Sevastopol Sanctions) Order 2014 do not solely apply to persons established in the United Kingdom or in the European Union.¹²¹ Indeed, at the hearing, Rosneft maintained that, if there were a breach of the restrictive measures, it could be held criminally liable as an accomplice, a point which the United Kingdom Government has not disputed.

211. In any event, the fact that it may not be possible to impose the penalties in question on Rosneft does not make the question hypothetical, since nowhere does the order for reference state that Rosneft is not entitled to contest the measures which the United Kingdom Government adopted pursuant to Article 8 of Regulation No 833/2014.

212. Moreover, the fact that Rosneft has not yet attracted any criminal penalty is irrelevant. Indeed, as the Court held in paragraph 64 of its judgment in *Unibet* (C-432/05, EU:C:2007:163), ‘if [a party] was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with [EU] law, that would not be sufficient to secure for it such effective judicial protection’.

213. This question must therefore be answered.

118 — See that statutory instruments cited in point 25 of this Opinion, which impose criminal penalties (including terms of imprisonment of up to two years) for infringement of the provisions of Regulation No 833/2014.

119 — This principle has long been recognised in EU law (see the judgment in *Racke*, 98/78, EU:C:1979:14, paragraph 20).

120 — See point 127 of this Opinion.

121 — See section 1(2)(a): ‘an offence may be committed under this Order in the United Kingdom by any person’ and section 4(2)(a): ‘a person commits an offence and may be arrested if that person is concerned in an activity ... for which EU authorisation is required ...’.

2. Substance

214. According to Rosneft, the terms used to describe the infringements, and in particular the terms ‘waters deeper than 150 metres’,¹²² ‘shale’,¹²³ ‘financial assistance’¹²⁴ and ‘transferable securities ... issued after 12 September 2014’,¹²⁵ do not have the degree of precision and certainty required for criminal penalties. Consequently, it submits that it would be contrary to the principles of legal certainty and *nulla poena sine lege certa* for a Member State to create criminal penalties on the basis of Article 8 of Regulation No 833/2014 without the Court first giving a uniform interpretation of these terms.

215. Like the referring court, I consider that the terms at issue are indisputably broad, but ultimately I doubt that their inherent ambiguities are sufficient to give rise to legal uncertainty.

216. As the Court held in paragraph 217 of its judgment in *Dansk Rørindustri and Others v Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408), ‘the principle that offences and punishments are to be strictly defined by law (*nullum crimen, nulla poena sine lege*) ... cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability’.

217. Pursuing that line of reasoning, the Court went on to hold that ‘the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such an activity entails.’¹²⁶

218. It is clear from that judgment that the mere fact that there are various possible interpretations of a provision of criminal law does not automatically render that provision contrary to the principles of legal certainty and *nulla poena sine lege certa*. Indeed, there are many provisions of criminal law the terms of which are not immediately amenable to only one interpretation.

219. As Her Majesty’s Treasury and the Secretary of State for Business, Innovation and Skills observed before the referring court, in cases where there is real doubt as to the interpretation to be given to the terms at issue, ‘it [is] always open to the company affected to seek guidance from the prosecutorial authorities and thereby obviate any risk of prosecution for otherwise innocent violations of the provisions in question’.¹²⁷

122 — Articles 3(3)(a) and 3a(1)(a) of Regulation No 833/2014. According to Rosneft, there are vast areas where the depth of the water varies considerably, such that, in some places, the water is deeper than 150 metres, while in others it is shallower than 150 metres. Rosneft also submits, in this context, that Regulation No 833/2014 does not identify the point from which the measurement of 150 metres is to be taken or whether the regulation prohibits vertical drilling at a point where the sea is shallower than 150 metres and then drilling out to a point in the rock lying in waters deeper than 150 metres.

123 — Articles 3(3)(c) and 3a(1)(c) of Regulation No 833/2014. According to Rosneft, there is no consensus, in the geological industry or any other industry, as to what shale is and Regulation No 833/2014 offers no definition.

124 — Article 4(3)(b) of Regulation No 833/2014. According to Rosneft, there is no UN or EU definition of the concept of financial assistance and Regulation No 833/2014 offers no definition.

125 — Article 5(2) of Regulation No 833/2014. According to Rosneft, it is impossible to know whether this provision prohibits the issuing, after 12 September 2014, of GDRs representing shares issued prior to that date. For a fuller definition of GDRs, see footnote 133 to this Opinion.

126 — Judgment in *Dansk Rørindustri and Others v Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 219).

127 — *R (OJSC Rosneft Oil Company) v Her Majesty’s Treasury and ors* [2015] EWHC 248 (Admin), paragraph 53. By contrast with the hypothetical situation criticised in point 62 of my Opinion in *Stichting Woonpunt and Others v Commission* (C-132/12 P, EU:C:2013:335), it seems that this option does exist in the present case.

220. I would point out in this connection that the Member States are required, in accordance with Article 19 TEU, to put in place legal remedies sufficient to enable economic operators to dispute the interpretation which the authorities of the Member States give to the terms of Decision 2014/512 and Regulation No 833/2014.

221. Those judicial authorities could then request a preliminary ruling in accordance with Article 267 TFEU if they considered that the terms of Regulation No 833/2014 or Decision 2014/512 (to the extent that the Court of Justice has jurisdiction) are not sufficiently clear, as indeed the referring court has done with question 3, which precisely concerns the interpretation of the terms to which question 2(b) relates.

222. I therefore propose that the Court's answer to question 2(b) should be that the principles of legal certainty and *nulla poena sine lege certa* do not preclude a Member State from imposing criminal penalties, pursuant to Article 8 of Regulation No 833/2014, before the meaning of the terms used in that regulation to define the scope of the offence in question has been sufficiently clarified by the Court of Justice.

D – Question 3(a)

223. By question 3(a), the national court asks the Court of Justice whether the terms 'financing' and 'financial assistance' used in Article 4(3)(b) of Regulation No 833/2014 include the processing of a payment by a bank or other financial institution.

224. According to Rosneft, these terms must be read together and understood as signifying the provision of financing and related services, which do not include payment processing, a view disputed by the Secretary of State for Business, Innovation and Skills, who considers that payment processing constitutes financial assistance within the meaning of Article 4(3)(b) of Regulation No 833/2014.

225. As the referring court observes, this question is of particular importance, since it is apparent from the evidence submitted to it that the terms have been interpreted differently by the competent authorities of the Member States.

226. Indeed, it is clear from the written observations lodged in these proceedings that the Estonian Government and the Commission¹²⁸ agree with the United Kingdom's interpretation of these terms, while the German Government supports the interpretation which Rosneft proposes. The French Government considers payment processing to be included within the concept of 'financial assistance' provided that the payment in question involves the transfer by the financial institution of new resources to the recipient.

227. I would also point out that the terms in question are used in several regulations imposing restrictive measures. Consequently, the Court's decision could have consequences extending beyond the present case.¹²⁹

228. In my opinion, the answer to this question cannot be categorical.

¹²⁸ — The Council has made no observations concerning the answer to be given to question 3.

¹²⁹ — See, for example, Article 2(b) and Article 4(1)(a) of Council Regulation (EC) No 314/2004 of 19 February 2004 concerning certain restrictive measures in respect of Zimbabwe (OJ 2004 L 55, p. 1), as subsequently amended, and Articles 2(b) and 3 of Council Regulation (EU) No 747/2014 of 10 July 2014 concerning restrictive measures in view of the situation in Sudan and repealing Regulations (EC) No 131/2004 and (EC) No 1184/2005 (OJ 2014 L 203, p. 1).

229. I would first of all observe that, according to the wording of the provision in question, prior authorisation is required for any ‘financing or financial assistance related to items referred to in Annex II, including in particular grants, loans and export credit insurance, for any sale, supply, transfer or export of those items, or for any provision of related technical assistance’.

230. That wording suggests, as the United Kingdom Government observes, that financial assistance is an alternative to financing and not a synonym for it or a subset of the concept of financing. Consequently, the concept of financial assistance must necessarily encompass activities other than those included within the concept of financing.

231. Moreover, included in the wording of the provision are several examples of what is meant by ‘financing or financial assistance’, namely ‘grants, loans and export credit insurance’. However, that list is preceded by the words ‘including in particular’, which indicate that other operations are also covered, albeit that the processing of payments is not expressly mentioned.

232. I would observe in this connection that, in its Guidance note of 16 December 2014 on the implementation of certain provisions of Regulation (EU) No 833/2014,¹³⁰ the Commission stated that ‘payment services and issuance of letters of guarantees/credit constitute financial assistance and are prohibited when linked to the underlying commercial transaction subject to a ban under Article 2’.¹³¹

233. The Commission also stated that ‘banks acting on behalf or to the benefit of their client should exercise due diligence on payments carried out by their customer and oppose ... any payment made in breach of the regulation. As regards banks acting as correspondent banks, they should oppose ... payments when information on such a breach is available.’¹³²

234. The objective of the provision in question is to prohibit any assistance of a financial nature with a transaction prohibited under Article 4(4) and 3(5) of Regulation No 833/2014, which is to say the sale, supply, transfer or export of the items included in Annex II, where there are reasonable grounds to believe that such sale, supply, transfer or export relates to items destined for any of the categories of oil exploration and production projects referred to in paragraph 3 of Article 3 of the regulation.

235. As I have explained in points 126 to 131 of this Opinion, the transactions covered by, and prohibited by Article 3(5) of Regulation No 833/2014 are transactions effected from the territory of the Member States.

236. Since Regulation No 833/2014 does not prevent the transit through the territory of the European Union of items included in Annex II dispatched from third countries and destined for the Russian Federation, it follows that the processing of payments relating to such transactions does not fall within the definition of ‘financial assistance’, within the meaning of Article 4(3)(b) of Regulation No 833/2014.

237. I would refer in this connection to recital 5 of the regulation, which, although it concerns the restrictions imposed in Article 5 on access to the capital markets for certain financial institutions, states that ‘other financial services such as ... payment services ... are not covered by this regulation’.

¹³⁰ — C(2014) 9950 final.

¹³¹ — C(2014) 9950 final, p. 2.

¹³² — C(2014) 9950 final, p. 3.

238. On the other hand, the processing of payments relating to the sale, supply, transfer or export, from the territory of the European Union, of items included in Annex II to the regulation is subject to the requirement for prior authorisation, and that is so that the competent authorities in the Member States are able to check whether the payment in question and the underlying transaction relate to one of the three categories listed in Article 3(3) of Regulation No 833/2014. It is only where the items in question are intended for a use in Russia that is not consistent with those three categories that the competent authorities are required to refuse authorisation.

239. For those reasons, I suggest that the Court's answer to question 3(a) should be that the term 'financial assistance' used in Article 4(3) of Regulation No 833/2014 includes the processing by a bank or other financial institution of payments relating to an underlying transaction covered by Article 3(1) of the regulation.

E – Question 3(b)

240. By question 3(b) the referring court asks the Court of Justice whether Article 5(2) of Regulation No 833/2014 prohibits the issuing, on or after 12 September 2014, of GDRs¹³³ under a deposit agreement with one of the entities listed in Annex VI, or any other dealings with GDRs, where they represent shares in one of those entities issued before 12 September 2014.

241. Rosneft maintains that the prohibition on the issuing of GDRs on or after 12 September 2014 does not extend to GDRs for which the underlying shares were issued before 12 September 2014. The FCA disputes that interpretation and considers that the prohibition applies from that date onwards regardless of the date on which the underlying shares were issued. The referring court concurs with the latter view.

242. In my opinion it is very clear from the wording of the provision in question that the issuing of GDRs is prohibited as from 12 September 2014 regardless of the date on which the underlying shares were issued.

243. In accordance with Article 5(2) of Regulation No 833/2014, 'it [is] prohibited to directly or indirectly purchase, sell, provide investment services for or assistance in the issuance of ... transferable securities ... with a maturity exceeding 30 days, issued after 12 September 2014'.

244. The term 'transferable securities' is defined in Article 1(f)(i) as 'shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and *depository receipts in respect of shares*'.¹³⁴

245. Since there is nothing in the wording of those provisions to indicate a cut-off date for the underlying securities, it is clear that the prohibition on the issuing of GDRs applies regardless of the date on which the underlying shares were issued.¹³⁵

133 — GDRs are certificates representing ownership of a certain number of a company's shares. Because these certificates are transferable, they constitute free-standing securities which can be listed and traded in the market independently from the underlying shares, which may be listed separately in a foreign market. GDRs are issued by depositories (often investment banks) pursuant to a deposit agreement concluded between the depository and the issuer of the underlying shares.

134 — My emphasis.

135 — See also, to that effect, the Commission's Guidance note of 16 December 2014 on the implementation of certain provisions of Regulation (EU) No 833/2014, C(2014) 9950 final, p. 6.

246. That seems quite logical to me, since, as the FCA observes, GDRs are investment instruments which, although linked to company shares, are quoted on exchanges and negotiated separately from the shares which they represent. In this way, GDRs offer companies in third countries access to the European Union's capital markets and enable them to raise capital on those markets without having to meet the criteria and fulfil the conditions for having their shares quoted on the exchanges for those markets.

247. It is also important to note that, according to the FCA, GDRs currently issued in respect of shares in Rosneft represent only 7.5% of the company's total share capital, yet the ceiling which the FCA has already authorised for the company's listing or admission to trading permits it to place up to approximately 90% of its capital in GDRs.

248. This means that, if Rosneft's view were to be accepted, the restrictive measures introduced by the provision in question would be rendered nugatory, since the majority of shares in Rosneft were issued before 12 September 2014 and Rosneft could continue to convert them freely into GDRs.

249. For those reasons, I suggest that the Court's answer to question 3(b) should be that Article 5(2) of Regulation No 833/2014 prohibits the issuing of GDRs in respect of shares in the entities listed in Annex VI to the regulation as from 12 September 2014 regardless of the date on which those shares were issued.

F – Question 3(c)

250. By question 3(c) the referring court asks the Court of Justice about the definition to be given to the term 'shale' used in Articles 3(3) and 3a(1)(c) of Regulation No 833/2014 and whether the terms 'waters deeper than 150 metres' used in Articles 3(3) and 3a(1)(a) of the regulation are to be understood in the sense that the measurement is to be taken from the point of drilling or elsewhere.

1. The concept of 'waters deeper than 150 metres'

251. As I mentioned in point 214 of this Opinion and in footnote 122, there are vast stretches of sea where the depth of the water varies considerably, such that, in some places, the water is deeper than 150 metres, while in others it is shallower than 150 metres. Rosneft submits that Regulation No 833/2014 does not identify the point from which the measurement of 150 metres is to be taken or state whether the regulation prohibits vertical drilling at a point where the sea is shallower than 150 metres and then drilling out to a point in the rock lying in waters deeper than 150 metres.

252. I would observe that Rosneft, the United Kingdom and French Governments and the Commission¹³⁶ concur as to the interpretation to be given to these words, inasmuch as they all take the view that the depth measurement must be taken at the point of drilling.

253. I also share that view, which to me seems logical.

254. Like the Commission, I consider that the measurement of 150 metres must be taken vertically, meaning that an undertaking may not drill diagonally from a point where the water is of a depth of 150 metres or less toward an oil field that lies beneath waters deeper than 150 metres.

255. Also excluded is vertical drilling at a point where the depth of the waters is less than 150 metres followed by drilling outwards to an oil field lying beneath waters deeper than 150 metres.

¹³⁶ — The other parties to the main proceedings and the other parties that have intervened have not made any observations on this point.

256. If other drilling were permitted, where technically and economically viable, it would be possible to circumvent the restrictive measure.

257. In addition, Rosneft, the French Government and the Commission (the United Kingdom not expressing a position in this regard) take the view that the criterion of 150 metres depth must apply to the spot where the drill itself is located, rather than to the perimeter of the oil field being drilled.

258. That would mean that the drilling of an oil field that lies partly beneath waters deeper than 150 metres and partly beneath waters shallower than 150 metres is not covered by Articles 3(3) and 3a(1)(a) of Regulation No 833/2014, provided that drilling takes place at a spot where the depth of the water is equal to or less than 150 metres.

259. I agree with that interpretation.

2. *The concept of ‘shale’*

260. Interpreting the concept of ‘shale’ is more difficult.

261. The United Kingdom Government considers that the Court is not in a position to undertake an examination of scientific and geological evidence, whereas the French Government considers that the concept of ‘shale’ corresponds to a precise geological concept which calls for no interpretation on the Court’s part.

262. Rosneft and the Commission, on the other hand, offer their own interpretations of the concept of ‘shale’, which are diametrically opposed.

263. On the basis of the evidence of its geological expert, Rosneft proposes as a definition of ‘shale’ deposits containing kerogen, composed principally of clay (with a clay mineral content of greater than 35%) and not containing liquid oil.

264. According to the Commission, the deposits in question include projects that have the potential to produce oil, regardless of whether the resources located within the shale are kerogen or crude oil, provided that hydraulic fracturing is applied.

265. Those diverging interpretations prove that, contrary to the French Government’s view, the geological concept of ‘shale’ is open to debate. Moreover, like the United Kingdom Government, I think that the Court is not in a position to give scientific definitions of geological terms such as shale, in particular where the author of the act in question, in this case the Council, has not defined the term.

266. Therefore, without wishing to give a geological expert’s definition of the concept of ‘shale’, I would point out, as does the Commission, that the term in question appears in the phrase ‘projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing’.

267. I doubt that that phrase is such as to prevent experts in the field, both within the undertakings concerned and within the competent authorities, from giving effect to it. Indeed, as the referring court observes, ‘at least in the vast majority of cases experts in the field would understand the limits of these definitions and ... the problems identified by [Rosneft] may hence be more hypothetical than real, or at least operate at the margins of the definitions’.¹³⁷

¹³⁷ — *R (OJSC Rosneft Oil Company) v Her Majesty’s Treasury and ors* [2015] EWHC 248 (Admin), paragraph 53.

268. It must nevertheless be emphasised that, since the restrictive measures concern oil exploration and production in Russia, the definition to be given to the term ‘shale’ must be one that takes into account the nature of the shale formations in that country.

269. Consequently, I do not think that the term ‘shale’ is amenable to scientific definition by the Court or, moreover, that such a definition is indispensable to the implementation of the provisions of Regulation No 833/2014 here in issue.

270. For those reasons, I propose that the Court’s answer to question 3(c) should be that the measurement of ‘waters deeper than 150 metres’ is to be taken vertically from the point of drilling.

VI – Conclusion

271. In light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the High Court of Justice of England and Wales, Queen’s Bench Division (Divisional Court), as follows:

(1) In accordance with the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, the Court has jurisdiction to give a preliminary ruling, under Article 267 TFEU, on the validity of Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine with regard to Article 40 TEU and to review the legality of Article 1(2)(b) to (d) and (3) and Article 7 of that decision.

(2) (a) Consideration of this question has revealed nothing of such a kind as to affect the validity of:

- Article 1(2)(b) to (d) and (3) and
- Article 7 of, and
- Annex III to Decision 2014/512

or of

- Article 3(1) to (4), (5), first and third subparagraphs, and (6) to (8),
- Article 3a,
- Article 4(3) and (4),
- Article 5(2)(b) to (d) and (3) and
- Article 11 of, and
- Annexes II and VI to Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine.

The second subparagraph of Article 3(5) of Regulation No 833/2014 is invalid.

(b) The principles of legal certainty and *nulla poena sine lege certa* do not preclude a Member State from imposing criminal penalties, pursuant to Article 8 of Regulation No 833/2014, before the terms used in that regulation to define the scope of the offence in question have been sufficiently clarified by the Court of Justice.

- (3) (a) The term ‘financial assistance’ used in Article 4(3) of Regulation No 833/2014 includes the processing by a bank or other financial institution of payments relating to an underlying transaction covered by Article 3(1) of the regulation.
- (b) Article 5(2) of Regulation No 833/2014 prohibits the issuing of global depository receipts in respect of shares in the entities listed in Annex VI to the regulation as from 12 September 2014 regardless of the date on which those shares were issued.
- (c) The measurement of ‘waters deeper than 150 metres’, within the meaning of Articles 3(3) and 3a(1)(a) of Regulation No 833/2014 is to be taken vertically from the point of drilling.