JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

12 July 2006 *

In Case T-253/02,

Chafiq Ayadi, residing in Dublin (Ireland), represented initially by A. Lyon, H. Miller and M. Willis-Stewart, Solicitors, and S. Cox, Barrister, and subsequently by A. Lyon, H. Miller and S. Cox,

applicant,

v

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

defendant,

* Language of the case: English.

supported by

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

and by

Commission of the European Communities, represented by C. Brown and M. Wilderspin, acting as Agents,

interveners,

APPLICATION for annulment in part of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9),

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

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

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 25 October 2005,

gives the following

Judgment

Legal context

1 Under Article 24(1) of the Charter of the United Nations, signed at San Francisco (United States of America) on 26 June 1945, the members of the United Nations 'confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.

2 Under Article 25 of the Charter of the United Nations, '[t]he Members of the [UN] agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

3 According to Article 41 of the Charter of the United Nations:

'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

4 In accordance with Article 48(2) of the Charter of the United Nations, the decisions of the Security Council for the maintenance of international peace and security 'shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'.

5 According to Article 103 of the Charter of the United Nations, '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

6 In accordance with Article 11(1) EU:

'The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:

— to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;

— to strengthen the security of the Union in all ways;

— to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter ...'

7 Under Article 301 EC:

'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures.'

8 Article 60 EC provides:

'(1) If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.

(2) Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest.

The Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish such measures. The President of the Council shall inform the European Parliament of any such decision taken by the Council.'

9 In accordance with the first paragraph of Article 307 EC:

'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.'

10 Lastly, Article 308 EC provides:

'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

Background to the case

11 On 15 October 1999 the Security Council of the United Nations ('the Security Council') adopted Resolution 1267 (1999), in which it inter alia condemned the fact that Afghan territory continued to be used for the sheltering and training of terrorists and planning of terrorist acts, reaffirmed its conviction that the suppression of international terrorism was essential for the maintenance of international peace and security, deplored the fact that the Taliban continued to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from territory held by the Taliban and to use Afghanistan as a base from which to sponsor international terrorist operations. In the second paragraph of the resolution the Security Council demanded that the Taliban should without further delay turn Usama bin Laden over to the appropriate authorities. In order to ensure compliance with that demand, paragraph 4(b) of Resolution 1267 (1999) provides that all the States must, in particular, freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any

other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need.

12 In paragraph 6 of Resolution 1267 (1999) the Security Council decided to establish, in accordance with rule 28 of its provisional rules of procedure, a committee of the Security Council composed of all its members ('the Sanctions Committee'), responsible in particular for ensuring that the States implement the measures imposed by paragraph 4, designating the funds or other financial resources referred to in paragraph 4 and considering requests for exemptions from the measures imposed by paragraph 4.

13 Taking the view that action by the Community was necessary in order to implement that resolution, on 15 November 1999 the Council adopted Common Position 1999/727/CFSP concerning restrictive measures against the Taliban (OJ 1999 L 294, p. 1). Article 2 of that Common Position prescribes the freezing of funds and other financial resources held abroad by the Taliban under the conditions set out in Security Council Resolution 1267 (1999).

14 On 14 February 2000, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2000 L 43, p. 1).

15 On 19 December 2000 the Security Council adopted Resolution 1333 (2000), demanding, inter alia, that the Taliban should comply with Resolution 1267 (1999), and, in particular, that they should cease to provide sanctuary and training for international terrorists and their organisations and turn Usama bin Laden over to

appropriate authorities to be brought to justice. The Security Council decided in particular to strengthen the flight ban and freezing of funds imposed under Resolution 1267 (1999). Accordingly paragraph 8(c) of Resolution 1333 (2000) provides that the States are, inter alia, '[t]o freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the [Sanctions Committee], including those in the Al-Qaeda organisation, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaeda organisation.'

16 In the same provision, the Security Council instructed the Sanctions Committee to maintain an updated list, based on information provided by the States and regional organisations, of the individuals and entities designated as associated with Usama bin Laden, including those in the Al-Qaeda organisation.

17 In paragraph 17 of Resolution 1333 (2000), the Security Council called upon all States and all international and regional organisations, including the United Nations and its specialised agencies, to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement.

18 In paragraph 23 of Resolution 1333 (2000), the Security Council decided that the measures imposed inter alia by paragraph 8 were to be established for 12 months and that, at the end of that period, it would decide whether to extend them for a further period on the same conditions.

19 Taking the view that action by the Community was necessary in order to implement that resolution, on 26 February 2001 the Council adopted Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP (OJ 2001 L 57, p. 1). Article 4 of that Common Position provides:

'Funds and other financial assets of Usama bin Laden and individuals and entities associated with him, as designated by the Sanctions Committee, will be frozen, and funds or other financial resources will not be made available to Usama bin Laden and individuals or entities associated with him as designated by the Sanctions Committee, under the conditions set out in [Resolution 1333 (2000)].'

20 On 6 March 2001, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1).

21 The third recital in the preamble to that regulation states that the measures provided for by Resolution 1333 (2000) 'fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned.'

22 Article 1 of Regulation No 467/2001 defines what is meant by 'funds' and 'freezing of funds'.

23 Under Article 2 of Regulation No 467/2001:

'1. All funds and other financial resources belonging to any natural or legal person, entity or body designated by the ... Sanctions Committee and listed in Annex I shall be frozen.

2. No funds or other financial resources shall be made available, directly or indirectly, to or for the benefit of, persons, entities or bodies designated by the Taliban Sanctions Committee and listed in Annex I.

3. Paragraphs 1 and 2 shall not apply to funds and financial resources for which the Taliban Sanctions Committee has granted an exemption. Such exemptions shall be obtained through the competent authorities of the Member States listed in Annex II.'

24 Article 9(2) of Regulation No 467/2001 provides that '[e]xemptions granted by the Taliban Sanctions Committee shall apply throughout the Community'.

25 Annex I to Regulation No 467/2001 contains the list of persons, entities and bodies affected by the freezing of funds imposed by Article 2. Under Article 10(1) of Regulation No 467/2001, the Commission is empowered to amend or supplement Annex I on the basis of determinations made by either the Security Council or the Sanctions Committee.

26 Annex II to Regulation No 467/2001 contains the list of competent national authorities for the purpose of applying inter alia Article 2(3). In the case of Ireland, those authorities are the Central Bank of Ireland, Financial Markets Department, on the one hand, and on the other, the Department of Foreign Affairs, Bilateral Economic Relations Section.

27 On 8 March 2001 the Sanctions Committee published a first consolidated list of the entities which and the persons who must be subjected to the freezing of funds pursuant to Security Council Resolutions 1267 (1999) and 1333 (2000). That list has since been amended and supplemented several times. The Commission has therefore adopted various regulations pursuant to Article 10 of Regulation No 467/2001, in which it has amended or supplemented Annex I to that regulation.

28 On 19 October 2001 the Sanctions Committee published a new addition to its list of 8 March 2001, including in particular the name of the following person, identified as being a person associated with Usama bin Laden, as follows:

'BIN MUHAMMAD, Ayadi Chafiq (A. K. A. AYADI SHAFIQ, Ben Muhammad; A. K. A. AYADI CHAFIK, Ben Muhammad; A. K. A. AIADI, Ben Muhammad; A. K. A. AIADY, Ben Muhammad), Helene Meyer Ring 10-1415-80809, Munich, Germany; 129 Park Road, NW8, London, England; 28 Chausse Di Lille, Moscron, Belgium; Darvingasse 1/2/58-60, Vienna, Austria; Tunisia; DOB: 21 January 1963; POB: Safais (Sfax), Tunisia.'

29 On the same day the Commission adopted Regulation (EC) No 2062/2001, amending, for the third time, Council Regulation (EC) No 467/2001 (OJ 2001 L 277, p. 25). In accordance with Article 1 thereof, the applicant's name was added to Annex I to Regulation No 467/2001 as follows:

'BIN MUHAMMAD, Ayadi Chafiq (aka Aayadi Shafiq, Ben Muhammad; aka Ayadi Chafik, Ben Muhammad; aka Aiadi, Ben Muhammad; aka Aiady, Ben Muhammad),

Helene Meyer Ring 10-1415-80809, Munich, Germany; 129 Park Road, London NW8, England; 28 Chausse Di Lille, Moscron, Belgium; Darvingasse 1/2/58-60, Vienna, Austria; Tunisia; born 21.1.1963, Safais (Sfax), Tunisia.'

30 On 16 January 2002 the Security Council adopted Resolution 1390 (2002), which lays down the measures to be directed against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities. Articles 1 and 2 of that resolution provide, in essence, that the measures, in particular the freezing of funds, imposed by Article 4(b) of Resolution 1267 (1999) and by Article 8(c) of Resolution 1333 (2000) are to be maintained. In accordance with paragraph 3 of Resolution 1390 (2002), those measures are to be reviewed by the Security Council 12 months after their adoption, at the end of which period the Council will either allow those measures to continue or decide to improve them.

31 Considering that action by the Community was necessary in order to implement that resolution, on 27 May 2002 the Council adopted Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746, 1999/727, 2001/154 and 2001/771/CFSP (OJ 2002 L 139, p. 4). Article 3 of that Common Position prescribes, inter alia, the continuation of the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in the list drawn up by the Sanctions Committee in accordance with Security Council Resolutions 1267 (1999) and 1333 (2000).

32 On 27 May 2002, on the basis of Articles 60 EC, 301 EC and 308 EC, the Council adopted Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 (OJ 2002 L 139, p. 9) ('the contested regulation').

33 According to the fourth recital in the preamble to that regulation, the measures laid down by, inter alia, Security Council Resolution 1390 (2002) 'fall within the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned.'

34 Article 1 of the contested regulation defines 'funds' and 'freezing of funds' in terms which are essentially identical to those used in Article 1 of Regulation No 467/2001. In addition, it defines what is meant by 'economic resources'.

35 Article 2 of Regulation No 881/2002 provides:

'1. All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen.

2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.

3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.'

36 Article 4 of the contested regulation provides:

'1. The participation, knowingly and intentionally, in activities, the object or effect of which is, directly or indirectly, to circumvent Article 2 or to promote the transactions referred to in Article 3, shall be prohibited.

2. Any information that the provisions of this Regulation are being, or have been, circumvented shall be notified to the competent authorities of the Member States and, directly or through these competent authorities, to the Commission.'

37 In accordance with Article 7(2) of Regulation No 881/2002, '[w]ithout prejudice to the rights and obligations of the Member States under the Charter of the United Nations, the Commission shall maintain all necessary contacts with the Sanctions Committee for the purpose of the effective implementation of this Regulation.'

38 Annex I to the contested regulation contains the list of persons, groups and entities affected by the freezing of funds imposed by Article 2. That list includes, inter alia, the applicant's name as follows:

'Bin Muhammad, Ayadi Chafiq (aka Ayadi Shafiq, Ben Muhammad; aka Ayadi Chafik, Ben Muhammad; aka Aiadi, Ben Muhammad; aka Aiady, Ben Muhammad), Helene Meyer Ring 10-1415-80809, Munich, Germany; 129 Park Road, London NW8, England; 28 Chaussee De Lille, Mouscron, Belgium; Darvingasse 1/2/58-60, Vienna, Austria; Tunisia; born 21.1.1963, Safais (Sfax), Tunisia.'

39 On 20 December 2002 the Security Council adopted Resolution 1452 (2002), intended to facilitate the implementation of counter-terrorism obligations. Paragraph 1 of that resolution provides for a number of derogations from and exceptions to the freezing of funds and economic resources imposed by Resolutions 1267 (1999), 1333 (2000) and 1390 (2002) which may be granted by the Member States on humanitarian grounds, on condition that the Sanctions Committee gives its consent.

40 On 17 January 2003 the Security Council adopted Resolution 1455 (2003), intended to improve the implementation of the measures imposed in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 2 of Resolution 1455 (2003), those measures are again to be improved after 12 months or earlier if necessary.

41 Taking the view that action by the Community was necessary in order to implement Security Council Resolution 1452 (2002), on 27 February 2003 the Council adopted Common Position 2003/140/CFSP concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP (OJ 2003 L 53, p. 62). Article 1 of that Common Position provides that, when implementing the measures set out in Article 3 of Common Position 2002/402/CFSP, the European Community is to provide for the exceptions permitted by United Nations Security Council Resolution 1452 (2002).

42 On 27 March 2003 the Council adopted Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, p. 1). In the fourth recital in the preamble to that regulation, the Council states that it is necessary, in view of the Security Council's Resolution 1452 (2002), to adjust the measures imposed by the Community.

43 Article 1 of Regulation No 561/2003 provides that 'The following Article shall be inserted in Regulation (EC) No 881/2002:

"Article 2a

1. Article 2 shall not apply to funds or economic resources where:

(a) any of the competent authorities of the Member States, as listed in Annex II, has determined, upon a request made by an interested natural or legal person, that these funds or economic resources are:

(i) necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;

(ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services;

(iii) intended exclusively for payment of fees or service charges for the routine holding or maintenance of frozen funds or frozen economic resources; or

(iv) necessary for extraordinary expenses; and

(b) such determination has been notified to the Sanctions Committee; and

(c) (i) in the case of a determination under point (a)(i), (ii) or (iii), the Sanctions Committee has not objected to the determination within 48 hours of notification; or

(ii) in the case of a determination under point (a)(iv), the Sanctions Committee has approved the determination.

2. Any person wishing to benefit from the provisions referred to in paragraph 1 shall address its request to the relevant competent authority of the Member State as listed in Annex II.

The competent authority listed in Annex II shall promptly notify both the person that made the request, and any other person, body or entity known to be directly concerned, in writing, whether the request has been granted.

The competent authority shall also inform other Member States whether the request for such an exception has been granted.

3. Funds released and transferred within the Community in order to meet expenses or recognised by virtue of this Article shall not be subject to further restrictive measures pursuant to Article 2.

...""

44 On 19 May 2003 the Commission adopted Regulation (EC) No 866/2003 of 19 May 2003 amending for the 18th time Council Regulation (EC) No 881/2002 (OJ 2003 L 124, p. 19). Under Article 1 of, and paragraph 5 of the Annex to, that regulation, Annex I to the contested regulation is amended to the effect that the entry referring to the applicant (see paragraph 38 above) is replaced by the following:

'Ayadi Shafiq Ben Mohamed BEN MOHAMED (alias (a) Bin Muhammad, Ayadi Chafiq (b) Ayadi Chafik, Ben Muhammad (c) Aiadi, Ben Muhammad (d) Aiady, Ben Muhammad (e) Ayadi Shafig Ben Mohamed (f) Ben Mohamed, Ayadi Chafig (g) Abou El Baraa), (a) Helene Meyer Ring 10-1415-80809, Munich, Germany (b) 129 Park Road, NW8, London, England (c) 28 Chaussée De Lille, Moscron, Belgium (d) Darvingasse 1/2/58-60, Vienna, Austria; date of birth: 21 March 1963; place of birth: Sfax, Tunisia; nationality: Tunisian, Bosnian, Austrian; passport No: E 423362 delivered in Islamabad on 15 May 1988; national identification No: 1292931; other information: his mother's name is Medina Abid; he is [actually] in Ireland.'

45 On 30 January 2004 the Commission adopted Regulation (EC) No 180/2004 of 30 January 2004 amending for the 29th time Regulation (EC) No 881/2002 (OJ 2004 L 28, p. 15). Under Article 1 of, and paragraph 4 of the Annex to, that regulation, Annex I to the contested regulation is amended to the effect that the entry referring to the applicant (see paragraph 38 above) is replaced by the following:

'Ayadi Shafiq Ben Mohamed Ben Mohamed (alias (a) Bin Muhammad, Ayadi Chafiq, (b) Ayadi Chafik, Ben Muhammad, (c) Aiadi, Ben Muhammad, (d) Aiady, Ben

Muhammad, (e) Ayadi Shafig Ben Mohamed, (f) Ben Mohamed, Ayadi Chafig, (g) Abou El Baraa), (a) Helene Meyer Ring 10-1415-80809, Munich, Germany, (b) 129 Park Road, NW8, London, England, (c) 28 Chaussée De Lille, Mouscron, Belgium. Date of birth: 21 March 1963. Place of birth: Sfax, Tunisia. Nationality: (a) Tunisian, (b) Bosnian. Passport No: E 423362 delivered in Islamabad on 15 May 1988. National identification No: 1292931. Other information: his mother's name is Medina Abid; he is [actually] in Ireland.'

46 On 30 January 2004 the Security Council adopted Resolution 1526 (2004) which is intended, on the one hand, to improve the implementation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000), and paragraphs 1 and 2 of Resolution 1390 (2002) and, on the other, to strengthen the mandate of the Sanctions Committee. Paragraph 3 of Resolution 1526 (2004) states that those measures are to be further improved in 18 months, or sooner if necessary.

47 Paragraph 18 of Resolution 1526 (2004) states that the Security Council 'strongly encourages all States to inform, to the extent possible, individuals and entities included in the [Sanctions Committee's] list of the measures imposed on them, and of the [Sanctions Committee's] guidelines and Resolution 1452 (2002)'.

48 On 29 July 2005 the Security Council adopted Resolution 1617 (2005). That resolution provides inter alia for the maintenance of the measures in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 21 of Resolution 1617 (2005), those measures are to be reviewed with a view to their possible further strengthening in 17 months, or sooner if necessary.

49 On 17 January 2006 the Commission adopted Regulation (EC) No 76/2006 amending for the 6 st time Regulation No 881/2002 (OJ L 12, p. 7). In accordance with Article 1 thereof and paragraph 8 in the Annex thereto, Annex I to the contested regulation is amended to the effect that the entry relating to the applicant (see paragraph 45 above) is replaced by the following entry:

'Shafiq Ben Mohamed Ben Mohamed Al-Ayadi (alias (a) Bin Muhammad, Ayadi Chafiq, (b) Ayadi Chafik, Ben Muhammad, (c) Aiadi, Ben Muhammad, (d) Aiady, Ben Muhammad, (e) Ayadi Shafig Ben Mohamed, (f) Ben Mohamed, Ayadi Chafig, (g) Abou El Baraa). Address: (a) Helene Meyer Ring 10-1415-80809, Munich, Germany, (b) 129 Park Road, NW8, London, England, (c) 28 Chaussée De Lille, Mouscron, Belgium, (d) Street of Provare 20, Sarajevo, Bosnia and Herzegovina (last registered address in Bosnia and Herzegovina). Date of birth: (a) 21.03.1963, (b) 21.01.1963. Place of birth: Sfax, Tunisia. Nationality: (a) Tunisian, (b) Bosnia and Herzegovina. Passport No: (a) E 423362 delivered in Islamabad on 15.05.1988, (b) 0841438 (Bosnia and Herzegovina passport issued on 30 December 1998 which expired on 30.12.2003. National identification No: 1292931. Other information: (a) address in Belgium is a PO box, (b) his father's name is Mohamed, mother's name is Medina Abid; (c) reportedly living in Dublin, Ireland.'

Procedure

50 By application lodged at the Registry of the Court of First Instance on 26 August 2002, Mr Ayadi brought an action against the Council and the Commission for annulment in part of the contested regulation.

51 By separate document lodged at the Registry of the Court of First Instance on 25 October 2002 the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance. The applicant

lodged his observations on that objection on 18 December 2002. By order of 3 February 2003, the Court of First Instance (Second Chamber) dismissed the action as inadmissible in so far as directed against the Commission and ordered the applicant to pay the costs relating to that part of the action.

52 By separate document lodged at the Registry of the Court of First Instance on 13 November 2002, Mr Ayadi applied for legal aid. By order of 3 February 2003, the President of the Second Chamber of the Court of First Instance granted Mr Ayadi legal aid.

53 By document lodged at the Registry of the Court of First Instance on 8 January 2003 the United Kingdom of Great Britain and Northern Ireland sought leave to intervene in these proceedings in support of the forms of order sought by the defendant. By order of 7 February 2003 the President of the Second Chamber of the Court of First Instance granted leave to intervene. The intervener lodged its statement within the prescribed period.

54 By document lodged at the Registry of the Court of First Instance on 24 July 2003 the Commission sought leave to intervene in these proceedings in support of the forms of order sought by the defendant. By order of 22 October 2003, the President of the Second Chamber of the Court of First Instance granted leave to intervene pursuant to Article 116(6) of the Rules of Procedure.

55 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure.

56 Save for the United Kingdom, which presented apologies for its absence, the parties presented oral argument and answered questions put by the Court at the hearing on 25 October 2005.

Forms of order sought

57 The applicant claims that the Court should:

— annul Article 2 and so much of Article 4 as relates to Article 2 of Regulation No 881/2002;

— or, alternatively, annul the reference to the applicant in Annex I to Regulation No 881/2002;

— order the Council to pay the costs.

58 At the hearing the applicant stated that his action was directed against the contested regulation only in so far as the latter is of direct and individual concern to him, of which the Court of First Instance took formal note in the minutes of the hearing.

59 The Council, supported by the United Kingdom and the Commission, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Facts

60 The applicant states that he is a Tunisian national and that since 1997 he has resided in Ireland, with his wife, also a Tunisian national, and their two minor children, both Irish nationals. His bank accounts in Ireland and the United Kingdom were frozen by order of those Member States. The applicant, who accepts that he has been designated by the Sanctions Committee as a person associated with Usama bin Laden, denies that that designation is correct but accepts that that matter lies outside the scope of these proceedings.

Law

1. *On admissibility*

Arguments of the parties

61 The United Kingdom observes that the applicant's assets were frozen pursuant to Regulation No 467/2001. The contested regulation merely maintained the freezing order on his assets in place and so did not bring about a distinct change in the applicant's legal position within the meaning of the case-law (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9). In those circumstances, the United Kingdom maintains that the applicant ought to have challenged Regulation No 467/2001 and that the present action, brought against the contested regulation, is out of time and hence inadmissible.

62 At the hearing the applicant argued that the effects of Regulation No 467/2001 were strictly limited in time, like Security Council Resolution 1333 (2000) which it implemented (see paragraph 18 above). In contrast, the temporal effects of the

contested regulation are unlimited, like those of Security Council Resolution 1390 (2002) which it implements and which simply provides for an opportunity of review after twelve months (see paragraph 30 above). The adoption of the contested regulation thus brought about a fundamental change in the applicant's legal situation.

63 The Council did not wish to express any view on that question at the hearing. On the other hand, the Commission concurred with the United Kingdom's opinion that the temporary nature of the Security Council Resolutions at issue is not of such relevance as to distinguish Regulation No 467/2001 from the contested regulation, given that all those resolutions provide a mechanism for the review of their applicability after twelve months. The fact that the contested regulation was adopted on a legal basis different from that of Regulation No 467/2001 is not relevant either, for, according to the Commission, it does not bring about a change in the applicant's legal position.

Findings of the Court

64 Under the fourth paragraph of Article 40 of the Statute of the Court of Justice, an application to intervene is to be limited to supporting the form of order sought by one of the parties. In addition, as provided in Article 116(3) of the Rules of Procedure of the Court of First Instance, the intervener must accept the case as he finds it at the time of his intervention.

65 The Council has not in its claims raised a plea of inadmissibility.

66 The Council and the Commission are not, therefore, entitled to raise such a plea of inadmissibility and the Court is not bound to consider the pleas relied on in this regard (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 22).

67 However, it is settled case-law that, under Article 113 of the Rules of Procedure, the Court may at any time, of its own motion, consider whether there exists any absolute bar to proceeding with a case, including any raised by the interveners (Case T-88/01 *Sniace* v *Commission* [2005] ECR II-1165, paragraph 52, and the case-law cited there).

68 In this case, the plea alleging a bar to proceeding raised by the interveners is a matter of public policy, since it relates to the admissibility of the action (Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 35). It may therefore be examined by the Court of First Instance of its own motion.

69 Although the United Kingdom has invoked *IBM* v *Commission* (cited in paragraph 61 above) in support of its plea of inadmissibility, the latter is in essence based on the settled case-law of the Court of Justice and the Court of First Instance relating to confirmatory acts.

70 According to that case-law, an action for annulment directed against an act which merely confirms a previous act, not challenged within the period prescribed, is inadmissible (Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 16, and Case C-480/93 P *Zunis Holding and Others* v *Commission* [1996] ECR I-1, paragraph 14). An act is a mere confirmation of an earlier act if it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the person to whom the earlier act was addressed (see judgment in Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraph 14; order in Case C-521/03 *Internationaler Hilfsfonds* v

Commission [2004], not published in the ECR, paragraph 47; judgment in Case T-331/94 *IPK* v *Commission* [1997] ECR II-1665, paragraph 24, and order in Case T-84/97 *BEUC* v *Commission* [1998] ECR II-795, paragraph 52).

71 In the present case, it must be concluded that the contested regulation is a new act in relation to Regulation No 467/2001 and that it was preceded by a reconsideration of the situation of the persons included, like the applicant, in the lists annexed to those regulations.

72 First of all, the two regulations differ appreciably both in their titles and in their preambles and material provisions, which is in itself enough to dismiss the theory that one is merely confirmatory of the other. Indeed, the definition of 'funds' in Article 1 of Regulation No 881/2002 does not correspond exactly to the definition of 'funds' in Article 1 of Regulation No 467/2001, the former providing, as the latter does not, for the freezing of 'economic resources'.

73 Next, Regulation No 467/2001 was adopted in order to give effect in the Community to Security Council Resolution 1333 (2000) in accordance with Common Position 2001/154, whereas the contested regulation was adopted in order to give effect to Resolution 1390 (2002) in accordance with Common Position 2002/402.

74 It cannot be denied that Resolution 1390 (2002) and Common Position 2002/402 contain new factors as compared to Resolution 1333 (2000) and Common Position 2001/154, and that the former were preceded by re-examination of the situation brought about by the latter. The same must necessarily be true of the contested regulation in comparison with Regulation No 467/2001.

75 Thus, as stated in the third and seventh recitals in the preamble to Common Position 2002/402, Resolution 1390 (2002) 'adjusts the scope of the sanctions concerning the freezing of funds' imposed by Resolution 1333 (2000) and, '[t]herefore, the European Union restrictive measures should be adjusted in accordance with UNSCR 1390 (2002)'. Similarly, in the words of the second and fourth recitals in the preamble to the contested regulation, '[t]he Security Council decided, inter alia, ... that the scope of the freezing of funds ... should be adjusted' and that, therefore, 'Community legislation is necessary'.

76 In particular, under paragraph 23 of Resolution 1333 (2000), the measures imposed by that regulation were established for twelve months at the end of which the Security Council was to decide whether the Taliban had complied with them and to decide accordingly whether to extend these measures for a further period on the same conditions. Resolution 1390 (2002) therefore contains a new and important element compared with Resolution 1333 (2000), in that it significantly extends that regulation's temporal scope.

77 Thus, contrary to the arguments of the United Kingdom and the Commission, a distinct change in the applicant's legal position has indeed been brought about by Resolution 1390 (2002), Common Position 2002/402 and the contested regulation. In point of fact, by means of those acts the applicant's funds remain frozen even after the period of twelve months laid down by paragraph 23 of Resolution 1333 (2002) has expired, whereas, if those acts had not been adopted, the obligation imposed on all the Member States of the UN to freeze the applicant's funds, laid down in that resolution, would automatically have been extinguished when the period in question had expired and the Community measures implementing that resolution would have lapsed.

78 Moreover, although by paragraph 1 of Resolution 1390 (2002), the Security Council decided to 'continue' the measures imposed by Resolution 1333 (2000), it did so following their re-examination, as envisaged by paragraph 23 of that resolution and

as is confirmed by paragraph 3 of Resolution 1390 (2002), under which the measures it lays down are to be 'reviewed' in 12 months.

79 Lastly, Regulation No 467/2001 was adopted on the legal basis of Article 60 EC and Article 301 EC alone, at a time when the measures at issue sought to interrupt or reduce economic relations with a third country, whereas the contested regulation was adopted on the legal basis of Article 60 EC, Article 301 EC and Article 308 EC, at a time when there was no longer any link between those measures and the territory or rulers of a third country. Contrary to the Commission's submission at the hearing, that change in the legal basis of the acts at issue, which was made in the light of developments in the international situation in the context of which the sanctions ordered by the Security Council and put into effect by the Community must be seen, does indeed constitute a new element and demands a review of the applicant's situation. That change has led to a change in his legal position, permitting him inter alia to rely on pleas in law and arguments quite different from those put forward in support of his action for annulment (see, to this effect, Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* [2005] ECR II-3533, under appeal, '*Yusuf*', paragraphs 108 to 124 and paragraphs 125 to 170, and Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649, under appeal, '*Kadi*', paragraphs 87 to 135).

80 It follows that the plea of inadmissibility raised by the United Kingdom and the Commission must be rejected.

81 With regard to the other conditions for the admissibility of the action, the Court also considers it appropriate to point out that, in so far as the applicant is expressly named in Annex I to the contested regulation, that act is of direct and individual concern to him, within the meaning of the fourth paragraph of Article 230 EC, even though that act is unquestionably of general application (*Yusuf*, paragraph 186). This action is therefore admissible.

2. *On the substance*

82 In support of the forms of order sought by him, the applicant essentially relies on three pleas in law, the first alleging that the Council was not competent to adopt Articles 2 and 4 of the contested regulation ('the contested provisions') and a misuse of powers, the second alleging breach of the fundamental principles of subsidiarity, proportionality and respect for human rights and the third alleging infringement of an essential procedural requirement.

The first plea, alleging lack of competence and a misuse of powers

Arguments of the parties

83 According to the applicant, Articles 60 EC and 301 EC did not confer on the Council the power to adopt the contested provisions, since the Taliban government in Afghanistan had fallen before they were adopted. Those provisions authorise only the adoption of measures designed to interrupt or reduce, where appropriate selectively, 'economic relations with one or more third countries'. Unlike Regulation No 467/2001, which provided for economic sanctions against Afghanistan, the contested regulation refers only to associates of Usama bin Laden, the Al Qaeda network and the Taliban. Those are not third countries and do not constitute the government of any part of Afghanistan.

84 As regards Article 308 EC, the applicant maintains that it does not confer on the Council the power to direct Member States to impose economic sanctions on individuals, in contravention of their fundamental rights. Such a power is incompatible with the limited terms of Articles 60 EC and 301 EC.

85 The adoption of the contested provisions therefore also constitutes a misuse of the powers conferred on the Council by Article 60 EC and Article 301 EC.

86 The Council takes issue with the applicant's arguments, referring to *Yusuf* and *Kadi*.

Findings of the Court

87 The Court of First Instance has previously ruled in *Yusuf* (paragraphs 107 to 170) and *Kadi* (paragraphs 87 to 135) on the Community's powers under Articles 60 EC, 301 EC and 308 EC to adopt provisions such as those in the contested regulation, which provide for economic and financial sanctions on individuals in connection with the struggle against international terrorism, but without establishing any link at all with a third country, unlike the provisions of Regulation No 467/2001.

88 On that occasion, as the applicant expressly acknowledged at the hearing in response to a question asked by the Court of First Instance, exhaustive answers were given to arguments in essence identical to those put forward by the parties in relation to this question in the present case (in connection with the similar arguments put forward in the case giving rise to *Yusuf*, see paragraphs 80 to 106 of that judgment, and in connection with the similar arguments put forward in the case giving rise to *Kadi*, see paragraphs 64 to 86 of that judgment).

89 In concluding its reasoning, the Court of First Instance held that 'the institutions and the United Kingdom are therefore right to maintain that the Council was competent to adopt the contested regulation which sets in motion the economic and

financial sanctions provided for by Common Position 2002/402, on the joint basis of Articles 60 EC, 301 EC and 308 EC' (*Yusuf*, paragraph 170, and *Kadi*, paragraph 135).

90 For essentially the same reasons as those set out in *Yusuf* and *Kadi*, the applicant's complaints alleging that the Community lacked competence are to be rejected (with regard to the Community judicature's power to give reasons for its judgment by reference to an earlier judgment ruling on largely identical questions, see Case C-229/04 *Crailsheimer Volksbank* [2005] ECR I-9273, paragraphs 47 to 49).

91 With regard to the allegation of misuse of powers, which alone might serve to distinguish this case from those giving rise to the judgments in *Yusuf* and *Kadi*, it too must be rejected, given that it is put forward merely as the corollary of the applicant's other complaints concerning competence.

92 The first plea must therefore be rejected in its entirety.

The second plea, alleging infringement of the fundamental principles of subsidiarity, proportionality and respect for human rights

Arguments of the parties

93 The applicant submits, first, that the contested provisions infringe the principle of subsidiarity in that they require Member States to adopt, on the basis of their obligations under Community law, measures which, under international law, they are free to choose to apply or not to apply.

94 In that regard, the applicant argues that Articles 25 and 41 of the Charter of the United Nations, interpreted in the light of the principles of that organisation, and in particular in the light of the principle of the sovereign equality of its Member States set out in Article 2(1) of the Charter, do not require Member States of the United Nations to apply without alteration or reservation those measures which the Security Council 'calls upon' them to apply. On the contrary, Member States are free to decide how to respond to such a call.

95 By contrast, the Council's interpretation, according to which paragraphs 8(c) and 17 of Security Council Resolution 1333 (2000) are binding on Members of the United Nations and therefore upon the Community institutions, is in his opinion inconsistent with the fundamental rules of international law and in particular with Articles 7, 8, 17, 22 and 23 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948, in that it would permit the Sanctions Committee to require Members of the United Nations to exclude individuals designated by that Committee from any means of obtaining financial support, without the person concerned's having any right to know the reasons for the measure or the material upon which it is based and without the individual's having any access to an independent or judicial body to determine its correctness.

96 Furthermore, even if the Security Council resolutions in question are binding on Member States, the Council does not explain why it was necessary for the Council itself to act in their place in the present case.

97 In the second part of the plea the applicant maintains that the contested provisions infringe the principle of proportionality, in so far as they have the effect of denying an individual all income or public assistance and, ultimately, any means of subsistence for him and his family. Such measures are not essential, even for the purposes of denying resources to Usama bin Laden.

98 The applicant contends, thirdly, that the contested provisions infringe his fundamental rights, particularly that of access to his property guaranteed by Article 1 of Protocol No 1 to the European Convention on Human Rights and Fundamental Freedoms ('the ECHR') and the right to a judicial remedy guaranteed by Article 6 of the ECHR. The outcome of those measures, which he contends are contrary to the constitutional traditions of the Member States, is that the applicant will be reduced to stealing in order to survive, which also constitutes degrading treatment prohibited by Article 3 of the ECHR and a denial of respect for his dignity in contravention of Article 8 of the ECHR.

99 With more particular regard to the alleged infringement of his right of access to his property, the applicant acknowledged at the hearing that this must be assessed solely in the light of the rules currently in force, in accordance with the rulings in *Yusuf* (paragraph 287) and *Kadi* (paragraph 236), and that account must therefore be taken of the express possibilities of exemptions or derogations from the freezing of funds provided for by Regulation No 561/2003, which was adopted after this action was brought.

100 On this point, the applicant has admitted that the Irish authorities granted him the public assistance necessary for his basic expenses, so that he was not deprived of all resources or of the means of subsistence. None the less, the contested regulation, even as amended by Regulation No 561/2003, did not let him enjoy other social advantages, prevented him from leading a normal life and made him utterly dependent on the Irish State for his subsistence. More particularly, he maintained that Article 2 of the contested regulation did not allow him to do any work at all, either employed or self-employed. Thus, he had been refused a taxi-driver's licence. In any event, it was impossible for him to hire a vehicle or to be paid by customers, since that would amount to making funds or economic resources available to him within the meaning of that provision.

101 With more particular regard to the alleged infringement of his right to a judicial remedy, the applicant accepted at the hearing that the judicial review performed in this case by the Court of First Instance must, in so far as it bears indirectly on the Security Council resolutions at issue, be confined to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed, as was held in *Yusuf* (paragraph 276 et seq.) and *Kadi* (paragraph 225 et seq.).

102 The applicant has nevertheless maintained that the conclusions reached by the Court of First Instance in *Yusuf* (in particular, in paragraphs 344 and 345) and *Kadi* (in particular, in paragraphs 289 and 290) cannot be transposed to the circumstances of this case. First, the freezing of his funds is not to be considered to be a temporary precautionary measure, in contrast to the finding in those two judgments, but rather to be actual confiscation. Second, there is no effective mechanism for reviewing the individual measures freezing funds adopted by the Security Council, with the result that the danger is that his property will remain frozen for the rest of his life. On this head the applicant has argued that he had endeavoured in vain to persuade the Security Council to alter its stance in relation to him. So, he wrote twice to the Irish authorities, on 5 February 2004 and 19 May 2004, seeking their assistance in having him removed from the Sanctions Committee list. By letter of 10 October 2005 those authorities informed him that his file was still being considered, but did not give him to understand that they would take any steps to his advantage.

103 The Council, supported by the interveners, opposes the applicant's arguments, referring to *Yusuf* and *Kadi*.

Findings of the Court

104 It is appropriate to begin by examining the first part of the plea and to continue by examining the second and third parts together. Determining whether any of the

applicant's fundamental rights have been infringed by the contested regulation necessarily involves an assessment of that measure's compliance with the principle of proportionality in the light of the objective pursued (Opinion of Advocate General Léger in Joined Cases C-317/04 and C-318/04 *Parliament* v *Council* [2006] ECR I-4721, point 107).

— Concerning the first part of the second plea, alleging breach of the principle of subsidiarity

105 The applicant argues in substance that, even if Articles 60 EC, 301 EC and 308 EC do confer competence in principle on the Community to adopt measures such as those in question in this case (the issue in the first plea in law), the fact remains that the Member States are best placed to determine what special measures are called for when a Security Council resolution is to be implemented. By adopting the contested regulation the Council, in his view, compromised their freedom of choice and offended against the principle of subsidiarity.

106 In that regard, it is appropriate to recall that the principle of subsidiarity is set out in the second paragraph of Article 5 EC, which provides that the Community, in areas which do not fall within its exclusive competence, is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

107 According to settled case-law, the Community judicature reviews the lawfulness of Community acts in the light of that general principle (see, to that effect, Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraphs 177 to 185; Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 58, and Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraphs 197 and 198).

108 The Court of First Instance considers, however, that this general principle cannot be relied on in the sphere of application of Articles 60 EC and 301 EC, even on the assumption that it does not fall within the exclusive competence of the Community (see, in this connection, Article 60(2) EC).

109 In fact, with regard to the interruption or reduction of economic relations with third countries, those very articles provide for action by the Community when that is 'deemed necessary' in the form of a common position or a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy (CFSP).

110 In the sphere of application of Articles 60 EC and 301 EC, the EC Treaty thus confers on the Union the power to determine whether action by the Community is necessary. Such determination falls within the ambit of the exercise of discretion by the Union. It excludes any right for individuals to challenge, in the light of the principle of subsidiarity enshrined in the second paragraph of Article 5 EC, the lawfulness of the action subsequently taken by the Community in accordance with the CFSP common position or joint action of the Union.

111 Moreover, since the Court has accepted, in *Yusuf* (paragraph 158 et seq.) and *Kadi* (paragraph 122 et seq.), that the sphere of application of Articles 60 EC and 301 EC could be extended, by having recourse to the additional legal basis of Article 308 EC, to the adoption of economic and financial sanctions imposed on individuals in the battle against international terrorism even when no connection with third countries has been established, it must follow that the lawfulness of Community measures adopted on that basis in accordance with a CFSP common position or joint action of the Union cannot be challenged by individuals in the light of the principle of subsidiarity either.

112 In any event, even assuming that the principle of subsidiarity finds application in circumstances such as those of this case, it is plain that the uniform implementation in the Member States of Security Council resolutions, which are binding on all members of the United Nations without distinction, can be better achieved at Community level than at national level.

113 Last, with regard to the claim that the Council compromised the Member States' freedom of choice, the Council was right when it stressed that Common Position 2002/402 reflects the unanimous assessment of the Member States that action by the Community was necessary in order to implement the freezing of funds decided on by the Security Council. As the United Kingdom points out, the Member States themselves having elected to fulfil their obligations under the Charter of the United Nations by means of a Community measure, the Council cannot be accused of having compromised their freedom of choice by complying with their intention.

114 The first part of the second plea must therefore be rejected.

— Concerning the second and third parts of the second plea, alleging breach of the principles of proportionality and of observance of human rights

115 Subject only to the specific point of law that will be considered in paragraph 156 below, the Court of First Instance has already ruled, in *Yusuf* (paragraphs 226 to 346) and *Kadi* (paragraphs 176 to 291), on all the points of law raised by the parties in connection with the second and third parts of the second plea in this action.

116 On that occasion, the Court held, in particular, as follows:

— from the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty (*Yusuf*, paragraph 231, and *Kadi*, paragraph 181);

— that primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations (*Yusuf*, paragraph 234, and *Kadi*, paragraph 184);

— although not a member of the United Nations, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it (*Yusuf*, paragraph 243, and *Kadi*, paragraph 193);

— first, the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations (*Yusuf*, paragraph 254, and *Kadi*, paragraph 204);

— as a result, the applicants' arguments challenging the contested regulation and based, on the one hand, on the autonomy of the Community legal order vis-à-

vis the legal order under the United Nations and, on the other, on the necessity of transposing Security Council resolutions into the domestic law of the Member States, in accordance with the constitutional provisions and fundamental principles of that law, must be rejected (*Yusuf*, paragraph 258, and *Kadi*, paragraph 208);

— the contested regulation, adopted in the light of Common Position 2002/402, constitutes the implementation at Community level of the obligation placed on the Member States of the Community, as Members of the United Nations, to give effect, if appropriate by means of a Community act, to the sanctions against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, which have been decided and later strengthened by several resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations (*Yusuf*, paragraph 264, and *Kadi*, paragraph 213);

— in that situation, the Community institutions acted under circumscribed powers, with the result that they had no autonomous discretion (*Yusuf*, paragraph 265, and *Kadi*, paragraph 214);

— in light of the considerations set out above, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of decisions of the Security Council or of the Sanctions Committee according to the standard of protection of fundamental rights as recognised by the Community legal order cannot be justified either on the basis of international law or on the basis of Community law (*Yusuf*, paragraph 272, and *Kadi*, paragraph 221);

— the resolutions of the Security Council at issue therefore fall, in principle, outside the ambit of the Court's judicial review and the Court has no authority

to call into question, even indirectly, their lawfulness in the light of Community law; on the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations (*Yusuf*, paragraph 276, and *Kadi*, paragraph 225);

— none the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible (*Yusuf*, paragraph 277, and *Kadi*, paragraph 226);

— the freezing of funds provided for by the contested regulation infringes neither the fundamental right of the persons concerned to make use of their property nor the general principle of proportionality, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens* (*Yusuf*, paragraphs 288 and 289, and *Kadi*, paragraphs 237 and 238);

— since the Security Council resolutions concerned do not provide a right for the persons concerned to be heard by the Sanctions Committee before their inclusion in the list in question and since it appears that no mandatory rule of public international law requires a prior hearing for the persons concerned in circumstances such as those of this case, the arguments alleging breach of such a right must be rejected (*Yusuf*, paragraphs 306, 307 and 321, and *Kadi*, paragraphs 261 and 268);

— in these circumstances in which what is at issue is a temporary precautionary measure restricting the availability of the property of the persons concerned, observance of their fundamental rights does not require the facts and evidence

adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it (*Yusuf*, paragraph 320, and *Kadi*, paragraph 274);

— nor were the Community institutions obliged to hear the persons concerned before the contested regulation was adopted (*Yusuf*, paragraph 329) or in the context of the adoption and implementation of that act (*Kadi*, paragraph 259);

— in dealing with an action for annulment of the contested regulation, the Court carries out a complete review of the lawfulness of that regulation with regard to observance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions; the Court also reviews the lawfulness of the contested regulation having regard to the Security Council's regulations which that act is supposed to put into effect, in particular from the viewpoints of procedural and substantive appropriateness, internal consistency and whether the regulation is proportionate to the resolutions; the Court reviews the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person (*Yusuf*, paragraphs 334, 335 and 337, and *Kadi*, paragraphs 279, 280 and 282);

— on the other hand, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order; nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has

taken or, subject to the limited extent defined in paragraph 337 above, to check indirectly the appropriateness and proportionality of those measures (*Yusuf*, paragraphs 338 and 339, and *Kadi*, paragraphs 283 and 284);

— to that extent, there is no judicial remedy available to the persons concerned, the Security Council not having thought it appropriate to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee (*Yusuf*, paragraph 340, and *Kadi*, paragraph 285);

— the lacuna thus found to exist in the previous indent in the judicial protection available to the applicants is not in itself contrary to *jus cogens*, for (a) the right of access to the courts is not absolute; (b) the limitation of the right of the persons concerned to access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, is inherent in that right; (c) such a limitation is justified both by the nature of the decisions that the Security Council is led to take under Chapter VII and by the legitimate objective pursued, and (d) in the absence of an international court having jurisdiction to ascertain whether acts of the Security Council are lawful, the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving the governments concerned, constitute another reasonable method of affording adequate protection of the fundamental rights of the persons concerned as recognised by *jus cogens* (*Yusuf*, paragraphs 341 to 345, and *Kadi*, paragraphs 286 to 290);

— the arguments relied on to challenge the contested regulation alleging breach of the right to an effective judicial remedy must consequently be rejected (*Yusuf*, paragraph 346, and *Kadi*, paragraph 291).

117 As the applicant acknowledged at the hearing, in its examination of the *Yusuf* and *Kadi* cases the Court gave exhaustive answers to the arguments, in essence identical, put forward in those cases by the parties in their written pleadings, in connection with the second and third parts of the second plea (in respect of the similar arguments put forward by the parties in the *Yusuf* case, see *Yusuf*, paragraphs 190 to 225, and, in respect of the similar arguments put forward by the parties in the *Kadi* case, see *Kadi*, paragraphs 138 to 175). That is particularly the case in relation to the applicant's arguments claiming that Security Council resolutions are not binding on the Member States (paragraph 94, above), that the resolutions in question are incompatible with fundamental rules of international law on the protection of human rights (paragraph 95, above), that fundamental rights guaranteed by the ECHR have been infringed (paragraph 98, above), particularly from the standpoint of proportionality (paragraph 97, above) and that the right to an effective judicial remedy has been infringed (paragraph 101, above).

118 Nevertheless, it is necessary to add the following points in response to the arguments more specifically propounded by the applicant concerning, on the one hand, the alleged ineffectiveness of the exemptions and derogations from the freezing of funds provided for by Regulation No 561/2003, especially as regards carrying on a trade or business (paragraphs 99 and 100, above), and, on the other, the alleged invalidity in the circumstances of the conclusions reached by the Court in *Yusuf* and *Kadi* concerning the compatibility with *jus cogens* of the lacuna found to exist in the judicial protection of the persons concerned (paragraphs 101 and 102, above).

119 With regard, first, to the alleged ineffectiveness of the exemptions and derogations from the freezing of funds, it is to be borne in mind that Article 2a of the contested regulation, added to the latter by Regulation No 561/2003 which was adopted as a result of Security Council Resolution 1452 (2002), provides, among other derogations and exemptions, that, upon a request made by an interested person, and provided that the Sanctions Committee does not expressly object, the competent national authorities may declare the freezing of funds or economic resources to be inapplicable to funds or economic resources which they have determined are 'necessary to cover basic expenses, including payments for

foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges' (paragraph 43, above). The use of the word 'including', repeating the text of Resolution 1452 (2002), shows that neither that resolution nor Regulation No 561/2003 provides a specific and exhaustive list of 'basic expenses' that may be exempted from the freezing of funds. The determination of the kinds of expenses capable of being so classified is therefore left, to a large extent, to be assessed by the competent national authorities responsible for the implementation of the contested regulation under the supervision of the Sanctions Committee. In addition, funds necessary for any 'extraordinary expenses' whatsoever may in future be unfrozen, on the express authorisation of the Sanctions Committee.

120 It is established that, in accordance with those provisions, Ireland sought and obtained the approval of the Sanctions Committee in August 2003 for the payment of public assistance to the applicant, so enabling him to meet his basic needs and those of his family. In December 2003 the Sanctions Committee authorised Ireland to increase the amount of the allowances paid to the applicant, having regard to the increase in the Irish national budget. It is clear that, far from having the purpose or the effect of submitting the applicant to inhuman or degrading treatment, the freezing of his funds takes account, so far as is possible, of his basic needs and fundamental rights (see, to this effect, *Yusuf*, paragraphs 291 and 312, and *Kadi*, paragraphs 240 and 265).

121 For the rest, it is indeed to be recognised that the freezing of the applicant's funds, subject only to the exemptions and derogations provided for by Article 2a of the contested regulation, constitutes a particularly drastic measure with respect to him, which is capable even of preventing him from leading a normal social life and of making him wholly dependent on the public assistance granted by the Irish authorities.

122 Nevertheless, it is to be recalled that that measure constitutes an aspect of the sanctions decided by the Security Council against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, for the purpose in particular of preventing terrorist attacks of the kind perpetrated in the United States of America on 11 September 2001 (*Yusuf*, paragraphs 295 and 297, and *Kadi*, paragraphs 244 and 246).

123 Any measure of this kind imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions (Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 22). Nevertheless, the importance of the aims pursued by the regulation imposing those sanctions is such as to justify those negative consequences, even though they may be of a substantial nature, for some operators (*Bosphorus*, paragraph 23).

124 In *Bosphorus*, paragraph 123 above, the Court of Justice ruled that the impounding of an aircraft belonging to a person based in the Federal Republic of Yugoslavia but leased to an 'innocent' external economic operator acting in good faith was not incompatible with the fundamental rights recognised by Community law, when compared with the public-interest objective of fundamental importance to the international community, which was to put an end to the state of war in the region and to the massive violations of human rights and of humanitarian international law in the Republic of Bosnia-Herzegovina. In its judgment of 30 June 2005 in Bosphorus v. Ireland, No 45036/98, not yet published in the Reports of Judgments and Decisions, the European Court of Human Rights also held that the impoundment of the aircraft did not give rise to a violation of the ECHR (paragraph 167), having regard to the nature of the interference at issue and to the public interest pursued by the impoundment and by the sanctions regime (paragraph 166).

125 It must be held a fortiori, in the present case, that the freezing of funds, financial assets and other economic resources of the persons identified by the Security

Council as being associated with Usama bin Laden, the Al-Qaeda network and the Taliban is not incompatible with the fundamental rights of the human person falling within the ambit of *jus cogens*, in light of the public-interest objective of fundamental importance to the international community which is to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts (see, to this effect, *Yusuf*, paragraph 298, and *Kadi*, paragraph 247).

126 It has, moreover, to be remarked that the contested regulation and the Security Council resolutions implemented by that regulation do not prevent the applicant from leading a satisfactory personal, family and social life, given the circumstances. Thus, according to the interpretation given at the hearing by the Council, which is to be approved, the use for strictly private ends of the frozen economic resources, such as a house to live in or a car, is not forbidden per se by those measures. That is all the more true where everyday consumer goods are concerned.

127 Approval must also be given to the reasoning put forward at the hearing by the Council, that the contested regulation and the Security Council resolutions implemented by that regulation do not of themselves prevent the applicant, contrary to his submission, from carrying on business or trade activities, whether as an employee or as a self-employed person, contrary to the his submission, but in substance concern the receipt of income from such activity.

128 First, in point of fact no provision in those acts makes express mention of the exercise of such activity, either to forbid or to regulate it.

129 Second, the measures at issue are not intended to prevent the persons concerned from actually acquiring funds or economic resources, but do no more than order the freezing of those funds and economic resources in order to prevent their being made available to, or exploited by, those persons, except for strictly personal purposes, as stated in paragraph 126, above. In consequence, it is not so much the carrying on of a trade or business, as an employee or as a self-employed person, as the free receipt of the income from such an activity that is regulated by those measures.

130 Third, by virtue of Article 2a of the contested regulation, Article 2 may be inapplicable, subject to the conditions set by that provision, to any kind of funds or economic resources, including therefore the economic resources needed for the carrying on of employed or self-employed professional activities and the funds received or receivable in connection with such activity. Although Article 2a constitutes a provision derogating from Article 2, it is not to be interpreted strictly in the light of the humanitarian objective that it plainly pursues.

131 Thus, in the circumstances of this case, both the grant to the applicant of a taxi-driver's licence and his hiring of a car, as 'economic resources', and the trade receipts produced by working as a taxi driver, as 'funds', may theoretically be the object of a derogation from the freezing of the applicant's funds and economic resources, if necessary on the conditions and within the limits fixed by one of the competent authorities of the Member States listed in Annex II to the contested regulation or by the Sanctions Committee.

132 However, as the Council observed at the hearing, it is for those national authorities, which are best placed to take into consideration the special circumstances of each

case, to determine in the first place whether such a derogation may be granted and then to ensure that it is reviewed and implemented in keeping with the freezing of the funds of the person concerned. Thus, in this case, it would be possible for those authorities to put in place controls designed to check that the earned income received by the applicant from working as a taxi driver does not exceed the limit of what is judged to be necessary to meet his basic expenses. In contrast, a refusal to grant him a taxi-driver's licence, decided on by those authorities without regard to his needs, whether basic or extraordinary, and without consulting the Sanctions Committee, would, a priori, indicate misinterpretation or misapplication of the contested regulation.

133 That being so, there are no grounds for challenging the findings made by the Court in *Yusuf* and *Kadi* in the light of the arguments more specifically developed by the applicant at the hearing and relating to the alleged ineffectiveness of the exemptions and derogations from the freezing of funds provided for by Regulation No 561/2003.

134 With regard, secondly, to the alleged invalidity, in the circumstances of this case, of the conclusions reached by the Court in *Yusuf* and *Kadi*, concerning the compatibility with *jus cogens* of the lacuna found to exist in the judicial protection of the persons concerned, the applicant pleads, on the one hand, that the freezing of his funds amounts to confiscation and, on the other, that the machinery for review of the individual measures for freezing of funds decided by the Security Council and put into effect by the contested regulation is ineffective.

135 So far as concerns, first, the allegedly confiscatory nature of the freezing of the applicant's funds, it is to be borne in mind that the Court has held in *Yusuf* (paragraph 299) and *Kadi* (paragraph 248) that freezing of funds is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof.

In addition, in its assessment of the compatibility of such a measure with *jus cogens*, the Court attached special significance to the fact that, far from providing for measures for an unlimited or unspecified period of application, the resolutions successively adopted by the Security Council have always provided a mechanism for re-examining whether it is appropriate to maintain those measures after 12 or 18 months at most have elapsed (*Yusuf*, paragraph 344, and *Kadi*, paragraph 289).

136 Moreover, the applicant has not put forward any evidence or argument that might shake the foundation of those findings in the particular circumstances of this case. On the contrary, those findings have in the meantime been corroborated by the fact that, like the four resolutions that preceded it (see paragraphs 18, 30, 40 and 46, above), Resolution 1617 (2005), adopted on 29 July 2005, that is to say, within the maximum period of 18 months prescribed by the previous Resolution 1526 (2004), once more provided for a mechanism for review 'in 17 months, or sooner'.

137 As regards, second, the effectiveness of the mechanism for review of the individual fund-freezing measures adopted by the Security Council and implemented by the contested regulation, it is to be borne in mind, in addition to the findings summarised in paragraph 116, above, that in *Yusuf* (paragraph 309 et seq.) and *Kadi* (paragraphs 262 et seq.), the Court noted that the persons concerned might address a request to the Sanctions Committee, through their national authorities, in order either to be removed from the list of persons affected by the sanctions or to obtain exemption from the freezing of funds.

138 On the basis of the measures referred to in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002), and set out afresh in paragraph 1 of Resolution 1526 (2004) and Resolution 1617 (2005), the Sanctions Committee is in fact responsible for the

regular updating of the list of persons and entities whose funds must be frozen pursuant to those Security Council resolutions.

139 With particular regard to an application for re-examination of an individual case, for the purpose of having the person concerned removed from the list of persons affected by the sanctions, the 'Guidelines of the [Sanctions] Committee for the conduct of its work' ('the Guidelines'), adopted on 7 November 2002, amended on 10 April 2003 and revised (without substantial amendment) on 21 December 2005, provide in section 8, entitled 'De-listing', as follows:

'(a) Without prejudice to available procedures, a petitioner (individual(s), groups, undertakings, and/or entities on the 1267 Committee's consolidated list) may petition the government of residence and/or citizenship to request review of the case. In this regard, the petitioner should provide justification for the de-listing request, offer relevant information and request support for de-listing;

(b) The government to which a petition is submitted (the petitioned government) should review all relevant information and then approach bilaterally the government(s) originally proposing designation (the designating government(s)) to seek additional information and to hold consultations on the de-listing request;

(c) The original designating government(s) may also request additional information from the petitioner's country of citizenship or residency. The petitioned and the designating government(s) may, as appropriate, consult with the Chairman of the Committee during the course of any such bilateral consultations;

(d) If, after reviewing any additional information, the petitioned government wishes to pursue a de-listing request, it should seek to persuade the designating government(s) to submit jointly or separately a request for de-listing to the Committee. The petitioned government may, without an accompanying request from the original designating government(s), submit a request for de-listing to the Committee, pursuant to the no-objection procedure;

(e) The Committee will reach decisions by consensus of its members. If consensus cannot be reached on a particular issue, the Chairman will undertake such further consultations as may facilitate agreement. If, after these consultations, consensus still cannot be reached, the matter may be submitted to the Security Council. Given the specific nature of the information, the Chairman may encourage bilateral exchanges between interested Member States in order to clarify the issue prior to a decision.'

140 The Court has previously held that, by adopting those Guidelines, the Security Council intended to take account, so far as possible, of the fundamental rights of the persons entered in the Sanctions Committee's list, and in particular their right to be heard (*Yusuf*, paragraph 312, and *Kadi*, paragraph 265). The importance attached by the Security Council to observance of those rights is, moreover, clearly apparent from its Resolution 1526 (2004). Under paragraph 18 of that resolution, the Security Council '[s]trongly encourages all States to inform, to the extent possible, individuals and entities included in the Committee's list of the measures imposed on them, and of the Committee's guidelines and resolution 1452 (2002)'.

141 Admittedly, the procedure described above confers no right directly on the persons concerned themselves to be heard by the Committee, the only authority competent to give a decision, on a State's petition, on the re-examination of their case, with the result that they are dependent, essentially, on the diplomatic protection afforded by

the States to their nationals; such a restriction of the right to be heard by the competent authority is not, however, to be deemed improper in the light of the mandatory prescriptions of the public international order. On the contrary, with regard to the challenge to the validity of decisions ordering the freezing of funds belonging to individuals or entities suspected of contributing to the financing of international terrorism, adopted by the Security Council through its Sanctions Committee under Chapter VII of the Charter of the United Nations on the basis of information communicated by the States and regional organisations, it is appropriate that the right of the persons involved to be heard should be adapted to an administrative procedure on several levels, in which the national authorities referred to in Annex II of the contested regulation play an essential part (*Yusuf*, paragraphs 314 and 315, and *Kadi*, paragraphs 267 and 268; see also, by analogy, 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).

142 Although the Sanctions Committee takes its decisions by consensus, the effectiveness of the procedure for requesting to be removed from the list is guaranteed, on the one hand, by the various formal consultation mechanisms intended to facilitate that agreement, provided for in section 8(b) to (e) of the Guidelines and, on the other, by the obligation imposed on all Member States of the United Nations, including the members of that committee, to act in good faith in that procedure in accordance with the general principle of international law that every treaty in force is binding upon the parties to it and must be performed by them in good faith (pacta sunt servanda), enshrined in Article 26 of the Treaty of Vienna on the Law of Treaties, concluded in Vienna on 23 May 1969. In this connection it must be observed that the Guidelines are binding on all the Member States of the United Nations by virtue of their international legal obligations, in accordance with the Security Council resolutions at issue. In particular, it follows from paragraph 9 of Resolution 1267 (1999), paragraph 19 of Resolution 1333 (2000) and paragraph 7 of Resolution 1390 (2002) that all States are required to cooperate fully with the Sanctions Committee in the fulfilment of its tasks, including supplying such information as may be required by the Committee in pursuance of those resolutions.

143 With more particular regard to the petitioned government, which is the government to which the request for removal from the list is addressed and which is, therefore, in most cases that of the petitioner's country of residence or nationality, the effectiveness of that procedure for removal from the list is further guaranteed by the obligation imposed on it by section 8(b) of the Guidelines to review all relevant information supplied by the person concerned and then to make a bilateral approach to the designating government.

144 Here it is appropriate to add that particular obligations are imposed on the Member States of the Community when a request for removal from the list is addressed to them.

145 The Sanctions Committee having, with its Guidelines, interpreted the Security Council resolutions in question as conferring on interested persons the right to present a request for review of their case to the government of the country in which they reside or of which they are nationals, for the purpose of being removed from the list in dispute (see paragraphs 138 and 139 above), the contested regulation, which gives effect to those resolutions within the Community, must be interpreted and applied in the same way (*Yusuf*, paragraph 276, and *Kadi*, paragraph 225). That right must accordingly be classed as a right guaranteed not only by those Guidelines but also by the Community legal order.

146 It follows that, both in examining such a request and in the context of the consultations between States and other actions that may take place under paragraph 8 of the Guidelines, the Member States are bound, in accordance with Article 6 EU, to respect the fundamental rights of the persons involved, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law, given that the respect of those fundamental rights does not appear capable of preventing the proper performance of their obligations under the Charter of the United Nations (see, a contrario, *Yusuf*, paragraph 240, and *Kadi*, paragraph 190).

147 The Member States must thus ensure, so far as is possible, that interested persons are put in a position to put their point of view before the competent national authorities when they present a request for their case to be reviewed. Furthermore, the margin of assessment that those authorities enjoy in this respect must be exercised in such a way as to take due account of the difficulties that the persons concerned may encounter in ensuring the effective protection of their rights, having regard to the specific context and nature of the measures affecting them.

148 Thus, the Member States would not be justified in refusing to initiate the review procedure provided for by the Guidelines solely because the persons concerned could not provide precise and relevant information in support of their request, owing to their having been unable to ascertain the precise reasons for which they were included in the list in question or the evidence supporting those reasons, on account of the confidential nature of those reasons or that evidence.

149 Similarly, having regard to the fact, noted in paragraph 141 above, that individuals are not entitled to be heard in person by the Sanctions Committee, with the result that they are dependent, essentially, on the diplomatic protection afforded by States to their nationals, the Member States are required to act promptly to ensure that such persons' cases are presented without delay and fairly and impartially to the Committee, with a view to their re-examination, if that appears to be justified in the light of the relevant information supplied.

150 It is appropriate to add that, as the Court noted, following the submissions of the United Kingdom, in *Yusuf* (paragraph 317) and *Kadi* (paragraph 270), it is open to the persons concerned to bring an action for judicial review based on the domestic law of the State of the petitioned government, indeed even relying directly on the contested regulation and the relevant resolutions of the Security Council which that regulation puts into effect, against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination and, more generally, against any infringement by that national authority of the right of

the persons involved to request the review of their case. At the hearing in this case the Council thus invoked, to that effect, a decision given by a court of a Member State ordering that State to request, as a matter of urgency, the Sanctions Committee to remove the names of two persons from the list in question, on pain of paying a daily penalty (Tribunal de première instance de Bruxelles (Court of First Instance, Brussels), Fourth Chamber, judgment of 11 February 2005 in the case of Nabil Sayadi and Patricia Vinck v Belgian State).

151 On this issue it is also to be borne in mind that, according to the Court of Justice's settled case-law (Case C-443/03 *Leffler* [2005] ECR I-9611, paragraphs 49 and 50, and the cases there cited), in the absence of Community provisions it is for the domestic legal system of each Member State to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from the direct effect of Community law. The Court has made it clear that those rules cannot be less favourable than those governing rights which originate in domestic law (principle of equivalence) and that they cannot render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). The principle of effectiveness must lead the national court to apply the detailed procedural rules laid down by domestic law only in so far as they do not compromise the raison d'être and objective of the Community act in question.

152 It follows that, in an action in which it is alleged that the competent national authorities have infringed the right of the persons involved to request review of their cases in order to be removed from the list at issue, it is for the national court to apply, in principle, national law while taking care to ensure the full effectiveness of Community law, which may lead it to refrain from applying, if need be, a national rule preventing that result (*Leffler*, paragraph 151, above, paragraph 51, and the case-law there cited), such as a rule excluding from judicial review a refusal of national authorities to take action with a view to guaranteeing the diplomatic protection of their nationals.

153 In the present case, the applicant claimed at the hearing that the Irish authorities had informed him by letter of 10 October 2005 that his request to be removed from the list at issue, made on 5 February 2004, was still under consideration by those authorities. In so far as the applicant intends thus to challenge the Irish authorities' failure to cooperate in good faith with him, it is for him to avail himself of the abovementioned opportunities for judicial remedy offered by domestic law.

154 In any event, such a lack of cooperation, even if it were established, in no way means that the procedure for removal from the list is in itself ineffective (see, by analogy, the order of the President of the Court of First Instance of 15 May 2003 in Case T-47/03 R *Sison* v *Council* [2003] ECR II-2047, paragraph 39, and the case-law there cited).

155 That being so, there are no grounds for challenging the assessment made by the Court of First Instance in *Yusuf* and *Kadi* concerning the arguments more specifically developed by the applicant at the hearing with regard to the alleged incompatibility with *jus cogens* of the lacuna found to exist in the judicial protection of the persons involved.

156 Last, in so far as *Yusuf* and *Kadi* do not answer the applicant's point that the Member States of the United Nations are not bound to apply without reservation or alteration the measures that the Security Council 'calls upon' them to adopt, the United Kingdom rightly counters that Article 39 of the Charter of the United Nations draws a distinction between 'recommendations', which are not binding, and 'decisions', which are. In this case, the sanctions provided for by paragraph 8(c) of Resolution 1333 (2000) were indeed adopted by way of 'decision'. Likewise, in paragraph 1 of Resolution 1390 (2002) the Security Council 'decide[d]' to continue the measures 'imposed' by that provision. So that argument too must be rejected.

157 Having regard to the foregoing, the second and third parts of the second plea must be rejected. This plea must therefore be rejected in its entirety.

The third plea, alleging infringement of an essential procedural requirement

Arguments of the parties

158 The applicant maintains that the Council infringed an essential procedural requirement in failing to state adequate reasons for taking the view that the adoption of Community legislation, rather than of national measures, was required in this case. The ground referred to in this regard in the fourth recital in the preamble to the contested regulation, namely, that of 'avoiding distortion of competition' is not founded in fact.

159 The Council and the United Kingdom consider that this plea coincides with the plea alleging infringement of the principle of subsidiarity and refer to their observations in response to that plea. In so far as the applicant contends that the contested regulation fails to set out the reasons why Community action was held to be appropriate and necessary, the United Kingdom denies that this is the case, in the light of the recitals in the preamble to the regulation. In so far as the applicant relies more specifically on a failure to state adequate reasons in relation to the alleged objective of avoiding a distortion of competition, the Council submits that the reasons for the contested regulation must be examined as a whole and not by isolating a single sentence in a page of recitals.

Findings of the Court

160 By this plea the applicant alleges a twofold failure to state proper reasons.

161 First, he claims that the Council failed to give an adequate statement of the reasons why it judged that in the circumstances it was necessary to adopt Community, rather than national, legislation.

162 That claim is unfounded, given that the legislative citations in the contested regulation make reference, on the one hand, to Articles 60 EC, 301 EC and 308 EC and, on the other, to Common Position 2002/402. Although the Court of First Instance found in *Yusuf* (paragraph 138) and *Kadi* (paragraph 102) that the preamble to the contested regulation wasted very few words on that point, the reasoning is none the less sufficient. As to the reasons for which it was considered in that common position that action by the Community was necessary, they are the Union's and not the Community's. They did not, therefore, need to be set out in the Community act itself.

163 Second, the applicant maintains that the ground given in the fourth recital in the preamble to the contested regulation, namely, the objective of 'avoiding distortion of competition' has no foundation in fact.

164 It is true that in *Yusuf* (paragraphs 141 and 150) and *Kadi* (paragraphs 105 and 114) the Court of First Instance found that the assertion that there was a risk of competition's being distorted, a result which according to its preamble the contested regulation seeks to prevent, was unconvincing and that therefore the measures at issue in the case could not find authorisation in the objective referred to in Article 3(1)(c) and (g) EC.

165 However, as the Council rightly observes, the statement of reasons for a regulation must be examined as a whole. According to the case-law, even if one recital of a contested measure contains a factually incorrect statement, that procedural defect cannot lead to the annulment of that measure if the other recitals in themselves supply a sufficient statement of reasons (Case 119/86 *Spain* v *Commission* [1987] ECR 4121, paragraph 51, and Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Council and Commission* [1999] ECR II-17, paragraph 160), which in this case they do.

166 In that regard, it may be observed that the statement of reasons required by Article 253 EC must show clearly and unequivocally the Council's reasoning so as to enable the persons concerned to ascertain the reasons for the measures and to enable the Community judicature to exercise its power of review. Furthermore, the question whether a statement of reasons is adequate must be assessed by reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question. In the case of a measure intended to have general application, as here, the preamble may be limited to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other (Case C-344/04 *International Air Transport Association and Others* [2006] ECR I-403, paragraphs 66 and 67, and the case-law there cited).

167 In the circumstances of this case, the legislative citations of the contested regulation and the first to seventh recitals in its preamble, in particular, more than satisfy those requirements, as is clear from *Yusuf* (paragraph 158 et seq.) and *Kadi* (paragraph 122 et seq.).

168 Furthermore, in so far as the contested regulation expressly names the applicant in Annex I, as a person to whom the freezing of funds must apply, sufficient reasons

are supplied by the reference made in Article 2 of that act to the corresponding designation made by the Sanctions Committee.

169 It follows from the above that the third plea must be rejected.

170 None of the pleas in law put forward by the applicant in support of his action being well founded, the latter must be dismissed.

Costs

171 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, he must be ordered to pay the costs in accordance with the form of order sought by the Council.

172 Nevertheless, under Article 87(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to bear, in addition to his own costs, those of the Council;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland and the Commission to bear their own costs.**

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 12 July 2006.

E. Coulon J. Pirrung

Registrar President

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