Judgment of the General Court (Seventh Chamber) of 9 September 2016. — Tri-Ocean Trading v Council of the European Union. — Common foreign and security policy — Restrictive measures taken against Syria — Freezing of funds — Error of assessment. — Case T-709/14.

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)9 September 2016 (*)(Common foreign and security policy — Restrictive measures taken against Syria — Freezing of funds — Error of assessment)In Case T-709/14,Tri-Ocean Trading, established in George Town (Cayman Islands), represented by B. Kennelly, Barrister, P. Saini QC, and N. Sheikh, Solicitor,applicant,vCouncil of the European Union, represented by B. Driessen and A. Vitro, acting as Agents,defendant,ACTION under Article 263 TFEU for the annulment of Council Implementing Decision 2014/488/CFSP of 22 July 2014 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2014 L 217, p. 49) and of Council Implementing Regulation (EU) No 793/2014 of 22 July 2014 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2014 L 217, p. 10), insofar as those measures concern the applicant, THE GENERAL COURT (Seventh Chamber),composed of M. van der Woude, President, I. Wiszniewska-Białecka and I. Ulloa Rubio (Rapporteur), Judges, Registrar: S. Spyropoulos, Administrator,having regard to the written part of the procedure and further to the hearing on 25 February 2016,gives the followingJudgment Background to the dispute1 This case arises as a result of the restrictive measures adopted by the European Union against the Syrian Arab Republic in order that the latter should cease using force against its civilian population.2 The applicant, Tri-Ocean Trading, is a company registered in the Cayman Islands, wholly owned by Tri-Ocean Energy, a company established in Egypt. It operates in the oil shipping field. 3 On 9 May 2011 the Council of the European Union adopted, on the basis of Article 29 TEU, Decision 2011/273/CFSP concerning restrictive measures against Syria (OJ 2011 L 121, p. 11). 4 Article 3(1) of that decision provides that Member States are to take the necessary measures to prevent the entry into, or transit through, their territories of persons responsible for violent repression against the civilian population in Syria, and persons associated with them, as listed in the annex to that decision.5 Article 4(1) of that decision provides that all funds and economic resources belonging to, owned, held or controlled by persons responsible for the violent repression against the civilian population in Syria, and natural or legal persons, and entities associated with them, are to be frozen. The detailed rules for the freezing of those funds are set out in the other paragraphs of that article. 6 On the same date, the Council adopted, on the basis of Article 215(2) TFEU and Decision 2011/273, Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria (OJ 2011 L 121, p. 1). Article 4(1) of that regulation provides for the freezing of all funds and economic resources belonging to, owned, held or controlled by the natural or legal persons, entities and bodies listed in Annex II to that regulation.7 Decision 2011/273 was replaced by Council Decision 2011/782/CFSP of 1 December 2011 concerning restrictive measures against Syria and repealing Decision 2011/273 (OJ 2011 L 319, p. 56). 8 Article 18(1) and Article 19(1) of Decision 2011/782 correspond to Article 3(1) and Article 4(1) of Decision 2011/273 respectively, with the added provision that the restrictive measures set out therein apply also to persons and entities benefiting from or supporting the regime.9 Regulation No 442/2011 was replaced by Council Regulation (EU) No 36/2012 of

18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation No 442/2011 (OJ 2012 L 16, p. 1). Regulation No 36/2012 lays down new restrictive measures applying in particular to persons benefiting from the policies of the regime or supporting it.10 On 29 November 2012, the Council adopted Decision 2012/739/CFSP concerning restrictive measures against Syria and repealing Decision 2011/782 (OJ 2012 L 330, p. 21). 11 Decision 2012/739 was replaced by Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria (OJ 2013 L 147, p. 14). The latter decision was subsequently extended until 1 June 2015 by Council Decision 2014/309/CFSP of 28 May 2014 amending Decision 2013/255 (OJ 2014 L 160, p. 37). It was subsequently extended until 1 June 2016 by Council Decision (CFSP) 2015/837 of 28 May 2015 amending Decision 2013/255 (OJ 2015 L 132, p. 82).12 On 22 July 2014, the Council adopted Implementing Decision 2014/488/CFSP implementing Decision 2013/255 (OJ 2014 L 217, p. 49), and Implementing Regulation (EU) No 793/2014 implementing Regulation No 36/2012 (OJ 2014 L 217, p. 10) ('the contested measures'). Those acts contain for the first time, in the annexes thereto, the applicant's name, spelt 'Tri Oceans Trading', together with the following grounds:'Providing support to the Syrian regime and benefiting from the regime by organising covert shipments of oil to the Syrian regime.'13 On 23 July 2014, the Council published in the Official Journal of the European Union the Notice for the attention of the persons subject to the restrictive measures provided for in Decision 2013/255 and Regulation No 36/2012 (OJ 2014 C 238, p. 4).14 According to that notice, the persons and entities concerned might submit to the Council a request for review of the decision whereby their names had been included in the lists annexed to the acts mentioned in paragraph 12 above, with supporting documentation. The attention of the persons and entities concerned was drawn too to the possibility of challenging the Council's decision before the General Court, in accordance with the conditions laid down in Article 275, second paragraph, TFEU and Article 263, fourth and sixth paragraphs, TFEU.15 The Council also informed the applicant that its name had been included in the lists in the annexes to Implementing Decision 2014/488 and Implementing Regulation No 793/2014 by letter of 23 July 2014, which the applicant states that it received on 10 August 2014. 16 By letter of 17 September 2014, the applicant asked the Council, in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), for access to the documents or information concerning it, relating to the oil shipments on which the listing of its name was based, the documents or information showing that those shipments supported the Syrian regime or that the applicant benefited from that regime, and the sources of those documents or that information. 17 On 26 September 2014, the Council adopted Implementing Decision 2014/678/CFSP implementing Decision 2013/255 (OJ 2014 L 283, p. 59), and Implementing Regulation (EU) No 1013/2014 implementing Regulation No 36/2012 (OJ 2014 L 283, p. 9). In those measures, the Council altered the applicant's name, now spelt Tri Ocean Trading or Tri-Ocean Energy. The applicant was notified of those measures by letter of 29 September 2014.18 By letters of 9 and 15 October and 3 November 2014, the Council granted the applicant access to a series of documents. By letter of 27 October 2014, the Council granted the applicant access to COREU document CFSP/0141/14 of 24 October 2014. Procedure and forms of order sought19 By application lodged at the Court Registry on 3 October 2014, the applicant brought the present action.20 In the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the General Court of 2 May 1991, the Court asked the Council to answer certain written questions and, where appropriate, to provide it with certain documents. The Council complied with those requests.21 The parties presented oral argument and answered questions put to them by the Court at the hearing on 25 February 2016.22 The applicant claims that the Court should:– annul the contested measures, in so far as those measures relate to it;–

order the Council to pay the costs of the proceedings.23 The Council contends that the Court should:– dismiss the action as manifestly unfounded;– order the applicant to pay the costs. Law24 In support of the application, the applicant relies, in essence, upon four pleas in law. The first plea alleges errors of fact and an error of assessment; the second, infringement of the rights of the defence and of the right to effective judicial protection; the third, failure to state reasons; and the fourth, infringement of the right to property and of the applicant's right to reputation.25 In the first plea, alleging errors of fact and an error of assessment, the applicant begins its argument by presenting introductory remarks on the intensity of the judicial review to be carried out by the Court. It continues by dividing its first plea into two parts, alleging, first, a lack of evidence sufficient to establish that it meets the criterion for application of restrictive measures that relates to support of the Syrian regime or that it benefits from the policies pursued by the regime and, secondly, the material inaccuracy of the allegations made against it.26 The applicant thus seeks to call into question the following grounds for the listing of its name:'Providing support to the Syrian regime and benefiting from the regime by organising covert shipments of oil to the Syrian regime.'27 In order to substantiate those grounds, the Council adduced the evidence contained in the letters of 9, 15 and 27 October and 3 November 2014. Those letters contain extracts of documents dated 17 July (Council documents 11875/14 and 11975/14), and 23 July (Council document 11877/14) and 25 September 2014 (Council documents 13191/14, 13191/14 COR 1, 13192/14 and 13192/14 COR 1), articles by Reuters Press Agency ('the Reuters articles') asserting the involvement of the applicant's parent company in covert oil shipments to Syria, a report prepared in September 2013 by Middle East Information and Communication Agency ('MEICA'), a one-page extract of a report prepared in April 2013 by the consultancy Wood MacKenzie as well as an extract of the document of 24 October 2014 bearing the reference Coreu/CFSP/141/14. 28 More specifically, the Council submits that it is apparent from the Reuters articles, published on 23 August 2012 ('the 2012 article') and 23 December 2013 ('the 2013 article'), respectively, that the applicant supports the Syrian regime and benefits from the policies pursued by the latter. According to the 2012 article, Tri-Ocean Energy, the applicant's parent company, and the Lebanese company Overseas Petroleum Trading ('OPT') made three shipments of liquefied petroleum gas (LPG) to Syria. According to the 2013 Article, Tri-Ocean Energy, the applicant's parent company, also organised the transport via the Clove oil tanker, from an Egyptian port, of a cargo of crude oil to Syria.29 First, the applicant submits that it does not meet the criterion for the application of restrictive measures that is laid down in Article 28(1) of Decision 2013/255 and Article 15(1) of Regulation No 36/2012, namely: support for the Syrian regime or benefiting from the policies pursued by the regime. According to the applicant, the Council did not have sufficient evidence to conclude that there was such support or that it benefited from those policies. It claims that the Council relied, in essence, on the 2013 article according to which Tri-Ocean Energy, the applicant's parent company, organised shipments of crude oil to Syria. 30 Secondly, the applicant disputes the veracity of the grounds for the inclusion of its name in the lists in the annexes to the contested measures, to the effect that it arranges covert shipments of oil to Syria. It states that it has never sold oil to any entity established in Syria. It also denies the information in the 2013 article and provides, to that end, a certain number of documents that, it submits, support its arguments. These include, in particular, a certificate of accounting from its parent company stating that it shipped oil to a company called Matra from an oil tanker flying the Tanzanian flag travelling to Romania and a report by an expert too, produced in the annex to the reply. Finally, the applicant submits in the reply that even if its contracting partner did deliver oil to the Syrian regime, the applicant cannot be held responsible for that delivery and, moreover, that the reason given by the Council implies the active arranging of such shipments, which the applicant denies. 31 The Council maintains that, by the arguments expounded in the reply, the applicant has amended its line of

argument. The applicant no longer disputes having carried out the acts which the Council claims it carried out, but argues instead that it did not know that those acts were objectionable. That change of position fundamentally alters the scope of its first plea in law and has ‘procedural implications’. In response to a question raised at the hearing as to the scope of its argument, the Council deferred to the Court’s discretion. 32 The Council also disputes the arguments raised by the applicant. It submits that it relies upon various pieces of evidence, such as the reports on the oil and gas sectors in Syria drafted by two different entities, namely: MEICA and Wood Mackenzie, and the Reuters articles as well. It states that it was entitled to rely upon that evidence for, on the one hand, contrary to the applicant’s submissions, it was not required to carry out its own examination of the accuracy of the allegations presented to it and, on the other, had not relied upon confidential information.33 Moreover, the Council argues that it is clear from that evidence that the applicant sold oil to the Syrian regime through OPT. In the Council’s submission, those sales constitute support for the Syrian regime and justify the applicant’s listing in the annexes to the contested measures. Moreover, the applicant also benefited from the policies implemented by the Syrian regime by reason of the elevated price at which it sold the oil to that regime. The Council notes that the applicant does not dispute the information in the 2012 article, although it is in a position to do so, and that the fact that it does not provide the documents which could exonerate it could be akin to a refusal to cooperate with the Council. The Council also states that the applicant ought to have realised that Matra and OPT were a single company and that it was public knowledge that OPT acted on behalf of the Syrian regime. Finally, it denies that there is any probative value in the information supplied by the applicant and is of the view that it consists merely of unproved allegations. The admissibility of the arguments presented in the reply34 Assuming that the Council’s argument relating to the amendment of the applicant’s arguments in the reply is to be interpreted as seeking to challenge the admissibility of the arguments presented in paragraphs 9 to 14 of the reply because they are new, it should be recalled that, as is apparent from Article 84(1) of the Rules of Procedure of the General Court, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact that come to light in the course of the procedure. However, a plea in law that constitutes amplification of a plea made previously, whether directly or by implication, in the original application, and is closely connected therewith, must be declared to be admissible. Moreover, arguments that in substance have a close connection with a plea raised in the application initiating the proceedings cannot be considered new pleas and may be raised at the stage of the reply or the hearing (judgment of 12 September 2012, Italy v Commission, T-394/06, not published, EU:T:2012:417, paragraph 48).35 In the present case, it should be noted that, by the arguments raised in the reply, the applicant submits in particular that the Council erred in law in respect of the ground for the listing of its name. Thus, it submits that that ground is factually incorrect and that, even assuming the actions alleged against it are established, namely the selling of oil to OPT, it was not in a position to know the destination of the cargo, or to exert control over the other contracting party or over the vessel that delivered the cargo. Moreover, it states that that sale does not constitute support for the Syrian regime, since the applicant acted in good faith at the time of the sale. It also disputes the Council’s statement that the oil shipment was sold at an inflated price.36 It must therefore be held that, in essence, the applicant disputes the truth and accuracy of the facts alleged in the contested measures in order to justify imposing on it the restrictive measures at issue.37 In the application, the applicant disputes the validity of the inclusion of its name in the lists set out in the annexes to the contested measures. To that end, it challenges the documents upon which it presumes that the Council relied and the material accuracy of the facts presented in those documents, both in respect of its having sold oil to Syria-related entities and in respect of specific elements relating to the transaction that the Council considered to be at issue. 38 Thus, the arguments set out in the reply

are supplementary to the plea made in the application, seeking to call into question the material accuracy of the facts justifying the inclusion of the applicant's name in the lists set out in the annexes to the contested measures. Consequently, the arguments expounded in the reply do not constitute a new plea within the meaning of the case-law referred to in paragraph 34 above. Those arguments are therefore admissible. The validity of the inclusion of the applicant's name in the lists set out in the annexes to the contested measures39 It should be noted that the Courts of the European Union must, in accordance with the powers conferred on them by the FEU Treaty, 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. That obligation is expressly laid down by the second paragraph of Article 275 TFEU (see judgment of 28 November 2013, Council v Fulmen and Mahmoudian, C-280/12 P, EU:C:2013:775, paragraph 58 and the case-law cited).40 According to case-law, the discretion enjoyed in this area by the Council does not prevent the courts of the European Union from determining, when carrying out the review of lawfulness, whether the facts upon which the Council has relied are true and accurate. The effectiveness of the judicial review guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union also requires the Courts of the European Union to satisfy themselves that a decision that affects the person or entity concerned individually rests on a sufficiently solid factual basis. That entails checking the factual allegations in the summary of reasons underlying that decision, with the consequence that judicial review is not to be restricted to assessment of the cogency in the abstract of the reasons relied upon, but must deal with the question whether those reasons, or, at the very least, one of them, deemed sufficient in itself to support that decision, have or has been substantiated (judgment of 18 July 2013, Commission and Others v Kadi, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 119).41 To that end, it is for the Courts of the European Union to carry out that examination, requesting the competent EU authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination. That is because it is the task of the competent European Union authority to establish, in the event of challenge, that the reasons relied upon against the person concerned are well founded, and not the task of that person to adduce evidence to the contrary, showing that those reasons are not well founded. There is no requirement that that authority should produce before the Courts of the European Union all the information and evidence inherent in the reasons alleged in the measures whose annulment is sought. It is, however, necessary that the information or evidence produced should support the reasons relied upon against the person concerned (see judgment of 28 November 2013, Council v Fulmen and Mahmoudian, C-280/12 P, EU:C:2013:775, paragraphs 65 to 67).42 Furthermore, the validity of the inclusion of the applicant's name in the lists set out in the annexes to the contested measures must be determined by assessing whether the situation of the applicant constitutes sufficient proof that the latter provides economic support for the Syrian regime or that it benefits from the policies pursued by the regime. Such an appraisal must be carried out by examining the evidence, not in isolation, but in the context to which it belongs. The Council discharges the burden of proof it bears if it produces before the Courts of the European Union a set of indicia sufficiently specific, precise and consistent to establish that there is a sufficient link between the person subject to a measure freezing his funds and the regime being combated (see judgment of 21 April 2015, Anbouba v Council, C-630/13P, EU:C:2015:247, paragraphs 51 and 53 and the case-law cited).43 First of all, it must be borne in mind that the legality of the contested measures may be assessed only on the basis of the elements of fact and of law on which they were adopted and not on the basis of information brought to the Council's knowledge after the adoption of those measures (judgment of 26 October 2012, Oil Turbo Compressor v Council, T-63/12, EU:T:2012:579, paragraph 29).44 It is in light of those considerations that it is to be ascertained whether the Council was entitled to hold, when adopting the

contested measures, that restrictive measures might be imposed on the applicant.45 It should be noted at the outset that Council documents 13191/14, 13191/14 COR 1, 13192/14 and 13192/14 COR 1, of 25 September 2014, relating to the measures adopted on 26 September 2014, and document Coreu/CFSP/141/14 of 24 October 2014 as well, were drawn up after the contested measures had been adopted. On that basis, in accordance with the case-law referred to in paragraph 43 above, the Council may not legitimately rely upon those documents in order to justify the inclusion of the applicant's name in the lists set out in the annexes to the contested measures.46 In the present case, it must be held that the documents submitted by the Council are not sufficient to support the allegations against the applicant.47 Documents 11875/14, 11975/14 and 11877/14 are internal Council documents whose purpose is to serve as preparatory documents for the contested measures and that repeat strictly the statement of reasons adopted therein. They do not, therefore, contain any additional information relating to the statement of reasons for the contested measures. 48 It should also be stated that the reports submitted by the Council do not make it possible to substantiate the grounds for listing raised against the applicant. In that regard, it should be noted that the report prepared by the consultancy Wood MacKenzie, to which the Council refers, consists of a one-page extract relating to the refinery in Banias (Syria), and refers neither to any shipment of oil nor to the applicant. In addition, that single page is a brief extract of the report, making it possible to determine neither the author nor the general contents thereof. The same is true of the MEICA report in which the state of the oil and gas sector in Syria in 2013 is presented, but without any reference to covert shipments of oil being made, or to the applicant's name. 49 Moreover, it must be held that no factual element in the Reuters articles is borne out by other evidence. First, it should be noted that the Reuters articles do not mention the applicant's name, but that of its parent company. 50 Secondly, with respect to the oil shipments made in 2012, it should be noted that the 2012 article referred to three LPG shipments made by the applicant's parent company. However, the grounds for including the applicant's name in the lists set out in the annexes to the contested measures relate to the transport of oil and not of gas. Therefore, the elements set out in the 2012 article do not constitute evidence capable of substantiating the allegations made against the applicant. 51 Thirdly, with respect to the oil shipments made in 2013, the 2013 article refers to a transaction made on 24 May 2013 between the applicant's parent company and OPT, in respect of the transport of a shipment of oil to Syria. It should be noted, first of all, that the applicant acknowledges that the transaction in question was conducted by its parent company. In the annex to the reply, it adduced evidence that the transaction had been concluded between its parent company and Matra and that the destination of the oil shipment stated in the contract was the port of Constanta (Romania). In addition, it should be noted that it is apparent from that contract and KPMG's letter of 6 February 2014 that the transaction was a sale made 'free on board' in which the costs and liabilities for the shipment of the cargo were to be met by the buyer. The applicant cannot therefore be held liable in law for events occurring after the delivery of the shipment. Next, it should be noted that, in its statement of reasons, the Council refers to the shipment of oil, without specifying the number of shipments or the quantities of oil shipped. Regardless of the volume and amount of the transaction, that single shipment is insufficient to establish the validity of the inclusion of the applicant's name in the lists set out in the annexes to the contested measures. Finally, the concept of 'covert shipments' involves, at the very least, the willing participation of the applicant. It must be stated, however, that the Council has adduced no evidence making it possible to conclude that the applicant had willingly participated. Accordingly, the matters set out in the 2013 article do not make it possible to substantiate, to the requisite legal standard, the allegations made against the applicant. 52 Fourthly, the Court cannot accept the argument expounded by the Council in the rejoinder that the applicant ought to have known that OPT and Matra were a single company. It should be noted that the Council was not in a position to rely upon such

evidence on the date of the listing of the applicant’s name in the annexes to the contested measures, given that that evidence emerged after the listing during the investigation. Accepting that argument would thus be contrary to the case-law set out in paragraph 43 above. In addition, the Council’s argument that the applicant ought to have been more diligent in respect of OPT following the publication of the 2012 article must be dismissed. As is apparent from the file, OPT’s name was not included in the lists at issue at the time of the transaction in 2013, and was included only from the time of the adoption of the contested measures. Accordingly, the Council may not criticise the applicant for having potentially maintained business relations with a company whose name was not included in the lists in question at the date of the facts at issue. 53 Similarly, the Council’s argument that the applicant’s conduct constitutes reluctance to cooperate must also be dismissed. As was noted in paragraph 41 above, the burden of proving conduct capable of justifying the inclusion of the applicant’s name in the lists set out in the annexes to the contested measures is borne by the Council, with the result that it is not for the applicant to adduce evidence to the contrary, showing that those reasons are not well founded. Accordingly, the Council may not merely assert certain facts without supporting them with evidence. 54 Therefore, as is apparent from paragraphs 47 to 53 above, it must be stated that, viewed as a whole, the evidence presented in the present case by the Council does not constitute a set of indicia sufficiently specific, precise and consistent, within the meaning of the case-law cited in paragraph 42 above, to establish to the requisite legal standard the merits of the allegations made against the applicant.55 Accordingly, the inclusion of the applicant’s name in the lists set out in the annexes to the contested measures must be regarded as vitiated by an error of assessment. 56 In the light of all the foregoing, the contested acts must be annulled, in so far as they concern the applicant, without it being necessary to examine the other pleas in law raised by the applicant in support of the action. Costs57 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the applicant has applied for costs and the Council has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the applicant. On those grounds,THE GENERAL COURT (Seventh Chamber)hereby:1. Annuls Council Implementing Decision 2014/488/CFSP of 22 July 2014 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria, and Council Implementing Regulation (EU) No 793/2014 of 22 July 2014 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria, in so far as they concern Tri-Ocean Trading;2. Orders the Council of the European Union to bear its own costs and to pay the costs incurred by Tri-Ocean Trading. Van der Woude Wiszniewska-Białecka Ulloa RubioDelivered in open court in Luxembourg on 9 September 2016.[Signatures]* Language of the case: English.

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