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Curbing the circumvention of sanctions against Iran over its nuclear programme: Afrasiabi

Case C-72/11, Criminal proceedings against Mohsen Afrasiabi, Behzad Sahabi, Heinz Ulrich Kessel, Judgment of the Court (Third Chamber) of 21 December 2011, nyr

1. EU-Iran relations

Relations between the EU and Iran have been strained for years. Nonetheless, the EU has always expressed its wish to gradually deepen bilateral relations with the country, mainly for economic reasons. In 2011, the EU was Iran’s largest trading partner, with EUR 14.5 bn of goods imported from Iran, and exports of EUR 11.3 bn;1 90 percent of EU imports from Iran were oil and related products. And yet, the EU does not have any contractual relations with Iran and with the exception of some humanitarian assistance and limited aid for drugs control, there is no financial and technical cooperation either. A trade agreement existed at the time of the Shah, but it lapsed in 1977.2 The Islamic Revolution of 1979 spoiled relations until well into the 1990s. An EU-Iran dialogue was initiated in 1995. After the election of the reform-minded President Khatami in 1997 this was extended to new areas and became the “Comprehensive Dialogue” in 1998.3 A dialogue meeting was held every six months in Troika format and allowed a wide-ranging exchange of views on global issues (counter-terrorism, human rights and non-proliferation), regional issues (Iraq, Gulf, Central Asia, the Middle East Peace Process), and areas of cooperation (drugs, refugees, energy, trade and investment). In recognition of their shared interests in commercial and political cooperation, the Council adopted a mandate to negotiate a comprehensive trade and cooperation agreement and a political dialogue and

2. EEC-Iran trade agreement of 14 Oct. 1963, O.J. 1963, 2554. In fact, the 1963 agreement with Iran was the EEC’s first agreement of a strictly commercial character which had ever been negotiated. See European Commission, DG Information, “The European Community and Iran”, doc. 97/75, note circulated on the occasion of the visit to Iran of Sir Christopher Soames, Commission Vice-President in charge of external relations (May 12–14,1975), available at <aei.pitt.edu/10352/1/10352.pdf> (last accessed on 16 Jan. 2013).
counter-terrorism agreement with Iran in 2002, with negotiations in both spheres starting later that year. In parallel, the EU launched a human rights dialogue with Iran, the first such dialogue to be established in accordance with the EU Guidelines on Human Rights dialogues. It was conducted until Iran declined to participate after 2004. For its part, the EU made deeper relations conditional upon progress by Iranian authorities in four areas: Iran’s attitude to the Middle East Peace Process, the human rights situation in Iran, Tehran’s support to terrorist movements and non-proliferation of weapons of mass destruction (“WMD”), including nuclear weapons.

The brief period of constructive engagement ground to a complete halt in 2005, as revelations on Iran’s clandestine nuclear activities and Tehran’s refusal to fully cooperate with the International Atomic Energy Agency (“IAEA”) led the EU to cease efforts to formalize closer relations. At its September 2005 meeting, the IAEA’s board of governors found Iran in non-compliance with its safeguards obligations, because of the “many failures and breaches of its obligations to comply with its NPT Safeguards Agreement”. Iran’s continued refusal to comply with its international obligations and cooperate fully with the IAEA triggered the United Nations Security Council (“UNSC”) in adopting a raft of resolutions, imposing sanctions against Iran, binding on all UN members. The EU fully implements these UNSC sanctions and has also adopted a number of complementary measures.

This case note will lay out the legal context of the case at hand (section 2), before presenting the facts and preliminary questions of the referring court (section 3), the Advocate General’s Opinion (section 4), the judgment of the Court (section 5), and an analysis of the whole (section 6). Some concluding remarks on the effectiveness of the sanctions regime against Iran will wrap up this commentary (section 7).

2. Legal context of the case: sanctions regimes

At the global level, the current sanctions package is reflected in UNSC Resolutions 1696 (2006), 1737 (2006), 1747 (2007) and 1803 (2008), 1835

4. ECOFIN Council conclusions, doc. C/02-198, Brussels, 12 July 2002, at I: “The Trade and Cooperation Agreement, the agreement on political dialogue and on counter-terrorism will form an indissociable whole when it comes to entry into force, application and denunciation.”
UNSC sanctions against Iran in effect supplement the US sanctions regime that has been in force since 1987 and has been upgraded at intervals. The UNSC resolutions all request Iran to suspend all enrichment-related and reprocessing activities and heavy water-related projects, and to take steps to build confidence regarding the nature of its nuclear programme. The restrictive measures set out in resolutions 1737 (2006), 1747 (2007) and 1803 (2008) are aimed at preventing Iran’s acquisition of nuclear and ballistic missile material, equipment and technology which can be used for military programmes. Excluding the most recent wave of restrictive measures (see section 7), the sanctions encompass the following measures:

- an embargo on all items which could contribute to Iran’s enrichment-related, reprocessing or heavy water-related activities, or to the development of nuclear weapon delivery systems, and ban on related technical or financial assistance;
- a visa ban and assets freeze on persons and entities directly associated with Iran’s proliferation of sensitive nuclear activities or the development of nuclear weapon delivery systems;
- a prohibition to supply arms to Iran;
- a ban on new grants, assistance or loans to Iran except for humanitarian and developmental purposes;
- a ban on commercial activity involving uranium mining, production or use of nuclear materials and technology by Iran overseas;
- an authorization to states to intercept, seize and dispose of Iranian cargo covered under the embargo;
- a prohibition on bunkering services to Iranian-owned or -contracted vessels;
- a ban on new branches, subsidiaries of Iranian banks abroad and ban on new joint ventures with Iranian banks.

The EU fully implements the UNSC sanctions and, partly as a result of US pressure, has also adopted a number of complementary, i.e. autonomous

7. US measures fall into three categories: a comprehensive trade an investment ban, sanctions on foreign parties engaging in proliferation or terrorism-related transactions and financial sanctions including a freeze of assets and a prohibition on access to US financial institutions. One of the latest upgrades in US sanctions consists in the re-imposition of a ban on the import of carpets, a measure that had been lifted in 2000.

measures. The latter include, notably, an embargo on key equipment and technology for the oil and natural gas industries, and a ban on the provision of certain services to and of investment in the oil and natural gas industries. Together, the UNSC implementing and EU autonomous measures constitute the most far-reaching sanctions package imposed by the EU to date.

UN Security Council Resolution 1737 (2006) serves as the basic legal document applicable to the case at hand. Adopted on 23 December 2006 on the basis of Article 41 of Chapter VII of the UN Charter, the Resolution instituted a number of restrictive measures in order to apply pressure on Iran to end proliferation-sensitive nuclear activities and the development of nuclear weapon delivery systems. Thus, all UN members were bound to freeze the funds, other financial assets and economic resources which were on their territories, that were owned or controlled by persons or entities black-listed by the UN sanctions committee, i.e. persons or entities engaged in, directly associated with, or providing support for, Iran’s proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems, or by persons or entities acting on their behalf or at their direction, or by entities owned or controlled by them, including through illicit means. The Resolution also imposed an obligation that no funds, financial assets or economic resources be made available to, or for the benefit of, such persons or entities.

In order to give effect to UNSC Resolution 1737 (2006), the Council of the European Union adopted Common Position 2007/140/CFSP which stated that “no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of persons and entities referred to in paragraph 1” of the Common Position. On the basis thereof, the Council adopted Regulation 423/2007, which entered into force on 20 April 2007. For the purposes of this Regulation only, Article 1(i) defined the concept of “economic resources” as “assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but which may be used to obtain funds, goods or services.” More specific to the circumstances of the case, i.e.

9. For an overview of these measures, see Factsheet “The European Union and Iran”, doc. 129724, Brussels, 6 Nov. 2012. See further section 7 of this annotation.
(the circumvention of) the provisioning ban on all items which could contribute to Iran’s development of nuclear weapon delivery systems, Article 7(3) and (4) of the Regulation provided:

“(3) No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities or bodies listed in Annexes IV and V.

(4) The participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent the measures referred to in paragraphs 1, 2 and 3 shall be prohibited.”

Article 12(2) provided an exception to the prohibitions set out in Article 7(3) so as to exclude liability “of any kind on the part of the natural or legal persons or entities concerned, if they did not know, and had no reasonable cause to suspect, that their actions would infringe these prohibitions.”

Finally, Annex II to the Regulation, entitled “Goods and technology referred to in Article 3”, identified, inter alia, “controlled atmosphere heat treatment furnaces, as follows: Furnaces capable of operation at temperatures above 400°C”. Among the legal persons, entities and bodies identified in Annex IV, Title A, to the Regulation was listed, in paragraph 10, “Shahid Hemmat Industrial Group (SHIG)”, with the following information: “Other information: (a) subordinate entity of AIO [Aerospace Industries Organization], (b) Involved in Iran’s ballistic missile programme.”

According to Regulation 423/2007, Member States were required to adopt the (implementing) rules on effective, proportionate and dissuasive penalties applicable to infringements of the Regulation. In Germany, such infringements are punishable by criminal penalties pursuant to Paragraph 34 of the Law on Foreign Trade (Außenwirtschaftsgesetz).

3. Facts of the case and questions for a preliminary ruling

In a preliminary reference under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Higher Regional Court), received at the Court of Justice on 18 February 2011, the Court was asked for its interpretation of two provisions of Council Regulation 423/2007 concerning restrictive measures against Iran. The reference had been made in criminal proceedings brought against Mr Afrasiabi, Mr Sahabi and Mr Kessel (“the defendants”), who were suspected of having infringed the Regulation by having participated in the supply and installation in Iran of a ceramic sintering furnace coming from Germany. Vacuum sintering furnaces enable the application of refractory linings to the guidance components and to the heads of long-range missiles
which can be used as delivery systems for WMD. The criminal proceedings against the defendants were based on an indictment drawn up by the Generalbundesanwalt beim Bundesgerichtshof (the Federal Public Prosecutor General at the Federal Court of Justice of Germany), who brought the criminal proceedings before the Oberlandesgericht Düsseldorf in 2010.

The facts can be paraphrased as follows. The competent entity as regards the development of the Iranian missile technology programme is Aerospace Industries Organization (“AIO”), together with its subordinate entities, including Shahid Hemmat Industrial Group (“SHIG”) as central procurement agent. In spring 2004, Mr Afrasiabi, director of Emen Survey Engineering Co Teheran (“Emen”) was instructed, in Iran, by the director of a concealed research facility for missile production to acquire a ceramic sintering furnace for SHIG. Afrasiabi made contact, in Germany, with Mr Sahabi, an engineer and long-standing acquaintance, in order to obtain a furnace. Sahabi put Afrasiabi in contact with Mr Kessel, director of the German manufacturing company FCT Systeme GmbH (“FCT”), with whom Sahabi for many years had a business relationship. The defendants had, at the latest in early 2004, reached an agreement for supply by FCT to Emen of a vacuum sintering furnace with related equipment. On 20 July 2006, Kessel, applied to the Federal Office of Economics and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, “BAFA”) for an export authorization for the supply of the furnace to Emen. Kessel was aware that Emen intended to use the furnace to sinter missile components destined for an end user in the Iranian missile programme. He concealed that information from BAFA which, being unaware of it, sent FCT a decision on 16 January 2007 stating that the export of the furnace did not require authorization (a “zero decision”). Pursuant to the entry into force of Regulation 423/2007, and in particular to the black-listing of AIO and SHIG in Annexes IV and V and to the reference to sintering furnaces in Annex II to that regulation, the zero decision became inoperative, of which Kessel was informed. The supply of the furnace by FCT to Emen nevertheless took place on 20 July 2007. In March 2008, Kessel sent two engineers to Teheran, who installed the furnace but not the software necessary for its operation. On 13 March 2008, BAFA notified FCT that Emen was suspected of carrying out procurement for the Iranian missile technology programme. Kessel had therefore refrained from making the furnace at Emen ready for use. Consequently, the manufacturing for SHIG did not commence.

The Oberlandesgericht Düsseldorf, which was asked to rule on the opening of the substantive criminal proceedings against Afrasiabi, Sahabi and Kessel, was doubtful as to the interpretation to be given to Article 7(3) and (4) of Regulation No 423/2007 and referred three questions to the Court of Justice, which can be paraphrased as follows:
1) Can an economic resource be regarded as being made available, within the meaning of Article 7(3), to a listed entity when that resource remains in the possession of a third party which intends to use it to manufacture products which are to be delivered to that entity only after they have been completed?

2) Does the prohibition on circumvention, within the meaning of Article 7(4), refer solely to conduct which is different from the infringement of the rule prohibiting making an economic resource available and is adopted to give a formal appearance of lawfulness to an act which does not comply with that rule, or does it refer instead to any act which has the effect or object of “making available” when that is prohibited?

3) How should the mental element of the terms “knowingly” and “intentionally”, used in Article 7(4), be interpreted? Does the prohibition on circumvention refer only to conduct adopted by someone knowing for certain that its object or effect is to circumvent the prohibitions set out in Article 7(3)? Or does the prohibition cover any act in respect of which its author realizes and accepts the possibility that it is aimed at or will result in a circumvention of the prohibition on “making available”?

4. Opinion of the Advocate General

In his Opinion of 16 November 2011, Advocate General Bot deemed it necessary to reformulate the questions of the referring court. His starting point was Article 7 of the Regulation, which in his view consists of two separate parts. In the first part (paras. 1–3) the Regulation prohibits the entities listed in Annexes IV and V to have funds or economic resources. To that end, paragraphs 1 and 2 determine that existing funds should be frozen; paragraph 3 prohibits anyone to make funds or economic resources available to these entities. The second part of Article 7 (para 4) criminalizes acts which deny the full effect of the prohibitions laid down in the preceding paragraphs. Advocate General Bot considered paragraph 4 indispensable, since not everything which is prohibited is also automatically criminalized. That provision thus establishes the principle that every offence is prosecuted. By referring to paragraphs 1, 2 and 3, paragraph 4 clearly determines the substantive components of the offence. Moreover, by using the words “knowingly” and “intentionally” paragraph 4 describes the component that is usually considered as the mental or psychological component of the offence – a component without which there would not be an offence. Advocate General Bot was of the opinion that a combined reading of Article 7(4) and Article 12(2) of the Regulation defines both the material and psychological
requirements of the prohibited behaviour which national criminal law should take account. This led him to the conclusion that paragraphs 3 and 4 of Article 7 complement and reinforce each other, since paragraph 4 renders the preceding provisions their full effect. In his opinion, paragraph 3 does not constitute an offence of a higher order than paragraphs 1 and 2.12

The questions for a preliminary ruling flow from Advocate General Bot’s deconstruction. In essence, the referring court wants to know the definitions of the terms which express both the material elements and the psychological component of the offence prosecuted by the Generalbundesanwalt: does the supply of a sintering furnace in the given circumstances amount to indirectly making available an economic resource”? What constitutes a “circumvention” pursuant to Article 7(1–3) of the Regulation? With which “subjective” properties of the breach do the words “knowingly” and “intentionally” correspond? Advocate General Bot considered that these definitions must be established on the basis of an autonomous and uniform interpretation because the Regulation applies to a field which has been harmonized, and refers only to national law insofar as it concerns the determination of the sanctions applicable to infringements of the measures prescribed by it (Art. 16(1)). Moreover, in assessing the meaning and scope of these concepts, special consideration should be given of the criminal law context in which they are laid down: the terms should be sufficiently clear and precise.13 Finally, Advocate General Bot was of the opinion that the interpretation method to be applied to the legal rationale of the text which Article 7(4) has to render effective, has to be teleological because analogical interpretation would – due to its inaccuracy – violate the principle of the legality of criminal offences and sanctions. In this case, it is absolutely clear what the objective of the Regulation is, i.e. to end all Iranian activities having to do with the development of nuclear weapons. Article 7 of the Regulation aims to prevent those acts or conduct which (could) threaten international peace and security, and risk annihilating people in volumes so as to qualify the behaviour as genocide, irrespective of whether this outcome was intended or the result of carelessness on the part of the offender. The provision should be able to respond to the creativity of those who, by their (legal) ruses, seek to veil the true purpose of their plans. According to Advocate General Bot, it is therefore not only legitimate but absolutely necessary that the definitions remain vague. After all, it not only concerns the punishment of particular acts or conduct, but

12. Opinion, paras. 37–40. This finding is reinforced by the classic drafting technique for sanctions legislation, whereby the standards of conduct are disconnected from the sanction.
also to ensure that everything which is conceivable to circumvent the law or to exploit the weaknesses of the rules is prohibited.14

As such, Advocate General Bot considered that the term “economic resources” encompasses a sintering furnace, regardless of whether the necessary software for its operation was installed.15 He also took the view that the Regulation prohibits the supply or installation in Iran of a sintering furnace, when this is done fraudulently in order to conceal the beneficiary of that resource.16 He stated that it is for the national courts to determine on a case-by-case basis whether there is a close link between the entity which was given the economic resource and an entity referred to in the annexes to the Regulation.17 He also considered the meaning of “knowingly” and “intentionally” for the purposes of Article 7(4) of the Regulation and concluded that this provision encompasses actions which intentionally contravene Article 7(1–3), but also actions which are reckless or negligent, where the person had reason to suspect that his actions would violate Article 7(1–3) of the Regulation.18

5. Judgment of the ECJ

In line with the Opinion of the Advocate General, the Court (Chamber of five judges, Lenaerts (Rapporteur)) held that a sintering furnace such as that at issue in the main proceedings constitutes an “asset”, within the meaning of the definition set out in very broad terms in Article 1(i) of Regulation 423/2007 of the concept of “economic resources”,19 and that it was not necessary that the furnace be immediately ready for use.20 The Court arrived at that conclusion, first by highlighting the particularly broad scope of (a) the prohibition laid down in Article 7(3) of the Regulation, as evidenced by the use of the words “directly or indirectly”,21 and (b) the expression “made available” in that provision: “rather than denoting a specific legal category of act, it encompasses all the acts necessary under the applicable national law if a person is effectively to obtain full power of disposal in relation to the asset

15. Ibid., para 75.
16. Ibid., para 59.
17. Ibid., para 60.
18. Ibid., para 96.
20. Ibid., paras. 47–49.
concerned”. For the purposes of the application of the concept of “economic resources”, particularly in the context of the prohibition laid down in Article 7(3), the Court subsequently formulated the relevant criterion, i.e. “whether there is a possibility that the asset in question may be used to obtain funds, goods or services capable of contributing to nuclear proliferation in Iran, which Resolution 1737 (2006), Common Position 2007/140/CFSP and Regulation No 423/2007 seek to combat”. The Court held that if the defendants acted on behalf, under the control or on the instructions of an entity listed in the annexes and intended to use the furnace for the benefit of that entity, then the national court was entitled to conclude that the furnace was indirectly made available to the entity for the purposes of Article 7(3). The Court also stated that “both the objective pursued by Regulation No 423/2007 and the need to ensure the effectiveness of that regulation in combating nuclear proliferation in Iran require that the prohibition laid down in Article 7(3) of that regulation encompass all persons implicated in acts prohibited by that provision”. According to the Court, Article 12(2) of the Regulation exonerates from all liability “of any kind” (including criminal liability), “persons who did not know, and had no reasonable cause to suspect, that their actions would infringe the prohibition on making available an economic resource laid down in Article 7(3) of that regulation”. Consequently, it was for the national court to assess, in respect of each defendant, whether, at the time of performing the acts at issue in the main proceedings, he knew or should reasonably have suspected that those acts would be contrary to such a prohibition.

In this respect, the Court held that, by referring in Article 7(4), to activities which have the direct or indirect object or effect of “circumventing”, in particular, the prohibition laid down in Article 7(3), the EU legislature meant to cover activities which have the aim or result of enabling their author to avoid the application of that prohibition. Such activities are distinguished from acts which formally infringe the prohibition on making available an economic resource laid down in Article 7(3). Only such a reading, namely that Article 7(4) refers to activities which cannot be regarded as acts of making available

23. Judgment, para 60.
24. Ibid., para 53.
25. Ibid., para 54.
26. Ibid., para 55.
prohibited under Article 7(3), is able to ensure the effectiveness of the first provision and an autonomous scope as regards the second provision in the context of the combating of nuclear proliferation in Iran.\(^{29}\) In essence, the prohibition laid down in Article 7(4) must therefore be understood as

“covering activities in respect of which it appears, on the basis of objective factors, that, under cover of a formal appearance which enables them to avoid the constituent elements of an infringement of Article 7(3) of the Regulation,\(^{30}\) none the less they have, as such or by reason of their possible link to other activities, the aim or result, direct or indirect, of frustrating the prohibition laid down in Article 7(3)”.\(^{31}\)

As the terms “knowingly” and “intentionally” in Article 7(4) imply cumulative elements of knowledge and intent,\(^{32}\) the prohibition in Article 7(4) of the Regulation covers participation in activities where a person either deliberately seeks, directly or indirectly, to circumvent the Article 7(3) prohibition or where he is aware of and accepts the possibility that his participation may lead to such circumvention.\(^{33}\)

6. Comment

The EU sanctions regimes imposed on Iran have been the subject of a series of judicial proceedings before the Court of Justice. Mostly, these cases have centred on the Council’s decisions to black-list persons or entities and the right of defence of the latter.\(^{34}\) On the same day of the ruling under review

\(^{29}\) Ibid., para 61.


\(^{31}\) Judgment, para 62.

\(^{32}\) Ibid., paras. 64 and 66.

\(^{33}\) Ibid., para 67.

\(^{34}\) See e.g. Case C-548/09 P, Bank Melli Iran v. Council, Judgment of 16 Nov. 2011, nyr, where the ECJ upheld the GC’s judgment in Case T-390/08, Bank Melli Iran v. Council, [2009] ECR II-3967 that the Council, by adopting Council Decision 2008/475/EC implementing Art. 7(2) of Regulation 423/2007 concerning restrictive measures against Iran (O.J. 2008, L 163/29), had not committed a manifest error of assessment in including Bank Melli Iran on the list in the amended Annex V to Regulation 423/2007 and had not infringed its duty to state the reasons for its decision. See also Case C-380/09 P, Melli Bank plc, judgment of 13 Mar. 2012, nyr, in which the ECJ ruled that for a subsidiary to be listed under this regime it was sufficient to show that the latter was “owned or controlled” by the mother company (Bank Melli Iran) which itself had been listed because of its involvement in the financing of nuclear proliferation. On 21 Mar. 2012, the GC annulled the listing of an Iranian company, Fulmen and Mr Mahmoudian, the company’s majority shareholder and Chairman of its Board of Directors, on the grounds of the Council’s failure to adduce evidence. The company had been listed under the EU’s restrictive
here, the Court of Justice delivered judgment in Case C-27/09 P, thereby marking the end of nearly 10 years of litigation in which the People’s Mojahedin Organization of Iran (PMOI) had challenged a long succession of Council decisions which were all annulled.35

With the present judgment, the Court of Justice, for the first time, took up the so-called “provisioning ban” and clarified the scope of prohibited activities pertaining to freezing of funds and economic resources put in place by the EU to combat the proliferation of nuclear weapons in Iran.36 The Court was asked to interpret two separate prohibitions set out in the Regulation on restrictive measures against Iran: (i) the prohibition of “making available”, directly or indirectly, funds or “economic resources” to or for the benefit of the black-listed parties; and (ii) the prohibition of participating, “knowingly” and “intentionally”, in activities the object or effect of which is, directly or indirectly, to circumvent the measures referred to, *inter alia*, in the former prohibition.

In its ruling, the Court was right to apply teleological reasoning to the provisioning ban. This has to do not just with the shortcomings of analogical interpretation which, as the Advocate General argued, would – due to its inaccuracy – violate the principle of the legality of criminal offences and sanctions. In general terms, the Court is well advised to interpret the rules of measures against Iran, on the grounds that it was involved in the installation of electrical equipment in the Qom/Fordoo nuclear site in Iran at the time when the existence of the site had not yet been revealed. Fulmen was included in the restrictive measures list as director of that company. The case before the GC revolved around the question of evidence regarding the alleged support given by the listed parties to nuclear proliferation. The GC dismissed the Council’s defence that it could not be expected to adduce evidence of this claim, and rejected the argument that judicial review must be limited to determining that the reasons relied on to justify the adoption of restrictive measures are “probable”. See Joined Cases T-439 & 440/10, *Fulmen and Fereydoon Mahmoudian v. Council*, Judgment of 21 Mar. 2012, nyr, paras. 96–97. These cases have been appealed to the ECJ, C-280/12 P.Yet, the GC has continued to annul the asset freezes of companies accused of being involved in Iran’s nuclear proliferation programme for failure to state (adequate) reasons. See e.g. Case T-53/12, *CF Sharp Shipping v. Council*, judgment of 26 Oct. 2012, nyr; Case T-63/12, *Oil Turbo Compressor Co. v. Council*, judgment of 26 Oct. 2012, nyr; and Case T-15/11, *Sina Bank v. Council*, judgment of 11 Dec. 2012, nyr.

35. Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v. Council and UK (OMPI)*, [2006] ECR II–4665, with annotation by Eckes, 44 CML Rev. (2007), 1117; Case T-256/07, *People’s Mojahedin Organization of Iran v. Council*, [2008] ECR II–3019; Case T-284/08, *People’s Mojahedin Organization of Iran v. Council*, [2008] ECR II–3487, with annotation by Spaventa, 46 CML Rev. (2009). In its judgment of 21 Dec. 2011, the Court rejected the appeal brought by France against the judgment of the GC in Case T-284/08, *PMOI* [2008] ECR I–3487 in which the GC had annulled a Council Decision freezing the assets of the PMOI on the basis that it was a terrorist organization. The Council should have informed the PMOI before reaching its decision to maintain their name on the list, in order to allow the PMOI the opportunity to defend themselves against the allegations raised by the decision.

secondary legislation in the light of the broader context provided by both the EU legal order and its “constitutio
tional telos”,37 and the relevant international legal framework and teleological elements derived therefrom.38 The latter is
especially important, as the interpretation of the provisions of Regulation 423/2007 in the light of the underpinning UNSC Resolution will promote the ulterior objectives for which the EU drew up the provisioning ban. In the case at hand it is clear what the objective of the UNSC Resolution 1737 (2006) is, i.e. to end all Iranian activities pertaining to the development of nuclear weapons so as to prevent those acts or conduct which (could) threaten or breach international peace and security. To that end, Regulation 423/2007, and Article 7 in particular, should cast as wide a net as possible, so as to ban those acts or conduct geared towards Iranian nuclear proliferation, irrespective of whether the outcome thereof was intended or the result of carelessness on the part of the offender.

Driven by this purpose, the Court rightly held that the first prohibition should be interpreted broadly and that it encompasses the supply and installation of items capable of contributing to nuclear proliferation, even where the item itself is not ready for use. Thus, a sintering furnace indeed constitutes an “economic resource” within the meaning of the Regulation and, in view of the risk that it may be diverted in order to support proliferation-sensitive nuclear activities in Iran, it is not necessary that that furnace be immediately ready for use. Moreover, the acts of supplying from a Member State and installing in Iran such a furnace for the benefit of a person are likely to fall within the scope of the Regulation’s concept of “making available”. The same applies to acts relating to the preparation and follow-up of the supply or installation of that furnace, or even the organization of contact between the persons involved. Thus, guided by the laudable desire to prevent unacceptable results, the Court defines a wide scope of prohibited activities put in place by the EU to combat the proliferation of nuclear weapons in Iran.

It is for the national courts to determine on a case-by-case basis whether there is a close link between the entity which was given the economic resource and an entity referred to in the annexes to the Regulation. While that may be


38. Under Art. 3(5) TEU, the Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions. See, to this effect, Case C-286/90, Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp., [1992] ECR I-6019, paras. 9 and 10, and Case C-162/96, Racke, [1998] ECR I-3655, paras. 45 and 46. In general, decisions by international organizations have an impact on the EU legal order and may be of interpretative assistance. See Wessel and Blockmans (Eds.), Between Autonomy and Dependence: the EU Legal Order under the Influence of International Organisations (T.M.C. Asser Press, 2013).
difficult, it is not only legitimate but also crucial that the definitions of the concepts enshrined in Article 7 of the Regulation remain vague. By broadly defining the concepts laid down in the provisioning ban, the judiciary is able to respond to the creativity of those who, by ruses, seek to veil the true purpose of their plans. After all, the Regulation concerns not only the punishment of particular acts or conduct, but also aims to ensure that everything which is conceivable to circumvent the law or to exploit the weaknesses of the rules is prohibited.

At the same time, however, in assessing the meaning and scope of the concepts laid down in the Regulation, special consideration should be given to the criminal law context in which they are laid down: in principle, the terms should be sufficiently clear and precise.\textsuperscript{39} It is here that the Court’s interpretation of the notions defining knowledge and intent are noteworthy. In the view of the Court, the second prohibition entails cumulative requirements of knowledge and intent that are met where a person deliberately seeks the object or the effect, direct or indirect, of circumvention connected therewith or where the person in question is aware that his participation in such an activity can have that object or effect and accepts that possibility.\textsuperscript{40} In other words, although the provisioning ban laid down in the Regulation encompasses all persons implicated in the prohibited acts, it applies only to those who knew or should reasonably have suspected that those acts infringe the ban. Unlike the Federal Public Prosecutor General at the Federal Court of Justice of Germany, who had expressed concern whether the prohibition of circumvention is compatible with the constitutional principle of clarity and definiteness, the Court convincingly tends towards a broad meaning of “knowingly” and “intentionally” for the purposes of the prohibition on circumvention of Article 7(4) of the Regulation. After all, the prohibition in the sanctions Regulation not only encompasses actions which intentionally contravene Article 7(1–3), but also actions which are reckless or negligent, where the person should reasonably have considered it possible that his participation in an activity could direct or indirectly have contributed to the purpose of circumventing the provisioning ban, and had tacitly accepted this. Given the specific context to which Regulation 423/2007 applies, i.e. the provision of support to entities subject to restrictive measures adopted in the framework of the Iranian nuclear programme, the Court’s wide interpretation of the requested definitions serves to promote the ulterior objectives of the underlying UNSC Resolution and Chapter VII of the UN Charter.

\textsuperscript{39} See \textit{M et al.}, cited \textit{supra} note 13, paras. 64 and 65 and the case law mentioned therein.
\textsuperscript{40} Judgment, paras. 63–68.
7. Closing the loopholes, increasing the pressure

The circumvention of the multiple international sanctions regimes has been noted at several intervals, most authoritatively in a leaked report of an expert panel set up under UNSC Resolution 1737 (2006), which stated that “Iran’s circumvention of sanctions across all areas, in particular front companies, concealment methods in shipping, financial transactions and the transfer of conventional arms and related material is wilful and continuing.” In 2012, the US Department of the Treasury reported that it had identified several companies and banks acting as front organizations helping Iran to evade existing sanctions by moving and selling its oil on the international market. Washington has also accused Iran of seeking to evade sanctions on its oil exports by disguising its tanker fleet.

With all the loopholes it is difficult to say what the full impact of the existing sanctions regimes is or could be. However, even with the circumventions, there is no doubt that the aggregate effect is already quite big. The UNSC Sanctions Committee established pursuant to Resolution 1737 (2006) has in subsequent reports noted that Iran’s rial has sharply depreciated against the American dollar; that sanctions on the energy sector have compelled big international traders in refined petroleum products to stop dealing with Iran; and that Iranian commercial entities are increasingly cut off from international financial markets, making it increasingly difficult to find ways to pay in US dollars or euros for the equipment they need. Evidence of a causal link between the sanctions and the decline in living standards of the Iranian population is harder to come by. Sanctions have not, however, had the effect of altering the total volume of trade and investment in Iran. Rather, they have produced a shift in the composition of Iran’s trading partners, away from European and towards Asian countries. While this trend was already visible in the period predating the UNSC sanctions imposition, it has accelerated since. Over the past decade, trade with China has largely replaced

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44. See Mousavian, The Iranian Nuclear Crisis. A Memoir (Carnegie Endowment for International Peace, 2012), at p. 19: “The deterioration of Iran’s economy . . . was not just because of sanctions but also because of mismanagement [on the part of Iran’s government].”
the declining share of the European Union’s trade with Iran,46 even if Beijing has been diversifying its supplies.47

IAEA findings on Iranian activities relating to the development of military nuclear technology, reflected in a report from November 2011,48 have further exacerbated concerns over the nature of Iran’s nuclear programme. Moreover, there has been little or no engagement from the Iranian side with efforts made by the High Representative for Foreign Affairs and Security Policy Catherine Ashton, on behalf of the so-called “E3+3” (the EU, France, Germany, the United Kingdom + China, Russia and the United States) aimed at resuming nuclear non-proliferation talks. Against this background, the Council of the European Union has in successive waves in 2012 extended its sanctions regime. In January 2012, it imposed a far-reaching import ban on Iranian crude oil and decided to freeze the assets of the Iranian central bank within the EU.49 Following a review of the measures, the Council in June 2012 confirmed that they would remain as approved in January. Thus, two exemptions ended, as scheduled, on 1 July 2012: contracts for importing Iranian oil concluded before 23 January had to be terminated by 1 July. From the same date, EU insurers were no longer allowed to provide third-party liability and environmental liability insurance for the transport of Iranian oil.50 In a similar move, the US on 12 July 2012 further tightened its sanctions on Iran, black-listing several companies and individuals that it believes are contributing to efforts to acquire nuclear weapons.51 On 21 December 2012, the Council of the European Union adopted a regulation giving effect to measures agreed in October further defining the prohibition regarding participation in transactions with Iranian financial institutions, unless

46. See figures reproduced in Portela, op. cit. supra note 8, at 21.
47. In oil, for example, by 30%, with heavy investments in Angola and Brazil. See Vines, “The Effectiveness of UN and EU Sanctions: Lessons for the Twenty-first Century”, 88 International Affairs (2012), 867–877.
51. As reported in “US tightens sanctions over Iran nuclear programme”, BBC News, 12 July 2012.
authorized in advance.\textsuperscript{52} The implementing regulation also defines the scope of the several export bans, including on graphite, metals, key naval equipment and technology for ship-building, additional key equipment or technology for the Iranian oil, natural gas and petrochemical sector and software for industrial production. The act also specifies which natural gas products may no more be imported into the EU. In addition, certain dual-use items or technologies relevant to industries controlled by the Islamic Revolutionary Guard Corps or for Iran’s nuclear programme are now included in the export prohibition for dual-use items and technologies. Finally, the regulation of 21 December 2012 further clarifies the prohibition to supply certain services in respect of Iranian oil tankers and cargo vessels and the ban on supplying vessels designed for the transport or storage of oil to Iran.

Recent reports show that, whereas the current UN sanctions against Iran have had limited effect, EU and US sanctions are having a greater impact than expected because of unusual levels of international acquiescence.\textsuperscript{53} This is particularly helped by Western dominance of the world banking and insurance systems, making targeting of Iranian oil transporters easier. The European Union’s oil embargo, in particular, is hurting Iran, as many States are diversifying away from Iranian oil.\textsuperscript{54} However, the West’s sanctions policies as a means of pressuring Iran to negotiate or make concessions has yet to yield real results in the diplomatic arena.\textsuperscript{55}

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