Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

21 March 2012*

(Common foreign and security policy — Restrictive measures against Iran with the aim of preventing nuclear proliferation — Freezing of funds — Actions for annulment — Obligation to state reasons — Rights of the defence — Right to effective judicial protection — Error of assessment — Burden and standard of proof)

In Joined Cases T-439/10 and T-440/10,

Fulmen, established in Teheran (Iran),

Fereydoun Mahmoudian, residing in Teheran,

represented by A. Kronshagen, lawyer,

applicants,

v

Council of the European Union, represented by M. Bishop and R. Liudvinaviciute-Cordeiro, acting as Agents,

defendant,

supported by

European Commission, represented by M. Konstantinidis and É. Cujo, acting as Agents,

intervener,

APPLICATION for annulment 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), 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), and Council Decision 2010/644/CFSP of 25 October 2010 amending Decision 2010/413 (OJ 2010 L 281, p. 81), and Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 (OJ 2010 L 281, p. 1), in so far as those measures concern the applicants, and, further, an application for recognition of the damage suffered by the applicants due to the adoption of the abovementioned measures,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and M. van der Woude, Judges,

* Language of the case: French.

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 23 November 2011,

gives the following

Judgment

Background to the dispute

1 The applicant in Case T-439/10, Fulmen, is an Iranian company, active in particular in the electrical equipment sector.

2 The applicant in Case T-440/10, Mr Fereydoun Mahmoudian, is Fulmen's majority shareholder and Chairman of its Board of Directors.

Restrictive measures adopted against the Islamic Republic of Iran

3 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').

4 The European Union adopted Council Common Position 2007/140/CFSP of 27 February 2007 concerning restrictive measures against Iran (OJ 2007 L 61, p. 49) and Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103, p. 1).

5 Article 5(1)(b) of Common Position 2007/140 provided for the freezing of all funds and economic resources which belong to certain categories of persons and entities. The list of those persons and entities was contained in Annex II to Common Position 2007/140.

6 As regards the powers of the European Community, Article 7(2) of Regulation No 423/2007 provided for the freezing of the funds of the persons, entities or bodies identified by the Council of the European Union as being engaged in nuclear proliferation in accordance with Article 5(1)(b) of Common Position 2007/140. The list of those persons, entities and bodies constituted Annex V to Regulation No 423/2007.

7 Common Position 2007/140 was repealed by Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran (OJ 2010 L 195, p. 39).

8 Article 20(1) of Decision 2010/413 provides for the freezing of the funds of several categories of entities. That provision concerns, in particular, 'persons and entities … that are engaged in, directly associated with, or providing support for [nuclear proliferation], or persons or entities acting on their behalf or at their direction, or entities owned or controlled by them, including through illicit means… as listed in Annex II'.

9 Article 19(1) of Decision 2010/413 provides, further, for restrictions on the admission to the territory of Member States of persons listed in Annex II to the decision.

10 Under Article 24(2) to (4) of Directive 2010/413:

'2. Where the Council decides to subject a person or entity to the measures referred to in Articles 19(1)(b) and 20(1)(b), it shall amend Annex II accordingly.

3. The Council shall communicate its decision to the person or entity referred to in paragraphs 1 and 2, including the grounds for listing, either directly, if the address is known, or through the publication of a notice, providing such person or entity an opportunity to present observations.

4. Where observations are submitted, or where substantial new evidence is presented, the Council shall review its decision and inform the person or entity accordingly.'

11 The list in Annex II to Decision 2010/413 was replaced by a new list, adopted in Council Decision 2010/644/CFSP of 25 October 2010 amending Decision 2010/413 (OJ 2010 L 281, p. 81).

12 Regulation No 423/2007 was repealed by Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran (OJ 2010 L 281, p. 1).

13 Under Article 16(2) of Regulation (EC) No 961/2010:

'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 … who, in accordance with Article 20(1)(b) of [Decision 2010/413], have been identified as:

(a) being engaged in, directly associated with, or providing support for [nuclear proliferation] 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;

…'.

14 Under Article 36(2) to (4) of Regulation No 961/2010:

'2. Where the Council decides to subject a natural or legal person, entity or body to the measures referred to in Article 16(2), it shall amend Annex VIII accordingly.

3. The Council shall communicate its decision, including the grounds for the listing, to the natural or legal person, entity or body referred to in paragraph 2, either directly, if the address is known, or through the publication of a notice, providing such natural or legal person, entity or body with an opportunity to present observations.

4. Where observations are submitted, or where substantial new evidence is presented, the Council shall review its decision and inform the natural or legal person, entity or body accordingly.'

Restrictive measures concerning the applicants

15 From the adoption of Decision 2010/413 on 26 July 2010, the applicants were named, by the Council, in the list of persons, entities and bodies in Part I of Annex II to that decision.

16 Consequently, the applicants' names were placed in the list of persons, entities and bodies in Part I of Annex V to Regulation No 423/2007 by Council Implementing Regulation (EU) No 668/2010 of 26 July 2010 implementing Article 7(2) of Regulation (EC) No 423/2007 (OJ 2010 L 195, p. 25, The effect of the adoption of Implementing Regulation No 668/2010 was the freezing of the applicants' funds and economic resources.

17 In Decision 2010/413 the Council adopted the following reasons in relation to Fulmen: 'Fulmen was involved in the installation of electrical equipment on the Qom/Fordoo [Iran] site before its existence had been revealed'. In Implementing Regulation No 668/2010, the following wording was used: 'Fulmen was involved in the installation of electrical equipment on the Qom/Fordoo site at a time when the existence of the site had not yet been revealed'.

18 As regards Mr Mahmoudian, the reasons stated in both Decision 2010/413 and in Implementing Regulation No 668/2010 were as follows: 'Director of Fulmen'.

19 The Council informed Fulmen by letter of 28 July 2010 of the listing of its name in Annex II to Decision 2010/413 and in Annex V to Regulation No 423/2007.

20 By respective letters of 26 August and 14 September 2010 Mr Mahmoudian and Fulmen asked the Council to reconsider their listing in Annex II to Decision 2010/413 and Annex V to Regulation No 423/2007. They also asked the Council to notify them of the evidence on the basis of which the restrictive measures imposed on them had been adopted.

21 The listing of the names of the applicants in Annex II to Decision 2010/413 was not affected by the adoption of Decision 2010/644.

22 Regulation No 423/2007 having been repealed by Regulation No 961/2010, Fulmen's name was placed by the Council in Part B, No 13 of Annex VIII to the latter regulation, whereas Mr Mahmoudian's name was placed in Part A, No 14 of the same annex. Consequently, the applicants' funds have since been frozen pursuant to Article 16(2) of Regulation No 961/2010.

23 As regards the listing of Fulmen, the reasons stated in Regulation No 961/2010 are the following: 'Fulmen was involved in the installation of electrical equipment on the Qom/Fordoo site before its existence had been revealed'. In relation to Mr Mahmoudian, the following reason was stated: 'Director of Fulmen'.

24 In letters of 28 October 2010 replying to the applicants' letters of 26 August and 14 September 2010, the Council stated that, after reconsideration, it rejected their request to have their names removed from the list of persons, entities and bodies in Annex II to Decision 2010/413 and Annex VIII to Regulation No 961/2010 (the 'contested lists'). The Council stated that, as the file did not contain any new factors which justified a change in its position, the applicants were to remain subject to the restrictive measures laid down in those acts. The Council further stated that its decision to maintain the names of the applicants in the contested lists was not based on any factors other than those referred to in the reasons stated for those lists.

Procedure and forms of order sought

25 By applications lodged at the Court Registry on 24 September 2010, the applicants brought the present action.

26 By documents lodged at the Court Registry on 17 January 2011, the European Commission sought leave to intervene in the present proceedings in support of the Council. By order of 8 March 2011 the President of the Fourth Chamber of the Court granted leave to intervene.

27 By order of the President of the Fourth Chamber of the Court of 15 November 2011, Cases T-439/10 and T-440/10 were joined for the purposes of the oral procedure and the judgment pursuant to Article 50 of the Rules of Procedure of the General Court.

28 The parties presented oral argument and replied to the oral questions of the Court at the hearing on 23 November 2011.

29 In their applications, the applicants claim that the Court should:

— annul Decision 2010/413 and Implementing Regulation No 668/2010 in so far as those measures affect them;

— order the Council to pay the costs.

30 In their replies, the applicants extended their heads of claim, to request that the Court should:

— annul Decision 2010/644 and Regulation No 961/2010 in so far as those measures affect them;

— recognise the damage suffered by them due to the adoption of the contested measures.

31 The Council and the Commission claim that the Court should:

— dismiss the applications;

— order the applicants to pay the costs.

Law

32 In their applications, the applicants have raised four pleas in law. The first plea claims an infringement of the obligation to state reasons, of their rights of defence and of their right to effective judicial protection. The second plea claims an error of law linked to the absence of a prior decision of a competent national authority. The third plea claims an error of assessment as regards the applicants' involvement in nuclear proliferation. The fourth plea claims financial and non-material damage suffered by the applicants due to the adoption of the contested measures.

33 At the hearing, the applicant withdrew the second plea in law, which was noted in the minutes of that hearing.

34 The Council and the Commission do not accept that the pleas in law raised by the applicants are well founded.

35 Before considering the pleas in law raised by the applicants, the admissibility of some of their claims, pleas and arguments must be examined.

Admissibility

Admissibility of the action for annulment of Decision 2010/644 and Regulation No 961/2010

36 As is clear from paragraphs 11 and 12 above, since the date when the applications were brought, the list in Annex II to Decision 2010/413 has been replaced by a new list, adopted in Decision 2010/644, and Regulation No 423/2007 has been repealed and replaced by Regulation No 961/2010. The applicants have asked to be allowed to adapt their initial claims so that their actions are directed to the annulment of those four measures (together, 'the contested measures').

37 It is to be borne in mind in this connection that, when a decision or a regulation of direct and individual concern to an individual is replaced, during the proceedings, by another measure with the same subject-matter, this is to be considered a new factor allowing the applicant to adapt its claims and pleas in law. It would be contrary to the principle of due administration of justice and to the requirements of procedural economy to oblige the applicant to make a fresh application. Moreover, it would be inequitable if the institution in question were able, in order to counter criticisms of a measure contained in an application brought before the European Union courts against that measure, to amend the contested measure or to substitute another for it and to rely in the proceedings on such an amendment or substitution in order to deprive the other party of the opportunity of extending his original pleadings to the later measure or of submitting supplementary pleadings directed against that measure (see, by analogy, Case T-256/07 *People's Mojahedin Organization of Iran* v *Council* [2008] ECR II-3019, paragraph 46 and case-law cited).

38 It is therefore appropriate in the present case, in accordance with that case-law, to allow the applicants' request and to hold that, on the date on which the oral procedure was closed, their actions also sought annulment of Decision 2010/644 and Regulation No 961/2010, in so far as those measures concerns them, and to allow the parties to reformulate their claims, pleas in law and arguments in the light of that new factor, which implies, for them, the right to submit supplementary claims, pleas in law and arguments (see, by analogy, *People's Mojahedin Organization of Iran* v *Council*, paragraph 37 above, paragraph 47).

Admissibility of the applicants' second head of claim and of the fourth plea in law

39 By their second head of claim, the applicants ask the Court to recognise the damage suffered by them due to the adoption of the contested measures.

40 At the hearing, the applicants explained that the purpose of their second head of claim was to obtain a declaratory judgment and that the fourth plea in law was submitted by way of support.

41 However, in proceedings before the courts of the European Union there is no remedy whereby the courts can adopt a position by means of a general declaration or statement of principle (Case T-33/01 *Infront WM* v *Commission* [2005] ECR II-5897, paragraph 171, and order of 3 September 2008 in Case T-477/07 *Cofra* v *Commission*, not published in the ECR, paragraph 21). Accordingly, the second head of claim and the fourth plea in law must be rejected, since the General Court manifestly lacks jurisdiction to hear them.

Admissibility, in Case T-439/10, of the argument that Fulmen was not active on the Qom/Fordoo site

42 In Case T-439/10 the Council and the Commission contend that Fulmen did not, before the stage of reply, specifically deny that it had been active on the Qom/Fordoo site. Consequently, Fulmen's argument on that point is said to constitute a new plea and is therefore inadmissible under Article 48(2) of the Rules of Procedure.

43 It must however be observed that, in paragraph 3 of its application, Fulmen claimed that it 'had never taken part in any way whatsoever … in activities linked to the nuclear or ballistic missile programme in Iran'. That wording necessarily implies that Fulmen did deny that it had been active on the Qom/Fordoo site, that being the only form of conduct of which it is accused by the Council as involvement in the activities concerned.

44 The same conclusion must be drawn in the light of paragraphs 30 and 31 of the application, where Fulmen denied that the reasons put forward by the Council to justify the imposition on it of restrictive measures are genuine and substantial. The claim that Fulmen was active on the Qom/Fordoo site is the sole reason relied on by the Council to support its inclusion in the contested lists.

45 In those circumstances, the Court must hold that Fulmen disputed the fact of its activity on the Qom/Fordoo site in the application, which means that its argument on that point does not constitute a new plea in law within the meaning of Article 48(2) of the Rules of Procedure.

46 The plea of inadmissibility raised by the Council and the Commission must therefore be rejected.

Substance

The first plea: infringement of the obligation to state reasons, of the applicants' rights of defence and of their right to effective judicial protection

47 The applicants claim that sufficient reasons are not stated in the contested measures so far as they are concerned, that their rights of defence were not respected in the procedure which led to the adoption of those measures and that, by failing to communicate to them the evidence against them, the Council also infringed their right to effective judicial protection. In Case T-440/10, Mr Mahmoudian also relies on the fact that the initial measures whereby his funds were frozen were not notified to him individually.

– The obligation to state reasons

48 The purpose of the obligation to state the reasons for an act adversely affecting a person, as provided for by the second paragraph of Article 296 TFEU and, more particularly in this case, by Article 24(3) of Decision 2010/413, Article 15(3) of Regulation No 423/2007 and Article 36(3) of Regulation No 961/2010, is, first, to provide the person concerned with sufficient information to make it possible to determine whether the act is well founded or whether it is vitiated by an error which may permit its validity to be contested before the European Union courts and, secondly, to enable those courts to review the lawfulness of that act. The obligation to state reasons thus laid down constitutes an essential principle of European Union law which may be derogated from only for overriding reasons. The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him and a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the Courts of the European Union (see, to that effect, Case T-390/08 *Bank Melli Iran* v *Council* [2009] ECR II-3967, paragraph 80 and case-law cited).

49 Unless, therefore, overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations militate against the communication of certain matters the Council is bound, by virtue of Article 15(3) of Regulation No 423/2007 and Article 36(3) of Regulation No 961/2010, to apprise the entity concerned by the measure adopted under, as the case may be, Article 15(3) of Regulation No 423/2007 or Article 16(2) of Regulation No 961/2010, of the actual specific reasons why the Council considers that provision to be applicable to it. It must therefore state the facts and points of law on which the legal justification of the measure depend and the considerations which led the Council to adopt it (see, to that effect, Case T-390/08 *Bank Melli Iran* v *Council*, paragraph 81 and case-law cited).

50 Further, the statement of reasons must be appropriate to the measure at issue and the context in which it was adopted. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary that the statement of reasons specify all the relevant matters of fact and law, inasmuch as the adequacy or otherwise of the reasons is to be evaluated with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for a

measure adversely affecting a person are sufficient if it was adopted in circumstances known to that person which enable him to understand the scope of the measure concerning him (see Case T-390/08 *Bank Melli Iran* v *Council*, paragraph 82 and case-law cited).

51 In the present case, it is clear from the reasons stated in the contested measures, first, that Fulmen is the subject of restrictive measures because it is claimed to have supplied electrical equipment on the Qom/Fordoo site and, secondly, that Mr Mahmoudian is the subject of such measures as a director of Fulmen.

52 While that statement of reasons is brief, it nonetheless complies with the rules of the case-law set out above. It enabled the applicants to understand what Fulmen was accused of having done and to dispute either the truth or the relevance thereof. Similarly, it can be understood from the statement of reasons that Mr Mahmoudian is the subject of restrictive measures because of the influence that he may be supposed to have within Fulmen in his alleged capacity as a director of that company.

53 The sufficiency of the statement of reasons provided is, moreover, confirmed by the content of the applications. The arguments of the applicants, in relation to whether their inclusion in the contested lists is well founded, are precisely concerned with the truth of Fulmen having acted on the Qom/Fordoo site and Mr Mahmoudian's position within Fulmen.

54 The applicants raise however two additional grounds of complaint.

55 First, both Fulmen and Mr Mahmoudian claim that the reasons stated are not supported by evidence, and consequently they were not placed in a position to assess not only the scope of the measures imposed on them, but also whether those measures were well founded.

56 However, the issue of the grounds for the contested measures is different from that of the evidence for the conduct of which the applicants are accused, namely, the facts set out in the contested measures and the treatment of those facts as constituting support for nuclear proliferation (see, to that effect, Case C-548/09 P *Bank Melli Iran* v *Council* [2011] ECR I-0000, paragraph 88).

57 Accordingly, the question whether the reasons stated in the contested measures are supported by evidence is relevant in the context of the third plea in law, claiming an error of assessment as regards the applicant's involvement in nuclear proliferation. However, it is ineffective in the context of this plea.

58 Secondly, Mr Mahmoudian claims that his personal details, as found in the reasons stated in the contested lists, suffer from several errors; in particular, he is no longer a director of Fulmen.

59 In that regard, two categories of information concerning Mr Mahmoudian must be distinguished.

60 First, as regards information identifying Mr Mahmoudian, namely the information on his passport and nationality, the fact that he has brought an action before the Court confirms that he has understood that he was the subject of the contested measures. Likewise, Mr Mahmoudian does not present any argument intended to prove that the inaccuracies affecting the information concerned, which are not disputed, it may be added, by the Council, made it more difficult to understand the evidence considered by the Council to inculpate him. In those circumstances, it cannot be held that there was an infringement of the obligation to state reasons in respect of those inaccuracies.

61 On the other hand, in disputing that he is a director of Fulmen, Mr Mahmoudian challenges the truth of the fact regarded by the Council as inculpating him. However, as stated in paragraph 56 above, the question of the claimed inadequacy of the statement of reasons in the contested measures is separate from the question of whether those reasons are well founded (see, to that effect, Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 47), and consequently the argument that Mr Mahmoudian is no longer a director of Fulmen is ineffective within this plea.

62 In the light of the foregoing, the complaint of an infringement of the obligation to state reasons must be rejected as being in part unfounded and in part as ineffective.

– The failure to notify Mr Mahmoudian individually of Decision 2010/413 and Implementing Regulation No 668/2010

63 Mr Mahmoudian claims that that the initial measures by which his funds were frozen, namely Decision 2010/413 and Implementing Regulation No 668/2010, were not notified to him individually, but were only published in the *Official Journal of the European Union*.

64 In that regard, Article 15(3) of Regulation No 423/2007, in force when Implementing Regulation No 668/2010 was adopted, required the Council to state individual and specific reasons for decisions taken pursuant to Article 7(2) of that regulation and to make them known to the persons, entities and bodies concerned. A similar provision is to be found in Article 24(3) of Decision 2010/413.

65 While, as a general rule, the Council was required to discharge the obligation laid down in Article 15(3) of Regulation No 423/2007 by giving individual notification, that provision did not prescribe any specific form, since it referred to no other obligation than that of 'making known' to the person concerned the reasons for his inclusion in the contested lists (see, to that effect, Case C-548/09 P *Bank Melli Iran* v *Council*, paragraphs 52 and 56). Similarly, Article 24(3) of Decision 2010/413 merely provides that the Council is to 'communicate its decision'.

66 In those circumstances, what matters is that useful effect should have been given to the provisions concerned (see, by analogy, Case C-548/09 P *Bank Melli Iran* v *Council*, paragraph 56).

67 In the present case, it is undisputed that no individual notification of Decision 2010/413 and Implementing Regulation No 668/2010 to Mr Mahmoudian took place. The parties however disagree on whether the Council was aware of Mr Mahmoudian's address and, if it was not, whether the Council was required to take steps to find it.

68 However, it must be observed that, notwithstanding that there was no individual notification, Mr Mahmoudian was in a position to communicate to the Council his observations on the imposition on him of restrictive measures, by letter of 26 August 2010, in other words within the period laid down for that purpose. Mr Mahmoudian also brought before the Court, within the prescribed period, an action seeking the annulment of Decision 2010/413 and Implementing Regulation No 668/2010. Further, he does not present any specific arguments to demonstrate that the absence of individual notification of the measures at issue made his defence vis-à-vis the Council more difficult, either in the administrative proceedings or before the Court.

69 In those circumstances, it must be held that, irrespective of whether the Council was aware of Mr Mahmoudian's address or was required to find it, the failure to comply with the obligation laid down in Article 24(3) of Decision 2010/413 and Article 15(3) of Regulation No 423/2007 has not prevented him from being aware of the individual and specific reasons for the imposition of restrictive measures on him. Consequently, the absence of individual notification of Decision 2010/413 and Implementing Regulation No 668/2010 to Mr Mahmoudian is not such, in the present case, as to justify annulment of those measures.

70 Accordingly, Mr Mahmoudian's argument on that point must be dismissed as ineffective.

– The principle of respect for the rights of the defence

71 According to settled case-law, observance of the rights of the defence, especially the right to be heard, in all proceedings initiated against an entity which may lead to a measure adversely affecting that entity, is a fundamental principle of European Union law which must be guaranteed, even when there are no rules governing the procedure in question (Case T-390/08 *Bank Melli Iran* v *Council*, paragraph 48 supra, paragraph 91).

72 The principle of respect for the rights of the defence requires, first, that the entity concerned must be informed of the evidence adduced against it to justify the measure adversely affecting it. Secondly, it must be afforded the opportunity effectively to make known its view on that evidence (see, by analogy, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council* [2006] ECR II-4665, '*OMPI*', paragraph 93).

73 As a preliminary, the Council and the Commission dispute the applicability of the principle of respect for the rights of the defence to the present case. Referring to Case T-181/08 *Tay Za* v *Council* [2010] ECR II-1965, paragraphs 121 to 123, they contend that the applicants were not subject to restrictive measures by reason of their own activities, but by reason of their membership of a general category of persons and entities. Consequently, the proceedings for the adoption of the restrictive measures were not initiated against the applicants within the meaning of the case-law cited in paragraph 71 above and they cannot, therefore, rely on the rights of the defence, or can rely on those rights only to a limited extent.

74 That argument cannot be accepted.

75 First, it is clear from the reasons stated in the contested measures that the imposition of restrictive measures on the applicants is justified by the claim that Fulmen was active on the Qom/Fordoo site and that Mr Mahmoudian had influence within Fulmen. Accordingly, unlike the case which gave rise to *Tay Za* v *Council*, the applicants are subject to restrictive measures because they are supposed themselves to be involved in nuclear proliferation, and not because of their membership of a general category of persons and entities associated with the Islamic Republic of Iran.

76 Consequently, paragraphs 121 to 123 of *Tay Za* v *Council* are not transposable to the present case.

77 Second, in any event, Article 24(3) and (4) of Decision 2010/413, Article 15(3) of Regulation No 423/2007 and Article 36(3) and (4) of Regulation No 961/2010 set out provisions to safeguard the rights of the defence of entities which are subject to restrictive measures adopted under those acts. Respect for those rights is subject to review by the Courts of the European Union (Case T-390/08 *Bank Melli Iran* v *Council*, paragraph 37).

78 In those circumstances, it must be concluded that the principle of respect for the rights of the defence can be relied on by the applicants in this case.

79 In that regard, the applicants claim that, in relation to the adoption of Decision 2010/413 and Implementing Regulation No 668/2010, the Council did not notify them of the evidence against them and did not give them the opportunity effectively to make known their views.

80 According to the case-law, as regards an initial measure whereby the funds of an entity are frozen, the evidence adduced against that entity should be notified to it either concomitantly with or as soon as possible after the adoption of the measure concerned. At the request of the entity concerned, it also has the right to make known its view on that evidence after the adoption of the measure (see, to that effect and by analogy, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 342, and *OMPI*, paragraph 137).

81 In the present case, the adoption of the initial measures whereby the funds of the applicants were frozen, namely Decision 2010/413 and Implementing Regulation No 668/2010, were notified individually to Fulmen on 28 July 2010. As regards Mr Mahmoudian, it is clear from paragraphs 67 to 69 above that the absence of individual notification of the measures concerned did not prevent him being aware of the individual and specific reasons for the imposition of restrictive measures on him, which means that that fact did not affect his rights of defence.

82 As regards the content of the notification of the evidence against them, the applicants state that, notwithstanding the requests made in their letters of 26 August and 14 September 2010, the Council did not notify them of the evidence, in particular the documents, which were the basis for its decision to impose the restrictive measures on them.

83 In that regard, the Council stated, in its replies to the abovementioned letters, that its file contained no evidence other than that set out in the contested measures.

84 Contrary to what is claimed by the applicants, that statement does not constitute an infringement of their rights of defence. The Council did not make the applicants' defence more difficult by concealing the existence or the content of evidence on which its claims were based. On the contrary, by admitting that there was no additional evidence of relevance in its file, it enabled the applicants to rely on that fact, as they have done in the third plea in law.

85 As regards the applicants' right effectively to make known their views, it is clear that, following the adoption of the initial measures whereby the applicants' funds were frozen, on 26 July 2010, the applicants sent to the Council the letters of 26 August and 14 September 2010, in which they set out their arguments and asked that the restrictive measures imposed on them be withdrawn. The Council replied to those letters on 28 October 2010. Consequently, it cannot be held that there was an infringement of the applicants' right effectively to make known their views.

86 In those circumstances, the complaint of an infringement of the applicants' rights of defence must be rejected as unfounded.

– The right to effective judicial protection

87 The principle of effective judicial protection is a general principle of European Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and in Article 47 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1). The effectiveness of judicial review means that the European Union authority in question is bound to communicate the grounds for a restrictive measure to the entity concerned, so far as possible, either when that measure is adopted or, at the very least, as swiftly as possible after that decision, in order to enable the entity concerned to exercise, within the periods prescribed, their right to bring an action. Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the courts of the European Union, and also to put the latter fully in a position to carry out the review of the lawfulness of the measure in question which is the duty of those courts (see, to that effect and by analogy, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, paragraphs 335 to 337 and case-law cited).

88 In the present case, it is clear, at the outset, from paragraphs 51 to 62 above, that the contested measures contained information which was sufficiently precise as regards the reasons for the adoption of the restrictive measures imposed on the applicants.

89 Next, those same reasons were individually notified to Fulmen. As regards Mr Mahmoudian, it is clear from paragraphs 67 to 69 above that the absence of individual notification of Decision 2010/413 and Implementing Regulation No 668/2010 did not affect his procedural rights, including his right to effective judicial protection.

90 Lastly, the Court is fully in a position to review the lawfulness of the contested measures.

91 In those circumstances, the complaint of an infringement of the applicants' right to effective judicial protection must be rejected as unfounded.

92 In the light of all the foregoing the first plea must be rejected.

The third plea in law: error of assessment as regards the applicants' involvement in nuclear proliferation

93 By their third plea, the applicants claim that the Council committed an error of assessment when it concluded that they had supported nuclear proliferation.

94 The applicants present two arguments in support of their position. By the first argument, relied on in both cases, they dispute that Fulmen was active on the Qom/Fordoo site and they maintain that the Council has not adduced evidence of its claims on that point

95 The Council maintains that Fulmen was involved in the installation of electrical equipment on the Qom/Fordoo site. At the hearing, the Council added that it could not be expected to adduce evidence of that claim. According to the Council, review by the courts of the European Union must be limited to determining that the reasons relied on to justify the adoption of the restrictive measures are 'probable'. That applies to the present case, given that Fulmen is a company which has long been active in the Iranian electrical equipment market and has a substantial workforce.

96 In that regard, it must be recalled that the judicial review of the lawfulness of a measure whereby restrictive measures are imposed on an entity extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based. In the event of challenge, it is for the Council to present that evidence for review by courts of the European Union (see, to that effect, Case T-390/08 *Bank Melli Iran* v *Council*, paragraphs 37 and 107).

97 Accordingly, contrary to what is claimed by the Council, the review of lawfulness which must be carried out in the present case is not limited to an appraisal of the abstract 'probability' of the grounds relied on, but must include the question whether those grounds are supported, to the requisite legal standard, by concrete evidence and information.

98 Nor can the Council claim that it is not required to adduce such evidence.

99 In that regard, first, the Council contends that the restrictive measures imposed on the applicants were adopted on the proposal of a Member State, in accordance with the procedure provided for in Article 23(2) of Decision 2010/413. That circumstance however in no way detracts from the fact that the contested measures are measures taken by the Council, which must, therefore, ensure that their adoption is justified, if necessary by requesting the Member State concerned to submit to it the evidence and information required for that purpose.

100 Secondly, the Council cannot rely on a claim that the evidence concerned comes from confidential sources and cannot, consequently, be disclosed. While that circumstance might, possibly, justify restrictions in relation to the communication of that evidence to the applicants or their lawyers, the

fact remains that, taking into consideration the essential role of judicial review in the context of adoption of restrictive measures, the courts of the European Union must be able review the lawfulness and merits of such measures without it being possible to raise objections that the evidence and information used by the Council is secret or confidential (see, by analogy, *OMPI*, paragraph 155). Further, the Council is not entitled to base an act adopting restrictive measures on information or evidence in the file communicated by a Member State, if that Member State is not willing to authorise its communication to the courts of the European Union whose task is to review the lawfulness of that decision (see, by analogy, Case T-284/08 *People's Mojahedin Organization of Iran* v *Council* [2008] ECR II-3487, paragraph 73).

101 Thirdly, the Council is incorrect in its claim that it cannot be expected to adduce proof of the involvement of an entity in nuclear proliferation, taking into consideration the clandestine nature of the conduct concerned. The mere fact that the adoption of restrictive measures is proposed pursuant to Article 23(2) of Decision 2010/413 presupposes that the Member State concerned or the High Representative of the Union for Foreign Affairs and Security Policy, as the case may be, are in possession of evidence or information demonstrating, in their opinion, that the entity concerned is involved in nuclear proliferation. Further, difficulties which may be encountered by the Council when attempting to prove that involvement may, in some cases, have an effect on the standard of proof required of it. On the other hand, the effect of such difficulties cannot be that the Council is entirely relieved of the burden of proof which rests on it.

102 As regards the assessment in the present case, the Council has produced no information or evidence in support of the reasons relied on in the contested measures. As the Council itself admits, in essence, it has relied on mere unsubstantiated allegations that Fulmen installed electrical equipment on the Qom/Fordoo site before the existence of that site was discovered.

103 In those circumstances, since it must be held that the Council has not adduced evidence that Fulmen was active on the Qom/Fordo site and, therefore, the third plea in law must be upheld, it is unnecessary to express any view on the second argument, put forward by Mr Mahmoudian in Case T-440/10, concerning his position within Fulmen.

104 Since the Council has not, in the contested measures, relied on other circumstances justifying the adoption of restrictive measures with regard to Fulmen and Mr Mahmoudian, the contested measures must be annulled in so far as they concern the applicants.

105 As regards the temporal effects of the annulment of the contested measures, it must be noted, first that Implementing Regulation No 668/2010, which amended the list in Annex V to Regulation No 423/2007, no longer has any legal effects subsequent to the repeal of Regulation No 423/2007 by Regulation No 961/2010.

106 Next, in respect of Regulation No 961/2010, it must be recalled that under the second paragraph of Article 60 of the Statute of the Court of Justice of the European Union, by way of derogation from Article 280 TFEU, decisions of the General Court declaring a regulation to be void are to take effect only as from the date of expiry of the period for bringing an appeal referred to in the first paragraph of Article 56 of that Statute or, if an appeal has been brought within that period, as from the date of dismissal of the appeal. The Council therefore has a period of two months, extended on account of distance by ten days, as from the notification of this judgment, to remedy the infringement established by the General Court by adopting, if appropriate, new restrictive measures with respect to the applicants. In the present case, the risk of serious and irreparable harm to the effectiveness of the restrictive measures imposed by Regulation No 961/2010 does not appear sufficiently great, having regard to the considerable impact of those measures on the applicants' rights and freedoms, to warrant the maintenance of the effects of that regulation with respect to the applicants for a period exceeding that laid down in the second paragraph of Article 60 of the Statute of the Court of Justice (see, by analogy, the judgment of 16 September 2011 in Case T-316/11 *Kadio Morokro* v *Council,* not published in the ECR, paragraph 38).

107 Lastly, as regards the temporal effects of the annulment of the Decision 2010/413, as amended by Decision 2010/644, it must be recalled that, under the second paragraph of Article 264 TFEU, the General Court may, if it considers it necessary, state which of the effects of the act which it has declared void are to be considered as definitive. In the present case, if the dates when the annulment of Regulation No 961/2010 and that of Decision 2010/413, as amended by Decision 2010/644, take effect were to differ, that would be likely seriously to jeopardise legal certainty, since those two acts impose on the applicants measures which are identical. The effects of Decision 2010/413, as amended by Decision 2010/644, must therefore be maintained as regards the applicants until the annulment of Regulation No 961/2010 takes effect (see, by analogy, *Kadio Morokro* v *Council*, paragraph 39).

Costs

108 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to pay the costs, as applied for by the applicants.

109 Under the first subparagraph of Article 87(4) of the Rules of Procedure, institutions which have intervened in the proceedings are to bear their own costs. Consequently, the Commission shall bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **annuls, in so far as they concern Fulmen and Mr Fereydoun Mahmoudian:**

   — **Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP,**

   — **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,**

   — **Council Decision 2010/644/CFSP of 25 October 2010 amending Decision 2010/413 and**

   — **Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation No 423/2007;**

2. **orders the effects of Decision 2010/413, as amended by Decision 2010/644, to be maintained as regards Fulmen and Mr Mahmoudian until the annulment of Regulation No 961/2010 takes effect;**

3. **dismisses the action as to the remainder;**

4. **orders the Council of the European Union to bear its own costs and to pay the costs incurred by Fulmen and by Mr Mahmoudian;**

5. **orders the European Commission to bear its own costs.**

Pelikánová Jürimäe van der Woude

Delivered in open court in Luxembourg on 21 March 2012.

[Signatures]