Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

10 September 2019*

(Appeal — Common foreign and security policy — Restrictive measures against the Islamic Republic of Iran — Compensation for the damage allegedly suffered by the appellant following its inclusion in the list of persons and entities subject to the freezing of funds and economic resources — Action for damages — Conditions which must be met in order for the European Union to incur non-contractual liability — Concept of 'sufficiently serious breach of a rule of EU law' — Assessment — Concept of 'company owned or controlled' — Obligation to state reasons)

In Case C-123/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 13 February 2018,

HTTS Hanseatic Trade Trust & Shipping GmbH, established in Hamburg (Germany), represented by M. Schlingmann, Rechtsanwalt,

appellant,

the other parties to the proceedings being:

Council of the European Union, represented by J.-P. Hix and M. Bishop, acting as Agents,

defendant at first instance,

European Commission, represented initially by R. Tricot, M. Kellerbauer and C. Zadra, and subsequently by R. Tricot, C. Hödlmayr and C. Zadra, acting as Agents,

intervener at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Prechal and M. Vilaras, Presidents of Chambers, A. Rosas (Rapporteur), E. Juhász, M. Ilešič, J. Malenovský, L. Bay Larsen, C.G. Fernlund, P.G. Xuereb, and N.J. Piçarra, Judges,

Advocate General: G. Pitruzzella,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 26 November 2018,

after hearing the Opinion of the Advocate General at the sitting on 5 March 2019,

* Language of the case: German.

gives the following

Judgment

1 By its appeal, HTTS Hanseatic Trade Trust & Shipping GmbH ('HTTS') asks the Court to set aside the judgment of the General Court of the European Union of 13 December 2017, *HTTS* v *Council* (T-692/15, 'the judgment under appeal', EU:T:2017:890), by which the General Court dismissed its action seeking compensation for the damage which it allegedly suffered following the inclusion of its name, first, by Council Implementing Regulation (EU) No 668/2010 of 26 July 2010 implementing Article 7(2) of Regulation (EC) No 423/2007 concerning restrictive measures against Iran (OJ 2010 L 195, p. 25), in Annex V to Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103, p. 1) and, second, by Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation No 423/2007 (OJ 2010 L 281, p. 1), in Annex VIII to Regulation No 961/2010.

Legal context

2 Chapter IV of Regulation No 961/2010, headed 'Freezing of funds and economic resources', includes Article 16, paragraph 2 of which provides:

'All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VIII shall be frozen. Annex VIII shall include the natural and legal persons, entities and bodies, not covered by Annex VII, who, in accordance with Article 20(1)(b) of Council Decision 2010/413/CFSP [of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 195, p. 39)], have been identified as:

(a) being engaged in, directly associated with, or providing support for Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems by Iran, including through involvement in the procurement of prohibited goods and technology, or being owned or controlled by such a person, entity or body, including through illicit means, or acting on their behalf or at their direction;

…

(d) being a legal person, entity or body owned or controlled by the Islamic Republic of Iran Shipping Lines (IRISL).

…'

Background to the dispute

3 The background to the dispute was set out in paragraphs 1 to 10 of the judgment under appeal as follows:

'1 [HTTS] is a company incorporated under German law, formed in March 2009 by N. Bateni, who is the sole shareholder and director. HTTS carries on the activities of shipping agents and technical managers of vessels.

2 This case has been brought in connection with the restrictive measures introduced in order to apply pressure on the Islamic Republic of Iran to end proliferation-sensitive nuclear activities and the development of nuclear weapon delivery systems ("nuclear proliferation"). More specifically, it

is one of a number of cases relating to measures taken against a shipping company, [IRISL,] and natural or legal persons alleged to be connected with that company, in particular HTTS and two other shipping companies, Hafize Darya Shipping Lines ("HDSL") and Safiran Pyam Darya Shipping Lines ("SAPID"), which the Council of the European Union allege[s] to be connected with IRISL.

3 HTTS was originally named among the persons, entities and bodies subject to restrictive measures listed in Annex V to [Regulation No 423/2007] on 26 July 2010, following the entry into force of [Implementing Regulation No 668/2010]. No action for annulment was brought against that listing. The inclusion of HTTS in the list of persons, entities and bodies subject to restrictive measures contained in Annex VIII [to Regulation No 961/2010], which was effected a few months later by that regulation, was however challenged by HTTS and was subsequently annulled by the General Court, which held that sufficient reasons had not been given (see paragraph 5 below).

4 In Regulation No 668/2010, the reason given for the inclusion of HTTS was essentially that it "act[ed] on behalf of HDSL in Europe". In Regulation No 961/2010, the reason was that it was "controlled and/or acting on behalf of IRISL".

5 By judgment of 7 December 2011, *HTTS* v *Council* (T-562/10, EU:T:2011:716), the General Court annulled Regulation No 961/2010 in so far as it concerned HTTS, but with effect from 7 February 2012, so as to give the Council the opportunity, in the meantime, to provide supplementary reasons for relisting that company. In this regard, the General Court held that to annul Regulation No 961/2010 with immediate effect might cause serious and irreparable harm to the effectiveness of the restrictive measures imposed by that regulation against the Islamic Republic of Iran, since "it cannot be excluded that, as regards the substance, the imposition of restrictive measures on [HTTS] could nonetheless be justified" (judgment of 7 December [2011], *HTTS* v *Council*, T-562/10, EU:T:2011:716, paragraphs 41 and 42).

6 Following the judgment of 7 December 2011, *HTTS* v *Council* (T-562/10, EU:T:2011:716), the Council relisted [HTTS] on several occasions. The listings were each challenged by [HTTS], and were annulled by the General Court in the judgments of 12 June 2013, *HTTS* v *Council* (T-128/12 and T-182/12, not published, EU:T:2013:312), and of 18 September 2015, *HTTS and Bateni* v *Council* (T-45/14, not published, EU:T:2015:650).

7 It should also be observed, at this point, that by judgment of 16 September 2013, *Islamic Republic of Iran Shipping Lines and Others* v *Council* (T-489/10, EU:T:2013:453), the General Court also annulled the inclusion of IRISL and other shipping companies, including HDSL and SAPID, in the relevant lists, on the ground that the matters advanced by the Council did not justify the listing of [IRISL] and, consequently, could not justify the adoption or continuation of restrictive measures against the other shipping companies which had been listed on the basis of their connections with IRISL.

8 By letter of 23 July 2015, [HTTS] sent a request to the Council seeking compensation for the damage which it considered that it had suffered by reason of its initial listing and its subsequent inclusion in the lists of persons connected with the activities of IRISL.

9 In the request for compensation, [HTTS] asserted that it was entitled to compensation for the material and non-material damage which it considered that it had suffered not only by reason of the listings effected by Regulation[s] Nos 668/2010 and 961/2010, which are the subject matter of the present dispute, but also by reason of subsequent listings and relistings (see paragraph 6 above). The material damage thus alleged amounted to EUR 11 928 939, and the non-material damage to EUR 250 000, for the period from 26 July 2010 to 18 September 2015.

10 By letter of 16 October 2015, the Council rejected the request.'

Procedure before the General Court and the judgment under appeal

4 By application lodged at the Registry of the General Court on 25 November 2015, HTTS brought an action seeking an order that the Council pay it compensation in the amount of EUR 2 516 221.50 for material and non-material damage suffered by reason of its inclusion in the lists contained in Annex V to Regulation No 423/2007 and Annex VIII to Regulation No 961/2010 ('the lists at issue').

5 By document lodged at the Registry of the General Court on 5 April 2016, the European Commission applied for leave to intervene in support of the form of order sought by the Council. The President of the Seventh Chamber of the General Court granted that application on 13 May 2016.

6 In its application initiating proceedings, HTTS put forward two pleas in law, alleging, respectively, that the obligation to state reasons was not complied with and that the substantive conditions for its inclusion in the lists at issue were not satisfied.

7 So far as concerns the second plea, which the General Court examined first, the Court observed first of all, in paragraphs 44 to 46 of the judgment under appeal, that a restrictive measure capable of applying to a non-State entity is in itself not an autonomous act of the Council in the nature of a penal or administrative sanction adopted against that entity, but a necessary measure, as provided for in Article 215(2) TFEU, for the purpose of enabling the European Union to achieve, step by step, the practical outcome which it is seeking in the context of international relations, namely, here, that of bringing an end to the nuclear proliferation activities of the Islamic Republic of Iran, and that, according to settled case-law, the wider objective of maintaining peace and international security, in accordance with the objectives of the European Union's external action stated in Article 21 TEU, is such as to justify negative consequences for certain economic operators, even significant negative consequences, arising from decisions implementing acts adopted by the European Union with a view to achieving that fundamental objective.

8 Next, the General Court stated in the first place, in paragraph 47 of the judgment under appeal, that the interference with the commercial activity of HTTS resulting from the freezing of its funds could not be regarded as giving rise automatically to non-contractual liability of the European Union and that, in order for such liability to arise, it was also necessary for the EU judicature to find that there was a flagrant or inexcusable failure to comply with the law on the part of the institution concerned or that it made manifest errors of assessment in relation to the alleged links between HTTS and the other companies concerned, such as, in particular, IRISL.

9 In the second place, the General Court pointed out, in paragraph 48 of the judgment under appeal, that even the fact that one or more acts of the Council said to give rise to the damage claimed by HTSS may have been annulled is not irrefutable evidence of a sufficiently serious breach on the part of the Council giving rise *ipso jure* to a finding of liability on the part of the European Union.

10 In the third place, in paragraphs 49 to 51 of the judgment under appeal, the General Court observed that, in compliance with the adversarial principle, whilst the applicant is entitled to rely on evidence postdating the occurrence of damage in order to prove the scope and extent of such damage, the defendant institution must be able to plead by way of defence all relevant matters arising before the action was brought, pursuant to Article 268 TFEU, before the EU judicature. The General Court states that this possibility is all the more justified in the area of the common foreign and security policy (CFSP), an area which is governed by rules and procedures that are intended inter alia to take account of the development over time of the factual and legal situation to which the European Union's international action relates. Thus, the General Court held that, if matters put forward by the institution concerned in the context of an action for damages that arose before that action was brought were held to be immaterial, that would seriously impair the effective exercise of the powers of the EU institutions in respect of the adoption of measures for the freezing of funds under the CFSP.

11 The General Court added, in paragraph 52 of the judgment under appeal, that in the judgment of 7 December 2011, *HTTS* v *Council* (T-562/10, EU:T:2011:716), annulment of Regulation No 961/2010 with immediate effect was avoided on the ground that it could not 'be excluded that, as regards the substance, the imposition of restrictive measures on [HTTS] could nonetheless be justified'.

12 In the light of those considerations, the General Court concluded that it could not ignore the relevant reasons and the evidence which the Council had put forward by way of defence, with a view to demonstrating that the condition relating to the existence of a sufficiently serious breach of a rule of EU law which must be met in order for non-contractual liability of the European Union to arise was not in fact met.

13 Thus, in the context of its examination of the relevant matters in order to establish whether the acts of inclusion of HTTS in the lists at issue could be regarded as flagrant and inexcusable breaches or manifest errors of assessment on the part of the Council, so far as concerns the nature of the links between HTTS and the other Iranian shipping companies, the General Court stated, in paragraphs 55 to 60 of the judgment under appeal, that what is contemplated by the concept of a company 'owned or controlled by another entity' is a situation in which a natural or legal person involved in the nuclear proliferation activity of the State in question is able to influence the commercial decisions of an undertaking with which it has a commercial relationship, even in the absence of any legal tie between the two economic entities, or any link in terms of ownership or equity participation. In that regard, the General Court recalled the case-law according to which the question whether an entity is 'owned or controlled' must be assessed on a case-by-case basis, by reference, inter alia, to the degree to which the entity concerned is owned or controlled. In the case in point, the General Court held that the evidence relied on by the Council, in particular the fact that the director of HTTS previously carried out the functions of legal director of IRISL and that HTTS had the same address as IRISL Europe GmbH, amounted to a set of indicia that were sufficiently precise and consistent for it to be concluded that it was at least plausible that HTTS was controlled by and/or was acting on behalf of IRISL. Therefore, the General Court held that, in adopting the fund-freezing measure at issue, the Council had not committed any flagrant and inexcusable breaches or manifest errors of assessment as to the scope of the commercial relationship that HTTS had with IRISL.

14 Finally, so far as concerns the alleged lack of justification for the inclusion of HTTS in the lists at issue following the annulment, by the judgment of 16 September 2013, *Islamic Republic of Iran Shipping Lines and Others* v *Council* (T-489/10, EU:T:2013:453), of the acts including IRISL, HDSL and SAPID in the lists concerning them, the General Court held, in paragraphs 62 and 63 of the judgment under appeal, first, that that annulment is not sufficient, by itself, to establish that the inclusion of HTTS in the lists at issue was vitiated by a sufficiently serious breach such as to give rise to non-contractual liability of the European Union. Second, the General Court found that the inclusion of HTTS in the lists at issue was founded essentially on a report of the Sanctions Committee of the United Nations Security Council establishing three manifest breaches by IRISL of the arms embargo instituted by Security Council Resolution 1747 (2007) of 24 March 2007. The General Court held that, having regard to the conclusions set out in that report, the finding that IRISL was involved in the nuclear proliferation activities of the Islamic Republic of Iran could not be regarded as manifestly erroneous.

15 Having regard to those considerations, the General Court dismissed the second plea.

16 In its examination of the first plea, the General Court rejected HTTS's argument relating to the lack of reasons for its inclusion in Annex VIII to Regulation No 961/2010. The General Court noted first of all, in paragraph 88 of the judgment under appeal, citing the judgment of 11 July 2007, *Sison* v *Council* (T-47/03, not published, EU:T:2007:207, paragraph 238), that, in principle, the fact that the reasons given for an act are inadequate does not give rise to liability of the European Union.

17 Next, in paragraphs 89 and 90 of the judgment under appeal, the General Court held, in essence, that, since the Council may, in order to demonstrate the legality of its conduct, make use of all matters arising until the action for damages is brought, the reasons stated for the inclusion of HTTS in the lists at issue had to be read in the light of the reasons relied on by the Council in Council Decision 2012/35/CFSP of 23 January 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2012 L 19, p. 22), which maintained the inclusion of HTTS in the list annexed to Council Decision 2010/413. According to the General Court, the supplementary reasons relied on by the Council in Decision 2012/35 enabled HTTS to understand why it had been included in the lists at issue.

18 In the light of those considerations, the General Court dismissed the first plea and, therefore, HTTS's action in its entirety.

Forms of order sought before the Court of Justice

19 HTTS claims that the Court should:

– set aside the judgment under appeal;

– order the Council to pay compensation in the amount of EUR 2 516 221.50 for material and non-material damage arising from its inclusion in the lists at issue and default interest calculated on the basis of the interest rate set by the European Central Bank (ECB) for its main refinancing operations, increased by two percentage points, from 17 October 2015 until the compensation has been paid in full; and

– order the Council to pay the costs.

20 The Council contends that the Court should:

– dismiss the appeal;

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

– in the alternative, dismiss the action; and

– order the appellant to pay the costs.

21 The Commission contends that the Court should:

– dismiss the appeal in its entirety;

– in the alternative, if the judgment under appeal is set aside, dismiss the action; and

– order HTTS to pay the costs.

The appeal

22 The appellant puts forward four grounds of appeal.

First ground of appeal

Arguments of the parties

23 HTTS submits that the General Court, in particular in paragraphs 49 and 50 of the judgment under appeal, erred in law in holding that the Council could rely on information and material that were not available to it when HTTS was included in the lists at issue, in order to demonstrate that it had not committed a breach of a rule of EU law sufficiently serious to give rise to non-contractual liability of the European Union. In the appellant's submission, the General Court had to place itself at the date on which the restrictive measures concerned were adopted in order to decide whether, on the basis of the material available to it, an administrative authority exercising ordinary care and diligence would have acted in the same way as the Council in the case in point.

24 HTTS adds that the specific features of the European Union's action and objectives in the context of the CFSP cannot justify a different approach. Thus, even in this area, conduct of the institutions may give rise to non-contractual liability of the European Union, as they are required to observe the principles of the rule of law and fundamental rights.

25 Furthermore, HTTS criticises the General Court for not having taken account of the judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402), which shows that its arguments are well founded. In that judgment, the Court of Justice held that the Council cannot remedy several years later, by adducing new evidence, the breach of its obligation to provide, in the event of a challenge, information or evidence substantiating the reasons for the adoption of restrictive measures against a natural or legal person.

26 The appellant contends, finally, that the General Court also should have taken account of the Council's statements in the cases which gave rise to the judgment of 12 June 2013, *HTTS* v *Council* (T-128/12 and T-182/12, not published, EU:T:2013:312), from which it is clear that at the beginning of 2012 the Council did not have the information upon which it relies by way of defence in the action before the General Court in order to demonstrate that the first condition for non-contractual liability of the European Union is not met.

27 The Council counters that the General Court rightly stated that, since an action for damages may be brought within five years from the occurrence of the event giving rise to the alleged damage, the institution concerned is entitled to rely, by way of defence, on all matters arising before the action was brought, within that period, in order to demonstrate that it did not commit a sufficiently serious breach of a rule of EU law, just as the applicant may prove the scope and extent of the damage to it on the basis of evidence postdating the damage's occurrence.

28 The contrary proposition would, in the Council's submission, be tantamount to seriously hindering the effective exercise of the powers concerning the CFSP that are assigned to the EU institutions to adopt, in aid of the implementation of that policy, the necessary restrictive measures.

29 As to HTTS's argument regarding the alleged breach by the General Court of the principles of the rule of law, the Council maintains that the EU judicature may, while observing those principles, take account of the particular circumstances relating to the fact that those measures have been adopted in order to implement CFSP decisions, as the General Court stated in paragraph 50 of the judgment under appeal.

30 Finally, as regards the argument which HTTS seeks to derive from the judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402), in the Council's submission it does not follow from that judgment that the General Court cannot take account of circumstances arising after the listings at issue have been adopted in order to determine whether there is a sufficiently serious breach

of a rule of EU law. In particular, the Council contends that, if the person subject to the restrictive measures has acted in such a way that those measures are justified, he should not be granted a right to compensation, even if the facts were not yet known to the institution when the measures were adopted and the measures were annulled on that ground. According to the Council, this would be all the more justified if the facts at issue were or had to be known to the person subject to the restrictive measures.

31 The Commission essentially agrees with the Council's arguments relating to observance of the principle of equality of arms, which constitute justification for the Council's ability to rely on matters arising after HTTS was included in the lists at issue. So far as concerns, in particular, the interpretation of the judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402), the Commission adds that the reference by HTTS to paragraph 40 of that judgment is incorrect since in that paragraph the Court adopts a position not on the relevant time for assessing the merits of an action for damages but on whether there was, in the case in point, a sufficiently serious breach of a rule of EU law.

Findings of the Court

32 It is clear from the Court's case-law that the European Union may incur non-contractual liability only if a number of conditions are fulfilled, namely the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals, the fact of damage and the existence of a causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (see, to that effect, judgments of 10 July 2003, *Commission* v *Fresh Marine*, C-472/00 P, EU:C:2003:399, paragraph 25; of 19 April 2012, *Artegodan* v *Commission*, C-221/10 P, EU:C:2012:216, paragraph 80 and the case-law cited; and of 13 December 2018, *European Union* v *Kendrion*, C-150/17 P, EU:C:2018:1014, paragraph 117).

33 So far as concerns in particular the first of those conditions, which is the only one at issue in the present appeal, the Court has stated that a sufficiently serious breach of a rule of law intended to confer rights on individuals is established where the breach is one that implies that the institution concerned manifestly and gravely disregarded the limits set on its discretion, the factors to be taken into consideration in that connection being, inter alia, the complexity of the situations to be regulated, the degree of clarity and precision of the rule breached and the measure of discretion left by that rule to the EU institution (see, to that effect, judgments of 19 April 2007, *Holcim (Deutschland)* v *Commission*, C-282/05 P, EU:C:2007:226, paragraph 50, and of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 30).

34 As the Advocate General has observed in point 20 of his Opinion, the requirement that there be a sufficiently serious breach of a rule of EU law stems from the need to strike a balance between, on the one hand, the protection of individuals against unlawful conduct of the institutions and, on the other, the leeway that must be accorded to the institutions in order not to paralyse action by them. That balancing exercise proves all the more important in the field of restrictive measures, in which the obstacles encountered by the Council in terms of availability of information often make the assessment that it must carry out particularly difficult.

35 It is in the light of those considerations that it must be ascertained whether the General Court erred in law when it held, in particular in paragraphs 49 and 50 of the judgment under appeal, that the Council may rely on all relevant matters arising before the action for damages was brought, in order to demonstrate that it did not commit a breach of a rule of EU law sufficiently serious to give rise to non-contractual liability of the European Union. More specifically, it is to be ascertained whether the General Court erred in law by permitting the Council, in that context, to rely on matters that it did not take into account when including HTTS in the lists at issue.

36 As is clear from the case-law cited in paragraph 32 of the present judgment, in order for the first condition for non-contractual liability of the European Union to be met, it is necessary (i) that a breach of a rule of EU law intended to confer rights on individuals has occurred and (ii) that that breach is sufficiently serious.

37 So far as concerns the first component of that condition, it should be noted that, according to settled case-law, in an action for annulment the legality of the contested act must be assessed on the basis of the facts and the law as they stood at the time when the act was adopted (judgments of 18 July 2013, *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 31 and the case-law cited, and of 3 September 2015, *Inuit Tapiriit Kanatami and Others* v *Commission*, C-398/13 P, EU:C:2015:535, paragraph 22 and the case-law cited).

38 The requirements of coherence that underlie the system of remedies which is provided for by the FEU Treaty mean that the methodology for examining the legality of a measure or of conduct of an EU institution must not differ according to the type of action.

39 Thus, in an action for damages too, illegality of an act or of conduct that may give rise to non-contractual liability of the European Union must be assessed on the basis of the facts and the law as they stood at the time when the act or conduct was adopted.

40 That conclusion is not called into question by the settled case-law, noted in essence by the General Court in paragraph 42 of the judgment under appeal, from which it follows that the action for damages is an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions of use dictated by its specific purpose (see, to that effect, judgment of 23 March 2004, *Ombudsman* v *Lamberts*, C-234/02 P, EU:C:2004:174, paragraph 59 and the case-law cited).That autonomy is without prejudice to the fact that, in order to assess the merits of such an action, the EU judicature is to analyse the legality of the conduct of the EU institution or body giving rise to the damage (see, to that effect, judgment of 23 March 2004, *Ombudsman* v *Lamberts*, C-234/02 P, EU:C:2004:174, paragraphs 60 and 61).

41 Since Regulation No 961/2010 was annulled by the judgment of the General Court of 7 December 2011, *HTTS* v *Council* (T-562/10, EU:T:2011:716), which, since an appeal was not brought against it within the time limit, had the force of *res judicata*, the first component of the first condition for non-contractual liability of the European Union was already fulfilled as regards that regulation (see, to that effect, judgment of 1 June 2006, *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, C-442/03 P and C-471/03 P, EU:C:2006:356, paragraphs 41 to 45).

42 So far as concerns the second component of the first condition for non-contractual liability of the European Union, it is also apparent from the case-law cited in paragraph 33 of the present judgment that non-contractual liability of the European Union can arise only if the institution concerned manifestly and gravely disregarded the limits set on its discretion. It is, furthermore, clear from that case-law that, in order to determine whether a breach of a rule of EU law is sufficiently serious, the EU judicature takes into account inter alia the complexity of the situations to be regulated, the difficulties in applying or interpreting the legislation and, more particularly, the margin of discretion available to the author of the act in question.

43 Thus, non-contractual liability of the European Union can arise only if an irregularity is found that would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence.

44 The parameters listed in paragraph 42 of the present judgment that are required to be taken into account when assessing whether there is a sufficiently serious breach of a rule of EU law all relate to the date on which the decision or the conduct was adopted by the institution concerned.

45 Accordingly, it must be held that, inasmuch as the degree of seriousness, required by the case-law, of the breach of a rule of EU law committed by the institution at issue is intrinsically linked to that breach, it cannot be assessed by reference to a time different from the time when the breach was committed.

46 It follows that the existence of a sufficiently serious breach of a rule of EU law must necessarily be assessed on the basis of the circumstances in which the institution acted on that particular date.

47 It also follows from the foregoing that, when disputing that there is a sufficiently serious breach of that kind, an institution can rely only on the matters which it took into account for the purpose of adopting the act concerned.

48 Finally, if an institution could rely on any relevant matter that was not taken into account when the decision concerned was adopted in order to demonstrate that it did not commit a breach of a rule of EU law sufficiently serious to give rise to non-contractual liability of the European Union, the outcome of the action for damages could vary according to the date on which it was brought. The award of compensation for the damage suffered on account of the conduct of the EU institutions would depend, in that context, on whether during the five-year period, prescribed in the first paragraph of Article 46 of the Statute of the Court of Justice of the European Union, in which an action for damages may be brought any matter that was not taken into account at the time of adoption of the decision concerned enabled the institution that adopted it to justify its actions.

49 It should be pointed out that that is not the purpose of the limitation period prescribed in that provision. In accordance with settled case-law, that period has the function, first, of ensuring protection of the rights of the aggrieved person, who must have sufficient time in which to gather the appropriate information with a view to a possible action, and, second, of preventing the aggrieved person from being able to delay the exercise of his right to damages indefinitely (judgment of 8 November 2012, *Evropaïki Dynamiki* v *Commission*, C-469/11 P, EU:C:2012:705, paragraphs 33 and 53 and the case-law cited).

50 Protection of the rights of the aggrieved person, who must have sufficient time in which to gather the appropriate information with a view to a possible action, could be undermined if the passage of time after adoption of the decision or conduct at issue were liable to make it more difficult to demonstrate that the institution concerned committed a sufficiently serious breach of a rule of EU law.

51 In the light of all the foregoing considerations, it must be concluded that the General Court erred in law in holding in essence, in paragraphs 49 and 50 of the judgment under appeal, that the Council may rely on any relevant matter that was not taken into account when HTTS was included in the lists at issue in order to demonstrate that it did not commit a breach of a rule of EU law sufficiently serious to give rise to non-contractual liability of the European Union.

52 Contrary to the Council's submissions, that conclusion cannot be called into question by the particular features of the CFSP.

53 First, as the Advocate General has noted in point 23 of his Opinion, the Court has already applied in that area the conditions, recalled in paragraph 32 of the present judgment, relating to the arising of non-contractual liability of the European Union (judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402). Second, it follows from the case-law cited in paragraph 33 of the present judgment that the complexity of the situations to be regulated and the difficulties in applying or interpreting the rules of EU law in that area, which have been applied by the Council in the course of adopting the act at issue, are taken into account when assessing the Council's conduct in order to determine whether it committed a sufficiently serious breach of a rule of EU law.

54 Nor is that conclusion called into question by the Council's argument that, since an action for damages may be brought within five years from the occurrence of the event giving rise to the alleged damage, the applicant may rely on evidence postdating the occurrence of the damage to it in order to prove the scope and extent of such damage.

55 In that regard, it should be noted that the concepts of 'sufficiently serious breach' and 'damage' are two separate concepts that differ temporally, so that they cannot be confused. 'Sufficiently serious breach', as is apparent from paragraphs 33 to 50 of the present judgment, is a static concept, fixed at the time when the unlawful act or conduct was adopted, whilst the concept of 'damage', on the other hand, is by nature a dynamic concept since, first, the damage may emerge after the unlawful act or conduct was adopted and, second, its extent may change over time.

56 It follows that the first ground of appeal must be upheld.

Second ground of appeal

Arguments of the parties

57 By its second ground of appeal, HTTS contests the General Court's classification of it as a company 'owned or controlled' by IRISL.

58 First of all, HTTS submits that the General Court erred in law in holding, in paragraph 56 of the judgment under appeal, that ownership links between it and IRISL were not to be taken into account in order to determine whether it was 'owned or controlled' by IRISL. Furthermore, Regulations No 423/2007 and No 961/2010 do not permit the listing of an entity which merely acts on behalf of IRISL.

59 As regards, next, the matters relied on by the Council and set out in paragraph 59 of the judgment under appeal, HTTS states, first, that they do not serve to show that it was 'owned or controlled' by IRISL. Second, HTTS observes that the Council did not have that material when it included HTTS in the lists at issue. In that regard, HTTS notes that, in the judgment of 6 September 2013, *Bateni* v *Council* (T-42/12 and T-181/12, not published, EU:T:2013:409), the General Court found that the material available to the Council when the acts contested in that case were adopted did not contain the slightest indication as to the nature of the alleged control by IRISL or as to the activities carried out by HTTS on behalf of IRISL.

60 Finally, HTTS highlights the fact that, whilst the General Court considered that the Council could legitimately rely on matters by way of defence, by contrast, the matters which it relied on in support of its action, such as the annulments of the listings of IRISL, SAPID and HDSL, were not taken into consideration.

61 The Council counters that, in paragraph 56 of the judgment under appeal, the General Court did not in any way hold that ownership links play no part in the assessment of a situation of ownership or control of a company, but merely stated that the decisive criterion in that regard is the ability to exert influence.

62 As regards the indicia relied on by the General Court in paragraph 59 of the judgment under appeal, the Council contends that the taking into account of those indicia, as a whole, supports the finding that it did not commit any flagrant and inexcusable breaches or manifest errors of assessment as to the scope of the commercial relationship that HTTS had with IRISL. In any event, in the Council's

submission, the arguments relied on by the appellant in this regard seek to challenge the assessment conducted by the General Court of the evidence available to it. Therefore, those arguments are inadmissible in an appeal.

63 Furthermore, the Council states that the judgment of 6 September 2013, *Bateni* v *Council* (T-42/12 and T-181/12, not published, EU:T:2013:409), is not relevant in the context of the present case, as that judgment concerned an action for annulment whose subject matter was not the inclusion of HTTS in the lists at issue.

64 Finally, the Council pleads that, by the judgment of 17 February 2017, *Islamic Republic of Iran Shipping Lines and Others* v *Council* (T-14/14 and T-87/14, EU:T:2017:102), the General Court confirmed that the listings of IRISL, HDSL and SAPID were lawful. In any event, the Council observes that the inclusion of HTTS in the lists at issue does not constitute a sufficiently serious breach of a rule of EU law, as the report of the Sanctions Committee of the United Nations Security Council found three manifest breaches by IRISL of the arms embargo instituted by Security Council Resolution 1747 (2007).

65 The Commission agrees with the Council's arguments. As regards the error of law relating to the criterion applicable for establishing in which situations a company controls or owns another legal entity, the Commission submits that there is no fundamental substantive difference between acting under a company's control and acting on its behalf, as both those situations necessarily involve a position of control or, at least, of influence.

Findings of the Court

66 The second ground of appeal is divided into two parts.

67 By the first complaint in the first part, HTTS submits, in essence, that the General Court wrongly held that ownership links do not constitute a matter that was required to be taken into account in order to determine whether it was a company 'owned or controlled' by IRISL.

68 Article 16(2)(d) of Regulation No 961/2010 requires the freezing of funds and economic resources belonging to persons, entities and bodies, not covered by the relevant Security Council resolutions, who, 'in accordance with Article 20(1)(b) of [Decision 2010/413] have been identified as … being a legal person, entity or body owned or controlled by [IRISL]'.

69 The use by Regulation No 961/2010 of the terms 'owned' and 'controlled' reflects the need to enable the Council to adopt effective measures against all persons, entities or bodies linked to companies involved in nuclear proliferation. It follows that the ownership or control may be direct or indirect. If that link had to be established solely on the basis of the direct ownership or control of those persons, the measures could be circumvented by numerous contractual or de facto possibilities of control, possibilities which would confer on a company opportunities to exert influence over other entities that are as extensive as in the case of direct ownership or control.

70 Thus, as the General Court pointed out in paragraph 55 of the judgment under appeal, the concept of a 'company owned or controlled' does not have, in the area of restrictive measures, the same meaning as it generally has in company law, where it serves to ascertain the commercial liability of a company which is legally subject to the control, as regards decision-making, of another commercial entity.

71 In paragraph 56 of the judgment under appeal, the General Court held that, in the context of assessing the legality of a restrictive measure, what is contemplated by that concept is a situation in which the natural or legal person involved in nuclear proliferation is able to influence the commercial decisions of another person with which it has a commercial relationship, even in the absence of any legal tie between the two economic entities, or any link in terms of ownership or equity participation.

72 The complaint raised by the appellant against that paragraph of the judgment under appeal is based on a misreading thereof.

73 As the Advocate General has observed in point 39 of his Opinion, it does not follow from paragraph 56 of the judgment under appeal that the General Court took no account whatsoever of the existence of any legal tie between HTTS and IRISL, or any link in terms of ownership or equity participation, but only that the absence of such a tie or link was not sufficient to rule out classification as an 'owned or controlled' entity.

74 In other words, the General Court held that, whilst the existence of a legal tie or a link in terms of ownership or equity participation in a company may, in certain cases, result in the ability to influence the decisions of the owned or controlled entity, it is not a *sine qua non* for the exertion of such influence.

75 In the light of the foregoing, it must be held that the General Court did not err in law when it held that a company may be classified as a 'company owned or controlled by another entity' where the latter is in a situation in which it is able to influence the decisions of the company concerned, even in the absence of any legal tie between the two economic entities, or any link in terms of ownership or equity participation.

76 The first complaint in the first part of the second ground of appeal must therefore be rejected as unfounded.

77 So far as concerns the second complaint in the first part of the second ground of appeal, according to which Regulations No 423/2007 and No 961/2010 do not permit a company that merely acts 'on behalf of' IRISL to be listed, it is true that the wording of Article 16(2)(d) of Regulation No 961/2010 does not expressly refer to acting on behalf of another company. Nevertheless, for the purposes of the adoption of measures such as those adopted by the Council in respect of HTTS, acting under the control of a person or entity and acting on behalf of such a person must be equiparated.

78 That conclusion is borne out, first, by analysis of the aim of that provision which, as has been pointed out in paragraph 69 of the present judgment, has the objective of enabling the Council to adopt effective measures against persons involved in nuclear proliferation and of preventing such measures from being circumvented.

79 Next, that conclusion is also supported by analysis of the context of Article 16(2)(d) of Regulation No 961/2010. It is to be noted, as the Commission has done, that in Article 16(2)(a) of Regulation No 961/2010 being controlled or owned by a person or entity is placed on an equal footing with acting at the direction or on behalf of a person or entity.

80 It follows that the second complaint in the first part of the second ground of appeal and, therefore, that part in its entirety must be rejected as unfounded.

81 As regards the second part of the second ground of appeal, it is appropriate to examine first of all the complaint that the indicia proving that HTTS was a 'company owned or controlled' by IRISL, set out in paragraph 59 of the judgment under appeal, were not known to the Council when HTTS was included in the lists at issue.

82 As is clear from paragraph 46 of the present judgment, the existence of a sufficiently serious breach of a rule of EU law that may give rise to non-contractual liability of the European Union must be assessed on the basis of the circumstances in which the institution at issue acted on the date of the conduct complained of or of the contested act.

83 That is why, as has been held in paragraph 47 of the present judgment, an institution cannot, when disputing that there is a sufficiently serious breach of that kind, rely on matters that were not taken into account for the purpose of adopting the act concerned, even if that institution is of the view that such matters may usefully supplement the reasons set out in that act or could have helped to provide a basis for its adoption.

84 In that regard, it should be noted that the Council confirmed at the hearing, in reply to a question from the Court, that at the time when Regulations No 668/2010 and No 961/2010 were adopted it did not have the material set out in paragraph 59 of the judgment under appeal, so that that material was not assessed by the Council when it examined the case.

85 The Court has already found, in paragraph 51 of the present judgment, that the General Court erred in law in holding that the Council may rely on matters that were not taken into account for the purpose of adoption of the act concerned in order to demonstrate that it did not commit a breach of a rule of EU law conferring rights on individuals that was sufficiently serious to give rise to non-contractual liability of the European Union.

86 It follows that the General Court also erred in law when it held, in essence, in paragraph 60 of the judgment under appeal, that it was apparent from matters not taken into account by the Council when including HTTS in the lists at issue that the Council did not commit a sufficiently serious breach of a rule of EU law in assessing the scope of the commercial relationship that HTTS had with IRISL.

87 Therefore, the first complaint in the second part of the second ground of appeal must be upheld.

88 There is no need to respond to the complaints, first, that the indicia relied on by the Council and set out in paragraph 59 of the judgment under appeal do not serve to show that HTTS was ‘owned or controlled’ by IRISL and, second, that the General Court did not assess the degree to which HTTS was owned or controlled on the basis of those indicia, since it has been held in paragraph 86 of the present judgment that the General Court erred in law in relying on matters, referred to in paragraph 59 of the judgment under appeal, that were not taken into account by the Council when including HTTS in the lists at issue.

89 Consequently the second part of the second ground of appeal must be upheld.

Third and fourth grounds of appeal

Arguments of the parties

90 The third and fourth grounds of appeal concern the error of law said to have been committed by the General Court in holding, first, that the Council did not infringe its obligation to state reasons for including HTTS in the lists at issue and, second, that the fact that the reasons given for an act are inadequate does not give rise to non-contractual liability of the European Union.

91 So far as concerns the third ground of appeal, HTTS submits that the General Court erred in law, in paragraph 86 of the judgment under appeal, when it presumed that Regulation No 668/2010 was applicable in the case in point, so that the Council did not infringe its obligation to state reasons for including HTTS in the lists at issue.

92 In HTTS's submission, Regulation No 668/2010 was rendered 'obsolete' by Regulation No 961/2010, which was in turn annulled by the General Court, by the judgment of 7 December 2011, *HTTS* v *Council* (T-562/10, EU:T:2011:716), on the ground that it was vitiated by a defective statement of reasons.

93 Furthermore, the 'supplementary' reasons referred to by the General Court in paragraphs 89 and 90 of the judgment under appeal in order to justify the inclusion of HTTS in the lists at issue amount to matters arising or brought to the Council's attention after those listings and consequently are not to be taken into account, for the reasons set out in the context of the first ground of appeal.

94 As regards the fourth ground of appeal, in HTTS's submission the General Court erred in law when it held, in paragraph 88 of the judgment under appeal, that, in principle, breach of the obligation to state reasons cannot give rise to non-contractual liability of the European Union. The appellant explains that compliance with the obligation to state reasons is essential in order for a procedure to be regarded as observing the principles of the rule of law. Therefore, breach of that obligation constitutes breach of the right to effective judicial protection. Furthermore, in the field of restrictive measures adopted under the CFSP, the obligation to state reasons gives rise to the obligation on the Council to gather information or evidence justifying such measures, in order to be able adduce that information or evidence before the EU judicature in the event of a challenge.

95 The Council and the Commission contend that the third and fourth grounds of appeal should be rejected.

Findings of the Court

96 The third and fourth grounds of appeal are closely linked and must therefore be examined together.

97 First of all, it must be held that the complaints relating to paragraphs 89 and 90 of the judgment under appeal are ineffective as they are directed against grounds of the judgment under appeal that are set out by the General Court for the sake of completeness.

98 Next, as the General Court pointed out in paragraphs 84 and 85 of the judgment under appeal, the listing of HTTS by Regulations No 668/2010 and No 961/2010 was not justified by the same reasons in those two regulations and the General Court found only Regulation No 961/2010 to be unlawful by the judgment of 7 December 2011, *HTTS* v *Council* (T-562/10, EU:T:2011:716).

99 That being so, first, the General Court could correctly hold, in paragraph 86 of the judgment under appeal, that it could not be inferred from the annulment of Regulation No 961/2010 by the judgment of 7 December 2011, *HTTS* v *Council* (T-562/10, EU:T:2011:716), that Regulation No 668/2010 also had to be regarded as unlawful on account of a defective statement of reasons.

100 Second, since HTTS did not contest the legality of Regulation No 668/2010 by means of an action for annulment, it was for it to demonstrate that that regulation was unlawful, in the action giving rise to the judgment under appeal. Acts of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (see, to that effect, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 52).

101 Accordingly, HTTS's argument, set out in paragraphs 91 and 92 of the present judgment, cannot be upheld.

102 In any event, even assuming that HTTS adduced evidence enabling Regulation No 668/2010 to be found unlawful for failure to state adequate reasons, its complaints cannot result in the finding of a breach of EU law sufficiently serious to give rise to non-contractual liability of the European Union.

103 Inadequacy of the statement of reasons for an act imposing a restrictive measure is not, in itself, such as to give rise to non-contractual liability of the European Union (see, to that effect, judgment of 30 September 2003, *Eurocoton and Others* v *Council*, C-76/01 P, EU:C:2003:511, paragraph 98 and the case-law cited).

104 It follows that the third and fourth grounds of appeal must be rejected.

105 In the light of all the foregoing considerations, the judgment under appeal must be set aside.

Referral of the case back to the General Court

106 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

107 Here, as has been found in the examination of the first and second grounds of appeal, the General Court erred in law as regards the first of the conditions, noted in paragraph 32 of the present judgment, which must be met in order for the European Union to incur non-contractual liability.

108 In addition, after concluding that there was not a sufficiently serious breach of a rule of EU law, the General Court, in paragraph 92 of the judgment under appeal, did not go on to examine the other conditions which must each be met in order for the European Union to incur non-contractual liability (see, to that effect, judgment of 19 April 2007, *Holcim (Deutschland)* v *Commission*, C-282/05 P, EU:C:2007:226, paragraph 57).

109 That being so, the case should be referred back to the General Court, so that it may, first, without considering matters which were not taken into account by the Council when HTTS was included in the lists at issue, conduct a fresh examination of whether a breach of a rule of EU law sufficiently serious to give rise to non-contractual liability of the European Union may exist. Next, if that examination shows that there is such a breach, the General Court will have the task of examining the other conditions, noted in paragraph 32 of the present judgment, which must be met in order for the European Union to incur non-contractual liability.

Costs

110 As the case is being referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 13 December 2017, *HTTS* v *Council* (T-692/15, EU:T:2017:890);**

2. **Refers the case back to the General Court of the European Union;**

3. **Reserves the costs.**

[Signatures]