OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 14 July 2011 (1)

Case C-27/09 P

French Republic

v

People's Mojahedin Organization of Iran

(Appeal – Restrictive measures with a view to combating terrorism – Freezing of funds and capital)

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Introduction

1. By its appeal, the French Republic requests the Court of Justice to set aside the judgment of the Court of First Instance (now the General Court) (2) of 4 December 2008 in Case T–284/08 *People's Mojahedin Organization of Iran* v *Council* ('the judgment under appeal'). (3)

2. By that judgment, the General Court annulled Council Decision 2008/583/EC ('the decision at issue') (4) in so far as it concerned the People's Mojahedin Organization of Iran ('PMOI'). The effect of that decision had been to maintain in place the arrangements for freezing the funds and other financial assets and economic resources of PMOI within the European Union.

3. The sequence of events that preceded the adoption of the judgment under appeal is complicated. For ease of comprehension, I have noted the main events in the body of this Opinion and have included a detailed chronology as a separate Annex.

4. The background to the case requires to be understood in the context of the significant increase in international terrorism in recent years, and the responses on the part of the United Nations and the European Union to the threat such terrorism has posed and continues to pose.

Legal context

5. On 28 September 2001, the United Nations Security Council adopted Resolution 1373 (2001). Article 1 of that resolution provides: '... all States shall: ... (c) 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 persons or entities acting on behalf of, or at the direction of such persons and entities ...'.

European Union legislation

6. As part of the arrangements relating to the implementation of Resolution 1373 (2001) within the European Union, the Council adopted Common Position 2001/931 (5) on 27 December 2001.

7. Recital 7 in the preamble to Common Position 2001/931 states:

'Action by the Community is necessary in order to implement some of those additional measures; action by the Member States is also necessary, in particular as far as the application of forms of police and judicial cooperation in criminal matters is concerned.'

8. Article 1 of Common Position 2001/931 provides:

'1. This Common Position applies in accordance with the provisions of the following Articles to persons, groups and entities involved in terrorist acts and listed in the Annex.

2. For the purposes of this Common Position, "persons, groups and entities involved in terrorist acts" shall mean:

– persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts,

– groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.

3. For the purposes of this Common Position, "terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:

(i) seriously intimidating a population, or

(ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:

(a) attacks upon a person's life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

(g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed under (a) to (h);

(j) directing a terrorist group;

(k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

For the purposes of this paragraph, “terrorist group” shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. “Structured group” means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

4. The list in the Annex shall 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. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list.

For the purposes of this paragraph “competent authority” shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.

5. The Council shall work to ensure that names of natural or legal persons, groups or entities listed in the Annex have sufficient particulars appended to permit effective identification of specific human beings, legal persons, entities or bodies, thus facilitating the exculpation of those bearing the same or similar names.

6. The names of persons and entities on 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.’

9. Article 4 of Common Position 2001/931 states:

‘Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States.’

10. The Annex to Common Position 2001/931 did not include PMOI.

11. Since it considered that a regulation was necessary in order to implement at European Union level the measures described in Common Position 2001/931, the Council adopted Regulation No 2580/2001 (‘the Regulation’). (6)

12. Article 1(6) of the Regulation contains the following definition:

‘“Controlling a legal person, group or entity” means any of the following:

(a) having the right to appoint or remove a majority of the members of the administrative, management or supervisory body of such legal person, group or entity;

(b) having appointed solely as a result of the exercise of one's voting rights a majority of the members of the administrative, management or supervisory bodies of a legal person, group or entity who have held office during the present and previous financial year;

(c) controlling alone, pursuant to an agreement with other shareholders in or members of a legal person, group or entity, a majority of shareholders' or members' voting rights in that legal person, group or entity;

(d) having the right to exercise a dominant influence over a legal person, group or entity, pursuant to an agreement entered into with that legal person, group or entity, or to a provision in its Memorandum or Articles of Association, where the law governing that legal person, group or entity permits its being subject to such agreement or provision;

(e) having the power to exercise the right to exercise a dominant influence referred to in point (d), without being the holder of that right;

(f) having the right to use all or part of the assets of a legal person, group or entity;

(g) managing the business of a legal person, group or entity on a unified basis, while publishing consolidated accounts;

(h) sharing jointly and severally the financial liabilities of a legal person, group or entity, or guaranteeing them.'

13. Article 2 of the Regulation provides:

'1. Except as permitted under Articles 5 and 6:

(a) all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list referred to in paragraph 3 shall be frozen;

(b) no funds, other financial assets and economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.

...

3. The Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which this Regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position [2001/931]; such list shall consist of:

(i) natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;

(ii) legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;

(iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in points (i) and (ii); or

(iv) natural legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to in points (i) and (ii).'

14. Article 8 of the Regulation states:

'The Member States, the Council and the Commission shall inform each other of the measures taken under this Regulation and supply each other with the relevant information at their disposal in connection with this Regulation ... and in respect of violation and enforcement problems or judgments handed down by national courts.'

15. By Decision 2001/927, (7) the Council adopted the initial list of persons, groups and entities to which the Regulation applied. PMOI's name was not included in that list.

16. In the annex to Common Position 2002/340 of 2 May 2002, (8) the Council set out an updated list of persons, groups and entities to which Common Position 2001/931 applied. Point 2 of that annex, entitled 'Groups and entities', included an entry relating to PMOI, which was identified as follows: 'Mujahedin-e Khalq Organisation (MEK or MKO) [minus the "National Council of Resistance of Iran" (NCRI)] (a.k.a. The National Liberation Army of Iran (NLA, the militant wing of the MEK), the People's Mujahidin of Iran (PMOI) [sic], National Council of Resistence (NCR) [sic], Muslim Iranian Student's Society [sic])'.

17. By Decision 2002/334, also of 2 May 2002, (9) the Council adopted an updated list of persons, groups and entities to which the Regulation applied. PMOI's name was included on that list in the same terms as those set out in the annex to Common Position 2002/340.

18. Pursuant to Article 1(6) of Common Position 2001/931 and Article 2(3) of the Regulation, the Council adopted a series of further decisions listing the persons, groups and entities to which that common position applied. PMOI's name continued to be included in the annexes to those decisions.

19. On 15 July 2008, the Council adopted the decision at issue. PMOI's name was once again included in the annex to that decision.

20. By Decision 2009/62, (10) which followed delivery of the judgment under appeal on 4 December 2008, the Council adopted an updated list of persons, groups and entities to which Regulation No 2580/2001 applied. PMOI's name was no longer included on the list.

Human rights legislation

21. Article 15(1) of the European Convention on Human Rights ('the Convention') provides:

'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

22. Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), (11) which is entitled 'Right to an effective remedy and to a fair trial', states:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

...'

Background

PMOI

23. PMOI is an Iranian political organisation. (12) It was founded in 1965, with the initial purpose of opposing the regime of the Shah. It took an active part in the protest within Iran that ultimately led to the Shah's downfall in 1979. Thereafter, it quickly came into conflict with the fundamentalist regime of Ayatollah Khomeini. Towards the end of 1981, many of its members and supporters went into exile, their principal place of refuge being France. In 1986, however, following negotiations between the French and Iranian authorities, the French Government effectively treated them as undesirable aliens and the leadership of PMOI, with several thousand followers, relocated to Iraq. There, they kept a formidable arsenal of weapons, including tanks and rocket launchers, until the invasion of that country by the coalition forces in 2003. From Iraq, they lent military support to their host in the war against Iran until its conclusion. They conducted violent operations inside Iran until 2001.

24. Since 2001 and, more particularly, the occupation of Iraq in 2003, PMOI has continually pursued a campaign to legitimise its status as a secular, democratic movement intent upon the peaceful overthrow of the present regime in Iran. At an extraordinary Congress held in Iraq in June 2001, PMOI claimed formally to have resolved to abandon all military action or activities in Iran.

25. The terrorist activities in which PMOI was earlier involved, however, led to its being proscribed as a terrorist organisation in several countries. By order taking effect on 8 October 1997, the United States Secretary of State designated PMOI as a 'foreign terrorist organisation' in that country. (13) On 28 March 2001, the United Kingdom Secretary of State for the Home Department ('the Home Secretary') made an order under the Terrorism Act 2000, the effect of which was to designate PMOI as a proscribed terrorist organisation in that Member State. (14)

26. Those activities also led to action being taken in France against alleged members of PMOI. In April 2001, the 'anti-terrorist prosecutor's office' of the Tribunal de grande instance de Paris (Regional Court, Paris) opened an inquiry (15) into charges of 'criminal association for the preparation of terrorist acts' as provided for by Law No 96/647 of 22 July 1996. The inquiry also focused on the 'financing of a terrorist group' under Law No 2001/1062 of 15 November 2001.

27. On 17 June 2003, PMOI's offices at Auvers-sur-Oise in France were raided by the French police. (16) A large number of persons were detained and some of them were remanded in custody. Although a substantial sum of money was found, no prosecutions were brought.

28. In addition to the inquiry mentioned in point 26 above, on 19 March and 13 November 2007 the anti-terrorist prosecutor's office brought supplementary charges against alleged members of PMOI. These involved, in particular, allegations of 'laundering the direct or indirect proceeds of fraud offences against particularly vulnerable persons and organised fraud' and having a link with a terrorist undertaking.

29. In the meantime, in the United Kingdom, on 30 October 2006, PMOI challenged a decision of the Home Secretary to refuse to de-proscribe it before the Proscribed Organisations Appeal Commission ('the POAC'). The essential thrust of its appeal was that, whatever the nature of its activities at the time of its proscription, PMOI had since renounced terrorism and rejected violence.

30. By the POAC decision, the POAC allowed PMOI's appeal. It described the Home Secretary's decision to refuse to de-proscribe PMOI as 'perverse'.

31. By judgment of 7 May 2008, (17) the Court of Appeal (England and Wales) dismissed the Home Secretary's application for leave to appeal against the POAC decision and ordered him to de-proscribe PMOI.

Events immediately preceding, and including, the adoption of the decision at issue

32. A number of events took place in close, or relatively close, succession prior to the adoption of the decision at issue.

33. On 9 June 2008, the French Republic provided the Council with what it termed additional information regarding PMOI which, in the opinion of that Member State, justified maintaining it on the list of persons, groups and entities whose assets were frozen pursuant to Article 1(4) of Common Position 2001/931 and Article 2(3) of the Regulation.

34. A series of meetings of the Council's working party responsible for the implementation of Common Position 2001/931 ('the CP 931 Working Party') then took place. (18) Following the approval of the decision at issue and the statement of reasons by that working party on 4 July 2008, a meeting of the Foreign Relations (Relex) Counsellors Working Party of the Council was held on the same day, at which agreement was reached on the text of an updated version of the decision at issue. This was, in turn, circulated to the Committee of Permanent Representatives and approved by that committee on 9 July 2008. The decision at issue was adopted on 15 July 2008.

35. In the meantime, by order of 23 June 2008 which entered into force on 24 June 2008, the Home Secretary, acting in response to the judgment of the Court of Appeal of 7 May 2008, removed PMOI's name from the list of organisations proscribed under the Terrorism Act 2000 in that Member State.

36. By letter of 15 July 2008, the Council notified the decision at issue to PMOI. A statement of reasons was attached to that letter. (19)

37. It is common ground that at no stage prior to the adoption of the decision at issue did the Council inform PMOI of the new information or new material on the file which, in the Council's view,

justified it being maintained on the list of organisations whose funds were frozen pursuant to Article 1(4) of Common Position 2001/931 and Article 2(3) of the Regulation.

The judgment under appeal

38. By application lodged at the Registry of the General Court on 21 July 2008, PMOI brought proceedings against the Council seeking the annulment of the decision at issue in so far as that decision applied to it.

39. The French Republic and the European Commission were granted leave to intervene in those proceedings.

40. By way of measures of inquiry, the General Court made an order on 26 September 2008 ('the order of 26 September 2008'), by which it directed the Council to provide to it all documents relating to the adoption of the decision at issue in so far as they concerned PMOI, without those documents being produced to PMOI at that stage of the proceedings if the Council claimed that they were confidential.

41. The Council complied with that order in two stages. First, on 10 October 2008, it produced a response ('the first response to the order of 26 September 2008') to which there were annexed eight documents. For seven of these, no claim as regards confidentiality was made and they were duly provided to PMOI. The eighth document comprised a confidential version of one of the documents contained in the other annexes. It was not provided to PMOI.

42. In the first response to the order of 26 September 2008, the Council indicated that it was unable to produce, at that stage, certain further documents setting out the proposed new basis for listing PMOI and explaining the reasons for its proposal, since these were classified as confidential by the French Republic and could not be made available at the time the response was submitted. Those documents had been circulated to the CP 931 Working Party in the process leading to the adoption of the decision at issue.

43. Those further documents were duly included in the annex to a second response by the Council ('the second response to the order of 26 September 2008'), lodged on 6 November 2008. In that response, the Council informed the General Court that the French Republic, having completed the domestic procedures necessary for the declassification of the three documents in question, had authorised the communication of the first two documents in their entirety; and had authorised the communication of the third subject to the deletion of two passages. These comprised information set out at points 3(a) and 3(f) of Annex 3 to the response (respectively, 'the point 3(a) information' and 'the point 3(f) information').

44. By judgment delivered on 4 December 2008, the General Court allowed PMOI's application and ordered the Council to bear the costs.

45. PMOI raised six pleas in law before the General Court. In so far as is relevant to this appeal, these comprised, first of all, breach of the rights of the defence, in that the Council adopted the decision at issue without first informing PMOI of the new information or new material in the file, which, in the Council's view, justified maintaining PMOI on the list of persons, groups and entities whose assets were frozen pursuant to Article 2(3) of the Regulation.

46. The General Court addressed that plea in paragraphs 36 to 47 of the judgment under appeal.

47. In paragraph 39, it stated: 'The Court finds that the Council's arguments totally fail to substantiate its claim that it was impossible for it to adopt the contested decision under a procedure that would have respected the applicant's rights of defence.'

48. More specifically, the General Court found that the alleged urgency was by no means established. Even assuming that the Council was not under an immediate duty to remove the applicant from the disputed list following the POAC decision of 30 November 2007, the possibility for the Council to continue to rely on the Home Secretary's decision which had served as the basis for the initial decision to freeze PMOI's funds came to an end as of 7 May 2008, when the Court of Appeal gave its judgment. Between that date and the date of adoption of the contested decision (15 July 2008), more than two months had elapsed. The Council had not explained why it was not possible for it to take steps immediately after 7 May 2008 with a view either to removing PMOI from

the disputed list or to maintaining it in that list on the basis of new evidence (paragraph 40).

49. Furthermore, even assuming that the first material relating to the judicial inquiry opened in April 2001 in Paris was communicated to the Council by the French authorities only in June 2008, this did not explain why that new material could not be communicated forthwith to PMOI, if the Council intended to rely on it against PMOI (paragraph 41).

50. It was therefore incorrect, both in law and in fact, to state that, following the entry into force on 24 June 2008 of the Home Secretary's order of 23 June 2008 delisting PMOI and the communication, more or less simultaneously, (20) of new material by the French authorities, a new decision to freeze funds had to be adopted as a matter of such urgency that it was not possible to comply with the applicant's rights of defence (paragraph 43).

51. The General Court also rejected the Council's argument that the statement of reasons notified to PMOI after the adoption of the decision at issue enabled it to exercise its right to bring an action and the Community judicature to carry out its review (paragraphs 45 and 46).

52. Paragraphs 49 to 79 of the judgment under appeal addressed the remainder of PMOI's pleas in law that are relevant to this appeal, namely, those alleging (1) breaches of Article 1(4) of Common Position 2001/931 and of Article 2(3) of the Regulation and a failure to discharge the burden of proof and (2) breach of PMOI's right to effective judicial protection.

53. In paragraphs 49 to 55 of the judgment under appeal, the General Court referred to its earlier case-law. In particular, having pointed out that, under Article 10 EC (now replaced, in substance, by Article 4(3) TEU), relations between the Member States and the institutions are governed by reciprocal duties to cooperate in good faith (paragraph 52), it went on to note (in paragraph 53) its case-law (21) stating that, when applying Article 1(4) of Common Position 2001/931 and Article 2(3) of the Regulation, the Council is under an obligation 'to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, in respect of the existence of "serious and credible evidence or clues" on which its decision is based'. It followed (paragraph 54) that, while it was for the Council to prove that the freezing of funds was legally justified, that burden of proof had 'a relatively limited purpose'.

54. In paragraph 55 of the judgment under appeal, the General Court went on to recall its case-law to the effect that, although the Council had broad discretion as to the matters to be taken into account in deciding whether an order for the freezing of funds should be made, the Union judicature remained under a duty to review the Council's interpretation of the relevant facts and had 'not only [to] establish whether the evidence relied on is factually accurate, reliable and consistent, but … also [to] ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it'. (22)

55. In paragraphs 56 to 58 of the judgment under appeal, the General Court stated:

'56 … the Court finds that neither the information contained in the contested decision, its statement of reasons and the letter of notification, nor even those contained in the Council's two answers to [the order of 26 September 2008], comply with the requirements in respect of proof which have been recalled above. In consequence, it has not been established to the required legal standard that the contested decision was adopted in accordance with the provisions laid down in Article 1(4) of Common Position 2001/931 and Article 2(3) of [the Regulation].

57 More specifically, the Council has not provided the Court with any precise information or material in the relevant file which indicates that the judicial inquiry opened by the anti-terrorist Prosecutor's office of the Tribunal de grande instance of Paris in April 2001 and the supplementary charges brought in March and November 2007 constitute, in respect of the applicant, a decision meeting the definition in Article 1(4) of Common Position 2001/931. Thus, the Council makes that allegation without adducing any evidence in support of its contention.

58 In this respect, it is appropriate to quote extensively the most relevant excerpts of the Council's first answer to the Court order of 26 September 2008:

"3. Four meetings of the CP 931 Working Party took place in order to prepare the adoption by

the Council of the decision in question, in so far as it concerned the Applicant. These meetings took place on 2 June, 13 June, 24 June and 2 July 2008. …

…

6. For the purposes of these meetings the French Republic also circulated three documents to delegations setting out the new proposed basis for listing the Applicant and explaining the reasons for its proposal. The third document comprised, in part, the text which became the Statement of Reasons as agreed by the Council and which already forms part of the file in these proceedings. At the time of circulation these documents were classified as confidential by the French Republic. The Council has informed the French Republic of the Court's Order and the French Republic is currently examining the issue of declassifying the documents in question. However, the Council has been informed that the need to comply with domestic legal requirements means that a decision on this matter cannot be taken within the time-limit set by the Registrar. Therefore, at the moment the Council is unable to comply with the Court's Order in relation to these documents as it does not have authorisation to provide them to the Court, even on a confidential basis. The Council respectfully asks for the Court's understanding on this matter and undertakes to inform the Court immediately of any decision by the French Republic concerning the documents in question.

…

11. In particular, the Council wishes to point out that it has not been provided with any additional evidence relating to the French judicial inquiry beyond that which has been set out in the Statement of Reasons. It understands that such additional evidence must, under French law, remain confidential during the course of the inquiry. The Council has reproduced all of the essential elements concerning the inquiry which were made available to it in the Statement of Reasons. One of the documents referred to in paragraph 6 did provide a more detailed list of the offences under investigation but these are all covered by the general description provided in the Statement of Reasons (namely, a series of offences all having a principal or subsidiary link with a collective undertaking whose aim is to seriously disrupt public order through intimidation or terror, as well as financing of a terrorist group and the laundering of direct or indirect proceeds of fraud offences against particularly vulnerable persons and organised fraud having a link with a terrorist undertaking).

12. Apart from the nature of the offences under investigation, and the details concerning the date when the inquiry commenced and when the supplementary charges were subsequently brought, the Council does not have any other information concerning the inquiry. The Council has not been informed of the specific identity of the persons under investigation; it knows only that these persons are alleged members of the Applicant, as indicated in the Statement of Reasons. Nor does it have any information about possible future steps in the inquiry. In short, no other evidence 'adduced against the applicant' in the context of the judicial inquiry was available to the Council when the contested decision was adopted beyond that which appears in the Statement of Reasons."'

56. The General Court then went on to address PMOI's argument that the national decision related to alleged members of that organisation and could not be held to concern the organisation itself; and the Council's counter-argument that, although the decision in question related to individuals, such a situation was 'logical and appropriate', since offences of the kind alleged could not be committed by the organisation itself but only by the individuals belonging to it and, moreover, that since PMOI itself was not a legal person it could not be the subject of criminal proceedings. The General Court held, first, that such an explanation was inconsistent with the literal wording of Article 1(4) of Common Position 2001/931 (paragraph 64 of the judgment under appeal). In the alternative, it held that even if such an interpretation was incorrect, the Council had failed to provide an explanation as to the 'actual and specific reasons' why, in the circumstances of the case, the acts ascribed to individuals should be imputed to PMOI itself. Such an explanation was 'completely missing in the present case' (paragraph 65).

57. The General Court went on to state, at paragraphs 71 to 76 of the judgment under appeal:

'71 Finally, the Court notes that, at the request of the French authorities, the Council has refused to declassify point 3(a) of the last of the three documents referred to at paragraph 58 above, [(23)] setting out a "summary of the main points which justify the keeping of [PMOI] on the EU list", drawn up by the said authorities for the attention of certain Member States delegations. According to the abovementioned letter from the French Ministry of Foreign and

European Affairs, the passage in question "contained information of a security nature with implications for national defence which is therefore, under Article 413–9 of the Penal Code, subject to protective measures to restrict its circulation", so that "the Ministry is unable to authorise its communication to the [General Court]".

72 As regards the Council's contention that it is bound by the French authorities' claim for confidentiality, this does not explain why the production of the relevant information or material in the file to the Court would violate the principle of confidentiality, whereas their production to the members of the Council, and thus to the governments of the 26 other Member States, did not.

73 In any case, the Court considers that the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision.

74 It is to be borne in mind that in the *OMPI* judgment (paragraph 154), the Court has already held that the judicial review of the lawfulness of a decision to freeze funds extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based, as the Council expressly recognised in its written pleadings in the case giving rise to the judgment in Case T–306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* [2005] ECR II–3533, annulled on appeal in Joined Cases C–402/05 P and C–415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008], not yet reported. [(24)] 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 justify disregarding those rights are well founded.

75 In the current context, that review is all the more essential because it constitutes the only 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 rights 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 its being possible to raise objections that the evidence and information used by the Council is secret or confidential (*OMPI* judgment, paragraph 155).

76 In the present case, the refusal by the Council and the French authorities to communicate, even to the Court alone, the information contained in point 3(a) of the last of the three documents referred to at paragraph 58 above has the consequence that the Court is unable to review the lawfulness of the contested decision.'

The appeal

58. In its challenge to the decision of the General Court, the French Republic raises three grounds of appeal. The first of these claims that the General Court erred in law by failing to take account of the specific circumstances in which the decision at issue was adopted. The second maintains that that Court erred in law by considering that the judicial inquiry opened in France did not constitute a decision meeting the definition laid down in Article 1(4) of Common Position 2001/931. The third claims that the General Court erred in law by holding that the Council's refusal to communicate the point 3(a) information did not enable that Court to review the lawfulness of the decision at issue and infringed the right to effective judicial protection. The French Republic therefore concludes that the judgment under appeal should be set aside.

59. PMOI, for its part, contests each of these grounds of appeal and contends that the appeal should be dismissed.

60. In contrast to the proceedings which gave rise to the *OMPI* and *PMOI I* judgments and, indeed, the judgment under appeal, no Member State or institution has sought leave to intervene at any stage in this appeal. In reply to written questions put by the Court on 2 June 2010 asking the Council and the European Commission to submit their observations concerning their experience in practice of implementing certain aspects of the judgment of the Court of Justice in *Kadi I*, the Council and Commission lodged written responses on 28 June and 24 June 2010, respectively. These provided no assistance in the analysis which follows and I shall not refer to them further in

this Opinion.

Admissibility

61. Before dealing with the substance of the appeal, it is necessary to address PMOI's challenge to admissibility.

62. PMOI argues, in essence, that, since France has not sought to challenge Decision 2009/62 and since its predecessor, the decision at issue, has been repealed and replaced, France has no legal interest in pursuing the appeal. It follows that the appeal is inadmissible. Alternatively, the appeal is devoid of purpose and the Court should decline to adjudicate on it.

63. I am not persuaded by those arguments.

64. In the first place, the second paragraph of Article 56 of the Statute of the Court of Justice provides, in effect, that both the Member States and the institutions of the Union who have intervened before the General Court may bring an appeal even where the decision of that Court does not directly affect them. Since the French Republic intervened in the proceedings at first instance, this provision applies directly to it in this appeal. Even had that not been the case, the French Republic would still have had an interest in bringing the appeal by virtue of the third paragraph of that article, which enables a Member State or institution to bring an appeal against a judgment of the General Court even where it did not intervene in the proceedings at first instance.

65. The reason for this is clear. The interpretation and application of European Union law is of paramount importance to Member States and institutions. They may have a very real interest in challenging an interpretation of European Union law delivered by the General Court, even if they did not participate in the proceedings before it.

66. Can it validly be argued that, even if the French Republic has an interest in bringing this appeal, it should none the less be declared inadmissible since it is devoid of purpose?

67. I do not think so.

68. First, as the French Republic points out, the effect of the judgment under appeal was to remove the decision at issue (at least in so far as it concerned PMOI) from the legal order of the Union since the date of that decision's adoption on 15 July 2008. If the appeal is successful, its effect will be to re-establish the decision in that legal order for the period between 15 July 2008 and the date of adoption of Decision 2009/62, which repealed it (26 January 2009).

69. Second, and more fundamentally, the French Republic has a concern for the future. The outcome of this appeal is of direct relevance to it. The setting aside of the judgment under appeal would allow the French Republic, should it see fit to do so, to initiate the procedure before the Council with a view to PMOI being reinstated on the list of persons, groups and entities whose assets are to be frozen pursuant to Article 1(4) of Common Position 2001/931 and Article 2(3) of the Regulation. Even a disposal that was less favourable would still serve a purpose. Depending on the terms of the Court's judgment, the French Republic would then know whether, for example, the information provided to the Council prior to the decision at issue was sufficient in law or whether further or different information was necessary. Whether, how and on what basis confidential or secret information should be made available to the General Court would also be clarified.

70. It seems to me that PMOI's plea as to inadmissibility is founded on an unduly restrictive approach towards the purpose that is served by clarifying the law.

71. I therefore consider that the appeal is admissible.

Substance

The first ground of appeal (alleged infringement of the rights of the defence)

72. By its first ground of appeal, the French Republic argues essentially that the General Court was wrong to hold, at paragraph 47 of the judgment under appeal, that the decision at issue was vitiated by a failure to notify PMOI of the new information on the file and a failure to give PMOI an opportunity to make representations, prior to that decision being adopted by the Council.

73. According to the French Republic, the urgency of the situation resulting from the order of the Home Secretary to remove PMOI's name from the list of proscribed organisations in the United Kingdom was such that immediate steps had to be taken if PMOI's name was to be retained on the Council's list. Time did not allow the Council to adopt the decision at issue under a procedure which would have permitted it to communicate the new information to PMOI. (25) The approach followed by the Council in adopting the decision at issue was therefore the proper one in the circumstances.

74. The attitude adopted by the General Court to the arguments advanced before it by the Council, which were essentially similar to those put forward by the French Republic in this appeal, can fairly be described as unsympathetic. It found that the Council's arguments 'totally fail[ed] to substantiate its claim that it was impossible for it to adopt the [decision at issue] under a procedure that would have respected [PMOI's] rights of defence' (paragraph 39 of the judgment under appeal). It went on to hold that 'the alleged urgency [was] by no means established'. Even assuming that the Council was not under an immediate duty to remove PMOI from the list following the POAC decision of 30 November 2007, the possibility for the Council to continue to rely on the Home Secretary's decision came to an end as of 7 May 2008, when the Court of Appeal gave its judgment. Between that date and the date of adoption of the decision at issue, 'more than two months [e] lapsed' (paragraph 40). Even assuming that the new information was communicated to the Council only in June 2008, this did not explain why the Council did not communicate it immediately to PMOI (paragraph 41).

75. It is worth examining the position in detail.

The procedure leading to the adoption of the decision at issue: (1) the period between 7 May 2008 and 9 June 2008

76. As regards that period, the position can be simply put. At least at the level of the Council, nothing of significance appears to have happened. The French Republic explains in its reply that the reason that the new information could not be provided until 9 June 2008 was that it was necessary for the French prosecution services to make that information public. Prior to that date, it was covered by what is termed 'investigative confidentiality'.

77. In the result, therefore, one month of the two-month period notionally available for the adoption of the decision was not used for the purpose of advancing the decision-making process within the Council itself. I might add that the same is true of the period from the date of the POAC decision of 30 November 2007 – which, while subject to appeal, at least gave rise to a strong possibility that it might no longer be possible to list PMOI on the basis of information provided by the United Kingdom – to 6 May 2008. It could be observed that to lose one period to inactivity might be regarded as a misfortune, but to lose two looks like carelessness. Such an outcome should be avoided if it is possible to do so.

78. In my opinion, it could indeed have been avoided in the circumstances at issue. (26)

79. While the responsibility for the adoption of decisions as to listing, and hence the procedure leading up to the adoption of those decisions, lies with the Council, that institution cannot act without input from, and the participation of, the Member States.

80. Article 4 of Common Position 2001/931 and Article 8 of the Regulation make it clear that the Member States are under an obligation to participate in the fight against terrorism. Those States are, of course, also under the general duty to cooperate in good faith laid down in Article 4(3) TEU. That principle is of general application and is especially binding in the area of police and judicial cooperation in criminal matters. (27)

81. In my view, it follows from those requirements that, once a person, group or entity is listed, the Member States are under an obligation to keep each other (and the Council) informed of developments within their respective systems which mean that the substratum on which the listing of a particular person, group or entity as a proscribed organisation is based either has disappeared or, more particularly, is at risk of disappearing. Once they have been so informed, all other Member States are then under a duty to place any material before the Council on which they wish, or may wish, to rely with a view to the listing in question being maintained. Given that matters may become urgent, the Member States must do so as swiftly as possible, thereby facilitating the Council's task while, at the same time, ensuring that the rights of the defence are respected.

82. In the present case, it appears that such timely cooperation was, regrettably, lacking.

The procedure leading to the adoption of the decision at issue: (2) the period between 9 June 2008 and 15 July 2008

83. With the benefit of comprehensive and up-to-date information, the Council will be better placed to adopt a decision with the minimum of delay. It must, of course, then follow the proper procedures leading to the adoption of the decision.

84. Before returning to the sequence of events leading to the adoption of the decision at issue, it may be helpful to pause briefly to examine the legal test that such a decision must satisfy if it is to withstand a challenge before the European Union judicature; and what that test in turn implies in terms of Council procedures.

85. In this context, it is worth noting the General Court's statement, in paragraph 55 of the judgment under appeal, that, when reviewing funds-freezing decisions, the Union judicature must not only 'establish' that the evidence relied on is factually accurate, reliable and consistent, but also 'ascertain' whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it.

86. That (twofold) test laid down by the European Union judicature goes to the validity of any decision adopted by the Council in the field of funds freezing. The decision in question must meet that test. A failure to do so may result in the decision being overturned on a challenge being brought before the General Court.

87. As regards the requirement to establish that the evidence is factually accurate, reliable and consistent, I shall address issues relating to the nature and intensity of the scrutiny to be applied by the Council below. (28) At this point in my analysis, I would simply observe that such a test appears to me to be unexceptionable.

88. The second of these aspects concerns the scope of the evidence in question. The decision-maker is under a duty to determine whether the evidence before it contains *all* the relevant information to be taken into account in order to assess the situation and whether that evidence is capable of substantiating the allegation that the person, group or entity concerned participates in, or facilitates, the commission of terrorist acts or is otherwise covered by Common Position 2001/931 or the Regulation.

89. From this, it follows that the Council must give full consideration to all material laid before it, since it must be satisfied that the material in question comprises all material that is relevant and that the information provided is sufficient to justify a funds-freezing order. In addition, and save where the order concerned is an initial one (29) and subject to issues relating to confidential evidence, (30) the Council must, in order to reach its decision, have provided the person, group or entity that is liable to be affected by the order in question with all the evidence on which it intends to found its decision and have given due weight to all that is said in response. (31)

90. To what extent did the procedures operated by the Council in the case at issue satisfy these requirements?

91. The responses provided by the Council to the General Court in reply to the order of 26 September 2008 disclose the following:

– first, it appears that a meeting of the CP 931 Working Party took place on 13 June 2008. The note of that meeting records that new information (relating to PMOI) was studied. A draft statement of reasons was circulated;

– the next meeting of that working party was held on 24 June 2008. The note of that meeting records that further information (again relating to PMOI) had been presented, and that the Member States had requested additional time in which to study the issue;

– in the record of the subsequent meeting, held on 2 July 2008, it is noted that in the light of the further additional information provided and the revised statement of reasons which had been circulated, delegates were given until 4 July to indicate whether they had any objection to PMOI's listing on the new basis proposed;

– thereafter, it appears, a meeting of the Foreign Relations (Relex) Counsellors Working Party of the Council was held on 4 July 2008, at which agreement was reached on the text of the decision at issue;

– that text was, in turn, circulated to the Committee of Permanent Representatives and approved by that committee on 9 July 2008;

– the decision at issue was adopted on 15 July 2008.

92. Leaving aside the role of the Member States in the procedure under discussion, the fact remains in this case that it was not until 9 June 2008 that the French Republic provided the new information and new material to the Council. For Article 1(4) of Common Position 2001/931 to apply, the Council must, as a starting point, be provided with particulars of the 'precise information or material in the relevant file which indicates that a decision has been taken by a competent authority'. There was, therefore, no basis on which the Council could have initiated the proceedings leading to the adoption of the decision at issue any earlier than 9 June 2008.

93. I would add that it appears from the documents produced by the Council in response to the General Court's order of 26 September 2008 that the final information on which the decision at issue was based was not supplied to the Council and considered by its working party until the meeting held on 2 July 2008. In my view, it would have been inappropriate for the Council to communicate information to PMOI until such time as it was clear beyond doubt that what was being communicated was all (and, indeed, no more than) the information that was going to be relevant to the Council's decision-making process.

94. While it is at least possible that one or more aspects of the procedure followed by the Council *after* the French Republic provided the new information and new material on 9 June 2008 might, with hindsight, have been accelerated, I think it unlikely that any such acceleration would have had a significant impact on the overall timescales. (32) I do not see that the procedure operated by the Council could be said to be materially at fault in the sense that it was not conducted rapidly enough.

95. In particular, the findings of the General Court appear to me to disregard the manner in which the Council had to operate in practice. The decision in question fell to be adopted by way of unanimity. The meetings concerned were attended by representatives from the Member States. It is reasonable to assume that those representatives needed instructions from their national authorities and/or governments. The procedure is, by its nature, a protracted (not to say cumbersome) one. It is clear from the notes of the meetings concerned that an immediate decision was not something that was 'on offer' in this case. In addition to the need to ensure that all Member States were in agreement with the proposed draft decision, the Council through its services (including, in particular its legal service) will have had to form a view, before the decision was finally adopted, as to the likelihood that it would withstand the scrutiny of the General Court in the event of its being challenged.

96. I therefore conclude that the General Court was wrong to hold that the Council had ample time, *if the decision at issue was to be adopted according to the timescale set by the Council in the present case*, in which to notify PMOI of the new information and new material received from the French Republic and to give PMOI the opportunity to make representations. I shall examine later whether that timescale was, in reality, the limiting factor which the Council claimed it to be in its submissions to the General Court. (33)

The requirement to notify PMOI

97. Was the Council correct in determining that it did not need to notify PMOI of the new information and give it an opportunity to make representations prior to the adoption of the decision at issue?

98. If it is accepted that the Council was not in a position to move significantly more rapidly during the period between 9 June 2008, when it received the relevant information from the French Republic, and 15 July 2008, when it adopted the decision at issue, the question remains whether it was permissible for the Council to adopt the decision at issue without first informing PMOI and giving the opportunity to make representations.

99. In my view, it was not.

100. Essentially, the case-law provides that, where a decision to freeze funds is taken for the first time, such a decision must, by its very nature, be able to benefit from a surprise effect and be able to be applied immediately. It cannot, therefore, be the subject-matter of notification before it is implemented. (34) The position is different in the case of a subsequent decision to freeze the same funds. There, the element of surprise is no longer relevant. Such a decision must be preceded by the possibility of a further hearing and, where appropriate, communication of any new evidence. (35)

101. A freezing order in relation to PMOI's funds having been in place since 3 May 2002, (36) it is plain that the decision at issue constituted a subsequent decision and not an initial one. On a straightforward application of that case-law, the new evidence therefore had to be communicated to PMOI; and PMOI had to be given the opportunity to respond to it and make its views known.

102. Nor can there be any merit in the argument that, since the decision at issue was based on new information, time, as it were, started to run again, with the result that prior notification was not required. What is relevant is not whether the information was new, but whether it related to the renewal of the existing freezing order rather than to the adoption of a freezing order for the first time. The decision at issue concerned the renewal of a freezing order. Surprise was thus both unnecessary and irrelevant.

103. Seen from PMOI's perspective, the element of protection afforded by the requirement of notification and the right to make representations prior to the adoption of the decision at issue is a fundamental one. It is thus essential to its rights of defence. It follows, in my view, that the General Court was quite correct when, in paragraphs 46 and 47 of the judgment under appeal, it rejected the Council's argument that PMOI's interests had been sufficiently addressed by notifying the decision to PMOI subsequently to its adoption and giving PMOI the opportunity to make representations at that point. Whether or not issues of urgency arise, it is simply not open to the Council to ride roughshod over a party's rights of defence in the manner in which it did.

104. What, therefore, ought the Council to have done?

105. There were three sets of interests involved in the situation which the Council faced. First, there were those of PMOI. Second, there were those of the Council, which was entitled, in my view, to take steps to ensure, so far as possible, that the decision at issue was not open to challenge on the ground that it had been adopted with undue haste or lack of care. Third, there were the interests of the other persons, groups and entities whose names appeared on the list set out in the annex to Decision 2007/868 (37) (the decision which immediately preceded the decision at issue). Those parties were entitled to the benefit of the obligation imposed on the Council by Article 1(6) of Common Position 2001/931 to review the names of persons, groups and entities whose funds are frozen 'at regular intervals and at least once every six months' in order to ensure that there were grounds for keeping them on the list.

106. Plainly, the Council had to balance those interests.

107. I have already indicated that, in my view, the procedure by which the Council adopted the decision at issue was not materially at fault.

108. As regards the persons, groups and entities whose names appeared on the list apart from PMOI, it seems to me that the Council was quite correct to treat the review of the list set out in Decision 2007/868 as being something which fell to be addressed as a matter of priority. Were the adoption of a fresh decision to have been postponed for the time necessary to allow for notification to and representations by PMOI, the Council might rightly have been criticised for failing to respect that priority (and thus for failing to respect the interests of those other parties).

109. That leaves PMOI.

110. The Council's arguments before the General Court as to urgency depended crucially on the premiss that no procedure was available for the Council to separate PMOI, on the one hand, from the remaining persons, groups and entities, on the other, and adopt different decisions in relation to each of them.

111. I see no reason why that should be the case.

112. In my view, the Council could, first, have adopted a decision in relation to the remaining persons, groups and entities that respected the timescale laid down in Article 1(6) of Common Position 2001/931. Second, and in order to protect PMOI's rights of defence, it could have deferred adopting a decision in relation to PMOI until such time as it had had the opportunity to follow the necessary initial procedures internally, then to notify PMOI and give it an opportunity to make representations and finally to consider those representations fully and carefully (again, following the necessary procedures internally) before deciding whether or not PMOI's name should be retained on the list.

113. It seems to me that this was not only an approach that the Council could follow in the circumstances leading up to the adoption of the decision at issue: it was the approach that the Council should have followed. By doing so, the Council would have ensured that the rights of the remaining persons, groups and entities were protected. It would also have ensured that its own procedures were properly respected and that the rights of defence of PMOI were similarly taken into account. (38)

114. Put another way, it seems to me that the Council's error lay in believing that it had to determine whether the names of *all* persons, groups and entities listed in the annex to Decision 2007/868 should be re-listed in the annex to the decision at issue within one and the same time frame. That error led the Council to conclude that there was 'no time' to respect PMOI's rights of defence prior to adopting the decision at issue. But the constraint of urgency *in relation to PMOI* was a phantom constraint. The Council was, of course, under an obligation to consider expeditiously whether PMOI should continue to be listed. But it was under no obligation to complete that process simultaneously with the review of the remainder of the list.

115. While I disagree with some of the reasoning set out by the General Court in the judgment under appeal concerning the procedure leading to the adoption of the decision at issue, I am therefore none the less of the opinion that that Court reached the proper conclusion in finding that the decision at issue fell to be annulled, since it was adopted following a procedure that failed to respect PMOI's rights of defence.

116. It follows that the first ground of appeal should be rejected.

The second and third grounds of appeal

117. Before I turn to the substance of these grounds of appeal, it is necessary to raise a preliminary point. The General Court made it clear that it was founding its decision to grant the application before it solely on its findings in relation to PMOI's fourth plea in law, alleging a breach of the rights of the defence (see paragraph 48 of the judgment under appeal). It follows that that Court's findings in relation to the pleas in law to which the French Republic's second and third grounds of appeal relate were set out purely for the sake of completeness.

118. In proceeding nevertheless to examine these grounds of appeal, I am fully mindful of the settled case-law of the Court, according to which a complaint directed against a ground included in a decision of the General Court purely for the sake of completeness cannot lead to the decision being set aside and is therefore nugatory. (39) However, in my view the second and third grounds of appeal do need to be addressed.

119. I say this because a failure to provide a response to the issues raised by these grounds of appeal would mean that the French Republic was faced with precisely the same uncertainty as led it to bring the appeal in the first place. (40) The same uncertainty may affect other Member States in the future. (41)

120. Declining to address the second and third grounds of appeal would be an unsatisfactory result. I shall therefore deal with these grounds of appeal in full. Since, in my view, their resolution ought not to affect the outcome of the appeal, I shall do so more discursively.

The second ground of appeal (alleged infringement of Article 1(4) of Common Position 2001/931)

121. By this ground of appeal, the French Republic argues that the General Court erred in law by holding (at paragraph 57 of the judgment under appeal) that the inquiry opened in France against alleged members of PMOI did not constitute a decision meeting the definition laid down in Article 1 (4) of Common Position 2001/931.

122. The following issues arising out of the General Court's analysis in the judgment under appeal are relevant to the second ground of appeal.

123. First, can the provisions of Article 1(4) of Common Position 2001/931 be satisfied where the decision of a competent authority under that article relates to a person, group or entity which is not the same as the person, group or entity identified in the decision taken by the Council for the purposes of that article (the first point)? Second, what is the proper interpretation to be given to the expression 'competent authority', as used in Article 1(4) of Common Position 2001/931 (the second point)? Third, was the General Court correct to hold that the inquiry was not based on 'serious and credible evidence or clues' (the third point)? Fourth, and assuming for immediate purposes that the answer to the first point is in the affirmative, to what extent was it incumbent on the Council to provide what the General Court termed in paragraph 65 of the judgment under appeal an 'explanation as to the actual and specific reasons' why the parties in question should be 'linked' (the fourth point)?

124. As regards the first point, I would observe that no issue can be taken with the finding of the General Court at paragraph 64 of the judgment under appeal, where it held that a literal construction of Article 1(4) of Common Position 2001/931 – which provides that a decision must have been taken 'in respect of the persons, groups and entities concerned' – would require that the decision of the competent authority be taken in respect of the party or parties identified in the Council's decision taken pursuant to that article. If such an interpretation were correct, the decision at issue would necessarily be fatally flawed, since it is not in dispute that the parties covered by the decision of the competent authority and those covered by the decision at issue are not identical.

125. Is a literal interpretation of Article 1(4) the correct one?

126. I do not think so.

127. In my view, having regard to the reason for which Common Position 2001/931 and the Regulation were enacted, it is necessary to construe this provision broadly. Terrorist organisations are unlikely to set out to assist the authorities by establishing themselves in an easily identifiable manner. Indeed, it has to be assumed that they will do precisely the opposite. As with any type of warfare which is conducted along guerrilla lines, an element of surprise, and hence concealment, is essential. An interpretation of Article 1(4) is thus required which is sufficiently flexible to accommodate this aspect. Provided that there exist 'serious and credible evidence or clues' for believing that the parties named in the decision of the competent authority and in the decision adopted by the Council to freeze funds are essentially the same, I consider that the requirements of Article 1(4) of Common Position 2001/931 will be satisfied.

128. This is *a fortiori* the position where, as in the present case, the French Republic maintains that, so far as it is aware, PMOI does not have legal identity. (42)

129. Support for the notion that a flexible interpretation is required can, in my view, be found first of all in the scope of the definition set out in Article 1(6) of the Regulation and the breadth of the wording used in Article 2(3) thereof. (43) Without the difficulties of identification I have outlined, such a wide approach would not be necessary. It can also be found, I suggest, in the manner in which parties whose funds are frozen are frequently identified in Council decisions to freeze funds. Thus, in the decision at issue, the entry in the Annex which relates to PMOI is worded as follows: '"Mujahedin-e Khalq Organisation" – "MEK" or "MKO", excluding the "National Council of Resistance of Iran" – "NCRI" (a.k.a. "The National Liberation Army of Iran" – "NLA" (the militant wing of the "MEK"), a.k.a. the "People's Mujahidin of Iran" – '"PMOI", a.k.a. "Muslim Iranian Student's Society")'. This is far from being an isolated example. Recourse to such 'fragmented' identifications of persons, groups and entities listed is common. (44)

130. I therefore conclude that the decision at issue was not fatally flawed by reason of the fact that the decision of the competent authority did not relate specifically to PMOI but only to persons who allegedly are or were members of that organisation.

131. As regards, next, the second and third points, which I shall consider together, it is clear from the wording of Article 1(4) of Common Position 2001/931 that the making of a finding by a national court as to the commission of a terrorist act or an attempt to perpetrate, participate in or facilitate such an act is a sufficient, but not a necessary, condition for the application of that article. It is also clear from the reference to a decision having been taken as to 'the instigation of investigations or prosecution for [such an act]' that what I might loosely term the 'precursors' to such a finding are

also included. Save where 'judicial authorities' have no competence in the area (a point which does not arise in the case of the proceedings in France against the alleged individual members of PMOI), the competent authority in question must be a 'judicial' one. Moreover, in the absence of 'condemnation for such deeds', the 'instigation or investigations' by that competent authority must be 'based on serious and credible evidence or clues'.

132. What, precisely, does the expression 'judicial authority' mean?

133. It is plain, given the breadth of Article 1(4) which I have outlined, that to apply its natural meaning, in English at least, which would normally suggest that the decision in question must represent a finding of guilt by a court, is unduly narrow. (45) It is necessary to give the expression a wider meaning, which would include the investigating and prosecuting authorities of the Member State in question.

134. It is also clear that a simple decision to initiate investigations will not, of its own, be enough. Such a decision may be based on mere suspicion. The investigations in question may, of course, *result in* serious and credible evidence or clues being established, in which case prosecution is, one imagines, likely to follow (although at the material time it may not yet have done so). Equally, however, the investigations may go nowhere. Such a decision to investigate will not therefore suffice for the purposes of Article 1(4).

135. The legal systems of the Member States are simply too different for it to be possible to lay down a single, precise, point in proceedings where the test of 'serious and credible evidence or clues' will be met. I shall therefore outline what I consider to be the general principles which apply.

136. In my opinion, the requirement to be met for there to be 'serious and credible evidence and clues' is that there should be material on the file which is *strongly suggestive* of a terrorist act or an attempt to perpetrate, participate in or facilitate such an act having been committed. The material need not be sufficient to form the basis of a subsequent prosecution, but it must be significantly more than mere suspicion or hypothesis. It must, as a minimum, be enough to indicate to a person who may have a funds-freezing order made against him the essential allegations that he needs to counter; and these must be put to him in such a way that enables him to exercise his rights of defence. (46)

137. Was the test met in the present case?

138. In paragraph 68 of the judgment under appeal, the General Court held that 'nothing on the file makes it possible to establish that the judicial inquiry opened in France in April 2001 … is based … on "serious and credible evidence or clues", as prescribed by Article 1(4) of Common Position 2001/931'.

139. In its appeal, the French Republic places particular reliance on Article 80–1 of the French *Code de procédure pénale*, which requires there to be strong or concordant evidence against a person in order for an examining magistrate to initiate an investigation. This, it argues, satisfies the requirement laid down by Article 1(4) in that regard.

140. The General Court's finding in paragraph 68 representing a statement of fact, I interpret the French Republic's argument to be that, in finding as it did, the General Court distorted the clear sense of the evidence before it.

141. In order to address this ground of appeal, it is necessary to examine the procedures initiated in France in 2001 and in 2007 in the context of the rules of French criminal procedure. I do so with diffidence. I do not pretend to a particular expertise which would qualify me to pronounce authoritatively on those rules. But the analysis is unavoidable if I am to deal with the second ground of appeal.

142. As I understand the rules of French criminal procedure governing the investigative stage of the proceedings, that stage will, at least in cases important enough to require the involvement of an examining magistrate, be initiated by the public prosecutor through the service of a '*réquisitoire*' on the examining magistrate. (47) This represents the point at which formal investigations will begin. (48) Should the examining magistrate form the view that there exists sufficient evidence to require further investigation with a view to proceeding to a full trial, he will proceed to initiate a *mise en examen* under Article 80–1 of the *Code de procédure pénale*. As mentioned, the examining

magistrate may initiate the *mise en examen* only if there is 'strong or concordant evidence' which makes it probable that the person under investigation has committed the offence in question. (49) The *mise en examen* by the examining magistrate thus seems to me to constitute the stage in the procedure which will meet the test of 'serious and credible evidence or clues'. Conversely, the mere opening of an inquiry and the procedure leading to the service of the *réquisitoire*, which is the responsibility of the public prosecutor, does not.

143. I have asked myself the question whether these 'ordinary' rules of French criminal procedure apply without modification to the investigation of persons and organisations whom Article 1(4) of Common Position 2001/931 is intended to cover, so that it is legitimate to draw this conclusion. However, the French Republic has specifically pleaded Article 80–1 as the basis of its second ground of appeal; and PMOI has not suggested that, as an organisation alleged to have participated in terrorist activities, it was subject to different or more stringent rules. I shall therefore proceed on the basis that a *mise en examen* by the examining magistrate constitutes the stage in the procedure at which the test of 'serious and credible evidence or clues' is satisfied.

144. Is it clear beyond doubt in this appeal that both the procedure initiated in France in 2001 and that initiated in 2007 had each reached the stage of a *mise en examen* by the examining magistrate?

145. No.

146. There does not appear to be any doubt that the procedure initiated by the 2001 inquiry was followed by a *mise en examen* in 2003. However, PMOI stated at the hearing, without being contradicted by the French Republic, that the 2007 inquiry had not been the subject of any *mise en examen*. On that basis, the test would not appear to have been met as regards that second procedure.

147. Since the reasoning of the French Republic is predicated on the existence of serious and credible evidence or clues as regards both procedures, it must meet that test as regards each of them for the purposes of its appeal. It has not done so with respect to the procedure initiated in 2007. It has therefore failed to establish that the General Court was wrong to hold that there was insufficient evidence that the proceedings in the French Republic satisfied the test laid down in Article 1(4) of Common Position 2001/931. The second ground of appeal should therefore be rejected.

148. I turn lastly to the fourth point. This, it will be recalled, concerns the observation by the General Court (at point 65 of the judgment under appeal) that there was no explanation as to the 'actual and specific reasons' why, in the circumstances of the case, the acts ascribed to individuals who were allegedly members or supporters of PMOI should be imputed to PMOI itself. The General Court held that such an explanation was 'completely missing in the present case'.

149. The French Republic argues, in effect, that it must have been evident to PMOI that the allegations against the individuals in question involved the organisation itself. It claims that it was clear from the response to the order of 26 September 2008 that this was the case and that the high number of individuals (24) against whom the investigation was brought necessarily presupposed that the organisation at issue was implicated.

150. I am not convinced by either of these arguments.

151. First, a perusal of the documents produced in response to the order of 26 September 2008 shows that these refer, it is true, to 'persons suspected of belonging to' and to 'alleged members of' PMOI. They go on to state that 'members of this organisation are ... currently being prosecuted for criminal activities aimed at funding their activities'. All of that does indeed amount to a series of assertions that the individuals and PMOI were regarded by the French Republic as being linked. It does not, however, provide the explanation which the General Court, in my view rightly, required. A string of general assertions that various people are members of organisation 'X' and that they are being investigated or prosecuted for (unspecified) criminal activities aimed at funding their activities does *not* suffice to impute their conduct to organisation 'X'.

152. Second, and as regards PMOI's actual knowledge of the underlying position, counsel for PMOI accepted, in response to a question from the Court at the hearing, that, as a result of the raid on its offices at Auvers-sur-Oise in 2003, 'PMOI could not be unaware ("*ne pouvait ne pas savoir*") that it was indirectly being targeted'. Even if it were to be accepted that this factual knowledge on PMOI's

part sufficed for the purposes of the investigation which commenced in 2001, no explanation has been provided as regards the investigation which commenced in 2007. PMOI has been adamant throughout that it was unaware of any link in that respect between investigations into individuals and the organisation. (50)

153. As regards the number of persons concerned, had this been one indication among many, or at least several, pointing to the involvement of PMOI as an organisation, I might perhaps have been persuaded. On its own, however, I cannot see that it takes the argument any further.

154. For all of the above reasons, the second ground of appeal should be rejected.

The third ground of appeal (alleged breach of the right to effective judicial protection)

155. By its third ground of appeal, the French Republic essentially criticises the General Court for having held, at paragraphs 71 to 76 of the judgment under appeal, that it was not open to the Council to withhold information on confidentiality grounds when responding to the order of 26 September 2008. The result of that failure to waive confidentiality was, according to the General Court, that the Court was unable to review the lawfulness of the decision at issue. It followed that PMOI's right to effective judicial protection had been infringed.

156. In support of its ground of appeal, the French Republic raises two principal arguments.

The first argument: 'the information withheld was not relied upon'

157. The General Court held in paragraph 73 of the judgment under appeal that the Council was not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the Member State concerned was not willing to authorise its communication to the Union judicature.

158. Implicit in that reasoning is a finding by the General Court that the Council did, in fact, base its decision to a material degree on that information or material.

159. The French Republic seeks to challenge that finding of fact. It argues that the information withheld by the Council in the second response to the order of 26 September 2008 (51) was not, in fact, relied on by the Council when it adopted the decision at issue. That, it says, is clear from paragraphs 11 and 12 of the first response to the order of 26 September 2008 (cited in paragraph 58 of the judgment under appeal). Furthermore, the statement of reasons and the documents submitted by the Council in response to that order were sufficient to establish that the Council had the relevant information it needed in order to adopt the decision at issue in so far as it concerned PMOI, on the basis of a national decision meeting the definition laid down in Article 1(4) of Common Position 2001/931.

160. Perusal of the second response to the order of 26 September 2008 shows that two passages were deleted from Annex 3 to that response. Paragraph 4 of that response states, with regard to the first passage (that is to say, the point 3(a) information), that 'the reason given [by the French Republic] for its deletion was that the information in question relates to public security and defence and is therefore subject to protective measures restricting its communication …'. As regards the second passage (that is to say, the point 3(f) information), the same paragraph states that 'the reason for its deletion was that it does not concern the PMOI but other entities included in the EU list of persons and entities involved in terrorist acts'.

161. The information contained in the deleted passages remains confidential. It has not been provided to this Court as part of the French Republic's appeal.

162. In challenging the finding of fact in question, what I take the French Republic to be arguing is that the General Court distorted the clear sense of the evidence before it. Were the position to be otherwise, this part of the ground of appeal would be manifestly inadmissible. (52)

163. Can it be said that the finding of the General Court distorts the sense of the evidence in that way?

164. In order to answer this question, it is necessary, first, to have regard to paragraphs 11 and 12 of the first response to the order of 26 September 2008.

165. The Council states, in paragraph 11, that it has not been provided with any additional evidence relating to the French judicial inquiry beyond that which has been set out in the statement of reasons, such additional evidence having, under French law, to remain confidential. It goes on to say that it has reproduced all of the essential elements concerning the inquiry that were made available to it in the statement of reasons. It adds the qualification that some more specific details were available from one of the documents in respect of which confidentiality was claimed. It then in turn qualifies that qualification, to the effect that those details were all covered by the general description provided in the statement of reasons.

166. In paragraph 12, the Council states, in effect, that it has no further information or material that is relevant to be known by the General Court. In particular, it has not been informed of the specific identity of the persons under investigation.

167. What, then, is the clear sense of the evidence in that context? The wording of paragraphs 11 and 12 of the Council's first response to the order of 26 September 2008 is, to put it kindly, unclear. Whether that opacity is the result of intentional obfuscation on the Council's part or merely represents poor use of language is not an issue that can be explored here. It seems to me that the General Court was entitled to make a finding of fact, based on the balance of probabilities, that the Council *had* based its decision to some (unspecified) extent on the material which that Court had not been given.

168. If one considers, second, the statement of reasons and the documents submitted by the Council in response to the order of 26 September 2008, the French Government argues that that statement and those documents were sufficient to establish that the Council had the information it needed in order to adopt the decision at issue in so far as it concerned PMOI.

169. That may be true. But the onus in this context is on the French Republic to establish that the Council did *in fact* base its decision on that material alone. To contend that the material was sufficient to establish that the Council had the necessary information does not satisfy that test.

170. It therefore seems to me that there is nothing in the propositions advanced by the French Republic to suggest that, in finding as it did, the General Court manifestly distorted the evidence before it. The French Government's first argument must accordingly be rejected.

The second argument: 'the information withheld was classified'

171. The French Republic refers to the classified nature of the information contained in the point in question (see paragraph 71 of the judgment under appeal). In response to the observation by the General Court at paragraph 72 of the judgment under appeal (that the latter could not understand why (in effect), if the document could be produced to the Council, and thus to the Governments of the other 26 Member States, it could not also be produced to that Court), the French Republic observes that, under Article 67(3) of the Rules of Procedure of the General Court, that Court will take into consideration only those documents which have been made available to the lawyers and agents of the parties and on which they have been given an opportunity to express their views. In other words, as I understand the point the French Republic is making, the General Court would not request the production of a document unless it was minded to take the contents of that document into account in its judgment. If it does indeed take those contents into account for that purpose, it will, of necessity, first make them available to the other side.

172. The French Republic goes on to add that it is not disputed that the French authorities were opposed, on grounds of confidentiality, to the document in question being communicated to PMOI. It follows that the General Court would not, in any event, have been able to take it into consideration.

173. The issue raised by this part of the French Republic's ground of appeal is one of crucial interest. To what extent should it be possible for a party to proceedings before the General Court to insist on information provided to that Court being treated as confidential, with the result that it is not made available to the other party or parties to the proceedings? And, if the information is so treated, may (or should) it nevertheless be taken into consideration by the General Court for the purposes of its judgment?

174. It is important to see this issue in the proper context.

175. Two articles of the Rules of Procedure of the General Court already contain provisions as to confidentiality. (53) First, under Article 67(3), it is open to a party responding to a measure of

inquiry to claim confidentiality in respect of all or part of the information communicated in its response. The Court will then assess that claim. During the period in which it does so, the document concerned will not be communicated to the other parties to the proceedings. The same article provides that, where a document to which access has been denied by an institution has been produced before the Court in proceedings relating to the legality of that denial, the document is not to be communicated to the other parties.

176. Second, by virtue of Article 116(2), the President of the General Court may, on application by one of the parties to the proceedings, omit secret or confidential information from the copies of the documents to be provided to an intervener pursuant to that article. Paragraph 6 of the same article provides that, where a party applies to intervene after the expiry of the six-week period referred to in Article 115(1), he will be provided with a copy of the report for the hearing. He will not be provided with the documents served on the parties under Article 116(2). For obvious reasons, the report for the hearing will not contain any material that is confidential.

177. What is absent from the Rules of Procedure of the General Court is any provision which might allow that Court to take account of confidential evidence submitted by one of the parties to an action before it without that evidence being disclosed to the other party or parties. Article 67(3) of the Rules of Procedure of the General Court allows that Court, where a document is submitted under a request that it be treated as confidential, two options. The General Court may *accept the request*, in which case the document will neither be disclosed to the other party or parties to the proceedings nor be taken into consideration for the purposes of the Court's judgment. Alternatively, it may *reject the request*, in which case the document will be disclosed to the other party or parties and may be taken into consideration for the purposes of the judgment. (54) No other solution is possible. There is, in other words, no 'middle way'.

178. In cases involving funds-freezing orders, both the General Court and the Court of Justice have anticipated that the need may arise for specific procedures governing confidential evidence to be introduced.

179. In the *OMPI* judgment, the General Court observed that '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'. (55) It went on to state that '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'. (56)

180. In *Kadi I*, the Court of Justice stated that 'overriding considerations to do with safety or the conduct of the international relations of the Community and its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters'. It added, however, that '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'. (57)

181. In a different context, namely that of public procurement, the Court of Justice observed in *Varec* (58) that 'in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest'. It went on to hold that 'the principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute … and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial'. (59)

182. All of that notwithstanding, Article 67(3) of the Rules of Procedure of the General Court remains in place. (60) No special procedure has been defined; and no specific techniques have yet been evolved to address the issue of how to deal with confidential evidence in such cases. On that basis, I can take no issue with the General Court's finding that the Council's refusal to communicate the confidential information in question had the result that that Court was unable to review the lawfulness of the decision at issue. Nevertheless, I do not consider the French Republic's position, in refusing to allow the Council to produce the confidential evidence in question as part of the latter's

reply to the order of 26 September 2008, to have been a wholly unreasonable one.

183. In the order of 26 September 2008, the General Court informed the Council that the documents would not be communicated to PMOI 'at this stage of the proceedings'. It did not – and, as I understand the rules of procedure, it could not – give the Council any assurance as to what might happen later.

184. First, it seems to me that a third party to the proceedings (such as the French Republic) might, in those circumstances, justifiably feel that the degree of protection guaranteed to the information in question was not sufficient to enable it to be disclosed to the Court, at least where the level of confidentiality attached to the information was high. It is significant in that regard that, in response to a question at the hearing, counsel for the French Republic stated that, had provisions as to the protection of confidential evidence been in place in the General Court's rules at the relevant time, he thought that the information in question *would* have been made available to that Court.

185. Second, the reliance by the General Court on the fact that the same information had already been provided to the members of the Council, and thus to the Governments of the 26 other Member States apart from the French Republic, appears misconceived. It could be taken that, in making the information available to the members of the Council and the Member States, there was never the remotest question of its being disclosed or made public in any way. (61)

186. In my view, it follows from this that serious consideration should now be given to amending the Rules of Procedure of the General Court so as to make provision for the production of evidence that is truly confidential for consideration by that Court in a way that is compatible with its character without doing unacceptable violence to the rights of the other party or parties to the action. (62)

187. This Opinion is not the appropriate place in which to enter into a lengthy discussion of the detailed aspects of any such amendments. I shall, however, describe in outline the principal issues which appear to me to arise.

188. Before an application for the annulment of a regulation freezing the funds of a person or organisation suspected of involvement or participation in terrorism reaches the European Union judicature, there must first have been action on the part of the European Union legislature, based on a decision taken, or information provided, by one or more Member States. It is easier to understand what needs to happen if one starts at the beginning of the story, rather than at the end.

189. I shall therefore begin my analysis by considering, first, the role played by the authorities of the Member States in adopting the decision (or instigating the investigation or prosecution) which will form the basis of a funds-freezing decision which the Council may adopt. I shall then address the position of the Council in adopting such a decision. Finally, I shall consider the role played by the General Court in dealing with a challenge to such a decision.

190. In so doing, I shall examine the factors affecting the handling of sensitive material that is relevant, but for which confidentiality is claimed (by the Council or by a Member State) as against the applicant. It would be inappropriate for me to be overly prescriptive as to the solutions to be adopted at each stage of the process. My purpose in exploring these issues is simply to assist those who will have to engage with the question of how precisely to deal with this conundrum – be that at Member State, Council or General Court level. In adopting this approach, I am conscious that the French Republic has expressly indicated that concern to clarify the law for the future was central to its decision to bring this appeal. (63)

The role played by the national authorities of the Member States

191. When the national authorities of the Member States take a decision which will form the basis of a funds-freezing decision adopted by the Council, the role played by those authorities will differ depending on the nature of that national decision and the circumstances in which it was adopted.

192. The decision in question may have been taken at the stage of the instigation of investigations or prosecution, or it may represent a 'condemnation', that is to say, a formal finding by a judicial or other body that the acts in question have taken place.

193. Furthermore, the decision may have been taken solely on the basis of open evidence which has been made available to the party against whom the funds-freezing order is proposed to be made.

Alternatively, it may have been taken, whether wholly or in part, on the basis of evidence, some or all of which was deemed too sensitive and/or confidential to be made available in that way. For the sake of simplicity, I shall refer to such evidence hereafter as 'closed evidence'.

194. The person, group or entity which was the subject of the decision may have had the opportunity of challenging it. Alternatively, there may have been no effective possibility of challenge under national law.

195. It is clear from its structure that Article 1(4) contemplates that the procedure within the Member State concerned will be judicial in nature. However, by referring to the concept of 'equivalent competent authority', it also reflects the fact that, in some Member States, the procedure is an executive one. That was, indeed, the position in respect of PMOI's original listing, where the decision in question was taken by the Home Secretary. In contrast, the proceedings involving PMOI in the French Republic have been judicial throughout.

196. Where the relevant national procedure involves the decision in question being taken by a member of the executive, that decision may well be adopted without the person concerned being able to learn the nature of the evidence and make representations prior to the adoption of the decision. However, the national legislation may make provision for a challenge then to be brought before the executive decision-maker and/or before the courts of the Member State concerned.

Procedure before the Council

197. In order for a funds-freezing decision to be valid, the Council is under a duty to satisfy itself that all the requirements laid down by Article 1(4) of Common Position 2001/931 have been met.

198. Thus, it must first satisfy itself that there is precise information or material in the relevant file, which indicates that a decision has been taken by a competent authority. (64) In the absence of such a decision, the Council can proceed no further.

199. Having done so, it must next determine whether the decision in question was taken in respect of the persons, groups and entities concerned against whom it is proposed to make the funds-freezing order. (65)

200. Next, it must verify whether (a) the decision concerned the instigation of investigations or prosecution for a terrorist act or an attempt to perpetrate, participate in or facilitate such an act, in which case, it must be based on serious and credible evidence or clues, or (b) whether the decision represented condemnation for such an act.

201. It must then establish whether the decision was adopted on the basis of open evidence which was made available to the person, group or entity against whom or which it is proposed to make the order or whether it was adopted on the basis of evidence, some or all of which was closed evidence.

202. Although Article 1(4) does not contain any express provision to that effect, it seems to me that it implicitly requires that the national decision in question must have been taken on a basis which respects the human and fundamental rights of the person, group or entity whose funds are proposed to be frozen. Although the Council cannot, by definition, check compliance with those rights under the national legal system of the Member State which took the decision, it is in a position to satisfy itself as regards compliance with those rights at European Union level. Indeed, since the Council's own funds-freezing decision must respect such rights if it is to withstand a subsequent challenge before the European Union judicature, (66) it seems to me that the Council must so satisfy itself prior to adopting its decision.

203. Inevitably, the procedure which the Council should follow in adopting a funds-freezing decision will vary, depending on the nature of the procedure followed at national level.

204. It seems to me that the following are the essential points that should be taken into account and the consequences to which they give rise. (67)

– Where the competent national authority was a 'judicial authority'

205. For the purposes of the examples which follow, I shall assume initially that the competent authority which adopted the national decision was a judicial authority. (68)

206. Where the decision of that authority represents a ‘condemnation’ for the acts in question, the Council must determine whether that decision was adopted on the basis of open evidence or closed evidence or a combination of the two.

207. If the condemnation was adopted on the basis of open evidence alone, the Council’s position is relatively straightforward. (69) It does not need to establish whether that decision was based on serious and credible evidence or clues. That task will already have been carried out by the competent authority in reaching its decision.

208. It follows that the only issue which remains to be addressed by the Council is that of compliance with the human and fundamental rights of the person, group or entity in question. (70)

209. Unless the funds-freezing decision is an initial one, (71) the evidence in question (being entirely open evidence) will be available for disclosure to the person, group or entity concerned, who will be in a position to make any appropriate representations concerning it prior to the Council adopting its decision.

210. The situation is less straightforward where the national decision was based on a mixture of open and closed evidence.

211. In that case, it seems to me that the first step that the Council must take is to determine whether it can base *its* funds-freezing decision on the open evidence alone. In such a case, the Council should, I suggest, proceed solely on the basis of that evidence and leave the closed evidence out of account. If so, it can proceed in the manner outlined in points 207 to 209 above.

212. If not, or if the evidence on which the national decision was based was entirely closed, the Council must ask the Member State concerned whether it is content for the closed evidence to be made available to the General Court in the event of a challenge being brought to the Council’s decision. If the Member State is not so content, then (both now and under the amendments to the General Court’s Rules of Procedure which I envisage in this Opinion) the Council can go no further. Its decision would not survive a challenge.

213. If the Member State endorses disclosure to the General Court (if required), the Council will proceed to adopt the decision to list in reliance on the closed evidence without being able to disclose it to the party concerned. As a result, that party will inevitably be deprived of the full right of challenge that would otherwise have been available to it at that stage.

214. The Council is, by definition, not equipped to make decisions as to whether evidence provided by a Member State on a confidential basis truly meets the legal definition of ‘secret and confidential evidence’ and thus merits the exceptional protection afforded to such material. Nor can it administer a procedure for the hearing of such evidence.

215. Within those constraints, however, the rights of the defence must be respected so far as possible. Where closed evidence is involved, the following further procedures should accordingly apply.

216. First, the Council should make available a non-confidential summary of the evidence to the party concerned, thereby giving that party an indication of the reasons on which it intends to base its decision. I regard the availability of a non-confidential summary as an irreducible minimum guarantee in a Union governed by the rule of law. In its absence, it is impossible for the rights of the defence to be safeguarded.

217. Second, the Council should make it clear to the person, group or entity concerned that both the underlying national decision and the decision which the Council has in mind to take rely on closed evidence, thereby giving that party an opportunity to challenge the Council’s own decision before the General Court, where procedures to protect that evidence can be put in place.

218. The national decision in question may, of course, not represent condemnation for the facts in question. It may merely have authorised investigation or prosecution in relation to those acts. It seems to me that, in such a case, the same permutations and the same issues arise as those described in points 206 to 217 above, but with the addition of one important further factor.

219. The Council must itself scrutinise the evidence offered in support of the national decision in

order to satisfy itself that that evidence meets the test of 'serious and credible evidence and clues' laid down under Article 1(4) of Common Position 2001/931. If the Council is not so satisfied, it cannot adopt a decision to list in relation to the person, group or entity concerned.

– Where the competent national authority was an 'equivalent competent authority'

220. There remains the question of the procedure to be followed where the competent authority concerned is not a judicial one but an 'equivalent competent authority'. A decision by such an authority may, of course, represent a condemnation for the acts in question, or it may be a decision taken on the basis of investigations only (by definition, in the case of an executive decision-maker, the question of 'prosecution' will not arise).

221. Here, it seems to me that the same permutations and the same issues arise as those which apply where the competent national authority is a judicial one. I would simply observe that, since there will have been no 'judicial' involvement in the decision-making process at the national level, it will be incumbent on the Council to give the national decision correspondingly greater scrutiny in terms of satisfying itself that the requirements of Article 1(4) of Common Position 2001/931 have been satisfied.

The Rules of Procedure of the General Court

222. Let us now assume that a challenge to the Council's funds-freezing decision is brought before the General Court, and examine what amendments to that Court's Rules of Procedure may be necessary in order to take account of the issues I have described above. I shall first delimit the scope of application of the modifications I have in mind. I shall then consider those amendments in relation to the following issues:

– the use of closed evidence;

– the need to comply with European Union guarantees of human rights (and, specifically, the rights of the defence).

Lastly, I shall turn to the nature of the review the Union judicature must carry out and its intensity.

– Scope of application

223. Questions of confidential and secret evidence are not limited to allegations of involvement or participation in terrorism. They may also be relevant, for example, in public procurement cases (where it is well known that an unsuccessful tenderer may seek to challenge the contract award for purely 'fishing' reasons in order to gain access to information that would otherwise be unavailable (72)) and in the area of competition law.

224. It is in relation to terrorist activities, though, that the issues are particularly acute.

225. This is because of the particularly sharp conflict which may arise between the competing claims of rights of the defence and the effective protection of national security.

226. In what follows, I shall therefore concentrate on questions of confidential evidence as they relate to allegations of terrorism and involvement in terrorist activities.

227. Possible dilution of the rights of the defence is liable to be a material factor in any case in which evidence is withheld on grounds of confidentiality. Any restriction of any kind on the evidence which is available to a party seeking to defend itself risks compromising the rights of that party and impairing its rights of defence.

228. The same is, however, also true of the effective protection of national security. Those involved in monitoring and pursuing terrorist activities, particularly those operating on the ground, may be exposed to personal danger in the form of torture or even death, should information be disclosed that may give a clue as to their activities or identities. (73) As a rule, therefore, Member States will legitimately wish to insist that effective restrictions on divulging material that may lead (directly, indirectly or accidentally) to the identification of sources or the unmasking of particular surveillance techniques must be maintained.

229. It is therefore essential that any amendments that are made concerning the rules as to the production of evidence before the General Court take those conflicting sets of interests fully and properly into account.

– The use of closed evidence

230. Any new rules as to closed evidence that may be adopted should apply only where, and to the extent that, they are absolutely necessary.

231. The principle set out in the preceding paragraph means that, where the evidence in support of a funds-freezing order is both open and closed, the General Court should always first seek to establish whether it is possible to decide the case by having regard to the open evidence alone, that is to say, without recourse to the closed evidence. If so, the closed evidence should simply be left out of account.

232. It is necessary to be alert to the fact that secret evidence may originate from flawed sources. It may simply be false, even though obtained in good faith and at considerable risk to the operative in the field. There may be a tendency on the part of Member States and their security services to over-classify information so that what ought truly to be in the public domain becomes classified as secret. Equally, there may be a tendency on the part of the courts to accept such information as true without proper scrutiny or questioning. In that regard, it is essential that, where the evidence in question is doubtful or ambiguous, any doubt or ambiguity be construed in favour of a party who has been unable to comment on it or to question it to the fullest possible extent.

233. The General Court had originally considered funds-freezing measures imposed on parties such as PMOI to have no more than a short-term effect. (74) When called upon to address the issue in his Opinion in *Kadi I*, (75) Advocate General Poiares Maduro took the view that those orders amounted to 'the indefinite freezing of someone's assets'. More recently, the General Court in *Kadi II* (76) observed that funds-freezing measures are 'particularly draconian' and noted that nearly 10 years had passed since Mr Kadi's funds had been frozen by the original order. It considered that it might be asked whether the time had come to call into question its original finding that such measures are short-term and/or temporary. (77)

234. I agree. Such orders are likely to have a serious, and disabling, effect on the activities of those whose funds are frozen. Indeed, that is their whole point.

235. Cases involving allegations of involvement in terrorist activities often arouse visceral emotions. The terrorist, after all, appears to have no scruples about disregarding the sacred canons of civilised society. It may be difficult to avoid, even subconsciously, a public perception that we should, in turn, relax our ordinary commitments to a fair trial where such accusations are concerned. Those accused of involvement in terrorist activities, so the argument runs, are worthy of a lower degree of legal protection than those accused of more 'mainstream' offences.

236. Any temptation to fall into that trap must be avoided. It is, in fact, precisely the marginal, the outsiders and the rejects who require the protection which the judicial system affords and who have the greatest need of it. (78) The oft-quoted tag 'your terrorist is my freedom-fighter' shows just how easy it is to allow the subjective reaction to colour the objective assessment. Yet it is the hallmark of a civilised society operating under the rule of law that the normal safeguards and guarantees are not abandoned in response to the fact that society's opponents are not playing by the same civilised rules.

237. The nature of freezing orders means that they do not, as such, involve the need to derogate from the Convention. It is worth recalling, in that regard, that specific derogations by Contracting States under the public emergency provisions in Article 15 of the Convention are *not* within the 'unlimited discretion' (79) of those States and must be 'strictly required by the exigencies of the situation'. (80) I see no reason for the test to be applied to exceptions from the normal rules of evidence on security grounds to be any less stringent.

238. The temptation to suspend guarantees of fundamental rights must, therefore, be resisted to the maximum extent possible. The argument that the requirements of the fight against international terrorism may, on their own, justify a relaxation of those guarantees is a spurious one. (81)

239. It follows, in my view, that the number of cases in which the amended rules concerning the use of closed evidence that I contemplate in this Opinion are, in fact, used should be very low. It

nevertheless seems essential that they should indeed be adopted.

– The need to comply with European Union guarantees of human rights

240. Respect for human rights is a condition of the lawfulness of acts of the European Union and measures incompatible with respect for human rights are not acceptable. (82)

241. The European Court of Human Rights ('the Strasbourg Court') has addressed the question of closed evidence in a number of cases involving actions brought against Contracting States.

242. It is clear from that case-law that the entitlement to disclosure of evidence as part of the rights of the defence is not an absolute right. This was decided as early as 1996 in *Doorson*. (83) In *Jasper*, (84) the Strasbourg Court held that 'in any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused ... In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest'. (85) Tellingly, however, that Court went on to hold that 'only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1) [of the Convention] ... Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities'. (86)

243. In *Dowsett*, the Strasbourg Court was required to rule on the situation which arose where the Contracting State had claimed public interest immunity in respect of certain evidence, which had accordingly been withheld from the defence. That evidence had, moreover, not been disclosed to the national court. In deciding that the applicant had not received a fair trial, the Court reiterated what it described as 'the importance that material relevant to the defence be placed before the trial judge for his ruling on questions of disclosure at the time when it can serve most effectively to protect the rights of the defence'. (87)

244. More recently, the issue before the Strasbourg Court in *A. and Others v. the United Kingdom* (88) was the compliance with the Convention of the United Kingdom system of what are termed 'special advocates'. This system operates in certain cases involving the use of secret evidence, including those where allegations of being involved in terrorist activities are concerned. (89) The Court accepted that the perceived need to protect the population of the United Kingdom from terrorist attack meant that there was a 'strong public interest' in maintaining the secrecy of sources of information concerning Al-Qaida and its associates. (90) It did not find that the system in question was, of itself, non-compliant. (91) Rather, it ruled that, in order for the requirements of the Convention to be satisfied, it is necessary that as much information about the allegations and evidence against each applicant be disclosed as is possible without compromising national security or the safety of others, that the party concerned be 'provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate' and that 'any difficulties caused to the defendant by a limitation on his rights [be] sufficiently counterbalanced by the procedures followed by the judicial authorities'. (92)

245. This, I suggest, represents an irreducible minimum requirement.

– The nature of the review the European Union judicature must carry out and its intensity

246. Adequate review by the courts of the substantive legality of a European Union freezing measure is indispensable if a fair balance is to be struck between the requirements of the fight against international terrorism, on the one hand, and the protection of fundamental freedoms and rights, on the other. (93)

247. While the terms 'terrorist act' and 'persons, groups and entities involved in terrorist acts' are defined in Article 1(2) and 1(3) of Common Position 2001/931, these expressions have no harmonised definition throughout the European Union. It follows that the Member States may adopt their own definitions. These may well differ. It also follows that, in any challenge at national level to the decision of the competent authority concerned, the courts and tribunals in the Member State in question will have regard to the definitions laid down by national law. (94)

248. Equally, in any review carried out at national level, it will be the standard of fundamental rights protection in the Member State concerned that will be applied by its courts and tribunals. That

standard is not necessarily the same as the European Union standard.

249. The Treaty represents a self-standing set of rules, that has been termed an 'autonomous legal system'. (95) In interpreting that legal order, the Court has, it is true, drawn 'inspiration from the constitutional traditions common to the Member States' for the purposes of defining the fundamental rights which form an integral part of the general principles of the legal order of the European Union. (96) It is also true that each of the Member States is a signatory to the Convention and is therefore bound to apply its rules. But to conclude that national systems for the protection of fundamental rights and the European Union equivalent *are, therefore, one and the same thing* seems to me to be simply misconceived. (97) In that regard, I must disagree with the view expressed by the General Court in *Kadi II*, where it stated: 'it is precisely those safeguards of the rights of the defence which exist at national level, subject to effective judicial review, which relieve the Community institutions of any obligation to provide fresh safeguards at Community level in relation to the same subject-matter'. (98)

250. Unlike the authorities and national courts of the Member States, the Council, for its part, is bound by the European Union standard of fundamental rights protection, and that standard alone. (99)

251. It follows from the above that, while the existence of a national decision is an essential precondition for the lawfulness of a decision by the Council to make a funds-freezing decision, it will not, of its own, suffice. The person, group or entity concerned must also be involved in terrorist acts as defined in Article 1 of Common Position 2001/931, not just for the purposes of national law. In that respect, the Council has no discretion. Either there is sufficient information to include a person, group or entity in the list, or there is not. The question is one of fact, to be assessed by applying the correct legal test.

252. That is the context in which the Council must undertake its decision-making process. It is likewise in that context that the European Union judicature must exercise its power of review.

253. Against that background, it seems to me entirely inappropriate that that power of review should be restricted to a 'light touch'. In that regard, I can do no better than quote from the Opinion of Advocate General Poiares Maduro in *Kadi I*, (100) where he stated that 'the implication that the present case concerns a "political question", in respect of which even the most humble degree of judicial interference would be inappropriate, is, in my view, untenable. The claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights. This does not detract from the importance of the interest in maintaining international peace and security; it simply means that it remains the duty of the courts to assess the lawfulness of measures that may conflict with other interests that are equally of great importance and with the protection of which the courts are entrusted. … Certainly, extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions. However, that should not induce us to say that "there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods". … Nor does it mean … that judicial review in those cases should be only "of the most marginal kind". On the contrary, when the risks to public security are believed to be extraordinarily high, the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who have little or no access to the political process. Therefore, in those instances, the courts should fulfil their duty to uphold the rule of law with increased vigilance. Thus, the same circumstances that may justify exceptional restrictions on fundamental rights also require the courts to ascertain carefully whether those restrictions go beyond what is necessary. …'. (101)

254. I agree. In the present context, applying those principles means that the Court must verify whether the claim that a particular person, group or entity is associated with terrorist activities is substantiated and it must ensure that the measures adopted strike a proper balance between the need to combat terrorism and the extent to which these measures encroach upon the fundamental rights of individuals.

255. That does not mean that the General Court must necessarily review every aspect of every case that comes before it in depth. Where it is clear, for example, that all proceedings at national level and before the Council have been fully compliant with European Union human rights guarantees, the review of that Court need be less intensive. What is essential in every case, however, is that the principle of effective judicial protection be fully satisfied. (102)

A final comment

256. It seems to me that a certain parallel can be drawn between the role of the European Union judicature in determining challenges to funds-freezing orders and proceedings before the Strasbourg Court. That Court operates on a principle of subsidiarity. In other words, it is assumed that Contracting States will comply with the Convention. The national courts of each Contracting State play a leading role in ensuring that the rights thereby guaranteed are in fact observed. It is only where there is an allegation of a failure to respect those rights and all other remedies have been exhausted that the Strasbourg Court will become involved. In the circumstances outlined above, the European Union judicature is being asked to perform the same function as the Strasbourg Court under the Convention. The role of the European Union judicature is to act as the final arbiter, and guarantee that fundamental rights are respected within the Union.

257. The analysis that I have set out in points 223 to 256 above is, I stress, a series of reflections as to the future. For the reasons set out in point 182, I consider that the third ground of appeal should be rejected.

Costs

258. Under Article 122 of the Rules of Procedure of the Court of Justice, where an appeal is unfounded, the Court is to make a decision as to costs. Under Article 69(2), the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, I consider that the appeal should be dismissed. PMOI has applied for costs. The French Republic should therefore be ordered to pay PMOI's costs.

Conclusion

259. Having regard to all the foregoing considerations, I am of the opinion that the Court should:

– dismiss the appeal; and

– order the French Republic to bear the costs.

ANNEX

BRIEF CHRONOLOGY

Date	Event
8 October 1997	Designation of PMOI as a 'foreign terrorist organisation' by the United States Secretary of State.
28 March 2001	Order of the United Kingdom Secretary of State for the Home Department, the effect of which was to designate PMOI as a proscribed terrorist organisation in that Member State.
April 2001	Opening of the judicial inquiry into the activities of alleged members of PMOI in the French Republic.
28 September 2001	Adoption by the United Nations Security Council of Resolution 1373 (2001).
27 December 2001	Adoption by the Council of Common Position 2001/931 and Regulation No 2580/2001. PMOI's name was not included on the list set out in the annexes to these measures.
2 May 2002	Adoption by the Council of Common Position 2002/340 and Decision 2002/334. PMOI's name was included on the list set out in the annexes to those measures.
26 July 2002	PMOI brought Case T–228/02 before the General Court.
17 June 2003	PMOI's offices at Auvers-sur-Oise were raided by the French police.
12 December 2006	The General Court upheld PMOI's action in Case T–228/02 to the extent of annulling Decision 2005/930 in so far as it concerned PMOI. The remainder of the action was dismissed.
19 March 2007	The Paris anti-terrorist prosecutor's office brought

	supplementary charges against alleged members of PMOI (see also 13 November 2007).
28 June 2007	The Council adopted Decision 2007/445, in the light of the judgment of the General Court in Case T–228/02. PMOI's name remained on the list set out in the annex to that decision.
16 July 2007	PMOI brought Case T–256/07 before the General Court. That action related to Council decisions both pre-dating and post-dating the POAC decision.
13 November 2007	As 19 March 2007.
30 November 2007	Delivery by the POAC of its decision allowing the challenge to the decision of the Home Secretary's decision refusing to lift PMOI's proscription as a terrorist organisation.
20 December 2007	Adoption by the Council of Decision 2007/868.
7 May 2008	Dismissal by the Court of Appeal (England and Wales) of the Home Secretary's application for leave to appeal against the POAC decision.
9 June 2008	Provision by the French Republic to the CP 931 Working Party of the new information on which the decision at issue was based.
13 June 2008	First meeting of the CP 931 Working Party.
23 June 2008	Removal by the Home Secretary of PMOI's name from the list of proscribed organisations in that Member State, with effect from 24 June 2008.
24 June 2008	Second meeting of the CP 931 Working Party. Further information relating to PMOI had been presented and delegates requested additional time in which to study the issue.
2 July 2008	Third meeting of the CP 931 Working Party. A revised Statement of Reasons was circulated and delegates were given until 4 July to consider whether they had any objections.
4 July 2008	Meeting of Council Foreign Relations (Relex) Counsellors Working Party, where agreement was reached on the text of an updated version of the decision at issue.
9 July 2008	Meeting of the Committee of Permanent Representatives to approve the decision at issue.
15 July 2008	Adoption by the Council of the decision at issue. The decision, together with the statement of reasons, was notified to PMOI on that date.
21 July 2008	PMOI brought Case T–284/08 before the General Court.
23 October 2008	The General Court upheld PMOI's action in Case T–256/07 to the extent of annulling Article 1 of Decision 2007/868 in so far as it concerned PMOI. The remainder of the action was dismissed.
4 December 2008	The General Court delivered the judgment under appeal.

1 – Original language: English.

2 – The change of name took place with the coming into force of the Treaty of Lisbon on 1 December 2009. For the sake of simplicity, I shall use the latter term throughout.

3 – [2008] ECR II–3487.

4 – Decision of 15 July 2008 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 2007/868/EC (OJ 2008 L 188, p. 21).

5 – Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

6 – Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

7 – Council Decision 2001/927/EC of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 83).

8 – Council Common Position 2002/340/CFSP of 2 May 2002 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2002 L 116, p. 75).

9 – Council Decision 2002/334/EC of 2 May 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2001/927/EC (OJ 2002 L 116, p. 33).

10 – Council Decision 2009/62/EC of 26 January 2009 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 2008/583/EC (OJ 2009 L 23, p. 25).

11 – The Charter was not binding at the time the principal action arose: see, by analogy, Case C–540/03 *Parliament* v *Council* [2006] ECR I–5769, paragraph 38. Following the entry into force of the Treaty of Lisbon, with effect from 1 December 2009 the Charter has the force of primary law (Article 6(1) TEU).

12 – For a fuller description of PMOI's alleged terrorist activities and purported renunciation of those activities, see the decision of the Proscribed Organisations Appeals Commission of England and Wales of 30 November 2007 in *Lord Alton of Liverpool and Others* v *Secretary of State for the Home Department* ('the POAC decision') at: http://www.siac.tribunals.gov.uk/poac/Documents/outcomes/PC022006%20PMOI%20FINAL%20JUDGMENT.pdf.

13 – See Designation of Foreign Terrorist Organisations, 62 Fed. Reg. 52,650 (1997).

14 – See the Terrorism Act (Proscribed Organisations) (Amendment) Order 2001. The organisation is described in Article 2 of that order as 'Mujaheddin e Khalq'.

15 – For a fuller discussion of the relevant procedural aspects of French criminal law, including, in particular, the role of the *réquisitoire* and the *mise en examen*, see point 142 below.

16 – See further point 152 below.

17 – *Secretary of State for the Home Department* v *Lord Alton of Liverpool and Others* [2008] EWCA Civ 443, available at http://www.bailii.org/ew/cases/EWCA/Civ/2008/443.html.

18 – These meetings are listed in point 91 below and in the Chronology set out in the Annex.

19– The letter and statement of reasons are reproduced in paragraphs 9 and 10, respectively, of the judgment under appeal.

20 – In fact, the period in question was one of over a month.

21 – See Case T–228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council* ('the *OMPI* judgment') [2006] ECR II–4665, paragraph 124, and Case T–256/07 *People's Mojahedin Organization of Iran* v *Council* ('the *PMOI I* judgment') [2008] ECR II–3019, paragraph 133.

22 – See paragraph 138 of the *PMOI I* judgment.

23 – That is to say, the point 3(a) information (see point 43 above). The General Court did not address the point 3(f) information at this point in its judgment. See further point 160 et seq. below.

24 – Now reported as [2008] ECR I–6351 and referred to below as '*Kadi I*'.

25 – The immediate predecessor of the decision at issue was Council Decision 2007/868/EC 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 2007/445/EC (OJ 2007 L 340, p. 100). It was dated 20 December 2007. By virtue of Article 1(6) of Common Position 2001/931, the Council was under an obligation to review the names of persons and entities listed in that decision at regular intervals and at least once every six months.

26 – See, in particular, the discussion at point 97 et seq. below.

27[27] – See, to that effect, the judgment under appeal, paragraph 52. Although the judgment under appeal referred, for obvious reasons, to Article 10 EC, nothing in the recast version set out in Article 4(3) TEU affects the underlying principle.

28 – See point 197 et seq. below.

29 – See further point 97 et seq. below.

30 – See further point 171 et seq. below.

31 – See further point 197 et seq. below.

32 – For example, by reducing the period for notification of delegations to the CP 931 Working Party that a particular person, group or entity will be discussed at a meeting of that body, as provided for in point 11 of Annex II to Council document 10826/07, the declassified version of which is available on http://www.consilium.europa.eu/uedocs/cmsUpload/st10826-re01en07.pdf.

33 - See point 105 et seq. below.

34 – See the *OMPI* judgment, paragraph 128, and *Kadi I*, cited in footnote 24 above, paragraph 308.

35 – *OMPI* judgment, paragraph 131.

36 – See Decision 2002/334, cited in footnote 9 above.

37 – Cited in footnote 25 above.

38 – In response to a question from the Court, counsel for PMOI stated at the hearing that that organisation did not object if the review of whether it should continue to be listed was not concluded within the six-month period referred to in Article 1(6) of Common Position 2001/931 in circumstances where the extension of the period operated to its benefit by, for example, allowing it to lead new evidence to address the new information and new material provided by a Member State.

39 – See, inter alia, Case C–399/08 P *Commission* v *Deutsche Post* [2010] ECR I–0000, paragraph 75; Case C–184/01 P *Hirschfeldt* v *EEA* [2002] ECR I–10173, paragraph 48; Joined Cases C–189/02 P, C–202/02 P, C–205/02 P to C–208/02 P and C–213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I–5425, paragraph 148; and the order of 9 March 2007 in Case C–188/06 P *Schneider Electric* v *Commission*, paragraph 64.

40 – The French Republic states in its written pleadings (with respect to its second ground of appeal) that ‘it is of very specific concern to the French Government that the Court of Justice should recognise that the [General Court] erred in law in that respect’.

41 – See also the Opinion of Advocate General Poiares Maduro in *Kadi I*, cited in footnote 24 above, point 16.

42 – Whether or not PMOI in fact has legal personality seems to me to be beside the point. The important issue is that the French authorities may have no means of knowing the true position.

43 – See points 12 and 13 above.

44 – See also the order of the General Court of 15 February 2005 in Case T–229/02 *PKK*

and KNK v *Council* [2005] ECR II–539, where the General Court itself, having noted that the groups or entities covered by Article 1(4) of Common Position 2001/931 'may ... not exist legally, or [may not be] in a position to comply with the legal rules which usually apply to legal persons', referred to the need to avoid 'excessive formalism' (paragraph 28).

45 – The French language version of Common Position 2001/931 uses the expression '*autorité judiciaire*'. The term '*judiciaire*' is defined in Cornu, G., *Vocabulaire juridique*, PUF, Paris, 2005, as follows: '*(dans un sens vague) qui appartient à la justice, par opposition à législatif et administratif. Ex. le pouvoir judiciaire, l'autorité judiciaire (cependant, même en ce sens, il ne s'agit que de la justice de l'ordre judiciaire); (dans un sens précis) qui concerne la justice rendue par les tribunaux judiciaires*'. Without wishing to enter into the intricacies of precisely what the French expression covers, I would observe that it appears markedly more extensive than the normal meaning given to the English expression 'judicial'.

46 – As an example of the type of surreal situation which can arise where a response cannot be made, I would cite this example, which is a transcript of part of a hearing before a United States Military Commission, where a detainee suspected of involvement in terrorist activities was being asked to respond to classified evidence previously presented in closed session (in which he had not been able to participate): '*Tribunal Recorder* [reading unclassified summary of the evidence presented in closed session]: While living in Bosnia, the Detainee associated with a known Al Qaida operative. *Detainee*: Give me his name. *Tribunal President*: I do not know. *Detainee*: How can I respond to this? *Tribunal President*: Did you know of anybody that was a member of Al Qaida? *Detainee*: No, no. *Tribunal President*: I'm sorry, what was your response? *Detainee*: No. *Tribunal President*: No? *Detainee*: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation. *Tribunal President*: We are asking you the questions and we need you to respond to what is on the unclassified summary'. (Cited in Turner, S., and Schulhofer, S.J., *The Secrecy Problem in Terrorism Trials*, Liberty & National Security Project, NYU School of Law, 2005).

47 – Article 80-1 of the Code de procédure pénale provides: '*Le juge d'instruction ne peut informer qu'en vertu d'un réquisitoire du procureur de la République …*'.

48 – See Delmas-Marty, M., 'French and English Criminal Procedure', in *The Gradual Convergence*, Ed. Markesinis, B.S., Clarendon Press, Oxford, 1994, p. 48: 'the *juge d'instruction* has three main tasks: first, he is charged, with the help of the *police judiciaire*, with putting together the evidence relating to the offence and building up the dossier on the case …' (the second and third tasks are not relevant here). See also Pradel., J., *L'instruction préparatoire*, Éditions Cujas, Paris, 1990, p. 7: '*l'instruction préparatoire est la phase du procès pénal au cours de laquelle, l'action publique étant mis en mouvement, des organes judiciaires spécialisés, notamment le juge d'instruction … recueillent les éléments nécessaires au jugement et décident de la suite à donner à la poursuite*'.

49 – '*À peine de nullité, le juge d'instruction ne peut mettre en examen que les personnes à l'encontre desquelles il existe des indices graves ou concordants rendant vraisemblable qu'elles aient pu participer, comme auteur ou comme complice, à la commission des infractions dont il est saisi*'.

50 – Paragraphs 66 and 67 of the judgment under appeal.

51 – See points 40 to 43 above.

52 – See, to that effect, Joined Cases C–204/00 P, C–205/00 P, C–211/00 P, C–213/00 P, C–217/00 P and C–219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I–123, paragraph 49.

53 – I should also mention, if only for the sake of completeness, the provisions of Article 50(2), which apply where cases have been joined.

54 – Article 67(3) was added to the Rules of Procedure of the General Court on 19 December 2000 (OJ 2000 L 322, p. 4) in order to give formal effect to the judgments in the '*Steel Beams Cases*' (Case T–134/94 *NMH Stahlwerke* v *Commission* [1999] ECR II–239; Case T–136/94 *Eurofer* v *Commission* [1999] ECR II–263; Case T–137/94 *ARBED* v *Commission* [1999] ECR II–303; Case T–138/94 *Cockerill-Sambre* v *Commission* [1999] ECR II–333; Case T–141/94 *Thyssen Stahl* v *Commission* [1999] ECR II–347; Case T–145/94 *Unimétal* v *Commission* [1999] ECR II–585; Case T–147/94 *Krupp Hoesch* v *Commission* [1999] ECR II–603; Case T–148/94 *Preussag Stahl* v *Commission* [1999] ECR II–613; Case T–151/94 *British Steel* v *Commission* [1999] ECR II–629; Case T–156/94 *Aristrain* v *Commission* [1999] ECR II–645; and Case T–157/94 *Ensidesa* v *Commission* [1999] ECR II–707). See also point 52 et seq. of my Opinion in Case C–450/06 *Varec* [2008] ECR I–581.

55 – Paragraph 155.

56 – Paragraph 158, emphasis added.

57 – Cited in footnote 24 above, paragraphs 342 and 344.

58 – Cited in footnote 54 above.

59 – See paragraphs 47 and 52. See also point 33 et seq. of my Opinion in that case.

60 – It appears that, on some occasions, a form of ad hoc arrangement has been reached using the provisions of Chapter 3 of Title 2 of the Rules of Procedure of the General Court concerning measures of organisation of procedure. Thus, in Case T–209/01 *Honeywell International* v *Commission* [2005] ECR II–5527, it is recorded that, following an objection on the part of one of the interveners regarding the confidentiality of an annex to the application, an informal meeting took place with the President of the Second Chamber of the General Court as a measure of organisation of procedure, following which the applicant lodged a new, non-confidential, version of that document, and that when asked whether it intended to pursue its objections as to confidentiality in the light of that new version, the intervener did not respond within the period prescribed (see paragraph 22). Such a procedure is not a formal one and requires, in essence, the agreement of all the parties to the proceedings, which will not, of course, be forthcoming in all cases.

61 – For a description of the obligations as to confidentiality which govern intelligence-sharing arrangements between State authorities, see the judgment of the Court of Appeal (England and Wales) in *Mohamed* v *Secretary of State for Foreign and Commonwealth Affairs***[2010] EWCA Civ 158,** paragraphs 43 and 44 (see http://www.bailii.org/ew/cases/EWCA/Civ/2010/65.html). As regards the CP 931 Working Party, the arrangements which govern its meetings provide for these to be held in a secure environment, so as to enable discussion to take place up to SECRET UE level (see Council Document 10826/07 of 21 June 2007 on the implementation of Common Position 2001/931, p. 5).

62 – I should add that similar considerations will require to be given to the Rules of Procedure of the Court of Justice in relation to the hearing of appeals where consideration of confidential evidence placed before the General Court is in issue.

63 – See footnote 40 above.

64 – For a discussion of the meaning of the expression 'judicial authority' in that context, see point 132 et seq. above.

65 – See point 124 et seq . above.

66 – If nothing else, by virtue of Article 6 TEU and Article 51(1) of the Charter.

67 – As this part of my Opinion is intended for indicative purposes only, I should apologise at this point if I have overlooked, or failed fully to address, one or more permutations that may be relevant. I have sought to cover the major possibilities and hope that I have omitted nothing which undermines that aim.

68 – As to the situation where the competent authority is not a judicial one but an equivalent competent authority, see point 220 below.

69 – Provided, of course, the other tests referred to in points 198 and 199 above are satisfied.

70 – See point 202 above.

71 – See point 100 above.

72 – See, for example, *Varec*, cited in footnote 54 above.

73 – It is also possible that the evidence in question may have been obtained from another State under international arrangements providing for mutual cooperation in the field of combating terrorist activities. See, in that regard, Article 4 of Common Position 2001/931, which imposes an obligation on Member States to afford each other the widest possible assistance in preventing and combating terrorist acts. Security forces may, understandably, be reluctant to share information in this way if they have real grounds to believe that it is not being kept secure by the recipient.

74 – In paragraph 133 of the *OMPI* judgment, for example, the General Court stated that 'what is at issue is a temporary protective measure'.

75 – Cited in footnote 24 above, point 47.

76 – Case T–85/09 [2010] ECR I–0000.

77 – See paragraphs 149 and 150.

78 – As to the influence of subjective perception on the way in which legal rules are formulated, see, further, my Opinion in Case C–427/06 *Bartsch* [2008] ECR I–7245, points 44 to 46.

79 – *A. and Others v. the United Kingdom*, [GC], no 3455/05, paragraph 173.

80 – Article 15(1). See also *Aksoy and Others v. Turkey*, nos. 14037/04, 14052/04, 14072/04, 14077/04, 14092/04, 14098/04, 14100/04, 14103/04, 14112/04, 14115/04, 14120/04, 14122/04 and 14129/04 (Sect. 2), paragraph 68.

81 – See, in that regard, my Opinion in Case C–345/06 *Heinrich* [2009] ECR I–1659, point 100.

82 – See, inter alia, *Kadi I*, cited in footnote 24 above, paragraph 284.

83 – *Doorson v. the Netherlands*, *Reports of Judgments and Decisions* 1996–II, § 70.

84 – *Jasper v. the United Kingdom*, [GC], no. 27052/95.

85 – Paragraph 52. The relevant part of that case was decided against the background of the provisions of Article 6(1) of the Convention governing the determination of criminal charges, but there is no reason for the statement of principle to be limited to that field. See also *Rowe and Davis v. the United Kingdom* [GC] no 28901/95, ECHR 2000–II, paragraph 61; *Fitt v. the United Kingdom* [GC], no 29777/96, ECHR 2000–II, paragraph 45; and *V. v. Finland* no. 40412/98, paragraph 75.

86 – *Jasper v. the United Kingdom*, cited in footnote 84 above, paragraph 52.

87 – *Dowsett v. the United Kingdom* no. 39482/98 (Sect. 2), ECHR 2003–VII, paragraph 50.

88 – Cited in footnote 79 above.

89 – The special advocates system is complex, but essentially it involves the appointment of a special counsel to represent the interests of a party who finds himself in opposition to the State, in circumstances where all or part of the evidence the State proposes to use against that party is not available for disclosure on national security

grounds. The special counsel must be security cleared, since it is this which gives him the right to inspect the confidential evidence (known as 'closed material'). He may communicate with his client at any time before being given access to the closed material, but not thereafter. The client has the right to be present at all stages of the proceedings at which non-confidential evidence is being led, but may not be present when the court or tribunal is considering closed material. The system was introduced when the Special Immigration Appeals Tribunal ('SIAC') was established in response to observations made by the Court of Human Rights in *Chahal v. the United Kingdom* (*Reports of Judgments and Decisions* 1996–V, § 131), where that Court found the United Kingdom to be in breach of Article 5(4) of the Convention, since evidence had been withheld from the national court on security grounds. Although the system has been adapted since its introduction in order to meet objections made, that does not mean that it is now without its critics. See, for example, the Report of the House of Lords and House of Commons Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Sixteenth Report): *Annual Renewal of Control Orders Legislation 2010*, p. 36. That report observes, inter alia, that special advocates have no access in practice to evidence or expertise which would enable them to challenge the assessments of the security service, that they have no means of gainsaying the United Kingdom Government's assessment that disclosure would cause harm to the public interest, with the result that Government assessments about what can and cannot be disclosed are effectively unchallengeable and almost always upheld by the court, and, generally, that, by hampering special advocates in their performance of the role they are intended to perform, the system, as currently in place, 'creates the risk of serious miscarriages of justice'. I would emphasise, though, that these observations relate essentially to the operation of the system rather than to its core structure, which does address the absurdity and blatant absence of rights of defence typified by *Dutschke* v *Secretary of State for the Home Department* (Appeal No TH 381/70 before the Immigration Appeals Tribunal), which became a *cause célèbre* amongst lawyers in the United Kingdom some 30 years ago. See, in that regard, Hepple., B.A., 'Aliens and Administrative Justice: the *Dutschke* Case', *Modern Law Review* Vol 34 (September 1971), pp. 501 to 519.

90 – Paragraph 216.

91 – Indeed, it held that the special advocate might 'perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing evidence and putting arguments on behalf of the detainee during the closed hearings' (paragraphs 218 and 220).

92 – *A. and Others v. the United Kingdom*, cited in footnote 79 above, paragraphs 205 and 220.

93 – See Case C–550/09 *E and F* [2010] ECR I–0000, paragraph 57, and *Kadi II*, cited in footnote 76 above, paragraph 137.

94 – For a full analysis of the relevant issues, see Case Note by Spaventa, E., on the *PMOI I* judgment and the judgment under appeal in (2009) 46 CML Rev., p. 1239.

95 – See *Kadi I*, cited in footnote 24 above, paragraph 316.

96 – See, inter alia, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 4, and, more recently, *Parliament* v *Council*, cited in footnote 11 above, paragraph 35, and Case C–409/06 *Winner Wetten* [2010] ECR I–0000, paragraph

58. See also Tridimas, T., 'Judicial Review and the Community judicature: towards a new European constitutionalism?', in *Principles of proper conduct for supranational, state and private actors in the European Union: towards a ius commune: essays in honour of Walter van Gerven*, Intersentia, 2001, p. 71, where he describes the Court's approach as 'constitutional doctrine by common law method'.

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97 – See Spaventa, E., 'Counter-terrorism and fundamental rights: judicial challenges and legislative changes after the rulings in Kadi and PMOI', (forthcoming) in *The EU and Global Emergencies*, Antoniadis, A., Schütze, R., and Spaventa, E. (eds), Hart Publishing, 2011, where she describes the view that challenges to listing are first and foremost a matter for the national authorities and/or courts as a 'Pontius Pilate approach' and goes on to express the opinion that that approach is 'deeply unsatisfactory since it is only for the Community judicature to assess the legitimacy of Union acts, and only those who are involved in "terrorist acts" as defined in Common Position 2001/931 can be included on the list. There is no reason why the Court should abdicate its interpretative and judicial duty to review whether there is sufficient evidence to include someone or a group in the list'. See also the Report of the European Union Agency for Fundamental Rights, *National Human Rights Legislation, Strengthening the fundamental rights architecture in the EU I,* 2010, which observes that 'EU Member States also have a relatively fragmented approach to monitoring compliance with various human rights guarantees' (p. 5).

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98 – Cited in footnote 77 above, paragraph 186.

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99 – See, for example, Article 51(1) of the Charter. See also, as regards the obligation to ensure compliance with fundamental rights at European Union level, Case 11/70 *Internationale Handelsgesellschaft*, cited in footnote 96 above, paragraph 4, and, as regards the distinction between national law and European Union law, Case C–299/95 *Kremzow* [1997] ECR I–2629, paragraph 15. See generally, *Kadi I*, cited in footnote 24 above, paragraph 285.

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100 – Cited in footnote 24 above. Although *Kadi I* concerned 'conventional' funds-freezing orders under United Nations Security Council Resolution 1333 (2000), I see no reason for the same principles not to apply to 'autonomous' orders under Resolution 1373 (2001).

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101 – Points 34 and 35.

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102 – See, in that regard, *Kadi I*, cited in footnote 24 above, paragraph 335.