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ACTION FOR DAMAGES IN THE CASE OF RESTRICTIVE MEASURES TAKEN AGAINST NATURAL AND LEGAL PERSONS: CASE C-123/18 P

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Introduction

The thesis will address the non-contractual liability of the European Union. This is a liability that takes place in the event that a EU institution violates the generic duty of the *neminem laedere*, which does not derive from a contract, but it extends to all and which establishes that the legal sphere of others must not be violated.

The compliance with this obligation by the European Union is not easy, since its institutions have to carry out functions that require a significant amount of discretion.

For this reason, the violation that gives rise to non-contractual liability must be a 'sufficiently serious breach of a rule of EU law'. In order to find a grave violation, the degree of clarity and precision of the rule breached is assessed, as well as the margin of discretion that such rule reserves for the Union institutions.

The violation is considered 'sufficiently serious' where certain fundamental rights are prevented, such as the right to defense.

With regard to the assessment of the seriousness of the violation, some considerations are necessary, as it often has a complex jurisprudential content. For example, the infringement of a rule of EU law such as to prevent the injured party from being able to exercise his right to defense is sufficient.

Moreover, in order to give rise to non-contractual liability, it is necessary that three conditions are simultaneously met:

the first condition provides that the unlawfullness derives from the conduct of the institution or agents of the Union in the exercise of their functions;

the second condition requires the existence of a real and actual damage;

and the third condition requires the existence of a direct causal link between the damage suffered and the conduct of the institutions or agents of the Union in the exercise of their functions.

The various functions performed by the Union include the management of the security policy, which is carried out following a rigorous procedure that involves other bodies and entities. The main objective is to anticipate the emergence of any internal and international security issue.

In this perspective, the Union makes use of blacklists, which are lists in which various subjects are included when suspected of criminal activities. The inclusion in the lists mus always be motivated by the regulation that provides it.

The dissertation examines the case of the inclusion of Hanseantic Trade Trust & Shipping GmbH in the lists, a maritime shipping company that has been the subject of multiple insertions in the aforementioned lists which, however, have proved to be inadequate under various aspects, in particular with respect to the obligation to state reasons. The following work describes the case analysing the appeals filed before the EU General Court and the final one discussed before the Court of Justice of the European Union.

CHAPTER I

EU NON-CONTRACTUAL LIABILITY

1.1 Normative context

In the legal sphere, the existence of 'liability' presupposes a situation deriving from a specific relationship, or from a specific norm, on the basis of which a legal entity may be called to account for the culpable or criminal violation of a legal obligation.
Based on the situation from which it originates, there exist various 'types' of liability. The 'criminal liability' is the kind of legal liability arising from the violation of a rule of criminal law of the legal order of a State. The latter can concern both individuals and entities.
Another type of liability is the 'contractual liability' which arises in the case of a violation of a specific duty, deriving from a previous obligatory relationship, whatever the source of the latter (*contract, fact, or other*). In this case, liability is no longer "criminal" but "civil"[1].
The 'non-contractual liability' arises in cases of violation of the generic principle *neminem laedere*, which is the duty, independent of a contract, to not affect the legal sphere of others.
A case of 'civil liability' arises when a significant interest, from a legal point of view, has been damaged and, it is followed by the obligation to compensate for such damage.
The substantial difference that exists between contractual and non-contractual liability lies in some specific aspects[2]:
– the *capacity:* while the contractual liability requires the subject have the 'capacity to act', that is the *legal capacity*, in the case on non-contractual liability the *natural capacity* is sufficient;
– the *burden of proof*: in cases of contractual liability, the claimant who claims the compensation for damages must prove only the existence of the obligation and its objective breach (it is on the debtor the duty to prove that the non-performance or the injury cannot be attributed to him), whereas in cases of non-contractual liability the claimant must prove the material fact, that is the conduct of the debtor, the damage suffered and the causal link between the breach of the obligation and the damage sustained by him as well as the fault (or the intention) of the agent;

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1 On the subject, in the Italian civil code, art. 1218 states that whenever the debtor does not exactly render the due performance, as stipulated, he is *liable for damages* unless he proves that the non-performance was due to impossibility of performance for causes not imputable to him.
2 STANZIONE (2012: 62-63).

– the *compensable damages*: in a case of *contractual liability*, where it concerns a case of negligent default, compensation can occur only for the damages that could be foreseen at the time in which the obligation arose; in a case of *non-contractual liability*, on the other hand, compensation can be awarded for *all the damages* deriving, directly and immediately, from the breach in question;
– the *limitation*: the right to compensation, in cases of *contractual liability*, is time-barred after the ordinary period of *ten years*, while for cases of *non-contractual liability* the right to compensation is usually time-barred after *five years*.
The Italian case law, as well as EU case law, recognizes the admissibility of both forms of liability. The latter is determined by a *breach* of a specific obligation and the *violation* of any personal right (such as the right to life or the right to personal safety).

The 'non-contractual liability' can be attributed to everyone who has caused a damage, be it a natural or legal person.
It follows that even institutions, such as the European Union, can be held responsible for non-contractual injuries whenever, through their actions, they may infringe the rights recognized to others.
Among the sources of European Union law, from which it is possible to derive EU's non-contractual liability, Art. 41, para. 3, of the Charter of Fundamental Rights of the European Union (EUCFR)[3] states that:

> Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

Art. 340 TFEU establishes that the contractual liability of the Union shall be governed by the law applicable to the contract in question and clarifies that EU non-contractual liability derives from both 'material actions' and regulatory activity[4]. This liability can be found only as a consequence of damages caused by illegal activities, while in the case of regulatory activity, the EU is only liable for damages caused by unlawful acts. The Union shall make good any damage caused by its institutions or its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States[5].

[3] The EUCFR, also known as the Charter of Nice, was proclaimed the first time on December 7th, 2000 in Nice, and a second time, as an adapted version, on 12 December 2007 in Strasburg by the Parliament, the Council and the Commission. The EUCFR came to have the same legal values as the EU Treaties in 2009, with the entry intro force of the Lisbon Treaty.
[4] Art. 340, para. 2, TFEU.
[5] Notwithstanding the second paragraph, the European Central Bank (ECB) shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or its servants in the performance of their duties.

This implies that, in cases in which the responsibility of an agent is invoked, the institution with which the agent has an employment relationship will be held accountable for the unlawful conduct.
For this to happen, it is necessary that the contested conduct is implicit in the acts performed by them in the exercise of their functions.
The obligation to pay for compensation is placed on the European institutions (including the European Council, the Court of Justice, the General Court).
The European Central Bank (ECB), on the other hand, is autonomously liable for compensation of damages caused by actions taken by its bodies (European Investment Bank, Ombudsman, Consumer Expectations Survey) or agents, for acts performed in the performance of their functions (including national central banks in the European System of Central Banks).
Actions for damages against the EU can be brought by: natural and legal persons (whether EU citizens or not); Member and non-member States and assignees.
For what concerns the personal liability of agents towards the EU, it is governed by the provisions contained in their Staff Regulation or the regime applicable to them. Two general principles remain, provided for by Art. 22 of the Staff Regulation[6], under which there can be a right of redress only if the fault of the agent is serious, and if the damage is caused in the performance of its functions.
Pursuant to Art. 272 TFEU, the European Court of Justice (CJEU) is competent for appeals concerning hypotheses of EU contractual liability. In the event of contractual liability, the condition for bringing the case before the Court lies in the existence of an arbitration clause contained in a private or public law contract entered into by the EU or on its behalf.
Even in cases of non-contractual liability, Art. 268 TFEU provides that the CJEU is competent in discussing the disputes relative to compensation for damages, pursuant to Art. 340 TFEU.

> The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of article 340.

Despite the explicit attribution of competence to the EU Court of Justice, many concerns remain.
In many cases, it can be complex to establish whether or not the CJEU is competent, especially when the damage derives from an activity carried out by a Member State.
Generally, it will be necessary to distinguish whether the damage was caused in the performance of a 'merely executive' state activity of an act issued by the EU or not. In the first case, the attribution of the breach must be extended to the EU and the CJEU will have the jurisdiction to settle the dispute; on the

[6] The Staff Regulation was issued in 1962, but since then it has undergone many variations up to a very important one, that of 22nd October 2013, with regulation n. 1023.

contrary, if the State acted discretionarily, for example, by implementing a directive, then the competence will be given to the national judge[7].
In summary, it is possible to trace a division of competence that differs according to the acts for which the compensation is required:
– if these are unlawful State measures, implemented in the execution of lawful EU acts, the competent judge will be the national one;
– if the State measures are unlawful and in execution of unlawful EU acts, there will be a liability contest, according to the principles of liability and subsidiarity[8].
The CJEU's jurisdiction in the field of EU non-contractual liability extends to criminal and police matters, but not to the CFSP[9] (except for restrictive measures taken against natural and legal persons).
As regards the 'contents' required for the appeal for non-contractual liability of the EU, the minimum elements are specified in Art. 41 of the CJEU Statute, from Art. 120 of the Rules of Procedure of the CJEU and from Art. 44, para. 1, of the Rules of Procedure of the General Court.
In general, these are elements that allows for the definition of:
– the object of the dispute and a sufficiently clear and precise presentation of the reasons;
– the unlawful conduct;
– the reasons underlying the causal link;
– the extent of the damage and its characteristics.
Finally, liability actions can be brought within a period of five years[10]: from the occurrence of all the conditions giving rise to the action, except for late faultless knowledge of the fact that caused the damage.
For 'generally applicable acts', the prescription begins from the actual materialization of the damage; for 'acts of individual scope', from the notification of the measure; if the damage has persisted over time, the prescription will be counted separately for each of the days in which the damage is produced[11].
Much of the legislation that regulates the 'non-contractual liability of the EU' is of jurisprudential origin. For this reason, the most important and incisive judgements regarding the interpretation of some specific aspects will be identified below.

[7] This is the conclusion established in the CJEU judgement of 26 February 1986, Case C-175/84 P, *Krohn v. Commission.*
[8] There will first be the jurisdiction of the national judge, then that of the CJEU [in practice, the judgement follows the internal appeals according to the principle of effectiveness (in cases of unsuitability of national remedies, the jurisdiction of the CJEU is immediate)].
[9] The Common Foreign and Security Policy is the foreign policy of the European Union, managed and promoted by the High Representative of the Union for Foreign Affairs and Security Policy and by the European External Action Service.
[10] Art. 46 Statute of the CJEU.
[11] CENDON (1994: 506).

1.2 EU jurisprudence

As anticipated, the European jurisprudence has contributed enormously to the interpretation of this subject. Among the most relevant rulings on the normative interpretation regulating EU non-contractual liability, the CJEU judgement of 2 December 1971, Case 5/71, *Aktien-zuckerfabrik Schoppenstedt v. Council* has a particular importance.
The case involved an application for compensation, under Art. 215, para. 2, EEC Treaty, for damages caused to the applicant by the regulation no. 759/68 of the Council laying down the measures needed to offset the difference between the national sugar prices and the prices valid from 1st July 1968. The latter measure had provoked a loss of income for the applicant's firm. The cited judgement is significant in having outlined the principle for which the action for damages is an independent action, in the sense that it is independent from an action for annulment[12] and from an action for failure to act[13].

In addition to the mentioned principle, the judgement established three more principles, all of extreme importance, which are reported in the following passage:

> 1) the action for damages provided for by articles 178 and 215, paragraph 2, of the Treaty was introduced as an autonomous form of action, with a particular purpose to fulfil within the system of actions and subject to conditions on its use dictated by its specific nature. It differs from an application for annulment in that its end is not the abolition of a particular measure, but compensation for damage caused by an institution in the performance of its duties.
> 2) a claim for any unspecified form of damages is not sufficiently concrete and must therefore be regarded as inadmissible.
> 3) where a legislative action involving measures of economic policy is concerned, the community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in article 215, second paragraph, of the treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred.

Therefore, in addition to having stated the 'autonomous' character of liability actions, the judgement established that the plea should include every element useful for its reconstruction and that the EU economic policy in itself may cause harm where it is necessary for the purpose that is pursued.
The autonomous character of the liability action implies that an action against institutions or its servants may be brought even by individuals who would not be entitled to bring an action for annulment or for failure to act.
This is a theoretical consequence, in that the Union's non-contractual liability is based on the unlawfulness of an act and its effects toward the individual who claims to have suffered the damage.

[12] Pursuant to Art. 263 TFEU.
[13] Pursuant to Art. 265 TFEU.

The judgement delivered by the CJEU on 29 September 1982, Case C-26/81, *Oleifici mediterranei v. EEC*, went in the same direction.
With the latter, the Court of Justice established that the conditions for the action for damages must be restrictive, therefore it has established that it must be subject to certain conditions.
All other subsequent judgements brought to the same conclusion.
Today, three main conditions must be met for the European Union to incur non-contractual liability. These conditions have been well defined in the judgement C-234/05 P[14], *Ombudsman v. Lamberts* of 2004, where it was established that, for the EU non-contractual liability to arise, the following conditions are necessary:

1) The rule of law infringed must be intended to confer rights on individuals;
2) the breach must be sufficiently serious, i.e. the Union institution concerned must have manifestly and gravely disregarded the limits of its discretion;
3) the existence of a causal link between the unlawful act and the damage sustained by the applicant.

The three conditions are cumulative, hence, in order for the Union to incur liability, it is necessary to prove the existence of an unlawful act or conduct by the Union, of an actual damage, and of a direct causal link between the damage alleged and the unlawful act or conduct.
The CJEU judgement of 19 April 2007, Case C-282/05 P, *Holcim AG v. Commission*, has confirmed the necessity of the three conditions and their cumulative nature.
These conditions, in turn, imply the existence of specific sub-conditions.
For what regards the first condition, the existence of a violation of a rule of law implies the violation of a specific act that, therefore, will be reported in the appeal.
The second condition requires the violation not to be modest, or that did not originate from a mere initiative falling within the allowed discretions.
Lastly, the third condition necessary for an action for damages to be admissible, establishes that the damage must be directly caused by an unlawful act or conduct of the Union.
This suggests that the damage must consist in a "sufficiently direct consequence" of the unlawful act or conduct committed by the institution concerned: if this is not the case, the coexistence of the other two conditions will not be sufficient to demonstrate the existence of the Union's liability.
The Union, in fact, is not legally bound to remedy all the unfavourable consequences of the alleged unlawful act or conduct.
However, taking into consideration that the existence of a causal link must be assessed on a case-by-case basis, largely depending on the particular circumstances concerning the dispute, it is not possible to identify a standard procedure that allows to find such causal link.

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[14] CJEU judgement of 23 March 2004, Case C-234/02 P, *Ombudsman v. Lamberts*.

Technically, the existence of a causal link could be deduced by comparing the situation caused by the unlawful act or conduct of the institution concerned, and the situation in which the applicant would have found himself if the institution had acted lawfully. By quantifying the impact, the relationship between the damage alleged by the applicant and the unlawful act or conduct of the institution concerned may be demonstrated[15]. Moreover, the damage must be individualized, and this does not happen when the act affects wide categories of economic operators and its consequences are mitigated for the individuals.

Finally, the monetary devaluation following the harmful event must be taken into account, as well as the default interests that develops following the Court's assessment of liability.

With respect to the nature of the damage suffered, the jurisprudence has recognized the possibility of referring to both 'material' and 'non-material' ones, as well as both to future and imminent damages, and to emerging damages or to loss of profit. The general requirement establishes that the damage must, however, always be certain and quantifiable.

The recognition of moral damages has been confirmed in a judgement in which two parties, the Gascogne Sack Deutschland (ex Sachsa Verpackung) and the Gascogne (ex Groupe Gascogne), resorted to a number of decisions of the EU Court[16].

In 2006 the two companies brought a case before the General Court for an action for annulment of a decision issued by the Commission in 2005 concerning the industrial bags sector. In 2005, the Commission imposed fines on several companies for their participation in an agreement of the plastic bags market. According to the Commission, the infringement consisted mainly of an agreement on price fixing, the allocation of market shares and quotas, the allocation of customers and deals and, finally, the exchange of information between Belgium, France, Germany, Spain, Luxembourg and the Netherands. The two German companies appeared among the companies subject to fines.

In 2011, the ruling of the General Court was negative and the two companies where ordered to bear the costs[17].

The appeal also was rejected[18]. The CJEU found that the action was unfounded, however they could have raised the question of excessive length of proceedings by which a claim for damages could have been made.

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15 CENDON (1994: 509).

16 EU General Court, judgement of 10 January 2017, Case T-577/14, *Gascogne Sack Deutschland (ex Sachsa Verpackung) and Gascogne (ex Groupe Gascogne) v. Union*. The judgement in question concerned the excessive lenght of proceedings of Cases T-72/06 and T-79/06.

17 EU General Court, judgement of 16 Novemebr 2011, Case T-72/06, *Groupe Gascogne v. Commission*.

18 CJEU, judgement of 26 November 2013, Case C-40/12 P, *Gascogne Sack Deutschland v. Commission.*

The applicants brought an action for damages before the General Court to obtain compensation for damages suffered due to the excessive duration of the previous cases.
In Case T-577/14 of January 2017, the General Court analysed all the three conditions for the liability action.
Regarding the first condition, related to the "unlawful conduct of the institution concerned", the breach was found only in the excessive length of the proceedings.
It was an infringement of the right provided for by Art. 47, para. 2, of the Charter of Fundamental Rights of the European Union.
The proceedings lasted for almost six years, a term considered unreasonable whatever the subject of the dispute. Moreover, the General Court found that forty-six months had passed between the end of the written procedure and the opening of the oral procedure, highlighting an unjustified inertia of twenty months.
Regarding the second condition on the actual existence of the damage alleged, the General Court concluded that the two companies had suffered material damages from the costs of setting up the bank guarantee intended to effect immediate settlement of the fine imposed by the decisions.
To conclude, with respect to the third condition, relating to the "existence of a causal link between the unlawful conduct and the damage alleged", it was found that, in both the previous cases, if the proceeding had not lasted so long, violating the principle of reasonable length of the proceedings, then the applicant would not have had to pay for the bank guarantee for the benefit of the Commission for an excessively long time.
This ruling, contrary to the past, has benefited from the entry into force of the Treaty of Lisbon. The entry into force of the Treaty (2009) brought profound modifications to the regulatory sources on which to base the rulings.
According to the judges, the continuation of the proceedings had violated Art. 47 of the Charter of Fundamental Rights of the European Union which, in the second paragraph states that[19]:

> everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defend and represented.

As the EUCFR became binding following the entry into force of the Treaty of Lisbon of 2009, the judges did not hesitate in identifying such violation.
Following this judgement, the two companies decided to apply to the General Court to make the EU pay compensation for both the cited material and non-material damage. The latter was found in the 'throes of uncertainty' in which the two companies found themselves due to the duration of the proceedings.

[19] The article is contained in Chapter VI, Justice and is titled: "right to an effective remedy and to a fair trial".

On 10 January 2017 the General Court[20] had partially admitted the claim of the two companies.
The judgement concluded that the previous Cases T-72/06 and T-79/06 had infringed the right regulated by Art. 47, para. 2, of the EUCFR which guarantees the reasonable duration of the proceedings.
The General Court found the existence of a material damage relative to the setting up of a bank guarantee to pay for the fine imposed.
The companies were recognized a compensation of 47.064,33 euro for the material damage.
The General Court had also recognized a moral damage suffered by both companies, consisting of the state of uncertainty in which the two had found themselves due to the excessive length of the proceedings, payed with a compensation of 5 thousand euro each.
Moreover, with the judgement in question, the Court definetly confirmed that the action for damages is an independent and specific form of action provided by the Treaties for the protection of individuals damaged by the Union.
Having founded the liability of the EU on the violation of Art. 47 EUCFR, the ruling in question is important, also, for another reason.
The EUCFR, or Charter of Nice, dates back to 2001 but has become binding, as anticipated, only with the entry into force of the Treaty of Lisbon in 2009 which recognized to it the same legal value as the EU Treaties.
Furthermore, Art. 47 EUCFR fully corresponds to Art. 6 of the European Convention on Human Rights (ECHR), as, pursuant to Art. 52, para. 3, EUCFR, it is established that the Union guarantees the same level of protection of fundamental rights as that provided by the ECHR, or guaranteeing a more extensive protection.
In particular, Art. 52, para. 3, on the scope of guaranteed rights, provides that:

> in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

The relevance of the aforementioned ruling derives from the fact that Art. 47 EUCFR shall no longer be interpreted in isolation, rather the right to an effective remedy and a fair trial must receive the same level of protection of the right provided for by Art. 41 EUCFR[21] and pursuant to Art. 6 ECHR.
Having said that, the ruling has definitely brought the EU non-contractual liability on a broader spectrum of principles, much more extensive than those of the Community.

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[20] EU General Court, judgement of 10 January 2017, Case T-577/14, *Gascogne Sack Deutschland and Gascogne v. Union*.
[21] Whose para. 3 refers precisely to Art. 340 TFEU.

Furthermore, Art. 6 ECHR guarantees an extensive spectrum of rights which reinforces the protection of individuals subject to trial and guarantees the right to an effective hearing.
It deals with the issues of fair trial, reasonable duration (Art. 6, para. 1, ECHR), presumption of innocence (Art. 6, para. 2), and procedural guarantees of the defender in relation to the adversarial principle (Art. 6, para. 3).
Art. 6, para. 1, ECHR states that everyone has the right to a fair and public trial by an independent and impartial judge or tribunal, within a reasonable time.
Regarding the judgement, it establishes that it must be pronounced publicly but, if necessary, excluding the press and the public in the interest of moral, public order or national security, the interest of minors, the protection of the private life of the parties or for risks of prejudice of the interests of justice.
Art. 6, para. 2, ECHR establishes that everyone should be deemed innocent until found guilty.
Art. 6, para. 3, ECHR guarantees the right to use witnesses.
The implicit harmonisation of the two legal orders (European and international) guarantees a uniform and homogeneous level of protection for non-contractual damages.

The Case 577/14 was challenged both by the CJEU and by the applicants (who did not consider adequate the amount of compensation).
In the judgement of 13 December 2018 relating to joined Cases C-138/17 P, *European Union v. Gascogne Sack Deutschland and Gascogne*, and C-146/17 P, *Gascogne Sack Deutschland and Gascogne v. European Union*, the CJEU annulled the compensation for damages by the EU for the costs of the banck guarantee incurred in the context of eccessive length of the proceedings before the EU General Court.
The Court concluded that the causal link between the excessive length of the proceedings and the payment of the bank guarantee could have been interrupted if the two companies had chosen to not pay the fine immediately.
Moreover, the Court had rejected the appeal brought by the two companies, confirming the compensation granted for the non-pecuniary damage.

1.2.1 Concept of a sufficiently serious breach of a rule of EU law

In addition to those analysed in the previous pages, the EU jurisprudence has provided further principles on which to set the criteria for the recognition and attribution of the ‘non-contractual liability’ of the EU.

Among these principles, the Court has clarified that the EU non-contractual liability can be attributed only in the event of "grave violation" of a superior rule intended to confer rights to individuals[22].
In *Bergaderm and Goupil v. Commission* the CJEU held that:

> the unlawful conduct alleged against a Community institution must consist of a sufficiently serious breach of a rule of law intended to confer rights on individuals.

In this ruling it was established that the criterion to be used to determine whether this condition has been met (or if it was sufficiently described) is whether the Community institution "manifestly and gravely disregarded the limits of its discretion"[23].
What emerges from this ruling is the existence of a strong analogy between the regime governing the non-contractual liability of the Union and that governing the liability of Member States for breaches of European Union law. Indeed, the Court held that:

> the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.

Despite this provision, in practice the assessment for the existence of the conditions for the EU non-contractual liability is stricter than that carried out for the establishment of Member States liability[24].
Lastly, the judges have clarified that:

> the complexity of the situations to be regulated, the difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question

are the various aspects that must be considered to determine the existence or not of a "serious and manifest" violation.
It follows that, the greater the discretion that the Union enjoys, the more it is required that the violation has been serious and manifest.
The *Bergaderm* ruling has a further relevance in considering the fact that in the past the Court made a distinction between the violation of a legislative Union act and that of violation of administrative Union acts.
The cases referring to the first hypothesis were subject to the "Schoppensted formula" according to which the Union would have faced non-contractual

[22] EU General Court, judgement of 13 June 1972, Joined Cases 9/71 and 11/71, *Compagnie d'approvisionnement de transport et de Crédit et Grand moulins de Paris v. Commission*, and CJEU judgement of 4 July 2000, Case C-352/98 P, *Bergaderm and Goupil v. Commission*.
[23] Case C-352/98 P, para. 43.
[24] CANNIZZARO (2018: 206).

liability only in the event of a "sufficiently flagrant violation of a superior rule of law for the protection of the individual", while, for administrative acts the liability threshold was relatively low.
The new "Bergaderm formula" has brought two important changes: there is no longer distinction between administrative and legislative acts and the idea of a "superior rule of law" was abandoned. The new test for the establishment of EU non-contractual liability now requires proving the following conditions:
(1) the Union has breached a rule intended to confer rights on individual,
(2) the breach must be sufficiently serious and
(3) there must be a direct causal link between the breach of the obligation and the damage alleged.

1.2.2 Obligation to state reasons

In cases concerning the EU non-contractual liability there is both an obligation to state reasons for the judgements and, for the appellant, the obligation to specify, with clear arguments, the motivation that is subject to the dispute.
For what regards the essential elements of the action for damages it is established that they concern both the object of the dispute and the summary presentation of the reasons in a sufficiently clear and precise manner (Art. 41 CJEU Statute, Art. 120 of the Rules of Procedure of the CJEU, Art. 44, para. 1 of the Rules of Procedure of the General Court).
Furthermore, it is necessary to specify every element that is useful in defining the unlawful conduct, the reasons on which the causal link is based and the description of the damage in terms of its character and nature.
On the other hand, the reasons of the ruling, as any other judgement, concern the description of the reasons that has brought to the adoption of the final decision.
The importance for the reasons of the judgement, as in any other case, is absolute.
In the Case of 19 October 2017, C-198/16 P, *Agriconsulting Europe SA v. European Commission*, the CJEU has been called to request the annulment of the judgement of the EU General Court of 28 January 2016, T-570/13, *Agriconsulting Europe v. Commission*.
The CJEU was called to rule on the judgement of the General Court in which it had rejected the action for damages brought by the appellant for the irregularities on the part of the European Commission in a tendering procedure in which it had taken part[25].
Among the motivations for the action before the CJEU, the Agriconsulting challenged the General Court for having distorted "the evaluation of the evaluation committee" and the "procedural documents", giving a non-

[25] Tender "*Establishment of a network facility for the implementation of the European innovation partnership (EIP) 'Agricultural Productivity and Sustainability'*" (AGRI-2012-EIP-01).

technical evaluation based on its own considerations. According to the applicant, this had produced a judgement based on contradictory and baseless statement of reasons.
In this sense, according to Agriconsulting, the Court would have failed to fulfil its obligation to state reasons.
The CJEU dismissed the appeal, having found that all the normative provisions were followed during the tender and that the General Court's assessment complied with the technical one. Nevertheless, the judges confirmed the importance of the sufficiently clear reasons by confirming the mechanism used in past judgements as the one issued on 16 July 2009, C-385/07 P, *Der Grüne Punkt – Duales System Deutschland v. Commission*, which, in para. 71, stated that:

> […] the question on whether the grounds of a judgement of the Court of First Instances are contradictory or inadequate is a question of law which is amenable, as such, to judicial review on appeal.

In the legal sphere, the concept of 'reason' coincides with the obligation of the Court to report the reasoning that led to the adoption of a measure. The 'reason', however, not only has a procedural connotation, but also a material one. For example, the European legislation on the listing procedure and on the adoption of individual sanctions requires that the initial registration in the lists of suspected terrorists must be based on precise information and that the recipients must be informed of the possibility to submit a request to know the motivation adopted by the Council for their listing.
The motivation in question is even more relevant considering that the Council has the duty to revise the names in the lists at least every six months, verifying that the conditions for their listing still hold.
A similar conclusion was reached in a case involving the two groups *LTTE* and *Hamas*[26] regarding an appeal of the regulation by which the EU Council kept their names in the lists with the relative measures, among them the freezing of funds[27]. The appeal concerned a request for annulment pursuant to Art. 263 TFEU for alleged violation of fundamental rights, since the Council had maintained their enlisting without revising the cases.
In upholding the appeal, the General Court annulled the regulation for the inclusion of the names in the lists for insufficient evidence.
The Court found that there were no valid reasons for the inclusion of the two applicants in the lists, as the Council had based its reasons on decisions of third States which did not offer the same protection as the EU.

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[26] LTTE was considered a terrorist group that, since 1976, has fought for an independent Tamil State in the north-east of Sri Lanka. Hamas was considered the armed wing of the Izzedin Brigades. In practice, the Council bases its decisions on information of public domain deriving from the Internet and the Press.
[27] EU General Court, judgement of 16 October 2014, joined Cases T-208/11 and T-508/11, *LTTE v. Council*; EU General Court, judgement of 17 December 2014, Case T-400/1, *Hamas v. Council.*

In particular, for the maintenance in the lists, it was necessary that the judgement of another Court provided the same protection as that guaranteed by the accession to the Convention for the Protection of Human Rights and Fundamental Freedoms and by the provisions of the EU Charter of Fundamental Rights[28].

Giving to third States a competent authority pursuant to the Common Position 2001/931/CFSP, would imply, according to the European judge, a different treatment between subjects of funds freezing measures[29].

Therefore, the reasons of the contested regulations were considered to lack the essential elements to suggest that the Council had verified them.

The obligation to state reason is a substantial element for the inclusion in the blacklists. Therefore, if changes had occurred to the factual situation, the Council has to acknowledge them[30].

The EU Council challenged the judgements in question claiming the existence of errors of law.

The Opinion of the Advocate General was in line with the judgement of the Court[31].

In the judgement, the Court drew three important conclusions:

– the inconsistency of information of public domain, obtained from the Press and the Internet, to support the reasons for the inclusion and the maintenance of names in the lists;

– when the reasons are based on decisions taken by third States, the Council must ascertain that the latter provides the same level of protection of fundamental rights as that provided by the Union;

– the Council has the duty to verify whether the initial decision that led to the inclusion in the lists is well founded.

With respect to Hamas, the Court had found that the Council did not base its decision to keep the company in the list on national decisions.

Even in subsequent actions for annulment brought by Hamas against the regulation concerning its inclusion, the Court held that the Council has the obligation to include, among its motivations, all the elements necessary for the applicant to exercise its right to defence and the right to effective judicial protection.

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28 BATTAGLINI (2017: 64)

29 The Council has the duty to carry out the regulatory verification necessary to ensure, at the State level, the same level of protection of the rights to defence and of effective judicial protection as that guaranteed at the Union level. The violation of such rule automatically makes it impossible to make use of the reasons provided by the States (joined Cases T-208/11 and T-508/11, *LTTE v. Council*, paras. 135 and 139).

30 EU General Court, judgement of 14 December 2014, Case T-400/10, *Hamas v. Council*, paras. 127, 129 and 130; EU General Court, judgement of 16 October 2014, Joined Cases T-208/11 and T-508/11, *LTTE v. Council*, paras. 204 and 206.

31 Opinion of the Advocate General Eleanor Sharpston of 22 September 2016, Cases C-599/14 P, *Council v. LTTE* and C-79/15 P, *Council v. Hamas.*

1.2.3 Action for damages and action for annulment

Besides the action for damages, the EU legislator has also provided for the action for annulment. With regard to the action for compensation, it should be noted that the ECSC Treaty[32] made a distinction between the liability deriving from a "service error" of the Community, fully compensable, and the liability related to an act already annulled by the Court for which it was indemnifiable only the direct and specific prejudice.
The EC Treaty did not make this distinction, limiting itself to imposing the obligation of compensation for damages caused by its institutions or its servants in the exercise of their functions. Moreover, unlike the ECSC Treaty, the EC Treaty had established that the damage must be individualised, therefore it does not exist if the act affects wide categories of economic operators, as the consequences for individuals are mitigated.
As anticipated, the correct evaluation of the amount of the damage must take into account both the monetary devaluation subsequent to the harmful event and the default interest that develops following the Court's assessment of liability.
The *action for annulment* referred to in Art. 262 TFEU (former Art. 230 EC Treaty) provides, instead, that the Court of Justice of the European Union carries out a legitimacy check on legislative Union acts, on acts of the Council, of the Commission and of the ECB (other than recommendations and opinions), as well as on acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. Moreover, it exercises a legitimacy check on acts of its organs and bodies.
Art. 264 TFEU (former Art. 231 EC Treaty) provides that, if the appeal is well founded, the Court of Justice of the European Union declares the contested act null and void. Furthermore, the Court, where it consider it necessary, clarifies the effects of the annulled act which must be considered definitive. The nullity is *erga omnes*, being it in operation for everyone and is *ex tunc* since it is retroactive to the moment the act was issued[33].
The relationship between the action for annulment and the action for damages has long been confirmed in the European jurisprudence. In the CJEU judgement of 15 July 1963, Case C-25/62, *Plaumann & Co v. European Commission*, the Court declared an appeal for compensation based on the unlawfulness of an act, which had not been previously annulled, inadmissible. Subsequently, however, the Court has revised its position, considering the action for damages as an 'autonomous form of action' compared to other actions, both for its purpose and for the conditions of its use.

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[32] The ESCS Treaty was signed in Paris on 18 April 1951 and entered into force on 23 July 1952. The "common market" envisaged in the Treaty was inaugurated on 10 February 1953 for coal and iron and on 1 May 1953 for steel.
[33] Pursuant to Art. 266 TFEU, "the judgement of the Court of Justice requires that the institution, whose act has been declared void, to take the necessary measures to comply with the judgement of the Court".

In the judgements that followed the cited one, the Court has always confirmed the necessity of avoiding that the action for damages was used in order to obtain the same outcome of a different action, therefore establishing the autonomy of the liability actions.
Today, the action for annulment is independent from the action for damages and can be brought only for:
– legislative acts (issued by the Council of the European Parliament);
– legally binding acts of the Council, the Commission and of the ECB;
acts of the European Parliament and of the European Council producing legal effects vis-à-vis third parties.
Potential applicants can be: the European Parliament, the Council, the Commission, Member States. These are referred to as privileged applicants as they do not need to prove any particular interest for the annulment.
Semi-privileged applicants are the ECB, the European court of Auditors and the European Committee of the Regions as they must prove a specific interest and to protect their prerogatives.
Lastly, the action for annulment can be brought by legal or natural persons but only for acts addressed to them or for acts of specific and individual concern, or against regulatory acts of direct concern to them that do not require implementing measures (Art. 263, para. 4, TFEU).
In this regard, the Case *Union de Pequenos Agricultores* of 2002[34] is worth to be mentioned.
The Unión de Pequeños Agricultores is a trade association of agricultural companies based in Spain which had brought an appeal against the ruling issued by the General Court on 23 November 1999 which dismissed the appeal for the partial annulment of a regulation concerning the organization of the olive oil market. Among the motivations, the General Court had declared the appeal inadmissible as the associates were not individually concerned by the provisions of the regulation in question.
Following the appeal before the CJEU, the judges confirmed that:

> A natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually.

A further difference compared to the action for damages is that the reasons for the annulment of an act are not necessarily linked to a damage and are summarized in the following:
– incompetence (internal and external);
– violation of essential procedural requirements (e.g. adoption procedure, lack of motivation for the acts);
– violation of the EU Treaties or legal rules related to their application (including general principles, fundamental rights, international agreements);
– abuse of power.

[34] CJEU, judgement of 25 July 2002, Case C-50/00 P, *Union de Pequenos Agricultores v. Council*.

1.3 EU liability in matters concerning restrictive measures

Among the various competences of the EU, we can find the power to adopt restrictive measures.
The restrictive measures (or "sanctions") are an instrument of the Common Foreign and Security Policy (CFSP) of the EU. These are measures that fall under the *integrated and comprehensive political approach* which includes the political dialogue, complementary efforts and the use of other tools available to the Member States.
The Common Foreign and Security Policy operates according to the principle of 'intergovernmental cooperation'.
The latter is included in the former second and third Pillars of the EU, and it is a solution adopted following the hesitations of many Member States to delegate such competences considered as internal competences.
By resorting to the 'intergovernmental cooperation', the CFSP adopts policies that are decided jointly by the Member States and international organizations (for example the UN Security Council) but whose management is entrusted to community bodies.
This means that the 'community method', which gives decision-making powers directly to EU bodies, does not apply for the CFSP which makes use of other instruments, such as the international convention[35].
The latter gives a primary role to Member States which share the right of initiative with the European Commission.
Decisions relating to the CFSP are taken unanimously within the EU Council while the European Parliament has a merely consultative role.
The CJEU has only a marginal role.
The objective pursued by the CFSP are enshrined in Art. 21, para. 2, of the consolidated version of the TEU of 1992:

> – safeguard EU values, fundamental interests, security, independence and integrity;
> – consolidate and support democracy, the rule of law, human rights and the principles of international law;
> – preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
> – foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
> – encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

[35] The 'intergovernmental method' is a decision-making process applied to both the CFSP and to the Justice and Home Affairs (JHA).

> – help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
> – assist populations, countries and regions confronting natural or man-made disasters;
> – promote an international system based on stronger multilateral cooperation and good global governance.

To ensure this policy, bodies have been set up to carry out the functions consistent to it:
– the Political and Security Committee which is responsible for establishing the basic strategies;
– the European Union Military Committee, composed of the heads of the Ministries of Defence of the Member States, which decides the guidelines for military action[36];
– the Civil Planning and Conduct Capability, which plans the security and defence policy under the control of the Political and Security Committee, in collaboration with the Commission;
– the military staff of the European Union composed of civil and military experts from Member states and of Council servants.
In 2004 the Political and Security Committee has outlined some basic principles regarding the management of some aspects of the CFSP:
– the use of sanctions;
– their implementation;
– how to measure and control their impact.
These basic principles are contained in the "*guidelines on the implementation and evaluation of restrictive measures"* and were initially adopted by the Council in 2003 and reviewed and updated in 2005, 2009, 2012 and 2017.
The sanctions in question can be addressed to various subjects[37]:
– governments of third States due to their policies;
– groups or organizations, e.g. terrorist groups;
– entities (companies) that provide the tools for the implementation of the policies in question;
– individuals.

It should be noted that all restrictive measures adopted by the EU comply with the obligations deriving from international law, eradicating any doubt as to their nature which, therefore, is not exclusively political.
The basic assumption is that these restrictive measures are aimed solely at achieving the objectives of the EU Common Foreign and Security Policy, pursuant to Arts. 21 and 23 of the Treaty on the European Union (TEU).

[36] Assisted by a Committee on civilian aspects of crisis management.
[37] Pursuant to Art. 215, paras. 1 e 2, TFUE.

The confirmation of the nature of the restrictive measures is given by the 'double decision-making mechanism of restrictive measures', in accordance with Chapter 2 of Title V of the TEU, and to Art. 215 TFEU[38].
Art. 215 (ex Art. 301 TEC) provides that:

> 1. where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or deduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
> 2. where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.
> 3. the acts referred to in this Article shall include necessary provisions on legal safeguards.

An appeal to the EU General Court and, on appeal, to the CJEU is envisaged for the protection of those subject to restrictive measures deemed unlawful. Moreover, in contrast to the regulations containing restrictive measures, the Treaty of Lisbon has introduced Art. 275 para. 2, TFEU which gives the possibility of appeal only for Community acts implementing other acts deriving from the CFSP adopting restrictive measures against natural or legal persons.
The Article, indeed, states that:

> the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.
> However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

Therefore, the appeal in question belongs only to the aforementioned parties and not to the appellants who, pursuant to Art. 263 TFEU, are entitled to challenge EU acts.
This provision differs from what has been established for the Treaties.
Art. 263 TFEU provides that for the appeal of the Treaties[39]:

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[38] The CFSP decision adopted by the Council constitutes the legal assumption for the adoption of sanctions but not their legal basis, which is constituted by Art. 215 TFEU.
[39] Furthermore, the paragraph in Art. 266 TFEU clarifies that the obligation of the institutions to provide the necessary documents for the judgement for annulment of the contested act (pursuant to Arts. 263-264 TFEU) or that declares the abstention of institution contrary to the Treaties (pursuant to Art. 265 TFEU), does not affect the obligation resulting from the application of Art. 340, para. 2, TFEU.

> any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct and individual concern to them and does not entail implementing measures.

When submitting the restrictive measures adopted against individuals pursuant to Title V, Chapter 2 od the Treaty to the Court, it should be considered that Art. 275 TFEU was referring to those "CFSP decisions adopted directly under the CFSP Chapter of the TEU, but not the decisions adopted to implement them under Article 215 TFEU"[40].

Therefore, the Court of Justice of the European Union (the General Court, at first instance) has the competence to rule on proceedings relating to the legitimacy review of acts that provide for restrictive measures.

In summary, the Court is not competent to rule on dispositions relating to the CFSP, but only to the restrictive measures that can be challenged pursuant to Art. 275 TFEU and the conditions for filing such appeals are established by Art. 263, para. 4, TFEU, according to which it is necessary to prove a direct and individual concern for the annulment of the contested act.

Having said that, it is necessary to examine what is the orientation of the Court relative to the non-contractual liability of the EU for the damage caused by the unlawful restrictive measures.

Analysing some judgements on this subject, it should be noted that the judicial control of the acts containing the restrictive measures has resulted in the removal of some of them, through the annulment, even partial, of these acts.

Frequent cases concerned the anti-terrorism activity, which led to the creation of lists containing the names of the subjects considered 'simply' suspects.

However, it has often been the case that, despite the *delisting* of some subjects, the prejudice deriving from their inclusion has been the subject of an action for damages.

The applicants not only demanded that the acts from which their inclusion in the lists be annulled, but also complained that they had suffered damage, material or not, following their inclusion in the so-called "blacklists".

Nonetheless, judicial cases show that the applicants hardly managed to receive compensation.

The reasons why, usually, the compensation for the damage suffered as a result of the inclusion in the 'blacklists' has been denied are mainly two:

first, the judges have found that the EU non-contractual liability has usually been low, that is, not sufficient to pay for compensation; secondly, the applicants have barely been able to prove the causal link between the inclusion of their names in the lists and the damage alleged.

A first sign of openness towards the compensation for damage caused by the *listing* could be found in the CJEU judgement of 20 May 2013, Case C-239/12P, *Abdulrahim v Council and Commission*.

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[40] HINAREJOS (2009: 159).

With this ruling, the Court held that the repeal of the *blacklisting* act does not extinguish the existence of the applicant's interest in bringing the case before the Court in order to obtain the annulment of the act itself, which would in turn constitute a sort of reparation for damage resulting from the damage to the his reputation.
The ruling states that[41]:

> […] whilst recognition of the illegality of the contested act cannot, as such, compensate for material harm or for interference with one's private life, it is nevertheless capable […] of rehabilitating him or constituting a form of reparation for the non-material harm which he has suffered by reason of that illegality, and of thereby establishing that he retains in bringing proceedings.

Mr Abdulrahim, of British nationality, had been suspected of having committed terrorist acts and, for this reason, according to the dictates of the CFSP, included in the *blacklist*[42].
Considering himself harmed in his reputation and right to defence, Mr Abdulrahim had brought the decision before the General Court, asking for compensation for the damages suffered. The judge requested to remove his name from both the Sanctions Committee and the Commission lists. Believing that the object of the dispute had failed and that the claim for compensation was unfounded, the General Court dismissed the case.
In the appeal in question, Mr Abdulrahim had specified that he had never been linked to Osama bin Laden, nor to the Al Qaeda network nor to the Taliban.
The decision of the General Court not to proceed was based on the circumstance that saw, during the dispute, the name of Mr Abdulrahim being removed from the Committee's list and, subsequently, by Regulation (EU) no. 36/2011 of the Commission, of 18 January 2001, containing one hundred and forty-third amendment to the regulation no. 881/2002 (OJ L 14, p.11), to be definitely removed.
Considering that the application for the annulment of his registration in the contested list had become void, the General Court held that there was no longer the need to adjudicate, albeit there had not been the annulment of the regulation that provided for his listing.
Mr Abdulrahim brought the case before the CJEU believing that the General Court erred in law.
The CJEU admitted that, while the repeal does not imply the recognition of unlawfulness of the act and its effect is *ex nunc*, the annulment of the act produces an effect *ex tunc*, and it is considered to have never existed.
Furthermore, since the annulment implies an automatic recognition of the unlawfulness of the act, this not only satisfies the applicant, but also constitutes a motivation to bring an action for damages.

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41 Case C-239/12P, para 72.
42 Provided by a Commission regulation (EC) no. 1330/2008 of 22 December 2008.

The ruling is not only relevant from the point of view of procedural law, but it plays a decisive role in the protection of the applicant from the point of view of substantive law.
Indeed, it allows for the recognition of the existence of a moral damage resulting from an unlawful act[43].
In his opinion, the Advocate General Bot stated that, despite the repeal of the act, the applicant showed a "continuing interest" in obtaining the recognition of the unlawfulness of his listing by the EU judicature[44].
The applicant would retain the interest in bringing proceedings or to obtain the restoration of his situation, or to avoid the recurring of the unlawfulness in the future, or, finally, for bringing an action for compensation.
On this ground, the Court held that the applicant's interest had not waned following the repeal of the act, believing that there was an interest for the applicant in the EU judge declaring that the applicant should have never been inserted in the list.
This is a new interpretation compared to the past and it is due to the introduction, with the Treaty of Lisbon, or Art.257 TFEU. As anticipated, the second paragraph of the provision explicitly provides for the possibility to appeal directly to the Court of Justice for CFSP acts that are considered unlawful.
It should be sufficient to consider the rulings that preceded the introduction of the Lisbon Treaty in 2009 to better understand the scope of the judgement.
For example, in Case C-355/04 P, *Segi and Others. v EU Council,* of 2007, a similar case to the cited one, the applicants' rights were not recognized. On that occasion, the Advocate General Mengozzi provided the following interpretation:

> […] if in a case such as that of the applicants there is genuinely no effective judicial remedy, this would not only be an extremely serious and flagrant inconsistency of the system within the Union, but also a situation which, from an external point of view, exposes the Member States of the Union to censure by the European Court of Human Rights and not only impairs the image and identity of the Union on the international plane but also weakens its negotiating position vis-à-vis third countries, creating a theoretical risk that they will activate clauses on the respect of human rights (so-called 'conditionality clauses'), which the Union itself ever more frequently requires to be included in the international agreements it signs[45].

The Advocate General went so far as to suggest that national judges should have been vested with the powers to annul Community acts that violated fundamental rights. These observations found their legal basis with the Lisbon Treaty.

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43 CIMIOTTA (2014: 457).
44 Opinion of the A.G. Bot, of 22 January 2013, para 61.
45 DI STASIO (2017: 318 ss.).

In this regard, the well-known *Kadi* case[46], in which the CJEU annulled the Council Regulation no. 881/2002 of 27 May 2002 which provided for restrictive measures against certain people (including Mr Kadi), and entities associated with Al-Qaeda and the Taliban, is worth of special consideration.
The inclusion of Mr Kadi in the lists had deprived him of "effective judicial protection". The judgement annulling the regulation that provided for his listing led to the transmission of the reasons for the listing to the permanent representative of France to the UN, authorizing the communication to Mr Kadi by the Commission.
In the communication, the Commission notified Mr Kadi that it would have kept his name in the list but gave him a period to file his observations. In fact, despite the annulment of the Regulation, the list was still valid, as being drafted with the UN Security Council which is external to the EU regulatory provisions. In practice, the annulment of the Regulation that provided for the inclusion of his name in the blacklist, would not have led to the cancellation of the name of Mr Kadi because the decision of its inclusion derived from the UN Security Council (according to the cited intergovernmental principle).
The applicant immediately brought the case before the General Court in order to obtain the partial annulment of the Regulation in the part that concerned him. The General Court upheld the appeal. However, in the judgement of 18 July 2013, joint Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi*, the CJEU considered the listing of Mr Kadi's name excessive and disproportionate and concluded that:

> the European Union may not impose restrictive measures on Mr Kadi, without evidence to substantiate his involvement in terrorist activities[47].

The new judgement focused on the alleged error of law of the appeal of Mr Kadi for failure to recognize judicial immunity, despite the annulment of the contested regulation.
However, according to the Court it was necessary to recall the relationship between the EU legal order and the system based on the UN Charter which provides that EU regulations implementing UN Security Council Resolutions cannot enjoy any immunity for judicial review.
Nevertheless, the Court recognized the duty to respect the fundamental principles of the Union even if the restrictive measures were adopted for the implementation of a binding resolution of the UN Security Council.

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[46] CJEU, judgement of 3 September 2008 joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and European Commission*.
[47] CJEU press release no. 93/13

The CJEU found some errors of law committed by the General Court[48] and clarified that[49]:

> […] the Courts of the European Union must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order, including review of such measures as are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

Nonetheless, the Court observed that:

> […] having regard to the preventive nature of the restrictive measures at issue, if, in the course of its review of the lawfulness of the contested decision, […] the Courts of the European Union consider that, at the very last, one of the reasons mentioned in the summary provided by the Sanctions Committee is sufficiently detailed and specific, that it is substantiated and that it constitutes in itself sufficient basis to support that decision, the fact that the same cannot be said of other such reasons cannot justify the annulment of that decision. In the absence of one such reason, the Courts of the European Union will annul the contested decision[50].

The Court concluded that, because no evidence had been produced to substantiate the allegations, firmly rejected by Mr Kadi, related to his involvement in activities related to international terrorism, it could not justify the adoption, at the Union level, of restrictive measures against him.
The ruling is of extreme interest as it has established that effective judicial protection must be always guaranteed when there is no evidence supporting the suspicion of terrorism.[51].
In addition, the judgement highlighted the importance of due diligence required to verify violations.
A similar case involved the bank *Syria International Islamic* which was included in the *blacklists* by a regulation that was subsequently annulled.
The General Court held that there was no evidence of injury since the damage alleged could also have resulted from measures taken by others. Furthermore, the General Court deemed to lack the competence to rule on the inclusion of persons in the lists by the EU Council.
In this case, the right to compensation for damages was theoretically foreseen, but it was objected that the applicant failed to prove it.

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48 The first error in law consisted in failure to grant judicial immunity to the contested regulation. The second error in law concerned the degree of intensity of the judicial review provided by the judgement under appeal. The third one concerned errors made by the General Court in examining the grounds for annulment on the basis of which Mr Kadi claimed a violation of the rights to defence and of effective judicial protection as well as a violation of the principle of proportionality.
49 Para. 97 of the aforementioned judgement.
50 Para. 130 of the aforementioned judgement.
51 On the same line, ECHR judgement of 12 September 2012, *Nada v. Switzerland.*

In the judgement of 11 June 2014, Case T-293/12, *Syria International Islamic Bank v. European Council* the General Court confirmed the principle under which compensation can be granted but only if the damage results from and error of law and not substantive ones[52].

1.4 CJEU's jurisdiction to review CFSP acts

The impossibility of the Court of Justice to review CFSP acts led to concerns about the judicial protection related to its operational choices.
The limit of the CJEU is enshrined in the Treaty of Lisbon which has confirmed the provision under which the Court lacks the competence in matters of CFSP (Art.24 TEU).
Nonetheless, there are two exceptions in which the CJEU can exercise the judicial review:
(1) to review the lawfulness of restrictive measures adopted by the Union against legal or natural persons[53].
(2) to ascertain the extent of the powers of the European institutions for the implementation of the CFSP[54].
Moreover, it is possible to obtain the opinion of the Court on the compatibility of an international agreement with the Treaties (Art. 218 TFEU).
The aforementioned Art. 218 grants an important competence to the CJEU when it states that[55]:

> a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended, or the Treaties are revised.

In this sense, although the Court has not the jurisdiction to rule on choices regarding the CFSP, it has a special role in establishing their compatibility with the Treaties.
The Court normally exercises this function when decisions are taken to review some initiatives concerning the security policy.

52 Art. 40 TEU
53 Art. 275 TFEU.
54 Art. 40 TEU.
55 Art. 218, para. 11, TFEU.

CHAPTER 2

THE HANSEANTIC TRADE TRUST & SHIPPING GMBH CASE

Introduction

Iran is a theocratic presidential Islamic republic whose internal affairs are managed according to Quranic principles, applying the Sharia which is the legal order based on religious dogmas.
In this sense, the country is particularly closed to western countries. In international politics, it manages its diplomatic relations in a defensive manner, that is, always defending its own religious 'values'. The country has long been at the center of a diplomatic case which had accused it of violating the international agreements on nuclear energy which provided for a limited use of energy of nuclear origin[56]. The Iranian government admitted to have funded a nuclear research program, but strongly rejected the accusations of building a nuclear arsenal. The program in question, according to the government, was for national use, but the international community, represented primarily by the United States and Europe, expressed serious concerns regarding the implications for international security, as there was a serious risk of eroding the Treaty on the Non-Proliferation of Nuclears Weapons (NPT), signed by Iran. Some European countries, supported by the United States, had conducted a long diplomatic policy against the Iranian determination to autonomously develop uranium enrichment, the industrial process that allows for both the production of energy and the development of nuclear weapons. The failure of the negotiation, which also included Russia, led to the referral of Iran to the UN Security Council. Only after more than ten years of negotiations, the international community has reached an agreement with the Iranian government.
In 2015, after almost forty years, the P5+1 countries (United States, Russia, China, Great Britain, France and Germany) signed an agreement on the Iranian nuclear program with the Iranian government.
The Iranian nuclear deal[57] was the culmination of a process of rapprochement with the international community promoted by the current Iranian President Hassan Rouhani.

[56] The accusation against Iran were put forward by the International Atomic Energy Agency (IAEA).
[57] Formally, the Joint Comprehensive Plan of Action (JCPOA).

2.1 legal and factual background

The HTTS Hanseantic Trade Trust & Shipping GmbH, based in Germany, deals with maritime mediation and technical management of vessels. In carrying out its business, it also performs services for IRISL, an Iranian shipping companies.
In 2007, the EU adopted restrictive measures against Iran aimed at putting pressure on the country to abandon its 'nuclear proliferation' policy. The restrictive measures were adopted through the Council Common Position 2007/140/CFSP of 27 February 2007[58] and the Council Regulation (EC) no. 423 of 19 April 2007[59].
A list of persons and entities (of Iranian nationality) subject to freezing of all capital and resources was attached to the Common Position mentioned[60]. Regulation (EC) no. 423/2007 was provided with an annex[61] containing a list of persons, entities, and bodies whose funds had been frozen[62]. These were subjects deemed by the Council to participate in nuclear proliferation activities (pursuant to Art. 5, para.1, lett. b) outlined by the Common Position mentioned.
On 26 July 2010, the Council repealed the Common Position referred to by adopting Decision no. 2010/413/CFSP[63].
By modifying the list of subjects subject to the freezing of funds, Art. 20, para. 1 of the decision in question extends it to:

> Persons and entities […] that are engaged in, directly associated with, or providing support for [Iranian 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 well as […] entities of [IRISL] and entities owned or controlled by them or acting on their behalf, as listed in Annex II.

On 25 October 2010, the Council Regulation (EU) no. 961 has repeald the previous Regulation no. 423/2007[64] stating that:

> All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VIII shall be frozen. Annex VIII shall include the natural and legal persons, entities and bodies, not covered in Annex VII, who, in accordance with Article 20(1)(b) of Council Decision no. 2010/413/CFSP, have been identified as:
> Being engaged in, directly associated with, or providing support for [Iranian 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;

58 OJ L 61, p. 49.
59 OJ L 103, p. 1.
60 Provided by Council Common Position 2007/140/CFSP, Art. 5, para. 2, lett. b).
61 Annex V.
62 Pusuant to Art. 7, para. 2, Regulation (EC) no. 423/2007.
63 OJ L 195, p. 39.
64 OJ L 281, p. 1.

[…] being a legal person, entity or body owned or controlled by [IRISL][65].

Art. 36 of the regulation governed the protocol necessary to insert persons, entities or bodies in the list of those subject to the restrictive measures referred to in Art. 16, providing that the aforementioned Annex VIII could be continuously modified through a specific procedure which impose the duty, on the Council, to notify each person, entity or body included in the list. The procedure provided for by Art. 36 was intended to allow those included in the list to submit their observations.

Once the eventual observations, which can be accompanied by new substantial evidence, have been received, the Council has the duty to review its decision and to inform the subject about the decision taken.

Among the names included in the list (Council Decision no. 2010/413), there was also the HTTS Hanseantic Trade Trust & Shipping GmbH.

Its inclusion was decided with Regulation (EC) no. 423/2007[66], while the freezing of funds and resources of the company was provided by the Implementing Regulation no. 668/2010.

The reason for its inclusion in the list was that it was deemed to act on behalf of Hafize Darya Shipping Lines (HDSL), a company associated with nuclear proliferation activities.

In practice, the Council considered the company instrumental for the activities carried out by HDSL in Europe.

According to the procedure described, the Council had informed the company of its inclusion in the list.

Consequently, the company requested to review the decision that led to its registration. This request was made by sending two letters, on 10 and 13 September 2010 respectively.

Since Regulation no. 423/2007 had been repealed, the registration of the company was to be considered adopted by Regulation 961/2010[67] in whose Annex VIII, at point 26 of the list, the reasons were clarified: "it is controlled and / or acts on behalf of IRISL".

In response to the observations of the company, the Council noted that there was not new evidence compared to that that led to the registration of the applicant's name and, therefore, there were no reasons for its delisting.

Despite the request of the company to know the evidence on which the Council had based its decision to include it in the list, there was no response.

On 16 December 2010 HTTS Hanseantic Trade Trust & Shipping GmbH brought the case before the EU General Court[68]. On 14 March 2011 the Council lodged its defense.

On 29 March 2011, the General Court informed the applicant that the defense was lodged beyond the time allowed, receiving, in response, the request by

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65 Art. 16, Council Regulation (EU) no. 961/2010.

66 OJ L 195, p. 25.

67 In particular, the registration was to be attributed to Art.16, para.2 of the regulation in question.

68 EU General Court, judgement of 7 December 2011, Case T-562/10, *HTTS v. Council*.

the applicant to give judgement by default, pursuant to Art. 22, para. 1 of the Rules of Procedure.
The requests of the applicant were:
– to annul Regulation no. 961/2010 in the part that concerned it;
– to order the Council to pay the costs.
The Commission and the Federal Republic of Germany applied to intervene in support of the Council. However, because of the delay with which the Council had lodged its defence, the application to intervene was rejected.
The General Court would have based its judgement only on the submission of the applicant.
Six pleas in law could be found in the applicant's submission:
The first one concerned the alleged violation, by the Council, of the duty to state reasons for its inclusion in the list; the second one, connected to the first, concerned the impossibility of the applicant to exercise its right to defense and, in particular, the right to be heard; the third plea concerned the infringement of the right to effective judicial protection; the fourth concerned an alleged error of assessment[69] ; the fifth referred to an alleged violation of the right to respect for property and the sixth, and last, plea referred to an alleged infringement of the principle of proportionality.
As anticipated in the previous pages, there is an obligation to state reasons for an act issued by the Council, and only 'compelling reasons'[70] can justify its derogation.
Moreover, the obligation is valid when the subject concerned by the act is notified, allowing him to submit its observations and to defend himself in the event of an injury.
The compelling reasons that may justify the failure to state reasons for the adoption of an act are linked to matters of security of the EU or the Member States or to matters of international politics.
Furthermore, the reasons must not be superficial but concrete and precise, and, in addition to the 'facts', they must also contain the legal issues concerned.
The statement of reasons must be adequate to the nature of the act in question and must be contextualized.
In the case in question, the reasons given by the Council to justify the inclusion of HTTS Hanseantic Trade Trust & Shipping GmbH in the list were found in Annex VIII of Regulation no. 961/2010 and in its letter of 28 October 2010, in which it notified the applicant of its inclusion in the list.
The reasons provided by the Council appeared contradictory. In particular, the letter proved to lack new evidence justifying the change in the Council's position. Furthermore, there was a contradiction between the reasons provided by Annex VIII of Regulation no. 961/2010 and the reasons provided by the Implementing Regulation no. 668/2010. If the reasons of the applicant's listing were based on alleged links between it and HDSL, it was not clear why

[69] Connected to the application of Art. 16, para. 2 of Council Regulation no. 961/2010
[70] The 'compelling reasons' include decisions made in the CFSP field or international agreements.

the Council did not deemed sufficient the elements contained in the applicant's letters of 10 and 13 September 2010, concerning the nature of its business and its autonomy from HDSL and IRISL, to review the restrictive measures taken against it.
If, on the other hand, the reasons were based on alleged direct links between the applicant and IRISL, neither Annex VIII of Regulation no. 961/2010 nor the letter of the Council of 28 October 2010 were sufficient to confirm the existence of such a link which would have justified the adoption of restrictive measures against it.
Based on these observations, the first plea appeared well founded and therefore was accepted.
According to the rule that provides for the obligation to state reasons for the adoption of an act, the Court ordered the annulment of Regulation no. 961/2010 in so far as it concerned the applicant. Therefore, it was not necessary to examine the other pleas.
However, it could not be excluded that the restrictive measures taken against the applicant, with respect to the substance, could be justified.
In the judgement[71], the General Court considered both aspects by ordering that the Council Regulation no. 961/10 was annulled in so far as it concerned HTTS Trade Trust & Shipping GmbH but that its effects were maintained for a period no longer than two months. After two months from the judgement, the Council relisted the applicant on many occasions and each listing was challenged and subsequently annulled by the General Court in the judgements of 12 June 2013[72] and 18 September 2015[73].

2.2. EU General Court, judgement of 13 December 2017, Case T-692/15, *HTTS v. Council*

On 25 November 2015 HTTS lodged an appeal at the registry of the General Court to order the Council to pay the sum of 2 516 221.50 EUR as compensation for material and non-material damages suffered. The European Commission applied to intervene in support of the Council. Among the reasons for the appeal, HTTS claimed a violation of the obligation to state reasons and of the substantial conditions that would have justified its inclusion in the contested lists. Furthermore, it was noted that meanwhile the name of IRISL was removed from the balcklist. The General Court, in the judgement of 13 December 2017, Case T-692/15, *HTTS v. Council*, dismissed the appeal stating that, in summary, the removal of IRISL from the list did not imply that

[71] EU General Court, judgement of 7 December 2011, Case T-562/10, *HTTS v. Council.*
[72] EU General Court, judgement of 12 June 2013, Cases T-128/12 and T-182/12, *HTTS v. Council.*
[73] EU General Court, judgement of 18 September 2015, Case T-45/14, *HTTS and Bateni v. Council.*

it was not connected with nuclear proliferation activities[74]. Moreover, with regard to the insufficient reasons (relating to the request of HTTS to the Council to provide clarifications about its inclusion in the lists) the General Court held that, in principle, it does not give rise to the Union's liability. Furthermore, the General Court held that, since the Council can rely on all evidence occurring before that the action was brought against it, the reasons for the inclusion of HTTS in the lists were to be determined in light of the reasons provided by the Council in Council Decision no. 2012/35/CFSP of 23 January 2012[75]. The latter maintained the inclusion of the applicant's name in the list attached to Council Decision no. 2010/413/CFSP of 26 July 2010.
The applicant challenged the appeal before the CJEU giving rise to a new proceeding: Case C-123/18 P whose parties have been HTTS Hanseantic Trade Trust & Shipping GmbH, as appellant, and the Council of the European Union, as defendant at first instance and the European Commission, as intervener at first instance.

[74] The removal from the list was due to a report by the Sanctions Committee of the UN Security Council.
[75] Amending Council Decision no. 2010/413/CFSP of 26 July 2010 relating to restrictive measures against Iran.

CHAPTER 3

CJEU JUDGEMENT

3.1 The judgement under appeal

The appeal against the judgement of the General Court of 13 December 2017, Case T-692/15, saw HTTS challenging several alleged errors of law made by the Court.
First, the General Court held that the Council had the right to include the name of the shipping company in the list despite not having the necessary information to do so (at the time of the registration).
This, according to the applicant, represented a 'sufficiently serious breach of a rule of EU law', determining the latter's non-contractual liability.
HTTS added that the institutions had to respect the principles of the 'rule of law', as well as fundamental rights even in matters of CFSP, despite the wide margin of discretion that characterizes this field.
Furthermore, HTTS believed that the General Court did not consider the CJEU judgement of 30 May 2017, Case C-45/!5 P, *Safa Nicu Sepahan v. Council*, which, in its view, would have demonstrated that its arguments were well founded[76].
On the other hand, the position of the Council concerned the alleged legitimacy to provide new evidence subsequent to the adoption of restrictive measures, since an action for damages can be brought within five years from the moment in which the damage arised.
Based on this consideration, in the Council's opinion, this term also represented the period within which the institution could have organized its defence. Moreover, the Council believed that a different interpretation would have hindered the exercise of its functions within the CFSP area.
With regard to the metioned judgement of 30 May 2017, the Council opposed to the idea that the General Court could not take into account the circumstances that arose after the adoption of the restrictive measures.
Indeed, according to the Council, it could be inferred from the judgement that, even if the facts were not yet known, if the person subject to restrictive measures had acted in such a way as to justify them, then no right to compensation should be recognized.
The Commission agreed with the arguments of the Council.
According to its jurisdiction, the CJEU focused its reconstruction of the facts only on the aspects 'of law'.

[76] In that judgement the CJEU held that it was not possible for the Council to produce new evidence that would have justified its conduct at a time subsequent to the adoption of restrictive measures.

First of all, a 'sufficiently serious breach of a rule of EU law' was necessary, followed by the existence of the damage and the causal link between the breach of the obligation on the part of the author of the act and the damage suffered by the injured parties.
In considering the requests of HTTS, the analysis focused on the first of these conditions, noting that such violation must be assessed taking into consideration the 'complexity of the situation to be regulated', the degree of clarity and precision of the rule breached, as well as the margin of discretion left by that rule to the EU institution.
The assessment must find a balance between the protection of individuals against unlawful acts of the institutions and the margin of discretion accorded to the institutions in order not to paralyze their action.
Based on these considerations, the CJEU had to decide whether the General Court, in its assessment of the existence of EU non-contractual liability, erred in law or not by helding that the Council could invoke all the relevant information and materials occurred before that the action for damages was brought before the Court (and not known at the time of the inclusion of the applicant's name in the list)[77].
These were elements that the Council did not take into account when HTTS was included in the contested lists, because it did not know them.
Some previous judgements had established that, in an action for annulment, the legality of the contested act should be assessed on the basis of the factual and legal elements existing at the time the act was adopted[78].
Having considered the fact that the methodology according to which the legality of an act (or of a conduct of a EU institution) is assessed does not differ according to the type of action, HTTS believed that also the actions for damages should be subject to this jurisprudence.
On this aspect, the General Court could not be considered in error, having itself recognized, in the judgement under appeal, that the action for damages is an autonomous form of action, therefore independent from the action for annulment.
Since Council Regulation no. 961/2010, which provided for the inclusion of the applicant in the lists, was annulled in the judgement of the General Court of 7 December 2011, Case T-562/10, *HTTS v. Council*, and not having been challenged within the time limit, it was to be considered definitive.
However, given the complexity of the situation, only the finding of an irregularity that, in similar circumstances, would not have been committed by an administrative authority excercising ordinary care and diligence would have given rise to EU non-contractual liability.
The existence of a 'sufficiently serious breach of a rule of EU law' must necessarily be assessed on the basis of the circumstances in which the institution had found itself when it adopted the contested act, dwelling on that

[77] Based on what was established in paras. 49 and 50 of the judgement under appeal.
[78] CJEU Judgement of 18 July 2013, Case C-501/11 P, *Schindler Holding and Others v. Commission*, para. 31; and CJEU judgement of 3 Septmeber 2015, Case C-398/13 P, *Inuit Tapiriit Kanatami and Others v. Commission*, para. 22.

particular date (being able only to produce the evidence that it took in consideration for the adoption of such act).
In the light of these considerations, the CJEU came to the conclusion that the General Court erred in law by allowing the Council to invoke any relevant matter that was not taken into account at the time of HTTS' inclusion in the lists[79].
Moreover, this is a conclusion that cannot be called into question by the peculiarity of the CFSP.
In this regard, it should be noted that the concepts of 'sufficiently serious breach' and 'damage' are distinct and they are placed on different time levels. The 'sufficiently serious breach' is, in fact, a static concept, which must be assessed at the time of the adoption of the unlawful act or conduct in question, while the concept of 'damage' is a dynamic one.
It follows that the first ground of appeal was to be upheld.
With regard to the second plea, HTTS contested the classification made by the General Court as a company 'owned or controlled' by IRISL.
In addition to this error, HTTS argued that Concil Regulations no. 423/2007 and no. 961/2010 did not even allow for the listing of an entity that had limited itself to act 'on behalf' of IRISL.
In addition to the lack of evidence to decide whether or not HTTS was owned or controlled by IRISL, the applicant stated that the Council did not have that material at the time they were needed, that is, when it included HTTS in the contested lists.
Nevertheless, in the judgement under appeal, the General Court admitted that the material available to the Council did not justify any registration.
There was a clear contradiction in the fact that, according to HTTS, while the General Court did not consider the annulments of the listing of IRISL to support the action, it nevertheless considered legitimate that the Council could rely on elements by way of defence.
The Council countered that there was evidence suggesting a commercial relationship between HTTS and IRISL and that it was enough to proceed with the inclusion in the list without incurring in manifest errors of assessment.
Furthermore, the Council held that the judgement of the General Court of 6 September 2013, Cases T-42/12 and T-181/12, *Bateni v. Council*, referred to by the applicant, was not relevant, as it concerned an action for annulment which did not cover the inclusion of HTTS in the contested lists.
Finally, the Council stated that, in 2017, the General Court confirmed the lawfulness of IRISL's inclusion in the lists[80].
To this, it must be added that the report of the Sanctions Committee of the UN Security Council had found three violations committed by IRISL concerning the arms embargo[81].
The second ground of appeal was divided in two parts.

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79 In essence, in paras. 49 and 50 of the judgement under appeal.
80 EU General Court, judgement of 17 February 2017, joined Cases T-14/14 and T-87/14, *Islamic Republic of Iran Shipping Lines v. Council*.
81 Security Council Resolution 1747 (2007).

On the one hand, HTTS claimed that the General Court had erroneously held that the ownership ties did not constitute an element to be taken into account in order to determine whether the applicant was a company 'owned or controlled' by IRISL.
Based on Council Regulation no. 961/2010, the ownership or control can be direct or indirect. Therefore, as recalled by the General Court in para. 55 of the judgement under appeal, the concept of 'a company owned or controlled' does not have the same meaning in the field of restrictive measures as in company law.
In para. 56 of the judgement under appeal, the term owned or controlled referred to the ability 'to influence the commercial decisions' of another company with which there is a commercial relationship, even in the absence of any legal link between the two economic subjects.
Therefore, the first complaint of the first part was rejected as unfounded.
The other complaint concerned Council Regulations no. 423/2007 and no. 961/2010 which did not provide for the inclusion in the lists of a company that limited itself to 'act on behalf' of IRISL.
Council Regulation no. 961/2010 stated that being owned or controlled by another person or entity was placed on the same level as acting on behalf of another person or entity.
In the light of these considerations, the CJEU rejected the first part of the second ground of appeal in its entirety.
The second part of the second plea alleged that the evidence proving that HTTS was owned or controlled by IRISL were not known by the Council on the date of HTTS' inclusion in the contested lists.
The CJEU had already found that the General Court erred in law by stating that the Council could rely on elements that were not taken in consideration for the adoption of the act.
It follows that the General Court had also made an error of law in declaring that the Council had not committed a 'sufficiently serious breach' when it took in consideration subsequent evidence.
Therefore, the first complaint of the second part of the second ground of appeal was upheld.
For what concerned the question relating to the use of 'indicia' in order to show the ownership or control, it emerged that the General Court made an error of law by relying, in its judgement, on elements that were not taken in consideration by the Council at the time of the inclusion of HTTS in the contested lists.
Consequently, the second part of the second ground of appeal was upheld.
The third and fourth grounds of appeal concerned the alleged error of law made by the General Court when it held that the Council did not violate its obligation to state reasons for the inclusion of the applicant in the contested lists, and, secondly, that the inadequacy of the reasons for the adoption of an act does not give rise to EU non-cotractual liability.
According to HTTS, the General Court erred in law in assuming that Implementing Regulation no. 668/2010 was applicable in the present case, as

it was superseded by Council Regulation no. 961/2010 which was in turn annulled by the General Court in 2011[82].
Furthermore, the 'supplementary' reasons, referred to by the General Court in order to justify the inclusion of HTTS in the contested lists, came to the attention of the Council subsequently, hence they could not have been taken into account.
As anticipated, according to HTTS, the General Court erred in law in stating that the infringement of the obligation to state reasons could not give rise to the Union's liability[83].
The recognition of such obligation would have entailed the need to collect information or evidence for the registration of HTTS in the lists.
The Council and the Commission contested both grounds of appeal.
As the two pleas were connected, they were examined together.
With regard to the inclusion of HTTS in the lists, the General Court declared unlawful only Regulation no. 961/2010 from which it could not be assumed that also Regulation no. 668/2010 was to be considered unlawful due to a defect in reasons.
Moreover, the applicant did not bring an action for annulment against the latter.
In this context, the arguments of HTTS were rejected.
However, even the unlawfulness of Regulation no. 668/2010 due to a lack of motivation would not have constituted a 'sufficiently serious breach'.
The inadequacy of the reasons for the adoption of an act introducing restrictive measures was not deemed, in and of itself, such as to give rise to EU non-contractual liability[84].
It followed that the third and fourth pleas were rejected.

3.2 Opinion of the Advocate General Pitruzzella

In light of the reconstruction analysed, on 5 March 2019 Advocate General Giovanni Pitruzzella presented his conclusions on Case C-123/18 P.
In presenting the facts, the Advocate General described the requests of the applicant, HTTS, highlighting the damage suffered from the inclusion in the lists concerning subjects suspected of being involved in Iranian nuclear proliferation activities. The Advocate reported the arguments analysed by the CJEU. Implementing Regulation (EU) no. 668/2010 and Council Regulation (EU) no. 961/2010 of 25 October 2010, which repealed the previous one, were the normative references invoked by the applicant.

82 EU General Court, judgement of 7 December 2011, Case T-562/10, *HTTS v. Council*.
83 Para. 88 of the judgement under appeal.
84 CJEU judgement of 30 September 2003, Case C-76/01 P, *Eurocoton and Others v. Council*.

The Case referred to the measures taken against a shipping company, IRISL, as well as to natural or legal persons allegedly related to it, such as HTTS and two other shipping companies[85].
In chronological order, the first listing of HTTS took place on 26 July 2010, due to the entry into force of Implementing Regulation no. 668/2010 which considered the company as a European agent of HDSL (which, as IRISL, was included in the lists).
Such inclusion was not challenged by means of an action for annulment.
Council Regulation no. 961/2010, instead, included HTTS in the lists on the basis that it was 'controlled and/or acting on behalf of IRISL'.
The latter was contested by HTTS and annulled by the General Court in the judgement of 7 December 2011.
However, the effect of the annulment was set to start on 7 February 2012, in order to give the Council the possibility to provide further evidence for the relisting.
Eventually the name of HTTS was subject to further inclusions by the Council, challenged each time.
The General Court annulled the inclusions of HTTS in the lists in two judgements, one in 2013, and the other in 2015[86].
Based on the observation that the evidence provided by the Council was inadequate for the listing, in 2013[87] the General Court annulled also the inclusion of IRISL in the lists[88].
In 2015, the applicant sent a letter to the Council seeking compensation for damages.
The alleged material and non-material damages were attributed both to the effects of Implementing Regulation no. 668/2010 and of Council Regulation no. 961/2010, as well as to subsequent listings. However, the Council rejected the request.
On 25 November 2015, HTTS brought an action for damages pursuant to Art. 268 TFEU.
The General Court rejected the two grounds put forward by HTTS to demonstrate the existence of a 'sufficiently serious breach of a rule of EU law':
– the alleged violation of the substantive requirements for the listing;
– the alleged violation of the obligation to state reasons.
In its assessment, the General Court analysed only the absence of a 'sufficiently serious breach of EU law'.
On 13 February 2018, HTTS decided to bring the case before the CJEU.
The action contained the request to order the Council to pay compensation in the amount of EUR 2 516 221,50.

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85 Hazife Darya Shipping Lines (HDSL) and Safiran Pyam Darya Shipping Lines (SAPID).
86 EU General Court, judgements of 12 June 2013, joined Cases T-128/12 and T-182/12, *HTTS v. Council* and of 18 September 2015, Case T-45/14, *HTTS and Bateni v. Council.*
87 EU General Court, judgement of 16 September 2013, Case T-489/10, *Islamic Republic of Iran Shipping Lines and Others v. Council.*
88 On that occasion, also the inclusion of HDSL and SAPID in the lists was annulled.

The Council asked the Court to reject the appeal, or, in the alternative, to refer the case back to the General Court.
The Commision intervened in support of the Council.
In the appeal, the grounds put forward by the applicant were four.

First ground of appeal

HTTS held that the General Court erred in law in stating that the fact that its inclusion in the lists was based on materials and information that were not yet available to the Council on the date of its inclusion was not a 'sufficiently serious breach'. According to HTTS, subsequent modification or new information cannot justify the Council's conduct retrospectively.
Thus, the General Court made an error of law in assuming that the time limit within which to collect the evidence should coincide with that to bring an action for damages.
In fact, even in the field of the CFSP and the margin of discretion left to the institution concerned, the rule of law must be always guaranteed, even in the adoption of restrictive measures.
Furthermore, although the annulment of Council Regulation no. 961/2010 did not produce immediate effect, this did not confer any right for registration in the absence of evidence.
It also must be added that the judgement in *Safa Nicu Sepahan v. Council* claimed that the infringement, on the part of the Council, of the obligation to state reasons for the inclusion in the lists would constitute, in and of itself, a 'sufficiently serious breach of a rule of EU law'.
Finally, in the General Court judgement of 12 June 2013, joined Cases T-128/12 and T-182/12, *HTTS v. Council*, it was found that the Council did not yet know, at the beginning of 2012, sufficient information for the listing.
The Council countered that it could rely on evidence subsequent to the conduct complained within the time limit of the action. The analysis of the General Court had also established the impossibility of asserting the liability of the Union institutions when they act in the CFSP field.
As for what regards the Case *Safa Nicu Sepahan v. Council*, the Council believed that the two proceeding were not comparable as, in the first case, the action concerned the lack of substantive elements for the inclusion in the lists, while, in the second case, the action concerned the exercise and scope of the Council's discretion.
EU non-contractual liability was to be established in light of the duty to protect the interests of the injured party and of the need to allow for the proper functioning of the institutions.
According to the Council, since the facts proved the link between HTTS and HDSL, SAPID and IRISL, the hypothesis of a 'sufficiently serious breach of EU law' was weakened. The lack of sufficient evidence was compensated by the existence of 'indicia'. These arguments were shared by the Commission.

Analysis

The analysis started from the argument that the purpose of the EU liability action is the protection of citizens against unlawful acts or conducts of its institutions that give rise to damage.
Even the Council, when it acts in the CFSP area is not immune from the possibility to be non-contractually liable for damages caused.
The existence of a 'sufficiently serious breach of a rule of EU law' intended to confer rights on individuals is the ground for extending the liability in question to the Council.
However, it is always necessary to find a balance between the interests of individuals, which must be protected against unlawful acts of the institutions, and the magin of discretion given to them in order 'not to paralyse action by them'.
This requirement holds even in the field of the CFSP in general, and in the adoption of restrictive measures in particular[89]. The conditions to be fulfilled in order to establish a violation of EU law are the existence of a 'sufficiently serious breach of a rule of EU law' which confers rights on individuals, the existence of the damage, and the causal link between such breach and the damage. The three conditions are cumulative.
Considering the arguments of the parties, the General Court, in the judgement under appeal, examined not only whether the Council 'manifestly and gravely' commited the unlawful conduct, as laid down by settled case-law, but also if the breach was 'flagrant and inexcusable', referring to previous jurisprudence[90].
Moreover, the General Court held that[91]:

> The wider objective of maintaining peace and international security, […] is such as to justify negative consequences, arising from decisions implementing acts adopted by the Union with a view to achieving that fundamental objective.

However, this observations, according to the Advocate General, could not be extended to the specific case, since the lawfulness of EU actions must be guaranteed.
According to the Advocate, the element that determined the error of law, and in turn vitiated the analysis of the General Court, was the meaning given by the General Court of a 'sufficiently serious breach'.
Furthermore, if the action for damages can be brought within five years after the occurrence of the event giving rise to the damage, it does not imply the right of the Council to rely on evidence subsequent to the inclusion of HTTS in the lists.

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89 Therefore, the establishement of EU non-contractual liability for an unlawful act or conduct of the Council in the adoption of restrictive measures should not prejudice the Union's participation to the preservation of the world order.
90 Paras. 31 and 46 of the judgement under appeal.
91 Para. 45 of the judgement under appeal.

The two different time frames for the separate conditions of EU non-contractual liability were confused.
The notion of a 'sufficiently serious breach' must be considered as fixed to a particular moment, that is, that of the alleged unlawful conduct.
Moreover, only the injured party that claims to have suffered from the actions of an institution is authorized to produce evidence subsequent to the event giving rise to the damage (to prove its existence).
For what concerns the 'complexity of the situation' which the Council had to face at the time of the adoption of the restrictive measures, according to the Advocate General, this is for the Council to demonstrate.
In the case in question, however, there seemed to be no risks of paralysis of the EU institutions if HTTS had not been included in the lists.
To conclude, the General Court, distorted the control to which it should have proceeded and vitiated its reasoning by an error of law. In such circumstances, according to the Advocate General, the first ground of appeal was to be accepted.

Second Ground of Appeal

The second plea concerned the analysis of an alleged error of law due to the fact that the General Court deemed that the Council's conclusion, according to which HTTS had to be included in the lists as a company 'owned or controlled' by IRISL, did not constitute a grave and inexcusable error, nor a manifest error of assessment.
According to the applicant, the General Court erred in law by stating that the notion of a company 'owned or controlled by another entity' was to be analysed without taking in consideration any link in terms of property[92].
Furthermore, HTTS contested that the elements provided by the Council, which were subsequent to the adoption of the contested measures, had proved to be useful.
Lastly, the applicant contested the fact that the annulments of the inclusion of IRISL in the lists were not taken in consideration.
According to the Council, the applicant had wrongly interpreted the judgement, as the General Court did not hold that ownership links had no relevance in assessing whether the substantive criteria for the inclusion in the lists were met but would have used other elements as well.
With regard to the question of the information presented after the adoption of the contested measures, the Council referred to its position in the context of the first plea.

Analysis

According to the analysis of the Advocate General, the General Court did not err in law by stating that a company may be considered ' owned or controlled

[92] Para. 56 of the judgement under appeal.

by another entity' when the latter can 'influence' the commercial decisions of the company in question, even if it happens in the absence of any ownership ties.
The interpretation given by the General Court on the content of the criteria does not show, according to the Advocate General, any error of law.
In determining whether the infringement of the substantive conditions for the inclusion in the lists at issue was a 'sufficiently serious breach', the General Court came to the conclusion that the Council had correctly deemed that the company was 'controlled and/or acted on behalf of IRISL'.
The listings of the applicant in 2010 were to be considered justified in the eyes of the General Court, which excluded the existence of a 'sufficiently serious breach of EU law'.
However, the Advocate General observed that, even if at the time of the inclusion of the name of the applicant in the lists the inclusion of IRISL had not yet been annulled, it was true that it happened subsequently.
In this way, what was allowed to the Council was denied to the applicant.
Therefore, as the Council did not provide adequate evidence for the inclusion of HTTS in the lists, the conclusion of the General Court was vitiated by an error of law. It followed that the second ground of appeal was to be upheld.

Third and Fourth Grouds of Appeal

In the third and fourth pleas, that were examined together, HTTS alleged an error of law made by the General Court where it did not consider that the unlawfulness of Council Regulation no. 961/2010 had implied the unlawfulness of Implementing Regulation no. 668/2010 which was not subjected to an action for annulment brought by the applicant.
In addition, HTTS argued that the judgement under appeal contained another error of law, where it did not recognize that the infringement of the obligation to state reasons entitled the applicant to claim its right to compensation[93].
According to HTTS, the General Court should have verified whether the violation of such obligation had also led to a violation of the right to an effective judicial protection, capable to give rise to the right to compensation.
The Council's position was different.
The scope of the judgement of the General Court of 7 December 2011, *HTTS v. Council*, was limited to Council Regulation no. 961/2010, and it was for the applicant to prove that the violation of the obligation to state reasons concerned also Implementing Regulation no. 668/2010.
Moreover, according to the Council, HTTS did not demonstrate the link between the infringement of the obligation to state reasons and the possible damage to its effective judicial protection.
Lastly, the reference to the CJEU judgement *Safa Nicu Sepahan v. Council* did not seem relevant to the case in object, as it concerned the control of the merits of the restrictive measures.

[93] Para. 88 of the judgement under appeal.

To conclude, the confirmation of the applicant's reasons in the context of the action for damages should have been sufficient to settle the dispute.
The Commission shared these arguments.

Analysis

The whole issue could be summarized with the analysis of the assessment of the infringement of the obligation to state reasons for the inclusion of HTTS in the lists.
It was necessary to establish whether this violation was sufficiently serious or not.
Council Regulation no. 961/2010, which provided for the inclusion of the applicant in the lists, was annulled due to inadequate reasons.
It was also necessary to identify whether the applicant was harmed in its right to an effective judicial protection.
According to the General Court, Implementing Regulation no. 668/2010 could not be considered unlawful since HTTS did not bring an action for annulment against it.
The Advocate General confirmed the position of the General Court, which held that it was for HTTS to demonstrate the reasons why its inclusion in the lists through Implementing Regulation no. 668/2010 was to be considered a 'sufficiently serious breach' of the obligation to state reasons.
It was therefore necessary to focus on the other issues raised.
The Advocate General noted a passage of the judgement under appeal stating that [94]:

> In the present action for damages the legality of the restrictive measure in question must, in any event, be determined having regard not only to the reasons originally given, but also to those subsequently given by the Council, in Decision 2012/35/CFSP […].

With regard to Council Regulation no. 961/2010, the question on its lafwfulness was definitively settled with the judgement of the General Court which declared its annulment in so far as it concerned HTTS.
According to the Advocate General, the General Court confused the two time frames, the one applied to the action for damages and the one that applies to the actions for annulment.
The General Court, by allowing the Council to rely on events occurred after 2010 to justify the applicant's inclusion in the lists through Council Regulation no. 961/2010, vitiated its reasoning. Since the complaint was founded, the third ground of appeal was to be upheld.
With regards to the systematic exclusion of EU liability in the case of inadequate reasons for an act, the General Court correctly considered the possibility that the infringement of the obligation to state reasons was such

[94] Para. 89 of the judgement under appeal.

that it affected the effective judicial protection of HTTS. Therefore, the fourth ground of appeal was to be rejected.

Counclusion of the Analysis

In his conclusions, the Advocate General suggested the CJEU to uphold the first, second, and third grounds of appeal.
Without prejudice to the result to which an assessment of the 'sufficiently serious breach of a rule of EU law' based on a correct test would have led, the application of such test would have required the assessment of factual elements relating to the situation 'as it stood in 2010' which were not contained in the file submitted to the Court.
Moreover, the General Court had limited its analysis to the finding of the absence of a 'sufficiently serious breach', without verifying the other substantive conditions imposed by the rules.
The General Court did not even address the amount of compensation for the damage which could not have been discussed between the parties in the appeal proceedings.
For these reasons, the Advocate General proposed to the Court to refer the case back to the General Court, pursuant to Art. 6, para. 1, of the Statute of the Court of Justice.

3.3 The Judgement of the Court

According to Art. 61, para. 1, of the CJEU Statute, when the judgement of the General Court has been set aside, the Court of Justice can give the final judgement, where the state of the proceedings so permits, or refer the case back to the General Court.
The errors of law made by the General Court and the failure to examine the other conditions, which are cumulatively necessary to give rise to EU non-contractual liability, limited the possibility of the CJEU to decide on the matter.
For these reasons, it was necessary to refer the case back to the General Court for a new assessment.
Accepting the conclusions of the Advocate General, the Court gave its judgement:
– the judgement of the General Court of 13 December 2017, Case T-692/15, *HTTS v. Council* had been set aside;
– the case was referred back to the EU General Court;
– the costs were reserved.

Conclusion

Case C-123/18 P, which saw the HTTS company resort to the CJEU for alleged errors of law committed by the EU General Court, was preceded by various appeals which, in their complexity, offer interesting ideas to understand the legal content of the EU non-cotractual liability.
This liability is determined only if specific conditions are met, including:
The unlawfulness of the conduct of EU institutions or its agents in the exercise of their functions; the existence of the damage; and the existence of a direct causal link between the damage suffered and the conduct of the EU institutions or agents in the exercise of their functions.
Given the need to guarantee a wide margin of discretion to the activities of the Union, it is also necessary to verify whether there has been a 'sufficiently serious breach of EU law'.
In the case, the HTTS maritime company, as applicant, highlighted the damage suffered as a result of being included in the balck lists which, according to the CFSP, contain the names of the subjects suspected of being involved, in various capacities, in the Iranian nuclear proliferation activities.
Implementing Regulation (EU) no. 668/2010 and Council Regulation (EU) no. 961/2010, which repealed the previous one, were the main references on which the dispute was centered.
According to much evidence, HTTS was suspected of being controlled by the Iranian company IRISL, which was also included in the lists. The first inclusion of HTTS in the lists took place with the adoption of Implementing Regultion no. 668/2010 which considered the company as acting in Europe on behalf of HDSL (which, as IRISL, was included in the lists). Such inclusion was not challenged by HTTS by means of an action for annulment. The subsequent regulation, Council Regulation no. 961/2010 instead, included HTTS in the lists, deeming it 'controlled by IRISL and acting in Europe on its behalf' but, following an appeal, it was annulled. However, in order to give the possibility to the Council to collect supplementary evidence of the inclusion of HTTS in the lists, the effect of the annulment was postponed of two months.
At the end of the two months, HTTS was included in the lists several times, each time contested by the latter.
The listings were annulled by two subsequent judgements of the General Court, one of 2013, and the other of 2015.
With the judgement of the General Court of 16 September 2013, even the listing of IRISL was annulled.
In 2015, HTTS requested to the Council a compensation for the alleged damage suffered.
The General Court rejected the two pleas of HTTS to show the existence of a 'sufficiently serious breach of EU law':
– The plea concerning the violation of the substantive conditions for the inclusion in the lists;

– The plea concerning the violation of the obligation to state reasons.
However, in its judgement, the EU General Court examined only the first of the aspects relating to the absence of a 'sufficiently serious breach of EU law' and not the others.
On 13 February 2018 HTTS decided to bright the case before the CJEU.
An interesting aspect of the proceedings before the CJEU concerned the claim of the Council to have the right to produce evidence for the applicant's inclusion in the lists within the time limit imposed to bring an action for damages and not at the time of the listing.
The CJEU judgement, however, highlighted that, because of the duty to provide reasons for the adoption of an act, the Council should have provided evidence of the time of the inclusion and not after it.
An alleged error of law was also found concerning the fact that the General Court held that the Council's assessment that HTTS was to be considered as 'owned or controlled' by IRISL, was not a grave and inexcusable error, nor a manifest error of assessment (in fact, IRISL was removed from the lists).
Finally, as the Council did not demonstrate that there were 'sufficiently serious' reasons to proceed with the inclusion of HTTS in the lists, the conclusion of the General Court was vitiated by an error of law.
The case described analysed the EU non-contractual liability, highlighting, in summary, the need to protect the ability of the EU to act discretionarily and the need to respect, at the same time, the right of subjects to carry out their defense. The obligation to state reasons for the acts issued is the main prerequisite. The case was referred back to the General Court.
The thesis highlighted some particularly interesting aspects that deserve further investigation. First, the possibility emerged of pursuing diplomatic policies, in collaboration with international organization, by adopting restrictive measures aimed at discouraging behaviors that are considered dangerous.
The problem arises when these sanctions are directed to natural or legal persons who are denied the possibility to exercise their right to defense. The obligation to state reasons for acts adopted by the Council is certainly the instrument that most limits this risk.
The thesis underlined that such obligation must apply at the time of the registration of the suspects in the blacklist, and not after it.
In this way, it is possible to distinguish the 'suspicion' from the 'likelihood' and the 'clue' from the 'evidence'.
At the same time, the right of individuals to compensation for damages must be assessed with regard to the general situation, requiring a systematic analysis of every aspect , as it is not enough to analyse the alleged lack of a 'sufficiently serious breach of EU law' for the inclusion in the lists.
The dissertation has therefore confirmed that the European Union is guided by democratic principles, and rejects any form of rough justice.
If, on the one hand, the formal conditions of the civil procedure are required, on the other, the democratic principles of the constitutions of the Member States are upheld.

To conclude, the thesis provides a confirmation of one of the cornerstones on which the European Union is based, namely that the relationship between the Community and the internal legal systems remains autonomous but coordinated, and that the principles of democracy proper of the Member States are entrenched in the Union.

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Riassunto

L'elaborato analizza l'istituto della 'responsabilità extracontrattuale' dell'UE, focalizzando il suo contenuto in ambito giurisprudenziale. In particolare, ci si è soffermati sul suo significato in seno alle misure restrittive adottate dall'UE nell'applicazione delle decisioni assunte nell'ambito della PESC, la politica estera e di sicurezza comune dell'Unione.
L'Art. 340 del TFUE stabilisce che, mentre la responsabilità contrattuale dell'UE è regolata dalla legge applicabile al contratto in causa, quella extracontrattuale deriva sia da condotte di natura 'materiale' che dall'attività normativa. In merito alle attività materiali, tale responsabilità è conseguente solo a danni cagionati da attività illecite, mentre, nel caso di attività normative, l'UE è responsabile solo per danni causati da atti illegittimi. In ambito materiale, essa è tenuta a risarcire, conformemente ai principi generali comuni ai diritti degli Stati membri, i danni cagionati dalle sue istituzioni o dai suoi agenti nell'esercizio delle loro funzioni.
La competenza in tema di responsabilità extracontrattuale dell'UE è della CGUE e si estende alla materia penale e di polizia, ma non alla PESC (salvo misure restrittive adottate nei confronti di persone fisiche e giuridiche).
Per quanto riguarda i 'contenuti' richiesti al ricorso per responsabilità extracontrattuale dell'UE, gli elementi minimi sono indicati dall'Art.41 Statuto CG, dall'Art. 120 del Regolamento proc. CG e dall'Art. 44, par. 1, del Regolamento proc. Tribunale di I grado.
La giurisprudenza europea ha fornito un importante contributo all'interpretazione del tema in oggetto. Tra le pronounce che maggiormente hanno inciso sull'interpretazione della normativa che regola l'istituto della responsabilità extracontrattuale dell'UE rileva la sentenza emanata dalla Corte di Giustizia Europea, il 2 dicembre 1971, causa C-5/71, *Aktien-Zuckerfabrik Schoppenstedt v. Consiglio*.
Oltre ad avere sancito il carattere 'autonomo' del ricorso per responsabilità extracontrattuale, la sentenza ha, altresì, stabilito che esso debba contenere ogni elemento utile per la ricostruzione della stessa e che la politica economica dell'UE di per sé può causare svantaggi, laddove essi siano necessari allo scopo perseguito.
Il principio di piena autonomia del procedimento per responsabilità extracontrattuale implica che un ricorso nei confronti delle istituzioni o dei propri funzionari possa essere proposto anche dagli individui che non sarebbero legittimati a proporre ricorso in annullamento o in carenza.
Nello stesso senso è andata la sentenza emessa dalla CGUE il 29 settembre 1982, causa C-26/81, *Oleifici mediterranei v. CEE*.

Con tale sentenza, la Corte di Giustizia ha deciso che i presupposti per l'azione di risarcimento danni devono essere intesi in termini restrittivi, e che essa debba essere soggetta ad alcune condizioni.
In tal senso sono andate anche tutte le altre sentenze successive.
Oggi, è possible sintetizzare in tre le condizioni necessarie per potere richiedere il risarcimento dei danni. Esse sono state ben delineate anche nella sentenza della Corte di Giustizia del 24 marzo 2004, causa C-234/02, *Mediatore europeo v. Lamberts*, dove è stato chiaramente stabilito che, per aversi responsabilità extracontrattuale dell'UE sono necessari i seguenti presupposti:
– *In primis*, è necessario che esista un oggettivo diritto del ricorrente che si presuma leso (ovvero che vi sia una normativa giuridica europea violata);
– occorre, poi, che si tratti di una violazione 'grave e manifesta' dei poteri discrezionali attribuiti all'istituzione stessa e, infine,
– che sussista il nesso causale tra il fatto illecito e il danno subito.
Inoltre, la giurisprudenza europea ha fondato la responsabilità dell'UE richiamando la violazione dell'Art. 47 della Carta dei Diritti Fondamentali dell'UE (CDFUE).
La CDFUE, o Carta di Nizza, risale al 2001 ma è diventata vincolante solo con il Trattato di Lisbona del 2009, che ne ha equiparato l'efficacia a quella dei Trattati istitutivi dell'UE.
Inoltre, l'Art. 47 CDFUE corrisponde, a pieno titolo, anche all'Art. 6 della Convenzione Europea dei Diritti Umani (CEDU), in quanto, ai sensi dell'Art. 52, par. 3 della CDFUE, si stabilisce che l'UE si impegna a garantire un livello di tutela dei diritti fondamentali almeno pari a quello assicurato nel Sistema CEDU, salvo garantire una protezione più estesa.
In particolare, l'Art. 52, par. 3, in merito alla portata dei diritti garantiti, prevede che:

> Laddove la presente Carta contenga diritti corrispondenti a quelli garantiti dalla convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali, il significato e la portata degli stessi sono uguali a quelli conferiti dalla suddetta convenzione. La presente disposizione non preclude che il diritto dell'Unione conceda una protezione più estesa.

Avendo richiamato l'Art. 47 CDFUE si è stabilito che i diritti ad un equo ed imparziale processo devono ricevere almeno un livello di tutela pari a quello previsto ai sensi dell'Art. 41 CDFUE ed ai sensi dell'Art. 6 CEDU.
A ciò si aggiunge che, l'Art. 6 CEDU garantisce uno spettro di diritti particolarmente esteso che rafforza la tutela dei cittadini sottoposti a giudizio e garantisce il diritto ad un contraddittorio effettivo.
Esso, infatti, affronta il tema dell'equo processo, della ragionevole durata (Art. 6 par.1), della presunzione di innocenza (Art.6 par. 2) e delle garanzie processuali dell'imputato in relazione al principio del contraddittorio (Art. 6 par. 3). Nell'ottica di tali garanzie, assume un particolare rilievo il c. d. *right to be heard*, ossia il diritto ad essere ascoltati, riconoscimento all'imputato di

potersi confrontare in giudizio con l'accusatore nell'ambito del più ampio principio del contraddittorio.
Continuando l'analisi della giurisprudenza, tra i vari principi interpretativi rileva quello che ha visto la Corte chiarire che la responsabilità extracontrattuale dell'UE sussiste, unicamente, nei casi caratterizzati da una 'violazione grave' di una norma superiore intesa a tutelare i singoli (sentenze 13 giugno 1972, cause riunite 9/71 e 11/71, *Compagnie d'approvisionnement de transport et de Crédit et Grand moulins de Paris v. Commissione*, e sentenza 4 luglio 2000, causa C-352/98 P *Bergaderm e Groupil v. Commissione*, punti 41 e 42).
Nella sentenza *Bergaderm e Groupil v. Commissione* è stato confermato che:

> II comportamento illecito contestato ad un'istituzione comunitaria deve consistere in una violazione sufficientemente caratterizzata di una norma giuridica preordinata a conferire diritti ai singoli.

In questa sentenza è stato deciso che il criterio da utilizzare per stabilire se tale condizione sia stata soddisfatta è quello della violazione 'manifesta e grave' dei limiti posti al potere discrezionale dell'istituzione comunitaria.
Inoltre, ciò che emerge dalla sentenza è l'esistenza di una profonda analogia tra i presupposti della responsabilità extracontrattuale e quelli che disciplinano l'azione di responsabilità civile degli Stati per violazione dei diritti dell'Unione.
Particolarmente interessante è quanto emerso dalla sentenza del 19 ottobre 2017, causa C-198/16 P, *Agriconsulting Europe SA v. Commissione europea*, in cui la Corte di Giustizia europea si è pronunciata in merito alla richiesta di annullamento della sentenza del Tribunale dell'Unione Europea del 28 gennaio 2016, causa T-570/13, *Agriconsulting Europe v. Commissione*.
La Corte doveva decidere in merito alla sentenza emessa dal Tribunale che aveva respinto un ricorso per risarcimento danni patiti dal ricorrente per le irregolarità commesse dalla Commissione europea nell'ambito di una gara d'appalto a cui aveva partecipato.
Tra le altre motivazioni del ricorso alla CGUE, la ricorrente contestava al Tribunale di aver snaturato "la valutazione del comitato di valutazione" e i "documenti processuali", imponendo una valutazione non tecnica ma basata su proprie considerazioni. Ciò avrebbe prodotto una sentenza basata su una motivazione contraddittoria e priva di fondamento.
In tal senso, il Tribunale sarebbe venuto meno al suo obbligo di motivazione.
La Corte respinse il ricorso, avendo rilevato che in fase di gara erano state rispettate tutte le previsioni normative e che la valutazione del Tribunale era stata aderente a quella tecnica. In tal senso, si evince il rilievo riconosciuto all'aspetto materiale.
Ad una simile conclusione si è giunti nel caso riguardante i due gruppi LTTE ed Hamas, relativo ad un'impugnazione dei regolamenti con cui il Consiglio dell'UE aveva rinnovato il loro mantenimento nelle blacklists, che raccolgono i nomi di sospettati di attività terroristiche. L'impugnazione ha avuto ad

oggetto la richiesta di annullamento ai sensi dell'Art. 263 TFUE per presunta violazione dei diritti fondamentali, avendo, il Consiglio, mantenuto l'iscrizione senza aver provveduto a riesaminare i casi.
Nell'accogliere i ricorsi, il Tribunale UE ha annullato per motivazione insufficiente i regolamenti di inserimento dei nominativi nelle liste.
I giudici hanno riconosciuto che non esistessero delle motivazioni giuridicamente valide per l'inserimento dei due ricorrenti nelle liste, essendosi il Consiglio basato, nelle sue motivazioni, unicamente su decisioni di Stati terzi che non offrono le medesime garanzie di protezione dell'UE.
In particolare, per il mantenimento nelle liste, è stato ritenuto necessario che il giudizio pervenuto da altro tribunale offrisse il medesimo grado di garanzia quale è quello fornito dall'adesione alla Convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali e alle disposizioni della Carta dei Diritti Fondamentali dell'Unione Europea.
L'elaborato ha approfondito i contenuti relativi al potere dell'UE di adottare misure restrittive.
Le misure restrittive (o "sanzioni) sono uno strumento della Politica Estera e di Sicurezza Comune (PESC) dell'UE. Si tratta di misure che rientrano nel cosiddetto *approccio politico integrato e globale* che comprende il dialogo politico, sforzi complementari e il ricorso ad altri strumenti a disposizione degli Stati membri.
La Politica Estera e di Sicurezza Comune funziona secondo il principio di 'Cooperazione intergovernativa'.
Per assicurare tale politica sono stati istituiti organi con funzioni ad essa coerenti:
– il Comitato Politico e di Sicurezza, che si occupa di stabilire le strategie di fondo;
– il Comitato Militare dell'Unione, composto dai Capi dei Ministeri della Difesa degli Stati membri, che decide gli orientamenti dell'azione militare;
– il Civil Planning and Conduct Capability, che pianifica la politica di sicurezza e difesa sotto il controllo del Comitato Politico e di Sicurezza, in stretta collaborazione con la Commissione;
– lo staff militare dell'Unione, composto da esperti civili e militari forniti dagli Stati membri e da funzionari del Consiglio.
Gli obbiettivi perseguiti dalla PESC sono sanciti dall'Art. 21, par. 2 della versione consolidata del TUE del 1992:

> *– salvaguardia dei valori, degli interessi fondamentali, della sicurezza, dell'indipendenza e dell'integrità dell'Unione Europea;*
> *– consolidamento e sostegno alla democrazia, allo Stato di diritto, ai diritti dell'uomo e ai principi del diritto internazionale;*
> *– preservazione della pace, prevenzione dei conflitti e rafforzamento della sicurezza internazionale, conformemente agli obiettivi e ai principi della Carta delle Nazioni Unite, dell'Atto finale di Helsinki e della Carta di Parigi.*
> *– sviluppo sostenibile dei paesi in via di sviluppo sul piano economico, sociale e ambientale, con l'obiettivo primo di eliminare la povertà;*
> *– incoraggiamento dell'integrazione di tutti i paesi nell'economia mondiale;*

– contributo all'elaborazione di misure internazionali volte a preservare e migliorare la qualità dell'ambiente e la gestione sostenibile delle risorse naturali mondiali, al fine di assicurare lo sviluppo sostenibile;
– aiuti alle popolazioni, ai paesi e alle regioni colpiti da calamità naturali o provocate dall'uomo;
– promozione di un sistema internazionale basato su una cooperazione multilaterale rafforzata e del buon governo mondiale.

Infine, l'elaborato approfondisce un caso specifico: il caso Hanseantic Trade Trust & Shipping GmbH.
La sentenza emessa va inquadrata nel contesto di un caso diplomatico relativo ai rapporti tra UE ed Iran.
Il Paese è stato a lungo accusato di avere violato gli Accordi Internazionali per l'Energia Atomica che prevedevano la limitazione al ricorso delle fonti di energia di origine nucleare. Il governo iraniano aveva ammesso di avere finanziato un programma di ricerca nucleare, ma aveva fortemente rigettato le accuse di proggettare un arsenale atomico. Alcuni paesi europei, appoggiati dagli Usa, hanno condotto una lunga politica diplomatica contro la determinazione iraniana di sviluppare in modo autonomo l'arricchimento dell'uranio, il processo industriale che consente sia la produzione di energia sia la costruzione di bombe atomiche. Durante tali tensioni vennero adottate sanzioni verso l'Iran, in particolare verso enti, persone fisiche e giuridiche sospettate di sostenere la politica pro nucleare iraniana.
La causa C-123/18 P, che ha visto la società HTTS ricorrere alla CGUE per presunti errori di diritto commessi dal Tribunale UE, è stata preceduta da vari ricorsi che, nella loro complessità, offrono spunti interessanti per comprendere i contenuti giuridici della responsabilità extracontrattuale dell'Unione.
Tale responsabilità si determina solo se esistono presupposti specifici tra cui: l'illegittimità del comportamento tenuto dalle istituzioni o dagli agenti dell'Unione nell'esercizio delle loro funzioni; la sussistenza di un danno reale ed attuale; e l'esistenza di un nesso di causalità diretta tra il danno subito e il comportamento tenuto dalle istituzioni o dagli agenti dell'Unione nell'esercizio delle loro funzioni.
Data la necessità di garantire un ampio margine di discrezionalità alle attività dell'Unione, occorre, inoltre, verificare se vi sia stata una 'violazione sufficientemente qualificata di una norma del diritto dell'Unione'.
Nel caso trattato, l'impresa marittima HTTS, ricorrente, ha evidenziato i danni subiti in merito all'avvenuta iscrizione nelle blacklists che, in base alla PESC, contengono i nomi dei soggetti sospettati di essere coinvolti, a vario titolo, nelle attività di proliferazione nucleare iraniane.
Il Regolamento di Esecuzione (UE) n. 668/2010 e il Regolamento n. 961/2010, che ha abrogato il precedente, hanno costituito i riferimenti su cui è stato incentrato il dibattito. In base a molti indizi, la HTTS è stata sospettata di essere controllata dalla società iraniana IRISL, anch'essa inserita negli elenchi. Il primo inserimento del nominativo della HTTS negli elenchi aveva avuto luogo con il Regolamento di Esecuzione n. 668/2010 che indicava la

società come un'agente europea della HDS (che, comel'IRISL, era inserita negli elenchi citati). Tale inserimento non era stato oggetto di ricorso di annullamento da parte della HTTS. Il Regolamento n. 961/2010 invece, aveva inserito la HTTS negli elenchi ritenendola 'controllata dall'IRISL ed agente in Europa per suo conto', ma, a seguito di ricorso, esso era stato annullato. Tuttavia, per consentire al Consiglio di raccogliere ulteriori prove per l'inserimento negli elenchi della HTTS, la decorrenza di tale annullamento venne posticipata di due mesi.
Alla scadenza del termine di due mesi, il nominativo della HTTS diventava oggetto di nuovi inserimenti da parte del Consiglio, ogni volta contestati da quest'ultima.
Gli inserimenti vennero annullati con due successive sentenze, una del 2013 e l'altra del 2015.
Con sentenza emesssa dal Tribunale UE il 16 settembre 2013, anche l'inserimento di IRISL era stato annullato.
Nel 2015, la HTTS aveva inviato al Consiglio una richiesta di risarcimento del presunto danno subito.
Il Tribunale aveva respinto i due motivi dedotti dalla HTTS per dimostrare l'esistenza di una 'violazione sufficientemente qualificata del diritto dell'Unione':
– il motivo concernente una violazione dei requisiti sostanziali per l'inserimento negli elenchi;
– il motivo concernente una violazione dell'obbligo di motivazione.
Tuttavia, nella sua sentenza, il Tribunale UE aveva analizzato unicamente gli aspetti riguardanti la mancanza di una 'violazione sufficientemente qualificata del diritto dell'Unione' e non gli altri.
Il 13 febbraio 2018 HTTS aveva così deciso un ricorso dinanzi alla CGUE.
Un aspetto interessante del dibattimento dinanzi alla Corte ha riguardato la pretesa del Consiglio di avere diritto di produrre gli elementi per l'iscrizione della ricorrente negli elenchi, entro il termine utile per intraprendere l'azione risarcitoria e non nel momento dell'inserimento negli elenchi.
La sentenza della CGUE ha evidenziato, invece, che in considerazione della necessità di motivare gli atti emessi, il Consiglio avrebbe dovuto detenere tali elementi nel momento dell'iscrizione e non dopo.
È emerso anche un presunto errore di diritto dovuto al fatto che il Tribunale avrebbe ritenuto che la valutazione del Consiglio, secondo cui la HTTS doveva essere considerata una società 'posseduta o controllata' dall'IRISL, non costituisse un errore grave ed inescusabile né un errore manifesto di valutazione (di fatto, l'IRISL era stata cancellata dagli elenchi).
Infine, non avendo il Consiglio dimostrato che vi fossero motivazioni 'sufficientemente gravi' per procedere all'iscrizione della HTTS, la conclusione del Tribunale era viziata da un errore di diritto.
Il caso descritto ha analizzato la responsabilità extracontrattuale dell'UE evidenziandone, in sintesi, la necessità di tutelare le esigenze dell'UE di agire discrezionalmente e quelle di rispettare, al contempo, il diritto dei soggetti di

potere esercitare la propria difesa. L'obbligo di motivazione ne costituisce il principale presupposto. Il caso è stato rimesso al Tribunale.
Il lavoro ha evidenziato alcuni aspetti particolarmente interessanti che meritano di essere approfonditi. *In primis* è emersa la possibilità di perseguire, in collaborazione con organismi internazionali, la politica diplomatica, adottando misure restrittive volte a disincentivare comportamenti che si considerano pericolosi.
Il problema si pone quando ad essere colpiti dalle sanzioni sono persone fisiche o giuridiche che si vedono sottrarre la possibilità di esercitare il loro diritto alla difesa. L'obbligo di motivazione degli atti emessi dal Consiglio rappresenta senz'altro lo strumento che maggiormente limita tale rischio. L'elaborato ha evidenziato che tale obbligo deve sussistere nel momento dell'assunzione della decisione di iscrizione nelle black lists dei soggetti sospettati e non successivamente.
In tal modo si distingue il 'sospetto' dalla 'verosimiglianza' e l''indizio' dalla 'prova'.
Nello stesso tempo, il diritto dei singoli a ricevere il risarcimento dei danni deve essere esaminato nel contesto generale, in quanto non basta analizzare la presunta mancanza di una 'violazione sufficientemente qualificata del diritto dell'Unione' per l'inserimento nelle liste, occorrendo un'analisi approfondita di ogni aspetto di quanto accaduto.
Il lavoro ha, dunque, confermato che l'Unione Europea è guidata da principi democratici, respingendo ogni forma di giustizia sommaria.
Se da un lato, vengono richiesti i presupposti formali della procedura civile, dall'altro si confermano i principi democratici su cui si basano le costituzioni degli Stati membri.
In conclusione, l'elaborato ha fornito una conferma di uno dei cardini dell'UE e cioè che il rapporto tra il sistema giuridico comunitario e quello interno è di autonomia ma anche di coordinamento e che i principi di democrazia a cui si ispirano le costituzioni degli Stati membri sono fatti propri dell'Unione.