Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 30 May 2018 [1]

Case C-430/16 P

Bank Mellat
v

Council of the European Union

(Appeal — Strengthening of restrictive measures against the Islamic Republic of Iran — Sector-specific measures — Admissibility — Commencement of the Joint Comprehensive Plan of Action in the course of proceedings before the General Court of the European Union — Effect on interest in bringing appeal proceedings — Effect on continuation of interest in bringing proceedings before the General Court — No need to adjudicate — Article 275 TFEU — Jurisdiction of the General Court in Common Foreign and Security Policy matters (CFSP) — Concept of 'restrictive measures against natural or legal persons' — Fourth paragraph of Article 263 TFEU — Concept of 'implementing measures' — Article 215 TFEU — Concept of necessity — Principle of proportionality — General principles of EU law)

Table of contents

I. Background to the dispute 3

II. Procedure before the General Court and the judgment under appeal 4

III. Procedure before the Court and forms of order sought 5

IV. Legal analysis 5

A. Principal view — the admissibility of the appeal 6

1. Summary of the arguments of the parties 6

2. Analysis 7

(a) Effects of the JCPOA 8

(b) Assessment in concreto of Bank Mellat's interest in bringing proceedings 9

1 Original language: French.

B. Alternative view — continuation in the course of proceedings before the General Court of Bank Mellat's interest in bringing proceedings 11

C. Further alternative view 12

1. Fourth and fifth grounds of appeal, alleging errors of law in the assessment of the conditions of the fourth paragraph of Article 263 TFEU and in the assessment of the jurisdiction of the General Court 12

(a) Fourth ground of appeal alleging an error of law in the assessment of the conditions of the fourth paragraph of Article 263 TFEU 12

(1) Judgment under appeal 12

(2) Summary of the arguments of the parties 13

(3) Analysis 14

(b) Fifth ground of appeal alleging an error of law in the assessment of the jurisdiction of the General Court 16

(1) Judgment under appeal 16

(2) Arguments of the parties and analysis 17

2. Substantive grounds of appeal 19

(a) First ground of appeal alleging an error in the interpretation and application of the requirement of necessity within the meaning of Article 215(1) TFEU 19

(b) Second ground of appeal alleging an error of law in the application of the principle of proportionality 19

(c) Third ground of appeal alleging that the General Court erred in law in holding that the regime at issue was compliant with the general principles of law 22

V. Costs 23

VI. Conclusion 23

1. By the present appeal, Bank Mellat seeks to have set aside the judgment of the General Court of the European Union of 2 June 2016, *Bank Mellat* v *Council*[2] ('the judgment under appeal') by which the General Court dismissed its action for annulment brought against Article 1, point 15, of Council Regulation (EU) No 1263/2012 of 21 December 2012 amending Regulation (EU) No 267/2012 concerning restrictive measures against Iran,[3] as well as its application for a declaration that Article 1, point 6, of Council Decision 2012/635/CFSP of 15 October 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran was inapplicable.[4]

2 T-160/13, EU:T:2016:331.

3 OJ 2012 L 356, p. 34.

4 OJ 2012 L 282, p. 58.

I. Background to the dispute

2. It can be seen from paragraph 1 et seq. of the judgment under appeal that the appellant, Bank Mellat, is an Iranian commercial bank. As part of the individual restrictive measures introduced in order to put pressure on the Islamic Republic of Iran to end proliferation-sensitive nuclear activities and the development of nuclear weapon delivery systems ('nuclear proliferation'), the appellant's name was, for the first time, placed on the lists of entities involved in Iranian nuclear proliferation on 26 July 2010.[5] Following successive amendments to the law, the appellant's name was again included in the 2010 and 2012 acts.[6]

3. In the absence of serious engagement in the negotiations on the part of the Islamic Republic of Iran,[7] the Council of the European Union considered it necessary to adopt additional restrictive measures by adopting Decision 2012/635. Article 1, point 6, of that decision amended Article 10 of Decision 2010/413. Regulation No 1263/2012 was also adopted in that context and amended Regulation No 267/2012. In particular, Article 1, point 15, of Regulation No 1263/2012 amended Article 30 of Regulation No 267/2012 and added Articles 30a and 30b to that regulation.[8] The regime at issue can be described as follows.

4. In essence, Article 30 of amended Regulation No 267/2012 provides for restrictions on financial transactions between, on the one hand, credit and financial institutions and bureaux de change established in Iran, as well as their branches or subsidiaries, and credit and financial institutions and bureaux de change controlled by persons, entities or bodies domiciled in Iran and, on the other hand, EU financial institutions.

5. According to Article 30(2) of amended Regulation No 267/2012, the only transfers which may be carried out are humanitarian transfers, transfers regarding personal remittances, transfers in connection with a specific trade contract provided that such transfer is not prohibited under that regulation, transfers regarding diplomatic missions or consular posts or international organisations, transfers regarding payment to satisfy claims by or against an Iranian person, entity or body, or transfers of a similar nature, as well as transfers necessary for the execution of the obligations arising from other types of contract.

6. It can be seen from Article 30(3) to (5) of amended Regulation No 267/2012 that the transfers of funds which may be authorised under paragraph 2 of that article are subject, according to the circumstances and their purpose, and with effect from various thresholds, to a prior notification obligation and to an obligation to obtain prior authorisation from the competent national authority.

7. Article 30a of amended Regulation No 267/2012 provides, inter alia, for certain restrictions on transfers of funds between, on the one hand, Iranian persons, entities or bodies and, on the other, EU nationals, which transfers are not covered by Article 30 of that regulation.

8. According to Article 30b(1) of amended Regulation No 267/2012, the restrictions provided for in Articles 30 and 30a of that regulation shall not apply where an authorisation has been granted in accordance with Articles 24 to 28a of that regulation.

5 That is to say in Annex II to 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) ('Decision 2010/413') and in Annex V to Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103, p. 1).

6 Namely 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), then Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 (OJ 2012 L 88, p. 1).

7 See recital 5 of Decision 2012/635.

8 For the purposes of referring to Articles 30, 30a and 30b as amended or introduced by Article 1(15) of Regulation No 1263/2012, I shall refer to those articles by reference to amended Regulation No 267/2012.

9. Article 30b(3) of amended Regulation No 267/2012 provides that, for the purposes of Article 30(3)(b) and 30(3)(c) and Article 30a(1)(c) of that regulation, the competent authorities shall grant the authorisation, under such terms and conditions as they deem appropriate, unless they have reasonable grounds to determine that the transfer of funds for which the authorisation is requested could be in breach of any of the prohibitions or obligations in that regulation.

II. Procedure before the General Court and the judgment under appeal

10. By application lodged at the General Court Registry on 15 March 2013, the appellant brought an action seeking the annulment of Article 1, point 15, of Regulation No 1263/2012 and a declaration that Article 1, point 6, of Decision 2012/635 was inapplicable to it.

11. Before examining the substance of the pleas in law, the General Court verified, of its own motion, whether it had jurisdiction to rule on the application for a declaration that Article 1, point 6, of Decision 2012/635 was inapplicable, which the appellant had stated should be construed as a plea of illegality within the meaning of Article 277 TFEU. The General Court concluded that it did not have jurisdiction in respect of that point.[9] It found, however, that it did have jurisdiction to rule on the heads of claim relating to Regulation No 1263/2012.[10]

12. With regard to those heads of claim, the General Court then verified that the conditions laid down in Article 263 TFEU were duly satisfied in the present case.[11] Of all of the provisions which Article 1, point 15, of Regulation No 1263/2012 amended in or introduced to Regulation No 267/2012, the General Court held that only Article 30(1), Article 30(3)(a), (b) and (c) and Article 30(5) of amended Regulation No 267/2012 were contained in a regulatory act, directly affected the appellant and did not entail implementing measures. The General Court dismissed the remainder of the action as inadmissible.

13. Finally, the General Court verified whether the appellant had an interest in bringing proceedings at the time of bringing the action.[12] Although the appellant was also subject to individual restrictive measures relative to which Article 1, point 15, of Regulation No 1263/2012 did not produce, according to the Council, additional legal effects, the General Court held that the appellant was subject, after the annulment of those individual restrictive measures following the Court's dismissal of the appeal in *Council* v *Bank Mellat*,[13] to the effects of Article 1, point 15, of Regulation No 1263/2012 and found that the appellant had an interest in bringing proceedings to challenge its legality before the General Court within the limits previously described.

14. Moving on to examine the substance of the appellant's action, the General Court ruled on the four pleas in law raised by the appellant. The first plea alleged that the regime at issue had no legal basis under Article 215 TFEU as it had no rational connection with the Common Foreign and Security Policy (CFSP) aim allegedly pursued. The second plea alleged that the regime at issue had no legal basis under Article 215 TFEU as it was disproportionate to the CFSP aim pursued. The third plea alleged that the regime at issue was contrary to the general principles of EU law and also to Article 215(3) TFEU, in particular the principles of proportionality, legal certainty, non-arbitrariness and equal treatment, the obligation to state reasons and the requirement that every sanction must contain the necessary legal safeguards. The fourth plea alleged breach of the appellant's property rights, its right to trade, the right to free movement of capital and the principle of proportionality.

9 See, for a summary of the judgment under appeal, point 73 et seq. of this Opinion.

10 For the examination of the jurisdiction of the General Court, see paragraphs 25 to 40 of the judgment under appeal.

11 See paragraphs 41 to 67 of the judgment under appeal.

12 See paragraphs 68 to 78 of the judgment under appeal.

13 Judgment of 18 February 2016 (C-176/13 P, EU:C:2016:96).

15. None of the substantive pleas in law having been successful, the General Court dismissed the action.

III. Procedure before the Court and forms of order sought

16. On 2 August 2016, Bank Mellat brought an appeal against the judgment under appeal. With regard to the form of order sought, it claims that the Court should set aside the judgment under appeal; annul Article 1, point 15, of Regulation No 1263/2012 in its entirety or to the extent that it applies to it; declare that Article 1, point 6, of Decision 2012/635 is inapplicable to it; order the Council to pay the costs relating to the appeal and to the proceedings before the General Court.

17. In its response, the Council contends that the Court should dismiss the appeal and order Bank Mellat to pay the costs. The European Commission and the United Kingdom of Great Britain and Northern Ireland,[14] interveners in support of the Council during the proceedings before the General Court, also contend to that effect.

18. The appellant, the Council, the United Kingdom and the Commission presented oral arguments at the hearing which took place before the Court on 10 January 2018.

IV. Legal analysis

19. In support of its appeal, the appellant raises five grounds of appeal. The first ground of appeal alleges an error of law in the interpretation and application of the requirement of necessity within the meaning of Article 215 TFEU. The second ground of appeal alleges an error of law in that the General Court wrongly found that the regime at issue was proportionate. The third ground of appeal alleges an error of law in that the General Court held that the regime at issue was compliant with the general principles of EU law. The fourth ground of appeal alleges an error of law in the interpretation of the fourth paragraph of Article 263 TFEU due to the fact that the General Court did not verify overall that Article 1, point 15, of Regulation No 1263/2012 satisfied the requirements of that Article 263 but examined individually each of the elements of the regime at issue which it helped to implement. The fifth ground of appeal alleges an error of law in the General Court's assessment of its own jurisdiction as a result of its taking the view that it did not have jurisdiction to rule on the arguments against Article 1, point 6, of Decision 2012/635.

20. The Council argues that Bank Mellat has no interest in the outcome of the appeal, due to the fact that the regime at issue was 'lifted' with effect from 16 January 2016, and that the appeal should therefore, in those circumstances, be declared inadmissible.

14 The United Kingdom brought a cross-appeal on 14 October 2016 before withdrawing it on 21 June 2017.

A. Principal view — the admissibility of the appeal

1. Summary of the arguments of the parties

21. The Council challenges the admissibility of the appeal and pleads the absence of an interest on the part of Bank Mellat in the outcome of the appeal due to the 'lifting' or 'withdrawal' of the contested measures which have, consequently, no longer been 'applicable' to the appellant since 16 January 2016 by virtue of the Joint Comprehensive Plan of Action ('JCPOA')[15] concluded with the Islamic Republic of Iran. Referring to the judgment in *Abdulrahim* v *Council and Commission* ('the *Abdulrahim* judgment')[16] — the applicability of which it nevertheless doubts in the context of non-individual restrictive measures — the Council argues that Bank Mellat could not derive any advantages from the present appeal, in view, in particular, of the general nature of the regime at issue. No changes could be expected in the Council's conduct. As to a possible action to establish the non-contractual liability of the European Union, even if the Court were to set aside the judgment of the General Court, the very fact that the latter concluded that the general regime was legal would prevent the condition that there be a sufficiently serious breach of EU law from being met. Furthermore, Bank Mellat would not be able to rely upon any damage to its reputation, precisely due to the general nature of the contested regime, the absence of any claim that the appellant participated personally in the activity targeted and to Bank Mellat's being subject in parallel to more severe individual restrictive measures.

22. The Commission states, in essence, that it has doubts as to the existence of an interest on Bank Mellat's part in bringing such appeal and emphasises that the individual restrictive measures to which Bank Mellat was subject until the judgment of the Court in *Council* v *Bank Mellat*[17] were even more severe from Bank Mellat's perspective, so that the annulment of the general regime which is under consideration in the present appeal would, in any event, have no effect on Bank Mellat. Bank Mellat has, moreover, acknowledged that the contested general regime has no real effect on its situation. The definitive annulment of the individual restrictive measures affecting it and the withdrawal of the general regime eliminated all possible legal effects on Bank Mellat.

23. Bank Mellat identifies four distinct advantages which it could still derive from having the general regime annulled, despite the fact that that regime was withdrawn with effect from 16 January 2016. Relying on the *Abdulrahim* judgment,[18] it submits, firstly, that that annulment would make it possible to prevent the Council from implementing the relevant sanctions again or adopting similar acts in the future. That is all the more important because the lifting of the general regime is only provisional. Secondly, having the general regime annulled would allow Bank Mellat to retain the possibility of subsequently bringing a claim for compensatory damages. Thirdly, the repeal or expiry of the general regime does not deprive Bank Mellat of an interest in establishing that it is illegal, due to the fact that the effects of that repeal or that expiry are not to be confused with the effects of an annulment.[19] Fourthly, the general regime had a negative effect on the appellant's reputation due to the link established by the Council in the general regime between banks and nuclear proliferation,[20] and having that regime annulled would constitute a form of non-compensatory reparation within the

15 See Article 1, point 17, of Council Decision (CFSP) 2015/1863 of 18 October 2015 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2015 L 274, p. 174), Article 1, point 15, of Council Regulation (EU) 2015/1861 of 18 October 2015 amending Regulation (EU) No 267/2012 concerning restrictive measures against Iran (OJ 2015 L 274, p. 1), Council Decision (CFSP) 2016/37 of 16 January 2016 concerning the date of application of Decision 2015/1863 (OJ 2016 L 11I, p. 1) and the notice of information concerning the date of application of Regulation 2015/1861 and Council Implementing Regulation (EU) 2015/1862 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran (OJ 2015 L 274, p. 161).

16 Judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331).

17 Judgment of 18 February 2016 (C-176/13 P, EU:C:2016:96).

18 Judgment of 28 May 2013 (C-239/12 P, EU:C:2013:331).

19 The appellant refers here to the judgment of 12 December 2006, *Organisation des Modjahedines du peuple d'Iran* v *Council* (T-228/02, EU:T:2006:384).

20 That negative effect is entirely comparable, according to the appellant, to that invoked in paragraphs 80 to 85 of the judgment of 25 November 2014, *Safa Nicu Sepahan* v *Council* (T-384/11, EU:T:2014:986).

meaning of the *Abdulrahim* judgment.[21] Moreover, the value of the judgment confirming the annulment of the individual restrictive measures is significantly undermined by the existence of the general regime. Bank Mellat also argues that no case-law confirms the Commission's position that the interest in challenging the legality of the general regime disappears as a result of the parallel existence of a regime of allegedly more severe individual restrictive measures.

2. Analysis

24. According to the case-law, an interest in bringing proceedings requires that the annulment of the contested act be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage for the party which brought it.[22] It follows that, in order for its action to be considered admissible, not only must the applicant be in a particular situation in relation to the act whose legality it wishes to challenge, but the annulment of that act must also have positive effects on its legal situation. The interest which the applicant must have may be expressed in economic terms but also in terms of judicial interest or protection.[23] It is that requirement or need that justifies the possibility of bringing proceedings before the Courts of the European Union. If the applicant cannot derive any advantages from the fact that its action may be upheld, the bringing of proceedings before the Courts of the European Union cannot be justified.

25. An interest in bringing proceedings, an essential and fundamental prerequisite for any action,[24] must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible,[25] and must, as at that date, be vested and current.[26] It must, moreover, continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it.[27] The same applies in the case of an appeal.[28]

26. To assess Bank Mellat's interest in bringing proceedings at the time of bringing the present appeal it is necessary, first of all, to assess the true effects of the JCPOA on the acts at issue, it being nevertheless understood that, in any event, the Court has already acknowledged that an applicant's interest in bringing proceedings does not necessarily disappear because the act challenged by it has ceased to have effect in the course of proceedings.[29]

27. The debate between the parties focused on the question of whether Bank Mellat could usefully rely upon the findings made in the *Abdulrahim* judgment[30] to the extent that, as the Council emphasised, that judgment was given in a case where *individual* restrictive measures had been repealed in the course of proceedings before the General Court. The facts underlying the present appeal can be distinguished from those in the case which gave rise to that judgment for two reasons. First of all, the regime at issue is a general regime and not a restrictive measure individually affecting Bank Mellat as a

21 The appellant refers here to paragraphs 70 to 74 of the judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331).

22 See judgments of 21 December 2011, *ACEA* v *Commission* (C-319/09 P, not published, EU:C:2011:857, paragraph 67), and of 27 Feburary 2014, *Stichting Woonlinie e.a.* v *Commission* (C-133/12 P, EU:C:2014:105, paragraph 54).

23 See judgment of 26 Feburary 2015, *Planet* v *Commission* (C-564/13 P, EU:C:2015:124, paragraphs 28 and 34).

24 See Order of 31 July 1989, *S.* v *Commission* (206/89 R, EU:C:1989:333, paragraph 8).

25 See judgment of 20 June 2013, *Cañas* v *Commission* (C-269/12 P, not published, EU:C:2013:415, paragraph 15 and case-law cited).

26 See judgment of 26 February 2015, *Planet* v *Commission* (C-564/13 P, EU:C:2015:124, paragraph 34).

27 See judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331, paragraph 61).

28 See judgments of 19 October 1995, *Rendo and Others* v *Commission* (C-19/93 P, EU:C:1995:339, paragraph 13), and of 13 July 2000, *Parliament* v *Richard* (C-174/99 P, EU:C:2000:412, paragraph 33); and Order of the President of the Court of 27 February 2002, *Commerzbank* v *Commission* (C-480/01 P(R), EU:C:2002:127, paragraph 20); and Orders of 19 January 2006, *Audi* v *OHIM* (C-82/04 P, not published, EU:C:2006:48, paragraph 20); of 5 July 2012, *Audi and Volkswagen* v *OHIM* (C-467/11 P, not published, EU:C:2012:425, paragraph 11); and of 15 November 2012, *Neubrandenburger Wohnungsgesellschaft* v *Commission* (C-145/12 P, not published, EU:C:2012:724, paragraph 23).

29 See judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331, paragraph 62).

30 Judgment of 28 May 2013 (C-239/12 P, EU:C:2013:331).

result of its inclusion on the lists of entities whose assets must be frozen. Next, the *Abdulrahim* judgment [31] specified the circumstances in which the applicant's interest in bringing proceedings can continue in the course of proceedings before the General Court despite the repeal of the contested acts, whereas here it is a question of deciding whether Bank Mellat had an interest in bringing proceedings at the time of bringing the appeal.

28. I do not think that an interest in bringing proceedings should be analysed differently according to whether the act at issue constitutes an individual restrictive measure or is based on a more general restrictive-measures regime, as in the case of the regime at issue. All that matters, in my view, is that the applicant may derive an advantage from its action. That notion of advantage also leads me to believe that the existence of an interest in bringing proceedings at the time of bringing the appeal does not necessarily have to be assessed more strictly compared to a situation in which that interest disappears in the course of proceedings before the General Court. In other words, the Court should not confine itself to simply noting that the act was repealed before the appeal was brought for the purposes of finding that there was no interest in bringing proceedings, but should seek to ascertain whether the appellant could still derive an advantage from its action before the Court, despite what could at times appear to be the removal of the subject matter of the dispute by the institution which adopted the act at issue.

29. Having said that, it is now necessary to determine the effects of the 2016 JCPOA on the regime at issue, before verifying whether Bank Mellat can still claim to derive any advantages from the present appeal.

(a) Effects of the JCPOA

30. Bank Mellat's situation with regard to the restrictive measures affecting it is as follows: the individual restrictive measures were definitively annulled once the Court dismissed the appeal brought by the Council which gave rise to the judgment of 18 February 2016, *Council* v *Bank Mellat* [32] and, in any event, they had no longer affected the appellant since 16 January 2016 by virtue of the JCPOA. As to the general regime whose legality the appellant wishes to challenge here, it also ceased to apply to Bank Mellat from 16 January 2016. The appeal was brought on 2 August 2016. However, as stated above, I do not think that the analysis of the interest in bringing proceedings should stop at that stage of the reasoning.

31. The JCPOA allowed a certain easing of tensions between the Islamic Republic of Iran and the international community which resulted, at EU level, in a commitment to 'lift all … sanctions' [33] and 'all … economic and financial restrictive measures' [34] and to 'terminate implementation of all … nuclear-related economic and financial sanctions'. [35] Article 1, point 17, of Decision 2015/1863 *suspended* the measures listed in it. As to Article 1, point 15, of Regulation 2015/1861, it expressly *deleted* Articles 30, 30a, 30b, 31 and 33 to 35 of amended Regulation No 267/2012. In other words, the general regime which Bank Mellat sought to have annulled before the General Court was thereby *deleted*. By virtue of Article 1 of Decision 2016/37, Decision 2015/1863 and, consequently, [36] Regulation 2015/1861 became applicable on 16 January 2016, the date on which the suspension and deletion of the measures concerned took effect.

31 Judgment of 28 May 2013 (C-239/12 P, EU:C:2013:331).

32 Judgment of 18 February 2016 (C-176/13 P, EU:C:2016:96). It should be noted that the Court's judgment post-dates the commencement of the JCPOA.

33 Recital 9 of Decision 2015/1863.

34 Recitals 5 and 6 of Regulation 2015/1861.

35 Recital 14 of Decision 2015/1863.

36 See Article 2(2) of Regulation 2015/1861.

32. Although the decision was taken, in the acts which implement the JCPOA, to lift or terminate the economic and financial sanctions and restrictive measures, it is clear from those acts that such decision is provisional since 'the commitment to lift all Union nuclear-related sanctions in accordance with the JCPOA is without prejudice … to the reintroduction of Union sanctions in the event of significant non-performance by Iran of its commitments under the JCPOA'. [37]

33. However, against that background, I do not think that the appellant's interest in bringing proceedings should be distinguished from that of any other applicant seeking the annulment of an act which is repealed in the course of proceedings. The measures at issue could be 'reactivated' by the Council in the event of a deterioration in relations with the Islamic Repubic of Iran; however, that reactivation should result, in my view, in the adoption of at least one new act which the appellant could therefore, in principle, challenge.

34. Thus, on the one hand, the mere fact that the lifting of the general regime is only provisional is not sufficient, in itself, to provide a basis for Bank Mellat's interest in bringing the present appeal proceedings. On the other hand, the cessation of the legal effects of the regime at issue does not necessarily lead to the disappearance of Bank Mellat's interest in bringing proceedings. [38]

(b) Assessment in concreto of Bank Mellat's interest in bringing proceedings

35. It is apparent, however, from the case-law of the Court that the question of whether an applicant retains its interest in bringing proceedings must be assessed in the light of the specific circumstances, taking account, in particular, of the consequences of the alleged unlawfulness and of the nature of the damage claimed to have been sustained. [39] The Court has identified a number of scenarios in which the applicant may retain an interest in seeking the annulment of an act. Thus, that applicant may retain such an interest in order to be restored to its original position, in order to induce the author of the contested act to make suitable amendments in the future, and thereby avoid the risk that the unlawfulness alleged in respect of that act will be repeated, or as the basis for possible proceedings for damages. [40]

36. It must, therefore, now be determined very specifically whether Bank Mellat can still rely, as it claims, upon any of the advantages which its appeal is supposed to be liable to confer on it.

37. Firstly, assuming that the effects of the JCPOA on the regime at issue are akin to those of a repeal, the Court has always clearly stated that a repeal does not amount to recognition of the illegality of the act in question and takes effect *ex nunc*, whereas a judgment annulling an act thereby retroactively removes that act from the legal order and that act is, consequently, deemed never to have existed. [41] Here, Bank Mellat's interest in bringing proceedings runs into the problem that the regime at issue has no effect on its situation due to the fact that that regime was superimposed on pre-existing individual restrictive measures. From a chronological point of view, Bank Mellat was included in the lists on 26 July 2010 [42] and that inclusion was definitively annulled on 18 February 2016, even though it had no longer been effective since 16 January 2016.

38. The acts in respect of which Bank Mellat sought a finding of illegality in the judgment under appeal cover a period from 2012 to 16 January 2016.

37 Recital 9 of Decision 2015/1863. See also recital 10 of that decision and recitals 6 and 7 of Regulation 2015/1861.

38 See point 26 of this Opinion.

39 See judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331, paragraph 65).

40 See judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331, paragraphs 63 to 64).

41 See judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331, paragraph 68).

42 See judgment of 18 February 2016, *Council* v *Bank Mellat* (C-176/13 P, EU:C:2016:96, paragraph 11 et seq.).

39. While the individual restrictive measures froze the appellant's funds, the general regime merely restricted transfers of funds between EU and Iranian banks and financial institutions by subjecting them, in most cases, to a prior notification or authorisation regime. However, as an entity covered by the individual restrictive measures, Bank Mellat could not, in any event, qualify for any transfers organised in the circumstances described by the acts at issue, as the derogations from the restrictions provided for by the individual measures were governed by the acts defining and implementing those measures. Consequently, the considerable negative consequences suffered by Bank Mellat are the result of the imposition on it of the illegal individual restrictive measures, and not of the general regime which did not, in my analysis, alter the legal situation of the appellant due to its chronological overlap with the individual restrictive measures. Bank Mellat appears, moreover, to recognise that when it concedes that it 'was not able to put forward evidence as to the concrete effects of the Financial Embargo because … that measure did not in fact have any effect because of the existence of the unlawful designation'. [43]

40. Secondly, it is also difficult in those particular circumstances to base a continuing interest on Bank Mellat's part in bringing proceedings on the possible rehabilitation or reparation of the harm suffered which recognition of the illegality of the general regime could constitute, [44] for two main reasons.

41. On the one hand, contrary to Bank Mellat's submissions, that regime did not make the bank the subject of opprobrium to the extent that being subject to that regime does not constitute a penalty for specifically identified personal conduct by Bank Mellat or suspected involvement in nuclear proliferation. I am inclined, rather, to consider, together with the Council and in line with the findings of the General Court, [45] that the regime at issue is in place to prevent the use of funds, transferred through banks such as the appellant, which could contribute to nuclear proliferation, including where those banks are unaware of that. I do not think, therefore, that the regime at issue could, per se, have caused any damage to Bank Mellat's reputation comparable to that at issue in the *Abdulrahim* case [46] and with regard to which it was imperative that it could, where applicable, result in reparation.

42. On the other hand, and in any event, the observation made above that the general regime has no effect on the appellant makes it impossible to identify any such damage to the reputation of the bank.

43. Thirdly, it is also in light of the foregoing considerations that I do not think that the Court could hold that Bank Mellat has an interest in bringing proceedings due to the fact that a finding of illegality in respect of the general regime could form the basis of a possible action for damages. Whilst I cannot agree with the Council's argument that the mere existence of the judgment under appeal by which the General Court dismissed the appellant's action against the acts at issue is sufficient to allow a finding that the condition, necessary to establish the non-contractual responsibility of the European Union, relating to the existence of a sufficiently serious breach of EU law, is, in any event, not met here, it is nevertheless clear that, in the absence of any legal effect on the appellant of the acts at issue, the chances of seeing a possible action for damages succeed cannot constitute an 'advantage' liable to be derived by the bank within the meaning of the Court's case-law on the interest in bringing proceedings.

44. Fourthly, there remains the final scenario, being that in which Bank Mellat should be found to have a continuing interest in bringing proceedings in order to induce the Council to make suitable amendments, and thereby avoid the risk that the unlawfulness alleged in respect of the acts at issue will be repeated. [47] That scenario laid down by the Court is, in my opinion, formulated too broadly. All parties have an interest, objectively, in unlawfulness not being repeated and that non-repetition

43 See footnote 12 of the appeal.

44 See judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331, paragraph 72 and case-law cited).

45 See paragraphs 127, 161 and 173 of the judgment under appeal.

46 Judgment of 28 May 2013 (C-239/12 P, EU:C:2013:331).

47 See judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331, paragraph 63 and case-law cited).

constitutes an advantage which could be present in any configuration. Interpreting that scenario in such a broad manner would lead the Court, in the end, to cease to recognise any effect on proceedings of the disappearance of the subject matter of the dispute. That is why the applicant should be required to show precisely the risk of repetition of unlawfulness upon which it relies. In my view, the fact that Bank Mellat's rights were not affected by the implementation of the regime at issue eliminates the condition relating to the existence of a risk of *repetition*. It is true that, in view of the provisional nature of the lifting of the restrictive measures against the Islamic Republic of Iran, there is a risk that those measures may be adopted again, as the appellant claims. However, in the event that those measures were reactivated, Bank Mellat would suffer the practical consequences of those measures for only the first time.

45. For all those reasons, my principal view is that it must be found that the appellant does not have an interest in bringing the appeal and the appeal must be dismissed as inadmissible. In those circumstances, the observations which follow will be provided by way of an alternative view only and will necessarily be more succinct.

B. Alternative view — continuation in the course of proceedings before the General Court of Bank Mellat's interest in bringing proceedings

46. Although I have just found that Bank Mellat does not have an interest in bringing the present appeal proceedings, the question of the continuation of Bank Mellat's interest in bringing the action for annulment before the General Court could arise by way of a preliminary point in the event that the Court did not share my position.

47. In this regard, I note that it is surprising that, whereas the judgment of the General Court dates from 2 June 2016, refers to the judgment of the Court given on 18 February 2016 confirming the annulment of the individual restrictive measures relating to the appellant[48] and contains specific observations on the existence of an interest on the part of the appellant in bringing proceedings at the time of bringing the action,[49] the General Court made absolutely no mention of the JCPOA, which became fully effective from 16 January 2016.

48. The failure to take into account the effects of that plan, added to the statement that the appellant had been automatically subject to the regime at issue from 18 February 2016,[50] vitiates the General Court's reasoning in relation to the appellant's interest in bringing proceedings, with regard to which the General Court was required to verify, where necessary of its own motion, not only whether it existed at the time of bringing the action but also whether it continued throughout the proceedings.

49. In this regard, it was only in response to a question inviting an oral response which was posed by the Court that the parties finally expressed their views on the failure, by the General Court, to take into account the effects of the JCPOA on Bank Mellat's interest in bringing the proceedings before the General Court. In essence, while they are all of the view that the General Court clearly did not take into account those effects or doubt that it did so, only Bank Mellat argues that, in accordance with the principles set out by the Court in the *Abdulrahim* judgment,[51] the General Court should, in any case, have found that Bank Mellat had a continuing interest in bringing proceedings before it due to the advantages which Bank Mellat could still derive from its action. According to Bank Mellat, the effect of the *ex tunc* annulment of the individual restrictive measures was that it was subject to the general regime with effect from its entry into force.

48 Judgment *Council* v *Bank Mellat* (C-176/13 P, EU:C:2016:96).

49 See paragraph 68 et seq. of the judgment under appeal.

50 See paragraph 76 of the judgment under appeal.

51 Judgment of 28 May 2013 (C-239/12 P, EU:C:2013:331).

50. However, the same reasoning as that used in the assessment of Bank Mellat's interest in bringing proceedings at the time of bringing the appeal leads me to find that that interest disappeared in the course of proceedings before the General Court since, through the combined effect of the JCPOA and the chronological overlap of the individual regime with the general regime, the absence of any real effect of the regime at issue on the legal situation of the appellant makes it impossible to imagine that Bank Mellat could have derived any advantages from its action before the General Court.

51. Thus, the judgment under appeal is vitiated by another error of law, in paragraph 77, as the General Court was wrong to conclude that 'a finding in the present case that the applicant has no interest in bringing proceedings against Article 1, point 15, of the contested regulation would have the effect of infringing the applicant's right to effective judicial protection, in so far as, after the definitive disappearance of the individual restrictive measures relating to the applicant, it would be subject to the effects of the regime at issue but would not be entitled to seek annulment of Article 1, point 15, of the contested regulation, because the period for bringing an action would have expired'. Contrary to the statement of the General Court, the annulment of that article was not capable of having legal consequences for Bank Mellat.[52]

52. Accordingly, assuming that the Court holds that the appeal is admissible, it should set aside the judgment under appeal due to the fundamental error of law which it contains with regard to the assessment of Bank Mellat's interest in bringing proceedings following the entry into force of the JCPOA and itself rule that there was no need to adjudicate on the appellant's action for annulment, in accordance with the case-law referred to in point 24 of this Opinion.

C. Further alternative view

1. Fourth and fifth grounds of appeal, alleging errors of law in the assessment of the conditions of the fourth paragraph of Article 263 TFEU and in the assessment of the jurisdiction of the General Court

(a) Fourth ground of appeal alleging an error of law in the assessment of the conditions of the fourth paragraph of Article 263 TFEU

(1) Judgment under appeal

53. In paragraph 44 et seq. of the judgment under appeal, the General Court verified that Bank Mellat satisfied the conditions laid down by the fourth paragraph of Article 263 TFEU for its action to be held to be admissible. After having found that Article 1, point 15, of Regulation No 1263/2012 was a regulatory act,[53] the General Court recalled the requirements of the fourth paragraph of Article 263 TFEU as clarified by the case-law. In that regard, it recalled that an action against such an act was admissible provided that it was established that it directly concerned Bank Mellat without any discretion being left to the addressees of the act responsible for its implementation.[54] Moreover, a regulatory act which directly affects the legal situation of a natural or legal person must not require implementing measures in order to be capable of challenge before the EU Courts.[55]

52 See paragraph 78 of the judgment under appeal.

53 See paragraphs 44 to 55 of the judgment under appeal.

54 See paragraph 56 of the judgment under appeal.

55 See paragraphs 57 and 58 of the judgment under appeal.

54. After having recalled the terms of the analysis which it was going to be required to undertake, the General Court carried out a separate examination of the provisions of Article 1, point 15, of Regulation No 1263/2012. It held that, as a financial institution established in Iran, Bank Mellat was not directly affected by Article 30a of amended Regulation No 267/2012 and that its action, as far as it concerned that provision, must be held to be inadmissible.[56] It went on to find that the first subparagraph of Article 30b(3) of amended Regulation No 267/2012 granted national authorities faced with a request for a transfer a discretion to determine whether the proposed transfer could breach other provisions of the regulation concerned, so that Bank Mellat could not claim to be directly concerned by that first subparagraph of Article 30b(3) which, moreover, entailed implementing measures. Bank Mellat's action was therefore held to be inadmissible as far as it concerned the first subparagraph of Article 30b(3) of amended Regulation No 267/2012.[57]

55. The General Court went on to hold that Article 1, point 15, of Regulation No 1263/2012 was of direct concern to Bank Mellat and did not entail implementing measures in three other respects: Article 30(1) (which provides for a prohibition on transfers, with no possibility of authorisation), Article 30(3)(a) together with Article 30(5) (which provides, in respect of certain transfers, for a prior notification obligation which is not subject to assessment by national authorities) and Article 30(3)(b) and (c), together with Article 30(5) (which provides for an obligation, which is not subject to assessment by national authorities and does not entail implementing measures, to initiate an authorisation procedure for transfers exceeding a certain threshold) of amended Regulation No 267/2012.[58]

56. The General Court consequently held that Bank Mellat's action was admissible in so far as it was brought against the three provisions referred to in the preceding point.[59]

(2) Summary of the arguments of the parties

57. In essence, Bank Mellat criticises the General Court for failing correctly to assess the direct concern condition, within the meaning of the fourth paragraph of Article 263 TFEU, with regard to Article 30a of amended Regulation No 267/2012. It argues that it was not possible for the General Court to consider that provision in isolation with regard to that condition to the extent that it is the regime at issue as a whole that directly affected it. An examination of Article 30a together with Article 30 of that regulation should have led the General Court to find that Article 30a completed Article 30 and that they were complementary provisions. In any event, even considered in isolation, the analysis relating to Article 30a of Regulation No 267/2012 should have led to a finding that Bank Mellat was indeed directly affected by that provision.

58. Bank Mellat also challenges the analysis which led the General Court to hold that the action was inadmissible in so far as it was brought against the first subparagraph of Article 30b(3) of amended Regulation No 267/2012. Bank Mellat argues that that article directly affects it in so far as it constitutes a provision which is central to the general regime implemented by Article 1, point 15, of Regulation No 1263/2012, in the context of which it should be viewed, and in so far as it gives national authorities the power to prohibit transactions, thus weakening the bank's commercial position. Those authorities do not have any discretion under that provision, which must be implemented automatically, any discretion which they may have being exercised only at a later stage. The first subparagraph of Article 30b(3) of amended Regulation No 267/2012 does not entail any

56 See paragraph 59 of the judgment under appeal.

57 See paragraphs 60 and 61 of the judgment under appeal.

58 See paragraphs 62 to 65 of the judgment under appeal.

59 See paragraphs 66 and 67 of the judgment under appeal.

implementing measures since it immediately and automatically confers a discretion on national authorities and thus has legal effect without the need for an intermediate measure on the part of those authorities. Bank Mellat points out that it should not find itself in a situation where, to challenge a provision and have access to the courts, it is obliged to infringe the law.

59. In the alternative, Bank Mellat argues that it submitted before the General Court that it was individually concerned by the general regime as a member of a class to which that regime related, which submission was not examined by the General Court nor, at the least, was implicitly rejected.

60. Finally, Bank Mellat argues that the separate examination of the provisions which the General Court carried out vitiated the General Court's analysis with regard to compliance with the conditions of the fourth paragraph of Article 263 TFEU and limited the judicial review to certain provisions only. Even if the General Court was able to consider the various elements of the general regime separately, it should have concluded that they are interlinked and that it is impossible to separate them from one another in the event of annulment.

61. The Council, the Commission and the United Kingdom are of the view that the General Court's analysis relating to compliance with the conditions of the fourth paragraph of Article 263 TFEU is free of errors of law with regard to Article 30a and Article 30b(3) of amended Regulation No 267/2012. In response to a question posed by the Court, the United Kingdom nevertheless takes the view that the General Court should have held, on the one hand, that Bank Mellat's action was brought against a legislative, not a regulatory, act and, on the other, that that action was also inadmissible in its entirety, in so far as it was brought against the other elements of the general regime contained in Article 1, point 15, of Regulation No 1263/2012, and due to a lack of a direct and individual interest on Bank Mellat's part.

(3) Analysis

62. As a preliminary point, I note that the General Court's finding that Regulation No 1263/2012 is a 'regulatory act' within the meaning of the fourth paragraph of Article 263 TFEU has not been challenged by the appellant.[60] There is therefore no need to revisit that issue and the analysis which follows is based on the premiss that it is indeed a regulatory act.

63. Where such an act is concerned, the fourth paragraph of Article 263 TFEU stipulates two conditions for an action for annulment to be admissible: the applicant must be directly concerned by the act challenged and that act must not entail implementing measures.

64. The parties' discussions arising from the opportunity to analyse compliance with those two conditions involved separating the various elements of the regime at issue rather than considering them together, as Bank Mellat proposes. I note that the defining feature of Bank Mellat's action before the General Court was the fact that it formally challenged a single provision — Article 1, point 15, of Regulation No 1263/2012 — which, itself, contained three articles, consisting of six, three and five paragraphs respectively and of numerous subdivisions. The method of analysis employed by the General Court is, in my view, fully justifiable in those circumstances, as I will show at the end of my analysis.

60 Only the United Kingdom appears to challenge that finding in its written response to the questions posed by the Court.

65. The General Court's reasoning in relation to Article 30a of amended Regulation No 267/2012 appears to be free of any errors of law. That article expressly provides that it governs situations which do not fall within the scope, including the personal scope, of Article 30 of that regulation.[61] It is clear that, as a bank established in Iran, Bank Mellat was covered by the general prohibition of transfers of funds under Article 30(1)(a) of amended Regulation No 267/2012 and was therefore not covered by the measures laid down by Article 30a of that regulation. It is difficult for a party which does not fall within the scope of a provision to establish that it is directly concerned by that provision within the meaning of the fourth paragraph of Article 263 TFEU. Bank Mellat's argument that the General Court should have looked at that condition by considering all the provisions of Article 1, point 15, of Regulation No 1263/2012 is, in any event, ineffective due to the absence of any effect of Article 30a of amended Regulation No 267/2012 on its legal situation.

66. As to the first subparagraph of Article 30b(3) of amended Regulation No 267/2012, it seeks to specify the conditions under which the general rule laid down by Article 30 of that regulation[62] — that is to say a prohibition in principle of transfers, accompanied by a regime of exceptions subject to prior notification or authorisation — must be implemented in practice. It thus provides that 'the competent authorities shall grant the authorisation, under such terms and conditions as they deem appropriate, unless they have reasonable grounds to determine that the transfer of funds for which the authorisation is requested could be in breach of any of the prohibitions or obligations in [amended Regulation No 267/2012]'. Consequently, the first subparagraph of Article 30b(3) of amended Regulation No 267/2012 subjects proposed transfers, in each case, to an authorisation which is automatically granted by national authorities in the absence of any suspected circumvention of the rules laid down by the regime at issue or to a refusal on the part of those authorities further to the exercise of their discretion where this is not the case.

67. With regard to the condition stipulated in the fourth paragraph of Article 263 TFEU that the appellant must be directly concerned by the act which it claims to challenge, it seems to me to be difficult, due to their consubstantiality, to hold, on the one hand, that that condition is met with regard to the general provision — namely Article 30 of amended Regulation No 267/2012 — and not with regard to the provision which establishes the detailed rules of that general provision — namely the first subparagraph of Article 30b(3) of that regulation. I admit, therefore, to having some reservations in view of the General Court's position on this point which seems to me to have merged two conditions which are nevertheless distinct by taking the view that, since decisions of national authorities were necessary under the first subparagraph of Article 30b(3) of amended Regulation No 267/2012, the appellant could not be directly concerned within the meaning of the fourth paragraph of Article 263 TFEU.

68. That said, that further error of law could have no effect if, in any event, it were to be confirmed that the first subparagraph of Article 30b(3) of amended Regulation No 267/2012 is a provision which entails implementing measures. I come now, therefore, to the analysis of the second condition set out at the end of the fourth paragraph of Article 263 TFEU.

69. The now settled case-law of the Court, most recently recalled in the judgments *Industrias Quimicas del Vallés* v *Commission*[63] and *European Union Copper Task Force* v *Commission*,[64] requires, in essence, that the expression 'which … does not entail implementing measures' be interpreted in the light of the objective of the fourth paragraph of Article 263 TFEU which is to ensure that individuals do not have to break the law in order to have access to a court. Where a

61 Article 30a(1) of amended Regulation No 267/2012 is worded as follows: 'Transfers of funds to and from an Iranian person, entity or body *which do not fall within the scope of Article 30(1)* shall be processed as follows: …' (emphasis added).

62 In particular, Article 30(3)(b) and (c) of amended Regulation No 267/2012. It should be pointed out that the first subparagraph of Article 30b(3) of that regulation also concerns the cases set out in Article 30a of that regulation, but I have already explained, in this regard, that Article 30a did not concern the appellant.

63 Judgment of 13 March 2018 (C-244/16 P, EU:C:2018:177, paragraph 42 et seq. and case-law cited).

64 Judgment of 13 March 2018 (C-384/16 P, EU:C:2018:176, paragraph 32 et seq. and case-law cited).

regulatory act entails implementing measures, judicial review of compliance with the European Union legal order is ensured irrespective of whether those measures were adopted by the European Union or the Member States and litigants are therefore protected against the application of the act concerned by the ability to challenge the implementing measures which the act entails. Where implementation of that act is a matter for the Member States, litigants may plead the invalidity of the basic act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court, under Article 267 TFEU. Consequently, whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the fourth paragraph of Article 263 TFEU. It is necessary, furthermore, to refer exclusively to the subject matter of the action and it is entirely irrelevant whether those measures are of an automatic nature.

70. In view of that case-law, I would be inclined to take the view that, if providing Bank Mellat with effective judicial protection is the consideration which must guide the interpretation of the last condition to be met under the fourth paragraph of Article 263 TFEU, the conclusion which the General Court reached by emphasising the need for a decision of the national authorities to authorise or, where applicable, to refuse the proposed transfer appears reasonable since, in such a case, the appellant would have been quite free to challenge a national decision refusing the proposed transfer before the national courts, without itself being obliged to breach EU law.

71. Confirmation of the finding that the action should be held to be inadmissible in so far as it was brought against the first subparagraph of Article 30b(3) of Regulation No 267/2012 supports the view that the General Court took a satisfactory approach by considering each provision separately with regard to the fourth paragraph of Article 263 TFEU. If it had been required to rule on the satisfaction of the conditions provided for in that article regarding Article 1, point 15, of Regulation No 1263/2012 considered as a whole, what should it have prioritised: the fact that Bank Mellat's action clearly met those conditions in the light of Article 30 of amended Regulation No 267/2012 or, on the contrary, should it have found that the action was wholly inadmissible due to there being two problematic provisions in that regard, one of which does not directly affect the appellant (Article 30a of that regulation), and the other of which entails implementing measures (first subparagraph of Article 30b(3) of that regulation)? The answer to that question is very difficult, and the approach ultimately chosen by the General Court appears measured as it fully respected Bank Mellat's right to bring proceedings, whilst also ensuring that the conditions set out in the fourth paragraph of Article 263 TFEU were applied in a coherent manner.[65]

72. Consequently, the fourth ground of appeal should be rejected as unfounded.

(b) Fifth ground of appeal alleging an error of law in the assessment of the jurisdiction of the General Court

(1) Judgment under appeal

73. In paragraph 25 et seq. of the judgment under appeal, the General Court examined its own jurisdiction to rule on Bank Mellat's third head of claim seeking to have Article 1, point 6, of Decision 2012/635 declared inapplicable to it.[66] After having recalled the wording of the fourth paragraph of Article 263 TFEU, and Articles 275 and 277 TFEU, the General Court found that Article 1, point 6, of Decision 2012/635 was a provision relating to the CFSP within the meaning of that Article 275 TFEU.[67] It noted that the derogation from rule of the jurisdiction of the Court, contained in

65 With the exception of the error of law identified in point 67 of this Opinion.

66 The General Court indicates, in paragraph 31 of the judgment under appeal, that the appellant stated that that head of claim should be construed as a plea of illegality under Article 277 TFEU.

67 See paragraphs 28 to 31 of the judgment under appeal.

Article 275 TFEU, must, as such, be interpreted narrowly. It then held that the measures provided for by Article 1, point 6, of Decision 2012/635 were general measures, whose scope was determined by reference to objective criteria and not by reference to natural or legal persons and that, consequently, it was not a decision providing for restrictive measures relating to such persons within the meaning of the second paragraph of Article 275 TFEU.[68] It then noted that the plea of illegality had been raised by the appellant in the context of an action for annulment brought against Article 1, point 15, of Regulation No 1263/2012 which is intended to implement, in the field of the FEU Treaty, Article 1, point 6, of Decision 2012/635.[69] However, according to the General Court, that Article 1, point 15, is not a decision providing for restrictive measures against natural or legal persons within the meaning of the second paragraph of Article 275 TFEU because it applies to objectively determined situations and produces legal effects in respect of categories of persons envisaged in a general and abstract manner and nor does its application flow from an assessment of the particular circumstances of each establishment concerned.[70] Consequently, the plea of illegality in respect of Article 1, point 6, of Decision 2012/635 was not raised in support of an action for annulment of a decision providing for restrictive measures within the meaning of the second paragraph of Article 275 TFEU.[71] In those circumstances, the General Court held that it did not have jurisdiction to rule on the plea of illegality in respect of Article 1, point 6, of Decision 2012/635.[72] It nevertheless went on to hold that the exception to the jurisdiction of the Courts of the European Union provided for in Article 275 TFEU did not go so far as to preclude review of the legality of a measure adopted under Article 215 TFEU that does not fall within the CFSP but which can be adopted only if there has been a prior CFSP decision, as is the case of Article 1, point 15, of Regulation No 1263/2012. The General Court therefore found that it had jurisdiction to rule on Bank Mellat's first and second heads of claim which related to that provision.[73]

(2) Arguments of the parties and analysis

74. In essence, Bank Mellat criticises the General Court for taking an overly formalistic and narrow view of its own jurisdiction, which is incompatible with the purpose of the system of effective judicial protection. Bank Mellat argues that, to the extent that it claims to be directly concerned by the regime at issue without the need, for those purposes, for implementing measures, the individual nature of the measures for the purposes of Article 275 TFEU is confirmed, and all the more so because they are measures adopted in respect of legal persons including the appellant. Bank Mellat also argues that Article 1, point 6, of Decision 2012/635 itself provides for such measures, which is sufficient to provide a basis for the General Court's jurisdiction to rule on the plea of illegality raised by the appellant. In the alternative, Bank Mellat argues that Article 1, point 15, of Regulation No 1263/2012 clearly constitutes a restrictive measure, that the legality of that article can be challenged and that a right to bring an incidental claim against Article 1, point 6, of Decision 2012/635 should be recognised on the basis of Article 277 TFEU due to the direct legal connection between the two provisions at issue.

75. The Council, the Commission and the United Kingdom consider that the present ground of appeal should be rejected as unfounded.

68 See paragraph 33 of the judgment under appeal.

69 See paragraphs 34 and 35 of the judgment under appeal.

70 See paragraph 36 of the judgment under appeal.

71 See paragraph 37 of the judgment under appeal.

72 See paragraph 38 of the judgment under appeal.

73 See paragraphs 39 and 40 of the judgment under appeal.

76. The legal basis of Decision 2012/635 is Article 29 TEU, which is one of the provisions of Chapter 2 of Title V of the TEU. In those circumstances, it appears that that decision does indeed fall within the scope of the exclusion provided for by the first paragraph of Article 275 TFEU so that, a priori, the Courts of the European Union do not have jurisdiction to hear disputes relating to the legality or the validity of such a decision. However, the second paragraph of Article 275 TFEU provides that the Courts of the European shall nevertheless have jurisdiction to review the legality 'of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V' of the TEU. Bank Mellat argues that Article 1, point 6, of Decision 2012/635 provides for precisely such measures and that the General Court should therefore have found that it had jurisdiction to rule on the plea of illegality which Bank Mellat had raised before it.

77. The interpretation which Bank Mellat suggests that the Court give to the second paragraph of Article 275 TFEU seems to me to render that provision meaningless. It is clear that the second paragraph of Article 275 TFEU, as a provision which derogates from the jurisdiction of the Courts of the European, must be interpreted narrowly — which the General Court also noted. However, by suggesting that Article 1, point 6, of Decision 2012/635 constitutes a decision providing for restrictive measures against natural or legal persons within the meaning of the second paragraph of Article 275 TFEU, Bank Mellat seeks to reduce considerably the scope of the exclusion set out in the first paragraph of that article. The difference in nature between the measures which affected Bank Mellat individually, which gave rise to the judgment of the Court dated 18 February 2016,[74] and those under consideration in the present appeal perfectly illustrates the distinction which must be made when applying the second paragraph of Article 275 TFEU. In other words, the Courts of the European Union do not have jurisdiction purely on the basis that there are restrictive measures, in the generic sense of the term. Those measures must also be of an individual nature.

78. Such an approach was confirmed by the Court for the first time in its judgment *Gbagbo and Others* v *Council*[75] in which it held that 'as regards measures adopted on the basis of provisions relating to the [CFSP], … it is the individual nature of those measures which, in accordance with the second paragraph of Article 275 TFEU and the fourth paragraph of Article 263 TFEU, permits access to the Courts of the European Union'.

79. That difference can be further illustrated by comparing the provisions of Decision 2012/635. Article 1, point 6, of that decision is intended to implement a general regime of restrictive measures indiscriminately affecting, in the circumstances described in it, banks domiciled in Iran on the basis of a general criterion and without any allegation of involvement in nuclear proliferation being made against those banks. That article falls within the exclusion provided for in the first paragraph of Article 275 TFEU. However, Article 2 of Decision 2012/635, which completes the list of persons and entities involved in nuclear or ballistic missile activities and persons and entities providing support to the Government of Iran, would fall, according to my analysis, within the scope of the second paragraph of Article 275 TFEU due to the individual nature of those measures.

80. Paragraph 33 of the judgment under appeal, in which the General Court sought to show that Article 1, point 6, of Decision 2012/635 was intended to implement restrictive measures of a general nature[76] before finding that it did not have jurisdiction, therefore appears to be free of any error of law.

74 Judgment *Council* v *Bank Mellat* (C-176/13 P, EU:C:2016:96).

75 Judgment of 23 April 2013 (C-478/11 P to C-482/11 P, EU:C:2013:258). The Court confirmed its position in the judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 103).

76 Or 'measures of general application' within the meaning of paragraph 98 of the judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236).

81. More surprising is the next stage of the General Court's reasoning, set out in paragraphs 35 and 36, in which the General Court observes that Article 1, point 15, of Regulation No 1263/2012 'is not a decision providing for restrictive measures … within the meaning of the second paragraph of Article 275 TFEU'. Such an assertion is irrelevant when the General Court was required to establish the situation of Article 1, point 6, of Decision 2012/635 with regard to Article 275 TFEU. However, that error of law does not affect the correct conclusion which it reached in paragraph 38 of its judgment.

82. In those circumstances, the fifth ground of appeal must be rejected as unfounded.

2. Substantive grounds of appeal

(a) First ground of appeal alleging an error in the interpretation and application of the requirement of necessity within the meaning of Article 215(1) TFEU

83. The appellant complains here that the General Court wrongly interpreted Article 215(1) TFEU and that it vitiated its judgment through an 'independent material error'. It argues that the General Court was wrong to hold that the requirement of necessity set out in that article did not concern the relationship between the act adopted on that basis and the CFSP aim pursued.

84. Article 215(1) TFEU provides that 'where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures …'.

85. Not only does the appellant's classification of the error which the General Court is alleged to have made appear to be incorrect,[77] it seems clear, from reading Article 215(1) TFEU alone, that the relationship of necessity which it introduces is indeed between the CFSP decision and the subsequent act which is adopted. Consequently, the General Court was asked, where necessary, to verify that Article 1, point 15, of Regulation No 1263/2012 constituted a measure which was necessary for the implementation of Decision 2012/635, and in particular Article 1, point 6, of that decision. The General Court was therefore right to find, in paragraph 87 of the judgment under appeal, that 'the reference to "necessary measures" is intended to ensure that the Council does not, under Article 215 TFEU, adopt restrictive measures that go beyond those laid down by the corresponding CFSP decision'. The Court has already observed that the Council's implementing power in that matter is subject to controls.[78] In this regard, and as the Commission rightly pointed out, the measures provided for by Article 1, point 15, of Regulation No 1263/2012 are already to a very large extent set out in Article 1, point 6, of Decision 2012/635.

86. In those circumstances, the first ground of appeal should be rejected as unfounded.

(b) Second ground of appeal alleging an error of law in the application of the principle of proportionality

87. Bank Mellat argues that the General Court's reasoning is vitiated as a result of an incorrect application of the principle of proportionality which led that Court to find that the regime at issue was compliant with that principle. The appellant identifies six objections. The first alleges an inappropriate definition of the standard of review which the Courts of the European Union must

77 It would seem to be more of an error of law than a material error.

78 See judgment of 1 March 2016, *National Iranian Oil Company* v *Council* (C-440/14 P, EU:C:2016:128, paragraph 54).

apply where such a regime is concerned. The second alleges an incorrect assessment of the severity of the sanctions. The third alleges an error in the identification of the aim pursued by the regime at issue. The fourth alleges an incorrect assessment of the necessity of that regime. The fifth alleges an error in the assessment of the existence of less restrictive alternative measures. The sixth and final objection alleges that, in its assessment relating to the principle of proportionality, the General Court failed to take sufficient account of Bank Mellat's individual situation.

88. With regard to the definition of the appropriate standard of judicial review, Bank Mellat argues, in essence, that the General Court reversed the burden of proof by failing to hold that the legal safeguards surrounding the adoption of individual restrictive measures can be applied to the assessment of the legality of a general regime such as the regime at issue, which led to a breach of its right to effective judicial protection. However, the General Court did not err in law by holding[79] that the case-law relied on by Bank Mellat before it was not applicable since the acts at issue, and in particular Regulation No 1263/2012, constituted acts of general application whose legal regime is different from that of individual decisions adopting individual restrictive measures against natural and legal persons whose designation is based on personal conduct, identified by the Council, corresponding to the designation criterion adopted by it. Furthermore, as the Council rightly pointed out, the regime at issue was adopted in an area involving political, economic and social choices and in which the Court has already allowed the European Union legislature a broad discretion to carry out those complex assessments, so that the legality of the regime at issue with regard to the principle of proportionality could be affected only if the regime was manifestly inappropriate having regard to the objective pursued.[80] It is clear from paragraph 110 of the judgment under appeal that the General Court did indeed seek to determine the proportionality of the regime at issue and, in particular, whether the Council could find that the adoption of that regime was appropriate and necessary in order to achieve the objective pursued of preventing nuclear proliferation and its funding without causing disproportionate disadvantages to the appellant. The General Court, in those circumstances, applied an appropriate standard of review in such a case.

89. With regard to the assessment of the severity of the sanctions, although the appellant clearly identifies that its criticism relates to paragraphs 205 to 211 of the judgment under appeal, it is nevertheless clear that, for the remainder, it simply alleges, without substantiation, that the General Court incorrectly assessed the severity of the sanctions. As Bank Mellat failed to provide sufficient observations on this point, the examination of the argument stops there.

90. With regard to the identification of the aim pursued by the regime at issue, the appellant again argues that the General Court should have required the Council to prove the appropriateness of that regime to the aim purportedly pursued of preventing nuclear proliferation. Bank Mellat also criticises the General Court for attaching too much significance to the Council's statements and for having been unable to identify the illegitimate aim actually being pursued, namely to put economic pressure on Iran. However, it should be noted that the appellant's arguments here relate to a part of the judgment under appeal which focused on what the General Court described as the 'first aim',[81] namely[82] that of preventing nuclear proliferation, and that the General Court did not simply accept the Council's assertions in order to hold that that aim was effectively pursued by the regime at issue,[83] but took its analysis further by finding that the appellant's own experiences seemed to corroborate the Council's points, since Bank Mellat was led to provide certain services to a listed entity without

79 See paragraph 100 et seq. of the judgment under appeal.

80 See judgment of 28 November 2013, *Council* v *Manufacturing Support & Procurement Kala Naft* (C-348/12 P, EU:C:2013:776, paragraph 120). See also judgment of 1 March 2016, *National Iranian Oil Company* v *Council* (C-440/14 P, EU:C:2016:128, paragraph 77).

81 See paragraph 117 et seq. of the judgment under appeal.

82 My emphasis.

83 In paragraph 122 of the judgment under appeal, the General Court displays a degree of caution as to the assumptions put forward by the Council summarised in the preceding paragraph of that judgment.

knowing that it was doing so.[84] Finally, Bank Mellat does not have grounds to argue that no proper analysis of the true aim pursued — namely to exert economic pressure on Iran — was carried out, as is shown by paragraphs 136 to 143 of the judgment under appeal, in which the General Court held that it did not emerge from the acts challenged that such an aim was being pursued. The General Court therefore correctly identified the aim pursued by the regime at issue.

91. With regard to the assessment of the necessity of the regime at issue, Bank Mellat argues, in essence, that the regime at issue goes beyond that which is necessary to achieve the aim pursued in so far as it applies to entities in respect of which there is no evidence of involvement in proliferation activities and in so far as it does not provide for sufficient exceptions. Bank Mellat argues that the General Court did not show that the Financial Embargo was necessary to achieve the aim pursued and its reasoning in this regard is far too broad. It can be seen, however, from the judgment under appeal that the General Court, after having noted that the regime at issue was intended to reinforce the restrictive measures adopted against the Islamic Republic of Iran, nevertheless held that there was a degree of continuity with the previous general regime, which Bank Mellat did not allege was unnecessary, and that the measured reinforcement of the regime in three respects[85] had not suddenly rendered the regime at issue excessive.[86] Furthermore, the appellant seems to criticise the General Court for extending the conclusions drawn from the analysis of the Financial Action Task Force to the field of nuclear proliferation by taking the view that those conclusions were evidence of systemic deficiencies in the Iranian banking and finance sector which rendered the reinforcement of the scrutiny of that sector carried out by the regime at issue consistent with the aim of preventing nuclear proliferation. However, that criticism seems to me to fall outside the review carried out by the Court in the context of an appeal as it seeks to call into question before the Court facts relied upon by the Council before the General Court[87] but which Bank Mellat does not argue have been distorted. For the remainder, it has already been confirmed that the regime at issue is not based on the identification of a risk specific to each banking and financial entity of participation in the prohibited activity and that it provides for a whole series of exceptions and exemptions which seek to contain, as far as possible, the negative effects of that regime. Those are two elements correctly identified by the General Court which clearly support the finding that the regime at issue does not go beyond that which is necessary to achieve the aim pursued.

92. With regard to the existence of less restrictive alternative measures, Bank Mellat argues that the General Court did not take the view, on the basis of those measures, that the regime at issue should have provided that it targeted only financial institutions for which there was a reasonable suspicion or a more favourable exceptions regime or clearer and less discretionary rules. However, the General Court's assessment relating to the identification of the systemic deficiencies in the Iranian banking sector, to which I have just referred, in my view makes it quite clear that it is necessary to subject the whole sector to a strict regime covering all Iranian banks, regardless of any consideration of their personal involvement in nuclear proliferation, and all the more so because the regime at issue did not seek to prohibit all transfers but, by subjecting transfers not only to a prior notification and authorisation regime but also to an exemptions regime, to evaluate those transfers in light of the risk which they posed, if any, in nuclear proliferation terms. I note, in addition, that Bank Mellat does not show how the alternative measures which it proposes would be as effective as the regime at issue, which definitively prevents its argument from succeeding.

93. With regard to taking into account Bank Mellat's individual situation for the purposes of assessing the proportionality of the regime at issue, the appellant argues, in essence, that the General Court should have taken into account the fact that there was no evidence of any support on its part for nuclear proliferation and that the General Court should have found that the regime at issue was not

84 See paragraph 126 of the judgment under appeal.

85 See paragraph 164 of the judgment under appeal.

86 See paragraph 165 of the judgment under appeal.

87 See paragraph 167 of the judgment under appeal.

necessary in view of that element. Again, the appellant's arguments on this issue are based on a misunderstanding of the nature of the regime at issue, that is to say a general regime which applied to entities on whose part it was not necessary to allege personal conduct linked to the risk of nuclear proliferation. Furthermore, the fact that Bank Mellat unknowingly provided services to a listed entity tends rather to confirm the necessity of a general regime such as the regime at issue for the purposes of tackling nuclear proliferation in Iran more effectively. That is also what the General Court held in paragraph 195 of the judgment under appeal, so that, contrary to what Bank Mellat claims and even though the General Court was not, in my view, obliged to do so due to the general nature of the regime at issue, that Court did indeed take into account, in part, the appellant's situation but in order to draw the opposite conclusions to those sought by Bank Mellat.

94. For all those reasons and as it has not been possible to identify any errors of law in the General Court's examination of the proportionality of the regime at issue, the second ground of appeal must be rejected as unfounded.

(c) Third ground of appeal alleging that the General Court erred in law in holding that the regime at issue was compliant with the general principles of law

95. Bank Mellat argues that the General Court was wrong to find that the arguments formulated as part of the third plea in law raised before the General Court were inadmissible, in so far as they related to the first subparagraph of Article 30b(3) of Regulation No 267/2012, and was also wrong to hold that the regime at issue did not breach the principles of legal certainty and non-discrimination, as well as the obligation to state reasons and the procedural safeguards provided in principle in the context of the adoption of restrictive measures.

96. With regard to the admissibility of the arguments formulated against the first subparagraph of Article 30b(3) of Regulation No 267/2012, I refer to point 66 et seq. of this Opinion.

97. With regard to the argument alleging a breach of the principle of legal certainty, after recalling the established case-law on that matter, the General Court correctly concluded that the regime at issue met the criteria required by the Court in order to hold that the need for legal certainty was satisfied.[88] In view of the nature of the regime under consideration and the rules for its operation, as defined in Article 1, point 15, of Regulation No 1263/2012, the appellant does not have grounds to argue that the principle of legal certainty is infringed in any way, the circumstances in which a prior notification or authorisation was necessary being, in my view, clearly set out. Consequently, I have no option but to share the General Court's conclusion that the provisions of the regime concerned, in particular Article 30(2) to (4) of Regulation No 267/2012, 'define, in a sufficiently clear and precise manner, the scope of the restrictions and obligations'.[89]

98. With regard to the argument alleging that the General Court wrongly interpreted the scope of the procedural obligations requiring to be met with a view to the adoption of the regime at issue, the General Court, first of all, verified that the reasons provided to the entities covered by the general regime had allowed those entities to understand the *ratio legis* of that regime in order to be able, where necessary, to challenge its legality[90] before, secondly, distinguishing the procedural safeguards which must be provided to natural or legal persons subject to individual restrictive measures from those which must be provided to persons made the subject of a general regime such as the regime at issue.[91] In that regard, there is no option but to uphold the General Court's analysis, since it is clear, as I have already had the opportunity to emphasise, that the regime at issue, unlike individual

88 See paragraphs 242 and 243 of the judgment under appeal.

89 Paragraph 243 of the judgment under appeal.

90 See paragraphs 226 to 229 of the judgment under appeal.

91 See paragraphs 232 to 240 of the judgment under appeal.

restrictive measures, is not based on a specific allegation of personal conduct which conflicts with the CFSP aim pursued, but on the risk of the use by Iran of the banks and financial institutions situated on its territory for nuclear-proliferation purposes, including where they are unaware of that. In those circumstances, the procedural safeguards provided in the phase preceding the adoption of the act are quite different from those governing the adoption of individual restrictive measures.[92] The regime at issue clearly does not constitute an individual decision addressed to Bank Mellat. Contrary to Bank Mellat's submissions, and in view of the difference between the legal regime applicable to individual restrictive measures and that applicable to the regime at issue, the conclusions drawn by the General Court in reviewing the legality of the individual restrictive measures are entirely independent of those which it could draw in the context of the action seeking to challenge the legality of the regime at issue. In those circumstances, the General Court did not err in law by rejecting the arguments alleging a breach of the obligation to state reasons and a breach of the legal safeguards required where restrictive measures are concerned.

99. Finally, with regard to the argument alleging a breach of the principle of non-discrimination, it is also clear here that the General Court did not err in law in holding that the specific treatment to which Iranian entities falling within the personal scope of the regime at issue are subject was justified by the very essence of the regime which sought to help to combat the risk of nuclear proliferation in Iran, once it was established that those entities could, even where they were unaware of it, be involved in funding such proliferation. As to the appellant's argument that that specific treatment is not necessary to achieve the aim pursued and that other, less restrictive measures exist, I am inclined to take the view that it seeks to call into question the analysis carried out by the General Court in reviewing the proportionality of the regime at issue and I therefore refer to my analysis in the context of the second ground of the present appeal.

100. For those reasons, the third ground of appeal should be rejected as unfounded.

V. Costs

101. I will deal with costs only in relation to my principal view, that is to say that the appeal is inadmissible. However, I cannot help but think that if the General Court had taken the correct approach to the issue of the disappearance of the interest in bringing proceedings in the course of the proceedings before it and if it had found that there was no need to adjudicate, that could have made the appellant decide not to bring the present appeal. That factor may, therefore, be taken into account when costs are determined.

102. Thus, under Article 138(1) of the Rules of Procedure of the Court, which applies to the appeal procedure by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Council applied for costs and the appeal brought by Bank Mellat must be held to be inadmissible, Bank Mellat should be ordered to pay the costs relating to the appeal. However, and for the reasons previously set out, I take the view that the Court should apply the final sentence of Article 184(4) of the Rules of Procedure of the Court and decide that the United Kingdom and the Commission will bear their own costs.

VI. Conclusion

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

(1) dismiss the appeal;

92 See, for a summary of those safeguards, judgment of 21 December 2011, *France* v *People's Mojahedin Organization of Iran* (C-27/09 P, EU:C:2011:853, paragraphs 64 to 66).

(2) order Bank Mellat to pay the costs incurred by the Council of the European Union;

(3) order the United Kingdom of Great Britain and Northern Ireland and the European Commission to bear their own costs.