Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 5 March 2019[1]

Case C-123/18 P

HTTS Hanseatic Trade Trust & Shipping GmbH
v

Council of the European Union

(Appeal — Action for damages — Restrictive measures against Iran — Compensation for the damage allegedly suffered by the appellant following the inclusion of its name in the list of persons and entities subject to the freezing of funds and economic resources — Concept of 'sufficiently serious breach of EU law' — Obligation to state reasons — Effective judicial protection)

1. The appellant, HTTS Hanseatic Trade Trust & Shipping GmbH ('HTTS') requests the Court to set aside the judgment of the General Court of the European Union of 13 December 2017, *HTTS* v *Council*,[2] by which the General Court dismissed its action seeking to establish non-contractual liability of the European Union, HTTS claiming to have suffered damage resulting from wrongful action on the part of the Council of the European Union following its listing, 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,[3] in Annex V to Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran,[4] and, secondly, by Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007,[5] in Annex VIII to Regulation No 961/2010 (collectively, 'the measures at issue').

I. Background to the dispute

2. It is clear from paragraph 1 et seq. of the judgment under appeal that HTTS is a company incorporated under German law, formed in March 2009 and headed by Mr Bateni, which carries on the activities of shipping agents and technical managers of vessels. This case was brought in the context of 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. More specifically, it is one of a number of cases relating to measures taken against a shipping company, Islamic Republic of Iran Shipping Lines ('IRISL') and natural or legal persons alleged to be connected with that company, which included in particular, according to the Council, HTTS and two other shipping companies, Hafize Darya Shipping Lines ('HDSL') and Safiran Pyam Darya Shipping Lines ('SAPID').

1 Original language: French.
2 T-692/15, 'the judgment under appeal', EU:T:2017:890.
3 OJ 2010 L 195, p. 25.
4 OJ 2007 L 103, p. 1.
5 OJ 2010 L 281, p. 1.

3. HTTS was initially listed on 26 July 2010, following the entry into force of Implementing Regulation No 668/2010, on the ground that it 'act[ed] on behalf of HDSL in Europe'. No action for annulment was brought against that listing. The listing of HTTS by Regulation No 961/2010 on the ground that it was 'controlled and/or acting on behalf of IRISL' was, however, challenged by HTTS and annulled by the General Court. By its judgment of 7 December 2011, *HTTS* v *Council*,[6] the General Court annulled Regulation No 961/2010 in so far as it concerned the appellant, with effect from 7 February 2012, so as to give the Council the opportunity, in the meantime, to provide supplementary reasons for its relisting.

4. Following that judgment, 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*[7] and of 18 September 2015, *HTTS and Bateni* v *Council*.[8]

5. In its judgment of 16 September 2013, *Islamic Republic of Iran Shipping Lines and Others* v *Council*,[9] 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.

6. By letter of 23 July 2015, the appellant 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. In the request for compensation, the appellant 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 Implementing Regulation No 668/2010 and Regulation No 961/2010, but also by reason of subsequent listings and relistings. By letter of 16 October 2015, the Council rejected that request.

II. The procedure before the General Court and the judgment under appeal

7. By application lodged at the Registry of the General Court on 25 November 2015, HTTS brought an action pursuant to Article 268 TFEU seeking compensation for the damage which it claimed to have suffered following its inclusion in Annex V to Regulation No 423/2007 as amended by Implementing Regulation No 668/2010 and in Annex VIII to Regulation No 961/2010.

8. The General Court ruled on the substance, without adopting a position on the plea, raised by the Council in the rejoinder, that the action was inadmissible by reason of the expiry of the limitation period prescribed by Article 46 of the Statute of the Court of Justice.[10]

9. With regard to the substance, the General Court preceded its analysis with preliminary observations relating to the factors established by the case-law as being relevant in deciding the issue of illegality in the context of an action for damages. It then rejected in turn both of the pleas put forward by HTTS in order to demonstrate the existence of a sufficiently serious breach of EU law, namely the plea alleging that the substantive listing conditions were not met and the plea alleging infringement of the obligation to state reasons. Rejecting both of those pleas, the General Court concluded that a sufficiently serious breach of EU law did not exist and therefore dismissed the action without examining whether the other requirements for liability to arise on the part of the European Union were met.

6 T-562/10, EU:T:2011:716.

7 T-128/12 and T-182/12, not published, EU:T:2013:312.

8 T-45/14, not published, EU:T:2015:650.

9 T-489/10, EU:T:2013:453.

10 See paragraphs 21 to 26 of the judgment under appeal. See also paragraph 92 of the judgment.

III. Procedure before the Court and forms of order sought

10. On 13 February 2018, HTTS brought an appeal against the judgment under appeal. As regards the form of order sought, it 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 and default interest at the rate set by the European Central Bank 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 of the proceedings.

11. In its response, 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 further alternative, dismiss the action; and order HTTS to pay the costs of the entire proceedings.

12. The European Commission, which intervened in support of the Council in the proceedings before the General Court, submits that the appeal should be dismissed in its entirety; in the alternative, the action should be dismissed; and the appellant should be ordered to pay the costs of the proceedings.

13. HTTS, the Council and the Commission presented oral argument at the hearing before the Court on 26 November 2018.

IV. Legal assessment

14. The appellant puts forward four grounds in support of its appeal. As requested by the Court, this Opinion will focus on the first ground of appeal.

A. The first ground of appeal

1. Summary of the arguments of the parties

15. HTTS argues, in essence, that, in paragraph 49 et seq. of the judgment under appeal, the General Court erred in law by taking into account, when assessing whether there was a sufficiently serious breach of EU law, information and matters that were not available to the Council at the time of its conduct in dispute and were invoked subsequently, by the Council, several years after that conduct. HTTS submits that, in order to assess whether that breach exists, the General Court cannot place itself at a date subsequent to that of the adoption of the measures at issue. According to HTTS, subsequent amendments or new information or evidence which did not actually lead to the adoption of the measures at issue cannot justify the Council's conduct retrospectively. HTTS also submits that the General Court was unable to infer from the rule fixing the time limit for bringing an action for damages that the conduct of the institution had to be analysed in the light of any events which occurred during the period between that conduct and the bringing of the action. It adds that the specific nature of the common foreign and security policy (CFSP) cannot lead to an exclusion of any liability on the part of the Council in the event of a serious and manifest breach of EU law since the rule of law must also prevail when restrictive measures are adopted. The General Court also could not base its finding that there was no sufficiently serious breach of EU law on the fact that the annulment of Regulation No 961/2010, ordered by the General Court, did not have immediate effect, particularly since the measures adopted by the Council following that annulment were also found to be unlawful. It follows from the judgment in *Safa Nicu Sepahan* v *Council*[11] that the infringement, by the Council, of its obligation to provide information concerning the listing decision or evidence substantiating the reasons for the adoption of restrictive measures constitutes, in itself, a sufficiently

11 Judgment of 30 May 2017 (C-45/15 P, EU:C:2017:402).

serious breach of a rule of law which it cannot rectify several years later. HTTS submits that the General Court should also have had regard to the Council's statements in Cases T-128/12 and T-182/12,[12] which show that, at the beginning of 2012, it did not have the information required for the listing. The General Court therefore could not take into consideration the reasons and evidence which the Council put forward by way of defence in the context of the action for damages brought against it.

16. In essence, the Council submits, for its part, that the General Court was entitled to hold that the Council could rely on matters which postdate the conduct complained of and predate the bringing of the action. It is not a matter of enabling the Council subsequently to exonerate itself from potential liability, but of enabling it to challenge the classification of the unlawful act committed as a sufficiently serious breach which may create entitlement to compensation. It does not follow from the General Court's analysis that liability on the part of the EU institutions may not be established when they are acting in the field of the CFSP. Not every unlawfulness found by the General Court in an action for annulment is sufficient to constitute a sufficiently serious breach of EU law in an action for damages and, when it established whether there was such a breach, the General Court was able to take into account specific circumstances relating to the fact that those measures were taken in order to implement CFSP decisions. Similarly, the General Court did not err in law in holding that, although it found that the restrictive measures concerning the appellant in the context of Case T-562/10[13] were unlawful on the ground of infringement of the obligation to state reasons, the possibility remained that those measures could be justified in the present case, and in deciding to defer the temporal effects of the annulment in order to enable the Council, if appropriate, to adopt new, lawful restrictive measures against HTTS. With regard to the failure to take account in the judgment under appeal of the case-law in *Safa Nicu Sepahan* v *Council*, the two instances are not comparable: that case-law concerns the lack of substantive evidence whereas, in the present case, the exercise and scope of the Council's discretion are under discussion. In any event, it is clear from the judgment in *Safa Nicu Sepahan* v *Council*[14] that the rule of law which must have been seriously breached offers protection only where the substantive conditions for its application are not satisfied. Since there were sufficient indicia to establish that those substantive conditions were satisfied, the principle of the protection of individual rights does not apply. Compliance with substantive criteria therefore may well be achieved only after the adoption of the legal act concerned. The Council also notes that the detailed rules for non-contractual liability on the part of the European Union to come into operation result from balancing the protection of the interests of the injured party and the need to enable the proper functioning of the institutions. It is unjustified to offer compensation to a person in respect of whom the facts that came to light after the adoption of acts — admittedly deemed to be unlawful — have confirmed that that person committed the conduct complained of prior to those acts being adopted. The facts demonstrate links between HTTS and HDSL, SAPID and IRISL. In those circumstances, it cannot be concluded that the Council committed a sufficiently serious breach of EU law solely on the ground that it did not yet have sufficient evidence. The Council therefore contends that the first ground of appeal should be rejected.

17. The Commission concurs, in essence, with the Council's line of argument.

12 Judgment of 12 June 2013, *HTTS* v *Council* (T-128/12 and T-182/12, not published, EU:T:2013:312).

13 Judgment of 7 December 2011, *HTTS* v *Council* (T-562/10, EU:T:2011:716).

14 Judgment of 30 May 2017 (C-45/15 P, EU:C:2017:402).

2. Analysis

18. The option available to individuals to claim, before the EU courts, that the European Union has incurred non-contractual liability is based on the notion that the European Union is based on the rule of law, and is the final step in protecting individuals from actions on the part of the EU institutions where those actions have caused damage.[15] A Union based on the fully complete rule of law requires that, where the Council acts within the context of the CFSP and then adopts restrictive measures, it is not immune from being held liable.

19. In its judgment in *Safa Nicu Sepahan* v *Council*,[16] the Court recalled the conditions governing establishment of the European Union's non-contractual liability. The first of those conditions — and the only one debated in the context of the present appeal — is the existence of a sufficiently serious breach of a rule of law that is intended to confer rights on individuals.[17] That test 'is satisfied where a breach is established which 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 degree of clarity and precision of the rule breached and the measure of discretion left by that rule to the EU authorities'.[18] A breach of EU law will, 'in any event, clearly be sufficiently serious if it has persisted despite a judgment finding the breach in question to be established, or despite a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted a breach'.[19]

20. It follows from that requirement of a sufficiently serious breach that any form of unlawful conduct of an institution does not necessarily give rise to a right to compensation. As the Council notes, it follows from the Court's traditional case-law, as formulated, that a balance is to be struck between the interests of individuals to be protected against serious unlawful conduct of institutions and the necessary leeway which must be accorded to the institutions so as not to paralyse action by them.

21. The latter requirement applies particularly in the field of the CFSP in general and restrictive measures in particular, a field in which the institutions' actions are generally characterised by the need to act swiftly on the basis of partial information which is often not directly available to the Council. The difficulties encountered by the Council in terms of the availability of information and evidence inevitably make the risk assessment that it must undertake complex and difficult. Potential liability of the European Union on account of the Council's conduct when adopting restrictive measures therefore should not undermine the participation of the European Union in maintaining the global order.

22. However, that risk of being undermined is excluded. First, the three conditions[20] which must each be satisfied for a right to compensation to be recognised are particularly onerous. Secondly, the Court has already recognised the possibility of taking into account the complexity of the situations to be regulated for the purposes of assessing whether the alleged breach of EU law was sufficiently serious.[21]

15 Judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 35).

16 Judgment of 30 May 2017 (C-45/15 P, EU:C:2017:402).

17 Judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 29).

18 Judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 30 and the case-law cited). Emphasis added.

19 Judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 31 and the case-law cited). Emphasis added.

20 As a reminder, the existence of a sufficiently serious breach of a rule of EU law conferring rights on individuals, the existence of damage and a direct causal link between that breach and the damage: see paragraph 29 of the judgment under appeal. See also judgment of 4 July 2000, *Bergaderm and Goupil* v *Commission* (C-352/98 P, EU:C:2000:361, paragraphs 41 and 42).

21 See, inter alia, judgments of 4 July 2000, *Bergaderm and Goupil* v *Commission* (C-352/98 P, EU:C:2000:361, paragraph 40); of 19 April 2007, *Holcim (Deutschland)* v *Commission* (C-282/05 P, EU:C:2007:226, paragraph 47); and of 16 July 2009, *Commission* v *Schneider Electric* (C-440/07 P, EU:C:2009:459, paragraph 160).

23. Moreover, it is clear from the judgment in *Safa Nicu Sepahan* v *Council*[22] that the Court did apply the traditional conditions relating to the establishment of non-contractual liability on the part of the European Union in respect of restrictive measures adopted in the context of combating nuclear proliferation in Iran and did not increase its requirements in the light of the policy area addressed by the institution concerned.

24. It must therefore be stated from the outset that it is evident from the judgment under appeal that, when assessing whether there was a sufficiently serious breach of EU law, the General Court examined whether the alleged infringements by the Council were not only manifest and grave, as laid down in the settled case-law, but were also 'flagrant and inexcusable', referring to a rule derived from General Court case-law which, to my knowledge, has never been confirmed by the Court of Justice.[23] The application of an enhanced test in the case of restrictive measures has no basis in the recent case-law of the Court of Justice, as stated above. Moreover, although, as the General Court recalls, 'the wider objective of maintaining peace and international security … is such as to justify negative consequences for economic operators, even significant negative consequences, arising from decisions implementing acts adopted by the Union with a view to achieving that fundamental objective',[24] those consequences are justified only where they are the result of a lawful EU act.[25] Therefore, I doubt that any lessons can be learnt from that finding where a decision has to be made as to whether or not there was a sufficiently serious breach of EU law.

25. Whilst the traditional case-law requires an assessment as to whether the conduct complained of constitutes 'manifest and grave disregard', the General Court thus examined whether there was a flagrant and inexcusable infringement. The taking into consideration of information that was not available to the Council at the time when the measures at issue were adopted demonstrates the consequences of the paradigm shift hidden in that purely semantic shift since it appears to indeed fall under review as to whether the conduct of the institution concerned can be *excused*. The symptom of the error of law which, as I shall demonstrate throughout this Opinion, will skew and therefore vitiate the General Court's analysis is therefore in the meaning given by the General Court to the concept of a 'sufficiently serious breach'.

26. Moreover, the legal basis for the Council's ability to rely on evidence which postdates the measure at issue — and thus to excuse, a posteriori, the conduct complained of — cannot, as the General Court maintains in paragraph 49 of the judgment under appeal, stem from the fact that, 'unlike an action for annulment, an action based on non-contractual liability may be brought up to five years after the occurrence of the event giving rise to the damage'. In stating that 'the institution in respect of which non-contractual liability is said to have arisen is, in principle, entitled to rely, by way of defence, on all relevant facts and matters occurring before the action for damages was, within that five-year period, brought against it, just as the applicant is entitled to rely on evidence postdating the occurrence of damage in order to prove the scope and extent of such damage',[26] the General Court erred in law and clearly confused the two different time frames of the two just as separate conditions for the arising of non-contractual liability of the European Union. In order to determine whether there was a sufficiently serious breach of EU law, the court must assess the conduct of the institution at the time when the measure at issue was adopted — in the present case, the individual decisions which made HTTS subject to restrictive measures in 2010. The Court of Justice did not rule otherwise in *Safa Nicu Sepahan* v *Council*[27] in holding that 'the obligation on the Council to provide, in the event of a challenge, information or evidence substantiating the reasons for the adoption of restrictive measures … was already apparent, *at the time when the provisions at issue were adopted*, from

22 Judgment of 30 May 2017 (C-45/15 P, EU:C:2017:402).

23 See paragraph 31 of the judgment under appeal. See also paragraph 46 of that judgment.

24 Paragraph 45 of the judgment under appeal.

25 See judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 39).

26 Paragraph 49 of the judgment under appeal.

27 Judgment of 30 May 2017 (C-45/15 P, EU:C:2017:402).

well-established case-law'.[28] The sufficiently serious breach must be understood as a concept fixed at a particular time: the time of the conduct complained of. Furthermore, still in the context of Case C-45/15 P, the Council seemed to share that static view of the sufficiently serious breach since it submitted that 'the case-law on the basis of which it [was] for the Council, in the event of a challenge, to provide information or evidence substantiating the reasons for the adoption of restrictive measures … was not clearly settled *at the time when* the first of the provisions at issue *was adopted*'.[29] By contrast, the damage, which necessarily postdates[30] the event giving rise to it, may evolve over time (in principle it will worsen) and is the dynamic component of the three conditions governing the European Union's non-contractual liability. It is therefore only logical that the party which considers that it has suffered damage on account of action on the part of an institution must be able to rely on matters which postdate the event giving rise to it — the sufficiently serious breach — in order to attest to the existence of such damage.

27. As I have already stated, I am fully inclined to accept that the action of the Council concerning restrictive measures is subject to particular constraints and that those constraints should be given due regard when assessing whether the European Union should incur non-contractual liability. However, there is nothing in the documents before the Court to indicate that, in the specific case of HTTS's listing by the measures at issue, the Council had faced such constraints and, in any event, it is for the Council to explain the complexity of the situation that it had to face *at the time when the restrictive measures were adopted* in order for the EU Court to be able, possibly, to take this into account in determining whether the conduct complained of constitutes a sufficiently serious breach of EU law.[31]

28. Therefore, the general conclusion reached by the General Court, in the words of paragraph 51 of the judgment under appeal, that 'to render [matters put forward] by the institution concerned … in the context of an action for damages [nugatory], where that institution … has proceeded … to adopt the freezing of funds measure in question, would be to create a serious hindrance to the effective exercise of the functions which the [T]reaties assign, in matters of the CFSP, to the Union institutions, by providing for the necessary restrictive measures to be adopted in aid of the implementation of the CFSP' seems to me, at the very least, to be scaremongering and cannot, in any event, exempt the Council from invoking such a risk in detail.

29. It follows from the foregoing that, by regarding only flagrant and inexcusable infringements as a sufficiently serious breach and by examining the conduct complained of in the light of information and evidence put forward after the measures at issue were adopted, the General Court distorted the review which it should have carried out and vitiated its reasoning by an error of law. Therefore, in those circumstances, the first ground of appeal must be upheld.

30. I would like to add some further thoughts.

31. I wonder whether, in allowing the Council to rely on such information and evidence subsequent to the conduct complained of, the General Court should not have also, without being accused of double standards, taken into account the events that affected HTTS after 2010, as HTTS submits. In that regard, I note that Regulation No 961/2010 was annulled, in so far as it concerned the appellant, by the General Court in the judgment of 7 December 2011, *HTTS* v *Council*, on the ground of infringement of the obligation to state reasons.[32] Nonetheless, as the General Court did not rule out that the listing could be justified as regards the substance, it decided to maintain the effects of the

28 Judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 40). Emphasis added.

29 Judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 34). Emphasis added.

30 The damage may also be concomitant with the event giving rise to it or may immediately follow it, but, by definition, it may never predate it.

31 See, by analogy, judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 41).

32 T-562/10, EU:T:2011:716, paragraph 39.

unlawful regulation for two months.[33] On 23 March 2012, Regulation (EU) No 267/2012[34] repealed Regulation No 961/2010, in which HTTS had been relisted by Council Implementing Regulation (EU) No 54/2012,[35] but maintained HTTS's listing for the same reasons as Implementing Regulation No 54/2012. In its judgment of 12 June 2013, *HTTS* v *Council*,[36] the General Court annulled that retention with effect from 22 August 2013, finding fault with the absence of specific material available to the Council and the manifest error of assessment committed by that institution. On 15 November 2013, the Council relisted HTTS by adopting Implementing Regulation (EU) No 1154/2013.[37] The General Court annulled the implementing regulation in so far as it concerned the appellant as the listing was not well founded. When ruling on the Council's request to maintain the temporal effects of the annulled measure, the General Court refused that request inter alia on account of the fact that 'the way in which the Council handled the applicants' files at an administrative level [was] characterised by a lack of care.[38] The General Court highlighted the fact that this was the third consecutive judgment annulling a measure concerning HTTS.[39] That last judgment is dated 18 September 2015 and the action for damages brought by HTTS before the General Court is dated 25 November 2015, so that the three annulment judgments of the General Court and the final finding that the Council demonstrated a lack of care could just as well have constituted factors confirming that the Council had committed a manifest and serious breach since the first listing by the measures at issue, if the General Court's logic in the judgment under appeal were also to be applied to the appellant's advantage.

32. In those circumstances, I must confess that I find it difficult to reconcile the General Court's reasoning in paragraph 46 et seq. of the judgment under appeal — by which the General Court allows the Council to rely on information and items of evidence that it did not have in its possession on the date of the conduct complained of in order to counter the complaint of a sufficiently serious breach of EU law — with Article 73 of that judgment — by which the General Court held that the Council's conduct after 23 January 2012 was irrelevant when establishing whether the Council had infringed to a sufficiently serious degree the appellant's right to effective judicial protection on account of the fact that the proceedings did not include a claim for compensation for the damage allegedly suffered by HTTS by reason of having been relisted following the judgments of 7 December 2011, *HTTS* v *Council*,[40] and of 12 June 2013, *HTTS* v *Council*,[41] but only for compensation for the damage it suffered between 26 July 2010 and 23 January 2012.

33. Finally, I agree with the General Court's statement that the action for annulment and the action for damages are two autonomous forms of action and the fact that an act may have been annulled does not constitute sufficient proof of a sufficiently serious breach of EU law.[42] In the specific case now before the Court, I wonder, however, whether the autonomy may be extended to the point of going back a posteriori on the finding that led to the annulment. In other words, even though, in Case T-562/10, the General Court annulled one of the two measures at issue on the ground of infringement of the obligation to state reasons, the Council appears to be entitled, in the context of the action for damages, to remedy a posteriori the initial unlawfulness in a manner which, ultimately, neutralises the effects of the annulment for the purposes of compensation. It is no longer simply a

33 Judgment of 7 December 2011, *HTTS* v *Council* (T-562/10, EU:T:2011:716, paragraphs 41 to 43).

34 Council Regulation of 23 March 2012 on restrictive measures against Iran and repealing Regulation No 961/2010 (OJ 2012 L 88, p. 1).

35 Council Implementing Regulation of 23 January 2012 implementing Regulation No 961/2010 (OJ 2012 L 19, p. 1).

36 T-128/12 and T-182/12, not published, EU:T:2013:312.

37 Council Implementing Regulation of 15 November 2013 implementing Regulation No 267/2012 (OJ 2013 L 306, p. 3). See judgment of 18 September 2015, *HTTS and Bateni* v *Council* (T-45/14, not published, EU:T:2015:650, paragraph 20 et seq.).

38 Judgment of 18 September 2015, *HTTS and Bateni* v *Council* (T-45/14, not published, EU:T:2015:650, paragraph 66).

39 Judgment of 18 September 2015, *HTTS and Bateni* v *Council* (T-45/14, not published, EU:T:2015:650, paragraph 66). On that date, the listings of IRISL, HDSL and SAPID were also annulled: see judgment of 18 September 2015, *HTTS and Bateni* v *Council* (T-45/14, not published, EU:T:2015:650, paragraph 18).

40 T-562/10, EU:T:2011:716.

41 T-128/12 and T-182/12, not published, EU:T:2013:312.

42 See paragraph 48 of the judgment under appeal.

matter of verifying that the unlawfulness criticised in the context of the action for annulment constitutes a sufficiently serious breach of EU law, but of going back on the very finding of that unlawfulness, which may therefore 'disappear' in the context of the action for damages. Once again, in the absence of serious difficulties invoked by the Council and of the risk of calling into question the effectiveness of the CFSP,[43] I wonder whether, in matters concerning restrictive measures, sending the Council the signal that, irrespective of the circumstances of its unlawful conduct, it will always be able to justify its actions *ex post* would tilt the balance too much towards the institution to the detriment of the rights of individuals[44] and would be such as to encourage a policy of preventive listings with no genuine or serious reasoning, since only conduct which is not just *serious* but *very serious* could lead to both annulment and liability on the part of the European Union.

34. I shall now turn to the analysis of the other grounds of appeal.

B. The other grounds of appeal

35. As stated,[45] the analysis of these grounds will be briefer, particularly since their examination constitutes an extension of the analysis of the first ground of appeal and the error of law identified therein.

1. The second ground of appeal, alleging an error of law in that the General Court considered that the Council's assessment that HTTS had to be regarded as being owned or controlled by IRISL did not constitute, in any event, a serious and inexcusable error or a manifest error of assessment

(a) Summary of the arguments of the parties

36. In essence, the appellant's criticisms are directed against paragraphs 56 to 63 of the judgment under appeal. The General Court is said to have erred in law in finding, in paragraph 56, that the question whether the appellant was a company 'owned or controlled by another entity', as a result of which it was subject to restrictive measures, had to be assessed without any consideration of ownership links. HTTS then criticises the General Court for having considered that pieces of information provided by the Council a posteriori had proven to be indicia sufficient to conclude that is was plausible that the appellant was 'controlled and/or acting on behalf of IRISL'. HTTS also complains that the General Court did not take account of subsequent developments in its case-law, in particular those concerning listings of IRISL, even though, at the same time, it relied on pieces of information provided by the Council after the measures at issue were adopted in order to conclude that a sufficiently serious breach of EU law did not exist. Moreover, the measures at issue do not authorise the listing of an entity which has merely acted on behalf of IRISL.

37. For its part, the Council contends that the second ground of appeal should be rejected. HTTS has misread paragraph 56 of the judgment under appeal as the General Court did not hold that ownership links do not play a role when assessing whether the substantive criteria for listing have been met. As regards the fact that the General Court took into account pieces of information which were submitted after the measures at issue were adopted and which led it to conclude that HTTS could plausibly be

43 The General Court itself no longer appeared to believe that, in the case of HTTS, such difficulties or risks existed: see judgment of 18 September 2015, *HTTS and Bateni* v *Council* (T-45/14, not published, EU:T:2015:650, paragraph 63 et seq.).

44 For the sake of completeness, I note that, when reviewing the legality of a Commission decision which is quasi-criminal in nature and has been adopted in a field in which the EU Courts carry out a full and unrestricted review, those Courts may, in the interests of the observance of the rights of the defence, take account of factors which were not known to the Commission when it adopted its decision. However, that option appears to be very restricted and is only for the benefit of individuals seeking to defend themselves against the institution's action and not the other way round. For an illustration, see judgment of 21 January 2016, *Galp Energía España and Others* v *Commission* (C-603/13 P, EU:C:2016:38, paragraph 72 and the case-law cited).

45 See point 14 of this Opinion.

regarded as being controlled and/or acting on behalf of IRISL, the Council refers to the position adopted by it in the context of the first ground of appeal. Moreover, it is clear from the measures at issue that the listing criterion involved an alternative and covered both an entity being controlled by as well as an entity acting on behalf of IRISL. The Council agrees with the General Court's analysis regarding the various pieces of information and submits that the General Court did not err in law in concluding that a sufficiently serious breach of EU law did not exist on account of the fact that it was plausible, in the light of that information, that HTTS satisfied the conditions for listing laid down in the measures at issue.

38. The Commission essentially shares the General Court's view and considers that the argument alleging an incorrect assessment of the facts assessed by the General Court in order to conclude that the appellant could be regarded as satisfying the listing criterion set out in the measures at issue is inadmissible since HTTS does not allege that the facts were distorted and review by the Court on appeal is traditionally limited to points of law.

(b) Analysis

39. First of all, the criticism of paragraph 56 of the judgment under appeal must be rejected since, as the Council submits, the appellant has misread that paragraph. 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 it is in a situation in which it is able to influence the commercial decisions of the company concerned, even in the absence of any legal tie or link in terms of ownership. That does not mean that no consideration is given to a possible link in terms of ownership, but simply that the absence of any ownership link is not sufficient to conclude that the criterion is not met, particularly since that criterion was clearly worded as an alternative and applied either to an ownership situation or a control situation. It also follows from those considerations that the complaint alleging that the measures at issue do not authorise the listing of a company which merely acts on behalf of IRISL must be rejected as unfounded in the light of the very wording of the listing criterion in the measures at issue. The General Court's interpretation of the content of the criteria contains no errors of law.

40. As to the remainder, it is clear from paragraph 58 et seq. of the judgment under appeal that the General Court applied, to the specific case before it and in the circumstances which it set out in paragraphs 42 to 53 of that judgment, the test to determine whether there was a sufficiently serious breach of EU law. When determining whether the breach of the substantive listing conditions that was complained of could constitute such a breach, the General Court reached the conclusion that 'the information and items of evidence advanced by the Council constitute[d] relevant [indicia] which [were] sufficiently precise and coherent and which justif[ied] the conclusion, in the context of this action for damages, that it [was] at least plausible that HTTS was "controlled and/or acting on behalf of IRISL"'.[46] Therefore, although the Council acknowledged that it did not have any information or evidence at the time of the listing in 2010 and also did not, at that time, put forward the actual and specific reasons why HTTS had been listed,[47] the fact that it subsequently had such information or evidence rendered the 2010 listings *possibly* justified in the eyes of the General Court which, therefore, ruled out the existence of a sufficiently serious breach.[48]

46 See paragraph 58 of the judgment under appeal.

47 I note that the reasons stated in the measures at issue to justify the listing are merely a reiteration of the listing criterion itself.

48 I note that, in the context of review of whether the grounds of a restrictive measure are lawful, it is settled case-law that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that measure, are substantiated: see judgment of 19 December 2018, *Azarov* v *Council* (C-530/17 P, EU:C:2018:1031, paragraph 22 and the case-law cited).

41. That reasoning is affected by the same error of law as that identified in the context of the first ground of appeal since it is the natural continuation of that error, the General Court putting into practice what it had first tried to justify from a more theoretical point of view. Therefore, I do not consider, as the Council and the Commission contend, that this is simply an attempt by HTTS to criticise the assessment of the facts which, except in the situation where facts have been distorted, which HTTS has not invoked, however, is not subject to review by the Court in appeal proceedings. For the same reasons as those set out in the analysis devoted to the first ground of appeal, it must be concluded that the General Court did not consider the correct point in time, that is to say, when the conduct complained of took place. In other words, and to continue the medical metaphor, although I have correctly identified the symptom in the error of law in paragraph 42 et seq. of the judgment under appeal, it is clear that the disease breaks out in paragraph 58 et seq. and therefore, ultimately, all of the analysis carried out with regard to identifying a sufficiently serious breach, here the substantive listing conditions because of insufficient evidence, is infected.

42. Like the appellant, I am also confused by the General Court's finding in paragraph 63 of the judgment under appeal, according to which '*when the applicant was included* in the lists at issue …, the listings of IRISL, HDSL and SAPID had not yet been annulled'.[49] In addressing that complaint, the General Court refused to take into consideration matters that the appellant relied on which took place after the measures at issue were adopted. Therefore, it clearly did not consider the same point in time as was taken into account when it assessed the Council's approach and the matters on which it relied. Again, it applied one rule to the Council and another to the appellant.

43. Accordingly, the General Court's reasoning with regard to the complaint alleging a sufficiently serious breach of the substantive listing conditions, on account of the fact that the Council had not established by means of adequate evidence that HTTS was controlled by IRISL, is vitiated by an error of law. The second ground of appeal must, consequently, be upheld.

2. The third and fourth grounds of appeal, taken together

(a) Summary of the arguments of the parties

44. In the third and fourth grounds of appeal, which must be considered together, HTTS submits in essence, first, that the General Court erred in law in not holding that the illegality that it had found in respect of Regulation No 961/2010 had affected the legality of Implementing Regulation No 668/2010 because the applicant had not brought an action for annulment against the latter regulation. The presumption thus established that Implementing Regulation No 668/2010 is lawful should therefore be rebutted and the infringement of the obligation to state reasons vitiating Implementing Regulation No 668/2010 cannot be justified by subsequent reasons, as the General Court did in paragraphs 89 and 90 of the judgment under appeal. Secondly, HTTS submits that paragraph 88 of the judgment under appeal is affected by an error of law as the inadequate statement of reasons must be regarded as capable of conferring entitlement to compensation. HTTS recalls that the obligation to state reasons is an essential requirement and notes the link that it maintains with effective judicial protection, as is clear from the judgment in *Safa Nicu Sepahan* v *Council*.[50] The General Court could not merely state that an inadequate statement of reasons is not, in general, capable of giving rise to liability on the part of the European Union, but should have examined, in the specific case before it, whether the infringement of the obligation to state reasons had led to an infringement of the applicant's right to effective judicial protection which is capable of conferring entitlement to compensation.

49 Emphasis added.

50 Judgment of 25 November 2014 (T-384/11, EU:T:2014:986).

45. The Council contends, in essence, that both grounds of appeal should be rejected. First, the General Court correctly held that the scope of its judgment of 7 December 2011, *HTTS* v *Council*,[51] was limited to Regulation No 961/2010 only. The General Court also correctly held that it was for HTTS, in the action before it, to put forward an independent line of argument to demonstrate that an infringement of the obligation to state reasons also affected Implementing Regulation No 668/2010, which it failed to do. Secondly, it submits that the exemption from compensation where there is an inadequate statement of reasons is justified by the limited compensatory function in order to maintain the ability of the EU institutions to act. The General Court merely recalled settled case-law. HTTS has not demonstrated the link between the infringement of the obligation to state reasons and any resulting infringement of its right to effective judicial protection, or how it has been prevented from exercising its rights of defence. The passage of the judgment in *Safa Nicu Sepahan* v *Council*[52] on which it relies indeed does not concern that issue, rather it concerns the review as to whether the restrictive measures at issue in that case were well founded. In any event, it is sufficient that the applicant is able to ascertain the reasons in the context of the action for damages.

46. The Commission essentially shares the Council's view.

(b) Analysis

47. The third and fourth grounds of appeal are directed against the part of the judgment under appeal which examines whether an infringement of the obligation to state the reasons for the listings at issue constituted a sufficiently serious breach, HTTS relying in essence on the judgment by which the General Court annulled Regulation No 961/2010 in so far as it concerned the applicant on the ground that there was no adequate statement of reasons. In addition, the arguments developed in the context of that examination indicate that the applicant's arguments also concerned the subject of effective judicial protection.[53]

48. As regards the complaint concerning the presumption that Implementing Regulation No 668/2010 is lawful on account of the fact that HTTS did not bring an action for annulment against it, the General Court was in fact right to hold that no conclusion as to the legality of Implementing Regulation No 668/2010 could be drawn from the judgment by which it annulled Regulation No 961/2010 only and that it was for HTTS to demonstrate why, in its view, its listing in Implementing Regulation No 668/2010 could be regarded as a sufficiently serious breach of the Council's obligation to state reasons. That complaint must therefore be rejected as unfounded.

49. Next, it should be noted that paragraph 89 of the judgment under appeal, in accordance with which 'in the present action for damages the *legality* of the restrictive measure in question must, in any event, be determined having regard not only to the reasons originally given, but also to those subsequently given by the Council, in Decision 2012/35/CFSP [[54]',[55] further demonstrates the error of law committed by the General Court as to the starting point for its analysis. The terminological precision which enables the sound understanding of concepts and a distinction to be made between actions leads me to point out that at issue, in that paragraph, is Regulation No 961/2010 and that the question as to whether it is lawful has been determined by final judgment of the General Court, which annulled it in so far as it concerned HTTS. However, paragraph 89 of the judgment under appeal clearly creates confusion and suggests that the unlawfulness found in the context of the action for annulment may be called into question in the context of the action for damages. I hope that I have demonstrated sufficiently that that cannot be the case. In any event, it is also clear that, when

51 T-562/10, EU:T:2011:716, paragraphs 68 and 69.

52 Judgment of 25 November 2014 (T-384/11, EU:T:2014:986, paragraphs 68 and 69).

53 See paragraphs 74 to 78 of the judgment under appeal.

54 Decision of 23 January 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2012 L 19, p. 22).

55 Judgment of 13 December 2017, *HTTS* v *Council* (T-692/15, EU:T:2017:890). Emphasis added.

assessing whether the infringement of the obligation to state reasons by the Council when the applicant was included in the list by Regulation No 961/2010 constituted a sufficiently serious breach, the General Court again, as HTTS has rightly stated, took into consideration matters which occurred after 2010,[56] thus vitiating its reasoning. Since that complaint is well founded, the third ground of appeal must be upheld.

50. As regards the systematic exclusion of liability on the part of the European Union where the reasons given for an act are inadequate, it is clear from the judgment under appeal that the General Court considered itself that the arguments put forward by HTTS in connection with the infringement of the obligation to state reasons could have been extended by invoking the principle of effective judicial protection.[57] Even if the case-law invoked in paragraph 88 of the judgment under appeal, in accordance with which 'the fact that the reasons given for an act are inadequate does not give rise to [non-contractual] liability on the part of the Union', applies in the same way in the case of restrictive measures,[58] in any event, the General Court does not seem to have stopped at that finding to reject the plea but extended its analysis, as can be seen by the use in paragraph 89 of the expression 'that being so', to verify, using a methodology which, in my view, is incorrect, whether the reasons provided in 2012 could have informed not only the appellant but also the General Court as to the reasons for HTTS's listing and the causes which gave rise to the damage allegedly suffered. In so doing, and even if that analysis was only minimal, the General Court did consider the possibility — *quod non* — that the infringement of the obligation to state reasons was such that it constituted a sufficiently serious breach of the effective judicial protection of HTTS. Consequently, the fourth ground of appeal must be rejected.

C. Conclusion of the analysis

51. As a result of the error of law which vitiates the General Court's reasoning and which has affected the whole of the analysis as to the existence of a sufficiently serious breach, I propose that the Court should uphold the first, second and third grounds of appeal. Moreover, I do not believe that the state of the proceedings permits final judgment to be given, for three reasons.

52. First, as I have just demonstrated, the General Court did not apply the appropriate test when determining whether there was a sufficiently serious breach of EU law. Without prejudice to the outcome of an analysis as to a sufficiently serious breach on the basis of the correct test, applying that test will require the assessment of factual material relating to the situation as it stood in 2010 which does not appear to me to be in the file submitted to the Court of Justice.

53. Secondly, even if applying that test leads to the conclusion that the first condition relating to the establishment of non-contractual liability on the part of the European Union is satisfied, it would remain to be determined whether the other two conditions are also satisfied. However, as I noted above,[59] since the General Court ended its analysis when it found that a sufficiently serious breach did not exist, it did not rule on the subsequent conditions. Moreover, the file submitted to the Court of Justice does not enable it to answer those questions itself.

56 See paragraph 90 of the judgment under appeal.

57 See paragraph 78 of the judgment under appeal.

58 The question may arise in view of their individual nature and the considerable impact that they are liable to have on the rights and freedoms of the persons and entities subject to them (see, inter alia, judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 40)). The question as to whether the case-law developed in relation to the obligation to state reasons for regulatory acts can be transposed immediately to restrictive measures, which is not directly raised in the context of the present appeal, does not, in my view, appear to have been addressed by the Court, the only available judgment being that of 11 July 2007, *Sison* v *Council* (T-47/03, not published, EU:T:2007:207, paragraph 238).

59 See point 9 of this Opinion.

54. Thirdly, even if on this occasion all of the conditions for non-contractual liability on the part of the European Union to be established were satisfied, the amount of compensation for the damage would still need to be determined and/or a decision would still need to be taken on the argument raised by the Council that the action for damages is time-barred, an argument which was not addressed by the General Court and, therefore, could not be debated between the parties in the appeal proceedings.

55. For all of those reasons, and without prejudging the conclusion that the General Court will reach following an analysis which does not contain any errors of law regarding the first of the conditions governing the establishment of non-contractual liability on the part of the European Union, I propose that the Court should refer the case back to the General Court in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice.

V. Costs

56. Since, according to my analysis, the case must be referred back to the General Court, the costs must be reserved, in accordance with Article 137 of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 184(1) of the Rules of Procedure.

VI. Conclusion

57. In the light of the foregoing, I propose that the Court should:

(1) set 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) refer the case back to the General Court of the European Union;

(3) order that the costs be reserved.