Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 19 March 2013 [1]

Joined Cases C-584/10 P, C-593/10 P and C-595/10 P

European Commission
Council of the European Union
United Kingdom of Great Britain and Northern Ireland
v

Yassin Abdullah Kadi

(Appeal — Common foreign and security policy (CFSP) — Restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban — Regulation (EC) No 881/2002 — Freezing of a person's funds and economic resources as a result of his inclusion in a list drawn up by a body of the United Nations — Committee of the Security Council created by paragraph 6 of Resolution 1267 (1999) of the Security Council (Sanctions Committee) — Inclusion of a person in Annex I to Regulation (EC) No 881/2002 — Action for annulment — Fundamental rights — Right to be heard, right to effective judicial review and right to respect for property — Extent and intensity of judicial review)

1. In its judgment of 3 September 2008 in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, [2] the Court held that the European Union ('EU') judicature must ensure the review, in principle a full review, of the lawfulness of acts of the EU institutions which give effect to the resolutions of the United Nations Security Council [3] providing for the freezing of the assets of persons and entities identified by the Security Council Sanctions Committee [4] on a consolidated list. [5]

2. The present cases call for the Court to clarify the scope and the nature of that review.

3. The difficulty faced by the Court here stems from the challenge represented by the problem raised, namely the globally coordinated prevention of terrorism.

4. I have already pointed out, in the context of another case, [6] the specific features of the fight against terrorism.

5. Terrorism is a criminal activity which has a totalitarian inspiration, which denies the principle of individual freedom and whose aim is to seize political, economic and judicial powers in a given society in order to entrench there its underlying ideology. The unpredictability and the devastating impact of terrorist acts committed require the public authorities to develop all conceivable means of

1 — Original language: French.

2 — Joined Cases C-402/05 P and C-415/05 P [2008] ECR I-6351 ('the judgment of the Court of Justice in *Kadi*').

3 — 'The Security Council'.

4 — 'The Sanctions Committee'.

5 — 'The List'.

6 — See my Opinion in Case C-300/11 *ZZ*, pending before the Court, points 35 to 46.

prevention. Accordingly, protection of intelligence assets and sources is an absolute priority. It must make it possible to evaluate the degree of potential threat, to which a prevention measure commensurate with the identified threat must respond. This calls for a highly flexible approach, because of the multi-faceted character of the situation on the ground. The conditions underlying the threat and the fight against it may be different depending on time and place, and the genuineness and the level of the threat may vary with changes in global geopolitical conditions.

6. Nevertheless, the fight against terrorism cannot lead democracies to abandon or deny their founding principles, which include the rule of law. However, it does cause them to make the changes to them that the preservation of the rule of law requires.

7. The measures decided on by the Security Council and the evaluations conducted by the Sanctions Committee regarding the existence of a terrorist threat likely to undermine international peace and security play a key role in combating international terrorism.

8. Consequently, in defining the extent and the intensity of its review of the lawfulness of EU acts giving effect to resolutions of the Security Council, the EU judicature must take account of the primary responsibility held by that international body in maintaining peace and security at global level.

9. In this Opinion, I shall first explain why, in my view, it would be wrong for the Court to reverse its decision not to grant immunity from jurisdiction to regulations giving effect to Security Council resolutions.

10. I shall then explain what should, in my view, be the extent and the intensity of the review of such regulations performed by the EU judicature. After highlighting the various arguments against the view taken by the General Court of the European Union in its judgment of 30 September 2010 in *Kadi* v *Commission*,[7] I shall advocate a normal review of the external lawfulness and a limited review of the internal lawfulness of those regulations.

11. Finally, I shall draw the conclusions from the standard of judicial review thus defined for the protected content of the fundamental rights invoked by Mr Kadi.

I – The appeals

12. By their appeals, the European Commission (Case C-584/10 P), the Council of the European Union (Case C-593/10 P) and the United Kingdom of Great Britain and Northern Ireland (Case C-595/10 P) are seeking to have set aside the judgment under appeal, by which the General Court annulled Commission Regulation (EC) No 1190/2008 of 28 November 2008,[8] in so far as that measure concerns Mr Kadi. The Commission, the Council and the United Kingdom also claim that the Court should dismiss Mr Kadi's application for the annulment of the contested regulation in so far as it concerns him.

13. The Commission, the Council and the United Kingdom put forward differing grounds in support of their respective appeals. There are, in essence, three. The first ground alleges an error of law in that the judgment under appeal failed to afford the contested regulation immunity from jurisdiction. The second alleges errors of law with regard to the level of intensity of judicial review determined in the judgment under appeal. The third alleges that the General Court erred in its examination of Mr Kadi's pleas in respect of infringement of his rights of defence and his right to effective judicial protection, and in respect of infringement of the principle of proportionality.

7 — Case T-85/09 [2010] ECR II-5177 ('the judgment under appeal').

8 — OJ 2008 L 322, p. 25 ('the contested regulation').

14. Before commencing the examination of the appeals, I will briefly describe the judgment of the Court of Justice in *Kadi*, its repercussions, and the judgment under appeal.

II – The judgment of the Court of Justice in *Kadi* and its repercussions

15. By its judgment in *Kadi*, the Court of Justice set aside the judgment of the General Court of 21 September 2005 in *Kadi* v *Council and Commission*[9] and annulled Regulation 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-Quaeda network and the Taliban, and repealing Council 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,[10] in so far as it concerned Mr Kadi.

16. In essence, the Court held that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all EU acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by that Treaty. It held further that, notwithstanding the fact that undertakings given in the context of the United Nations must be treated as binding when Security Council resolutions are implemented, it is not a consequence of the principles governing the international legal order under the United Nations that an act adopted by the European Union, such as Regulation No 881/2002, enjoys immunity from jurisdiction. It added that such immunity cannot find a basis in the EC Treaty.

17. In those circumstances the Court of Justice held that the EU judicature must ensure the review, in principle a full review, of the lawfulness of all EU acts in the light of fundamental rights, including the review of measures which are designed to give effect to Security Council resolutions, and that the General Court's reasoning was therefore vitiated by an error of law.

18. Adjudicating on the action brought by Mr Kadi in the General Court, it held that, because the Council neither communicated to Mr Kadi the evidence used against him to justify the restrictive measures which had been imposed on him nor afforded him the right to be informed of that evidence within a reasonable period after those measures were enacted, Mr Kadi had not had the opportunity to make his point of view in that respect known to advantage. In those circumstances, it found that Mr Kadi's rights of defence and his right to effective judicial review had been infringed and that there was an unjustified restriction on his right to property. The effects of the annulled regulation in so far as it concerned Mr Kadi were maintained for a maximum period of three months in order to allow the Council to remedy the infringements found.

19. The repercussions of that judgment of the Court of Justice in so far as it concerned Mr Kadi may be summarised as follows.

20. On 21 October 2008, the Chairman of the Sanctions Committee communicated the summary of reasons for Mr Kadi's inclusion in the list to France's Permanent Representative to the UN and authorised its transmission to Mr Kadi. The wording of that summary is set out in paragraph 50 of the judgment under appeal.

9 — Case T-315/01 [2005] ECR II-649 ('the judgment of the General Court in *Kadi I*').

10 — OJ 2002 L 139, p. 1.

21. On 22 October 2008, France's Permanent Representative to the European Union transmitted that summary of reasons to the Commission, which sent it to Mr Kadi on the same day, informing him that, for the reasons set out in that summary, it envisaged maintaining his listing in Annex I to Regulation No 881/2002. The Commission gave Mr Kadi until 10 November 2008 to comment on those reasons and to provide it with any information that he might consider relevant before it took its final decision.

22. On 10 November 2008, Mr Kadi submitted his comments to the Commission, requesting disclosure of the evidence supporting the assertions and allegations made in the summary of reasons and also the relevant documents in the Commission's file, and requesting a further opportunity to make representations on that evidence, once he had received it. He also attempted to refute, providing evidence in support of his refutation, the allegations made in the summary of reasons, in so far as he was able to respond to general allegations.

23. On 28 November 2008, the Commission adopted the contested regulation.

24. Recitals 3 to 6, 8 and 9 in the preamble to the contested regulation read as follows:

'(3) In order to comply with the judgment of the Court of Justice [in *Kadi*], the Commission has communicated the … [summary] of reasons … to Mr Kadi … and given [him] the opportunity to comment on these grounds in order to make [his] point of view known.

(4) The Commission has received comments by Mr Kadi … and [has] examined these comments.

(5) The list of persons, groups and entities to whom the freezing of funds and economic resources should apply, drawn up by [the Sanctions Committee], includes Mr Kadi …

(6) After having carefully considered the comments received from Mr Kadi in a letter dated 10 November 2008, and given the preventative nature of the freezing of funds and economic resources, the Commission considers that the listing of Mr Kadi is justified for reasons of his association with the Al-Qaeda network.

…

(8) In view of this, Mr Kadi … should be added to Annex I.

(9) This Regulation should apply from 30 May 2002, given the preventative nature and objectives of the freezing of funds and economic resources under Regulation … No 881/2002 and the need to protect legitimate interests of the economic operators, who have been relying on the legality of [the regulation annulled by the judgment of the Court of Justice in *Kadi*].'

25. Under Article 1 and the Annex to the contested regulation, Annex I of Regulation No 881/2002 was amended, inter alia, to the effect that the following entry was added under the heading 'Natural persons': 'Yasin Abdullah Ezzedine Qadi (alias (a) Kadi, Shaykh Yassin Abdullah; (b) Kahdi, Yasin; (c) Yasin Al-Qadi). Date of birth: 23.2.1955. Place of birth: Cairo, Egypt. Nationality: Saudi Arabian. Passport No: (a) B 751550, (b) E 976177 (issued on 6.3.2004, expiring on 11.1.2009). Other information: Jeddah, Saudi Arabia.'

26. The contested regulation, in accordance with Article 2 thereof, entered into force on 3 December 2008 and applied from 30 May 2002.

27. By letter of 8 December 2008, the Commission replied to Mr Kadi's comments of 10 November 2008, essentially stating:

— in providing him with the summary of reasons and inviting him to comment on them, the Commission had complied with the judgment of the Court of Justice in *Kadi*;

— the judgment of the Court of Justice in *Kadi* did not require that the Commission disclose the further evidence requested;

— as the relevant Security Council resolutions required 'preventative' asset freezing, the freezing must be supported, with respect to the requisite evidentiary standard, by 'reasonable grounds, or a reasonable basis, to suspect or believe that the individual or entity designated is a terrorist, one who finances terrorism or a terrorist organisation';

— the letter from Mr Kadi confirmed his participation in the decisions and activities of the Muwafaq Foundation and his links with Mr Ayadi, who was part of a contact network with Usama bin Laden, and

— the dropping of the criminal proceedings against Mr Kadi in Switzerland, Turkey and Albania had no bearing on the relevance of his inclusion on the list drawn up by the Sanctions Committee, which may be based on information from other United Nations Member States. In addition, those decisions to drop proceedings were taken within the framework of criminal proceedings, which have different standards of evidence from those applicable to Sanctions Committee decisions, which are preventative in nature.

28. The Commission concluded that the inclusion of Mr Kadi in the list annexed to Regulation No 881/2002 was justified by his association with the Al-Qaeda network. It enclosed with its letter a statement of reasons identical to the summary of reasons previously sent to Mr Kadi, together with the text of the contested regulation, drawing attention to the possibility for him to challenge that regulation before the General Court and to submit at any time a request to the Sanctions Committee to have his name removed from the list.

III – The judgment under appeal

29. By application lodged at the General Court on 26 February 2009, Mr Kadi brought an action for annulment of the contested regulation in so far as it concerned him. In support of his claims, he put forward five pleas in law. The second plea alleged breach of the rights of the defence and of the right to effective judicial protection, and the fifth plea alleged breach of the principle of proportionality.

30. In the judgment under appeal, the General Court stated as a preliminary point in paragraph 126 that, in the light of paragraphs 326 and 327 of the judgment of the Court of Justice in *Kadi* and in circumstances such as those of that case, its task is to ensure the review, 'in principle the full review', of the lawfulness of the contested regulation in the light of fundamental rights, without affording that regulation any immunity from jurisdiction on the ground that it gives effect to Security Council resolutions. In paragraphs 127 to 129 of the judgment under appeal, it added that, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection, as the Court of Justice considered to be the case at paragraph 322 of its judgment in *Kadi*, the review carried out by the EU judicature of EU measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them.

31. The argument of the Commission and the Council concerning the Court of Justice's failure to make a determination, in its judgment in *Kadi*, on the extent and intensity of the judicial review was held, in paragraph 131 of the judgment under appeal, to be clearly wrong. The General Court held in essence, in paragraphs 132 to 135 of that judgment, that it is apparent from paragraphs 326, 327, 336 and 342 to 344 of the judgment of the Court of Justice in *Kadi* that the Court of Justice intended that its review, 'in principle [a] full review', should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in that measure are based.

32. It added, in paragraphs 138 to 146 of the judgment under appeal, that, by taking on the essential content of the General Court's reasoning in the judgment in *Organisation des Modjahedines du peuple d'Iran* v *Council*,[11] the Court of Justice approved and endorsed the standard and intensity of the review as carried out by the General Court in that judgment and it was therefore necessary to apply to the present context the principles set out by the General Court in that judgment and in its subsequent decisions concerning the EU's 'autonomous' system of sanctions.

33. The General Court continued with some supplementary considerations based on the nature and effects of the contested fund-freezing measures on those subjected to them, viewed from a temporal perspective. In that regard, in paragraph 150 of the judgment under appeal, it asked whether 'given that now nearly 10 years have passed since the applicant's funds were originally frozen – it is not time to call into question the finding of this Court, at paragraph 248 of [the judgment of the General Court in *Kadi I*], and reiterated in substance by the Court of Justice at paragraph 358 of [the judgment of the Court of Justice in *Kadi*], according to which the freezing of funds is a temporary 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'.

34. The General Court concluded in paragraph 151 of the judgment under appeal that 'once there is acceptance of the premiss, laid down by the judgment of the Court of Justice in *Kadi*, that freezing measures such as those at issue in this instance enjoy no immunity from jurisdiction merely because they are intended to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the principle of a full and rigorous judicial review of such measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned'.

35. Going on to examine the second and fifth pleas for annulment in the light of these various preliminary observations, it held, with regard to the first limb of the second plea, which alleged an infringement of Mr Kadi's rights of defence, in paragraphs 171 to 175 of the judgment under appeal, that:

— those rights were observed only in the most formal and superficial sense, as the Commission considered itself strictly bound by the Sanctions Committee's findings and therefore at no time envisaged calling those findings into question in the light of Mr Kadi's comments or taking due account of his comments;

— the Commission refused Mr Kadi access to the evidence against him despite his express request, whilst no balance was struck between his interests, on the one hand, and the need to protect the confidential nature of the information in question, on the other, and

11 — Case T-228/02 [2006] ECR II-4665 ('the judgment in *OMPI*').

— the few pieces of information and the imprecise allegations in the summary of reasons, such as the claim that Mr Kadi was a shareholder in a Bosnian bank in which planning sessions against a United States facility in Saudi Arabia 'may have' taken place, were clearly insufficient to enable the applicant to launch an effective challenge to the allegations against him.

36. The General Court therefore held, in paragraph 177 of the judgment under appeal, with reference to the judgment of the European Court of Human Rights of 19 February 2009 in *A. and Others v. United Kingdom*, that it was clear that Mr Kadi was not in a position to mount an effective challenge to any of the allegations against him, given that all that was disclosed to him was the summary of reasons. After noting, in paragraph 178 of the judgment under appeal, that the Commission had made no real effort to refute the exculpatory evidence advanced by Mr Kadi, it concluded, in paragraph 179 of that judgment, that the contested regulation was adopted in breach of Mr Kadi's rights of defence. Referring to paragraphs 319 to 325 of the judgment of the Court of Justice in *Kadi*, it added, in paragraph 180 of the judgment under appeal, that the fact that Mr Kadi had an opportunity to be heard by the Sanctions Committee with a view to him being removed from its list clearly did not remedy that breach.

37. With regard to the second limb of the second plea, which alleged an infringement of the principle of effective judicial protection, the General Court ruled, in paragraphs 181 and 182 of the judgment under appeal, that given the lack of any proper access to the information and evidence used against him, Mr Kadi was also unable to defend his rights with regard to that evidence in satisfactory conditions before the Union judicature and that that infringement of the right to effective judicial protection had not been remedied in the course of this action before the General Court, as no evidence had been adduced in the course of that action by the institutions concerned. Stating that it was not able to review the lawfulness of the contested regulation, the General Court concluded, in paragraph 183 of the judgment under appeal, that Mr Kadi's fundamental right to effective judicial review had not, in the circumstances, been observed. Taking the view that the contested regulation was adopted in breach of the rights of the defence, it found an infringement of the principle of effective judicial protection in paragraph 184 of the judgment under appeal.

38. The Council's argument that the additional procedural safeguards put in place by the Commission in response to the judgment of the Court of Justice in *Kadi* correspond to those put in place by the Council in response to the judgment in *OMPI*, which were endorsed in the judgment of the General Court in *People's Mojahedin Organization of Iran* v *Council*,[12] was rejected on the ground that such an argument disregarded the marked procedural differences between the two Community regimes used for the freezing of funds.[13]

39. The second plea for annulment was therefore held to be well founded in each of its two limbs.[14]

40. As regards the fifth plea, the General Court held, in paragraphs 192 to 194 of the judgment under appeal, that since the contested regulation was adopted without enabling Mr Kadi to put his case to the competent authorities despite the significant restriction of his property rights represented by the freezing measures to which he was subject, having regard to their general application and duration, the imposition of such measures constituted an unjustified restriction of that right. Mr Kadi's claim that the infringement by that regulation of his fundamental right to respect for property entailed a breach of the principle of proportionality was well founded.

41. The General Court therefore annulled the contested regulation in so far as it concerned Mr Kadi.

12 — Case T-256/07 [2008] ECR II-3019.

13 — See paragraphs 185 to 187 of the judgment under appeal.

14 — See paragraph 188 of the judgment under appeal.

42. It should be pointed out that on 5 October 2012 the Sanctions Committee decided to delist Mr Kadi after considering his delisting request and the report produced by the Ombudsperson. Mr Kadi's name was therefore deleted from Annex I to Regulation No 881/2002.[15] That deletion, which took place after the present appeals were lodged, does not, in my view, remove the interest in bringing proceedings on the part of the Commission, the Council and the United Kingdom or that of Mr Kadi in the context of his application for annulment.[16]

43. It is now necessary to assess the reasoning adopted by the General Court, examining in turn three issues, namely the absence of immunity from jurisdiction of the contested regulation, the extent and intensity of judicial review in the context of the present cases and, lastly, the protected content of the fundamental rights invoked in this case by Mr Kadi.

IV – The absence of immunity from jurisdiction of the contested regulation

44. This first ground is put forward by the Council as its main ground of appeal. The Council, supported by the Kingdom of Spain, Ireland and the Italian Republic, complains that the General Court erred in law by refusing, in particular in paragraph 126 of the judgment under appeal, in line with the judgment of the Court of Justice in *Kadi*, to afford the contested regulation immunity from jurisdiction.

45. The Council and Ireland formally request this Court to reconsider the principles set out in that regard in its judgment in *Kadi*. Ireland contends that the issue of the contested regulation not enjoying immunity from jurisdiction has not been finally decided, since neither that regulation nor the procedure followed by its author prior to its adoption are the same as those involved in the case culminating in the judgment of the Court of Justice in *Kadi*. The Council and Ireland add that there have been instances where this Court has departed from the principles set out in its previous judgments.[17]

46. In my view, the Court should not alter its refusal, in its judgment in *Kadi*, to afford an EU act such as the contested regulation immunity from jurisdiction.

47. I would point out that the policy of refusing to afford immunity from jurisdiction to EU acts giving effect to restrictive measures decided at international level is not an isolated one in the case-law of the Court, which has confirmed it in *Hassan and Ayadi* v *Council and Commission*[18] and *Bank Melli Iran* v *Council*.[19]

48. The Court thus held in paragraph 105 of the latter judgment, citing the judgment of the Court of Justice in *Kadi*, that 'without the primacy of a Security Council resolution at the international level thereby being called into question, the requirement that the Community institutions should pay due regard to the institutions of the United Nations could not result in their abstaining from reviewing the lawfulness of Community measures in the light of the fundamental rights forming an integral part of the general principles of Community law'.

15 — See Commission Implementing Regulation (EU) No 933/2012 of 11 October 2012 amending for the 180th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al-Qaeda network (OJ 2012 L 278, p. 11).

16 — With regard to the continuing interest in bringing proceedings after removal from the list, see my Opinion in Case C-239/12 P *Abdulrahim* v *Council and Commission*, pending before the Court.

17 — See, for example, Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16.

18 — Joined Cases C-399/06 P and C-403/06 P [2009] ECR I-11393, paragraphs 69 to 75.

19 — Case C-548/09 P [2011] ECR I-11381, paragraphs 100 to 103 and 105.

49. As regards the merits of this policy, I cannot see any reason to take the view that the EU judicature should suspend its function where it is asked to rule on the lawfulness of a regulation such as the one at issue in the present cases. I therefore endorse the many arguments put forward by the Court in its judgment in *Kadi* to justify its refusal to afford immunity from jurisdiction to regulations which give effect within the European Union to restrictive measures adopted at United Nations level, such as the freezing of the funds in question. Those arguments essentially relate to the 'constitutional' guarantee embodied, in a Union based on the rule of law, by the judicial review of the conformity of any EU act, including an act which gives effect to an act of international law, with the fundamental rights enshrined in EU law, to the compatibility of such review with the principles governing the relationship between the international legal order under the United Nations and the EU legal order, and the lack of a foundation, in the treaties on which the European Union is based, for immunity from jurisdiction of acts such as the contested regulation.

50. In short, the Court took the view that, even where the EU institutions have a limited freedom of action in giving effect to international law, they are required to respect fundamental rights. It could only confirm its capacity to review respect for the fundamental rights of persons on the Sanctions Committee's list, whilst acknowledging that in certain cases fundamental rights can be infringed where the institutions of the Union give effect to international law. Any other solution would have been in sharp contrast with the Court's settled case-law, which seeks to ensure general protection of fundamental rights where an EU measure is under consideration by it.

51. As is shown by the other pleas raised in the present appeals, the subject-matter of the debate is no longer whether judicial review is possible but the conditions for that review. By taking account of the context in which Mr Kadi's assets were frozen in order to modulate the review by the EU judicature it is possible to defuse, to a large extent, the criticisms which have sometimes been levelled at the position of principle taken by the Court in its judgment in *Kadi*.

52. The respect which the European Union must pay to the binding rules of international law does not therefore have to be reflected in immunity from jurisdiction for the contested act but in an adaptation of the judicial review conducted. Consequently, I consider that the Court's confirmation of its role in the protection of the fundamental rights of persons on the Sanctions Committee's list must be subject to the clarifications that are necessary as regards the extent and the intensity of the review to be conducted by the EU judicature of the EU acts giving effect to those lists.

V – The extent and the intensity of the judicial review

A – *The errors in law committed by the General Court in defining the applicable standard of review*

53. Like the Commission, the Council, the United Kingdom and all the intervening governments, I consider that the General Court committed several errors in law in defining the characteristics and the standard of review which the EU judicature should perform in the context of restrictive measures such as the freezing of Mr Kadi's assets.

54. In the judgment under appeal, the General Court rejected the view taken by the Commission, the Council and the intervening governments which advocated limiting the judicial review of EU acts transposing within the Union the list of persons and entities identified by the Sanctions Committee whose assets must be frozen. Those parties essentially called on the General Court not to substitute its own assessment for that of the Sanctions Committee. More precisely, the Commission took the view that the General Court should merely consider, first, whether the applicant was effectively given the right to be heard and, second, whether the Commission's assessment of the applicant's comments appears to be unreasonable or vitiated by a manifest error.

55. The General Court held that if the review were limited in that way 'there would be no effective judicial review of the kind required by the Court of Justice in *Kadi*, but rather a simulacrum thereof'. It added that '[t]hat would amount, in fact, to following the same approach as that taken by this Court in its own judgment in *Kadi*'. [20]

56. That initial assessment by the General Court, which formed the basis for the rest of its reasoning, seems to me to be fundamentally incorrect. The underlying assumption is that the Court took a clear position in its judgment in *Kadi* in favour of an intensive judicial review of the justification for listing Mr Kadi. The view taken by the General Court is also incorrect in so far as it treats a limited judicial review as equivalent to no review.

57. Later on in its judgment, the General Court clarified its reasoning, stating that 'the review carried out by the Community judicature of Community measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them'. [21] The General Court also took the view that 'the Court of Justice intended that its review, "in principle [a] full review", should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in the measure are based'. [22] I consider that, in doing so, the General Court made the judgment of the Court of Justice in *Kadi* say something that it does not say.

58. To understand properly the significance of the Court's reference to what it termed, 'in principle [a] full review', [23] of EU acts which are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, it should be borne in mind that, in using that wording, the Court sought to respond to the view put forward by the General Court in its judgment in *Kadi I*, which consisted in excluding any review of such EU acts in the light of fundamental rights protected by EU law.

59. The Court's use of the expression, 'in principle [a] full review', is therefore intended to emphasise the fact that the judicial review extends to all EU acts, whether or not they are adopted pursuant to a rule of international law, and that the review concerns both the external lawfulness of those acts and their internal lawfulness in the light of fundamental rights protected by EU law. On the basis of that statement of principle, this Court rejected the General Court's position that the contested regulation had to 'enjoy immunity from jurisdiction so far as concerns its internal lawfulness save with regard to its compatibility with the norms of *jus cogens*'. [24]

60. Whilst one might therefore infer from this Court's use of the expression, 'in principle [a] full review' an indication as to the extent of the judicial review of the contested regulation which it intends to conduct, it is, in my view, too much to state that, in using that wording, the Court has taken a clear position on the level of intensity of that review. In its judgment in *Kadi*, the Court did not take an explicit stance in favour of an intensive review of the justification for listing Mr Kadi, which would require a rigorous examination of the evidence and information on which the assessment by the Sanctions Committee was based.

61. The expression 'in principle [a] full review' and, more specifically, the use of the words 'in principle' ('*en principe*') where the Court of Justice has placed them, appears to suggest an interpretation which is precisely the opposite of the one adopted by the General Court. If the Court of Justice had wished to express the idea that, from the point of view of its intensity, its review had to be

20 — Paragraph 123 of the judgment under appeal.

21 — Paragraph 129 of the judgment under appeal.

22 — Paragraph 135 of the judgment under appeal.

23 — Judgment of the Court of Justice in *Kadi*, paragraph 326. The Court also mentions the requirement of an 'examination', in principle a full examination, in paragraph 330 of its judgment.

24 — Ibid., paragraph 327.

full, without any exceptions, the use of the words 'in principle' was pointless. If it had wished to stress that it intended to establish an absolute principle, it should have used the expression 'on principle the full review' ('*par principe complet*'). The true position is that, in three words [in French], the Court expressed clearly and concisely the idea that its review, however broad it is, is full only in principle and that there are therefore possible exceptions. If there is an area in which an exception is appropriate, it is, for the reasons set out above, in the area of the fight against terrorism, which includes prevention, seen from the perspective of global coordination.

62. Whilst this Court has certainly accepted the principle of a review of the internal lawfulness of EU acts which are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, it has not specified the conditions for such a review. In this regard, contrary to the claim made by the General Court in paragraph 133 of the judgment under appeal, the statement by the Court of Justice in paragraph 336 of its judgment in *Kadi*, that it must be possible to apply judicial review to the lawfulness of the grounds on which the contested EU measure is founded does not imply an intensive review by it of the justification for that act on the basis of the evidence in support of the factual and legal grounds cited.

63. It is also wrong, in my view, to take the view adopted by the General Court in paragraphs 138 to 147 of the judgment under appeal that, in its judgment in *Kadi*, the Court of Justice 'approved and endorsed the standard and intensity of the review as carried out by the General Court in *OMPI*'. The judgment of the Court of Justice in *Kadi* does not make any reference to that judgment. Furthermore, the reasoning by the General Court in favour of harmonising the standards of judicial review in the two parts of the proceedings concerning asset freezing measures appears to be inconsistent with the finding made by the General Court itself of 'marked procedural differences between the two Community regimes used for the freezing of funds'. [25]

64. Moreover, in substance, at the very least on account of the difference in the nature of the two asset freezing regimes, I do not think that the standard of review established by the General Court in the case-law following the judgment in *OMPI* should be applied in the context of the listing regime decided by the Sanctions Committee. According to that case-law, [26] although the General Court recognises that the competent EU institution possesses some latitude, 'that does not mean that [the General Court] is not to review the interpretation made by that institution of the relevant facts'. According to the General Court, the EU judicature 'must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it'. The General Court stated, however, that 'it is not its task to substitute its own assessment of what is appropriate for that of the competent Community institution'.

65. The standard of review thus outlined by the General Court is characterised by the fact that 'the judicial review of the lawfulness of a Community decision to freeze funds extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based'. [27]

25 — See paragraph 185 of the judgment under appeal.

26 — See paragraph 142 of the judgment under appeal.

27 — See paragraph 143 of the judgment under appeal.

66. Even though I shall not be examining here the relevance of such a standard of review in connection with the regime of autonomous asset freezing lists, it should be noted that the application to the fight against terrorism of the case-law according to which complex economic assessments may give rise to a relatively thorough review by the EU judicature [28] is far from obvious, in my view. Should intelligence analyses and sources be subject to the EU courts? Furthermore, to adopt such a standard of review would, it seems, be to forget that inclusion on an autonomous list is based largely on the assessment made by the competent national authorities of the existence, the reliability and the sufficiency of evidence or serious and credible clues of the involvement of the person concerned in terrorist activities. [29] The question would therefore have to be raised whether, in a system based largely on the confidence which the EU institutions place in the evaluation conducted by the competent national authorities of the seriousness of the evidence or clues to support a freezing measure, an intensive review of that evidence by the EU judicature is in fact appropriate.

67. Whatever the case, as regards the implementation of restrictive measures decided by the Sanctions Committee, there are several reasons against a judicial review as thorough as that undertaken by the General Court in the judgment under appeal, with reference to its judgment in *OMPI*. Those reasons relate to the preventative nature of the measures in question, the international context of the contested act, the need to balance the requirements of combating terrorism and the requirements of protection of fundamental rights, the political nature of the assessments made by the Sanctions Committee in deciding to list a person or an entity, and the improvements in the procedure before that body in recent years and, in particular, since the judgment of the Court of Justice in *Kadi*. I shall examine these arguments in turn.

68. First of all, it should be borne in mind that this Court has ruled, consistently and even recently, that freezing measures constitute temporary precautionary measures which do not deprive the persons concerned of their property. [30] The funds are therefore frozen as a precautionary measure, but have not been confiscated. Such measures do not constitute criminal sanctions. Nor, likewise, do they imply any accusation of a criminal nature. [31] They are intended to prevent new terrorist acts being committed and the significant repercussions they can have on the designated persons and entities are inherent in that preventative function. The financing of terrorism employs such diffuse, complicated and concealed channels that its prevention requires action to be taken at a very early stage, very peripheral to any specific criminal activity. In fact, prevention must seek to paralyse an entire set of networks, with all that the term means. The existence of such restrictive measures thus acts as a deterrent on possible suppliers of funds, who know that they may suffer very serious consequences if they support terrorist organisations. Even though their duration may be long (why should prevention be any shorter than the threat?), the important point is that the measure and its duration can be subject to a judicial review once again tailored to the specific character of the measure. Furthermore, it should be noted that measures of this kind may be limited in time, as is shown, moreover, by the case of Mr Kadi. Accordingly, the General Court erred in law in relying, in paragraphs 148 to 151 of the judgment under appeal, on a possible questioning of the preventative nature of freezing measures in order to advocate an intensive judicial review of such measures.

28 — See, in this regard, the reference made by the General Court in paragraph 142 of the judgment under appeal to this Court's judgment in Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 57 and the case-law cited. According to that case-law, the existence of a margin of discretion with regard to economic matters does not rule out 'an in-depth review of the law and of the facts'. See Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraphs 54 and 62. See also Case C-73/11 P *Frucona Košice* v *Commission* [2013] ECR, paragraphs 75 and 76.

29 — See Joined Cases C-539/10 P and C-550/10 P *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa* [2012] ECR, paragraph 69.

30 — *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraph 120.

31 — See, to this effect, judgment of the General Court of 2 September 2009 in Joined Cases T-37/07 and T-323/07 *El Morabit* v *Council*, paragraph 43.

69. Second, in its judgment in *Kadi*, the Court of Justice held that 'the European [Union] must respect international law in the exercise of its powers'.[32] It explained that '[o]bservance of the undertakings given in the context of the United Nations is required … in the sphere of the maintenance of international peace and security, when the [Union] gives effect … to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations'.[33] It also stressed the fact that, '[i]n the exercise of that latter power it is necessary for the [Union] to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them'.[34] Lastly, this Court stated that, in drawing up measures to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, the Union must 'take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation'.[35]

70. Whilst these observations cannot exclude the review by the EU judicature of the lawfulness of an EU act giving effect to a resolution of the Security Council, as the Court ruled in paragraph 299 of its judgment in *Kadi*, they do, in my view, strengthen the case for tailoring the judicial review conducted according to the international context of the Union's action.

71. That context is characterised here by the primary responsibility held by the Security Council for the maintenance of international peace and security, which, in principle, prevents the EU institutions and judicature from substituting their own assessment regarding the merits of restrictive measures decided within that body. An intensive judicial review, such as that advocated by the General Court in the judgment under appeal, cannot be performed without encroaching on the prerogatives of the Security Council in defining what constitutes a threat to international peace and security and the measures necessary to eradicate that threat. Since it is for the Sanctions Committee to decide to include a person or an entity on the list, the judicial review conducted within the European Union must be commensurate with the limited discretion enjoyed by the EU institutions. In other words, the primary responsibility held by the Security Council in the area in question must not be undermined and the Union must not be made a forum for appeals against or reviews of decisions taken by the Sanctions Committee.

72. Several provisions of the EU Treaty and of the FEU Treaty also militate in favour of limiting the judicial review in such a context.

73. Thus, under Article 3(5) TEU, the Union must 'contribute to peace, security, … the protection of human rights, … as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. Furthermore, under Article 21(1) TEU, the Union's action on the international scene is to be guided, inter alia, by 'respect for the principles of the United Nations Charter and international law'. That provision also stipulates that the Union must 'promote multilateral solutions to common problems, in particular in the framework of the United Nations'. Mention must also be made of Article 21(2)(c) TEU, which provides that the Union must work for a high degree of cooperation in all fields of international relations in order to 'preserve peace, prevent conflicts and strengthen international security, in accordance with the

32 — Paragraph 291 and the case-law cited.

33 — Paragraph 293.

34 — Paragraph 294.

35 — Paragraph 296.

purposes and principles of the United Nations Charter …'. Lastly, Declaration No 13 adds that '[the Conference] stresses that the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security'. [36]

74. These provisions lay the foundations for action by the Union in the field of the common foreign and security policy which has due regard to the action undertaken by the United Nations.

75. In defining the extent and the intensity of its review, the Court must take account of the origin and the context of the EU act it is reviewing. In this instance, the Court cannot ignore the fact that inclusion on the list is decided on the basis of a centralised, universal procedure at the level of the United Nations or that such a decision is based on a summary of reasons drawn up by the Sanctions Committee on the basis of information or evidence which is provided to it by the State(s) which made the listing request, in most cases in confidence, and which is not intended to be made available to the EU institutions.

76. Consequently, the most effective way, in my view, to balance the objective of combating terrorism and optimum protection of the fundamental rights of listed persons, in the spirit of the abovementioned Treaty provisions, is to develop cooperation between the Union and the United Nations in the area in question. It should be noted in this regard that Article 220(1) TFEU provides that '[t]he Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies …'. It follows that the affirmation of the autonomy of the EU legal order which, in the judgment of the Court of Justice in *Kadi*, justified the Court's refusal to afford immunity from jurisdiction to EU acts giving effect to decisions of the Sanctions Committee is not, in my view, antithetical to the development of closer cooperation with that body. Moreover, in its judgment in *Parliament* v *Council*, [37] the Court stated that Common Position 2002/402, Regulation No 881/2002 and Regulation No 1286/2009 [38] established a 'system of interaction between the Security Council and the Union'. [39]

77. Third, in its judgment in *Kadi*, after stating that 'overriding considerations to do with safety or the conduct of the international relations of the [Union] and of its Member States may militate against the communication of certain matters to the persons concerned', [40] the Court held that the EU judicature must contribute to the necessary balance between the fight against terrorism and protection of fundamental rights. It is thus its task 'to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice'. [41] In my view, one of these techniques is for the EU judicature to modulate the intensity of its review in the light of the context in which the contested EU act finds itself.

78. Fourth, as the Commission and the intervening governments emphasised at first instance, the power to decide that a person is associated with Al-Qaeda and that it is therefore necessary to freeze his assets in order to prevent him from financing or preparing acts of terrorism has been vested in the Security Council and it is difficult to conceive of a more important and more complex policy area which involves assessments concerning the protection of international security.

36 — Declaration annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

37 — Case C-130/10 [2012] ECR.

38 — Council Regulation of 22 December 2009 amending 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 (OJ 2009 L 346, p. 42).

39 — *Parliament* v *Council*, paragraph 71.

40 — Paragraph 342.

41 — Paragraph 344.

79. Asset freezing lists are part of a policy to prevent the international terrorist threat. The objective of measures freezing the funds of designated persons 'is to stop those persons having access to economic or financial resources, whatever their nature, that they could use to support their terrorist activities'. [42]

80. As regards the list drawn up by the Sanctions Committee, it is true that listing is based on evidence indicating how the conduct of a person or an entity has a link with a terrorist organisation and therefore constitutes a threat to international peace and security, but it also has regard more generally to strategic and geopolitical interests. In this regard, the choice of the persons to be listed must be modified as the threat changes and must reflect the desire to fight against one or another terrorist organisation located in one or another region of the world. [43] Listings are thus part of a political process which goes beyond any individual case. Despite its targeted nature which gives it a personal dimension, this asset freezing regime is, above all, a way to combat terrorist organisations, to weaken and even dismantle them. In my view, the political dimension of this process in which the Union has decided to participate calls for moderation in the performance of the judicial review by the EU judicature, that is to say, it must not, in principle, substitute its own assessment for that of the competent political authorities.

81. Fifth, the improvements in the procedure before the Sanctions Committee since 2008 also militate in favour of a limited review of the internal lawfulness of the contested regulation by the EU judicature. Whether account is taken, in the context of the present appeals, only of the changes made before the contested regulation or whether those which have been made since then are also to be examined, it is indisputable that the United Nations has embarked on a process of improvement in the listing and delisting procedures in terms of equity and respect for the rights of the defence, with the adoption by the Security Council of Resolutions 1822 (2008) of 30 June 2008, 1904 (2009) of 17 December 2009 and 1989 (2011) of 17 June 2011.

82. This process reflects a realisation within the United Nations that, despite confidentiality requirements, the listing and delisting procedures must now be implemented on the basis of a sufficient level of information, that the communication of that information to the person concerned must be encouraged, and that the statement of reasons must be adequately substantiated. The Ombudsperson, who performs her functions in complete independence and impartiality, plays a significant role in this regard. She gathers the information needed for her assessment from the States concerned, she initiates a dialogue with the petitioner on that basis, and she then makes her proposals to the Sanctions Committee as to whether or not it is necessary to keep a person or an entity on the list. In the delisting procedure, the Sanctions Committee thus takes its decisions on the basis of an independent and impartial evaluation of whether or not it is necessary to keep the persons concerned on the list. The rigorous examination carried out by the Ombudsperson requires that there be a strong justification for keeping a name on the list, that is to say, that there must be sufficient information to form a 'reasonable and credible' basis for listing. [44] In view of the important role played by the Ombudsperson in the decisions taken by the Sanctions Committee, I consider that the procedure before it can no longer be regarded as purely diplomatic and intergovernmental. It should also be noted that the periodic review of the list makes it possible, among other things, to ensure that information is regularly updated and that the statement of reasons is supplemented, where necessary. The improvements to the procedure before the Sanctions Committee thus help to guarantee that listings are based on sufficiently serious evidence and are evaluated on an on-going basis.

42 — Case C-340/08 *M and Others* [2010] ECR I-3913, paragraph 54. See also, to this effect, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraph 67.

43 — The complete revision of the list prescribed by Resolution 1822 (2008) of 30 June 2008 shows that the Security Council is alert to the need to ensure that its action to fight terrorism is modified as the threat changes.

44 — Twelfth report of the Analytical Support and Sanctions Implementation Monitoring Team, submitted pursuant to Resolution 1989 (2011) concerning Al-Qaeda and associated individuals and entities (paragraph 31).

83. As the Ombudsperson has acknowledged,[45] the judgment of the Court of Justice in *Kadi* led to the establishment of the Office of the Ombudsperson, which has made it possible to raise the quality of the list considerably. It would be paradoxical if the Court failed to take account of the improvements to which it has directly contributed, even though the Office of the Ombudsperson is not a judicial body.

84. The Ombudsperson has contributed to developing the transmission of information by States to the Sanctions Committee, which ensures that decisions are taken on the stronger foundations. It is only because of this dialogue that the list will be kept up-to-date and will continue to receive international support. This dynamic might be checked if the Sanctions Committee were forced, de facto, as implied by the solution outlined by the General Court in the judgment under appeal, to communicate to the EU institutions the evidence or information which States have agreed, not without difficulty, to transmit to it. Those States could be less inclined in future to transmit confidential information to the Sanctions Committee, which would have a detrimental effect on the quality and fairness of the listing and delisting procedures. Excessively high regional or national requirements could, in truth, prove to be counterproductive in balancing the fight against terrorism and the protection of the fundamental rights of listed persons.

85. I consider that an effective global fight against terrorism requires confidence and collaboration between the participating international, regional and national institutions, rather than mistrust. The mutual confidence which must exist between the European Union and the United Nations is justified by the fact that the values concerning respect for fundamental rights are shared by those two organisations.

86. This does not mean that carte blanche should be given to the decisions of the Sanctions Committee or that they should be applied automatically without any critical analysis, even where a manifest error is highlighted during the implementation process. However, in my view, since the listing and delisting procedures in the Sanctions Committee allow for a careful examination of whether listings are justified and whether or not it is necessary to maintain them, the EU courts should not adopt a standard of review which would require the EU institutions to examine systematically and intensively the merits of the decisions taken by the Sanctions Committee, on the basis of evidence or information available to that body, before giving effect to them. The improvements to the listing and delisting procedure should strengthen the confidence that the EU institutions and judicature have in the decisions taken by the Sanctions Committee.

87. In the light of the foregoing, I take the view that the listing and delisting procedures within the Sanctions Committee provide sufficient guarantees for the EU institutions to be able to presume that the decisions taken by that body are justified. The improvements to the procedure within the United Nations allow, in particular, the presumption to be made that the reasons cited in support of listing are based on sufficient evidence and information. The EU judicature should not therefore perform an intensive review of the justification for listing on the basis of the evidence and information on which the assessments made by the Sanctions Committee are based.

88. This presumption of justification can, however, be called into question during the implementation procedure within the Union, in the course of which the listed person may adduce new evidence or information. It is clear, in this regard, that the more the procedure within the United Nations is transparent and based on information which is sufficient in terms of its quantity and reliability, the less regional and national implementing institutions will be tempted to challenge the assessments made by the Sanctions Committee.

45 — Mexico Conference, 24 June 2011, Annex I to the rejoinder submitted by the French Republic.

89. The carrying out by the EU institutions of an implementation procedure that fully respects the rights of the defence allows them, despite the presumption of justification attached to the evaluation made by the Sanctions Committee, to ensure that a listing within the Union cannot be based on a statement of reasons which is shown to be manifestly inadequate or erroneous. That is why the implementation procedure must allow listed persons and entities to challenge the statement of reasons by adducing new evidence or information, where appropriate.

90. It is therefore essential that the EU judicature carries out a strict review of the way in which the implementation procedure was conducted by the Commission. The review of the internal lawfulness of the contested EU act should be limited to checking for manifest errors of assessment. I shall now consider in greater detail what should be, in my view, the extent and the intensity of the review performed by the EU judicature of EU acts giving effect to decisions of the Sanctions Committee.

B – *My proposal for the applicable standard of review*

91. To define the extent and the intensity of that review is to ask three questions: what are the benchmarks with reference to which the review is conducted? What is the court reviewing? How does it review?

92. The answer to the first two questions is clear from the judgment of the Court of Justice in *Kadi*. The EU judicature may be led to review the lawfulness of EU acts giving effect to decisions of the Sanctions Committee having regard to EU law as a whole and, in particular, having regard to the fundamental rights protected within the EU legal order. In addition, the judicial review may relate not only to the external lawfulness of the contested act, but also to its internal lawfulness. The extent of the judicial review is therefore particularly broad, such that it may be described as 'full'.

93. The answer to the third question raises the issue of the intensity of the judicial review.

94. As is clear from my earlier comments, I do not share the view taken by the General Court to the effect that, in essence, a judicial review of lesser intensity should be treated as equivalent to no review. The EU judicature has always modified its review in the light of the type of dispute before it, the context of the contested act and the nature of the underlying assessments, if, for example, they are complex or if they are of a political nature. [46]

95. In my view, the specific context of the contested regulation, as described above, justifies the aspects relating to the external lawfulness of the regulation being subject to a normal review, whilst the aspects relating to the internal lawfulness of that regulation should be the subject of a limited review.

1. A normal review of the external lawfulness of the contested regulation

96. With regard to the judgment of the Court of Justice in *Kadi*, one author has noted that reliance on procedural rights often permits indirect protection to be afforded to substantive rights. [47] Others have observed that if the reasons are not communicated, as in *Kadi I*, there is a presumption of inadequacy or excessiveness capable of justifying the annulment of the act. [48] These two comments rightly highlight the importance of the judicial review of the formal and procedural aspects of the contested act.

46 — For an in-depth analysis of the circumstances which lead the Union judicature to modify its judicial review, see Bouveresse, A., '*Le pouvoir discrétionnaire dans l'ordre juridique communautaire*', Bruylant, 2010, p. 309 et seq.

47 — Jacqué, J.-P., 'Conclusions', *Le droit à un procès équitable au sens du droit de l'Union européenne*, Anthemis, 2012, p. 325.

48 — Labayle, H. and Mehdi, R., 'Le contrôle juridictionnel de la lutte contre le terrorisme: Les black lists de l'Union dans le prétoire de la Cour de justice', *Revue trimestrielle de droit européen*, 2009, p. 259.

97. Performing a strict review of compliance with essential procedural requirements and of the existence of a procedure which respects the rights of the defence allows the EU judicature to adopt a more restrained stance where it is called upon to review the internal lawfulness of the contested act. This represents the traditional dialectical relationship between the review of external lawfulness and the review of internal lawfulness. In return for the recognition of discretion on the part of the competent political authorities and the resulting restriction of the review of substantive lawfulness, the EU judicature has reinforced the formal and procedural constraints to which it makes the adoption of the act subject. [49] The procedural and formal rules seek to guarantee the substantive lawfulness of the act by that quality to be assessed and, moreover, to facilitate the determination by its author of its appropriateness. By increasing procedural and formal constraints, the judicature thus attempts to reinforce the presumption of the internal lawfulness and appropriateness of the contested measure. [50] As a result, even if the judicature adopts a position of self-restraint as regards the justification for listing, the stringent procedural requirements it lays down guarantee a proper balance between the protection of fundamental rights and the fight against terrorism.

98. As regards the contested act, the EU judicature must rigorously review whether it was adopted in a procedure which respected the rights of the defence. In particular, it must ascertain whether the reasons for listing were communicated to the person concerned, whether those reasons are sufficient to permit him to defend himself properly, whether he was able to submit his comments to the Commission and whether the latter took them adequately into consideration.

99. In determining whether or not the reasons communicated to the listed person were adequate, reference should be made to the Court's settled case-law concerning the obligation to state reasons for EU acts. [51] In essence, the statement of reasons must enable the person concerned to ascertain the reasons for the measures and enable the court having jurisdiction to exercise its power of review. The statement of reasons must indicate the actual and specific reasons why the competent authority considered that a restrictive measure should be adopted in respect of the person concerned, in such a way that the statement allows the person concerned to understand the allegations made against him and to defend himself effectively by challenging the reasons relied on.

100. The requirement of a statement of reasons varies according to the nature of the act in question and the context in which it was adopted. That requirement must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons is adequate must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. [52]

101. In other words, the person concerned must be in a position, on the basis of the statement of reasons, to challenge the merits of the contested act. In particular, he must be able to challenge the truth of the claims made, their legal classification and, more broadly, the content of that act, in particular having regard to the principle of proportionality.

49 — Ritleng, D., 'Le juge communautaire de la légalité et le pouvoir discrétionnaire des institutions communautaires', *AJDA*, 1999, p. 645. This dialectical relationship was highlighted by the Court in Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14.

50 — Ritleng D., in *Contentieux de l'Union européenne*, 1, Annulation, Exception d'illégalité, Lamy, 2011, p. 218.

51 — See, inter alia, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraph 138 et seq., and Case C-417/11 P *Council* v *Bamba* [2012] ECR, paragraph 49 et seq.

52 — See, inter alia, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraphs 139 and 140, and *Council* v *Bamba*, paragraph 53.

102. In addition to verifying that an adequate statement of reasons has been communicated, the EU judicature must also ascertain whether the person concerned was able to submit his comments to the Commission and whether the Commission took them into consideration adequately. In that regard, the Commission must scrupulously examine those comments and any new information provided by the person concerned.

103. By contrast, in the context of the contested regulation, the requirement of a procedure which respects the rights of the defence does not extend so far as to require the EU institutions to obtain from the Sanctions Committee all the information or evidence which it has available and then to transmit it to the listed person so that he can submit his comments on its relevance.

104. Such communication of evidence is even less justified since, in my view, the EU judicature must limit the intensity of its review of the substantive lawfulness of the contested regulation.

2. A limited review of the internal lawfulness of the contested regulation

105. Whilst, as we have seen, the EU judicature must perform a rigorous review of whether the statement of reasons is adequate, it must, by contrast, conduct a limited review of the merits of the statement of reasons. In particular, in view of the fact that it is for the Sanctions Committee to evaluate the appropriateness of a listing, it is not part of its task to examine the evidence in support of the alleged conduct.

106. I consider that the different components of the substantive lawfulness of an EU act giving effect to decisions of the Sanctions Committee must therefore be limited to ascertaining the existence of a manifest error.

107. That is the case, first, with the review of the accuracy of the facts claimed. In the system of interaction established between the Union and the Sanctions Committee, it is for the Sanctions Committee [53] to obtain from the States concerned the information or evidence which makes it possible to establish the existence of facts to justify inclusion on the list. The EU institutions are not intended to have that information or that evidence. Since the substantive accuracy of the facts must be presumed to have been established by the Sanctions Committee, only a manifest error in the factual finding made is capable of leading to the annulment of the implementing act.

108. The same holds, second, for the review of the legal classification of the facts. In my view, the EU judicature must simply ascertain that the Commission did not commit a manifest error when it took the view, in the light of the statement of reasons, that the legal conditions permitting the adoption of a freezing measure were satisfied.

109. Lastly, with regard to the review of the content of the contested act, the review by the EU judicature must be limited, in view of the broad discretion enjoyed by the Sanctions Committee in determining whether inclusion on the list is appropriate, to ascertaining that the listing is not manifestly inappropriate or disproportionate in the light of the importance of the objective pursued, namely the fight against international terrorism.

110. In summary, the review performed by the EU judicature of the internal lawfulness of EU acts giving effect to decisions taken by the Sanctions Committee must not, in principle, call into question the merits of the listing, except in cases where the implementation procedure for that listing within the European Union has highlighted a flagrant error in the factual finding made, in the legal classification of the facts or in the assessment of the proportionality of the measure.

53 — With the assistance of the Ombudsperson and the Monitoring Team since Resolution 1904 (2009).

VI – The protected content of the fundamental rights relied on

111. I shall respond here to the third ground raised by the Commission, by the Council in the alternative, and by the United Kingdom, according to which the General Court committed errors in law in examining the pleas raised by Mr Kadi relating to an infringement of his rights of defence and of his right to effective judicial protection, and a breach of the principle of proportionality.

112. At first instance, the General Court confirmed the argument put forward by Mr Kadi attributing to the rights of the defence and the right to effective judicial protection a content such that the Commission was compelled to obtain and examine the underlying evidence before giving effect to a listing decided by the Sanctions Committee. The Commission thus became a review body for the decisions taken by the Sanctions Committee and the EU judicature an appellate body for those decisions.

113. I have already explained the reasons why the relationship between the Sanctions Committee and the European Union should not be seen in these terms, but on the basis of mutual confidence and effective collaboration.

114. With this in mind, I take the view that the references made by the Court of Justice in its judgment in *Kadi* to the need for listed persons to be communicated the 'evidence adduced against them' or 'used against them' relate only to the communication of a sufficiently detailed statement of reasons, but not to the communication of the evidence or information held by the Sanctions Committee in support of the listings decided by it. I would point out in this regard that the Court was careful to state, in paragraph 342 of its judgment in *Kadi*, that 'overriding considerations to do with safety or the conduct of the international relations of the [Union] and of its Member States may militate against the communication of certain matters to the persons concerned'.

115. In the system of interaction established between the Sanctions Committee and the Union, the protected content of the rights of defence and of the right to effective judicial protection thus resides primarily in communicating to the person concerned a statement of reasons indicating the actual and specific reasons why the competent political authority considered that a freezing measure should be taken and in rigorous consideration of the comments made by the listed person to challenge the relevance of those reasons. In my view, an examination by the Commission and by the EU judicature of the evidence and information held by the Sanctions Committee, and on the basis of which the Sanctions Committee drafted the statement of reasons, cannot be required on the grounds of the protection of the rights of the defence and of the right to effective judicial protection.

116. In the present case, it must be stated that, from reading the statement of reasons reproduced in paragraph 50 of the judgment under appeal, Mr Kadi was aware of the actual and specific reasons which, according to the Sanctions Committee, justified his inclusion on the list. The evidence adduced against Mr Kadi does not, contrary to the view taken by the General Court in paragraph 174 of the judgment under appeal, constitute 'imprecise allegations' but is sufficiently precise to allow the person concerned to contest the personal and professional relationships, in connection with Al-Qaeda and its financing, of which he is accused. The same applies, inter alia, to the allegation that the Muwafaq Foundation, of which Mr Kadi was a founding trustee and director, joined with Al-Qaeda, the role played by the Foundation in financing terrorist activities, the links which Mr Kadi maintained with Mr Al-Ayadi, who is alleged to have collaborated with Usama bin Laden, or the allegation that Usama bin Laden provided the working capital for Mr Kadi's companies in Albania.

117. Furthermore, contrary to the assessment made by the General Court in paragraph 171 of the judgment under appeal, there is nothing to indicate that the applicant's rights of defence were observed 'only in the most formal and superficial sense'. Mr Kadi has not shown how the Commission failed to carry out a sufficiently careful and close examination of the comments made by him after the

communication of the statement of reasons. [54]

118. It follows that the General Court erred in law in taking the view that the contested regulation was adopted in breach of the applicant's rights of defence.

119. In addition, the communication to Mr Kadi of the statement of reasons was such as to permit him to defend himself before the EU judicature and to permit the judicature to conduct a review of the lawfulness of the contested regulation, in accordance with the conditions described above.

120. The General Court therefore committed a further error in law in taking the view, in paragraphs 182 and 183 of the judgment under appeal, that, since it could not examine the evidence against the applicant, it was not able to undertake a review of the lawfulness of the contested regulation, which led it to find a breach of the applicant's right to effective judicial protection.

121. Lastly, the General Court committed a final error in law in taking the view that, in the light of its finding of a breach of the rights of defence and the right to effective judicial protection, the applicant's claim that the infringement by the contested regulation of his fundamental right to respect for property entailed a breach of the principle of proportionality was well founded.

122. On all these grounds, I propose that the Court set aside the judgment under appeal.

123. Since, in my view, the appeals are well founded, I consider that it is not only justified for the Court itself to give judgment on the action for annulment brought by Mr Kadi, having regard to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, but it is also expedient for it to do so in order to end the saga of the *Kadi* cases. As will be seen, most of the responses to the various pleas raised by Mr Kadi largely follow from my above observations.

VII – The action before the General Court

124. The applicant puts forward five grounds of appeal in support of his application for the annulment of the contested regulation. The first alleges lack of a sufficient legal basis. The second alleges breach of the rights of the defence and of the right to effective judicial protection. The third alleges breach of the obligation to state reasons laid down in Article 296 TFEU. The fourth alleges a manifest error of assessment of the facts. Last, the fifth plea alleges breach of the principle of proportionality.

125. With regard to the ground of appeal alleging lack of a sufficient legal basis, the applicant considers that the contested regulation was not adopted in accordance with the first indent of Article 7(1) of Regulation No 881/2002, in the version in force at the time. Under that provision, '[t]he Commission shall be empowered to … amend or supplement Annex I on the basis of determinations made by either the United Nations Security Council or the Sanctions Committee …'. Contrary to the claim made by the applicant, that provision does not make the adoption of the contested regulation subject to a fresh 'determination' leading to a new listing of Mr Kadi by the Sanctions Committee. The Commission complied with the judgment of the Court of Justice in *Kadi* and acted in accordance with the first indent of Article 7(1) of Regulation No 881/2002 by adding Mr Kadi's name to Annex I to that regulation, at the end of a second procedure which this time respected Mr Kadi's rights of defence. The first ground of appeal must therefore be rejected as unfounded.

54 — For a summary of the letter which the Commission sent Mr Kadi on 8 December 2008 in response to his comments, see point 27 of this Opinion.

126. As regards the second ground of appeal, alleging breach of the rights of the defence and of the right to effective judicial protection, and the third ground of appeal, alleging breach of the obligation to state reasons laid down in Article 296 TFEU, I refer to my above observations, from which it is clear that those grounds of appeal must be rejected as unfounded.

127. As for the fourth ground of appeal, alleging a manifest error of assessment of the facts, it should be noted, first of all, that, in my view, the discussions which took place both before the General Court and before the Court of Justice did not reveal a manifest error regarding the substantive accuracy of the facts as they are set out in the statement of reasons. Second, I do not believe that the Commission committed a manifest error of assessment in taking the view, following the Sanctions Committee on the basis of its statement of reasons and after exchanges with the applicant, that the facts established by the Sanctions Committee reflected the existence of a threat to international peace and security, which the applicant was not able to show had ceased since his initial inclusion on the list.

128. Lastly, with regard to the fifth ground of appeal, alleging a disproportionate breach of Mr Kadi's property rights, I have already stated that, contrary to the situation in the judgment of the Court of Justice in *Kadi*, such a breach cannot follow, in the present case, from an infringement of the rights of defence and the right to effective judicial protection, which has not occurred in my view. Furthermore, aside from the procedural aspect of the protection of property rights, the breach of those rights is also not established in substance. I refer in this regard to the Court's reasoning in paragraphs 354 to 366 of its judgment in *Kadi*, and, by analogy with the Court's ruling in connection with the autonomous fund freezing regime, to paragraphs 120 to 130 of its judgment in *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*.

VIII – Conclusion

129. In the light of all the foregoing considerations, I propose that the Court should:

— set aside the judgment of the General Court of the European Union in Case T-85/09 *Kadi* v *Commission* and

— dismiss the action brought by Mr Yassin Abdullah Kadi.