MATERIALS ON THE LAW OF THE EUROPEAN UNION

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FOOD SUPPLEMENTS II: STANDING TO CHALLENGE ACTS OF EU INSTITUTIONS (DIRECT AND INDIVIDUAL CONCERN)

INTRODUCTION
Remember that a person who wishes to challenge an act of an EU institution has the following options:

Art 230	**Damages Actions Art 288**	**Actions in national courts**
Challenge EU measure 2 month limitation period restricted standing direct concern individual concern	Remedy in damages re actions of Cty instns	challenge to validity using prelim. ref. Art 234 eg where MSt implements EU rules

[also Art 232
failure to act
Art 241
indirect challenge]

Article 230 limits the standing of natural and legal persons to bring a claim before the CFI:

Article 230 (ex Article 173)
The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-a-vis third parties.
It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers....
Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former...

The Lisbon Treaty would amend Art 230 so that it would provide:

Any natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

DIRECT CONCERN AND DIRECTIVES

The "direct and individual concern" requirement for standing for natural or legal persons[2] to bring an action under Art. 230 has been interpreted narrowly by the ECJ. A claimant must establish that it is both directly concerned and individually concerned by the act it wishes to challenge.

The Alliance for Natural Health challenged the Food Supplements Directive by means of a challenge to the UK's implementing regulations in the English courts because it did not have the option to challenge the Food Supplements Directive when it was adopted. Restricting standing to challenge the legality of EU legislative acts to circumstances where a person is **directly** concerned by the measure means that challenges to directives must be instituted in national courts. If the Lisbon Treaty is ratified it will change the Treaty language regulating standing, although there remains a reference to direct concern and standing would not exist to challenge measures which "entail implementing measures". Presumably this could refer to implementing measures promulgated by the Member States or by EU institutions. The combination of the new language in Art. 230 (which was supposed to liberalize the standing requirement) with the increased resort to regulations rather than directives as legislative instruments could have an impact on the ability of individuals and firms to challenge EU measures.

The materials which follow raise some questions about the nature of directives - instruments which by definition involve national implementing measures, although which often do not give the member States any real discretion in implementation. Why is it that the formal need for implementation means that a person who wishes to challenge a measure has to wait for national implementing measures ? Is this an implicit concern with ripeness?

Under Art. 249 directives are not supposed to impose obligations **directly** on individuals and firms - it is the national implementing provisions which are supposed to impose the obligations. And we saw in *Marshall* v *Southampton and South-West Hampshire Area Health Authority* that "a Directive may not of itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against such a person".[3] Thus the **direct concern** element of the standing requirement is not satisfied in relation to a directive.

However, although directives are not recognised as a source of obligations which are imposed on natural and legal persons, the existence of a directive that a Member State has not in fact implemented, or with which the Member State is not complying

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[2] People and entities that owe their existence to law, such as corporations.

[3] Materials packet no. 1, p. 73 at para 48.

may in fact have an impact on the legal position of a natural/legal person.[4]

One example of a directive which can produce such effects is in the area of free movement of goods. The EU has adopted a Directive which requires the Member States to notify draft technical regulations and standards to the Commission.[5] The Directive is designed to ensure that national rules setting technical standards for different products do not operate as barriers to the free movement of goods, and a wide range of draft rules is caught by the Directive's notification requirement. After notification the Commission can indicate to the Member State concerned that the draft rules would contravene community law or that the Commission plans to propose EU rules on the matters covered by the notified draft rules. In practice, the Commission has recognized that: "stakeholders consider that national technical rules still mean that they do not really have access to free trade in the EU".[6]

The ECJ held that national courts are required to refuse to apply any national regulations which have not been notified in accordance with the Technical Standards Directive.

In **Unilever Italia SpA v Central Food SpA**[7] Unilever had supplied a quantity of extra virgin olive oil to Central Food. Central Food refused to pay for the olive oil on the basis that it was not labelled in accordance with Italian rules. Italy only notified the labelling rules to the Commission after the Commission learned of their existence, and the Commission instructed Italy that it should postpone adoption of the rules for 12

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[4] Such cases are sometimes described as involving incidental effects. We therefore have direct effect; indirect effects (interpretation) and incidental effects.

[5] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204/37 (Jul. 21, 1998) http://eur-lex.europa.eu/LexUriServ/site/en/oj/1998/l_204/l_20419980721en00370048.pdf (replaces an earlier directive which was adopted in 1983 (Directive 83/189, referred to in the Unilever case). See also http://ec.europa.eu/enterprise/tris/index_en.htm for information about the application of the directive, including information about Member State notifications under the directive.

[6] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, the Internal Market for Goods: a Cornerstone of Europe's Competitiveness, 2 COM(2007) 35 (Feb. 14, 2007) http://ec.europa.eu/enterprise/regulation/internal_market_package/docs/com2007-35_internalmarket_en.pdf. The Commission introduced a New Internal Market Package for Goods, which includes a Regulation (rather than a directive) laying down procedures on the application of national technical rules on products lawfully marketed in another Member State. Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC, OJ No. L 218/21 (Aug. 13, 2008).

[7] http://www.bailii.org/eu/cases/EUECJ/2000/C44398.html .

months because the Commission planned to propose EU rules. Italy adopted the rules before the 12 month period expired. Unilever argued that under the circumstances Central Food could not invoke the Italian rules to avoid paying for the olive oil because the Italian rules were invalid under the Technical Standards Directive. Unilever and Central Food took their dispute to court in Italy, and on a preliminary reference the ECJ addressed the issue as follows:

31 The question from the national court seeks, in essence, to ascertain whether a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted during a period of postponement of adoption prescribed by Article 9 of Directive 83/189.
32 Unilever contends that the Court has confirmed, in its judgment in CIA Security, that a national technical regulation adopted in breach of the obligations imposed by Articles 8 and 9 of Directive 83/189 cannot in any circumstances be relied on against individuals.
33 The Commission submits, first, that in CIA Security, which concerned a dispute between individuals, the Court held that technical regulations adopted in breach of Directive 83/189 were inapplicable and that it follows from that judgment that such inapplicability may be invoked in a dispute between individuals. It adds that there is no reason why that consequence of non-compliance with Directive 83/189 should not also apply in proceedings for summary judgment such as the main proceedings in this case.
34 Second, the Commission contends, such inapplicability is mandatory both in the case of breach of the obligation of notification laid down in Article 8 of Directive 83/189 and in that of failure to observe the postponement periods prescribed in Article 9 of that directive. The adoption of a national technical regulation after notification of the draft but during the standstill period, without taking account of the observations or other reactions of the Commission and the other Member States, entails the risk of creating new hindrances to intra-Community trade wholly identical to that resulting from the adoption of a technical regulation in breach of the obligation of notification.
35 The Italian Government, supported by the Danish Government, observes that, whilst the Court has indeed attributed direct effect to certain provisions of directives in that individuals, in the absence of proper transposition, may rely on such provisions as against the defaulting Member State, it has also held that to extend such a precedent to relationships between individuals would be tantamount to granting the Community power to impose, with immediate effect, obligations on individuals, even though it has no such competence except where it is empowered to adopt regulations. Thus, it is clear from settled case-law of the Court that a directive cannot of itself impose obligations on individuals and cannot therefore be relied on as such against them. No derogation from that principle can be based on the judgment in CIA Security. The operative part of that judgment discloses no intention to reverse the principle according to which a directive cannot have direct effect in horizontal relations between individuals.
36 The Italian, Danish and Netherlands Governments also submit, in particular, that in CIA Security the Court merely held that failure to observe the obligation of notification laid down in Article 8 of Directive 83/189 gives rise to the inapplicability of the technical regulation concerned. Article 9 of Directive 83/189 differs substantially from Article 8. It is the effectiveness of the preventive control provided for in Article 8 of Directive 83/189 which gave rise to that interpretation. By contrast, inapplicability in the event of breach of the obligation to postpone adoption pursuant to Article 9 would not contribute to the effectiveness of control by the Commission. In such circumstances, the fact that a Member State has not observed a

procedural rule such as that laid down in Article 9 cannot have any effect other than that of allowing the Commission to bring infringement proceedings against the defaulting State.
37 In view of those submissions, it is appropriate, first, to consider whether the legal consequence of failure to fulfil the obligations imposed by Directive 83/189 is the same in relation both to the obligation to observe periods of postponement under Article 9 of Directive 83/189 and to the obligation of notification under Article 8 of Directive 83/189.
38 CIA Security related to a technical regulation which had not been notified in accordance with Article 8 of Directive 83/189. This explains why the operative part of that judgment confines itself to finding that technical regulations which have not been notified in accordance with that article are inapplicable.
39 However, in the statement of the grounds on which that finding was based, the Court also examined the obligations deriving from Article 9 of Directive 83/189. The Court's reasoning shows that, having regard to the objective of Directive 83/189 and to the wording of Article 9 thereof, those obligations must be treated in the same way as those deriving from Article 8 of the same directive.
40 Thus, in paragraph 40 of CIA Security, it was emphasised that Directive 83/189 is designed, by means of preventive control, to protect freedom of movement for goods, which is one of the foundations of the Community, and that, in order for such control to be effective, all draft technical regulations covered by the directive must be notified and, except in the case of those regulations whose urgency justifies an exception, their adoption or entry into force must be suspended during the periods laid down in Article 9.
41 Next, in paragraph 41 of that judgment, the Court held that notification and the period of postponement afford the Commission and the other Member States an opportunity to examine whether the draft regulations in question create obstacles to trade contrary to the EC Treaty or obstacles which were to be avoided through the adoption of common or harmonised measures and also to propose amendments to the national measures envisaged. That procedure also enables the Commission to propose or adopt Community rules regulating the matter dealt with by the envisaged measure.
42 In paragraph 50 of CIA Security the Court indicated that the aim of the directive was not simply to inform the Commission but is also, more generally, to eliminate or restrict obstacles to trade, to inform other States of technical regulations envisaged by a State, to give the Commission and the other Member States time to react and to propose amendments for lessening restrictions to the free movement of goods arising from the envisaged measure and to afford the Commission time to propose a harmonising directive.
43 The Court went on to hold that the wording of Articles 8 and 9 of Directive 83/189 was clear in that they provide a procedure for Community control of draft national regulations, the date of their entry into force being subject to the Commission's agreement or lack of opposition.
44 Although, in paragraph 48 of CIA Security, after reiterating that the aim of Directive 83/189 was to protect freedom of movement for goods by means of preventive control and that the obligation to notify was essential for achieving such Community control, the Court found that the effectiveness of such control would be that much greater if the directive were interpreted as meaning that breach of the obligation to notify constituted a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals, it follows from the considerations set out in paragraphs 40 to 43 of this judgment that breach of the obligations of postponement of adoption set out in Article 9 of Directive 83/189 also constitutes a substantial procedural defect such as to render technical regulations inapplicable.
45 It is therefore necessary to consider, secondly, whether the inapplicability of technical regulations adopted in breach of Article 9 of Directive 83/189 can be invoked in civil

proceedings between private individuals concerning contractual rights and obligations.
46 First, in civil proceedings of that nature, application of technical regulations adopted in breach of Article 9 of Directive 83/189 may have the effect of hindering the use or marketing of a product which does not conform to those regulations.
47 That is the case in the main proceedings, since application of the Italian rules is liable to hinder Unilever in marketing the extra virgin olive oil which it offers for sale.
48 Next, it must be borne in mind that, in CIA Security, the finding of inapplicability as a legal consequence of breach of the obligation of notification was made in response to a request for a preliminary ruling arising from proceedings between competing undertakings based on national provisions prohibiting unfair trading.
49 Thus, it follows from the case-law of the Court that the inapplicability of a technical regulation which has not been notified in accordance with Article 8 of Directive 83/189 can be invoked in proceedings between individuals for the reasons set out in paragraphs 40 to 43 of this judgment. The same applies to non-compliance with the obligations laid down by Article 9 of the same directive, and there is no reason, in that connection, to treat disputes between individuals relating to unfair competition, as in the CIA Security case, differently from disputes between individuals concerning contractual rights and obligations, as in the main proceedings.
50 Whilst it is true, as observed by the Italian and Danish Governments, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 20), that case-law does not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable.
51 In such circumstances, and unlike the case of non-transposition of directives with which the case-law cited by those two Governments is concerned, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.
52 In view of all the foregoing considerations, the answer to the question submitted must be that a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted during a period of postponement of adoption prescribed in Article 9 of Directive 83/189.

Question

Do you think that the decision here is consistent with the statement in Marshall? What is happening here is that the provisions of a directive are having an impact on the legal rights of individuals and firms by invalidating national rules that would otherwise apply to them. Although we can say that the directive is limiting the Member State's freedom of action, it has an incidental effect on the legal position of buyers and sellers of olive oil in Italy. The ECJ's decision means that the rights and obligations of Unilever and Central Food are different from their rights and obligations if the directive were not enforced in this way.

Note also that the provisions of this directive which had an impact on Unilever and Central Food did not require any implementing rules within the Member States. This means that the parties would not be able to challenge the directive by means of a challenge to any national implementing rules in national court.

In addition, the directive had an impact on the contracting parties long after the 2 month limitation period under Art. 230 had expired. And this directive would not in any case be regarded as being of individual concern to the parties at the time it was adopted (see below).

But, putting aside the individual concern point for the moment, should we think about some directives as directly concerning natural/legal persons under Art. 230? Should it make a difference whether the directive needs national implementing measures? What about a directive like the Food Supplements Directive which does not seem to require much adjustment to domestic conditions in the Member States?

Another category of cases which raises similar issues relates to planning permissions. EU rules require environmental impact assessments for planning permissions,[8] and where such assessments are not carried out it may be possible for interested people to challenge the grant of planning permission as being invalid. Thus a person who could have obtained valid planning permission if the directive did not exist is deprived of the planning permission because the directive does exist.[9] And this is the case in circumstances where the Member State has not implemented the directive properly.

In one case, **Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Cockle Fishing Case)**[10] nature protection associations in the Netherlands challenged authorizations for cockle fishing which had been granted by the Dutch authorities on the basis that assessments required by the Birds Directive and the Habitats Directive had not been carried out. The Advocate General explained why the associations were concerned as follows:

13. Those nature protection associations brought an action against those rejections before the Raad van State (Council of State). They claimed in essence that cockle fishing, as authorised by the decisions at issue in the main action, causes permanent damage to the geomorphology, flora and fauna of the Waddenzee's seabed. They also submitted that such fishing reduces the food stocks of birds which feed on shellfish, causing a decline in their populations, in particular for oyster-catchers and eider ducks. The Waddenvereniging and the Vogelbeschermings-vereniging also claimed that those decisions were contrary to the Habitats and Birds Directives...

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[8] Failure to require environmental impact assessments where required under European Community law would put the Member State at risk of having enforcement proceedings brought against it. See e.g., *Commission v Ireland*, Case C-183/05 at http://www.bailii.org/eu/cases/EUECJ/2007/C18305.html .

[9] An example of such a case is *R* v *Durham CC ex p Huddleston*.[2000] 1 WLR 1484.

[10] http://www.bailii.org/eu/cases/EUECJ/2004/C12702.html

The **Judgment of the ECJ** held that the national court should take account of the requirements of the Directive:

64. By its fifth question, the national court asks in essence whether, when a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of art 6(3) of the Habitats Directive, it may examine whether the limits of discretion of the competent national authorities laid down by that provision have been complied with even though it has not been transposed into the legal order of the member state concerned despite the expiry of the time limit laid down for that purpose.
65. It should be recalled that the obligation of a member state to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of art 249 EC ... and by the directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of member states including, for matters within their jurisdiction, the courts ...
66. As regards the right of an individual to rely on a directive and of the national court to take it into consideration, it would be incompatible with the binding effect attributed to a directive by art 249 EC to exclude, in principle, the possibility that the obligation which it imposes may be relied on by those concerned. In particular, where the Community authorities have, by directive, imposed on member states the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set by the directive... That also applies to ascertaining whether, failing transposition into national law of the relevant provision of the directive concerned, the national authority which has adopted the contested measure has kept within the limits of its discretion set by that provision.
67. More particularly, as regards the limits of discretion set by art 6(3) of the Habitats Directive, it follows from that provision that in a case such as that in the main action, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site, that being the case if there remains no reasonable scientific doubt as to the absence of such effects ...
68. Such a condition would therefore not be observed were the national authorities to authorise that activity in the face of uncertainty as to the absence of adverse effects for the site concerned.
69. It follows that art 6(3) of the Habitats Directive may be taken into account by the national court in determining whether a national authority which has granted an authorisation relating to a plan or project has kept within the limits of the discretion set by the provision in question.
70. Consequently, the answer to the fifth question must be that where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of art 6(3) of the Habitats Directive, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the member state concerned despite the expiry of the time limit laid down for that purpose.

Note that the **Opinion of Advocate General Kokott** was even more forthright in its

comments about this issue:[11]

128. As the court has consistently held, a provision of a directive is directly applicable on expiry of the period laid down for implementation where, as its subject matter is concerned, it is unconditional and sufficiently precise ...
129. Under art 23 of the Habitats Directive, Member States are required to implement it within two years of its notification. The directive was notified on 5 June 1992 and therefore the period laid down for its implementation expired on 5 June 1994...
130. Both provisions are unconditional, at least in respect of the Wadden Sea....
131. As regards the precision of the provisions, art 6(3) of the Habitats Directive lays down a body of rules made up of several stages which sets out clearly the requirements and legal consequences at each stage. Therefore, in the light of the authorising authorities' discretion set out above, this provision is capable of having direct effect.
132. Furthermore, art 6(2) of the Habitats Directive also contains clearly defined requirements, namely deterioration or significant disturbance of sites. There is, however, a margin of discretion as regards the appropriate steps to avoid such effects.
133. This discretion could preclude direct application... In the view of the Commission, a judgment of the court relating to art 4 of Council Directive (EEC) 75/442... as amended.. also militates in favour of this conclusion. This provision is couched in general terms in a similar way to art 6(2) of the Habitats Directive. The court ruled that art 4 of Directive 75/442 indicates a programme to be followed and sets out the objectives which the Member States must observe in their performance of other more specific obligations imposed on them by the directive. This provision must be regarded as defining the framework for the action to be taken by the Member States regarding the treatment of waste and not as requiring, in itself, the adoption of specific measures or a particular method of waste disposal ...
134. However, on closer examination, art 4 of Directive 75/442 and art 6(2) of the Habitats Directive are hardly comparable. Article 6(2) does not set out the objectives of the Habitats Directive, nor is this provision given concrete expression by other provisions.
135. The parallels with judgments in which the court acknowledged direct applicability in spite of the Member States' discretion are much stronger. For example, in the WWF case the court held that in national proceedings too individuals may plead that the national legislature has, in implementing a directive, exceeded the discretion granted to it by Community law... Otherwise the binding effect of the directive would be undermined.
136. The implementation of art 6(2) of the Habitats Directive does not necessarily involve legislative measures. However, the courts can establish a fortiori whether or not the discretion has been exceeded in selecting the appropriate measures. It is relatively easy to declare misuse of power in particular where no steps were taken to avoid imminent deterioration or significant disturbance or where no further measures were adopted despite the obvious ineffectiveness of the measures taken previously.
137. Therefore, art 6(2) of the Habitats Directive is directly applicable in so far as misuse of power is claimed...
138. It does not inevitably follow from the direct applicability of a provision of Community law that any individual may bring an action before the courts where there is failure to comply with it. In the present case the question arises as to whether and under what conditions individuals-or non-governmental organisations-may rely on provisions relating to the conservation of natural

[11] The opinion contains extensive citations to case law, most of which I have omitted.

habitats and species.
139. According to the established case law, wherever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the state...
140. Accordingly, the court draws a distinction between the directly applicable provisions of a directive in terms of rights of prohibition and grounds for entitlements. Whereas rights of prohibition may be invoked against any conflicting national provision, entitlements must be laid down in the relevant provision...
141. As regards the aspect of rights of prohibition, the possibility of invoking them stems from the action (contrary to Community law) which is to be prohibited. Where avenues of legal redress against such action exist under national law, all relevant directly applicable provisions of the directive must be complied with within that framework. Therefore, in this regard an individual may rely on art 6(2) and (3) of the Habitats Directive where avenues of legal redress against measures infringing the above-mentioned provisions are available to him...
142. In so far as directly applicable provisions of a directive establish entitlements, national law is subject to minimum standards of Community law as regards the availability of legal redress. It follows from the settled case law of the court that although, in the absence of Community rules governing the matter, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, such rules may not be less favourable than those governing similar domestic actions (the principle of equivalence) and may not render practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)...
143. However, there is no evidence to suggest that rights of an individual are established. The objective of protection laid down by art 6(2) and (3) of the Habitats Directive is to conserve habitats and species within areas which form part of Natura 2000. Unlike in the case of rules on the quality of the atmosphere or water... the protection of common natural heritage is of particular interest ...but not a right established for the benefit of individuals. The close interests of individuals can be promoted only indirectly, as a reflex so to speak.
144. The answer to the fifth question must therefore be that individuals may rely on art 6(2) and (3) of the Habitats Directive in so far as avenues of legal redress against measures infringing the above-mentioned provisions are available to them under national law....
145. In the present case the direct application of arts 6(2) and (3) of the Habitats Directive could be precluded by the disadvantages to cockle fishermen stated by PO Kokkelvisserij.
146. It is true that, according to case law, a directive which has not been transposed does give rise to obligations on individuals either in regard to other individuals or, a fortiori, in regard to the member state itself (See Pretore di Salo v Persons Unknown Case 14/86 [1987] ECR 2545 (para 19). See also Faccini Dori v Recreb Srl Case C-91/92 [1995] All ER (EC) 1, [1994] ECR I-3325 (para 20 et seq).). This case law is based on the fact that under art 249 EC ...a directive is binding upon each member state to which it is addressed but not upon the individual. It could be understood as meaning that any burden on citizens as a result of directly applicable directives must be excluded.
147. In this regard, it should be noted, firstly, that in any event the provisions of the relevant national law must, as far as possible, be interpreted in such a way that the purposes of Community law, and in particular of the relevant provisions of the directive, are achieved (See Marleasing SA v La Commercial Internacional de Alimentacion SA Case C-106/89 [1990] ECR

I-4135 (para 8), Wagner Miret v Fondo de Garantia Salarial Case C-334/92 [1993] ECR I-6911 (para 20) and the Faccini Dori case.... The Raad van State itself states that such an interpretation, in accordance with the directive, of art 12 of the Netherlands Natural Conservation law is possible. Moreover, any discretion which may exist must be exercised to this effect.

148. Secondly, on closer examination the case law does not necessarily preclude any burden on citizens resulting from directly applicable directives. The judgments rejecting direct applicability concerned, on the one hand, the application of directives in the civil law relationship between citizens (See the Faccini Dori case (para 48), cited in footnote 49, above, and Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) Case 152/84 [1986] 2 All ER 584, [1986] ECR 723.), and on the other, citizen's obligations towards the state, in particular in the field of criminal law (See Criminal proceedings against Kolpinghuis Nijmegen BV Case 80/86 [1987] ECR 3969 (para 6 et seq) and the Pretore di Salo case ...). Moreover, it can be inferred from ECSC v Acciaierie e Ferriere Busseni SpA (in liq) (Case C-221/88 [1990] ECR I-495 (para 23 et seq).), which concerned the status of a Community claim in bankruptcy proceedings, that directly applicable directives cannot undermine vested rights.

149. However, where an activity requires authorisation before it can be carried on, direct application of the provisions of a directive does not, as regards the decision on such authorisation, result in a direct obligation on individuals, nor would it encroach on vested rights. On the contrary, it merely precludes granting an advantage to an individual which would involve a state decision in his favour. This decision would be based on provisions of national law contrary to the requirements of the directive. Therefore, by adopting such a decision the member state would be failing to fulfil its obligations under the directive. However, member states may not adopt such a decision which grants an advantage to an individual but infringes Community law. Either the relevant provisions of national law underlying the grant of such advantage must be interpreted and applied in conformity with the directive, or-where interpretation in conformity with the directive is not possible-they must not be applied. At least as long as legal positions protected by Community law are not affected, such an indirect burden on citizens does not preclude state authorities from being bound by directly applicable directives.

150. This view can be based on other cases in which the court permitted an indirect burden on individuals by the direct application of directives (See Togel v Niederosterreichische Gebietskrankenkasse Case C-76/97 [1998] ECR I-5357 (para 52), Fratelli Costanzo SpA v Comune di Milano Case 103/88 [1989] ECR 1839 (para 28), both concerning public procurement; and R v Medicines Control Agency, ex p Smith & Nephew Pharmaceuticals Ltd Case C-201/94 (1996) 34 BMLR 141, [1996] ECR I-5819 (para 35 et seq), concerning the licensing of medicinal products. See also the opinion of Advocate General Leger in R (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions) Case C-201/02 [2005] All ER (EC) 323 (para 65 et seq), concerning the directive on environmental impact assessment.). The court recently confirmed this view when it ruled that mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the member state concerned....

151. In summary, the answer to the fifth question must therefore be that individuals may rely on art 6(3) of Directive 92/43 in so far as avenues of legal redress against measures infringing the above-mentioned provisions are available to them under national law. They may, under the same conditions, rely on art 6(2) of Directive 92/43 in so far as error of assessment is claimed. An indirect burden on citizens which does not encroach on legal positions protected by

Community law does not preclude the recognised (vertical) binding of state authorities to directly applicable directives.

These cases deal with circumstances in which natural/legal persons can enforce their rights under Directives, rather than with circumstances in which they can challenge Directives. However, if enforcement of rights under a Directive results in a change of the legal position of someone affected by the Directive, does it not seem reasonable that the affected person should be able to challenge the Directive ?

The Court of First Instance has said that the name given to a particular legal instrument was not necessarily determinative of whether it could be challenged under Art. 230 by natural/legal persons. In **European Environment Bureau et al v Commission** ,[12] a number of environmental and other organisations challenged a directive which allowed paraquat to be used under certain circumstances. The CFI issued an order rejecting a plea of inadmissibility relating to the nature of the contested act as a directive stating:

33 The Commission submits that in the fourth paragraph of Article 230 EC there is no mention of the possibility for a natural or legal person to challenge a directive. Accordingly, in asking the Community judicature to annul the contested act, the applicants are asking the Court to disregard the precise wording of the fourth paragraph of Article 230 EC. The action against the contested act is, in any event, inadmissible because directives are legislative in nature.
34 The Court finds that, contrary to the Commission's submission, although the fourth paragraph of Article 230 EC makes no express provision regarding the admissibility of actions brought by private persons for the annulment of a directive, that fact in itself is not sufficient for such actions to be declared inadmissible (see order in Case T-321/02 Vannieuwenhuyze-Morin v Parliament and Council [2003] II-1997, paragraph 21 and case-law cited). The Community institutions cannot exclude, merely by the choice of the form of the act in question, the judicial protection afforded to individuals under that provision of the Treaty (see order in Case T-84/01 Association contre l'heure d'été v Parliament and Council [2002] ECR II-99, paragraph 23 and case-law cited).
35 Likewise, the Commission is incorrect in maintaining that the legislative nature of the contested act precludes its being challenged through an action for annulment brought by individuals. It follows from the case-law that, in certain circumstances, even a legislative act applying to the generality of traders concerned may be of direct and individual concern to some of them (Case C-358/89 Extramet Industrie v Council [1991] ECR I-2501, paragraph 13; Case C-309/89 Codorniu v Council [1994] ECR I-1853, paragraph 19; Case C-451/98 Antillean Rice Mills v Council [2001] ECR I-8949, paragraph 46; Case T-43/98 Emesa Sugar v Council [2001] ECR II-3519, paragraph 47).
36 In those circumstances, it is appropriate to reject the plea of inadmissibility relating to the

[12] Case T-94/04 Order of 28 November 2005.

nature of the contested act.[13]

The ECJ does not always agree with the CFI as we will see later in the Jego-Quéré Case.

INDIVIDUAL CONCERN

A measure is of individual concern to a natural/legal person if it affects that person by reason of attributes peculiar to them or circumstances in which they are differentiated from all other persons. Being affected by a measure because you carry on a particular economic activity is not sufficient. For example, in **Plaumann v Commission, Case 25/62** the ECJ said:

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed . in the present case the applicant is affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of the addressee.

Very many of the EU's directives affect people and firms precisely because they carry on a particular economic activity. In some cases particular firms are affected in ways that others are not and may have standing under Art. 230 as a result. In the **Codorníu** case[14] the ECJ did find that a company that had been in the business of producing sparkling wine for very many years and for which it had a trademark "Gran Crémant de Codorníu" which had been recognised in Spain since 1924 had standing to challenge a Regulation which provided that the term "crémant" could only be applied to sparkling wines produced in France and Luxembourg:

18 As the Court has already held, the general applicability, and thus the legislative nature, of a measure is not called in question by the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time, as long as it is established that it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose ....
19 Although it is true that according to the criteria in the second paragraph of Article [230] of the Treaty the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them.

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[13] In the same order the CFI found that the applicants did not have standing to challenge the directive. See below at p 40.

[14] http://www.ena.lu/judgment-court-justice-codorniu-council-case-c-309-89-18-1994-020006996.html

20 Natural or legal persons may claim that a contested provision is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons (see..Plaumann v Commission..).
21 Codorniu registered the graphic trade mark "Gran Cremant de Codorniu" in Spain in 1924 and traditionally used that mark both before and after registration. By reserving the right to use the term "crémant" to French and Luxembourg producers, the contested provision prevents Codorniu from using its graphic trade mark.
22 It follows that Codorniu has established the existence of a situation which from the point of view of the contested provision differentiates it from all other traders.
23 It follows that the objection of inadmissibility put forward by the Council must be dismissed.

Codorníu also succeeded on the merits. At the time this case was decided some people speculated as to whether the decision was an indication that the ECJ's approach to defining standing was relaxing. In the years since the decision it has become clear that the ECJ does not wish to relax its interpretation of the "direct and individual concern" requirement.

Galileo Lebensmittel GmbH & Co v Commission[15] related to the Regulation on the .eu top level domain which sets out rules regulating the allocation of domain names within the .eu TLD.[16] Article 5(2) of the Regulation provided that:

Within three months of the entry into force of this Regulation, Member States may notify to the Commission and to the other Member States a limited list of broadly-recognised names with regard to geographical and/or geopolitical concepts which affect their political or territorial organisation that may either: (a) not be registered, or (b) be registered only under a second level domain according to the public policy rules. The Commission shall notify to the Registry without delay the list of notified names to which such criteria apply.

The Commission adopted implementing rules with respect to this issue in a 2004 Regulation, which provided in Article 9:

Registration of geographical and geopolitical concepts as domain names in accordance with Article 5(2)(b) of Regulation (EC) No 733/2002 may be provided for by a Member State that has notified the names. This may be done under any domain name that has been registered by that Member State
The Commission may ask the Registry to introduce domain names directly under the .eu TLD for use by the Community institutions and bodies. After the entry into force of this Regulation and not later than a week before the beginning of the phased registration period provided for in Chapter IV, the Commission shall notify the Registry of the names that are to be reserved

[15] Case C-483/07 P, Feb. 17, 2009, not yet available in English.

[16] Regulation No 733/2002 on the Implementation of the .eu Top Level Domain, OJ No. L 113/1, (Apr. 30, 2002) http://www.eurid.eu/files/ec20733_en.pdf .

and the bodies that represent the Community institutions and bodies in registering the names.[17]

The Commission asked to be able to register the domain name galileo.eu, as it has a program under the Galileo name:[18]

Galileo is Europe's initiative for a state-of-the-art global navigation satellite system, providing a highly accurate, global positioning service under civilian control. While providing autonomous navigation and positioning services, Galileo will at the same time be interoperable with GPS and GLONASS, the two other global satellite navigation systems. The fully deployed Galileo system will consist of 30 satellites and the associated ground infrastructure.

When Galileo Lebensmittel applied for registration of the same name it was told the domain name was reserved for the Commission. The firm challenged the decision by the Commission to reserve the domain name for itself, and, on the basis of its own trade mark rights, alleged a breach of Art 10 of Regulation 874/04 which provides that:

Holders of prior rights recognised or established by national and/or Community law and public bodies shall be eligible to apply to register domain names during a period of phased registration before general registration of. eu domain starts.
'Prior rights' shall be understood to include, inter alia, registered national and community trademarks, geographical indications or designations of origin, and, in as far as they are protected under national law in the Member-State where they are held: unregistered trademarks, trade names, business identifiers, company names, family names, and distinctive titles of protected literary and artistic works.

The CFI dismissed the challenge on the basis that Galileo Lebensmittel was not the addressee of the decision and was not individually concerned by it. On appeal to the ECJ the ECJ distinguished Codorniu on the basis that, unlike Codorniu, Galileo Lebensmittel would not be prevented from using its trademark . Economic harm to the firm was not enough to make it directly and individually concerned by the decision.

In the last few years the ECJ's position on how to interpret the direct and individual concern phrase sometimes diverged from those of Advocate General Jacobs (in particular) and the CFI. The following two cases, Unión de Pequeños Agricultores and Jégo Quéré, illustrate the different views on this issue.

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[17] Commission Regulation No 874/2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration, OJ No. L 162/40 (Apr. 30, 2004) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004R0874:20051011:EN:PDF.

[18] http://ec.europa.eu/transport/galileo/index_en.htm

Consider which approach to this issue is preferable? Why might the ECJ take a different view from the CFI?

Unión de Pequeños Agricultores v Council Case T- ; C-50/00

A trade association representing small Spanish agricultural interests challenged a regulation which applied to the market in olive oil.

Advocate General Jacobs' Opinion

3.The present appeal, which the Court has decided to hear in plenary session with a view to reconsidering its case-law on individual concern, raises an important question of principle: namely whether a natural or legal person (individual) who is directly but not individually concerned by the provisions of a regulation within the meaning of the fourth paragraph of Article 230 EC as interpreted in the case-law should none the less be granted locus standi where that individual would otherwise be denied effective judicial protection owing to the difficulty of challenging the regulation indirectly through proceedings in national courts or whether locus standi under the fourth paragraph of Article 230 EC falls to be determined independently of the availability of such an indirect challenge.

4. I will argue that locus standi must indeed be determined independently and that moreover the only solution which provides adequate judicial protection is to change the case-law on individual concern....

38. As is common ground in the present case, the case-law of the Court of Justice acknowledges the principle that an individual who considers himself wronged by a measure which deprives him of a right or advantage under Community law must have access to a remedy against that measure and be able to obtain complete judicial protection.

39. That principle is, as the Court has repeatedly stated, grounded in the constitutional traditions common to the Member States and in Articles 6 and 13 of the European Convention on Human Rights. Moreover, the Charter of fundamental rights of the European Union, while itself not legally binding, proclaims a generally recognised principle in stating in Article 47 that [e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.

40. In my view, proceedings before national courts are not, however, capable of guaranteeing that individuals seeking to challenge the validity of Community measures are granted fully effective judicial protection.

41. It may be recalled, first of all, that the national courts are not competent to declare measures of Community law invalid. In a case concerning the validity of a Community measure, the competence of the national court is limited to assessing whether the applicant's arguments raise sufficient doubts about the validity of the impugned measure to justify a request for a preliminary ruling from the Court of Justice. It seems to me, therefore, artificial to argue that the national courts are the correct forum for such cases. The strictly limited competence of national courts in cases concerning the validity of Community measures may be contrasted with the important role which they play in cases concerning the interpretation, application and enforcement of Community law. In such cases, the national courts may, as the Commission stated at the hearing, be described as the ordinary courts of Community law. That description is, however, not appropriate for cases which do not involve questions of interpretation, but raise only issues of the validity of Community measures, since in such cases the national courts do not have power to decide what is at issue.

42. Second, the principle of effective judicial protection requires that applicants have access to

a court which is competent to grant remedies capable of protecting them against the effects of unlawful measures. Access to the Court of Justice via Article 234 EC is however not a remedy available to individual applicants as a matter of right. National courts may refuse to refer questions, and although courts of last instance are obliged to refer under the third paragraph of Article 234 EC, appeals within the national judicial systems are liable to entail long delays which may themselves be incompatible with the principle of effective judicial protection and with the need for legal certainty. National courts - even at the highest level - might also err in their preliminary assessment of the validity of general Community measures and decline to refer questions of validity to the Court of Justice on that basis. Moreover, where a reference is made, it is in principle for the national court to formulate the questions to be answered by the Court of Justice. Individual applicants might thus find their claims redefined by the questions referred. Questions formulated by national courts might, for example, limit the range of Community measures which an applicant has sought to challenge or the grounds of invalidity on which he has sought to rely.

43. Third, it may be difficult, and in some cases perhaps impossible, for individual applicants to challenge Community measures which - as appears to be the case for the contested regulation - do not require any acts of implementation by national authorities. In that situation, there may be no measure which is capable of forming the basis of an action before national courts. The fact that an individual affected by a Community measure might, in some instances, be able to bring the validity of a Community measure before the national courts by violating the rules laid down by the measures and rely on the invalidity of those rules as a defence in criminal or civil proceedings directed against him does not offer the individual an adequate means of judicial protection. Individuals clearly cannot be required to breach the law in order to gain access to justice.

44. Finally, compared to a direct action before the Court of First Instance, proceedings before the national courts present serious disadvantages for individual applicants. Proceedings in the national courts, with the additional stage of a reference under Article 234 EC, are likely to involve substantial extra delays and costs. The potential for delay inherent in proceedings brought before domestic courts, with the possibility of appeals within the national system, makes it likely that interim measures will be necessary in many cases. However, although national courts have jurisdiction to suspend a national measure based on a Community measure or otherwise to grant interim relief pending a ruling from the Court of Justice, the exercise of that jurisdiction is subject to a number of conditions and is - despite the Court's attempts to provide guidance as to the application of those conditions - to some extent dependent on the discretion of national courts. In any event, interim measures awarded by a national court would be confined to the Member State in question, and applicants might therefore have to bring proceedings in more than one Member State. That would, given the possibility of conflicting decisions by courts in different Member States, prejudice the uniform application of Community law, and in extreme cases could totally subvert it. Proceedings before the Court of First Instance under Article 230 EC are generally more appropriate for determining issues of validity than reference proceedings under Article 234 EC

45. I consider, moreover, that proceedings before the Court of First Instance under Article 230 EC are generally more appropriate for determining issues of validity than reference proceedings under Article 234 EC.

46. The procedure is more appropriate because the institution which adopted the impugned measure is a party to the proceedings from beginning to end and because a direct action involves a full exchange of pleadings, as opposed to a single round of observations followed by oral observations before the Court. The availability of interim relief under Articles 242 and 243

EC, effective in all Member States, is also a major advantage for individual applicants and for the uniformity of Community law.
47. Moreover, where a direct action is brought, the public is informed of the existence of the action by means of a notice published in the Official Journal and third parties may, if they are able to establish a sufficient interest, intervene in accordance with Article 37 of the Statute of the Court. In reference proceedings interested individuals cannot submit observations under Article 20 of the Statute unless they have intervened in the action before the national court. That may be difficult, for although information about reference proceedings is published in the Official Journal, individuals may not be aware of actions in the national courts at a sufficiently early stage to intervene.
48. Of even greater importance is the point that it is manifestly desirable for reasons of legal certainty that challenges to the validity of Community acts be brought as soon as possible after their adoption. While direct actions must be brought within the time-limit of two months laid down in the fifth paragraph of Article 230 EC, the validity of Community measures may, in principle, be questioned before the national courts at any point in time. (35) The strict criteria for standing for individual applicants under the existing case-law on Article 230 EC make it necessary for such applicants to bring issues of validity before the Court via Article 234 EC, and may thus have the effect of reducing legal certainty.

Preliminary conclusion
49. I consider, for all of those reasons, that the case-law on the locus standi of individual applicants ...is incompatible with the principle of effective judicial protection. While review of Community measures through proceedings before national courts may be appropriate where a case raises mixed issues of interpretation and validity of Community law, proceedings before the Court of First Instance under the fourth paragraph of Article 230 EC are clearly more appropriate where a case concerns exclusively the validity of a Community measure. Since such cases will by definition raise questions of law, the possibility of an appeal on points of law provided by Article 225 EC would ensure that the Court of Justice could exercise effective ultimate control over the decisions adopted by the Court of First Instance.

The approach favoured by UPA
50. I do not agree with UPA, however, that it follows from that conclusion that an applicant who is not individually concerned within the meaning of the fourth paragraph of Article 230 EC, as that provision has hitherto been interpreted in the case-law, should be granted standing to challenge a regulation where an examination of the particular case reveals that the applicant would otherwise be denied effective judicial protection.
51. First, there is - as the Commission points out - no support for that suggestion in the wording of the fourth paragraph of Article 230 EC. The conditions for locus standi laid down by that provision are objectively defined (direct and individual concern) and make no reference to the availability or absence, in particular instances, of alternative remedies in national courts.

52. Second, the Treaty confers upon the Community judicature the task of ruling on the interpretation and validity of Community law; it is - as the Court of Justice has repeatedly stated - not competent to rule on the interpretation and validity of national law. For the Community judicature to examine, on a case-by-case basis, the existence in national law of procedures and remedies enabling individual applicants to challenge Community measures would in my view come perilously close to taking on a role not conferred by the Treaty. Moreover, the Community judicature is not well placed to carry out what may in some cases be a complex and

time-consuming inquiry into the details of national procedural law. That point is illustrated by the present case where the parties disagree on the applicant's position in Spanish law and where it is difficult, perhaps impossible, to determine on the basis of the information in the file and the arguments presented at the hearing whether the applicant has an alternative remedy in national law.

53. Third, to accept that locus standi under the fourth paragraph of Article 230 EC may depend on national law - which is likely to differ as between Member States and to develop over time - would inevitably lead to inequality and a loss of legal certainty in an area of law already marked by considerable complexity. It would in my view be unsatisfactory if, for example, an individual in Spain were permitted to challenge a regulation under the fourth paragraph of Article 230 EC whilst an individual in the United Kingdom, affected by the regulation in a similar way, was denied access to the Court of First Instance owing to the different standing rules which apply in the two Member States. Such an outcome would infringe the principle of equal treatment and could result in the lawfulness of the same measure being raised simultaneously in proceedings before the Court of First Instance and the Court of Justice.

The approach favoured by the Council and the Commission

54. The question, then, is how to ensure - within the limitations imposed by the wording and structure of the Treaty - that individual applicants are granted effective judicial protection. The Council and the Commission have suggested, essentially, that the solution is to change rules of national law which render it difficult, or impossible, to challenge Community measures in the national courts.

55. I cannot accept that suggestion either.

56. Access to the Court of Justice via Article 234 EC is - as I have explained above - not a remedy available to individual applicants as a matter of right. Individuals cannot, as a matter of Community law, control whether a reference is made, which measures are referred to the Court of Justice for review or what grounds of invalidity are raised in the questions put by the national court. Those features are inherent in the system of judicial cooperation laid down in Article 234 EC and they cannot be changed by modifications at the level of national procedural law. Nor would the approach favoured by the Council and the Commission resolve the other problems linked to the preliminary rulings procedure identified above: applicants would continue to face serious delays, problems of obtaining interim relief would persist and the advantages - in terms of procedure and legal certainty - of direct actions would not be realised.

57. The suggestion that effective judicial protection would be secured by a ruling to the effect that national laws which render it difficult or impossible to challenge Community measures are contrary to Community law might also underestimate the difficulties of changing the operation of national legal systems. It would, as UPA points out, be very difficult - both for individuals and for the Commission acting pursuant to Article 226 EC - to monitor and to enforce an obligation to grant individuals the possibility of challenging general Community acts before national courts.

58. In addition to those points, it may be noted that to secure access to justice for individual applicants in all of the Member States, the Court of Justice would have to rule, perhaps repeatedly, on issues which are inherently sensitive and which have hitherto been considered to fall squarely within the realm of national procedural autonomy.

Suggested solution: a new interpretation of the notion of individual concern

59. The key to the problem of judicial protection against unlawful Community acts lies therefore, in my view, in the notion of individual concern laid down in the fourth paragraph of Article 230 EC. There are no compelling reasons to read into that notion a requirement that an individual

applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee. On that reading, the greater the number of persons affected by a measure the less likely it is that judicial review under the fourth paragraph of Article 230 EC will be made available. The fact that a measure adversely affects a large number of individuals, causing wide-spread rather than limited harm, provides however to my mind a positive reason for accepting a direct challenge by one or more of those individuals.
60. In my opinion, it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.

Advantages of the suggested interpretation of the notion of individual concern
61. A development along those lines of the case-law on the interpretation of Article 230 EC would have several very substantial advantages.
62. First, if one rejects the solutions advanced by UPA and by the Council and Commission - and there are very strong reasons for doing so - it seems the only way to avoid what may in some cases be a total lack of judicial protection - a déni de justice.
63. Second, the suggested interpretation of the notion of individual concern would considerably improve judicial protection. By laying down a more generous test for standing for individual applicants than that adopted by the Court in the existing case-law, it would not only ensure that individual applicants who are directly and adversely affected by Community measures are never left without a judicial remedy; it would also allow issues of validity of general measures to be addressed in the context of the procedure which is best suited to resolving them, and in which effective interim relief is available.
64. Third, it would also have the great advantage of providing clarity to a body of case-law which has often, and rightly in my view, been criticised for its complexity and lack of coherence, and which may make it difficult for practitioners to advise in what court to take proceedings, or even lead them to take parallel proceedings in the national courts and the Court of First Instance.
65. Fourth, by ruling that individual applicants are individually concerned by general measures which affect them adversely, the Court of Justice would encourage the use of direct actions to resolve issues of validity, thus limiting the number of challenges raised via Article 234 EC. That would, as explained above, be beneficial for legal certainty and the uniform application of Community law. It may be noted in that regard that the TWD case-law - according to which an individual cannot challenge a measure via Article 234 EC where, although there was no doubt about his standing under the fourth paragraph of Article 230 EC, he omitted to take action within the time-limit laid down in the fifth paragraph of that Article - would, in my view, not normally extend to general measures. Individuals who were adversely affected by general measures would therefore not be precluded by that case-law from challenging such measures before national courts. None the less, if the notion of individual concern were interpreted in the way I have suggested, and standing for individuals accordingly liberalised, it may be expected that many challenges would be brought by way of direct action before the Court of First Instance.
66. A point of equal, or even greater, importance is that the interpretation of Article 230 EC which I propose would shift the emphasis of judicial review from questions of admissibility to questions of substance. While it may be accepted that the Community legislative process should be protected against undue judicial intervention, such protection can be more properly achieved by the application of substantive standards of judicial review which allow the institutions an appropriate margin of appreciation in the exercise of their powers than by the

application of strict rules on admissibility which have the effect of blindly excluding applicants without consideration of the merits of the arguments they put forward.

67. Finally, the suggested interpretation of the notion of individual concern would remove a number of anomalies in the Court's case-law on judicial review. The most important anomalies arise from the fact that the Court has adopted different approaches to the notion of individual concern and to other provisions of Article 173 of the EEC Treaty (now, after amendment, Article 230 EC).

68. Thus, the Court has taken a generous view of the types of acts which are susceptible to review. Under the first paragraph of Article 173 of the EEC Treaty, the Court was originally competent to review acts of the Council and the Commission other than recommendations and opinions. Article 189 of the EEC Treaty (now Article 249 EC) defined binding Community acts as regulations, directives and decisions. It might have been thought, on the basis of those provisions, that the Court was only competent to review regulations, directives and decisions adopted by the Council or the Commission. However, in ERTA the Court was willing to review the legality of Council proceedings regarding the negotiation and conclusion by the Member States of an agreement on the working conditions of the crews of vehicles engaged in international road transport on the ground, essentially, that the purpose of the procedure for judicial review laid down in Article 173 of the EEC Treaty - which is to ensure observance of the law in the interpretation and application of the Treaty - would not be fulfilled unless it was possible to challenge all measures, whatever their nature or form, which are intended to have legal effects. In Les Verts the Court was asked to review two measures, adopted by the European Parliament, on the reimbursement of expenses incurred by parties taking part in the 1984 elections. In declaring that action admissible, it held that while Article 173 refers only to acts of the Council and the Commission ... an interpretation of [that provision] which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary to both the spirit of the Treaty as expressed in Article 164 [now Article 220 EC] and to its system.

69. When deciding which institutions are entitled to bring proceedings for annulment under the Treaty, the Court has not adopted a strict reading of the Treaty text either. Prior to the entry into force of the Treaty on European Union, the first paragraph of Article 173 of the EEC Treaty provided that the Court had jurisdiction in actions brought by a Member State, the Council or the Commission. The absence of any reference to the European Parliament in that provision did not, however, prevent the Court from holding in Chernobyl that an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives, for while [t]he absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, ... it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties.

70. Similarly, when considering on what grounds the validity of Community measures adopted may be challenged, the Court held that although Article 173 of the EEC Treaty provided that the Court had jurisdiction in actions brought on grounds of infringement of this Treaty or of any rule of law relating to its application, the need for a complete and consistent review of legality require[d] that provision to be construed as not depriving the Court of jurisdiction to consider, in proceedings for the annulment of a measure based on a provision of the EEC Treaty, a submission concerning the infringement of a rule of the EAEC or ECSC Treaties.

71. The restrictive attitude towards individual applicants which the Court has adopted in the context of the fourth paragraph of Article 230 EC - and which it has, despite the extension of the powers of the Community by successive Treaty amendments, declined to reconsider - appears

difficult to justify in the light of the cases decided under the other paragraphs of Article 173 of the EEC Treaty, where the Court has adopted a generous and dynamic interpretation of the Treaty, or even a position contrary to the text, to ensure that the evolution in the powers of the Community institutions does not undermine the rule of law and the institutional balance.
72. A further anomaly in this area arises from the fact that under Community law there are no restrictions on the standing of individuals to bring actions for damages under Articles 235 EC and 288 EC. The class of individuals capable of seeking damages for loss caused by Community measures is thus unlimited. In the context of the strict standing rules applied under the fourth paragraph of Article 230 EC, that seems paradoxical since damages actions will often involve, or effectively involve, challenges to the legality of general Community measures. Thus the Court of First Instance already has jurisdiction to review the legality of general measures in claims for damages (or on a plea of illegality under Article 241 EC) at the suit of an unlimited class of individuals.

Objections to the suggested interpretation of the notion of individual concern
73. What, then, are the objections to the suggestion that an individual applicant is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests? According to the Council and the Commission a broader interpretation of the notion of individual concern than that adopted in the Court's existing case-law would be contrary to the fourth paragraph of Article 230 EC and result in a flood of additional challenges to Community acts.
74. I am not convinced by those arguments.
75. First, it may be acknowledged that the wording of Article 230 EC sets certain limits which must be respected. All individual applicants do not have standing to challenge all Community acts. However, I do not accept the proposition that the wording of the fourth paragraph of Article 230 EC excludes the Court from re-considering its case-law on individual concern. It is clear, and cannot be stressed too strongly, that the notion of individual concern is capable of carrying a number of different interpretations, and that when choosing between those interpretations the Court may take account of the purpose of Article 230 EC and the principle of effective judicial protection for individual applicants. In any event, the Court's case-law in other areas acknowledges that an evolutionary interpretation of Article 230 EC is needed in order to fill procedural gaps in the system of remedies laid down by the Treaty and ensure that the scope of judicial protection is extended in response to the growth in the powers of the Community institutions. While that case-law acknowledges that it may even be necessary to depart from the wording of the Treaty to provide effective judicial protection, the Court is not required to take such a step in the present case, since the interpretation I propose is wholly compatible with the wording of the Treaty.
76. Second, the wording of the second paragraph of Article 173 of the EEC Treaty (now the fourth paragraph of Article 230 EC) differs from, and is more restrictive than, the wording of Article 33 of the ECSC Treaty. It has been argued that that difference reflects the Treaty draftsmen's intention to break away from the liberal case-law on standing which had developed under the ECSC Treaty since its entry into force in 1952, and to impose strict limits on the scope of locus standi under the EEC Treaty, in order to prevent numerous challenges by individual applicants from undermining legislation laboriously adopted by unanimity in the Council of Ministers.
77. There was, in my view, never much force in that argument. to insulate potentially unlawful measures from judicial scrutiny can rarely, if ever, be justified on grounds of administrative or

legislative efficiency. That is true in particular where limitations on standing may lead to a complete denial of justice for particular individuals. Arguments drawn from a comparison of the ECSC and the EEC Treaties are, moreover, much less persuasive today than when the Court was first called upon to determine the meaning of individual concern. The second paragraph of Article 173 of the EEC Treaty has been renumbered but never amended substantively since the Treaty came into force on 1 January 1958. Inferences drawn from the historical background of a provision of that age cannot be allowed to freeze the interpretation of the notion of individual concern. That point is underlined by the fact that the reasons which, allegedly, motivated the Treaty draftsmen to limit individual standing under the EEC Treaty are, in any event, of limited relevance today. On the one hand, the European Community is now firmly established and its legislative process, to a large extent based on the adoption of measures by majority voting in the Council of Ministers and the European Parliament, is sufficiently robust to withstand judicial scrutiny at the instigation of individuals. On the other hand, Community law now affects the interests of individuals directly, frequently and deeply; there is therefore a correspondingly greater need for effective judicial protection against unlawful action.

78. It may also be noted that although the European Communities originate in a set of Treaties concluded by the Member States in the context of public international law, the Community legal order has developed in such a way that it would no longer be accurate to describe it as a system of intergovernmental cooperation, nor would it be appropriate to describe the Court of Justice as an international tribunal. The fact that individual applicants have traditionally not, or only exceptionally, been given standing to appear before international judicial bodies is therefore of no relevance for the interpretation to be given to the fourth paragraph of Article 230 EC in the present day.

79. Third, I am not convinced that a relaxation of the requirements for individual concern would result in a deluge of cases which would overwhelm the judicial machinery. There is no record of that having happened in those legal systems, inside and outside the European Union, which have in recent years progressively relaxed their requirements for standing.The instigation of proceedings by an individual pursuant to Article 230 EC is moreover subject to a number of conditions. In addition to individual concern, applicants are required to show direct concern, and actions must be brought within a time-limit of two months. While those conditions have played only a limited role in the case-law in the past, their importance would almost certainly increase in response to a relaxation of the requirement of individual concern. It may be thought that a relaxation of the requirements for standing would therefore result in an increase in the number of applications under the fourth paragraph of Article 230 EC which, though appreciable, would not be insuperable.

80. An increase in the case-load need not undermine the Community judicature's ability to carry out its task and deliver speedy justice. A large proportion of the increase would presumably consist of challenges by different individuals and associations to the same Community measures. Such cases could be dealt with, without any significant additional drain on the resources of the Court of First Instance, by joinder of cases or by selecting test cases. Where challenges were manifestly unfounded in substance, the Court of First Instance could, under Article 111 of its Rules of Procedure, dismiss them by reasoned order. Given the complexity of the present case-law on standing, and the detailed reasoning contained in the orders of the Court of First Instance in particular on issues of individual concern, it would hardly require considerable extra effort to dismiss such applications on substantive grounds.

81. Furthermore, the efficiency of the Courts' case-handling could, if necessary, be increased by procedural and jurisdictional reforms. Certain amendments to the Rules of Procedure of the Court of First Instance, aimed at expediting proceedings, have already been introduced. The

Treaty of Nice lays down a more flexible procedure for amendment of the Rules of Procedure of the Court of First Instance and the Court of Justice. More importantly, the amendments to the Treaty proposed by the Treaty of Nice also envisage the creation of judicial panels to determine proceedings brought in specific areas - such as staff complaints and, perhaps, trade marks. Moreover it will remain possible, if necessary, to increase the number of judges and staff at the Court of First Instance.

Is the time ripe for an evolution in the interpretation of the notion of individual concern?

82. At the hearing, the Council stressed that the case-law on individual concern was settled and that it would therefore be inappropriate to depart from it in the present case. It is true that the Court should, for reasons of legal certainty, depart from settled case-law only where there are compelling arguments in favour of, and the time is ripe for, such a step. In the preceding sections, I have argued that the case for reconsidering the case-law on individual concern is indeed compelling. There are four developments which, in my view, show that the time has come for the Court to respond to those arguments.

83. First, the Council's assertion that the case-law on individual concern is entirely consistent and settled is not correct. The Court has, in a number of important judgments decided over the past 10 years, relaxed the requirements for standing to some extent. In Extramet and Codorníu the Court accepted that general measures in the form of regulations may be challenged by individual applicants, since [t]he fact that an act is of general application does not prevent it from being of direct and individual concern to some of the traders concerned. Moreover, the Court has held that an individual will be granted standing to challenge a general measure not only where the measure affects only a closed class of individuals to which the applicant belongs, but also where by reason of a factual situation which differentiates the applicant from all other persons he may be regarded as individually concerned. Thus in Codorníu a Spanish producer of sparkling wines sought to challenge a provision of a regulation which reserved the use of the designation crémant for wines produced in certain areas of France and Luxembourg. That provision was capable of affecting the position of all producers of sparkling wines in the Community using, or desiring to use, the designation crémant. The Court found none the less that Codorníu registered the graphic trade mark Gran Cremant de Codorníu in Spain in 1924 and traditionally used that mark both before and after registration. By reserving the right to use the term crémant to French and Luxembourg producers, the contested provision prevents Codorníu from using its graphic trade mark, and it concluded that Codorníu had therefore established the existence of a situation which from the point of view of the contested provision differentiate[d] it from all other traders.

84. The gradual movement towards wider access for individuals under the fourth paragraph of Article 230 EC suggests a growing acceptance of the view that strict standing requirements for individual applicants are no longer acceptable. The fact that, in Greenpeace, the Court apparently left open the possibility that standing might be granted in particular situations where the case-law would otherwise entail a denial of justice may also be seen as a recognition of the problematic character of that case-law. A more explicit endorsement of that view is to be found in the contribution of the Court of Justice to the intergovernmental conference which led to the adoption of the Treaty of Amsterdam, where it stated that [i]t may be asked, however, whether the right to bring an action for annulment under Article 173 of the EC Treaty (and the corresponding provisions of the other Treaties), which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions.

85. Second, the case-law on standing for individual applicants is, as several commentators have pointed out, increasingly out of line with the administrative laws of the Member States. Thus French law, and systems based on it, have used the notion of an acte faisant grief, so that practically any person adversely affected by a measure has standing to challenge it; and the notion of intérêt pour agir has been construed broadly. In English law, the jurisdictional requirement of a sufficient interest for an applicant to apply for judicial review will rarely be an obstacle to access to the court.

86. In other areas, the basic principles of judicial review have been modelled on the laws of the Member States. Thus Community law effectively protects fundamental principles derived from the national laws - principles such as proportionality, equality, legitimate expectations, legal certainty and fundamental human rights. In relation to standing, however, the position of the individual is far more restricted than in many, if not all, national legal systems. This is a paradoxical situation, especially given the continuing concern about the lack of full democratic legitimacy of Community legislation, which exposes the Community to a risk of resistance by national courts which, it should not be forgotten, have repeatedly emphasised their resolve to ensure that developments in Community law do not undermine the judicial protection of individuals.

87. It might be objected that some systems of national law draw a distinction between legislation and administrative measures and allow only for judicial review of administrative measures at the initiative of individuals. Since general Community measures are analogous in their effects to legislation, review at the instigation of individuals is not required.

88. I do not accept that objection.

89. While it may be true that access to judicial review of legislation is generally subject to stricter conditions than review of administrative measures, the laws of the Member States do not in general exclude individuals from challenging legislation which violates constitutionally enshrined rights or fundamental principles of law. In certain Member States such as Austria, Belgium, Germany and Spain (and some of the States currently applying for membership of the European Union legislation may be challenged by individuals directly before constitutional courts. In other Member States, such as Denmark, Greece, Ireland, Portugal and Sweden, challenges to the lawfulness of legislation may be raised before, and upheld by, the ordinary courts.

90. The restrictions on access to judicial review of legislation which exist in the Member States are, moreover, based on two essential premisses: national laws generally establish a clear distinction between legislation and administrative measures and legislation is systematically adopted by more democratically legitimate procedures than administrative measures. By contrast, the Community treaties do not establish a clear hierarchy of norms, and while the EC Treaty draws a distinction between basic Community measures and implementing measures, the former are not systematically adopted by more democratically legitimate procedures than the latter. For example, a basic regulation adopted by the Council and the European Parliament may confer the task of adopting implementing measures upon the Council or the Commission. The choice of implementing authority may affect the procedures by which the implementing measures will be adopted and their democratic legitimacy. Moreover, while the European Parliament plays an increasingly important role in the Community legislative process, its powers vary with the area of the Treaty concerned.

91. Nor can it be argued, by analogy with the position in certain Member States where review of legislation is limited to the constitutional court, that review of general measures should be confined to the Court of Justice, to the exclusion of the Court of First Instance. The Court of First Instance already has jurisdiction to review general measures, both in actions for damages

and on a plea of illegality.
92. Moreover, in the preamble to the Decision establishing the Court of First Instance, the Community legislature stated that it is necessary, in order to maintain the quality and effectiveness of judicial review in the Community legal order, to enable the Court [of Justice] to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law, and that the task of the Court of First Instance was to improve the judicial protection of individual interests. It appears from those statements that the Community legislature envisaged a division of competence between the Court of First Instance and the Court of Justice: where the former would concentrate on reviewing the legality of Community measures at the suit of individuals, the latter would concentrate on ruling on issues of interpretation through the preliminary rulings procedure and on reviewing the legality of the judgments of the Court of First Instance, thus providing the ultimate control over the lawfulness of Community measures.
93. While the Court of Justice may have felt that the Decision establishing the Court of First Instance did not provide the means necessary to implement that vision fully, since it originally gave that Court jurisdiction in actions brought by individuals pursuant to the fourth paragraph of Article 230 EC only in matters related to competition law, the Community legislature has since then transferred competence from the Court of Justice to the Court of First Instance over all actions brought by individuals pursuant to the fourth paragraph of Article 230 EC. Moreover, the amendments proposed by the Treaty of Nice to the wording of Article 220 EC recognise the Court of First Instance as being not merely attached to the Court of Justice (Article 225 EC), but as being responsible together with the Court of Justice for the observance of the law in the interpretation and application of the Treaty.
94. The Treaty of Nice envisages, in the new Article 225 EC, that the Court of First Instance shall have jurisdiction to hear and determine at first instance all cases referred to in Articles 230, 232, 235, 236 and 238, with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice. Thus in principle the Court of First Instance will have jurisdiction for all actions for annulment, whether introduced by individuals, Member States or Community institutions. The role of the Court of First Instance as the primary court for review of legality, subject to the appellate jurisdiction of the Court of Justice, will thereby be significantly enhanced.
95. With a view to the implementation of those provisions the Court of Justice has proposed, in a recent working paper, that, of actions for annulment brought by a Member State, a Community institution, or the European Central Bank, only those brought against the Parliament or the Council, or against the Parliament and the Council jointly, should be reserved to the Court of Justice under the Statute. Those cases are to be reserved to the Court of Justice, under the Court's proposal, so as to preserve its quasi-constitutional role of reviewing the Community's basic legislative activities (l'activité normative de base). However, in order to avoid reversing the previous transfer to the Court of First Instance of actions brought by individuals and undertakings, the proposal is limited to actions brought by Member States, Community institutions and the European Central Bank.

96. In my view, whatever arrangements are made for the allocation between the Court of Justice and the Court of First Instance of actions brought by a Member State, a Community institution, or the European Central Bank, those arrangements cannot be allowed to affect the separate and overriding requirement that the individual should have the right to challenge all Community measures by which he is prejudiced. If, as seems to me appropriate, such challenges should be brought in the Court of First Instance, the quasi-constitutional role of the

Court of Justice will be preserved by its appellate jurisdiction. Indeed that role will increase if individuals are allowed to challenge general measures before the Court of First Instance, with a right of appeal before the Court of Justice.
97. A final development which, in my view, suggests the need to reconsider the case-law on individual concern is the Court's evolving case-law on the principle of effective protection of rights derived from Community law in national courts. While that principle was enunciated in 1986, in the case of Johnston, its implications have only gradually been spelt out in the Court's case-law in the subsequent period. It is now clear from the judgments in Factortame and Verholen that the principle of effective judicial protection may require national courts to review all national legislative measures, to grant interim relief and to grant individuals standing to bring proceedings, even where they would be unable to do so under national law.
98. Some commentators have contrasted the high standards which the Court's case-law thus imposes on national legal systems with the limited access for individuals to the Community Courts. While it may be too harsh to speak of double standards in that respect, it cannot be denied that the strict rules on standing under the fourth paragraph of Article 230 EC as currently interpreted by the Court, and the textual and historical arguments invoked by the Council and the Commission in order to justify them, seem increasingly untenable in the light of the Court's case-law on the principle of effective judicial protection.
99. Thus, the time is now ripe to reconsider the strict interpretation of the fourth paragraph of Article 230 EC which - by encouraging individual applicants to bring issues of validity before the Court of Justice via Article 234 EC - has the effect of removing cases from the court which was created for the purpose of dealing with them, and to improve the judicial protection of individual interests.

Conclusion
100. The case-law on the standing of individuals to bring proceedings before the Court of Justice (now before the Court of First Instance) has, over the years, given rise to a large volume of discussion, much of it very critical. It cannot be denied that the limited admissibility of actions by individuals is widely regarded as one of the least satisfactory aspects of the Community legal system. It is not merely the restriction on access which is criticised; it is also the complexity and apparent inconsistency which have resulted from attempts by the Court to allow access where the traditional approach would lead to a manifest denial of justice. Thus, one of the fullest and most authoritative recent studies refers to the blot on the landscape of Community law which the case-law on admissibility has become. While there may be doubts about the degree of criticism that can be levelled at the case-law, it is surely indisputable that access to the Court is one area above all where it is essential that the law itself should be clear, coherent and readily understandable.
101. In this Opinion I have argued that the Court should - rather than envisage, on the basis of Greenpeace, a further limited exception to its restrictive case-law on standing - instead re-consider that case-law and adopt a more satisfactory interpretation of the concept of individual concern.
102. It may be helpful to summarise the reasons for that view, as follows:

(1) The Court's fundamental assumption that the possibility for an individual applicant to trigger a reference for a preliminary ruling provides full and effective judicial protection against general measures is open to serious objections:
- under the preliminary ruling procedure the applicant has no right to decide whether a reference is made, which measures are referred for review or what grounds of invalidity are

raised and thus no right of access to the Court of Justice; on the other hand, the national court cannot itself grant the desired remedy to declare the general measure in issue invalid;
- there may be a denial of justice in cases where it is difficult or impossible for an applicant to challenge a general measure indirectly (e.g. where there are no challengeable implementing measures or where the applicant would have to break the law in order to be able to challenge ensuing sanctions);
- legal certainty pleads in favour of allowing a general measure to be reviewed as soon as possible and not only after implementing measures have been adopted;
- indirect challenges to general measures through references on validity under Article 234 EC present a number of procedural disadvantages in comparison to direct challenges under Article 230 EC before the Court of First Instance as regards for example the participation of the institution(s) which adopted the measure, the delays and costs involved, the award of interim measures or the possibility of third party intervention.
(2) Those objections cannot be overcome by granting standing by way of exception in those cases where an applicant has under national law no way of triggering a reference for a preliminary ruling on the validity of the contested measure. Such an approach
- has no basis in the wording of the Treaty;
- would inevitably oblige the Community Courts to interpret and apply rules of national law, a task for which they are neither well prepared nor even competent;
- would lead to inequality between operators from different Member States and to a further loss of legal certainty.
(3) Nor can those objections be overcome by postulating an obligation for the legal orders of the Member States to ensure that references on the validity of general Community measures are available in their legal systems. Such an approach would
- leave unresolved most of the problems of the current situation such as the absence of remedy as a matter of right, unnecessary delays and costs for the applicant or the award of interim measures;
- be difficult to monitor and enforce; and
- require far-reaching interference with national procedural autonomy.
(4) The only satisfactory solution is therefore to recognise that an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests. That solution has the following advantages:
- it resolves all the problems set out above: applicants are granted a true right of direct access to a court which can grant a remedy, cases of possible denial of justice are avoided, and judicial protection is improved in various ways;
- it also removes the anomaly under the current case-law that the greater the number of persons affected the less likely it is that effective judicial review is available;
- the increasingly complex and unpredictable rules on standing are replaced by a much simpler test which would shift the emphasis in cases before the Community Courts from purely formal questions of admissibility to questions of substance;
- such a re-interpretation is in line with the general tendency of the case-law to extend the scope of judicial protection in response to the growth of powers of the Community institutions (ERTA, Les Verts, Chernobyl);

(5) The objections to enlarging standing are unconvincing. In particular:
- the wording of Article 230 EC does not preclude it;
- to insulate potentially unlawful measures from judicial scrutiny cannot be justified on grounds of administrative or legislative efficiency: protection of the legislative process must be achieved

through appropriate substantive standards of review;
- the fears of over-loading the Court of First Instance seem exaggerated since the time-limit in Article 230(5) EC and the requirement of direct concern will prevent an insuperable increase of the case-load; there are procedural means to deal with a more limited increase of cases.
(6) The chief objection may be that the case-law has stood for many years. There are however a number of reasons why the time is now ripe for change. In particular:
- the case-law in many borderline cases is not stable, and has been in any event relaxed in recent years, with the result that decisions on admissibility have become increasingly complex and unpredictable;
- the case-law is increasingly out of line with more liberal developments in the laws of the Member States;
- the establishment of the Court of First Instance, and the progressive transfer to that Court of all actions brought by individuals, make it increasingly appropriate to enlarge the standing of individuals to challenge general measures;
- the Court's case-law on the principle of effective judicial protection in the national courts makes it increasingly difficult to justify narrow restrictions on standing before the Community Courts.

103. For all of those reasons I conclude that an individual should be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.

In the ECJ

32. As a preliminary point, it should be noted that the appellant has not challenged the finding of the Court of First Instance ...to the effect that the contested regulation is of general application. Nor has it challenged the finding...that the specific interests of the appellant were not affected by the contested regulation or the finding ...that its members are not affected by the contested regulation by reason of certain attributes which are peculiar to them or by reason of factual circumstances in which they are differentiated from all other persons.
33. In those circumstances, it is necessary to examine whether the appellant, as representative of the interests of its members, can none the less have standing, in conformity with the fourth paragraph of Article [230] of the Treaty, to bring an action for annulment of the contested regulation on the sole ground that, in the alleged absence of any legal remedy before the national courts, the right to effective judicial protection requires it.
34. It should be recalled that, according to the second and third paragraphs of Article [230] of the Treaty, the Court is to have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers or, when it is for the purpose of protecting their prerogatives, by the European Parliament, by the Court of Auditors and by the European Central Bank. Under the fourth paragraph of Article [230], [a]ny natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.
35. Thus, under Article [230] of the Treaty, a regulation, as a measure of general application, cannot be challenged by natural or legal persons other than the institutions, the European

Central Bank and the Member States ...
36.However, a measure of general application such as a regulation can, in certain circumstances, be of individual concern to certain natural or legal persons and is thus in the nature of a decision in their regard...That is so where the measure in question affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee ...
37. If that condition is not fulfilled, a natural or legal person does not, under any circumstances, have standing to bring an action for annulment of a regulation...
38. The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.
39. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms...
40. By Article [230] ..[241]... and [234] on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts... Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article [230] of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article [241] of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid ... to make a reference to the Court of Justice for a preliminary ruling on validity.
41. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.
42. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.
43. As the Advocate General has pointed out in paragraphs 50 to 53 of his Opinion, it is not acceptable to adopt an interpretation of the system of remedies, such as that favoured by the appellant, to the effect that a direct action for annulment before the Community Court will be available where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures.
44. Finally, it should be added that, according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually. Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually... such an interpretation

cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts.
45. While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States... to reform the system currently in force.
46. In the light of the foregoing, the Court finds that the Court of First Instance did not err in law when it declared the appellant's application inadmissible without examining whether, in the particular case, there was a remedy before a national court enabling the validity of the contested regulation to be examined.

Jégo-Quéré v Commission, Case T-177/01, CFI 2002,[19] Case C-263/02 P ECJ 2004[20]

In the CFI

A French fishing company operated in waters south of Ireland using 4 boats over 30m long and nets with an 80mm mesh which were banned by a Community regulation. The company challenged the validity of the regulation. The CFI recognised that the company would not have standing under Art. 230 on the basis of the settled case law, but suggested that there might be other relevant considerations:

38. Consequently, it follows that the applicant cannot be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC, on the basis of the criteria hitherto established by Community case-law.
39. However, the applicant asserts that, were its action to be dismissed as inadmissible, it would be denied any legal remedy enabling it to challenge the legality of the contested provisions. Since the regulation does not provide for the adoption of any implementing measures by the Member States, the applicant maintains that, in the present case, it would have no right of action before the national courts.
40. The Commission, on the other hand, takes the view that the applicant is not denied access to the courts, since it can bring an action for non-contractual liability pursuant to Article 235 EC and the second paragraph of Article 288 EC.
41. In that regard, it should be borne in mind that the Court of Justice itself has confirmed that access to the courts is one of the essential elements of a community based on the rule of law and is guaranteed in the legal order based on the EC Treaty, inasmuch as the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of acts of the institutions (Case 294/83 Les Verts v European Parliament [1986] ECR 1339, paragraph 23). The Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the ECHR (Case 222/84 Johnston [1986] ECR 1651, paragraph 18).
42. In addition, the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

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[19] http://www.bailii.org/eu/cases/EUECJ/2002/T17701.html

[20] http://www.bailii.org/eu/cases/EUECJ/2004/C26302P.html

43. It is therefore necessary to consider whether, in a case such as this, where an individual applicant is contesting the lawfulness of provisions of general application directly affecting its legal situation, the inadmissibility of the action for annulment would deprive the applicant of the right to an effective remedy.
44. In that regard, it should be recalled that, apart from an action for annulment, there exist two other procedural routes by which an individual may be able to bring a case before the Community judicature - which alone have jurisdiction for this purpose - in order to obtain a ruling that a Community measure is unlawful, namely proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC and an action based on the non-contractual liability of the Community, as provided for in Article 235 EC and the second paragraph of Article 288 EC.
45. However, as regards proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC, it should be noted that, in a case such as the present, there are no acts of implementation capable of forming the basis of an action before national courts. The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him does not constitute an adequate means of judicial protection. Individuals cannot be required to breach the law in order to gain access to justice (see point 43 of the Opinion of Advocate General Jacobs delivered on 21 March 2002 in Case C-50/00 P Unión de Pequeños Agricultores v Council, not yet published in the European Court Reports).
46. The procedural route of an action for damages based on the non-contractual liability of the Community does not, in a case such as the present, provide a solution that satisfactorily protects the interests of the individual affected. Such an action cannot result in the removal from the Community legal order of a measure which is nevertheless necessarily held to be illegal. Given that it presupposes that damage has been directly occasioned by the application of the measure in issue, such an action is subject to criteria of admissibility and substance which are different from those governing actions for annulment, and does not therefore place the Community judicature in a position whereby it can carry out the comprehensive judicial review which it is its task to perform. In particular, where a measure of general application, such as the provisions contested in the present case, is challenged in the context of such an action, the review carried out by the Community judicature does not cover all the factors which may affect the legality of that measure, being limited instead to the censuring of sufficiently serious infringements of rules of law intended to confer rights on individuals (see Case C-352/98 P Bergaderm and Goupil v Commission [2000] ECR I-5291, paragraphs 41 to 43; Case T-155/99 Dieckmann & Hansen v Commission [2001] ECR II-0000, paragraphs 42 and 43; see also, as regards an insufficiently serious infringement, Joined Cases C-104/89 and C-37/90 Mulder and Others v Council and Commission [1992] ECR I-3061, paragraphs 18 and 19, and, for a case in which the rule invoked was not intended to confer rights on individuals, paragraph 43 of the judgment of 6 December 2001 in Case T-196/99 Area Cova and Others v Council and Commission [2001] ECR II-0000).
47. On the basis of the foregoing, the inevitable conclusion must be that the procedures provided for in, on the one hand, Article 234 EC and, on the other hand, Article 235 EC and the second paragraph of Article 288 EC can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation.
48. It is true that such a circumstance cannot constitute authority for changing the system of

remedies and procedures established by the Treaty, which is designed to give the Community judicature the power to review the legality of acts of the institutions. In no case can such a circumstance allow an action for annulment brought by a natural or legal person which does not satisfy the conditions laid down by the fourth paragraph of Article 230 EC to be declared admissible (see the order of the President of the Court of Justice of 12 October 2000 in Case C-300/00 P(R) Federación de Cofradías de Pescadores and Others v Council [2000] ECR I-8797, paragraph 37).
49. However, as Advocate General Jacobs stated in point 59 of his Opinion in Unión de Pequeños Agricultores v Council (cited in paragraph 45 above), there is no compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee.
50. In those circumstances, and having regard to the fact that the EC Treaty established a complete system of legal remedies and procedures designed to permit the Community judicature to review the legality of measures adopted by the institutions (paragraph 23 of the judgment in Les Verts v Parliament, cited in paragraph 41 above), the strict interpretation, applied until now, of the notion of a person individually concerned according to the fourth paragraph of Article 230 EC, must be reconsidered.
51. In the light of the foregoing, and in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.
52. In the present case, obligations are indeed imposed on Jégo-Quéré by the contested provisions. The applicant, whose vessels are covered by the scope of the regulation, carries on fishing operations in one of the areas in which, by virtue of the contested provisions, such operations are subjected to detailed obligations governing the mesh size of the nets to be used.
53. It follows that the contested provisions are of individual concern to the applicant.
54. Since those provisions are also of direct concern to the applicant (see paragraph 26 above), the objection of inadmissibility raised by the Commission must be dismissed and an order made for the action to proceed.

When the case was appealed to the ECJ, **Advocate General Jacobs' Opinion** included the following passages:

39. It is necessary to consider the Commission's second plea in the context of the Court's judgment in Unión de Pequeños Agricultores which was delivered after the Commission lodged its present appeal.
40.That case arose out of an application brought by an association of farmers, the Unión de Pequeños Agricultores (UPA'), pursuant to the fourth paragraph of Article 230, for the annulment of Regulation (EC) No 1638/98 of 20 July 1998 amending the common organisation of the olive oil market.The Court of First Instance dismissed the application by reasoned order as manifestly inadmissible. UPA appealed to the Court of Justice, arguing that the order infringed its right to effective judicial protection given that the regulation which it wished to challenge did not require any national implementing legislation which could, under Spanish law, give rise to national proceedings such as would allow a reference for preliminary ruling to be made.

41. Having heard the case in plenary session, the Court of Justice dismissed UPA's appeal and upheld the traditional interpretation of individual concern as laid down in Plaumann. Whilst accepting that the requirement of individual concern must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually', the Court also stated that such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts'.
42. In the light of the Court's judgment in Unión de Pequeños Agricultores, it seems clear that the Commission must succeed in its second plea, that the Court of First Instance erred in law when it departed from the traditional interpretation of individual concern. By finding Jégo-Quéré individually concerned on the basis of a new interpretation of that concept, after having concluded that individual concern was lacking under the test laid down in Plaumann, the Court of First Instance acted in breach of the fourth paragraph of Article 230.
43. Jégo-Quéré seeks to resist such a conclusion on the basis that in the present case, by contrast with Unión de Pequeños Agricultores, it is uncontested that Jégo-Quéré could bring its case before a national court only by infringing the law. Jégo-Quéré contends that such a possibility does not adequately protect its right to an effective judicial remedy. It also identifies other grounds for distinguishing Unión de Pequeños Agricultores, which I shall discuss in the context of its cross-appeal.
44. As I explained in my Opinion in Unión de Pequeños Agricultores, I find highly problematic the strict test of standing currently applicable under the fourth paragraph of Article 230. In my view, that test gives rise to a real risk that individuals will be denied any satisfactory means of challenging before a court of competent jurisdiction the validity of a generally applicable and self-implementing Community measure. It may prove impossible for such individuals to gain access to a national court (which in any event has no competence to rule on validity) otherwise than by infringing the law in the expectation that criminal (or other enforcement) proceedings will then be brought against them when the national court may be persuaded to refer to the Court of Justice the issue of the validity of the measure. Besides the various practical disadvantages which may attend the making of a reference in the context of criminal proceedings, such a procedural avenue exposes the individuals in question to an intolerable burden of risk.
45. Nor do Article 235 and the second paragraph of Article 288 appear to me to supply an adequate alternative remedy. As the Court of First Instance stated in the present case, an action for damages does not allow the Community judicature to perform a comprehensive judicial review of all of the factors which may affect the legality of a Community measure. For such an action to proceed, it is necessary for the applicant to show a sufficiently serious infringement of rules of law intended to confer rights on individuals. The Commission is not, in my view, correct to state that in order to determine whether such an infringement has been shown, it will always be necessary for a Community Court to undertake an exhaustive investigation of the legality of the measure at issue.
46. However, it clearly follows from the Court's judgment in Unión de Pequeños Agricultores that the traditional interpretation of individual concern, because it is understood to flow from the Treaty itself, must be applied regardless of its consequences for the right to an effective judicial remedy.
47. Such an outcome is to my mind unsatisfactory, but is the unavoidable consequence of the limitations which the current formulation of the fourth paragraph of Article 230 is considered by the Court to impose. As the Court made clear in Unión de Pequeños Agricultores, necessary reforms to the Community system of judicial review are therefore dependent upon action by the

Member States to amend that provision of the Treaty. In my opinion, there are powerful arguments in favour of introducing a more liberal standing requirement in respect of individuals seeking to challenge generally applicable Community measures in order to ensure that full judicial protection is in all circumstances guaranteed.

48. I am therefore of the opinion that as the law now stands the Commission's appeal must succeed on the strength of its second plea in law. In the light of that conclusion, it does not appear to me to be necessary to address the Commission's first plea, alleging a breach of the Rules of Procedure of the Court of First Instance.

The cross-appeal

49. There remains the issue whether, as Jégo-Quéré contends, the Court of First Instance was wrong to hold that Jégo-Quéré lacked individual concern within the traditional interpretation of that concept.

50. Jégo-Quéré asserts, contrary to the conclusion of the Court of First Instance, that the contested regulation is not in reality a measure of general application but is rather a bundle of individual decisions, by which Jégo-Quéré is directly and individually concerned, in the form of a regulation. Jégo-Quéré identifies a variety of exceptions provided for in the regulation which, it alleges, are adapted to meet the specific circumstances of various fishing companies operating in the areas to which the regulation applies. According to Jégo-Quéré, the various exceptions do not reflect objective differences and are not justified by the aim pursued by the regulation, which is to protect hake stocks.

51. It appears to me that the Court of First Instance correctly applied the test laid down in the case-law when it concluded that the contested provisions, given that they were addressed in abstract terms to undefined classes of persons and applicable to objectively determined situations, were of general application.

52. Jégo-Quéré further points to two circumstances, in particular, which in its view differentiate it from all other persons affected by the contested regulation, and thereby render it individually concerned within the meaning of the fourth paragraph of Article 230.

53. First, Jégo-Quéré asserts that it is the only operator which fishes for whiting in the Celtic Sea on a permanent basis with vessels exceeding 30 metres in length and which catches only negligible quantities of juvenile hake in the form of by-catch'.

54. However, even if Jégo-Quéré were to demonstrate that it is currently the only operator meeting the criteria which it specifies, it would still be affected by the contested regulation by reason of a commercial activity which other operators, fulfilling the same criteria, could potentially undertake. As the Court of First Instance held, Jégo-Quéré was affected by the contested regulation only in the same way as any other economic operator actually or potentially in the same situation'.

55. Secondly, Jégo-Quéré claims to be individually concerned in consequence of the fact that it was the only fishing company, prior to the adoption of the contested regulation, which proposed to the Commission a solution alternative to the imposition upon it of the contested provisions. That solution, whereby independent observers would verify that Jégo-Quéré's vessels did not catch hake, would successfully have accomplished the objective pursued by the regulation.

56. The representations which Jégo-Quéré made to the Commission prior to the adoption of the regulation could only operate to differentiate it in accordance with the case-law relating to individual concern if there were a rule in the applicable Community legislation which granted it some specific procedural guarantee. As the Court of First Instance noted, such is not the case here.

57. I cannot therefore agree with Jégo-Quéré that the contested measure is of individual

concern to it according to the traditional interpretation of that concept, with the consequence that its cross-appeal must in my view fail and its action for annulment be declared inadmissible.

The ECJ did not agree with the CFI either:

23 The Commission alleges that the interpretation of individual concern adopted by the Court of First Instance in the contested judgment is so wide as to remove in fact the requirement of individual concern laid down by the fourth paragraph of Article 230 EC. The Court of First Instance erred in law by confusing the right to an effective remedy with a general individual direct right to bring proceedings for annulment of general measures, as the fact that the latter is unavailable does not mean that the former does not exist. It is wrong to conclude, as the Court of First Instance did at paragraph 47 of the contested judgment, that the judicial system established by the Treaty can no longer be regarded as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation, and that, accordingly, the conditions governing the admissibility of an application for annulment should be extended for the benefit of individuals by reconsidering the settled case-law relating to the notion of a person individually concerned according to the fourth paragraph of Article 230 EC.
24 The Commission points out in this regard that in the majority of the Member States, the right of individuals to bring direct proceedings for the annulment of a measure of general application is limited in various ways. Frequently, it is impossible to bring proceedings for the annulment of a law, or the right to do so is restricted by reason of the legal bases on which proceedings may be brought or the conditions governing locus standi. In some Member States, there is in fact no general right of individuals to bring direct proceedings for the annulment of legislative acts promulgated by the administrative authorities. Those systems have never been subject to censure by the European Court of Human Rights.
25 Lastly, the Commission claims that, having regard to the case-law set out in Case C-188/92 TWD Textilwerke Deggendorf [1994] ECR I-833, the interpretation of individual concern upheld by the Court of First Instance would restrict the ability of individuals to challenge the legality of Community measures of general application.
26 Jégo-Quéré argues that a wide and flexible interpretation of the fourth paragraph of Article 230 EC, as adopted by the Court of First Instance, would allow it, without at the same time changing the system of judicial remedies established by the Treaty, to challenge the legality of a provision which causes it considerable harm. Failing such an interpretation, there would be a breach of Articles 6 and 13 of the ECHR, as there would be no means for it to contest the validity of the provisions at issue. Since Regulation No 1162/2001 applies directly, without intervention on the part of the national authorities, there is no measure capable of being challenged before the national courts, thus enabling the validity of that regulation to be contested indirectly. Accordingly, it cannot benefit from full legal protection under national law without contravening Regulation No 1162/2001.
27 As regards proceedings brought on the basis of non-contractual liability under Articles 235 EC and the second paragraph of Article 288 EC, Jégo-Quéré disputes the Commission's argument that, given the fact that the duration of Regulation No 1162/2001 is limited to six months, an action for damages might constitute a more appropriate remedy than an application for annulment. It claims that the regulation is merely a stage in an ongoing process of reform of the common fisheries policy, which requires the adoption of medium and long-term measures. As a consequence, Jégo-Quéré would be left with no choice but to bring fresh actions for damages on a periodic basis.

28 Furthermore, it would be paradoxical to interpret the notion of individual concern restrictively, when there are no restrictions on individuals bringing actions for damages under Articles 235 EC and 288 EC, which are based on the premiss that the legality of Community measures of general application may be contested without restriction.

Assessment by the Court

29 It should be noted that individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the ECHR (see, in particular, Case 222/84 Johnston [1986] ECR 1651, paragraph 18, and Case C-50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I-6677, paragraph 39).

30 By Articles 230 EC and Article 241 EC, on the one hand, and by Article 234 EC, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions, and has entrusted such review to the Community Courts. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity (see Unión de Pequeños Agricultores v Council, paragraph 40).

31 Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection (see Unión de Pequeños Agricultores v Council, paragraph 41).

32 In that context, in accordance with the principle of sincere cooperation laid down in Article 10 EC, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act (see Unión de Pequeños Agricultores v Council, paragraph 42).

33 However, it is not appropriate for an action for annulment before the Community Court to be available to an individual who contests the validity of a measure of general application, such as a regulation, which does not distinguish him individually in the same way as an addressee, even if it could be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures (see Unión de Pequeños Agricultores v Council, paragraphs 37 and 43).

34 Accordingly, an action for annulment before the Community Court should not on any view be available, even where it is apparent that the national procedural rules to not allow the individual to contest the validity of the Community measure at issue unless he has first contravened it.

35 In the present case, it should be pointed out that the fact that Regulation No 1162/2001 applies directly, without intervention by the national authorities, does not mean that a party who is directly concerned by it can only contest the validity of that regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a

general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by Regulation No 1162/2001 may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly.

36 Although the condition that a natural or legal person can bring an action challenging a regulation only if he is concerned both directly and individually must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty. The Community Courts would otherwise go beyond the jurisdiction conferred by the Treaty (see Unión de Pequeños Agricultores v Council, paragraph 44).
37 That applies to the interpretation of the condition in question set out at paragraph 51 of the contested judgment, to the effect that a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.
38 Such an interpretation has the effect of removing all meaning from the requirement of individual concern set out in the fourth paragraph of Article 230 EC.
39 It follows from the above that the Court of First Instance erred in law. Accordingly, the second plea in law must be declared to be well founded.

The cross-appeal
Arguments of the parties
40 Jégo-Quéré claims that the Court of First Instance was wrong to hold that it is not individually concerned by Regulation No 1162/2001 for the purposes of the fourth paragraph of Article 230 EC, as that provision has been interpreted in the settled case-law of the Court. The regulation in question is in reality made up of a bundle of individual decisions, adapted to meet the particular circumstances of some of the operators concerned. There are no objective reasons justifying such a differentiated approach. Having regard to the objective of the protection of juvenile hake, a regulation of general application should prohibit all fishing in the relevant areas with a mesh size of less than 100 mm.
41 According to Jégo-Quéré, there are two particular circumstances which differentiate it from all other persons affected by Regulation No 1162/2001. First, it is the only party fishing for whiting in the Irish Sea on a permanent basis with vessels of over 30 metres in length and which only catches minimal quantities of juvenile hake in the form of by-catches. Secondly, it is the only fishing company to have proposed to the Commission, before Regulation No 1162/2001 was adopted, a particular solution for the renewal of hake stocks, which was ultimately not accepted.
42 At the hearing, the Commission submitted that none of the arguments relied on by Jégo-Quéré could justify the conclusion that that company was individually concerned by Regulation No 1162/2001. The appeal should accordingly be dismissed.

Asssessment by the Court
43 As the Court of First Instance rightly held at paragraphs 23 and 24 of the contested

judgment, Articles 3(d) and 5 of Regulation No 1162/2001, which Jégo-Quéré seeks to have annulled, are addressed in abstract terms to undefined classes of persons and apply to objectively determined situations. Accordingly, those articles are, by their nature, of general application.

44 However, the Court has consistently held that the fact that a measure is of general application does not mean that it cannot be of direct and individual concern to certain economic operators (see, inter alia, Case C-142/00 P Commission v Netherlands Antilles [2003] ECR I-3483, paragraph 64).

45 In particular, natural or legal persons cannot be individually concerned by such a measure unless they are affected by it by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as an addressee (see, inter alia, Case 25/62 Plaumann v Commission [1963] ECR 95, 107, and Commission v Netherlands Antilles, paragraph 65).

46 The fact that Jégo-Quéré is the only operator fishing for whiting in the waters south of Ireland with vessels of over 30 metres in length does not, as the Court of First Instance points out at paragraph 30 of the contested judgment, differentiate it, as Articles 3(d) and 5 of Regulation No 1162/2001 are of concern to it only in its objective capacity as an entity which fishes for whiting using a certain fishing technique in a specific area, in the same way as any other economic operator actually or potentially in the same situation.

47 Furthermore, no provision of Community law required the Commission, when adopting Regulation No 1162/2001, to follow a procedure under which Jégo-Quére would be entitled to claim rights that might be available to it, including the right to be heard. Community law has accordingly not conferred any particular legal status on an operator such as Jégo-Quéré with regard to the adoption of Regulation No 1162/2001 (see, to that effect, Case 191/82 FEDIOL v Commission [1983] ECR 2913, paragraph 31).

48 In those circumstances, the fact that Jégo-Quéré was the only fishing company to propose to the Commission, before Regulation No 1162/2001 was adopted, a particular solution for the renewal of hake stocks does not make it individually concerned for the purposes of the fourth paragraph of Article 230 EC.

49 The cross-appeal should accordingly be dismissed.

50 In the light of the foregoing, the contested judgment should be set aside, and, having regard to the first paragraph of Article 61 of the Statute of the Court of Justice, the application for annulment of Articles 3(d) and 5 of Regulation No 1162/2001 must be declared to be inadmissible.

Note how the ECJ pushes the responsibility for ensuring the right to an effective remedy on to the national legal systems and the national courts. Is this a good answer?

Here is another excerpt from the **European Environment Bureau et al v Commission** order (in the CFI) (see above p. 13). In reading the excerpts from this decision, consider whether (by November 2005) the CFI has come round to the ECJ's view or not.

37 The Commission denies that the applicants are directly and individually concerned by the contested act. As to whether the applicants are individually concerned by the contested act, it maintains that natural or legal persons cannot be individually concerned by a legislative act unless they are affected by it by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them

individually in the same way as the addressee of an act would be (see Case C-263/02 P Commission v Jégo-Quéré [2004] ECR I-3425, paragraph 45 and case-law cited). That is not the situation in the present case.

38 The applicants maintain that they are directly and individually concerned by the contested act.

39 As to the requirement of being individually affected, they claim, first, that they are particularly affected by the contested act because the activities of each of them consist in defending the higher interests which are at stake in this case, namely environmental protection and public health. Thus, the EEB, Natuur en Milieu and Naturskyddföreningen are active in environmental protection and conservation of nature, including wildlife, in the context of Directive 92/43. The IUF and EFFAT are active in the protection of the interests of workers, particularly agricultural workers, including their health. The contested act affects those interests specifically because it represents a 'setback' in the protection of those interests, contrary to Community law. They add that the contested act has an even greater impact on Naturskyddföreningen, whose property rights are at stake in this case.

40 Second, they claim that the EEB and EFFAT have special advisory status in their respective spheres of expertise with the Commission and other European institutions, that Natuur en Milieu, Naturskyddföreningen and the IUF have identical status with other national and supranational authorities and that, in keeping with their goals as stated in their statutes, some of the applicants specifically requested the Commission not to include paraquat in Annex I to Directive 91/414.

41 Third, they claim essentially that, under Netherlands law, Natuur en Milieu is regarded as being directly and individually concerned by breaches of legal rules protecting environmental and wildlife interests and that Naturskyddföreningen enjoys the same status under Swedish law.

42 Fourth, the applicants claim that their action must be held to be admissible in the light of the principle of effective judicial protection, the principle of equality of arms and the Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies (COM/2003/0622 Final) ('the Århus Regulation Proposal').

43 First, regarding the need to afford them effective judicial protection, the applicants submit that annulment of the contested act would prevent triggering a myriad of complex, lengthy and costly authorisation procedures in various Member States. They state that if they had to apply to the national courts, they would have to monitor possible submissions of applications for authorisation in all Member States, study the legal system of the States where marketing authorisations have been applied for and bring proceedings before the competent national courts. Furthermore, given the principle of mutual recognition provided for in Article 10 of Directive 91/414, applicants wishing to object to the placing on the market of products containing paraquat would have to intervene in all national procedures. Lastly, they maintain that, contrary to the Commission's assertion, it is not merely a question of convenience because a national court may not, as a practical matter, rule on the validity of the contested act. It follows that, from the point of view of the effectiveness of legal remedies available to the applicants, they are, pursuant to Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), which are applicable to the Court of First Instance pursuant to Article 6(2) EU, entitled to bring the present action before the Court of First Instance.

44 Turning, next, to the principle of equality of arms, the applicants claim, first, that an action

challenging the contested act brought by a producer of paraquat, such as Syngenta, would be declared admissible under the fourth paragraph of Article 230 EC, as evidenced by the order in Joined Cases T-112/00 and T-122/00 Iberotam and Others v Commission [2001] ECR II-97, paragraph 79. The principle of equality of arms, enshrined in Articles 6, 13 and 14 of the ECHR, requires that parties which are affected in opposite ways by an act adopted by the Commission have equal opportunities in respect of legal remedies available to them. They add that the Court of Justice's judgment in Joined Cases 10/68 and 18/68 Eridania and Others v Commission [1969] ECR 459, in which it was held that the fact that an individual is in competition with the addressees of the contested act is not sufficient to confer standing on that individual, is irrelevant to the present case, because that case concerned competitive relationships which are entirely absent from the present case.

45 Lastly, the applicants maintain that their action is admissible in the light of the statement of reasons in the Århus Regulation Proposal. In that statement of reasons, the Commission considers that it is not necessary to amend Article 230 EC to provide standing to European environmental protection organisations which meet certain objective criteria contained in that proposal. The applicants, moreover, meet those criteria, which, following the Commission's reasoning, is sufficient to confer on them standing to challenge the contested act.

Findings of the Court

46 Under the fourth paragraph of Article 230 EC '[a]ny natural or legal person may … institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

47 In the present case, it follows from Article 6 of the contested act that it is addressed solely to the Member States. It is therefore for the applicants to demonstrate inter alia that they are individually concerned by that act, of which they are not the addressees.

48 It follows from the case-law that applicants who, as in the present case, are not the addressees of an act may not claim that they are individually concerned by it unless it is affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of the act would be (see Case C-50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I-6677, paragraph 36 and case-law cited).

49 It is, accordingly, necessary to consider whether, in the present case, the applicants are concerned by the contested act by reason of certain attributes peculiar to them or there is a factual situation which differentiates them from all other persons in relation to the contested act.

50 In order to establish that they are individually concerned by the contested act, the applicants claim, first, that they are especially affected by that act due to the serious adverse effects it has on protection of the environment and workers' health, in the form of a setback in the protection of those interests. In addition, Naturskyddföreningen is also specially affected because of the adverse effects the contested act has on its property rights.

51 The Court notes, first, that the applicants do not specify how the contested act entails a setback for protection of the environment and workers' health; nor do they provide any concrete evidence to support the allegation of serious adverse effects on Naturskyddföreningen's property rights.

52 Next, the Court observes that, in the present case, the contested act essentially amends Annex I to Directive 91/414 by referring in it to the active substance paraquat and by laying down the conditions for its use as an active substance (Article 1); requires Member States, on the one hand, to review the authorisation for each plant protection product containing paraquat

and, on the other, to re-evaluate authorised plant protection products containing paraquat (Article 3); requires Member States to ensure that the authorisation holders report at the latest on 31 March 2008 on the effects of risk-mitigation measures to be applied through a stewardship programme and on the implementation of advances in paraquat formulations (first paragraph of Article 4); and requires the Commission to submit to the Standing Committee on the Food Chain and Animal Health a report on the application of the contested act, indicating whether the requirements for inclusion in Annex I to Directive 91/414 continue to be satisfied and to propose any amendment, including if necessary the withdrawal from that annex, that it deems necessary (second paragraph of Article 4).

53 Irrespective of the issue of which of those provisions, in the applicants' view, has or have serious adverse effects on the interests they defend in the form of a setback in the protection of those interests and a serious infringement of the property rights of one of them, it is clear that those provisions affect them in their objective capacity as entities active in the protection of the environment or workers' health, or even as holders of property rights, in the same manner as any other person in the same situation.

54 It is apparent from the case-law that that capacity is not by itself sufficient to establish that the applicants are individually concerned by the contested act (see, to that effect, Case C-321/95 P Greenpeace and Others v Commission [1998] ECR I-1651, paragraph 28, and order in Case T-154/02 Villiger Söhne v Council [2003] ECR II-1921, paragraph 47 and case-law cited).

55 It follows from the foregoing that the alleged serious adverse effects the contested act has on the applicants' interests and property rights do not establish that they are individually concerned by the contested act.

56 Second, the applicants claim that the EEB and EFFAT have special advisory status with the European institutions, that Natuur en Milieu, Naturskyddföreningen and the IUF have similar status with national or supranational authorities and that, in accordance with the stated goal in their statutes, some of the applicants specifically requested the Commission not to include paraquat in Annex I to Directive 91/414.

57 It should be borne in mind, first, that the fact that a person participates, in one way or another, in the process leading to the adoption of a Community act does not distinguish him individually in relation to the act in question unless the relevant Community legislation has laid down specific procedural guarantees for such a person (see order in Case T-339/00 Bactria v Commission [2002] ECR II-2287, paragraph 51 and the case-law cited). In the present case, the Community legislation applicable to the adoption of the contested act does not provide for any procedural guarantee for the applicants, or even for any form of participation by the Community advisory bodies, be they national or supranational, to which the applicants allegedly belong. Accordingly, neither the fact that the applicants asked the Community authorities not to include paraquat in Annex I to Directive 91/414 nor their alleged participation in advisory bodies leads to the conclusion that they are individually concerned by the contested act.

58 Third, as to the argument that Netherlands and Swedish law consider applicants to be directly and individually concerned by acts which adversely affect the interests which they defend, the Court notes that the standing conferred on those applicants in some of the legal systems of the Member States is irrelevant for the purposes of determining whether they have standing to bring an action for annulment of a Community act pursuant to the fourth paragraph of Article 230 EC (see, to that effect, the order in Case T-585/93 Greenpeace and Others v Commission [1995] ECR II-2205, paragraph 51).

59 It follows from the foregoing that Community law, as it now stands, does not provide for standing to bring a class action before the Community courts, as envisaged by the applicants in

the present case.
60 Fourth, the applicants maintain that effective judicial protection, as enshrined in Articles 6 and 13 of the ECHR, which is applicable to the Community institutions pursuant to Article 6(2) EU, means that the present action must be declared admissible because, first, proceedings brought before national courts would be lengthy, complex and costly and, second, those courts are not able to rule on the questions raised in the present proceedings.
61 The Court of Justice has held that the right to effective judicial protection is one of the general principles of law stemming from the constitutional traditions common to the Member States and that that right has also been enshrined in Articles 6 and 13 of the ECHR (Unión de Pequeños Agricultores v Council, paragraph 48 above, paragraphs 38 and 39).
62 In the same judgment, the Court of Justice stated that by Article 230 EC and Article 241 EC, on the one hand, and by Article 234 EC, on the other, the EC Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community courts. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community courts under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity (Unión de Pequeños Agricultores v Council, paragraph 48 above, paragraph 40).
63 Lastly, it is apparent from the case-law that the admissibility of an action for annulment before the Community courts does not depend on whether there is a remedy before a national court enabling the validity of the act being challenged to be examined (see, to that effect, Unión de Pequeños Agricultores v Council, paragraph 48 above, paragraph 46).
64 It follows that, according to the approach taken in the case-law of the Court of Justice, the argument relating to effective judicial protection put forward by the applicants is not in itself sufficient to justify the admissibility of their action
65 Fifthly, the applicants maintain that their action must be declared admissible by virtue of the principle of equality of arms. Suffice it to note that it is apparent from the case-law that the mere fact that an applicant is affected by an act in a manner opposite to that in which a person entitled to bring an action for annulment of that act is affected is not sufficient to confer standing on that applicant (see, to that effect, Eridania and Others v Commission, paragraph 44 above, paragraph 7, and Case C-106/98 P Comité d'entreprise de la société française de production and Others v Commission [2000] ECR I-3649, paragraph 41). In those circumstances, even if the intervener did have standing to bring an action for annulment of the contested act, as the applicants maintain, that fact alone would not establish that the applicants meet the requirement of being individually concerned by the contested act or exempt them from having to prove that they meet that requirement.
66 Sixthly and lastly, the applicants claim that they have standing because, first, the Commission, in the statement of reasons of the Århus Regulation Proposal, states that European environmental protection organisations which meet certain objective criteria have standing for the purposes of the fourth paragraph of Article 230 EC and, second, in the present case the applicants meet those objective criteria.
67 The Court notes, first, that the principles governing the hierarchy of norms (see, inter alia, Case C-240/90 Germany v Commission [1992] ECR I-5383, paragraph 42) preclude secondary legislation from conferring standing on individuals who do not meet the requirements of the fourth paragraph of Article 230 EC. A fortiori the same holds true for the statement of reasons

of a proposal for secondary legislation.
68 Accordingly, the statement of reasons relied on by the applicants does not release them from having to show that they are individually concerned by the contested act. Moreover, even if the applicants were acknowledged as qualified entities for the purposes of the Århus Regulation Proposal, it is clear that they have not put forward any reason why that status would lead to the conclusion that they are individually concerned by the contested act.
69 In the light of all the foregoing, the Court finds that the applicants are not individually concerned by the contested act. Accordingly, the action must be declared inadmissible without its being necessary to consider whether the applicants are directly concerned by that act.

TERRORISM CASES

The **European Parliament's Resolution on Terrorism** of 15 February 2007 begins by stating that the Parliament:

1. Supports the need for a strategic objective of combating terrorism globally, respecting human rights, with the ultimate aim of achieving a more secure European Union, and allowing its citizens to enjoy a true area of freedom, security and justice; shares the view of the Council that, other forms of terrorism notwithstanding, the most serious threat to Europe at the moment is posed by violent radical groups claiming to defend Islam, such as the criminal Al-Qaeda network and the groups which are affiliated to it or are inspired by its ideology;
2. Emphasises the need for the European Union, its Member States and its partner countries to base their global counter-terrorism strategy on the fundamental principles which also serve to guide the actions of the United Nations, on a constructive and serious dialogue between peoples and nations, as well as between cultures, religions and civilisations, taking account of the respective perceptions and concerns, and on respect for international law;
3. Calls on the Commission and the Member States to ensure that certain groups of people from various diasporas living in Europe are not stigmatised, in particular by supporting policies to combat xenophobia and human rights violations against immigrant and refugee communities, as well as development aid projects undertaken by migrants or migrants" associations;
4. Expresses its regret at the failure of the UN World Summit in 2005 to reach an agreement on a comprehensive definition of terrorism, and stresses the need to arrive at a generally accepted definition of international terrorism; therefore calls on the Council to adopt a common position establishing a definition of terrorism on the basis of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism and taking into account the definition proposed by the former Secretary-General of the United Nations, Kofi Annan;
5. Stresses the urgent need fully and properly to implement all the political measures adopted at the highest political level in the European Union Counter-Terrorism Strategy, the Action Plan and the Strategy for Combating Radicalisation and Recruitment to Terrorism, so that the ambitious mechanisms and proposals set out in those documents result as soon as possible in specific and effective practical measures to combat terrorism;
6. Welcomes the adoption by the General Assembly of the United Nations Global Counter-Terrorism Strategy and its annexed Plan of Action; stresses the need for terrorism in all its forms and manifestations to be combated by all available means, pursuant to the UN Charter as reflected in the Security Council's Resolution 1624 (2005); expresses concern at the delay in the adoption of the global convention on international terrorism; encourages the Institutions of the European Union and the various Member States to continue working

unstintingly to achieve an international consensus permitting, on the one hand, the adoption of the global convention and, on the other, the effective implementation of the measures set out in the said Strategy and Plan of Action;
7. Regrets the fact that, despite evidence of the terrorist threat, some Member States have not yet signed and/or ratified some of the 17 United Nations universal instruments on combating terrorism; notes that as yet only two countries have ratified 13 conventions and 78 other countries have ratified or acceded to 12 of them; considers it particularly worrying, however, that 33 other countries have ratified or acceded to only 6 or fewer such international conventions;
8. Calls on those Member States of the European Union and their partners which have not already done so to adopt swiftly the national legislation necessary for the effective implementation of those conventions and to inform the relevant bodies of the United Nations thereof in good time;
9. Recommends that, in its external actions, the European Union should make use of appropriate means in order to encourage countries to become parties to all universal instruments against terrorism and to enact, as appropriate, the domestic legislation necessary to implement the provisions of those conventions and protocols, also benefiting from the UN's technical expertise;
10. Emphasises that the European Union's external actions to combat international terrorism should in the first place be aimed at prevention, in order to ensure that radical or extremist groups, and also States, do not resort to terrorism and do not support it as a strategy in the pursuit of their objectives; urges the Member States to acquire greater institutional capacity for combating terrorism; considers that in broad terms the objectives relating to prevention set out in the European Union Counter-Terrorism Strategy are in keeping with that objective;
11. Calls on the EU to ensure that measures taken with a view to fighting terrorism do not lead to curbs on the ability of the media in countries in the South to deal in an independent way with issues relating to the rights of poor, vulnerable people and to publish information that is essential when it comes to determining the specific aid to be provided to those countries;
12. Calls on the countries with which the EU has commenced accession negotiations or which have expressed their intention of joining the EU to take immediate measures to disband nationalistic and fanatical organisations which are directly opposed to the democratic principles of the Union and which stir up animosities and racial hatred;
13. Reiterates the need at all times to drive home the message that terrorism is unacceptable and unjustifiable by all state and non-state actors in all circumstances and in all cultures, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify it, and to eliminate all factors which may be exploited by terrorists, such as the dehumanisation of victims, the outbreak and persistence of violent conflicts, bad governance, the lack of civil rights and violation of human rights, religious and ethnic discrimination, political exclusion and socio-economic marginalisation;
14. Considers it likewise fundamental that the European Union's external actions to combat international terrorism, while complying with the relevant case law of the Court of Justice of the European Communities and the European Court of Human Rights, should aim to prevent terrorists from gaining access to the means for carrying out their attacks, for example by depriving them of the opportunity to travel, to gain access to means of communication and to proselytise, to use the Internet for their purposes, to receive financial support, to engage in money laundering, to gain access to arms, be they conventional, nuclear, biological, chemical or radiological, and to easily attain their objectives and achieve their aims;
15. Considers that the protective measures included in the European Union Counter-Terrorism

Strategy are in line with this objective but that their actual effectiveness varies greatly and that there are various other options in terms of the Union's external action;
16. Reiterates the need to fight against flows of illicit capital and money laundering within the Union (through the implementation by December 2007 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing(5)) and elsewhere, and to exercise effective control over various Islamic charities;
17. Notes that Member States have an obligation to exercise vigilance and recommends that determined use be made of the instruments at the disposal of the Union in its external actions in order to make countries which support terrorist groups and which organise, finance, encourage or support terrorist activities by any other means desist from doing so, if necessary through the imposition of sanctions or through coercive measures;
18. Supports unreservedly the development of the capacity of States to prevent terrorism through the promotion of the rule of law, respect for human rights and the establishment of effective criminal justice systems as well as through the promotion of high-quality education and religious and cultural tolerance; to that end, urges all the States within the international community to ensure that incitement to commit terrorist acts is banned by law and to prevent such conduct, as called for in the United Nations Global Counter-Terrorism Strategy of 8 September 2006;
19. Considers that the development of a preventative capacity also requires States to directly oppose the financing of terrorist organisations by practical means, to seek to ensure that transport is safe (as stipulated in the European Programme for Critical Infrastructure Protection (EPCIP) (COM(2004)0702)), to make use of the possibilities offered by the Internet to combat terrorism, to improve the protection of potential terrorist targets and the capacity to respond to attacks, and to improve their capacity to prevent terrorists from acquiring conventional weapons or nuclear, biologic, chemical or radiological materials;
20. Emphasises the need to continue defending human rights and fundamental freedoms in the fight against terrorism by means of the international instruments available, taking account of the fact that human rights are a universal value and an integral part of European external action but also of the fact that their violation clearly jeopardises the fight against terrorism and constitutes a failure of democracy; considers, therefore, that the only effective instruments employed in the fight against international terrorism are legal means and that all activities that escape independent international scrutiny, such as extraordinary renditions or prisons that operate outside the international legal framework, should be prohibited under international law....[21]

The post 9/11 governmental response to terrorist activity has included detaining suspected terrorists,[22] and various measures to prevent terrorists using the organized financial system (and also to subject a larger number of financial businesses to formal

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[21] http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2007-0050&language=EN See also EU Parliament, Committee on Foreign Affairs, Report on the external dimension of the fight against international terrorism (2006/2032(INI)) A6-0441/2006 (Jan. 12, 2006).

[22] A number of EU Member States co-operated with the CIA in the rendition of suspected terrorists.

control).[23] Terrorists, and people who support them, have also been subjected to economic sanctions. In the US these sanctions are administered by the Office of Foreign Assets Control (OFAC).[24]

The UN Security Council,[25] which has, within the UN system, responsibility for collective defence, has adopted many Resolutions establishing sanctions in respect of terrorist activity.[26] **Security Council Resolution 1333 of 2000**[27] contained the following provisions:

5. Decides that all States shall:
(a) Prevent the direct or indirect supply, sale and transfer to the territory of Afghanistan under Taliban control as designated by the Committee established pursuant to resolution 1267 (1999), hereinafter known as the Committee, by their nationals or from their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned;
(b) Prevent the direct or indirect sale, supply and transfer to the territory of Afghanistan under Taliban control, as designated by the Committee, by their nationals or from their territories, of technical advice, assistance, or training related to the military activities of the armed personnel under the control of the Taliban...
6. Decides that the measures imposed by paragraph 5 above shall not apply to supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance or training, as approved in advance by the Committee, and affirms that the measures imposed by paragraph 5 above do not apply to protective clothing, including flak jackets and military helmets, exported to Afghanistan by United Nations personnel, representatives of the media, and humanitarian workers for their personal use only...
8. Decides that all States shall take further measures...

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[23] *See, e.g.*, Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ No. L 309/15 (Nov. 25, 2005) *available at* Http://eur-lex.europa.eu/lexuriserv/site/en/oj/2005/l_309/l_30920051125en00150036.pdf.; Commission Directive 2006/70/EC laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis, OJ No. L 214/29 (Aug. 4, 2006) at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_214/l_21420060804en00290034.pdf .

[24] See http://www.treas.gov/offices/enforcement/ofac/ . And see also e.g., OFAC, Terrorism, What You Need to Know about US Sanctions at http://www.treas.gov/offices/enforcement/ofac/programs/terror/terror.pdf.

[25] http://www.un.org/Docs/sc/

[26] *See, e.g.*, Security Council Resolutions No. 1267 of 1999, No.1333 of 2000, No. 1390 of 2002, and No. 1526 of 2004, No. 1618 of 2005, No. 1617 of 2005, No. 1611 of 2005, No. 1735 of 2006.

[27] http://www.unhcr.org/refworld/country,,,RESOLUTION,AFG,4562d8cf2,3b00f51e14,0.html.

(c) To freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization, 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-Qaida organization and requests the Committee to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization...
12. Decides further that the Committee shall maintain a list of approved organizations and governmental relief agencies which are providing humanitarian assistance to Afghanistan.. that the Committee shall keep the list under regular review, adding new organizations and governmental relief agencies as appropriate...
15. Requests the Secretary-General in consultation with the Committee...
(b) To consult with relevant Member States to put into effect the measures imposed by this resolution and resolution 1267 (1999) and report the results of such consultations to the Council;
(c) To report on the implementation of the existing measures, assess problems in enforcing these measures, make recommendations for strengthening enforcement, and evaluate actions of the Taliban to come into compliance;
(d) To review the humanitarian implications of the measures imposed by this resolution and resolution 1267 (1999), and to report back to the Council within 90 days of the adoption of this resolution with an assessment and recommendations, to report at regular intervals thereafter on any humanitarian implications and to present a comprehensive report on this issue and any recommendations no later than 30 days prior to the expiration of these measures;
16. Requests the Committee to fulfil its mandate by undertaking the following tasks in addition to those set out in resolution 1267 (1999)...
(b) To establish and maintain updated lists, based on information provided by States and regional organizations, of individuals and entities designated as being associated with Usama bin Laden, in accordance with paragraph 8 (c) above;
(c) To give consideration to, and decide upon, requests for the exceptions set out in paragraph.. 6..above;
(D)...maintain an updated list of approved organizations and governmental relief agencies which are providing humanitarian assistance to Afghanistan, in accordance with paragraph 12 above;
(e) To make relevant information regarding implementation of these measures publicly available through appropriate media, including through the improved use of information technology...
(g) To make periodic reports to the Council on information submitted to it regarding this resolution and resolution 1267 (1999), including possible violations of the measures reported to the Committee and recommendations for strengthening the effectiveness of these measures...
18. Calls upon States to bring proceedings against persons and entities within their jurisdiction that violate the measures imposed by paragraphs 5, 8, 10.. above and to impose appropriate penalties;
19. Calls upon all States to cooperate fully with the Committee in the fulfilment of its tasks, including supplying such information as may be required by the Committee in pursuance of this

resolution....

The Security Council's 1267 Committee has developed a list of persons covered by the sanctions,[28] and the Counter-Terrorism Committee[29] facilitates multilateral co-operation in this area. Commentators have criticised the process which has produced the list. The criteria for inclusion are vague (individuals and entities associated with bin Laden) and the procedure for developing the lists gives no rights to people who are considered for inclusion. See, for example, this discussion by **Simon Chesterman**[30]:

...When Resolution 1267 was first passed, sanctions targeted specifically at the Taliban regime were intended to minimize collateral harm to the population of Afghanistan; in the wake of September 11, sanctions became a means of restricting the flow of terrorist finances. Over time, it became clear that freezing the assets of individuals or banks indefinitely raised concerns both in terms of the rights of the affected individuals and the accountability structures for the exercise of this power. By September 2005, a United Nations summit of world leaders called upon the Security Council to "ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions." ...

Sanctions are not a form of criminal punishment as such - a point that is frequently emphasized by defenders of the regime and those tasked with implementing it. In Yusuf and Kadi,[31] a pair of judgments issued in 2005 by the European Court of First Instance, this characterization as preventive rather than punitive was important in determining that the practice, described as "a temporary precautionary measure restricting the availability of the applicants' property," did not violate fundamental rights of the individuals concerned. The court noted 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."

Nevertheless, once an individual is included on the list it is difficult to be removed. Prior to January 2002 there was no official procedure for managing the sanctions regime. Resolution 1390 (2002) requested the Committee to "promulgate expeditiously such guidelines and criteria as may be necessary to facilitate the implementation" of the sanctions regime. In August 2002 a policy for de-listing was announced by the Chairman of the 1267 Committee, requiring a listed person to petition his or her government of residence or citizenship to request review of the case, putting the onus on the petitioner to "provide justification for the de-listing request, offer relevant information and request support for de-listing." That government was then expected to

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[28] See http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm

[29] http://www.un.org/sc/ctc/

[30] Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071 (2006).

[31] Yusuf and Al Barakaat International Foundation v Council and Commission Case T-306/01 at http://www.bailii.org/eu/cases/EUECJ/2005/T30601.html ; Kadi v Council and Commission Case T-315/01 at http://www.bailii.org/eu/cases/EUECJ/2005/T31501.html .

review the information and approach the government(s) that first listed the person on a bilateral basis "to seek additional information and to hold consultations on the de-listing request." The Committee adopted guidelines implementing this approach in November 2002. In the event that the relevant government of residence or citizenship chooses not to request review of the case, there is no provision for an alternative means of petition. The Liberian sanctions regime, by contrast, allows for an individual to petition the relevant committees in "exceptional cases." Two individuals duly submitted petitions that were received by the committee but rejected on the merits.

In practice the Committee itself has little direct input into listing or de-listing, instead ratifying decisions made in capitals on the basis of a confidential "no-objection" procedure. Under this procedure a proposed name is added to the list if no member of the Committee objects within a designated period. Until 2005 this period was forty-eight hours; it was recently extended to five days. In practice, the amount of information provided to justify listing and identify an individual or entity varies. There has been some progress from the days when the Angola Sanctions Committee regarded the nom de guerre "Big Freddy" as sufficient identifying information, but statements of case vary considerably. The average statement of case on the 1267 Committee runs to about a page and a half of information, with some considerably longer. At the other extreme, one statement of case requesting the listing of seventy-four individuals included a single paragraph of justification for the entire group. The capacity of members of the Committee to make an informed decision on whether to agree to a listing depends significantly on their access to intelligence information, either through their own services or their relationship with the designating state. In the absence of some national interest in a situation, however, there is little incentive to challenge a specific listing....

A number of people whose names have appeared on the 1267 list as incorporated into law within the EU have attempted to challenged their inclusion before the CFI. The claimants argued that EU measures implementing the Security Council sanctions should be invalidated for various reasons, but in particular because their right ot a fair hearing was not respected, As noted above, the challenges in the Yusuf and Kadi cases in 2005 were unsuccessful.[32] Here is an excerpt from the CFI's judgment in **Yusuf**:

184 In accordance with the second paragraph of Article 249 EC, a regulation has general application and is directly applicable in all Member States, whereas a decision is binding only on those to whom it is addressed.

185 According to established case-law, the criterion for distinguishing between a regulation and a decision must be sought in the general application or otherwise of the measure in question. The essential characteristics of a decision arise from the limitation of the persons to whom it is addressed, whereas a regulation, being essentially of a legislative nature, is applicable to objectively determined situations and entails legal effects for categories of persons regarded generally and in the abstract. Furthermore, the legislative nature of a measure is not called in question by the fact that it is possible to determine more or less precisely the number or even the identity of the persons to whom it applies at any given time, as

[32] Although see the decision in Kadi in 2008 below at 70. This decision involved joined cases where the appellants were Kadi and Al Barakaat. Al Barakaat was another party in the Yusuf case, but Yusuf abandoned his appeal.

long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose...

186 In the circumstances of the case, the contested regulation unarguably has general application, since it prohibits anyone to make available funds or economic resources to certain persons. The fact that those persons are expressly named in Annex I to the regulation, so that they appear to be directly and individually concerned by it, within the meaning of the fourth paragraph of Article 230 EC, in no way affects the general nature of that prohibition which is effective erga omnes, as is made clear in particular by Article 11, by virtue of which the contested regulation applies:

– within the territory of the Community, including its airspace,

– on board any aircraft or any vessel under the jurisdiction of a Member State,

– to any person elsewhere who is a national of a Member State,

– to any legal person, group or entity which is incorporated or constituted under the law of a Member State,

– to any legal person, group or entity doing business within the Community.

187 In actual fact, the applicants' line of argument stems from a confusion of the concept of the addressee of an act with the concept of the object of that act. Article 249 EC contemplates only the former, in that it provides that a regulation has general application, whereas a decision is binding only upon those to whom it is addressed. By contrast, the object of an act is immaterial as a criterion for its classification as a regulation or a decision.

188 Thus, an act the object of which is to freeze the funds of the perpetrators of terrorist acts, viewed as a general and abstract category, would be a decision if the persons to whom it was addressed were one or more persons expressly named. On the other hand, an act the object of which is to freeze the funds of one or more persons expressly named is in fact a regulation if it is addressed in a general and abstract manner to all persons who might actually hold the funds in question. That is precisely the situation in this case.

189 The second ground must accordingly be rejected.....

267... if the Court were to annul the contested regulation, as the applicants claim it should, although that regulation seems to be imposed by international law, on the ground that that act infringes their fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicants ask the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.

268 The institutions and the United Kingdom ask the Court as a matter of principle to decline all jurisdiction to undertake such indirect review of the lawfulness of those resolutions which, as rules of international law binding on the Member States of the Community, are mandatory for the Court as they are for all the Community institutions. Those parties are of the view, essentially, that the Court's review ought to be confined, on the one hand, to ascertaining whether the rules on formal and procedural requirements and jurisdiction imposed in this case on the Community institutions were observed and, on the other hand, to ascertaining whether the Community measures at issue were appropriate and proportionate in relation to the resolutions of the Security Council which they put into effect.

269 It must be recognised that such a limitation of jurisdiction is necessary as a corollary to the principles identified above, in the Court's examination of the relationship between the international legal order under the United Nations and the Community legal order.

270 .. the resolutions of the Security Council at issue were adopted under Chapter VII of the Charter of the United Nations. In these circumstances, determining what constitutes a threat to

international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts, subject only to the inherent right of individual or collective self-defence mentioned in Article 51 of the Charter.

271 Where, acting pursuant to Chapter VII of the Charter of the United Nations, the Security Council, through its Sanctions Committee, decides that the funds of certain individuals or entities must be frozen, its decision is binding on the members of the United Nations, in accordance with Article 48 of the Charter.

272 ... the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of such a decision 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

273 First, such jurisdiction would be incompatible with the undertakings of the Member States under the Charter of the United Nations, especially Articles 25, 48 and 103 thereof, and also with Article 27 of the Vienna Convention on the Law of Treaties.

274 Second, such jurisdiction would be contrary to provisions both of the EC Treaty, especially Articles 5 EC, 10 EC, 297 EC and the first paragraph of Article 307 EC, and of the Treaty on European Union, in particular Article 5 EU, in accordance with which the Community judicature is to exercise its powers on the conditions and for the purposes provided for by the provisions of the EC Treaty and the Treaty on European Union. It would, what is more, be incompatible with the principle that the Community's powers and, therefore, those of the Court of First Instance, must be exercised in compliance with international law ...

275 It has to be added that, with particular regard to Article 307 EC and to Article 103 of the Charter of the United Nations, reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community...

276 It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in 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.

277 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.

278 In this connection, it must be noted that the Vienna Convention on the Law of Treaties, which consolidates the customary international law and Article 5 of which provides that it is to apply 'to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation', provides in Article 53 for a treaty to be void if it conflicts with a peremptory norm of general international law (jus cogens), defined as 'a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Similarly, Article 64 of the Vienna Convention provides that: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.

279 Furthermore, the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations

declared themselves determined to ‘reaffirm faith in fundamental human rights, in the dignity and worth of the human person’. In addition, it is apparent from Chapter I of the Charter, headed ‘Purposes and Principles’, that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms.

280 Those principles are binding on the Members of the United Nations as well as on its bodies. Thus, under Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act ‘in accordance with the Purposes and Principles of the United Nations’. The Security Council’s powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations.

281 International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.

282 The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, in some circumstances, extend to determining whether the superior rules of international law falling within the ambit of jus cogens have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute ‘intransgressible principles of international customary law’ (Advisory Opinion of the International Court of Justice of 8 July 1996, The Legality of the Threat or Use of Nuclear Weapons...).....

332 Examination of the applicants’ arguments relating to the alleged breach of their right to an effective judicial remedy must take into account the considerations of a general nature already given to them in connection with the examination of the extent of the review of lawfulness, in particular with regard to fundamental rights, which it falls to the Court to carry out in respect of Community acts giving effect to resolutions of the Security Council adopted pursuant to Chapter VII of the Charter of the United Nations.

333 In the circumstances of this case, the applicants have been able to bring an action for annulment before the Court of First Instance under Article 230 EC.

334 In dealing with that action, the Court carries out a complete review of the lawfulness of the contested 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.

335 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.

336 Giving a decision pursuant to that review, the Court finds that the alleged errors in the identification of the applicants and two other entities that vitiate the contested regulation ... are without relevance for the purposes of these proceedings, since it is not disputed that the applicants are indeed one of the natural persons and one of the entities respectively entered in the Sanctions Committee’s list on 9 November 2001... The same applies to the fact that according to the Swedish police authorities considered, after checking, that the second applicant’s accounts were in order...

337 In this action for annulment, the Court has moreover held that it has jurisdiction to review 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.
338 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.
339 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.. to check indirectly the appropriateness and proportionality of those measures. It would be impossible to carry out such a check without trespassing on the Security Council's prerogatives under Chapter VII of the Charter of the United Nations in relation to determining, first, whether there exists a threat to international peace and security and, second, the appropriate measures for confronting or settling such a threat. Moreover, the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted vis-à-vis the persons concerned in order to frustrate that threat, entails a political assessment and value judgments which in principle fall within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of international peace and security.
340 It must thus be concluded that, to the extent set out in paragraph 339 above, there is no judicial remedy available to the applicant, the Security Council not having thought it advisable 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.

341 However, it is also to be acknowledged that any such lacuna in the judicial protection available to the applicants is not in itself contrary to jus cogens.
342 Here the Court would point out that the right of access to the courts, a principle recognised by both Article 8 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, is not absolute. On the one hand, at a time of public emergency which threatens the life of the nation, measures may be taken derogating from that right, as provided for on certain conditions by Article 4(1) of that Covenant. On the other hand, even where those exceptional circumstances do not obtain, certain restrictions must be held to be inherent in that right, such as the limitations generally recognised by the community of nations to fall within the doctrine of State immunity ...and of the immunity of international organisations ...
343 In this instance, the Court considers that the limitation of the applicants' right of 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 of the United Nations, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, in accordance with the relevant principles of international law (in particular Articles 25 and 103 of the Charter), is inherent in that right as it is guaranteed by jus cogens.
344 Such a limitation is justified both by the nature of the decisions that the Security Council is led to take under Chapter VII of the Charter of the United Nations and by the legitimate objective pursued. In the circumstances of this case, the applicants' interest in having a court hear their case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the

Security Council in accordance with the Charter of the United Nations. In this regard, special significance must attach to the fact that, far from providing for measures for an unlimited 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 ....
345 Last, the Court considers that, 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 both the "petitioned government" and the "designating government" ...constitute another reasonable method of affording adequate protection of the applicants' fundamental rights as recognised by jus cogens.
346 It follows that the applicants' arguments alleging breach of their right to an effective judicial remedy must be rejected.
347 None of the applicants' pleas in law or arguments having been successful, and the Court considering that it has sufficient information available to it from the documents in the file and the statements made by the parties at the hearing, the action must be dismissed....

By the end of 2006 the CFI seemed to be taking a slightly more generous view of the process rights of people designated on Security Council sanctions lists (although note that part of the difference in approach is due to differences in the sanctions regimes (ie the amount of discretion at the EU level). Here is an excerpt from the CFI's judgment in **Organisation des Modjahedines de Peuple d'Iran v European Council**[33]:

89 It is appropriate to begin by examining, together, the pleas alleging infringement of the right to a fair hearing, infringement of the obligation to state reasons and infringement of the right to effective judicial protection, which are closely linked. First, the safeguarding of the right to a fair hearing helps to ensure that the right to effective judicial protection is exercised properly. Second, there is a close link between the right to an effective judicial remedy and the obligation to state reasons. As held in settled case-law, the Community institutions' obligation under Article 253 EC to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the lawfulness of the decision and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and ascertain whether or not the decision is well founded ...Thus, the parties concerned can make genuine use of their right to a judicial remedy only if they have precise knowledge of the content of and the reasons for the act in question...

Applicability of the safeguards relating to observance of the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001[34]

[33] Case T-228/02 (Dec. 12, 2006).

[34] Council Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ No. L 344/70 (Dec. 28, 2001) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0070:0075:EN:PDF.

- The right to a fair hearing

91 According to settled case-law, observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question. That principle requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the matters on which the penalty is based...

92 In the present case, the contested decision, by which an individual economic and financial sanction was imposed on the applicant (freezing of funds), undeniably affects the applicant adversely..

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

94 So understood, the safeguarding of the right to a fair hearing in the context of the administrative procedure itself is to be distinguished from that resulting from the right to an effective judicial remedy against the act having adverse effects which may be adopted at the end of that procedure...

95 Moreover, the safeguard relating to observance of the actual right to a fair hearing, in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001, cannot be denied to the parties concerned solely on the ground, relied on by the Council and the United Kingdom ... that neither the ECHR nor the general principles of Community law confer on individuals any right whatsoever to be heard before the adoption of an act of a legislative nature ....

96 It is true that the case-law relating to the right to be heard cannot be extended to the context of a Community legislative process culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned ...

97 It is also true that the contested decision, which maintains the applicant in the disputed list, after the applicant had been included by the decision initially contested, has the same general scope as Regulation No 2580/2001 and, like that regulation, is directly applicable in all Member States. Thus, despite its title, it is an integral part of that regulation for the purposes of Article 249 EC ...

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

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

100 That solution was justified in those cases by the fact that the Community institutions had merely transposed into the Community legal order, as they were required to do, resolutions of the Security Council and decisions of its Sanctions Committee that imposed the freezing of the funds of the parties concerned, designated by name, without in any way authorising those

institutions, at the time of actual implementation, to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations. The Court inferred therefrom that the Community principle relating to the right to be heard could not apply in such circumstances, where a hearing of the persons concerned could not in any event lead the institution to review its position ...

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

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

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

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

105 Lastly, the Council stated at the oral hearing that, as the Community institution which adopted Regulation No 2580/2001 and the decisions implementing that regulation, it did not consider itself to be bound by the common positions adopted as part of the CFSP by the Council in its capacity as the institution composed of the representatives of the Member States, although it did consider it appropriate to ensure that its actions were consistent with the CFSP and the EC Treaty.

106 The Council adds, rightly, that the Community does not act under powers circumscribed by the will of the Union or that of its Member States when, as in the present case, the Council adopts economic sanctions measures on the basis of Articles 60 EC, 301 EC and 308 EC. That point of view is, moreover, the only one compatible with the actual wording of Article 301 EC,

according to which the Council is to decide on the matter 'by a qualified majority on a proposal from the Commission', and that of Article 60(1) EC, according to which the Council 'may take', following the same procedure, the urgent measures necessary for an act under the CFSP.
107 Since the identification of the persons, groups and entities contemplated in Security Council Resolution 1373 (2001), and the adoption of the ensuing measure of freezing funds, involve the exercise of the Community's own powers, entailing a discretionary appreciation by the Community, the Community institutions concerned, in this case the Council, are in principle bound to observe the right to a fair hearing of the parties concerned when they act with a view to giving effect to that resolution.
108 It follows that the safeguarding of the right to a fair hearing is, as a matter of principle, fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001.

- The obligation to state reasons
109 In principle, the safeguard relating to the obligation to state reasons provided for by Article 253 EC is also fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001, a point which has not been questioned by any of the parties.

- The right to effective judicial protection
110 As to the safeguard relating to the right to effective judicial protection, it should be borne in mind that, according to settled case-law, individuals must be able to avail themselves of effective judicial protection of the rights they have under the Community legal order, as the right to such protection is part of the general legal principles deriving from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the ECHR ...
111 This also applies particularly to measures to freeze the funds of persons or organisations suspected of terrorist activities...
112 In the present case, the only reservation expressed by the Council, in relation to the applicability of the principle of that safeguard, is that the Court has no jurisdiction to review the internal lawfulness of the relevant provisions of Regulation No 2580/2001, because they were adopted by virtue of powers circumscribed by Security Council Resolution 1373 (2001) and therefore benefit from the principle of primacy referred to in paragraph 103 above.
113 It is not, however, necessary for the Court to rule on the well-foundedness of that reservation because ... the present dispute can be resolved solely on the basis of a judicial review of the lawfulness of the contested decision, and none of the parties deny that that indeed comes within the Court's competence.

Purpose of and restrictions on the safeguards relating to the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001
- The right to a fair hearing
114 It is appropriate first, to define the purpose of the safeguard of the right to a fair hearing in the context of the adoption of a decision to freeze funds under Article 2(3) of Regulation No 2580/2001, distinguishing between an initial decision to freeze funds referred to in Article 1(4) of Common Position 2001/931 ('the initial decision to freeze funds') and any subsequent decision to maintain a freeze of funds, following a periodic review, as referred to in Article 1(6) of that common position ('subsequent decisions to freeze funds').
115 In that context, it should be noted, first, that the right to a fair hearing only falls to be

exercised with regard to the elements of fact and law which are liable to determine the application of the measure in question to the person concerned, in accordance with the relevant rules.

116 In the circumstances of the present case, the relevant rules are laid down in Article 2(3) of Regulation No 2580/2001, according to which the Council, acting by unanimity, is to establish, review and amend the list of persons, groups and entities to which that regulation applies, in accordance with the provisions laid down in Article 1(4) to (6) of Common Position 2001/931. Thus, in accordance with Article 1(4) of Common Position 2001/931, the list is to be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. 'Competent authority' is understood to mean a judicial authority, or, where judicial authorities have no jurisdiction in the relevant area, an equivalent competent authority in that area. Moreover, the names of persons and entities in the list are to be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them in the list, as provided for by Article 1(6) of Common Position 2001/931.

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

118 Accordingly, the observance of the right to a fair hearing in the context of the adoption of a decision to freeze funds is also liable to arise at those two levels...

119 The right of the party concerned to a fair hearing must be effectively safeguarded in the first place as part of the national procedure which led to the adoption, by the competent national authority, of the decision referred to in Article 1(4) of Common Position 2001/931. It is essentially in that national context that the party concerned must be placed in a position in which he can effectively make known his view of the matters on which the decision is based, subject to possible restrictions on the right to a fair hearing which are legally justified in national law, particularly on grounds of public policy, public security or the maintenance of international relations ....

120 Next, the right of the party concerned to a fair hearing must be effectively safeguarded in the Community procedure culminating in the adoption, by the Council, of the decision to include or maintain it on the disputed list, in accordance with Article 2(3) of Regulation No 2580/2001. As a rule, in that area, the party concerned need only be afforded the opportunity effectively to make known his views on the legal conditions of application of the Community measure in question, namely, where it is an initial decision to freeze funds, whether there is specific

information or material in the file which shows that a decision meeting the definition laid down in Article 1(4) of Common Position 2001/931 was taken in respect of him by a competent national authority and, where it is a subsequent decision to freeze funds, the justification for maintaining the party concerned in the disputed list.

121 However, provided that the decision in question was adopted by a competent national authority of a Member State, the observance of the right to a fair hearing at Community level does not usually require, at that stage, that the party concerned again be afforded the opportunity to express his views on the appropriateness and well-foundedness of that decision, as those questions may only be raised at national level, before the authority in question or, if the party concerned brings an action, before the competent national court. Likewise, in principle, it is not for the Council to decide whether the proceedings opened against the party concerned and resulting in that decision, as provided for by the national law of the relevant Member State, was conducted correctly, or whether the fundamental rights of the party concerned were respected by the national authorities. That power belongs exclusively to the competent national courts or, as the case may be, to the European Court of Human Rights...

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

123 The Court notes that, under Article 10 EC, relations between the Member States and the Community institutions are governed by reciprocal duties to cooperate in good faith ... That principle is of general application and is especially binding in the area of JHA governed by Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions ...

124 In a case of application of Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001, provisions which introduce a specific form of cooperation between the Council and the Member States in the context of combating terrorism, the Court finds that that principle entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, both in respect of the issue of whether there are 'serious and credible evidence or clues' on which its decision is based and in respect of recognition of potential restrictions on access to that evidence or those clues, legally justified under national law on grounds of overriding public policy, public security or the maintenance of international relations ...

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

126 It follows from the foregoing that, in the context of relations between the Community and its

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

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

128 The Court therefore finds, as held in Yusuf ...and as submitted in the present case by the Council and the United Kingdom, that notification of the evidence adduced and a hearing of the parties concerned, before the adoption of the initial decision to freeze funds, would be liable to jeopardise the effectiveness of the sanctions and would thus be incompatible with the public interest objective pursued by the Community pursuant to Security Council Resolution 1373 (2001). An initial measure freezing funds must, by its very nature, be able to benefit from a surprise effect and to be applied with immediate effect. Such a measure cannot, therefore, be the subject-matter of notification before it is implemented ...

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

130 In that context, the parties concerned must also have the opportunity to request an immediate re-examination of the initial measure freezing their funds .... The Court recognises, however, that such a hearing after the event is not automatically required in the context of an initial decision to freeze funds, in the light of the possibility that the parties concerned also have immediately to bring an action before the Court of First Instance, which also ensures that a balance is struck between observance of the fundamental rights of the persons included in the disputed list and the need to take preventive measures in combating international terrorism...

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

132 The Court cannot accept the viewpoint put forward by the Council and the United Kingdom on this point at the oral hearing, to the effect that the Council need only hear the parties

concerned, in the context of the adoption of a subsequent decision to freeze funds, if they have previously made an express request to that effect. Under Article 1(6) of Common Position 2001/931, the Council may only adopt such a decision after having ensured that maintaining the parties concerned in the disputed list remains justified, which implies that it must afford them the opportunity effectively to make known their views on the matter.
133 Next, the Court recognises that, in circumstances such as those of this case, where what is at issue is a temporary protective measure restricting the availability of the property of certain persons, groups and entities in connection with combating terrorism, overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude the communication to the parties concerned of certain evidence adduced against them and, in consequence, the hearing of those parties with regard to such evidence, during the administrative procedure....
134 Such restrictions are consistent with the constitutional traditions common to the Member States, as submitted by the Council and the United Kingdom, who have pointed out that exceptions to the general right to be heard in the course of an administrative procedure are permitted in many Member States on grounds of public interest, public policy or the maintenance of international relations, or when the purpose of the decision to be taken is or could be jeopardised if the right is observed ...
135 They are, moreover, consistent with the case-law of the European Court of Human Rights which, even in the more stringent context of adversarial criminal proceedings subject to the requirements of Article 6 of the ECHR, acknowledges that, in cases concerning national security and, more specifically, terrorism, certain restrictions on the right to a fair hearing may be envisaged, especially concerning disclosure of evidence adduced or terms of access to the file...
136 In the present circumstances, those considerations apply above all to the 'serious and credible evidence or clues' on which the national decision to instigate an investigation or prosecution is based, in so far as they may have been brought to the attention of the Council, but it is also conceivable that the restrictions on access may concern the specific content or the particular grounds for that decision, or even the identity of the authority that took it. It is even possible that, in certain, very specific circumstances, the identifiction of the Member State or third country in which a competent authority has taken a decision in respect of a person may be liable to jeopardise public security, by providing the party concerned with sensitive information which it could misuse.
137 It follows from all of the foregoing that the general principle of observance of the right to a fair hearing requires, unless precluded by overriding considerations concerning the security of the Community or its Member States, or the conduct of their international relations, that the evidence adduced against the party concerned, as identified in paragraph 126 above, should be notified to it, in so far as possible, either concomitantly with or as soon as possible after the adoption of an initial decision to freeze funds. Subject to the same reservations, any subsequent decision to freeze funds must, in principle, be preceded by notification of any new evidence adduced and a hearing. However, observance of the right to a fair hearing does not require either that the evidence adduced against the party concerned be notified to it before the adoption of an initial measure to freeze funds, or that that party automatically be heard after the event in such a context.

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

to make it possible to determine whether the act is well founded or whether it is vitiated by an error which may permit its validity to be contested before the Community Courts and, second, to enable the Community judicature to review the lawfulness of the decision ...The obligation to state reasons therefore constitutes an essential principle of Community law which may be derogated from only for compelling reasons...

139 The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him. A failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the Community Courts ...The possibility of regularising the total absence of a statement of reasons after an action has been started might prejudice the right to a fair hearing because the applicant would have only the reply in which to set out his pleas contesting the reasons which he would not know until after he had lodged his application. The principle of equality of the parties before the Community Courts would accordingly be affected...

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

141 The Court has consistently held that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and to the context in which it was adopted. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for a decision are sufficient if it was adopted in circumstances known to the party concerned which enable him to understand the scope of the measure concerning him... Moreover, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision ...

142 In the context of the adoption of a decision to freeze funds under Regulation No 2580/2001, the grounds for that decision must be assessed primarily in the light of the legal conditions of application of that regulation to a given scenario, as laid down in Article 2(3) thereof and, by reference, in Article 1(4) or Article 1(6) of Common Position 2001/931, depending on whether it is an initial decision or a subsequent decision to freeze funds.

143 The Court cannot accept the position advocated by the Council that the statement of reasons may consist merely of a general, stereotypical formulation, modelled on the drafting of Article 2(3) of Regulation No 2580/2001 and Article 1(4) or (6) of Common Position 2001/931. In accordance with the principles referred to above, the Council is required to state the matters of fact and law which constitute the legal basis of its decision and the considerations which led it to adopt that decision. The grounds for such a measure must therefore indicate the actual and specific reasons why the Council considers that the relevant rules are applicable to the party concerned ...

144 That entails, in principle, that the statement of reasons of an initial decision to freeze funds must at least refer to each of the aspects referred to in paragraph 116 above and also, where applicable, the aspects referred to in paragraphs 125 and 126 above, whereas the statement of reasons for a subsequent decision to freeze funds must indicate the actual and specific reasons why the Council considers, following re-examination, that the freezing of the funds of the party concerned remains justified.
145 Moreover, when unanimously adopting a measure to freeze funds under Regulation No 2580/2001, the Council does not act under circumscribed powers. Article 2(3) of Regulation No 2580/2001, read together with Article 1(4) of Common Position 2001/931, is not to be construed as meaning that the Council is obliged to include in the disputed list any person in respect of whom a decision has been taken by a competent authority within the meaning of those provisions. This interpretation, endorsed by the United Kingdom at the oral hearing, is confirmed by Article 1(6) of Common Position 2001/931, to which Article 2(3) of Regulation No 2580/2001 also refers, and according to which the Council is to conduct a 'review' at regular intervals, at least once every six months, to ensure that 'there are grounds' for keeping the parties concerned in the disputed list.
146 It follows that, in principle, the statement of reasons for a measure to freeze funds under Regulation No 2580/2001 must refer not only to the statutory conditions of application of that regulation, but also to the reasons why the Council considers, in the exercise of its discretion, that such a measure must be adopted in respect of the party concerned.
147 The considerations set out in paragraphs 143 to 146 above must nevertheless take account of the fact that a decision to freeze funds under Regulation No 2580/2001, whilst imposing an individual economic and financial sanction, is, like that act, also regulatory in nature, as explained in paragraphs 97 and 98 above. Moreover, a detailed publication of the complaints put forward against the parties concerned might not only conflict with the overriding considerations of public interest which will be discussed in paragraph 148 below, but also jeopardise the legitimate interests of the persons and entities in question, in that it would be capable of causing serious damage to their reputation. Accordingly, the Court finds, exceptionally, that only the operative part of the decision and a general statement of reasons, of the type referred to in paragraph 143 above, need be in the version of the decision to freeze funds published in the Official Journal, it being understood that the actual, specific statements of reasons for that decision must be formalised and brought to the knowledge of the parties concerned by any other appropriate means.
148 Moreover, in circumstances such as those of this case, it must be recognised that the overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds, just as they may preclude the evidence adduced against those parties from being communicated to them during the administrative procedure. In that connection the Court refers to the considerations set out above, in particular in paragraphs 133 to 137 above, regarding the restrictions on the general principle of observance of the right to a fair hearing which may be permitted in such a context. Those considerations are valid, mutatis mutandis, in respect of the restrictions which may be imposed on the obligation to state reasons.
149 Although it is not applicable to the circumstances of the present case, the Court also considers that inspiration may be drawn from the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC,

72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, corrigendum OJ 2004 L 229, p. 35, corrigendum to the corrigendum OJ 2005 L 197, p. 34). Article 30(2) of that directive provides that 'the persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision [restricting the freedom of movement and residence of a citizen of the Union or a member of his family] taken in their case is based, unless this is contrary to the interests of State security'.

150 In accordance with the settled case-law of the Court of Justice (Case 36/75 Rutili [1975] ECR 1219, and Case 131/79 Santillo [1980] ECR 1585) concerning Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117), repealed by Directive 2004/38, Article 6 of which was essentially identical to Article 30(2) of the latter, any person enjoying the protection of the provisions quoted must be entitled to a twofold safeguard, consisting of notification to him of the grounds on which any restrictive measure has been adopted in his case and the availability of a right of appeal. Subject to the same reservation, in particular, this requirement means that the State concerned must, when notifying an individual of a restrictive measure adopted in his case, give him a precise and comprehensive statement of the grounds for the decision, to enable him to take effective steps to prepare his defence.

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

- The right to effective judicial protection

152 Lastly, with respect to the safeguard relating to the right to effective judicial protection, this is effectively ensured by the right the parties concerned have to bring an action before the Court against a decision to freeze their funds, pursuant to the fourth paragraph of Article 230 EC ...

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

154 As part of that review, and having regard to the grounds for annulment put forward by the party concerned or raised by the Court of its own motion, it is for the Court to ensure, inter alia, that the legal conditions for applying Regulation No 2580/2001 to a particular scenario, as laid down in Article 2(3) of that regulation and, by reference, either Article 1(4) or Article 1(6) of Common Position 2001/931, depending on whether it is an initial decision or a subsequent decision to freeze funds, are fulfilled. That implies that the judicial review of the lawfulness of

the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based, as the Council expressly recognised in its written pleadings in the case giving rise to the judgment in Yusuf... The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in order to not to respect those rights are well founded.

155 In the present case, that review is all the more imperative because it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. Since the restrictions imposed by the Council on the right of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial ... the Community Courts must be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential.

156 Although the European Court of Human Rights recognises that the use of confidential information may be necessary when national security is at stake, that does not mean, in its view, that national authorities are free from any review by the national courts simply because they state that the case concerns national security and terrorism...

157 The Court finds that, here also, inspiration may be drawn from the provisions of Directive 2004/38. As noted in the case-law referred to in paragraph 150 above, Article 31(1) of that directive provides that the persons concerned are to have access to judicial and, where appropriate, administrative means of redress in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health. Moreover, Article 31(3) of that directive provides that the means of redress are to allow for an examination of the lawfulness of the decision, as well as of the facts and circumstances on which the proposed measure is based.

158 The question whether the applicant and/or its lawyers may be provided with the evidence and information alleged to be confidential, or whether they may be provided only to the Court, in accordance with a procedure which remains to be defined so as to safeguard the public interests at issue whilst affording the party concerned a sufficient degree of judicial protection, is a separate issue on which it is not necessary for the Court to rule in the present action...

159 Lastly, it is true that the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC, 301 EC and 308 EC, consistent with a common position adopted on the basis of the CFSP. Because the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the Council's assessment of the factors as to appropriateness on which such decisions are based...

Application to the present case

160 The Court notes, first, that the relevant legislation, namely Regulation No 2580/2001 and Common Position 2001/931 to which it refers, does not explicitly provide for any procedure for notification of the evidence adduced or for a hearing of the parties concerned, either before or concomitantly with the adoption of an initial decision to freeze their funds or, in the context of

the adoption of subsequent decisions, with a view to having them removed from the disputed list. At most, Article 1(6) of Common Position 2001/931 states that 'the names of persons and entities in the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list', and Article 2(3) of Regulation No 2580/2001 provides that 'the Council ... shall ... review and amend the list ..., in accordance with the provisions laid down in Article 1 ... (6) of Common Position 2001/931'.

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

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

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

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

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

166 Moreover, neither the written pleadings of the different parties to the case, nor the file material produced before the Court, enable it to conduct its judicial review, since it is not even in a position to determine with certainty, after the close of the oral procedure, exactly which is the national decision referred to in Article 1(4) of Common Position 2001/931, on which the contested decision is based.

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

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

169 In its statement in intervention, the United Kingdom stated that 'the Applicant [did] not allege, and there [was] nothing to suggest, that the Applicant [had] not [been] included in the Annex on the basis of [a decision adopted by a competent authority identifying the applicant as

being involved in terrorist activities]'. That same statement also appears to indicate that, in the view of the United Kingdom, the decision in question was that of the Home Secretary of 28 March 2001, confirmed by decision of that Home Secretary of 31 August 2001, then, in an action for judicial review, by judgment of the High Court of 17 April 2002 and, lastly, on appeal, by decision of the POAC of 15 November 2002.

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

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

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

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

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

The claim for damages

Arguments of the parties

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

Findings of the Court

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

177 To satisfy those requirements, an application for compensation for damage said to have been caused by a Community institution must indicate the evidence from which the conduct

which the applicant alleges against the institution can be identified, the reasons why the applicant considers there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage.... However, a claim for an unspecified form of damage is not sufficiently concrete and must therefore be regarded as inadmissible...
178 More specifically, a claim for damages in respect of non-material injury, whether as symbolic reparation or as genuine compensation, must give particulars of the nature of the injury alleged in connection with the conduct for which the defendant institution is held responsible and must quantify the whole of that injury, even if approximately ....
179 In the present case, the claim for damages contained in the application must in all likelihood be construed as compensation for non-material injury, as it is set at the symbolic amount of EUR 1. The fact remains, however, that the applicant has not specified the nature and type of that non-material injury nor, more importantly, identified the allegedly improper conduct of the Council which it is alleged is the cause of that injury. It is not for the Court to seek and identify, from amongst the various pleas put forward in support of the action for annulment, that or those on which it may consider the claim for damages to be based. Nor is it for the Court to make assumptions and ascertain whether there is a causal link between the conduct referred to in those pleas and the non-material injury alleged.
180 That being so, the claim for damages contained in the application lacks even the most basic detail and must, accordingly, be declared inadmissible, especially given that the applicant did not even attempt to remedy that defect in its reply.
181 It also follows that it is not necessary to rule, in connection with the claim for damages, on the pleas and arguments relied on by the applicant in support of its action for annulment, but not yet considered by the Court (see paragraph 174 above)...

On those grounds, THE COURT OF FIRST INSTANCE (Second Chamber) hereby:
1. Dismisses the action as in part inadmissible and in part unfounded in so far as it seeks annulment of Common Position 2005/936/CFSP of 21 December 2005 updating Common Position 2001/931/CFSP and repealing Common Position 2005/847/CFSP;
2. Annuls, in so far as it concerns the applicant, Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/848/EC;
3. Dismisses the claim for damages as inadmissible....

In September 2008, in **Kadi v Council & Commission**, [35]the ECJ annulled Regulation No 881/2002.[36] The ECJ began by describing the history leading up to the adoption of Regulation 881/2002 as follows (I have excluded the references to developments before Security Council Resolution 1333 (2000) :

[35] Cases C-402/05 P & C-415/05 P http://www.bailii.org/eu/cases/EUECJ/2008/C40205.html .

[36] Council Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida 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, OJ No. L 139/9 (May 29, 2002) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:139:0009:0022:EN:PDF.

19 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).

20 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'.

21 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.

22 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.

23 Taking the view that action by the European 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).

24 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)].'

25 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).

26 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'.

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

28 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.'

29 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 was empowered to amend or supplement Annex I on the basis of determinations made by either the Security Council or the Sanctions Committee.

30 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) (see the Committee's press release AFG/131 SC/7028 of 8 March 2001). That list has since been amended and supplemented several times. The Commission has in consequence adopted various regulations pursuant to Article 10 of Regulation No 467/2001, in which it has amended or supplemented Annex I to that regulation.

31 On 17 October and 9 November 2001 the Sanctions Committee published two new additions to its summary list, including in particular the names of the following entity and person:

'Al-Qadi, Yasin (A.K.A. Kadi, Shaykh Yassin Abdullah; A.K.A. Kahdi, Yasin), Jeddah, Saudi Arabia', and

'Barakaat International Foundation, Box 4036, Spånga, Stockholm, Sweden; Rinkebytorget 1, 04, Spånga, Sweden'.

32 By Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25), Mr Kadi's name was added, with others, to Annex I.

33 By Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Regulation No 467/2001 (OJ 2001 L 295, p. 16), the name Al Barakaat was added, with others, to Annex I.

34 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. Paragraphs 1 and 2 of that resolution provide, in essence, for the continuance of the measures freezing funds imposed by paragraphs 4(b) of Resolution 1267 (1999) and 8(c) of Resolution 1333 (2000). In accordance with paragraph 3 of Resolution 1390 (2002), those measures were to be reviewed by the Security Council 12 months after their adoption, at the end of which period the Council would either allow those measures to continue or decide to improve them.

35 Taking the view 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).

36 On 27 May 2002 the Council adopted the contested regulation on the basis of Articles 60 EC, 301 EC and 308 EC.

The ECJ held that the Regulation was invalid because it infringed fundamental rights (the right to effective judicial protection and the right to property):

280 The Court will now consider the heads of claim in which the appellants complain that the Court of First Instance, in essence, held that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, could not be subject to judicial review of its internal lawfulness, save with regard to its compatibility with the norms of jus cogens, and therefore to that extent enjoyed immunity from jurisdiction.
281 In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 Les Verts v Parliament [1986] ECR 1339, paragraph 23).
282 It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community (see, to that effect, Opinion 1/91 [1991] ECR I'6079, paragraphs 35 and 71, and Case C-459/03 Commission v Ireland [2006] ECR I'4635, paragraph 123 and case-law cited).
282 In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (see, inter alia, Case C'305/05 Ordre des barreaux francophones et germanophone and Others [2007] ECR I'5305, paragraph 29 and case-law cited).
284 It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C'112/00 Schmidberger [2003] ECR I'5659, paragraph 73 and case-law cited).
285 It follows from all those considerations 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 Community 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 the Treaty.
286 In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.
287 With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a

resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens.

288 However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.

289 The Court has thus previously annulled a decision of the Council approving an international agreement after considering the internal lawfulness of the decision in the light of the agreement in question and finding a breach of a general principle of Community law, in that instance the general principle of non-discrimination (Case C'122/95 Germany v Council [1998] ECR I'973).

290 It must therefore be considered whether, as the Court of First Instance held, as a result of the principles governing the relationship between the international legal order under the United Nations and the Community legal order, any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is in principle excluded, notwithstanding the fact that, as is clear from the decisions referred to in paragraphs 281 to 284 above, such review is a constitutional guarantee forming part of the very foundations of the Community.

291 In this respect it is first to be borne in mind that the European Community must respect international law in the exercise of its powers (Poulsen and Diva Navigation, paragraph 9, and Racke, paragraph 45), the Court having in addition stated, in the same paragraph of the first of those judgments, that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.

292 Moreover, the Court has held that the powers of the Community provided for by Articles 177 EC to 181 EC in the sphere of cooperation and development must be exercised in observance of the undertakings given in the context of the United Nations and other international organisations (Case C'91/05 Commission v Council [2008] ECR I'0000, paragraph 65 and case-law cited).

293 Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

294 In the exercise of that latter power it is necessary for the Community 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.

295 Next, it is to be noted that the powers provided for in Articles 60 EC and 301 EC may be exercised only in pursuance of the adoption of a common position or joint action by virtue of the provisions of the EC Treaty relating to the CFSP which provides for action by the Community.

296 Although, because of the adoption of such an act, the Community is bound to take, under the EC Treaty, the measures necessitated by that act, that obligation means, when the object is to implement a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, that in drawing up those measures the Community is to 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.

297 Furthermore, the Court has previously held that, for the purposes of the interpretation of the contested regulation, account must also be taken of the wording and purpose of Resolution 1390 (2002) which that regulation, according to the fourth recital in the preamble thereto, is designed to implement (Möllendorf and Möllendorf-Niehuus, paragraph 54 and case-law cited).
298 It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.
299 It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.
300 What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.
301 Admittedly, the Court has previously recognised that Article 234 of the EC Treaty (now, after amendment, Article 307 EC) could, if the conditions for application have been satisfied, allow derogations even from primary law, for example from Article 113 of the EC Treaty on the common commercial policy (see, to that effect, Centro-Com, paragraphs 56 to 61).
302 It is true also that Article 297 EC implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations it has accepted for the purpose of maintaining international peace and security.
303 Those provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.
304 Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.
305 Nor can an immunity from jurisdiction for the contested regulation with regard to the review of its compatibility with fundamental rights, arising from the alleged absolute primacy of the resolutions of the Security Council to which that measure is designed to give effect, find any basis in the place that obligations under the Charter of the United Nations would occupy in the hierarchy of norms within the Community legal order if those obligations were to be classified in that hierarchy.
306 Article 300(7) EC provides that agreements concluded under the conditions set out in that article are to be binding on the institutions of the Community and on Member States.
307 Thus, by virtue of that provision, supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary Community law (see, to that effect, Case C'308/06 Intertanko and Others [2008] ECR I'0000, paragraph 42 and case-law cited).

308 That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.
309 That interpretation is supported by Article 300(6) EC, which provides that an international agreement may not enter into force if the Court has delivered an adverse opinion on its compatibility with the EC Treaty, unless the latter has previously been amended.
310 It has however been maintained before the Court, in particular at the hearing, that the Community judicature ought, like the European Court of Human Rights, which in several recent decisions has declined jurisdiction to review the compatibility of certain measures taken in the implementing of resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, to refrain from reviewing the lawfulness of the contested regulation in the light of fundamental freedoms, because that regulation is also intended to give effect to such resolutions.....
316 As noted above in paragraphs 281 to 284, the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.
317 The question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.
318 It has in addition been maintained that, having regard to the deference required of the Community institutions vis-a-vis the institutions of the United Nations, the Court must forgo the exercise of any review of the lawfulness of the contested regulation in the light of fundamental rights, even if such review were possible, given that, under the system of sanctions set up by the United Nations, having particular regard to the re-examination procedure which has recently been significantly improved by various resolutions of the Security Council, fundamental rights are adequately protected.
319 According to the Commission, so long as under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever.
320 In this connection it may be observed, first of all, that if in fact, as a result of the Security Council's adoption of various resolutions, amendments have been made to the system of restrictive measures set up by the United Nations with regard both to entry in the summary list and to removal from it [see, in particular, Resolutions 1730 (2006) of 19 December 2006, and 1735 (2006) of 22 December 2006], those amendments were made after the contested regulation had been adopted so that, in principle, they cannot be taken into consideration in these appeals.
321 In any event, the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community.
322 Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection.
323 In that regard, although it is now open to any person or entity to approach the Sanctions Committee directly, submitting a request to be removed from the summary list at what is called

the 'focal' point, the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto.
324 The Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request.
325 Moreover, those Guidelines do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information. Last, if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.
326 It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.
327 The Court of First Instance erred in law, therefore, when it held, in paragraphs 212 to 231 of Kadi and 263 to 282 of Yusuf and Al Barakaat, that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, must enjoy immunity from jurisdiction so far as concerns its internal lawfulness save with regard to its compatibility with the norms of jus cogens.
328 The appellants' grounds of appeal are therefore well founded on that point, with the result that the judgments under appeal must be set aside in this respect.
329 It follows that there is no longer any need to examine the heads of claim directed against that part of the judgments under appeal relating to review of the contested regulation in the light of the rules of international law falling within the ambit of jus cogens ....
330 Furthermore, given that in the latter part of the judgments under appeal, relating to the specific fundamental rights invoked by the appellants, the Court of First Instance confined itself to examining the lawfulness of the contested regulation in the light of those rules alone, when it was its duty to carry out an examination, in principle a full examination, in the light of the fundamental rights forming part of the general principles of Community law, the latter part of those judgments must also be set aside.

Concerning the actions before the Court of First Instance
331 As provided in the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, the latter, when it quashes the decision of the Court of First Instance, may give final judgment in the matter where the state of proceedings so permits.
332 In the circumstances, the Court considers that the actions for annulment of the contested regulation brought by the appellants are ready for judgment and that it is necessary to give final judgment in them.
333 It is appropriate to examine, first, the claims made by Mr Kadi and Al Barakaat with regard to the breach of the rights of the defence, in particular the right to be heard, and of the right to

effective judicial review, caused by the measures for the freezing of funds as they were imposed on the appellants by the contested regulation.
334 In this regard, in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.
335 According to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) (see, to this effect, Case C'432/05 Unibet [2007] ECR I'2271, paragraph 37).
336 In addition, having regard to the Court's case-law in other fields (see, inter alia, Case 222/86 Heylens and Others [1987] ECR 4097, paragraph 15, and Joined Cases C'189/02 P, C'202/02 P, C'205/02 P to C'208/02 P and C'213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I'5425, paragraphs 462 and 463), it must be held in this instance that the effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested regulation and leading to the imposition on those persons or entities of a body of restrictive measures, means that the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.
337 Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature (see, to that effect, Heylens and Others, paragraph 15), and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.
338 So far as concerns the rights of the defence, in particular the right to be heard, with regard to restrictive measures such as those imposed by the contested regulation, the Community authorities cannot be required to communicate those grounds before the name of a person or entity is entered in that list for the first time.
339 As the Court of First Instance stated in paragraph 308 of Yusuf and Al Barakaat, such prior communication would be liable to jeopardise the effectiveness of the freezing of funds and resources imposed by that regulation.
340 In order to attain the objective pursued by that regulation, such measures must, by their very nature, take advantage of a surprise effect and, as the Court has previously stated, apply with immediate effect (Möllendorf and Möllendorf-Niehuus, paragraph 63).
341 Nor were the Community authorities bound to hear the appellants before their names were included for the first time in the list set out in Annex I to that regulation, for reasons also connected to the objective pursued by the contested regulation and to the effectiveness of the measures provided by the latter.
342 In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community

and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.
343 However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism.
344 In such a case, it is none the less the task of the Community judicature 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 ...
345 In the circumstances, the inevitable conclusion is, first of all, that neither the contested regulation nor Common Position 2002/402 to which the former refers provides for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in Annex I to that regulation and for hearing those persons, either at the same time as that inclusion or later.
346 It has next to be pointed out that the Council at no time informed the appellants of the evidence adduced against them that allegedly justified the inclusion of their names for the first time in Annex I to the contested regulation and, consequently, the imposition of the restrictive measures laid down by the latter.
347 It is not indeed denied that no information was supplied in that connection to the appellants, whether in Regulation No 467/2001 as amended by Regulations Nos 2062/2001 and 2199/2001, their names being mentioned for the first time in a list of persons, entities or bodies to whom and to which a measure freezing funds applies, in the contested regulation or at some later stage.
348 Because the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view in that respect known to advantage. Therefore, the appellants' rights of defence, in particular the right to be heard, were not respected.
349 In addition, given the failure to inform them of the evidence adduced against them and having regard to the relationship, referred to in paragraphs 336 and 337 above, between the rights of the defence and the right to an effective legal remedy, the appellants were also unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature, with the result that it must be held that their right to an effective legal remedy has also been infringed.
350 Last, it must be stated that that infringement has not been remedied in the course of these actions. Indeed, given that, according to the fundamental position adopted by the Council, no evidence of that kind may be the subject of investigation by the Community judicature, the Council has adduced no evidence to that effect.
351 The Court cannot, therefore, do other than find that it is not able to undertake the review of the lawfulness of the contested regulation in so far as it concerns the appellants, with the result that it must be held that, for that reason too, the fundamental right to an effective legal remedy which they enjoy has not, in the circumstances, been observed.
352 It must, therefore, be held that the contested regulation, in so far as it concerns the appellants, was adopted without any guarantee being given as to the communication of the inculpatory evidence against them or as to their being heard in that connection, so that it must

be found that that regulation was adopted according to a procedure in which the appellants' rights of defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed.

353 It follows from all the foregoing considerations that the pleas in law raised by Mr Kadi and Al Barakaat in support of their actions for annulment of the contested regulation and alleging breach of their rights of defence, especially the right to be heard, and of the principle of effective judicial protection, are well founded.

354 Second, the Court will now examine the plea raised by Mr Kadi with regard to breach of the right to respect for property entailed by the freezing measures imposed on him by virtue of the contested regulation.

355 According to settled case-law, the right to property is one of the general principles of Community law. It is not, however, absolute, but must be viewed in relation to its function in society. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed (see, in particular, Regione autonoma Friuli-Venezia Giulia and ERSA, paragraph 119 and case-law cited; see also, to that effect in the context of a system of restrictive measures, Bosphorus, paragraph 21).

356 In order to assess the extent of the fundamental right to respect for property, a general principle of Community law, account is to be taken of, in particular, Article 1 of the First Additional Protocol to the ECHR, which enshrines that right.

357 Next, it falls to be examined whether the freezing measure provided by the contested regulation amounts to disproportionate and intolerable interference impairing the very substance of the fundamental right to respect for the property of persons who, like Mr Kadi, are mentioned in the list set out in Annex I to that regulation.

358 That freezing measure constitutes a temporary precautionary measure which is not supposed to deprive those persons of their property. It does, however, undeniably entail a restriction of the exercise of Mr Kadi's right to property that must, moreover, be classified as considerable, having regard to the general application of the freezing measure and the fact that it has been applied to him since 20 October 2001.

359 The question therefore arises whether that restriction of the exercise of Mr Kadi's right to property can be justified.

360 In this respect, according to the case-law of the European Court of Human Rights, there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court must determine whether a fair balance has been struck between the demands of the public interest and the interest of the individuals concerned. In so doing, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest for the purpose of achieving the object of the law in question...

361 As the Court has already held in connection with another Community system of restrictive measures of an economic nature also giving effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the importance of the aims pursued by a Community act is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights...

362 In the case in point, the restrictive measures laid down by the contested regulation contribute to the implementation, at Community level, of the restrictive measures decided on by the Security Council against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them.
363 With reference to an objective of general interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate...
364 On this point, it is also to be taken into consideration that the contested regulation, in the version amended by Regulation No 561/2003, adopted following Resolution 1452 (2002), provides, among other derogations and exemptions, that, on a request made by an interested person, and unless the Sanctions Committee expressly objects, the competent national authorities may declare the freezing of funds to be inapplicable to the funds necessary to cover basic expenses, including payments for foodstuffs, rent, medicines and medical treatment, taxes or public utility charges. In addition, funds necessary for any 'extraordinary expense' whatsoever may be unfrozen, on the express authorisation of the Sanctions Committee.
365 It is further to be noted that the resolutions of the Security Council to which the contested regulation is intended to give effect provide for a mechanism for the periodic re-examination of the general system of measures they enact and also for a procedure enabling the persons concerned at any time to submit their case to the Sanctions Committee for re-examination, by means of a request that may now be made direct to the Committee at what is called the 'focal' point.
366 It must therefore be found that the restrictive measures imposed by the contested regulation constitute restrictions of the right to property which might, in principle, be justified.
367 In addition, it must be considered whether, when that regulation was applied to Mr Kadi, his right to property was respected in the circumstances of the case.
368 It is to be borne in mind in this respect that the applicable procedures must also afford the person concerned a reasonable opportunity of putting his case to the competent authorities. In order to ascertain whether this condition, which constitutes a procedural requirement inherent in Article 1 of Protocol No 1 to the ECHR, has been satisfied, a comprehensive view must be taken of the applicable procedures...
369 The contested regulation, in so far as it concerns Mr Kadi, was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him.
370 It must therefore be held that, in the circumstances of the case, the imposition of the restrictive measures laid down by the contested regulation in respect of Mr Kadi, by including him in the list contained in Annex I to that regulation, constitutes an unjustified restriction of his right to property.
371 The plea raised by Mr Kadi that his fundamental right to respect for property has been infringed is therefore well founded.
372 It follows from all the foregoing that the contested regulation, so far as it concerns the appellants, must be annulled.
373 However, the annulment to that extent of the contested regulation with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive

measures imposed by the regulation and which the Community is required to implement, because in the interval preceding its replacement by a new regulation Mr Kadi and Al Barakaat might take steps seeking to prevent measures freezing funds from being applied to them again.

374 Furthermore, in so far as it follows from this judgment that the contested regulation must be annulled so far as concerns the appellants, by reason of breach of principles applicable in the procedure followed when the restrictive measures introduced by that regulation were adopted, it cannot be excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified.

375 Having regard to those considerations, the effects of the contested regulation, in so far as it includes the names of the appellants in the list forming Annex I thereto, must, by virtue of Article 231 EC, be maintained for a brief period to be fixed in such a way as to allow the Council to remedy the infringements found, but which also takes due account of the considerable impact of the restrictive measures concerned on the appellants' rights and freedoms.

376 In those circumstances, Article 231 EC will be correctly applied in maintaining the effects of the contested regulation, so far as concerns the appellants, for a period that may not exceed three months running from the date of delivery of this judgment.