JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

12 December 2006 *

In Case T-228/02,

Organisation des Modjahedines du peuple d'Iran, established in Auvers-sur-Oise (France), represented by J.-P. Spitzer, lawyer, D. Vaughan QC, and É. de Boissieu, lawyer,

applicant,

v

Council of the European Union, represented by M. Vitsentzatos and M. Bishop, acting as Agents,

defendant,

* Language of the case: French.

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by J.E. Collins, and subsequently by R. Caudwell and C. Gibbs, acting as Agents, assisted by S. Moore, Barrister,

intervener,

ACTION, initially, for annulment of Common Position 2002/340/CFSP of 2 May 2002 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2002 L 116, p. 75), of Common Position 2002/462/CFSP of 17 June 2002 updating Common Position 2001/931/CFSP and repealing Common Position 2002/340 (OJ 2002 L 160, p. 32), and of Council Decision 2002/460/EC of 17 June 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/334/EC (OJ 2002 L 160, p. 26), in so far as the applicant is included in the list of persons, groups and entities to which those provisions apply and, additionally, a claim for damages,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: E. Coulon,

having regard to the written procedure and further to the hearing on 7 February 2006,

gives the following

Judgment

Background to the case

1 As appears from the case-file, the applicant, the Organisation des Modjahedines du peuple d'Iran (People's Mujahidin of Iran, Mujahedin-e Khalq in Farsi), was founded in 1965 and set itself the objective of replacing the regime of the Shah of Iran, then the mullahs' regime, by a democracy. In 1981 it took part in the foundation of the National Council of Resistance of Iran (NCRI), a body defining itself as the 'parliament in exile of the Iranian resistance'. At the time of the facts giving rise to the present dispute, it was composed of five separate organisations and an independent section, making up an armed branch operating inside Iran. According to the applicant, however, it and all its members have expressly renounced all military activity since June 2001 and it no longer has an armed structure at the present time.

2 By order of 28 March 2001, the United Kingdom Secretary of State for the Home Department ('the Home Secretary') included the applicant in the list of organisations proscribed under the Terrorism Act 2000. The applicant brought two parallel actions against that order, one an appeal before the Proscribed Organisations Appeal Commission ('POAC'), the other for judicial review before the High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court) ('the High Court').

3 On 28 September 2001, the United Nations Security Council ('the Security Council') adopted Resolution 1373 (2001) laying down strategies to combat terrorism by all means, in particular the financing thereof. Paragraph 1(c) of that resolution provides, inter alia, that all States must freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled by such persons; and of persons and entities acting on behalf of, or at the direction of, such persons and entities.

4 On 27 December 2001, taking the view that action by the Community was needed in order to implement Security Council Resolution 1373 (2001), the Council adopted Common Position 2001/930/CFSP on combating terrorism (OJ 2001 L 344, p. 90) and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

5 According to Article 1(1) of Common Position 2001/931, the latter applies 'to persons, groups and entities involved in terrorist acts and listed in the Annex'. The applicant's name does not appear in that list.

6 Article 1(2) and (3) of Common Position 2001/931 defines what is to be understood by 'persons, groups and entities involved in terrorist acts' and by 'terrorist act'.

7 According to the terms of Article 1(4) of Common Position 2001/931, the list in the Annex is to be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it

concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. 'Competent authority' is understood to mean a judicial authority or, where judicial authorities have no competence in the relevant area, an equivalent competent authority in that area.

8 According to Article 1(6) of Common Position 2001/931, the names of persons and entities in the list in the Annex are to be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them in the list.

9 According to Articles 2 and 3 of Common Position 2001/931, the European Community, acting within the limits of the powers conferred on it by the EC Treaty, is to order the freezing of the funds and other financial assets or economic resources of persons, groups and entities listed in the Annex and is to ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for their benefit.

10 On 27 December 2001, considering that a regulation was necessary in order to implement at Community level the measures described in Common Position 2001/931, the Council adopted, on the basis of Articles 60 EC, 301 EC and 308 EC, Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70). That regulation provides that, except as permitted thereunder, all funds belonging to a natural or legal person, group or entity included in the list referred to in Article 2(3) thereof are to be frozen. Likewise, it is prohibited

to make funds available or provide financial services to those persons, groups or entities. The Council, acting by unanimity, is to establish, review and amend the list of persons, groups and entities to which the regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931.

11 The initial list of persons, groups and entities to which Regulation No 2580/2001 applies was established by Council Decision 2001/927/EC of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 (OJ 2001 L 344, p. 83). The applicant's name is not included in that list.

12 By judgment of 17 April 2002 the High Court dismissed the action for judicial review brought by the applicant against the Home Secretary's order of 28 March 2001 (see paragraph 2 above), considering, essentially, that the POAC was the appropriate forum to hear the applicant's arguments, including those alleging infringement of the right to be heard.

13 On 2 May 2002, the Council adopted, under Articles 15 EU and 34 EU, Common Position 2002/340/CFSP, updating Common Position 2001/931 (OJ 2002 L 116, p. 75). The annex thereto updates the list of persons, groups and entities to which Common Position 2001/931 applies. Point 2 of that annex, entitled 'Groups and entities', includes inter alia the applicant's name, identified as follows :

'Mujahedin-e Khalq Organisation (MEK or MKO) (minus the "National Council of Resistance of Iran" (NCRI)) (a.k.a. The National Liberation Army of Iran (NLA, the militant wing of the MEK), the People's Mujahidin of Iran (PMOI), National Council of Resistance (NCR), Muslim Iranian Students' Society)'.

14 By Council Decision 2002/334/EC of 2 May 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2001/927 (OJ 2002 L 116, p. 33), the Council adopted an updated list of the persons, groups and entities to which that regulation applies. The applicant's name is included in that list, in the same terms as those employed in the Annex to Common Position 2002/340.

15 On 17 June 2002, the Council adopted Common Position 2002/462/CFSP updating Common Position 2001/931 and repealing Common Position 2002/340 (OJ 2002 L 160, p. 32) and also Council Decision 2002/460/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2002/334 (OJ 2002 L 160, p. 26). The applicant's name was maintained in the lists provided for by Common Position 2001/931 and by Regulation No 2580/2001 ('the disputed lists' or, in the case of the latter, 'the disputed list').

16 By judgment of 15 November 2002 the POAC dismissed the appeal brought by the applicant against the Home Secretary's order of 28 March 2001 (see paragraph 2 above), considering, inter alia, that there was no requirement to hear the applicant's views beforehand, such a hearing being impractical or undesirable in the context of legislation directed against terrorist organisations. According to that same decision, the legal scheme of the Terrorism Act 2000 provides a genuine opportunity for the applicant's views to be heard before the POAC.

17 Since then, the Council has adopted a number of common positions and decisions updating the disputed lists. Those in force at the date of the close of the oral procedure were: Common Position 2005/936/CFSP of the Council of 21 December 2005 updating Common Position 2001/931 and repealing Common Position

2005/847/CFSP (OJ 2005 L 340, p. 80), and Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2005/848/EC (OJ 2005 L 340, p. 64). The applicant's name has always been maintained in the disputed lists by the acts thus adopted.

Procedure and forms of order sought

18 By application lodged at the Registry of the Court of First Instance on 26 July 2002, the applicant brought the present action, in which it claims that the Court should:

— annul Common Positions 2002/340 and 2002/462 and also Decision 2002/460, in so far as those acts concern it;

— consequently, declare those Common Positions and that decision to be inapplicable in respect of it;

— order the Council to pay EUR 1 by way of damages for the harm suffered;

— order the Council to pay the costs.

19 In its defence, the Council contends that the Court should:

— dismiss the action as in part inadmissible and in part unfounded;

— order the applicant to pay the costs.

20 By order of 12 February 2003, after the parties had been heard, the President of the Second Chamber of the Court of First Instance granted the United Kingdom of Great Britain and Northern Ireland leave to intervene in support of the forms of order sought by the Council. The intervener lodged its statement in intervention, seeking to have the action dismissed, and the applicant lodged its observations thereon within the prescribed periods.

21 After hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and, by way of measures of organisation of the procedure provided for in Article 64 of the Rules of Procedure of the Court of First Instance, called on the parties, by letter from the Registry of 1 December 2005, to submit their written observations on the inferences to be drawn, for the remainder of the present action, from the new factors, that is, the repeal and replacement on a number of occasions after the application was lodged of the acts challenged in that action, namely Common Positions 2002/340 and 2002/462 and also Decision 2002/460, by acts which have always maintained the applicant in the disputed lists.

22 In its observations, lodged at the Court Registry on 21 December 2005, the Council maintained that it was not necessary to express a view on the Common Positions, since the action is, in its view, in any event inadmissible in this respect. In respect of the Community decisions implementing Regulation No 2580/2001, the Council takes the view that it 'is appropriate to consider that the application is directed against Decision 2005/848/EC' of the Council of 29 November 2005 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2005/722/EC (OJ 2005 L 314, p. 46) 'or any other decision having the same subject-matter which may be in force on the date the Court of First Instance delivers it judgment, in so far as that decision concerns the applicant'.

23 In its observations, lodged at the Registry on 2 January 2006, the applicant takes the view that 'the present action must be considered to be directed against Common Position 2005/847/CFSP of the Council of 29 November 2005' updating Common Position 2001/931 and repealing Common Position 2005/725/CFSP (OJ 2005 L 314, p. 41) and 'Decision 2005/848'. Moreover, in the annex to its observations, the

applicant attached a series of new documents, which were put into the case-file. By letter from the Registry of 19 January 2006, those observations and documents were notified to the Council, which acknowledged receipt thereof on 27 January 2006.

24 By letter lodged at the Registry on 25 January 2006, the applicant lodged written observations on the Report for the Hearing, in which it stated inter alia that the action must henceforth also be considered to be directed against Common Position 2005/936 and Decision 2005/930. In the annex to that letter, it attached a further series of new documents. The parties were notified that a decision as to whether those annexes would be put into the case-file would be taken at the hearing.

25 The parties presented oral argument and answered questions put to them by the Court at the hearing on 7 February 2006. During that hearing, the Council argued that the new documents lodged at the Registry by the applicant on 18 and 25 January 2006 (see paragraphs 23 and 24 above) had not been lodged properly. The Council added that it was not in a position to put forth its views properly on those documents because it had been notified of them too late. The Council accordingly asked the Court either not to allow the documents in question to be put into the case-file, or to order that the written procedure be reopened in order to allow the Council to set out its views in writing. The Court reserved its decision on that request, and also on whether the documents referred to in paragraph 24 above would be put into the case-file.

26 In response to a question from the Court, the applicant stated that, as acknowledged by the Council in its observations lodged at the Registry on 23 December 2005 (see paragraph 22 above), the present action must be considered to be directed against Common Position 2005/936 and Decision 2005/930 and also, as the case may be, against all other acts in force on the date the forthcoming judgment is delivered, having the same subject-matter as that common position and decision and having the same effect on it, in so far as those acts concern it.

The procedural consequences of the repeal and replacement of the acts initially challenged

27 As appears from paragraph 17 above, the acts initially challenged by the present action, namely Common Positions 2002/340 and 2002/462 and also Decision 2002/460 ('the decision initially contested'), have been repealed and replaced on a number of occasions after the application was lodged, by acts which have always maintained the applicant in the disputed lists. On the date on which the oral procedure was closed, those were Common Position 2005/936 and Decision 2005/930.

28 It must be observed that, where a decision is, during the proceedings, replaced by another decision with the same subject-matter, this is to be considered a new factor allowing the applicant to adapt its claims and pleas in law. It would not be in the interests of the due administration of justice and the requirements of procedural economy to oblige the applicant to make a fresh application to the Court. Moreover, it would be inequitable if the institution in question were able, in order to counter criticisms of a decision contained in an application to the Community judicature, to amend the contested decision or to substitute another for it and to rely in the proceedings on such an amendment or substitution in order to deprive the other party of the opportunity of extending his original pleadings to the later decision or of submitting supplementary pleadings directed against that decision (Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 8; Joined Cases 351/85 and 360/85 *Fabrique de Fer de Charleroi and Dillinger Hüttenwerke* v *Commission* [1987] ECR 3639, paragraph 11; Case 103/85 *Stahlwerke Peine-Salzgitter* v *Commission* [1988] ECR 4131, paragraphs 11 and 12; and Joined Cases T-46/98 and T-151/98 *CCRE* v *Commission* [2000] ECR II-167, paragraph 33).

29 In its judgments in Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* [2005] ECR II-3533, appeal pending ('*Yusuf*'), paragraph 73, and Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649, appeal

pending (*'Kadi'*), paragraph 54, the Court applied that case-law to the scenario in which a regulation of direct and individual concern to an individual is replaced, during the procedure, by a regulation having the same subject-matter.

30 Consistently with that case-law, it is therefore appropriate in the present case to allow the applicant's request that its action be considered, on the date on which the oral procedure was closed, to seek annulment of Common Position 2005/936 and Decision 2005/930, in so far as those acts concern it, and to allow the parties to reformulate their claims, pleas and arguments in the light of those new factors, which implies, for them, the right to submit additional claims, pleas and arguments.

31 In those circumstances, it is appropriate, first, to allow the documents attached to the applicant's observations on the Report for the Hearing, lodged at the Registry on 25 January 2006 (see paragraph 24 above), to be put into the case-file and, second, to dismiss the Council's request that neither the documents in question, nor the applicant's observations in response to the Court's written question, lodged at the Registry on 18 January 2006 (see paragraphs 23 and 25 above), should be allowed into the case-file. The production of new evidence and documents and the submission of new offers of evidence must be regarded as an inherent part of the parties' right to reformulate their claims, pleas and arguments, in the light of the new factors referred to in the preceding paragraphs. As to the question whether the addition to the case-file of the documents in question at a late stage justifies, in the present case, a reopening of the written procedure so as to safeguard the Council's rights of defence (see paragraph 25 above), reference is made to paragraph 182 below.

32 As to the remainder, the Court considers that only actions for annulment of an act in existence adversely affecting the applicant may be brought before it. Accordingly, even if, as held in paragraph 30 above, the applicant may be permitted to reformulate its claims so as to seek annulment of acts which have, during the proceedings, replaced the acts initially challenged, that solution cannot authorise the

speculative review of the lawfulness of hypothetical acts which have not yet been adopted (see order in Case T-22/96 *Langdon* v *Commission* [1996] ECR II-1009, paragraph 16, and case-law cited).

33 It follows that there are no grounds for allowing the applicant to reformulate its claims so that they are directed not only against Common Position 2005/936 and Decision 2005/930, but also, as the case may be, against any other acts in force at the time of the subsequent judgment, having the same subject-matter as those acts and having the same effect on it, in so far as those acts concern it (see paragraph 26 above).

34 Accordingly, for the purposes of the present action, the Court's review will concern only those acts already adopted and still in force and challenged on the date on which the oral procedure closed, namely Common Position 2005/936 ('the contested Common Position') and Decision 2005/930 ('the contested decision') (collectively 'the contested acts'), even if those acts have in turn been repealed and replaced by other acts before the date of delivery of the present judgment.

35 In such circumstances, the applicant still has an interest in obtaining annulment of the contested acts, in that the repeal of an act of an institution does not constitute recognition of the unlawfulness of that act and has only prospective effect, unlike a judgment annulling an act, by which the act is eliminated retroactively from the legal order and is deemed never to have existed. Moreover, as acknowledged by the Council at the hearing, if the contested acts are annulled, it will be obliged to take the measures necessary to comply with that judgment, pursuant to Article 233 EC, which may involve its amending or withdrawing, as the case may be, any acts which have repealed and replaced the acts contested subsequent to the close of the oral procedure (see, to that effect, Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraphs 46 to 48).

The second head of claim

36 By its second head of claim, as reformulated at the hearing, the applicant asks the Court to declare the contested acts inapplicable to it, as a consequence of the partial annulment thereof sought by the first head of claim.

37 It is clear that the second head of claim, so formulated, has no scope independent of the first head of claim. That being so, it must be regarded as having no purpose.

The application for annulment of the contested Common Position

Arguments of the parties

38 The applicant maintains that the present action is admissible, since both the contested Common Position and the contested decision concern it directly and individually and affect it adversely. It states, more specifically, that the Court is competent to review the lawfulness of the Common Position in question, failing which justice will be denied.

39 According to the applicant, the principles of a State governed by the rule of law, as enshrined in Article 6(2) EU, apply to all of the Union's acts, including those adopted as part of the Common Foreign and Security Policy (CFSP) or police and judicial cooperation in criminal matters (commonly known as 'Justice and Home Affairs') (JHA). As the right to obtain a judicial determination is part of the foundation of a

State governed by the rule of law, as also evidenced by Articles 35 EU and 46 EU and the Court of Justice's case-law (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraphs 38 and 39), none of those acts must fall outside the scope of judicial review by the Court of Justice and the Court of First Instance. Otherwise, according to the applicant, a lawless zone would be created.

40 In any event, the legislative process pursued by the Council in this case must be held to be illegal, as must the basing of the contested Common Position on the provisions relating to the CFSP. In the light of, inter alia, the primacy of Community law as enshrined in Article 47 EU, the Court is competent to declare illegal an act adopted on the basis of CFSP or JHA. The applicant refers to Case C-170/96 *Commission* v *Council* [1998] ECR I-2763.

41 That process has been characterised by the steadfast will on the part of the Council, relying on an international rule, to circumvent the imperatives of the protection of fundamental rights and democratic, legislative or judicial review of its acts, in disregard of the general principles of Community law. However, the persons in charge of the actual implementation of those acts of the Union remain subject to judicial review, in the light of fundamental rights.

42 That will was, moreover, criticised by the European Parliament when it was consulted on the draft text of Regulation No 2580/2001. It is illustrated, inter alia, by the fact that the Council gave itself the power to implement Regulation No 2580/2001, by way of decisions which, in addition, do not appear to contain reasons.

43 Without denying that the applicant is directly and individually concerned by the contested acts, the Council and the United Kingdom contend that the action is inadmissible in so far as it is directed against the contested Common Position.

44 The Council and the United Kingdom submit that, consequently, the present action must be restricted to a review of the lawfulness of the contested decision, by which the measures provided for by Regulation No 2580/2001 are made applicable to the applicant.

Findings of the Court

45 According to the settled case-law of the Court (order of 7 June 2004 in Case T-338/02 *Segi and Others* v *Council* [2004] ECR II-1647, appeal pending, paragraph 40 et seq.; order of 7 June 2004 in Case T-333/02 *Gestoras Pro Amnistía and Others* v *Council*, not published in the ECR, appeal pending, paragraph 40 et seq., and order of 18 November 2005 in Case T-299/04 *Selmani* v *Council and Commission*, not published in the ECR, paragraphs 52 to 59), the action must be dismissed as, in part, clearly inadmissible and, in part, clearly unfounded in so far as it seeks annulment of the contested Common Position.

46 The Court notes, at the outset, that that Common Position is not an act of the Council adopted on the basis of the EC Treaty and subject, as such, to the review of its lawfulness provided for by Article 230 EC, but rather an act of the Council, composed of representatives of the Governments of the Member States, adopted on the basis of Articles 15 EU, under Title V of the EU Treaty relating to the CFSP, and 34 EU, under Title VI of the EU Treaty relating to JHA.

47 It is clear that neither Title V of the EU Treaty relating to the CFSP nor Title VI of the EU Treaty relating to JHA make any provision for actions for annulment of common positions before the Community Courts.

48 Under the EU Treaty, in the version resulting from the Treaty of Amsterdam, the powers of the Court of Justice are listed exhaustively in Article 46 EU.

49 That article does not confer any competence on the Court in relation to the provisions of Title V of the EU Treaty.

50 With respect to the relevant provisions of Title VI of the EU Treaty, that article provides:

'The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty:

...

(b) provisions of Title VI, under the conditions provided for by Article 35 [EU];

...

(d) Article 6(2) [EU] with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty;

...'

51 According to the relevant provisions of Article 35 EU:

'1. The Court of Justice shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions, and decisions on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.

...

6. The Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure.

...'

52 It follows from Articles 35 EU and 46 EU that, under Title VI of the EU Treaty, legal remedies seeking a ruling as to validity or annulment are available only as against framework decisions, decisions and the measures implementing conventions provided for by Article 34(2)(b), (c) and (d) EU, with the exception of the common positions provided for in Article 34(2)(a) EU.

53 It should further be noted that the safeguard of observance of fundamental rights referred to in Article 6(2) EU is not relevant to the present case, as Article 46(d) EU gives the Court of Justice no further competence (*Segi and Others* v *Council*, paragraph 45 above, paragraph 37).

54 In the Community legal system founded on the principle of conferred powers, as embodied in Article 5 EC, the absence of an effective legal remedy as claimed by the applicant cannot in itself confer independent Community jurisdiction in relation to an act adopted in a related yet distinct legal system, namely that deriving from Titles V and VI of the EU Treaty (*Segi and Others* v *Council*, paragraph 45 above, paragraph 38). Nor can the applicant rely on *Unión de Pequeños Agricultores* v *Council*, paragraph 39 above. In that judgment (paragraph 40), the Court based its reasoning on the fact that the EC Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the lawfulness of acts of the institutions. However, as indicated above, the EU Treaty has, in relation to acts adopted on the basis of Titles V and VI thereof, established a limited system of judicial review, certain areas being outside the scope of that review and certain legal remedies not being available.

55 The Court notes in this respect, however, that, without its being necessary to consider the possibility of challenging the validity of a common position before the courts of the Member States, the contested Common Position requires the adoption of implementing Community and/or national acts in order to be effective. It has not been contended that those implementing acts cannot themselves be the subject-matter of an action for annulment either before the Community Courts or before the national courts. Thus, it has not been established that the applicant does not have available to it an effective legal remedy, albeit indirect, against the acts adopted pursuant to the contested Common Position which affect it adversely and directly. In the present case, moreover, the applicant has availed itself of its right of action against the contested decision.

56 In those circumstances, the Court of First Instance has jurisdiction to hear an action for annulment directed against a Common Position adopted on the basis of Articles 15 EU and 34 EU only strictly to the extent that, in support of such an action, the applicant alleges an infringement of the Community's competences (*Selmani* v *Council and Commission*, paragraph 45 above, paragraph 56). The Community Courts have jurisdiction to examine the content of an act adopted pursuant to the EU Treaty in order to ascertain whether that act affects the Community's competences and to annul it if it should emerge that it ought to have been based on a provision of the EC Treaty (see, to that effect, *Commission* v *Council*, paragraph 40 above, paragraphs 16 and 17, and Case C-176/03 *Commission* v *Council* [2005] ECR I-7879, paragraph 39; *Segi and Others* v *Council*; *Gestoras Pro Amnistía and Others* v *Council*, paragraph 45 above, paragraph 41; see also, by analogy, Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 25).

57 In the present case, to the extent that the applicant alleges misuse of powers on the part of the Council acting in Union matters in disregard of the Community's competences, in order to deprive it of all forms of judicial protection, the present action therefore comes within the jurisdiction of the Community Courts.

58 The Court finds, however, that the Council, acting in Union matters, far from infringing the Community's competences, on the contrary, relied on them in order to implement the contested Common Position. First, the Council, having made use of the relevant Community powers, in particular those laid down in Articles 60 EC and 301 EC, cannot be criticised for having been unaware of them. The applicant has not identified any relevant legal basis other than the provisions actually used in the present case which might have been disregarded, contrary to Article 47 EU. Second, those provisions themselves provide for the prior adoption of a common position or a joint action in order to be applicable. It follows that the prior adoption of a common position before the implementation of the Community competences exercised in the present case demonstrates compliance with those competences and not breach thereof. Moreover, even if the use of a common position on the basis of the EU Treaty means that the persons affected are denied a direct remedy before the Community Courts, namely the possibility of challenging directly the lawfulness of

the contested Common Position, such a result does not constitute as such a disregard of the Community's competences. Lastly, with regard to the Parliament resolution of 7 February 2002, in which the Parliament criticises the choice of a legal basis coming within the field of the EU Treaty for the establishment of the list of persons, groups or entities involved in terrorist acts, it must be noted that that criticism concerns a political choice and does not call into question, as such, the lawfulness of the legal basis chosen or concern the question of failure to observe Community competences (*Segi and Others* v *Council*, paragraph 45 above, paragraph 46).

59 The Court, exercising the limited judicial review within its competence under the EC Treaty, can therefore only find that the contested Common Position does not infringe the Community's competences.

60 It follows from the foregoing that, to the limited extent to which the Court has jurisdiction to hear and determine this action in so far as it is directed against the contested Common Position, that action must be dismissed as manifestly unfounded.

The action for annulment of the contested decision

61 In support of its claim for annulment of the contested decision, the applicant puts forward three pleas in law. The first plea comprises five parts, alleging infringement of the right to a fair hearing, infringement of essential procedural requirements, infringement of the right to effective judicial protection, infringement of the

presumption of innocence and a manifest error of assessment. The second plea is based on infringement of the right to revolt against tyranny and oppression. The third is based on infringement of the principle of non-discrimination.

62 It is appropriate to begin by examining the first plea.

Arguments of the parties

63 Under the first plea, the applicant does not contest, as such, either the lawfulness or legitimacy of measures such as the freezing of funds provided for by the contested acts directed against the persons, groups and entities involved in terrorist acts, within the meaning of Common Position 2001/931.

64 The applicant does maintain, however, in the first part of that plea, that the contested decision infringes its fundamental rights, in particular its right to a fair hearing as guaranteed in particular in this case by Article 6(2) EU and by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), in that that act imposes sanctions on it and causes it considerable harm, without its having being able to express its views either before the adoption of the act or even afterwards. It submits that, given that its offices and managers are known, its representatives ought to have been summoned and heard before it was included in the disputed list. At the oral hearing, the applicant insisted that it was not even aware of the identity of the national authority that allegedly took the decision in respect of it for the purposes of Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001, or of the evidence and information on the basis of which such a decision was taken. According to the applicant, it was included in the disputed list 'apparently solely only on the basis of documents produced by the Tehran regime'.

65 The applicant adds, in the second and third parts of the plea, that its inclusion in the disputed list, without its views having been heard beforehand and without the slightest indication of the factual and legal grounds providing legal justification, also infringes the obligation to state reasons provided for in Article 253 EC as well as the right to effective judicial protection (Case 3/67 *Mandelli* v *Commission* [1968] ECR 25, and *Johnston*, paragraph 39 above).

66 The applicant further maintains, in the fourth part of the plea, that its inclusion also infringes the presumption of innocence, as guaranteed by Article 48(1) of the Charter of Fundamental Rights and also refers, in this respect, to the judgment of the European Court of Human Rights of 10 February 1995 in *Allenet de Ribemont* (series A No 308).

67 Lastly, the applicant maintains in the fifth part of the plea that its inclusion in the disputed list is the result of a manifest error of assessment. It states that there is no reason to accuse it of being a terrorist organisation.

68 The Council and the United Kingdom maintain that the contested decision does not infringe the fundamental rights infringement of which is alleged.

69 More specifically, with respect to the right to be heard, the Council observes that the applicant itself has stated that it wrote to the current President of the Council, before the adoption of the decision initially contested, in order to plead its case. The Council maintains that it heard the applicant's views at that time before proceeding to freeze its funds. It refers to the order of the President of the Second Chamber of the Court of First Instance of 2 August 2000 in Case T-189/00 R *'Invest' Import und*

Export and Invest Commerce v *Commission* [2000] ECR II-2993, paragraph 41, which indirectly implies that early contacts with the authorities, setting out one's point of view in detail and knowledge of the imminent inclusion in the blacklist are all factors which satisfy the right to be heard.

70 Moreover, the applicant has never contacted the Council again, since the decision initially contested was adopted, in order to have its case reconsidered with a view to its being removed from the disputed list.

71 In any event, it is not apparent from the ECHR, the Charter of Fundamental Rights, a non-binding instrument, or the constitutional traditions common to the Member States, that observance of the right to a fair hearing entails an unconditional right to be heard before the adoption of a civil or administrative sanction measure, such as that challenged in the present case.

72 The Council and the United Kingdom observe that exceptions to the general right to be heard during administrative procedures appear to be possible, at least in some Member States, on grounds of public interest, public policy or the maintenance of international relations, or when the purpose of the decision to be taken would be or could be defeated if the right in question were to be observed. The Council refers to German, French, Italian, English, Danish, Swedish, Irish and Belgian law by way of example.

73 The United Kingdom Government describes the special procedure applicable before the POAC, in the context of an action brought against a decision of the Home Secretary to prohibit an organisation he believes to be involved in terrorism, pursuant to the Terrorism Act 2000. One feature, among others, of that procedure is the appointment of special counsel to represent the applicant before the POAC, sitting in camera, or the fact that the POAC may take into consideration evidence

which has not been divulged to that party or its legal representative, pursuant to the law or on grounds of public interest. In this case, the applicant was the subject of such a proscription decision (see paragraph 2 above), against which it has brought two parallel actions, one an appeal before the POAC, the other an action for judicial review before the High Court. By judgment of 17 April 2002, the High Court dismissed the action for judicial review (see paragraph 12 above) and, by judgment of 15 November 2002, the POAC dismissed the appeal (see paragraph 16 above).

74 Likewise, according to the Council and the United Kingdom, Community law does not confer on the applicant any right to be heard before being included in the disputed list.

75 According to the United Kingdom, the present case is different from the one which gave rise to the judgment in Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, relied on by the applicant, in that the inclusion of the applicant in the disputed list is not the implementation of a procedure concerning it, relating to a pre-existing right, but rather the adoption of a legislative or administrative measure by the Community institutions. A person affected by such a measure is not a defendant in a procedure and, consequently, the question of rights of the defence simply does not arise. Its rights are safeguarded by the possibility of bringing legal proceedings, in this case an action before the Court of First Instance on the basis of Article 230 EC, in order to have ascertained whether the rules at issue have been adopted legally and/or whether the applicant does in fact come within the scope of those rules.

76 The Council also refers, in the same vein, to Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585, paragraphs 20 and 24, and Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 20. The Council doubts, moreover, that the principles deriving from case-law in competition and trade protection cases may be applied without reservation to the present case. In its view, the most relevant case-law for the present case is that which has held that, in the case of a person concerned by a Community sanction adopted on the proposal of a national authority, the right to be

heard must actually be secured in the first place in the relations between that undertaking and the national administrative authority (*'Invest' Import und Export and Invest Commerce* v *Commission*, paragraph 69 above, paragraph 40).

77 The Council states, with regard to Article 6 of the ECHR, that there is nothing in the case-law of the European Court of Human Rights to indicate that the safeguards provided for by that provision should have been applied during the administrative procedure which led to the adoption of the contested decision. The freezing of the applicant's assets is not a criminal penalty and cannot be equated with such a penalty under the gravity-related criteria applied by the European Court of Human Rights (Eur. Court H.R. *Engel and Others*, judgment of 8 June 1976, Series A No 22; *Campbell and Fell*, judgment of 28 June 1984, Series A No 80; and *Öztürk*, judgment of 23 October 1984, Series A No 85). That court has also held that Article 6(1) of the ECHR is not applicable to the administrative phases of an investigation before the administrative authorities. Only the manner in which the information gathered during the administrative inquiries is used in judicial proceedings is covered by the right to a fair hearing (Eur. Court H.R. *Fayed*, judgment of 21 September 1994, Series A No 294-B).

78 The United Kingdom also disputes that Article 6(1) of the ECHR envisages the adoption of legislative or regulatory measures. That provision applies only to challenges concerning rights and obligations of a civil nature, and the safeguards it provides are applicable only where there is a dispute requiring a decision. It thus does not give individuals the right to be heard before the adoption of a set of general rules which interferes with their property rights. In such a situation, individuals are only entitled to bring a subsequent challenge against the lawfulness of those rules or the application thereof to their circumstances (Eur. Court H.R., *Lithgow and Others*, judgment of 8 July 1986, Series A No 102, and *James and Others*, judgment of 21 February 1986, Series A No 98).

79 In the present case, in the submission of the United Kingdom, neither the inclusion of the applicant in the disputed list nor, accordingly, the freezing of its assets come

within the scope of Article 6(1) of the ECHR. Consequently, the applicant had no right to put forward its arguments before the adoption of those measures. Under that same provision, however, the applicant does have the right to bring legal proceedings to challenge the lawfulness of the acts in question. It has in fact exercised that right in bringing the present action.

80 In any event, the acts at issue in the present case, introduced as an emergency measure, are not disproportionate to the objective pursued and did not cause an unfair lack of balance between the requirements of the public interest and those relating to the protection of fundamental rights, it being understood that the right to a fair hearing may be exercised once those measures have been taken.

81 The Council and the United Kingdom point out that providing information to or hearing the views of the applicant before freezing its assets would have compromised the attainment of the important public interest objective pursued by Regulation No 2580/2001, which is to prevent funds from being used to finance terrorist activities. According to the Council and the United Kingdom, the applicant could have taken advantage of the time period allowed it to submit its comments to transfer those funds out of the Union.

82 The United Kingdom adds that there are in all likelihood overriding reasons of national security for not disclosing to the party concerned the information and evidence on the basis of which a competent authority may adopt a decision finding that an entity is involved in terrorism.

83 As to the alleged failure to state reasons, the Council contends that the contested decision, whilst not containing a specific statement of reasons, merely updates the list provided for by Regulation No 2580/2001, Article 2(3) of which lists the criteria on the basis of which the persons, groups and entities are included in the disputed list. That regulation, the contested Common Position and the contested decision,

taken together in a context well known to the applicant, thus satisfy the obligation to state reasons as contemplated in the case-law, it being understood that the material conditions in the fight against terrorism are not the same as those existing in other areas, such as competition (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15; see, in the context of freezing funds, *'Invest' Import und Export and Invest Commerce* v *Commission*, paragraph 69 above, paragraph 43).

84 The Council adds that the contested decision does not have any adverse effect on the presumption of innocence.

85 As to the allegation of a manifest error of assessment, the Council and the United Kingdom contend that the applicant can hardly claim that it is not a terrorist organisation and that it does not therefore come within the scope of Article 2(3) of Regulation No 2580/2001.

86 The Council and the United Kingdom observe that, under Article 1(4) of Common Position 2001/931, the disputed list is to be established on the basis of precise information or material in the file which indicates that a decision has been taken by a competent national authority identifying a person, group or entity as being involved in terrorist activities. The applicant has not maintained, and nor does anything suggest, that it was not included in the disputed list on the basis of such a decision.

87 The Council acknowledges that, as set out in that same provision, it is to check that the national authorities comply with the criteria fixed by the Union. However, that check does not concern facts such as those alleged by the applicant, or information sometimes based on protected sources or on the actions of specialised units in the Member States. Given the essential role played in the procedure by the competent

national authorities, the Council and the United Kingdom take the view that a challenge to the very facts in the light of which those authorities proposed the inclusion of a person in the disputed list or an application for review of their decision can properly be brought only at the national level. The United Kingdom observes in this regard that Article 7 of Regulation No 2580/2001 allows the Commission to amend the annex to that regulation on the basis of information provided by the Member States.

88 Moreover, the Home Secretary, who is the competent national authority in this area in the United Kingdom, has rejected an application brought by the applicant to have itself removed from the list of proscribed organisations pursuant to the Terrorism Act 2000. Whilst noting the applicant's assertions that it has been involved in a legitimate struggle against an oppressive regime and that its acts of resistance have been focused on military targets in Iran, the Home Secretary declared that he could not accept 'any right to resort to acts of terrorism, whatever the motivation'. The legal proceedings brought by the applicant against that decision have been rejected (see paragraph 73 above).

Findings of the Court

89 It is appropriate to begin by examining, together, the pleas alleging infringement of the right to a fair hearing, infringement of the obligation to state reasons and infringement of the right to effective judicial protection, which are closely linked. First, the safeguarding of the right to a fair hearing helps to ensure that the right to effective judicial protection is exercised properly. Second, there is a close link between the right to an effective judicial remedy and the obligation to state reasons. As held in settled case-law, the Community institutions' obligation under Article 253 EC to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the lawfulness of the decision and the persons concerned to know the reasons for the measure adopted so that

they can defend their rights and ascertain whether or not the decision is well founded (Case 24/62 *Germany* v *Commission* [1963] ECR 63, 69; Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, paragraph 22; Joined Cases T-346/02 and T-347/02 *Cableuropa and Others* v *Commission* [2003] ECR II-4251, paragraph 225). Thus, the parties concerned can make genuine use of their right to a judicial remedy only if they have precise knowledge of the content of and the reasons for the act in question (see, to that effect, Case C-309/95 *Commission* v *Council* [1998] ECR I-655, paragraph 18, and Case T-89/96 *British Steel* v *Commission* [1999] ECR II-2089, paragraph 33).

90 In the light of the principal arguments put forward by the Council and the United Kingdom, the Court will begin by considering whether the rights and safeguards alleged by the applicant to have been infringed may, in principle, apply in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001. The Court will then determine the purpose of and identify the restrictions on those rights and safeguards in such a context. Lastly, the Court will rule on the alleged infringement of the rights and safeguards in question, in the specific circumstances of the present case.

Applicability of the safeguards relating to observance of the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001

— The right to a fair hearing

91 According to settled case-law, observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in

question. That principle requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the matters on which the penalty is based (see *Fiskano* v *Commission*, paragraph 75 above, paragraphs 39 and 40, and case-law cited).

92 In the present case, the contested decision, by which an individual economic and financial sanction was imposed on the applicant (freezing of funds), undeniably affects the applicant adversely (see also paragraph 98 below). That case-law is, therefore, relevant to the present case.

93 It follows from that case-law that, subject to exceptions (see paragraph 127 et seq. below), the safeguarding of the right to be heard comprises, in principle, two main parts. First, the party concerned must be informed of the evidence adduced against it to justify the proposed sanction ('notification of the evidence adduced'). Second, he must be afforded the opportunity effectively to make known his view on that evidence ('hearing').

94 So understood, the safeguarding of the right to a fair hearing in the context of the administrative procedure itself is to be distinguished from that resulting from the right to an effective judicial remedy against the act having adverse effects which may be adopted at the end of that procedure (see, to that effect, Case T-372/00 *Campolargo* v *Commission* [2002] ECR-SC I-A-49 and II-223, paragraph 36). The arguments of the Council and the United Kingdom relating to Article 6 of the ECHR (see paragraphs 77 to 79 above) are thus irrelevant to this plea.

95 Moreover, the safeguard relating to observance of the actual right to a fair hearing, in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001, cannot be denied to the parties concerned solely on the ground,

relied on by the Council and the United Kingdom (see paragraphs 78 and 79 above), that neither the ECHR nor the general principles of Community law confer on individuals any right whatsoever to be heard before the adoption of an act of a legislative nature (see, to that effect and by analogy, *Yusuf*, paragraph 29 above, paragraph 322).

96 It is true that the case-law relating to the right to be heard cannot be extended to the context of a Community legislative process culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned (Case T-521/93 *Atlanta and Others* v *Council and Commission* [1996] ECR II-1707, paragraph 70, upheld on appeal in Case C-104/97 P *Atlanta* v *Commission and Council* [1999] ECR I-6983, paragraphs 34 to 38).

97 It is also true that the contested decision, which maintains the applicant in the disputed list, after the applicant had been included by the decision initially contested, has the same general scope as Regulation No 2580/2001 and, like that regulation, is directly applicable in all Member States. Thus, despite its title, it is an integral part of that regulation for the purposes of Article 249 EC (see, by analogy, order in Case T-45/02 *DOW AgroSciences* v *Parliament and Council* [2003] ECR II-1973, paragraphs 31 to 33, and case-law cited, and *Yusuf*, paragraph 29 above, paragraphs 184 to 188).

98 In the instant case, however, the contested regulation is not of an exclusively legislative nature. Whilst being of general application, it is of direct and individual concern to the applicant, to whom it refers by name as having to be included in the list of persons, groups and entities whose funds are to be frozen pursuant to Regulation No 2580/2001. Since it is an act which imposes an individual economic and financial sanction (see paragraph 92 above), the case-law cited in paragraph 96 above is therefore irrelevant (see, by analogy, *Yusuf*, paragraph 29 above, paragraph 324).

99 It is, moreover, appropriate to mention the aspects which distinguish the present case from the cases which gave rise to the judgments in *Yusuf* and *Kadi*, paragraph 29 above, where it was held that the Community institutions were not required to hear the parties concerned in the context of the adoption and implementation of a similar measure freezing the funds of persons and entities linked to Osama bin Laden, Al-Qaeda and the Taleban.

100 That solution was justified in those cases by the fact that the Community institutions had merely transposed into the Community legal order, as they were required to do, resolutions of the Security Council and decisions of its Sanctions Committee that imposed the freezing of the funds of the parties concerned, designated by name, without in any way authorising those institutions, at the time of actual implementation, to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations. The Court inferred therefrom that the Community principle relating to the right to be heard could not apply in such circumstances, where a hearing of the persons concerned could not in any event lead the institution to review its position (*Yusuf*, paragraph 29 above, paragraph 328, and *Kadi*, paragraph 29 above, paragraph 258).

101 In the present case, by contrast, although Security Council Resolution 1373 (2001) provides inter alia in Paragraph 1(c) that all States must freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts, of entities owned or controlled directly or indirectly by such persons, and of persons and entities acting on behalf of, or at the direction of, such persons and entities, it does not specify individually the persons, groups and entities who are to be the subjects of those measures. Nor did the Security Council establish specific legal rules concerning the procedure for freezing funds, or the safeguards or judicial remedies ensuring that the persons or entities affected by such a procedure would have a genuine opportunity to challenge the measures adopted by the States in respect of them.

102 Thus, in the context of Resolution 1373 (2001), it is for the Member States of the United Nations (UN) — and, in this case, the Community, through which its Member States have decided to act — to identify specifically the persons, groups and entities whose funds are to be frozen pursuant to that resolution, in accordance with the rules in their own legal order.

103 In that connection, the Council maintained at the hearing that, in the implementation of Security Council Resolution 1373 (2001), the measures that it adopted under circumscribed powers, which thereby benefit from the principle of primacy as contemplated in Articles 25 and 103 of the United Nations Charter, are essentially those provided for by the relevant provisions of Regulation No 2580/2001, which determine the content of the restrictive measures to be adopted in relation to the persons referred to in Paragraph 1(c) of that resolution. However, unlike the acts at issue in the cases which gave rise to the judgments in *Yusuf* and *Kadi*, paragraph 29 above, the acts which specifically apply those restrictive measures to a given person or entity, such as the contested decision, do not come within the exercise of circumscribed powers and accordingly do not benefit from the primacy effect in question. The Council submits that the adoption of those acts falls instead within the ambit of the exercise of the broad discretion it has in the area of the CFSP.

104 These submissions may, in substance, be approved by the Court, subject to the potential difficulties in applying Paragraph 1(c) of Resolution 1373 (2001) which may arise owing to the absence, to date, of a universally-accepted definition of the concepts of 'terrorism' and 'terrorist act' in international law (see, on this point, Final Document (A/60/L1) adopted by the UN General Assembly on 15 September 2005, on the occasion of the world summit celebrating the 60th anniversary of the UN).

105 Lastly, the Council stated at the oral hearing that, as the Community institution which adopted Regulation No 2580/2001 and the decisions implementing that regulation, it did not consider itself to be bound by the common positions adopted

as part of the CFSP by the Council in its capacity as the institution composed of the representatives of the Member States, although it did consider it appropriate to ensure that its actions were consistent with the CFSP and the EC Treaty.

106 The Council adds, rightly, that the Community does not act under powers circumscribed by the will of the Union or that of its Member States when, as in the present case, the Council adopts economic sanctions measures on the basis of Articles 60 EC, 301 EC and 308 EC. That point of view is, moreover, the only one compatible with the actual wording of Article 301 EC, according to which the Council is to decide on the matter 'by a qualified majority on a proposal from the Commission', and that of Article 60(1) EC, according to which the Council 'may take', following the same procedure, the urgent measures necessary for an act under the CFSP.

107 Since the identification of the persons, groups and entities contemplated in Security Council Resolution 1373 (2001), and the adoption of the ensuing measure of freezing funds, involve the exercise of the Community's own powers, entailing a discretionary appreciation by the Community, the Community institutions concerned, in this case the Council, are in principle bound to observe the right to a fair hearing of the parties concerned when they act with a view to giving effect to that resolution.

108 It follows that the safeguarding of the right to a fair hearing is, as a matter of principle, fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001.

— The obligation to state reasons

109 In principle, the safeguard relating to the obligation to state reasons provided for by Article 253 EC is also fully applicable in the context of the adoption of a decision to

freeze funds under Regulation No 2580/2001, a point which has not been questioned by any of the parties.

— The right to effective judicial protection

110 As to the safeguard relating to the right to effective judicial protection, it should be borne in mind that, according to settled case-law, individuals must be able to avail themselves of effective judicial protection of the rights they have under the Community legal order, as the right to such protection is part of the general legal principles deriving from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the ECHR (see Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 421, and case-law cited).

111 This also applies particularly to measures to freeze the funds of persons or organisations suspected of terrorist activities (see, to that effect, Article XIV of the Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002).

112 In the present case, the only reservation expressed by the Council, in relation to the applicability of the principle of that safeguard, is that the Court has no jurisdiction to review the internal lawfulness of the relevant provisions of Regulation No 2580/2001, because they were adopted by virtue of powers circumscribed by Security Council Resolution 1373 (2001) and therefore benefit from the principle of primacy referred to in paragraph 103 above.

113 It is not, however, necessary for the Court to rule on the well-foundedness of that reservation because, as will be discussed below, the present dispute can be resolved solely on the basis of a judicial review of the lawfulness of the contested decision, and none of the parties deny that that indeed comes within the Court's competence.

Purpose of and restrictions on the safeguards relating to the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001

— The right to a fair hearing

114 It is appropriate first, to define the purpose of the safeguard of the right to a fair hearing in the context of the adoption of a decision to freeze funds under Article 2 (3) of Regulation No 2580/2001, distinguishing between an initial decision to freeze funds referred to in Article 1(4) of Common Position 2001/931 ('the initial decision to freeze funds') and any subsequent decision to maintain a freeze of funds, following a periodic review, as referred to in Article 1(6) of that common position ('subsequent decisions to freeze funds').

115 In that context, it should be noted, first, that the right to a fair hearing only falls to be exercised with regard to the elements of fact and law which are liable to determine the application of the measure in question to the person concerned, in accordance with the relevant rules.

116 In the circumstances of the present case, the relevant rules are laid down in Article 2(3) of Regulation No 2580/2001, according to which the Council, acting by

unanimity, is to establish, review and amend the list of persons, groups and entities to which that regulation applies, in accordance with the provisions laid down in Article 1(4) to (6) of Common Position 2001/931. Thus, in accordance with Article 1(4) of Common Position 2001/931, the list is to be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. 'Competent authority' is understood to mean a judicial authority, or, where judicial authorities have no jurisdiction in the relevant area, an equivalent competent authority in that area. Moreover, the names of persons and entities in the list are to be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them in the list, as provided for by Article 1(6) of Common Position 2001/931.

117 As rightly pointed out by the Council and the United Kingdom, the procedure which may culminate in a measure to freeze funds under the relevant rules therefore takes place at two levels, one national, the other Community. In the first phase, a competent national authority, in principle judicial, must take in respect of the party concerned a decision complying with the definition in Article 1(4) of Common Position 2001/931. If it is a decision to instigate investigations or to prosecute, it must be based on serious and credible evidence or clues. In the second phase, the Council, acting by unanimity, must decide to include the party concerned in the disputed list, on the basis of precise information or material in the relevant file which indicates that such a decision has been taken. Next, the Council must, at regular intervals, and at least once every six months, ensure that there are grounds for keeping the party concerned in the list. Verification that there is a decision of a national authority meeting that definition is an essential precondition for the adoption, by the Council, of an initial decision to freeze funds, whereas verification of the consequences of that decision at the national level is imperative in the context of the adoption of a subsequent decision to freeze funds.

118 Accordingly, the observance of the right to a fair hearing in the context of the adoption of a decision to freeze funds is also liable to arise at those two levels (see, to that effect and by analogy, *'Invest' Import und Export and Invest Commerce* v *Commission*, paragraph 69 above, paragraph 40).

119 The right of the party concerned to a fair hearing must be effectively safeguarded in the first place as part of the national procedure which led to the adoption, by the competent national authority, of the decision referred to in Article 1(4) of Common Position 2001/931. It is essentially in that national context that the party concerned must be placed in a position in which he can effectively make known his view of the matters on which the decision is based, subject to possible restrictions on the right to a fair hearing which are legally justified in national law, particularly on grounds of public policy, public security or the maintenance of international relations (see, to that effect, Eur. Court H.R., *Tinnelly & Sons Ltd and Others and McElduff and Others* v *United Kingdom*, judgment of 10 July 1998, Reports of Judgments and Decisions, 1998-IV, §78).

120 Next, the right of the party concerned to a fair hearing must be effectively safeguarded in the Community procedure culminating in the adoption, by the Council, of the decision to include or maintain it on the disputed list, in accordance with Article 2(3) of Regulation No 2580/2001. As a rule, in that area, the party concerned need only be afforded the opportunity effectively to make known his views on the legal conditions of application of the Community measure in question, namely, where it is an initial decision to freeze funds, whether there is specific information or material in the file which shows that a decision meeting the definition laid down in Article 1(4) of Common Position 2001/931 was taken in respect of him by a competent national authority and, where it is a subsequent decision to freeze funds, the justification for maintaining the party concerned in the disputed list.

121 However, provided that the decision in question was adopted by a competent national authority of a Member State, the observance of the right to a fair hearing at

Community level does not usually require, at that stage, that the party concerned again be afforded the opportunity to express his views on the appropriateness and well-foundedness of that decision, as those questions may only be raised at national level, before the authority in question or, if the party concerned brings an action, before the competent national court. Likewise, in principle, it is not for the Council to decide whether the proceedings opened against the party concerned and resulting in that decision, as provided for by the national law of the relevant Member State, was conducted correctly, or whether the fundamental rights of the party concerned were respected by the national authorities. That power belongs exclusively to the competent national courts or, as the case may be, to the European Court of Human Rights (see, by analogy, Case T-353/00 *Le Pen* v *Parliament* [2003] ECR II-1729, paragraph 91, upheld on appeal in Case C-208/03 P *Le Pen* v *Parliament* [2005] ECR I-6051).

122 Nor, if the Community measure to freeze funds is adopted on the basis of a decision by a national authority of a Member State concerning investigations or prosecutions (rather than on the basis of a decision of condemnation), does the observance of the right to a fair hearing require, as a rule, that the party concerned be afforded the opportunity effectively to make known his views on whether that decision is 'based on serious and credible evidence or clues', as required by Article 1(4) of Common Position 2001/931. Although that element is one of the legal conditions of application of the measure in question, the Court finds that it would be inappropriate, in the light of the principle of sincere cooperation referred to in Article 10 EC, to make it subject to the exercise of the right to a fair hearing at Community level.

123 The Court notes that, under Article 10 EC, relations between the Member States and the Community institutions are governed by reciprocal duties to cooperate in good faith (see Case C-339/00 *Ireland* v *Commission* [2003] ECR I-11757, paragraphs 71 and 72, and case-law cited). That principle is of general application and is especially binding in the area of JHA governed by Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions (Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 42).

124 In a case of application of Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001, provisions which introduce a specific form of cooperation between the Council and the Member States in the context of combating terrorism, the Court finds that that principle entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, both in respect of the issue of whether there are 'serious and credible evidence or clues' on which its decision is based and in respect of recognition of potential restrictions on access to that evidence or those clues, legally justified under national law on grounds of overriding public policy, public security or the maintenance of international relations (see, by analogy, Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921, paragraph 69, and case-law cited).

125 However, these considerations are valid only in so far as the evidence or clues in question were in fact assessed by the competent national authority referred to in the preceding paragraph. If, on the other hand, in the course of the procedure before it, the Council bases its initial decision or a subsequent decision to freeze funds on information or evidence communicated to it by representatives of the Member States without it having been assessed by the competent national authority, that information must be considered as newly-adduced evidence which must, in principle, be the subject of notification and a hearing at Community level, not having already been so at national level.

126 It follows from the foregoing that, in the context of relations between the Community and its Member States, observance of the right to a fair hearing has a relatively limited purpose in respect of the Community procedure for freezing funds. In the case of an initial decision to freeze funds, it requires, in principle, first, that the party concerned be informed by the Council of the specific information or material in the file which indicates that a decision meeting the definition given in Article 1(4) of Common Position 2001/931 has been taken in respect of it by a competent authority of a Member State, and also, where applicable, any new material referred to in paragraph 125 above and, second, that it must be placed in a position in which it can effectively make known its view on the information or

material in the file. In the case of a subsequent decision to freeze funds, observance of the right to a fair hearing similarly requires, first, that the party concerned be informed of the information or material in the file which, in the view of the Council, justifies maintaining it in the disputed lists, and also, where applicable, of any new material referred to in paragraph 125 above and, second, that it must be afforded the opportunity effectively to make known its view on the matter.

127 At the same time, however, certain restrictions on the right to a fair hearing, so defined in terms of its purpose, may legitimately be envisaged and imposed on the parties concerned, in circumstances such as those of the present case, where what are in issue are specific restrictive measures, consisting of a freeze of the financial funds and assets of the persons, groups and entities identified by the Council as being involved in terrorist acts.

128 The Court therefore finds, as held in *Yusuf*, paragraph 29 above, and as submitted in the present case by the Council and the United Kingdom, that notification of the evidence adduced and a hearing of the parties concerned, before the adoption of the initial decision to freeze funds, would be liable to jeopardise the effectiveness of the sanctions and would thus be incompatible with the public interest objective pursued by the Community pursuant to Security Council Resolution 1373 (2001). An initial measure freezing funds must, by its very nature, be able to benefit from a surprise effect and to be applied with immediate effect. Such a measure cannot, therefore, be the subject-matter of notification before it is implemented (*Yusuf*, paragraph 29 above, paragraph 308; see also, to that effect and by analogy, the Opinion of Advocate General Warner in Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, 2061, 2068, 2069).

129 However, in order for the parties concerned to be able to defend their rights effectively, particularly in legal proceedings which might be brought before the Court of First Instance, it is also necessary that the evidence adduced against them be notified to them, in so far as reasonably possible, either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds (see also paragraph 139 below).

130 In that context, the parties concerned must also have the opportunity to request an immediate re-examination of the initial measure freezing their funds (see, to that effect, in the case-law of the Community civil service, Case T-211/98 *F* v *Commission* [2000] ECR-SC I-A-107 and II-471, paragraph 34; Case T-333/99 *X* v *ECB* [2001] ECR-SC II-3021, paragraph 183, and *Campolargo* v *Commission*, paragraph 94 above, paragraph 32). The Court recognises, however, that such a hearing after the event is not automatically required in the context of an initial decision to freeze funds, in the light of the possibility that the parties concerned also have immediately to bring an action before the Court of First Instance, which also ensures that a balance is struck between observance of the fundamental rights of the persons included in the disputed list and the need to take preventive measures in combating international terrorism (see, to that effect and by analogy, the Opinion of Advocate General Warner in *National Panasonic* v *Commission*, paragraph 128 above, at [1980] ECR 2069).

131 It must be emphasised, however, that the considerations just mentioned are not relevant to subsequent decisions to freeze funds adopted by the Council in connection with the re-examination, at regular intervals, at least every six months, of the justification for maintaining the parties concerned in the disputed list, provided for by Article 1(6) of Common Position 2001/931. At that stage, the funds are already frozen and it is accordingly no longer necessary to ensure a surprise effect in order to guarantee the effectiveness of the sanctions. Any subsequent decision to freeze funds must accordingly be preceded by the possibility of a further hearing and, where appropriate, notification of any new evidence.

132 The Court cannot accept the viewpoint put forward by the Council and the United Kingdom on this point at the oral hearing, to the effect that the Council need only hear the parties concerned, in the context of the adoption of a subsequent decision to freeze funds, if they have previously made an express request to that effect. Under Article 1(6) of Common Position 2001/931, the Council may only adopt such a decision after having ensured that maintaining the parties concerned in the disputed list remains justified, which implies that it must afford them the opportunity effectively to make known their views on the matter.

133 Next, the Court recognises that, in circumstances such as those of this case, where what is at issue is a temporary protective measure restricting the availability of the property of certain persons, groups and entities in connection with combating terrorism, overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude the communication to the parties concerned of certain evidence adduced against them and, in consequence, the hearing of those parties with regard to such evidence, during the administrative procedure (see, by analogy, *Yusuf*, paragraph 29 above, paragraph 320).

134 Such restrictions are consistent with the constitutional traditions common to the Member States, as submitted by the Council and the United Kingdom, who have pointed out that exceptions to the general right to be heard in the course of an administrative procedure are permitted in many Member States on grounds of public interest, public policy or the maintenance of international relations, or when the purpose of the decision to be taken is or could be jeopardised if the right is observed (see the examples referred to in paragraph 72 above).

135 They are, moreover, consistent with the case-law of the European Court of Human Rights which, even in the more stringent context of adversarial criminal proceedings subject to the requirements of Article 6 of the ECHR, acknowledges that, in cases concerning national security and, more specifically, terrorism, certain restrictions on the right to a fair hearing may be envisaged, especially concerning disclosure of evidence adduced or terms of access to the file (see, by way of example, *Chahal* v *United Kingdom*, judgment of 15 November 1996, Report 1996-V, § 131, and *Jasper* v *United Kingdom*, judgment of 16 February 2000, No 27052/95, not published in Reports of Judgments and Decisions, §§ 51 to 53, and case-law cited; see also Article IX.3 of the Guidelines adopted by the Committee of Ministers of the Council of Europe, referred to in paragraph 111 above).

136 In the present circumstances, those considerations apply above all to the 'serious and credible evidence or clues' on which the national decision to instigate an investigation or prosecution is based, in so far as they may have been brought to the attention of the Council, but it is also conceivable that the restrictions on access may concern the specific content or the particular grounds for that decision, or even the identity of the authority that took it. It is even possible that, in certain, very specific circumstances, the identifiction of the Member State or third country in which a competent authority has taken a decision in respect of a person may be liable to jeopardise public security, by providing the party concerned with sensitive information which it could misuse.

137 It follows from all of the foregoing that the general principle of observance of the right to a fair hearing requires, unless precluded by overriding considerations concerning the security of the Community or its Member States, or the conduct of their international relations, that the evidence adduced against the party concerned, as identified in paragraph 126 above, should be notified to it, in so far as possible, either concomitantly with or as soon as possible after the adoption of an initial decision to freeze funds. Subject to the same reservations, any subsequent decision to freeze funds must, in principle, be preceded by notification of any new evidence adduced and a hearing. However, observance of the right to a fair hearing does not require either that the evidence adduced against the party concerned be notified to it before the adoption of an initial measure to freeze funds, or that that party automatically be heard after the event in such a context.

— The obligation to state reasons

138 According to settled case-law, the purpose of the obligation to state the reasons for an act adversely affecting a person is, first, to provide the person concerned with sufficient information to make it possible to determine whether the act is well

founded or whether it is vitiated by an error which may permit its validity to be contested before the Community Courts and, second, to enable the Community judicature to review the lawfulness of the decision (Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraph 145, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 462). The obligation to state reasons therefore constitutes an essential principle of Community law which may be derogated from only for compelling reasons (see Case T-218/02 *Napoli Buzzanca* v *Commission* [2005] ECR-SC I-A-267 and II-1221, paragraph 57, and case-law cited).

139 The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him. A failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the Community Courts (Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, paragraph 22, and *Dansk Rørindustri and Others* v *Commission*, paragraph 138 above, paragraph 463). The possibility of regularising the total absence of a statement of reasons after an action has been started might prejudice the right to a fair hearing because the applicant would have only the reply in which to set out his pleas contesting the reasons which he would not know until after he had lodged his application. The principle of equality of the parties before the Community Courts would accordingly be affected (Case T-132/03 *Casini* v *Commission* [2005] ECR-SC I-A-253 and II-1169, paragraph 33, and *Napoli Buzzanca* v *Commission*, paragraph 138 above, paragraph 62).

140 If the party concerned is not afforded the opportunity to be heard before the adoption of an initial decision to freeze funds, compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the party concerned, especially after the adoption of that decision, to make effective use of the legal remedies available to it to challenge the lawfulness of that

decision (Case T-237/00 *Reynolds* v *Parliament* [2005] ECR-SC I-A-385 and II-1731, paragraph 95; see also, to that effect, Joined Cases T-371/94 and T-394/04 *British Airways and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 64).

141 The Court has consistently held that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and to the context in which it was adopted. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for a decision are sufficient if it was adopted in circumstances known to the party concerned which enable him to understand the scope of the measure concerning him (Case 125/80 *Arning* v *Commission* [1981] ECR 2539, paragraph 13; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraph 87; Case C-42/01 *Portugal* v *Commission* [2004] ECR I-6079, paragraph 66; and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraphs 278 to 280). Moreover, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision (see *Delacre and Others* v *Commission*, paragraph 83 above, paragraph 16, and case-law cited).

142 In the context of the adoption of a decision to freeze funds under Regulation No 2580/2001, the grounds for that decision must be assessed primarily in the light

of the legal conditions of application of that regulation to a given scenario, as laid down in Article 2(3) thereof and, by reference, in Article 1(4) or Article 1(6) of Common Position 2001/931, depending on whether it is an initial decision or a subsequent decision to freeze funds.

143 The Court cannot accept the position advocated by the Council that the statement of reasons may consist merely of a general, stereotypical formulation, modelled on the drafting of Article 2(3) of Regulation No 2580/2001 and Article 1(4) or (6) of Common Position 2001/931. In accordance with the principles referred to above, the Council is required to state the matters of fact and law which constitute the legal basis of its decision and the considerations which led it to adopt that decision. The grounds for such a measure must therefore indicate the actual and specific reasons why the Council considers that the relevant rules are applicable to the party concerned (see, to that effect, Case T-117/01 *Roman Parra* v *Commission* [2002] ECR-SC I-A-27 and II-121, paragraph 31, and *Napoli Buzzanca* v *Commission*, paragraph 138 above, paragraph 74).

144 That entails, in principle, that the statement of reasons of an initial decision to freeze funds must at least refer to each of the aspects referred to in paragraph 116 above and also, where applicable, the aspects referred to in paragraphs 125 and 126 above, whereas the statement of reasons for a subsequent decision to freeze funds must indicate the actual and specific reasons why the Council considers, following re-examination, that the freezing of the funds of the party concerned remains justified.

145 Moreover, when unanimously adopting a measure to freeze funds under Regulation No 2580/2001, the Council does not act under circumscribed powers. Article 2(3) of Regulation No 2580/2001, read together with Article 1(4) of Common Position

2001/931, is not to be construed as meaning that the Council is obliged to include in the disputed list any person in respect of whom a decision has been taken by a competent authority within the meaning of those provisions. This interpretation, endorsed by the United Kingdom at the oral hearing, is confirmed by Article 1(6) of Common Position 2001/931, to which Article 2(3) of Regulation No 2580/2001 also refers, and according to which the Council is to conduct a 'review' at regular intervals, at least once every six months, to ensure that 'there are grounds' for keeping the parties concerned in the disputed list.

146 It follows that, in principle, the statement of reasons for a measure to freeze funds under Regulation No 2580/2001 must refer not only to the statutory conditions of application of that regulation, but also to the reasons why the Council considers, in the exercise of its discretion, that such a measure must be adopted in respect of the party concerned.

147 The considerations set out in paragraphs 143 to 146 above must nevertheless take account of the fact that a decision to freeze funds under Regulation No 2580/2001, whilst imposing an individual economic and financial sanction, is, like that act, also regulatory in nature, as explained in paragraphs 97 and 98 above. Moreover, a detailed publication of the complaints put forward against the parties concerned might not only conflict with the overriding considerations of public interest which will be discussed in paragraph 148 below, but also jeopardise the legitimate interests of the persons and entities in question, in that it would be capable of causing serious damage to their reputation. Accordingly, the Court finds, exceptionally, that only the operative part of the decision and a general statement of reasons, of the type referred to in paragraph 143 above, need be in the version of the decision to freeze funds published in the Official Journal, it being understood that the actual, specific statements of reasons for that decision must be formalised and brought to the knowledge of the parties concerned by any other appropriate means.

148 Moreover, in circumstances such as those of this case, it must be recognised that the overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds, just as they may preclude the evidence adduced against those parties from being communicated to them during the administrative procedure. In that connection the Court refers to the considerations set out above, in particular in paragraphs 133 to 137 above, regarding the restrictions on the general principle of observance of the right to a fair hearing which may be permitted in such a context. Those considerations are valid, mutatis mutandis, in respect of the restrictions which may be imposed on the obligation to state reasons.

149 Although it is not applicable to the circumstances of the present case, the Court also considers that inspiration may be drawn from the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, corrigendum OJ 2004 L 229, p. 35, corrigendum to the corrigendum OJ 2005 L 197, p. 34). Article 30(2) of that directive provides that 'the persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision [restricting the freedom of movement and residence of a citizen of the Union or a member of his family] taken in their case is based, unless this is contrary to the interests of State security'.

150 In accordance with the settled case-law of the Court of Justice (Case 36/75 *Rutili* [1975] ECR 1219, and Case 131/79 *Santillo* [1980] ECR 1585) concerning Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117), repealed by Directive 2004/38, Article 6 of which was essentially identical to Article 30(2) of the latter, any person enjoying the protection of the provisions quoted must be entitled to a twofold safeguard, consisting of notification

to him of the grounds on which any restrictive measure has been adopted in his case and the availability of a right of appeal. Subject to the same reservation, in particular, this requirement means that the State concerned must, when notifying an individual of a restrictive measure adopted in his case, give him a precise and comprehensive statement of the grounds for the decision, to enable him to take effective steps to prepare his defence.

151 It follows from all of the foregoing that, unless precluded by overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, and subject also to what has been set out in paragraph 147 above, the statement of reasons for an initial decision to freeze funds must at least make actual and specific reference to each of the aspects referred to in paragraph 116 above and also, where applicable, to the aspects referred to in paragraphs 125 and 126 above, and state the reasons why the Council considers, in the exercise of its discretion, that such a measure must be taken in respect of the party concerned. Moreover, the statement of reasons for a subsequent decision to freeze funds must, subject to the same reservations, state the actual and specific reasons why the Council considers, following re-examination, that the freezing of the funds of the party concerned remains justified.

— The right to effective judicial protection

152 Lastly, with respect to the safeguard relating to the right to effective judicial protection, this is effectively ensured by the right the parties concerned have to bring

an action before the Court against a decision to freeze their funds, pursuant to the fourth paragraph of Article 230 EC (see, to that effect, Eur. Court H.R., *Bosphorus* v *Ireland*, judgment of 30 June 2005, No 45036/98, not yet published in the Reports of Judgments and Decisions, § 165, and decision in *Segi and Others and Gestoras pro Amnistía* v *The 15 Member States of the European Union*, judgment of 23 May 2002, Nos 6422/02 and 9916/02, Reports of Judgments and Decisions, 2002-V).

153 Thus the judicial review of the lawfulness of a decision to freeze funds taken pursuant to Article 2(3) of Regulation No 2580/2001 is that provided for in the second paragraph of Article 230 EC, under which the Community Courts have jurisdiction in actions for annulment brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application or misuse of powers.

154 As part of that review, and having regard to the grounds for annulment put forward by the party concerned or raised by the Court of its own motion, it is for the Court to ensure, inter alia, that the legal conditions for applying Regulation No 2580/2001 to a particular scenario, as laid down in Article 2(3) of that regulation and, by reference, either Article 1(4) or Article 1(6) of Common Position 2001/931, depending on whether it is an initial decision or a subsequent decision to freeze funds, are fulfilled. That implies that the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based, as the Council expressly recognised in its written pleadings in the case giving rise to the judgment in *Yusuf*, paragraph 29 above (paragraph 225). The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded.

155 In the present case, that review is all the more imperative because it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. Since the restrictions imposed by the Council on the right of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial (see, to that effect, Case C-341/04 *Eurofood* [2006] ECR I-3813, paragraph 66), the Community Courts must be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential.

156 Although the European Court of Human Rights recognises that the use of confidential information may be necessary when national security is at stake, that does not mean, in its view, that national authorities are free from any review by the national courts simply because they state that the case concerns national security and terrorism (see Eur. Court H.R., *Chahal* v *United Kingdom*, paragraph 135 above, § 131, and case-law cited, and *Öcalan* v *Turkey*, judgment of 12 March 2003, No 46221/99, not published in the Reports of Judgments and Decisions, § 106, and case-law cited).

157 The Court finds that, here also, inspiration may be drawn from the provisions of Directive 2004/38. As noted in the case-law referred to in paragraph 150 above, Article 31(1) of that directive provides that the persons concerned are to have access to judicial and, where appropriate, administrative means of redress in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health. Moreover, Article

31(3) of that directive provides that the means of redress are to allow for an examination of the lawfulness of the decision, as well as of the facts and circumstances on which the proposed measure is based.

158 The question whether the applicant and/or its lawyers may be provided with the evidence and information alleged to be confidential, or whether they may be provided only to the Court, in accordance with a procedure which remains to be defined so as to safeguard the public interests at issue whilst affording the party concerned a sufficient degree of judicial protection, is a separate issue on which it is not necessary for the Court to rule in the present action (see nevertheless Eur. Court H.R., *Chahal* v *United Kingdom*, paragraph 135 above, §§ 131 and 144; *Tinnelly & Sons and Others and McElduff and Others* v *United Kingdom*, paragraph 119 above, §§ 49, 51, 52 and 78; *Jasper* v *United Kingdom*, paragraph 135 above, §§ 51 to 53; and *Al-Nashif* v *Bulgaria*, judgment of 20 June 2002, No 50963/99, not published in the *Reports of Judgments and Decisions*, §§ 95 to 97, and also Article IX.4 of the Guidelines adopted by the Committee of Ministers of the Council of Europe, cited in paragraph 111 above).

159 Lastly, it is true that the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC, 301 EC and 308 EC, consistent with a common position adopted on the basis of the CFSP. Because the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the Council's assessment of the factors as to appropriateness on which such decisions are based (see paragraph 146 above and, to that effect, Eur. Court H.R., *Leander* v *Sweden*, judgment of 26 March 1987, Series A No 116, § 59, and *Al-Nashif* v *Bulgaria*, paragraph 158 above, §§ 123 and 124).

Application to the present case

160 The Court notes, first, that the relevant legislation, namely Regulation No 2580/2001 and Common Position 2001/931 to which it refers, does not explicitly provide for any procedure for notification of the evidence adduced or for a hearing of the parties concerned, either before or concomitantly with the adoption of an initial decision to freeze their funds or, in the context of the adoption of subsequent decisions, with a view to having them removed from the disputed list. At most, Article 1(6) of Common Position 2001/931 states that 'the names of persons and entities in the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list', and Article 2(3) of Regulation No 2580/2001 provides that 'the Council ... shall ... review and amend the list ..., in accordance with the provisions laid down in Article 1 ... (6) of Common Position 2001/931'.

161 Next, the Court finds that at no time before this action was brought was the evidence adduced against the applicant notified to it. The applicant rightly points out that both the initial decision to freeze its funds and subsequent decisions, up to and including the contested decision, do not even mention the 'specific information' or 'material in the file' showing that a decision justifying its inclusion in the disputed list was taken in respect of it by a competent national authority.

162 Thus, even though the applicant learned that it was soon to be included in the disputed list, and even though it took the initiative to contact the Council in an attempt to prevent the adoption of such a measure (see paragraph 69 above), it had not been apprised of the specific evidence adduced against it in order to justify the sanction envisaged and was not, therefore, in a position effectively to make known its views on the matter. In those circumstances, the Council's argument that it heard the applicant before proceeding with the freezing of funds cannot be accepted.

163 The foregoing considerations, concerning verification of respect for the right to a fair hearing, are also applicable, mutatis mutandis, to the determination of whether the obligation to state reasons has been fulfilled.

164 In the circumstances of the present case, neither the contested decision nor Decision 2002/334, which it updates, satisfies the requirement of a statement of reasons as set out above; they merely state, in the second recital in their preamble, that it is 'desirable' to adopt an up-to-date list of the persons, groups and entities to which Regulation (EC) No 2580/2001 applies.

165 Not only has the applicant been unable effectively to make known its views to the Council but, in the absence of any statement, in the contested decision, of the actual and specific grounds justifying that decision, it has not been placed in a position to avail itself of its right of action before the Court, given the aforementioned links between safeguarding the right to a fair hearing, the obligation to state reasons and the right to an effective legal remedy. It must be borne in mind that the possibility of regularising the total absence of a statement of reasons after an action has been started is currently viewed in the case-law as prejudicing the right to a fair hearing (see paragraph 139 above).

166 Moreover, neither the written pleadings of the different parties to the case, nor the file material produced before the Court, enable it to conduct its judicial review, since it is not even in a position to determine with certainty, after the close of the oral

procedure, exactly which is the national decision referred to in Article 1(4) of Common Position 2001/931, on which the contested decision is based.

167 In its application, the applicant merely maintained that it was included in the disputed list 'apparently solely on the basis of documents produced by the Tehran regime'. In its reply, it added, in particular, that 'there was nothing by way of explanation as to why it was entered' in the disputed list and that 'the reasons for its inclusion were most likely diplomatic'.

168 In its defence and rejoinder, the Council refrained from taking any position on this issue.

169 In its statement in intervention, the United Kingdom stated that 'the Applicant [did] not allege, and there [was] nothing to suggest, that the Applicant [had] not [been] included in the Annex on the basis of [a decision adopted by a competent authority identifying the applicant as being involved in terrorist activities]'. That same statement also appears to indicate that, in the view of the United Kingdom, the decision in question was that of the Home Secretary of 28 March 2001, confirmed by decision of that Home Secretary of 31 August 2001, then, in an action for judicial review, by judgment of the High Court of 17 April 2002 and, lastly, on appeal, by decision of the POAC of 15 November 2002.

170 In its observations on the statement in intervention, the applicant did not specifically refute or even comment upon those observations of the United

Kingdom. However, in the light of the applicant's pleas and general arguments and, more specifically, its allegations referred to in paragraph 167 above, it is not possible simply to accept the United Kingdom's position at face value. At the hearing, moreover, the applicant reiterated its position that it did not know which competent authority had adopted the national decision in respect of it, nor on the basis of what material and specific information that decision had been taken.

171 Furthermore, at the hearing, in response to the questions put by the Court, the Council and the United Kingdom were not even able to give a coherent answer to the question of what was the national decision on the basis of which the contested decision was adopted. According to the Council, it was only the Home Secretary's decision, as confirmed by the POAC (see paragraph 169 above). According to the United Kingdom, the contested decision is based not only on that decision, but also on other national decisions, not otherwise specified, adopted by competent authorities in other Member States.

172 It is therefore clear that, even at the end of the oral procedure, the Court is not in a position to review the lawfulness of the contested decision.

173 In conclusion, the Court finds that the contested decision does not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicant's right to a fair hearing was not observed. Furthermore, the Court is not, even at this stage of the procedure, in a position to review the lawfulness of that decision.

174 Those considerations must therefore lead to the annulment of the contested decision, in so far as it concerns the applicant, without it being necessary to rule, as part of the action for annulment, on the last two parts of the first plea or on the other pleas and arguments put forward in the action.

The claim for damages

Arguments of the parties

175 The applicant has not put forward any matters of fact or law in support of its claim seeking for the Council to pay it EUR 1 for the harm allegedly suffered. Neither the Council nor the intervener has expressed any view on this point in their written pleadings or at the hearing.

Findings of the Court

176 Pursuant to Article 19 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, an application must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court of First Instance to decide the case, if appropriate without other information. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible the essential points of fact and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible (see Case T-19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II-315, paragraph 64, and case-law cited).

177 To satisfy those requirements, an application for compensation for damage said to have been caused by a Community institution must indicate the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons why the applicant considers there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage (Case T-38/96 *Guérin automobiles* v *Commission* [1997] ECR II-1223, paragraphs 42 and 43, and *Chiquita Brands and Others* v *Commission*, paragraph 176 above, paragraph 65, and case-law cited). However, a claim for an unspecified form of damage is not sufficiently concrete and must therefore be regarded as inadmissible (*Chiquita Brands and Others* v *Commission*, paragraph 176 above, paragraph 66).

178 More specifically, a claim for damages in respect of non-material injury, whether as symbolic reparation or as genuine compensation, must give particulars of the nature of the injury alleged in connection with the conduct for which the defendant institution is held responsible and must quantify the whole of that injury, even if approximately (see Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, paragraph 81, and case-law cited).

179 In the present case, the claim for damages contained in the application must in all likelihood be construed as compensation for non-material injury, as it is set at the symbolic amount of EUR 1. The fact remains, however, that the applicant has not specified the nature and type of that non-material injury nor, more importantly, identified the allegedly improper conduct of the Council which it is alleged is the cause of that injury. It is not for the Court to seek and identify, from amongst the

various pleas put forward in support of the action for annulment, that or those on which it may consider the claim for damages to be based. Nor is it for the Court to make assumptions and ascertain whether there is a causal link between the conduct referred to in those pleas and the non-material injury alleged.

180 That being so, the claim for damages contained in the application lacks even the most basic detail and must, accordingly, be declared inadmissible, especially given that the applicant did not even attempt to remedy that defect in its reply.

181 It also follows that it is not necessary to rule, in connection with the claim for damages, on the pleas and arguments relied on by the applicant in support of its action for annulment, but not yet considered by the Court (see paragraph 174 above).

The request to have the written procedure reopened

182 The considerations which have led the Court to annul the contested decision, in so far as it concerns the applicant, are in no respect based on the new documents lodged by it at the Registry on 18 and 25 January 2006 (see paragraphs 23 and 24 above). Although those documents were put into the case-file (see paragraph 31 above), they must therefore be regarded as being devoid of relevance for the purposes of the present judgment. In those circumstances, it is not necessary to grant the Council's request to have the written procedure reopened (see paragraph 25 above).

Costs

183 Article 87(3) of the Rules of Procedure provides that the Court may order that costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. In the circumstances of the present case, the Council must be ordered to pay, in addition to its own costs, four-fifths of the applicant's costs.

184 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the action as in part inadmissible and in part unfounded in so far as it seeks annulment of Common Position 2005/936/CFSP of 21 December 2005 updating Common Position 2001/931/CFSP and repealing Common Position 2005/847/CFSP;**

2. **Annuls, in so far as it concerns the applicant, Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/848/EC;**

3. **Dismisses the claim for damages as inadmissible;**

4. **Orders the Council to bear its own costs and to pay four fifths of the applicant's costs;**

5. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.**

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 12 December 2006.

E. Coulon J. Pirrung

Registrar President

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