

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 22 September 2016 (1)

Case C-599/14 P

Council of the European Union
v
Liberation Tigers of Tamil Eelam (LTTE)

(Appeal — Restrictive measures with the aim of preventing terrorism — Maintaining individuals, groups and entities on the list provided for by Article 2(3) of Regulation No 2580/2001 — Common Position 2001/931/CFSP — Articles 1(4) and (6) — Procedure — Meaning of ‘competent authority’ — Role of decision by authorities of third States — Use of information available in the public domain — Rights of the defence — Duty to state reasons)

1. The Council of the European Union has appealed against the judgment of the General Court in Joined Cases T-208/11 and T-508/11 (2) (‘the judgment under appeal’) annulling a series of Council implementing measures in so far as, with a view to combating terrorism, they included the Liberation Tigers of Tamil Eelam (‘the LTTE’) on the list of persons, groups and entities to whom, or for whose benefit, it is prohibited to provide financial services. The General Court annulled those measures for reasons relating to, inter alia, the insufficient statement of grounds accompanying them and the grounds on which the Council had relied for maintaining the LTTE on that list.
2. The Council submits that, in the judgment under appeal, the General Court erred in law by:
 - wrongly holding that the Council must demonstrate in the statement of reasons that it has verified that the activity of the listing authority in the third State is carried out with sufficient safeguards;
 - assessing the Council’s use of information in the public domain; and
 - not concluding that the listing of the LTTE could stand on the basis of the 2001 UK proscription order. (3)

Legal background

Common Position 2001/931

3. Council Common Position 2001/931/CFSP (4) was adopted to give effect to United Nations Security Council (‘UNSC’) Resolution 1373 (2001). According to that resolution, all States are to

prevent and suppress the financing of terrorist acts and freeze without delay funds and other financial assets or economic resources of, inter alia, persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts. (5)

4. Article 1(1) provides that ‘[the] 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’. (6)

5. Article 1(2) defines ‘persons, groups and entities involved in terrorist acts’ as including ‘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’. Article 1(3) defines a ‘terrorist act’ for the purposes of Common Position 2001/931. (7)

6. Article 1(4) provides that 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 [UNSC] 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.’

7. Article 1(6) provides that ‘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’.

8. In accordance with Articles 2 and 3, respectively, the (then) European Community, acting within the limits of the powers conferred on it by the (then) Treaty establishing the European Community, ‘shall order the freezing of funds and other financial assets or economic resources of persons, groups and entities listed in the Annex’ and ‘shall ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for the benefit of persons groups and entities listed in the Annex’.

9. The Annex to Common Position 2001/931 contained the initial list of persons, groups and entities referred to in Article 1. That list did not include the LTTE.

Regulation No 2580/2001

10. Recitals 3 and 4 of Council Regulation (EC) No 2580/2001 (8) refer to UNSC Resolution 1373 (2001). Recital 5 states that (what was then) Community action is necessary in order to implement the Common Foreign and Security Policy (‘CFSP’) aspects of Common Position 2001/931. According to recital 6, that regulation is a measure needed at (what was then) Community level and complementary to administrative and judicial procedures regarding terrorist organisations in the European Union and third countries.

11. Article 1(2) of Regulation No 2580/2001 defines the ‘freezing of funds, other financial assets

and economic resources’ as ‘... the prevention of any move, transfer, alteration, use of or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management’. According to Article 1(4), the definition of ‘terrorist act’ for the purposes of Regulation No 2580/2001 is that found in Article 1(3) of Common Position 2001/931.

12. Article 2(3) provides that the Council is to establish, review and amend the list of persons, groups and entities to which Regulation No 2580/2001 applies (‘the Article 2(3) list’), in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931. It states, in particular, that that list shall consist of:

‘...’

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

...’

13. The LTTE was first put on the list annexed to Common Position 2001/931 by Common Position 2006/380/CFSP. (9) It was placed on the same day on the Article 2(3) list by Council Decision 2006/379/EC. (10) The LTTE did not challenge that initial listing. It has remained on the Article 2(3) list as a result of a series of decisions and regulations (including the contested regulations (11)), each of which repealed and replaced its predecessor. When the LTTE lodged its first action (12) at the General Court, it sought annulment of Council Implementing Regulation (EU) No 83/2011, in so far as it concerned the LTTE. That regulation was in force at the time and included the LTTE at item 2.17 in the Article 2(3) list. (13) When the LTTE lodged its second action, (14) it sought annulment of Council Implementing Regulation (EU) No 687/2011 (which repealed, *inter alia*, Implementing Regulation No 83/2011) in so far as it concerned the LTTE. (15)

14. The recitals of each of the contested regulations indicate that the Council has provided all the persons, groups and entities (where practically possible) with a statement of reasons explaining why they were listed in the previous regulation. They state that the Council has informed the persons, groups and entities listed in the previous regulation of the fact that it has decided to keep them on the list. Furthermore, they explain that those persons, groups and entities have been told that it is possible to request a statement of the Council’s reasons for putting them on the list (where one had not already been communicated to them). According to those recitals, the Council took into account, in carrying out a complete review of the Article 2(3) list, any observations submitted to it by those concerned.

15. The General Court described the content of the statement of reasons in connection with Implementing Regulation No 83/2011 as follows:

‘167. Those grounds begin with a paragraph in which the Council (i) describes the LTTE as a “terrorist group” formed in 1976 which fights for a separate Tamil State in the north and east of Sri Lanka, (ii) states that the LTTE has carried out “a number of terrorist acts including repeated attacks on and intimidation of civilians, frequent attacks against government targets, disruption of political processes and kidnappings and political assassinations” and (iii) submits that “while the recent military defeat of the LTTE has significantly weakened its structure, the likely intention of the organisation is to continue terrorist attacks in Sri Lanka” (first paragraphs of the grounds for the contested regulations).

168. Next the Council draws up a list of the “terrorist attacks” which it claims that the LTTE carried out from August 2005 until April 2009 or — according to the contested regulations — until

June 2010 (second paragraphs of the grounds for the contested regulations).

169. After stating that “those acts fall within the provision of Article 1(3), subpoints (a), (b), (c), (f) and (g) of Common Position 2001/931, and were committed with the aims set out in Article 1(3), points (i) and (iii) thereof”, and that “[the LTTE] falls within Article 2(3)(ii) of Regulation No 2580/2001” (third and fourth paragraphs of the grounds for the contested regulations), the Council refers to decisions that the UK and Indian authorities adopted in 1992, 2001 and 2004 against the LTTE — including two United Kingdom (“UK”) decisions. One decision is of the UK Secretary of State for the Home Department (“the Home Secretary”) of 29 March 2001 proscribing the LTTE as an organisation involved in terrorism under the UK Terrorism Act 2000 (“the 2001 UK proscription order”) (fifth and sixth paragraphs of the grounds for Implementing Regulations Nos 83/2011 through to 125/2014), as well as in 2012 (sixth and seventh paragraphs of the grounds for Implementing Regulation No 790/2014).

170. As regards the UK decisions and — solely in the grounds for Implementing Regulation No 790/2014 — the Indian decisions, the Council refers to the fact that they are reviewed regularly or are subject to review or appeal.

171. The Council deduces from those considerations that “decisions in respect of the [LTTE] have thus been taken by competent authorities within the meaning of Article 1(4) of Common Position 2001/931” (seventh paragraphs of the grounds for the contested regulations).

172. Finally, the Council “notes that the above decisions ... still remain in force, and is satisfied that the reasons for including [the LTTE] on the list [relating to frozen funds] remain valid” (eighth paragraphs of the grounds for the contested regulations). The Council concludes from this that the LTTE must continue to appear on that list (ninth paragraphs of the grounds for the contested regulations).’

Summary of the procedure at first instance and the judgment under appeal

16. On 11 April 2011, the LTTE brought an action (registered as Case T-208/11) before the General Court challenging its inclusion in the Article 2(3) list in Implementing Regulation No 83/2011. After the LTTE was maintained on the list annexed to Implementing Regulation No 687/2011, it brought a new action (registered as Case T-508/11) seeking annulment of that regulation on the same terms. After that regulation was repealed and replaced by Council Implementing Regulation (EU) No 1375/2011 (16) and the LTTE was maintained on the Article 2(3) list, the LTTE requested that Cases T-208/11 and T-508/11 be joined. It sought leave to amend the forms of order sought in both cases so that they would also cover Implementing Regulation No 1375/2011. The cases were joined by order of 15 June 2012. In the course of the proceedings, as new implementing measures were adopted, the LTTE requested adjustment of the scope of the annulment sought to include Council Implementing Regulations (EU) No 542/2012, (17) No 1169/2012, (18) No 714/2013, (19) No 125/2014 (20) and No 790/2014. (21) Together with the other implementing regulations, these together comprise ‘the contested regulations’. The General Court accepted those adjustments.

17. The European Commission and the Netherlands Government have intervened in both cases in support of the Council, which asked the General Court to reject the LTTE’s application and to condemn it to pay the costs. In Case T-208/11, the United Kingdom Government has also intervened in support of the Council.

18. The LTTE raised six pleas in law that applied in both cases; one additional plea was relevant only to Case T-508/11. Only pleas three to six are relevant to this appeal.

19. By its *third plea* (lack of any decision taken by a competent authority), the LTTE maintained that the grounds for the contested regulations contained references to decisions of authorities of the United Kingdom and India which did not amount to decisions by a competent authority for the purposes of Common Position 2001/931. Should the General Court find that the UK decisions were decisions of competent authorities, the LTTE complained that those decisions were not based on serious and credible evidence or indicia; nor did the grounds identify the bases for those decisions. Should the General Court find that a decision of an authority of a third State (namely India) was a decision of a competent authority, the LTTE submitted that the Indian decisions declaring it unlawful had not been subject to review by an Indian tribunal, as required under Indian law. Nor did the statement of grounds refer to that fact or otherwise show that the Indian decisions were decisions adopted by a competent authority. In any event, the Indian decisions were not based on serious and credible evidence or indicia and the bases for those decisions were not included in the statement of reasons. The LTTE also argued that the Indian authorities were not a reliable source of information because of their bias.

20. The General Court rejected the LTTE's objection that the UK and Indian authorities were not competent authorities. (22) The General Court referred to the case-law confirming that an administrative authority can be a competent authority and that the fact that a decision constituted an administrative decision is not in itself decisive. (23) The General Court held that, although there was a preference for decisions from judicial authorities, the second paragraph of Article 1(4) of Common Position 2001/931 '... in no way excludes the taking into account of decisions from administrative authorities where (i) those authorities are actually vested, in national law, with the power to adopt restrictive decisions against groups involved in terrorism and (ii) where those authorities, although only administrative, may nevertheless be regarded as "equivalent" to judicial authorities'. (24) Furthermore, existing case-law also showed that Common Position 2001/931 did not require that the decision should be taken in the context of criminal proceedings; such decisions can also form part of a procedure aimed at adopting preventive measures. (25) In the present case, the UK and Indian decisions formed part of national proceedings seeking to impose preventive or punitive measures in connection with the fight against terrorism.

21. After having found that the Home Secretary was a competent authority, the General Court decided that an authority of a third State could be recognised as a competent authority within the meaning of Common Position 2001/931. (26) The General Court found the essential precondition of verifying whether there is a decision of a national authority fulfilling the definition in Article 1(4) to be all the more important in the case of decisions adopted by authorities of a third State. It noted that many third States are not bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms and that none of them is subject to the provisions of the Charter of Fundamental Rights of the European Union. The General Court therefore held that the Council must, before acting on the basis of a decision of an authority of a third State, carefully verify that the relevant legislation of that State ensures protection of the rights of the defence and of the right to effective judicial protection that is equivalent to that guaranteed under EU law. There cannot be evidence that the third State in practice fails to apply that legislation. The General Court added that, in the absence of equivalence between the level of protection ensured by the legislation of a third State and EU law, a finding that a national authority of a third State has the status of a competent authority within the meaning of Common Position 2001/931 would entail a difference in treatment between persons covered by EU funds-freezing measures based on whether the decisions underlying those measures emanated from authorities of third States or of Member States. (27)

22. In the case at issue, the General Court found that the grounds for the contested regulations did not contain any evidence suggesting that the Council had carried out such a thorough verification. (28) The General Court also rejected the Council's argument that, had this been an

initial listing (rather than a re-listing), there would have been a more detailed statement of reasons reflecting a more detailed initial assessment of the Indian legislation. Against that background, the General Court upheld the third plea in so far as it related to the Indian authorities and rejected it in so far as it concerned the UK authorities. (29)

23. The General Court next examined the *fourth to sixth pleas, taken together with the second plea*. Those pleas were:

- failure to undertake the review required under Article 1(6) of Common Position 2001/931 (fourth plea);
- breach of the obligation to state reasons (fifth plea);
- infringement of the rights of the defence and the right to effective judicial protection (sixth plea); and
- wrongful categorisation of the LTTE as a terrorist organisation for the purposes of Article 1(3) of Common Position 2001/931 (second plea).

24. The General Court described those pleas as supporting the claim that the Council had based the contested regulations on a list of acts which the Council itself attributed to the LTTE, rather than on decisions of competent authorities. The second and fourth pleas concerned the claim that the imputation of terrorist activities to the LTTE in that listing had no sufficient factual or legal basis. The fifth and sixth pleas concerned the claim that there were too many gaps in the grounds for the contested regulations to enable the LTTE to mount an effective defence and to allow the EU courts to exercise judicial review. (30)

25. The General Court first set out (31) the principles and case-law on the basis of which it would consider the grounds put forward by the Council in the contested regulations. (32) It found that the Council had based those regulations on information which it had derived from the press and the internet, not on assessments contained in decisions of competent authorities. (33) According to the General Court, the Council's reasoning was as follows: (i) the Council had itself classified the LTTE as a terrorist organisation and imputed to it a series of acts of violence which the Council took from the press and the internet; (ii) next, the Council had stated that the acts imputed to the LTTE were terrorist acts within the meaning of Common Position 2001/931 and that the LTTE was a terrorist group; and (iii) finally the Council had referred to decisions of UK and Indian authorities which, with respect to Implementing Regulations Nos 83/2011 to 125/2014, predated the imputed acts. (34)

26. The General Court found that the Council had not identified, in the grounds for the implementing regulations, subsequent national review decisions or other decisions of competent authorities which actually examined and upheld the specific acts set out at the beginning of those grounds. The Council merely cited the initial national decisions and stated, without more, that they remained in force. Only with respect to Implementing Regulation No 790/2014 did the Council mention national decisions subsequent to the acts specifically imputed to the LTTE. There, however, the Council had failed to show that those decisions actually examined and upheld the specific acts set out at the beginning of those grounds. (35) For those reasons, the General Court distinguished the present case, where the Council had made its own independent imputations of fact on the basis of the press or the internet, from cases where the factual basis of the Council regulations originated in decisions of competent national authorities. (36) Thus, according to the General Court, the Council had purported to exercise the functions of a competent authority. However, those functions were neither within the Council's competence according to Common Position 2001/931 nor within

its means. (37)

27. The General Court found the Council's approach to contravene the two-tier system established by Common Position 2001/931. According to the General Court, any new terrorist act which the Council inserts in its statement of reasons during the review process must have been the subject of an examination and a decision by a competent authority within the meaning of that common position. (38)

28. The General Court dismissed the Council's argument that the lack of reference (in the grounds for the contested regulations) to specific decisions of competent authorities which had specifically examined and upheld the acts set out at the top of those grounds was attributable to the LTTE, which could and should have challenged the restrictive measures concerning it at national level. That was so because: (i) the obligation to base fund-freezing decisions on a factual basis is not subject to action by the person or group concerned; (ii) the argument confirmed that the Council had in fact relied on information which it had derived from the press and the internet; and (iii) the argument further suggested that the national fund-freezing decisions on which the Council relied might themselves, if no challenge had been brought by the party concerned under national law, not be based on any specific act of terrorism. (39)

29. The General Court was not convinced by the argument of the Council and the Commission that an obligation to derive the factual basis of the fund-freezing regulations from decisions of competent authorities might lead, in the absence of such decisions, to unjustified removal of persons or groups from the Article 2(3) list, having regard also to the fact that the review in the Member States might differ from the biannual review at EU level. That argument was inconsistent with Common Position 2001/931, which requires that the factual basis of the EU decision be based on information which has been specifically examined and upheld in decisions of competent national authorities.

30. Under the two-tier system, it was for the Member States to transmit regularly to the Council, and for the Council to collect, the decisions of competent authorities adopted within those Member States, as well as the grounds for those decisions. If, despite that transmission of information, a decision of a competent authority concerning a specific act capable of constituting a terrorist act was not available to the Council, the General Court found that the Council, in the absence of its own means of investigation, must ask a competent national authority to assess that act, with a view to a decision being taken by that authority. For that purpose, the Council may contact both the 28 Member States, in particular the Member States which have already examined the situation of the person or group concerned, and a third State satisfying the requisite conditions as to the protection of the rights of the defence and the right to effective judicial protection. The General Court accepted that the decision in question does not necessarily need to be taken by the national authority periodically reviewing the placement of the person or group concerned on the national list relating to frozen funds. In any event, the fact that the timing of periodic review at national level is different from that in force at EU level cannot justify the Member State concerned postponing the examination of the action in question which the Council has requested. The two-tier system and the principle of sincere cooperation mean that the Member States must respond without delay if the Council requests them to assess an act capable of constituting a terrorist act and, where appropriate, a competent authority should take a decision within the meaning of Common Position 2001/931. (40)

31. The General Court went on to say that the absence of any new terrorist act during a given six-month period does not in any way mean that the Council should withdraw the person or group concerned from the Article 2(3) list. The Council may maintain the person concerned on that list, even after the cessation of the terrorist activity in the strict sense, if the circumstances warrant

it. (41)

32. The General Court added that the need for a factual basis in decisions of competent authorities does not mean that there is a risk of unjustifiably maintaining a person or group on the Article 2(3) list. Common Position 2001/931 does not contain any obligation to rely on decisions of competent authorities in order *not* to maintain a person or group in the Article 2(3) list. Such a decision is not subject to the same procedural requirements, even though, in the majority of cases, it will take place in the light of favourable decisions adopted at national level. (42)

33. The General Court therefore annulled the contested regulations in so far as they concerned the LTTE, on the basis that Regulation No 2580/2001 applies in the case of armed conflict (not relevant to this appeal (43)) and that the Council infringed both Article 1 of Common Position 2001/931 and the obligation to state reasons. (44)

Claims and submissions on appeal

34. The Council, supported by the Commission (45) and the French, Netherlands and United Kingdom Governments, asks the Court to set aside the judgment under appeal, to give final judgment in the matters that are the subject of its appeal by dismissing the applications and to order the LTTE to pay the costs of the Council in Joined Cases T-208/11 and T-508/11 and in the present appeal. The LTTE asks the Court to dismiss the appeals, to confirm the judgment under appeal and to order the Council to pay the costs.

35. At the hearing held on 3 May 2016, all of these parties also presented oral argument.

36. By its *first ground of appeal*, the Council submits that the General Court erred in law by deciding that the Council was under a duty to demonstrate, in the statement of reasons sent to the LTEE, that it had verified that the activity of the listing authority in the third State was carried out with sufficient safeguards. The Council's main arguments can be summarised as follows: the statement of reasons must pertain to information that enables the LTTE to understand why it was listed and, in particular, the conduct that prompted the listing. The statement of reasons should not refer to any other information, including information relating to the Council's assessment of the relevant procedural safeguards applicable to the decision of a competent authority of a third State on which it relied. It also follows that the absence of information regarding that assessment in the statement of reasons does not mean that the Council failed to carry out such an assessment.

37. The LTTE asks the Court to reject the first ground of appeal. The General Court rightly found that there was no reference whatsoever in the statement of reasons to the rights of the defence or the right to effective judicial protection. The LTTE considers that Common Position 2001/931 provides a legal basis for requiring the Council to verify both the legislation and the practice of a third State, in order to establish whether the standards of the rights of defence and effective judicial protection are in conformity with those guaranteed under EU law. In fact, general principles of EU law apply to Common Position 2001/931 and the implementing regulations. Therefore, any Article 1(4) decision must be taken in accordance with those rights. Individuals should not be expected to be familiar with the procedural guarantees in third States. Furthermore, any analysis regarding third States will be set out in the statement of reasons only if the outcome of the Council's assessment is positive.

38. By its *second ground of appeal*, the Council submits that the General Court erred in law in its assessment of the use of information in the public domain.

39. First, the General Court was wrong to presume that the Council must regularly provide new

reasons justifying why the applicant remains subject to restrictive measures, and that — notwithstanding the 2001 UK proscription order and the EU asset freeze — there was a steady stream of decisions from national authorities that the Council could and should take into account during its six-monthly review.

40. Second, the General Court dismissed the Council's use of open source material in circumstances where the information cited by the Council was used to determine whether — notwithstanding the fact that the Council *could* continue to list the LTTE on the basis of the existing decisions of competent authorities — it *should* continue to list the LTTE.

41. Third, although the General Court stated that the Council should have asked a competent authority to review the press items, there is no basis for such a procedure in Common Position 2001/931, the Court's judgment in *Al-Aqsa* or elsewhere. In any event, the General Court's position would lead to an unworkable situation.

42. Fourth, the General Court was wrong to conclude that its refusal to uphold the Council's reliance on open source material should necessarily result in the annulment of the contested regulations.

43. The LTTE responds that the acts listed in the statement of reasons were not derived from decisions of competent authorities because each listed act post-dated the national decisions. That confirms that the decision to keep the LTTE on the Article 2(3) list can only have been based on information provided in the press and on the internet. The General Court did not hold that the Council must provide new reasons for justifying why the applicant should remain subject to restrictive measures on a regular basis. It merely determined that, if the Council chooses to provide new reasons, those reasons must be derived from decisions of competent authorities. The General Court was right to find that, by making an independent assessment on the basis of information provided in the press and on the internet, the Council in fact sought to exercise the function of a competent authority.

44. By its *third ground of appeal*, the Council submits that the General Court erred in law by not concluding that the 2001 UK proscription order could serve as a valid decision within the meaning of Article 1(4) of Common Position 2001/931. First, the General Court found in *PMOI* (46) that such an order was a decision of a competent national authority. Second, the General Court required the Council to have before it all the elements relied upon by the Home Secretary when proscribing the LTTE.

45. The LTTE submits that, if none of the terrorist acts leading the Home Secretary to proscribe the LTTE was known to the Council, the Council could not verify whether the 2001 UK proscription order met the requirements of Article 1(4) of Common Position 2001/931. In that case, the General Court in its turn could not verify whether the evidence relied on was factually accurate, reliable and consistent. It would also mean that none of the parties involved would be able to examine whether a decision within the meaning of Article 1(4) had been taken. Furthermore, the Council's argument that it may not be realistic to require the sharing of certain information underpinning a national decision is hypothetical. In the current proceedings, it does not appear that the information (if any) underlying the 2001 UK proscription order was restricted.

Assessment

Preliminary remarks

46. This appeal in essence invites the Court to (re)consider the architecture of the mechanism through which EU restrictive measures under Common Position 2001/931 and Regulation

No 2580/2001 are maintained and the role of the Member States and third States in that scheme.

47. Within that scheme, a distinction can be made between: (i) the initial listing and (ii) the decision to maintain a person, entity or group on the Article 2(3) list. As regards the first type of decision, Common Position 2001/931 lays down the procedure which the Council is to apply and the materials on which it may rely. No such rules are set out for the second type of decision. It is that second type of decision that was the subject of the LTTE's action before the General Court and is at issue in the present appeal.

48. Article 1(6) of Common Position 2001/931 provides only for there to be a regular review of the names of persons and groups on the Article 2(3) list in order to ensure that there are grounds for keeping them on the list. The central issues in this appeal are how the Council may establish that such grounds exist and what the Council must communicate to the persons or groups concerned.

49. It follows from Article 1(6) of Common Position 2001/931 that, in the absence of grounds for keeping a person or group on that list, the Council must remove or 'delist' them. (47) In that regard, it is common ground that the LTTE has not itself submitted observations and evidence to the Council which may affect the reasons for its inclusion in the Article 2(3) list and possibly result in its delisting. In the context of a different type of restrictive measure, the Court has held that, where such observations and evidence are provided and taken into account in amending the reasons for listing a person in the decision taken in the framework of the CFSP, the amendment must also appear in the regulation adopted pursuant to the TFEU. (48)

50. Neither party has challenged the part of the judgment on the LTTE's first plea, in both cases, that Regulation No 2580/2001 does not apply to the conflict between the LTTE and the Government of Sri Lanka because only international humanitarian law governs that armed conflict (and therefore also acts committed in that context). That matter has, however, been raised in Case C-158/14 *A and Others*.

51. In its pleadings, the Council places considerable emphasis on the fact that the LTTE never challenged any of the national decisions on which the Council relied or the Council regulations through which it was initially listed and then maintained on the Article 2(3) list. However, as I see it, review of a Council regulation involves examining whether the Council complied with applicable rules of EU law, including conditions laid down in Common Position 2001/931 and fundamental rights. Nothing in those rules makes that review dependent on whether the party concerned has first challenged the decision of the competent authority before the appropriate national forum.

52. At the hearing, the Council was asked whether it is necessary to address the first ground of appeal. That ground concerns the requirement to state reasons for a decision adopting restrictive measures. It is true that, if the Court considers that, at the very least, one of the reasons mentioned is sufficiently detailed and specific, the fact that the same cannot be said of the other reasons cannot justify annulling the decision. (49) That means that, in the present case, should the Court decide (in the context of the second and/or third grounds of appeal) that the General Court erred and find that the contested regulations were properly based on, for example, the 2001 UK proscription order and sufficiently reasoned, it would then not be necessary also to consider whether the statements of the reasons for relying on the decisions of third States were sufficient. However, taking into account the systemic importance of the matter underlying the first ground and its possible relevance to other cases, I shall examine the first ground irrespective of the merits of the other grounds of appeal.

First ground of appeal

53. The first ground of appeal concerns the scope of the Council's obligation to state reasons for

relying on a decision of an authority of a third State as a basis for showing that there continue to be grounds for maintaining an organisation, such as the LTTE, on the Article 2(3) list. That plea presupposes that the General Court was correct in accepting that, provided that the Council, before acting upon that decision, has verified carefully that the relevant legislation of that third State ensures protection of the rights of the defence and a right to effective judicial protection equivalent to those guaranteed under EU law, such a decision may constitute a decision of a competent authority within the meaning of Article 1(4) of Common Position 2001/931. Whether the Council can rely at all on a decision of an authority of a third State and, if so, under what conditions, are questions that are not before the Court in this appeal.

54. Common Position 2001/931 contains no express requirement for a statement of reasons. The basis for that requirement lies elsewhere. Thus, pursuant to Article 296 TFEU, the Council must explain expressly and in detail the specific grounds for maintaining a group, such as the LTTE, on the Article 2(3) list. That explanation must provide sufficient information to enable the group adversely affected by the act to understand the reasons why it remains on that list and the Union courts to review the decision. (50) That obligation is a further expression of the corresponding fundamental right under Article 47 of the Charter. (51)

55. The obligation to state reasons is an essential procedural requirement. It is separate from the question of the evidence of the alleged conduct. That relates to the substantive legality of the act and involves assessing the truth of the facts set out in that act and the characterisation of those facts as evidence justifying the use of restrictive measures against the person concerned. (52)

56. In particular, when imposing a measure freezing funds, the Council must, in the statement of reasons for that act, ‘... identify the actual and specific reasons why the Council considers, in the exercise of its discretion, that that measure must be adopted in respect of the person concerned’. (53) The Council must also identify ‘... the individual, specific and concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures ...’. (54) Whether specific requirements are to be satisfied by the statement of reasons will depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. The statement of reasons does not necessarily need to go into all the relevant facts and points of law. That is because whether a statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. (55)

57. It is therefore appropriate to start by examining the type of act at issue and the grounds on which it may be based.

58. Putting and keeping a person or group on the Article 2(3) list involves assessing the risk that they are or might be involved in terrorist acts as defined in Article 1(3) of Common Position 2001/931. The initial assessment must be based, in accordance with Article 1(4) of Common Position 2001/931, on ‘precise information or material in the relevant file’ indicating that a competent authority has taken a decision in respect of the persons, groups and entities concerned. The text of Article 1(4) offers some guidance on the subject of those decisions. What matters is that a decision was taken by a competent authority, ‘irrespective’ of whether that decision concerns, on the one hand, the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participating in or facilitating such an act based on serious and credible evidence or clues or, on the other hand, a conviction for the act of terrorism, or an attempt to perpetrate, participate in or facilitate such an act. The latter must necessarily also have been based on serious and credible evidence. (56) In any event, the Council must be satisfied that there are ‘serious and credible evidence and clues’. (57) That implies that the Council need not have available to it all the elements

on which a competent authority relied in adopting a (executive or judicial) decision, such as the 2001 UK proscription order in the present case. That is so because the Council cannot *de novo* review the seriousness and credibility of the evidence or clues upon which a decision of a competent authority is based. However, it can and must review whether the decision was based on evidence and whether the authority considered that evidence to be serious and credible. What the Council cannot do is itself examine the evidence. Instead, the purpose of the Council's review of decisions of competent authorities (of both Member States and third States) is limited to verifying whether, as a matter of EU law, such decisions constitute a sufficient basis for applying EU restrictive measures.

59. It follows that, based on the content of the measure alone, the statement of reasons for an initial decision to include a person or group in the Article 2(3) list must communicate at least: (i) the individual, specific and concrete reasons for considering that there is a risk that a person or group may be involved in terrorist acts as defined in Article 1(3) and therefore that restrictive measures must be adopted, (58) and (ii) the decisions of competent authorities, within the meaning of Article 1(4), which were used as a basis for those reasons. Both elements affect the legality of the measure. Without communication of both elements, the person or group concerned cannot know on what substantive grounds he or it was listed and whether the Council complied with the statutory conditions applicable for listing; and the Court cannot perform its review. I therefore do not agree with the Council that the statement of reasons should be limited to information regarding the conduct that led to the Council's listing of the LTTE, even if the Council is right that the obligation to state reasons is a requirement that is separate from the question of the evidence of the alleged conduct. (59)

60. The first ground of appeal concerns the second element: is it sufficient, when relying on decisions of a competent authority of third States, to identify only the decision of the competent authority within the meaning of the second paragraph of Article 1(4)?

61. In my opinion, it is not.

62. When the Council relies on decisions of competent authorities of Member States acting within the scope of EU law, it is a given that those authorities are under a duty to respect the fundamental rights applicable in the European Union. Thus, the standards of protection and the level of protection — as a matter of EU law — are well established and subject to the Court's review. When relying on their decisions, the Council will normally be justified in presuming that those decisions have been taken in compliance with applicable fundamental rights, in particular, the rights of defence and effective judicial protection. However, that presumption is not absolute. In Opinion 2/13, the Court found that the principle of mutual trust between the Member States requires that, particularly with regard to the area of freedom, security and justice, each of those States should consider, *save in exceptional circumstances*, all the other Member States to be complying with EU law, particularly the fundamental rights recognised by EU law. (60) To put the point a different way: the principle is one of mutual trust, but not of blind mutual trust, come what may.

63. The same consideration must apply in the present context. Thus, where the Council considers that there is evidence showing a real risk that a decision of a competent authority was *not* adopted in compliance with those rights in a specific case at issue, it may not rely on that decision for the purposes of adopting restrictive measures pursuant to Common Position 2001/931, without further assessment. As I put it in my Opinion in *France v People's Mojahedin Organization of Iran*, '... 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, it seems to me that the Council must satisfy itself 'as regards compliance with those rights at European Union level' prior to adopting its decision'. (61) In other (more normal) circumstances, it may presume compliance with the relevant fundamental rights and thus may rely on that decision to include a person or group on the Article

2(3) list.

64. It follows that, as regards decisions of a competent authority of a *Member State*, it may be sufficient for the Council to identify in its statement of reasons the decision on which it relied and to explain why it is a decision of a competent authority within the meaning of the second paragraph of Article 1(4) of Common Position 2001/931. Based on that statement of reasons, the person or group concerned is then made aware that the Council acted upon the presumption that applicable fundamental rights were respected and that there were no exceptional circumstances such that it could not rely upon that presumption. Where the Council had evidence showing a real risk that fundamental rights were not respected, it must show that it is satisfied that there was compliance with fundamental rights and make that clear in the statement of reasons.

65. The situation is different where the Council decides to rely on a decision of a competent authority of a *third State*. Those authorities do not act within same constraints as the Member States in terms of fundamental rights protection, even if their legal protection of fundamental rights might be at least equivalent to that guaranteed under EU law. The Council itself accepts that it must be satisfied that a decision of an authority of a third State was taken in circumstances where fundamental rights were afforded protection at a level at least equivalent to that applicable under EU law (and governing equivalent decisions of authorities of Member States).

66. Apart from a general presumption that third States respect their obligations under international law (which might include commitments as regards human rights), there is no basis for presupposing the level of fundamental rights protection that is guaranteed in a third State and whether it is 'at least equivalent to' that in the European Union. Whilst the rules of international law (including, in particular, the European Convention on Human Rights) binding upon a third State might be indicative, domestic law must also be taken into account. It is for the Council to verify whether the level of fundamental rights protection is at least equivalent to that under EU law and whether there is evidence pointing to the possibility that the decision at issue may not have been adopted in compliance with the relevant and applicable standard of protection.

67. In my opinion, that means that the Council is under a duty to examine (i) what rules of domestic law of that third State apply to the decision at issue (including any rules of international law that are part of domestic law); (ii) what standards and level of protection are provided by those rules (including whether administrative or judicial review of the decision is available, thus guaranteeing the fundamental right to effective judicial protection) and whether they are equivalent to the protection guaranteed under EU law; and (iii) whether there is evidence pointing to the possibility that the decision at issue may not have been adopted in compliance with the relevant and applicable standard of protection. However, unlike the General Court, I see no need for the Council to verify systematically whether the third State in practice fails to apply its legislation protecting the rights of the defence and guaranteeing effective judicial protection. That is neither necessary nor sufficient in order to determine whether, in a specific case, the Council is justified in relying on a specific decision of a competent authority.

68. Nor do I subscribe to the Council's concern that there is a risk of interference in the political system of a third State and its suggestion that such risks could be avoided if the Council were allowed to make its observations on that State's legal system in the course of subsequent judicial proceedings; in particular in its written pleadings which are covered by the second paragraph of Article 20 of the Statute of the Court of Justice. (62) As I see it, the Council's assessment is limited to verifying equivalence between the laws of a third State and EU laws and to the guarantees available in a specific case. Its object is not to verify compliance of a third State with any rules of international law that bind it or with domestic laws of other States. Furthermore, the considerations that might lead the Council to rely on the decisions of an authority of a third State are made known

to the person or group concerned only where the Council finds there to be equivalence. If the outcome of that assessment is negative, the Council may not rely on the decision of the authority of the third State and no part of the Council's assessment will be made available to the person or group concerned or be released in the public domain.

69. For those same reasons, there is no basis for resorting to communicating the statement of reasons only in written observations filed in proceedings before the General Court. In any event, the duty to state reasons implies the corresponding right of the adversely affected party to receive reasons: that right cannot be made dependent on first challenging the Council's regulation before the EU Courts. The right enables the person concerned to learn the essential elements underlying the measure adversely affecting him and therefore to challenge that measure; not the other way around. (63)

70. Where that assessment is positive, the Council must then set out, in the statement of reasons, its grounds for deciding that the decision of the competent authority of a third State was adopted subject to standards of fundamental rights protection equivalent to those that apply, as a matter of EU law, to decisions taken by authorities of the Member States. It is therefore insufficient to include only a reference to the decision.

71. That is not to say that the Council must disclose in the statement of reasons the entirety of its analysis and present a general and full evaluation of the constitutional and criminal law and practice of a third State. Rather, it must state in clear terms why, in the present case involving a particular decision of a competent authority, the law of the third State provides for an equivalent level of protection of, at least, the rights of the defence and effective judicial protection and must communicate the legal sources of the rights on which it has relied.

72. The Council also appears to distinguish, in support of its first ground of appeal, between the decision whereby it initially lists a person or group and subsequent decisions whereby it maintains them on the Article 2(3) list. I shall address that distinction in greater detail in the context of the second plea. For the reasons explained in that part of this Opinion, (64) I consider that, where the Council relies on a decision of a competent authority of a third State when deciding to maintain a person or group on the Article 2(3) list, it must provide a sufficient statement of reasons for relying on that decision.

73. I therefore find no error in the General Court's interpretation underlying its finding that the Council did not provide any assessment of the levels of protection of the rights of the defence or the judicial protection provided by Indian legislation and that the mere reference to sections of legislative provisions and to periodic review by the Indian Home Affairs Minister is insufficient. The fact that I consider that the General Court erred in so far as it suggested there to be a general obligation on the Council to examine in practice and in the abstract a third State's effective application of its legislation protecting the rights of the defence and of effective judicial protection does not alter that conclusion.

74. The first ground of appeal must therefore be rejected as unfounded.

Second ground of appeal

Introduction

75. The Council's second ground of appeal primarily concerns the grounds on which the Council may decide to maintain a person or group on the Article 2(3) list and the requirement to include those grounds in the statement of reasons. That ground of appeal is based in essence on three arguments: (i) the General Court wrongly assumed that the Council must regularly provide new

reasons justifying why the party concerned should remain subject to restrictive measures; (ii) the General Court wrongly found that the Council cannot rely on materials in the public domain which have not been incorporated in a decision of a competent authority; and (iii) the General Court wrongly decided to annul the contested decision on the ground that the Council could not rely on materials in the public domain.

76. I shall address each argument in turn.

Must the Council regularly provide new reasons justifying why a group remains subject to restrictive measures?

77. I agree with the Council that, when deciding to maintain a person or group concerned on the Article 2(3) list, the Council is not always required to provide new reasons (in the sense of new facts addressed in a decision of a competent authority or a new decision of such an authority relating to facts on which the Council has previously relied) for keeping that party on the list. That may sometimes, but not necessarily always, be required.

78. The basis for a listing in accordance with Article 1(4) of Common Position 2001/931 is that there is a decision of 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’. Evidence must consist of precise information or material.

79. Initial listing is thus based on decisions concerning past facts. The purpose of the reference to a national decision is to ‘... [seek] ... to ensure that the decision of the Council be taken on a sufficient factual basis enabling the latter to conclude that there is a danger that, if preventive measures are not taken, the person concerned may continue to be involved in terrorist activities’. (65) Its function is that of ‘... establishing the existence of evidence or serious and credible clues as to the involvement of the person concerned in terrorist activities, regarded as reliable by the national authorities’. (66) For an initial listing, those decisions are thus used to assess the risk of terrorist acts or involvement in such acts in the future. (67) There is no justification to freeze funding for (terrorist) acts where there is no (longer a) risk that such acts will occur.

80. Based on that assessment, it then is for the Council to decide where to set the level of protection against that risk and to evaluate whether a particular person or group presents such a risk (possibly even though they have not committed terrorist acts for some time). (68) That then justifies the application of preventive measures. The assessment of the risk in a specific case must be based on the facts and information available in the decisions of competent authorities. Taking into account the two-tier system underlying Common Position 2001/931, those decisions are the sole basis for showing that there are grounds to list a person, entity or group. The Council must verify whether the decision within the meaning of Article 1(4) of Common Position 2001/931 is sufficiently precise (i) to identify the person or group concerned and (ii) to establish a possible nexus (as described in Article 1(2) of that common position) between the person or group concerned and terrorist acts as defined in Article 1(3) thereof. The Council must also consider the timing of both the decision and the facts to which it pertains in order to determine whether they establish a present (and possibly a future) risk of terrorism justifying the adoption of restrictive measures.

81. It follows that, whilst the Council has a discretion in assessing the risk of terrorism, setting the level of protection and choosing the means through which to address that risk, it can include persons, groups and entities in the Article 2(3) list only where there are sufficient grounds for establishing that those persons, groups and entities show the required connection to terrorist acts or

activities. It thus exercises a discretion in its examination of the decisions of competent authorities and the facts and evidence upon which they are based. However, Common Position 2001/931 does not provide that, when taking the initial listing decision, the Council itself has investigative or other fact-finding powers. (69) Consequently, the Council has no discretion in choosing the basis for establishing the grounds for listing. That basis must be found in decisions of competent authorities.

82. Article 1(6) of Common Position 2001/931 provides for review of the Article 2(3) list at regular intervals (at least once every six months). The purpose of that review is to ensure that there continue to be grounds for keeping a person or group on the list. It offers no further guidance on what those grounds are and on what they must be based.

83. In my view, the grounds (that is to say, the reasons) for first listing and then keeping a person or group on the Article 2(3) list must be the same: persons, entities or groups may remain on that list only in so far as the risk of terrorist acts and activities and their involvement therein continues to exist. The rationale for the two-tier design of the listing mechanism is the same irrespective of how long a person or group remains on the list. In other words, after an initial listing, a listed person or group cannot be presumed to satisfy the grounds for listing unless and until it requests to be delisted and adduces evidence of new facts to support that request.

84. Instead, the Council has a supervisory function to discharge. It falls to the Council to verify, in the context of its review, whether there are still grounds, based on facts and evidence, for listing. In *Al-Aqsa*, the Court held that, when reviewing whether to continue listing a person or group, the essential question is ‘... whether, since that person was included in that list or since the last review, the factual situation has changed in such a way that it is no longer possible to draw the same conclusion in relation to the involvement of the person at issue in terrorist activities’. (70) What matters is thus whether new facts or evidence have emerged or whether there is a change in the assessment by the competent national authorities of that party’s involvement in (the financing of) terrorism. (71) Elsewhere in that judgment, the Court referred to the question whether there was evidence ‘showing that ... the factual situation or evaluation thereof by the national authorities had changed in so far as concerns the appellant’s involvement in the financing of terrorist activities’. (72)

85. I read those paragraphs of *Al-Aqsa* as focusing especially on what may cause the Council to *remove* a person or group from the Article 2(3) list. Thus, a competent authority may decide that, in the light of new facts and evidence, a person or group is no longer involved in the financing of terrorism. Or, the Council itself may discover facts that lead it to reconsider its earlier decision and possibly remove a person or group from the Article 2(3) list.

86. In the present case, the question raised by the second ground of appeal is whether the Council must show (and include in the statement of reasons) new reasons for *keeping* a person or group on the Article 2(3) list. In my opinion, there cannot, on the one hand, be a hard and fast rule entitling the Council to maintain a person or group on the Article 2(3) list only where there are decisions of competent authorities taken or known to the Council after the initial or previous listing. On the other hand, the initial decision(s) used as a basis for the initial listing will not always be sufficient.

87. Whether or not a new decision of a competent authority is required, and therefore needs to be included in the statement of reasons, will depend on a number of factors.

88. Where the Council adopts an Article 1(6) decision *without* relying on a new decision of a competent authority, it must be satisfied that the decision of a competent authority on which it previously relied to adopt either the initial decision or a subsequent decision to keep a person or group on the Article 2(3) list continues to be a sufficient basis for showing there are grounds to do

so. Thus, based on the facts and evidence underlying the earlier decision(s) of the competent authority (even if those decisions were subsequently repealed for reasons unrelated to those facts and evidence showing involvement in terrorist acts or activities (73)), the Council must show that the facts and evidence on which the (initial or earlier) decision(s) of the competent authority was or were based continue to justify its assessment that the person or group concerned presents a risk of terrorism and that, consequently, preventive measures are justified. Put simply: the risk and the consequent need for preventive measures must still exist.

89. Because decisions of competent authorities necessarily relate to facts preceding those decisions, it follows that the longer the period between those facts and those decisions, on the one hand, and the new decision to maintain a person or group on the Article 2(3) list, on the other hand, the greater the obligation on the Council to verify diligently whether, at the time of its review, its conclusion continues to be validly based on that decision and the facts underpinning it. (74) Where the decision of the competent authority has been renewed or extended, the Council must verify on what basis that was done. It follows therefore that the Council's analysis cannot be entirely identical to that performed when adopting an earlier Article 1(6) decision based on the same decision of a competent authority. At the very least, it is necessary to take into account the passage of time. That must also be reflected in the statement of reasons.

90. Where the person or group that is adversely affected has submitted to the Council information in response to either the previous listing decision or the statement of reasons concerning the next listing decision, the Council must also take into account that information (75) and explain in its statement of reasons for the new listing decision why that information does not change its assessment.

91. Where a new relevant decision of a competent authority is available and known to the Council, that institution then must verify on what facts and evidence that decision was based and whether it can be used to show that there continue to be grounds for keeping a person or group on the Article 2(3) list. In that regard, the Council's responsibilities (including as regards its statement of reasons) will differ depending on whether the national decision merely renews or extends the earlier decision of the competent authority on which the Council previously relied or whether it is an entirely new decision, possibly of another competent authority of (possibly another) Member State that is based on other facts and evidence.

92. I have already explained what I consider to be the conditions under which persons or groups may be included in the Article 2(3) list based on a decision of a competent authority of a third State. (76) I take the same position with respect to Article 1(6) decisions. Where previous listing decisions were already based on such third State decision(s) and the Council previously showed those conditions to be satisfied, I do not consider that the Council must set out all those facts and evidence again in the new statement of reasons when it continues to rely on those decisions. Rather, the Council must explain (i) why, at the time of deciding whether to keep a person or group on the Article 2(3) list, those decisions still show that there are grounds for continuing to list that person or group and (ii) why it is still satisfied that those decisions were adopted subject to standards of fundamental rights protection at least equivalent to those that apply, as a matter of EU law, to decisions taken by authorities of the Member States. Where the Council relies on a new decision of the same third State, the extent to which the Council has to state the relevant facts and evidence again will depend on how that new decision compares with the earlier decision. However, in any event the Council must show that the conditions under which persons or groups may be included in the Article 2(3) list based on such a decision continue to be satisfied.

93. In the present case, it is true that the General Court appeared (at paragraphs 175 to 177 of the judgment under appeal) to require the Council to produce more recent national decisions and to

refer to the grounds of those decisions, without examining first whether the Council had showed that there continued to be grounds for keeping the LTTE on the Article 2(3) list on the basis of the existing decisions of competent authorities on which it had previously relied.

94. However, when those paragraphs are read together with paragraph 196 of the judgment under appeal, it becomes clear that the General Court also found that the Council had merely cited the initial decisions of competent authorities and had stated, without more, that they remained in force; and that as regards the specific acts which it identified (which had taken place *subsequent* to those decisions), the Council did not rely on decisions of competent authorities. In those circumstances, any decisions of competent authorities relied upon should evidently have been different and more recent than the initial decisions to which the Council referred. The General Court accepted that more recent decisions were mentioned with respect to Implementing Regulation No 790/2014, but found that the Council had not shown how those decisions examined and upheld the specific acts to which the Council referred. In paragraph 204 of the judgment under appeal, the General Court made it even clearer that the Council could not justify maintaining a person or group on the Article 2(3) list based on new terrorist acts without those acts having been the subject of an examination and a decision by a competent authority.

95. Against that background, I consider that the General Court was justified in finding that, because there was no new or other decision of a competent authority relating to the list of terrorist acts to which the Council had referred forming a satisfactory basis for maintaining that there were grounds to list the LTTE, the Council was precluded from relying on a list of terrorist attacks allegedly carried out by that organisation without those facts being shown in decisions of competent authorities.

May the Council rely on open source materials in deciding to maintain a group on the Article 2(3) list?

96. It follows from my conclusion that the Council, in deciding to keep the LTTE on the Article 2(3) list, was precluded from relying on a list of terrorist attacks allegedly carried out by the LTTE without those facts being shown in decisions of competent authorities, that the Council may not in principle (also) rely on information about new attacks available in the public domain as a basis for showing that there are grounds for keeping a person, entity or group on the Article 2(3) list.

97. The Council's second argument in support of its second ground of appeal raises the question whether there are exceptions to that principle. In deciding to maintain a person or group on the Article 2(3) list, may the Council nonetheless rely on grounds based on facts and evidence found elsewhere than in decisions of competent authorities?

98. In my opinion, it may not.

99. An essential feature of the two-tier system underlying Common Position 2001/931 is that the Council cannot itself find facts which can then form the basis for subjecting a person or group to EU preventive measures. Nor does it have the necessary investigatory powers to do so. (77) Instead, it can include a person or group on the Article 2(3) list only where the file indicates that a decision has been taken by a national judicial authority or, subject to certain conditions, an administrative authority. That requirement exists in order to ensure that a person or group is included on the list only on a sufficiently solid factual basis. (78) The premiss is that, on the one hand, decisions of those authorities, in accordance with national law, establish or review and uphold serious and credible evidence or clues that a person or group is involved in terrorist acts or activities. On the other hand, the person or group concerned enjoys the fundamental rights of defence and effective judicial protection in respect of those decisions.

100. As I see it, that rationale is equally relevant to the decision to maintain a person or group on the Article 2(3) list. The reasons for that decision must have a sufficiently solid factual basis. Allowing the Council itself to find evidence or clues of (past or future) involvement in terrorist acts and activities which the Council deemed to be covered under Article 1(2) and (3) of Common Position 2001/931 would imply a difference in treatment between, on the one hand, persons or groups that are maintained on the Article 2(3) list based on decisions of competent authorities and, on the other hand, those kept on that list based on facts found by the Council on its own initiative (even if the Council also relied to some extent on decisions of competent authorities). The latter category would then enjoy fewer rights of due process and effective judicial protection as regards the facts found by the Council. They could only have recourse to the Union courts for challenging the factual findings made by the Council. Whereas, under the two-tier system, a challenge is possible in principle both at national level (to the decision of the competent authority) and at EU level (to the Council's listing decision). Direct reliance by the Council on such information or material would thus risk denying the person or group concerned the fundamental right to obtain review before a national court of a decision adversely affecting it (whereas where a decision of a competent authority is available, a person or group would have that right). Rather, it would fall solely to the EU courts to perform that review. Thus, the Council cannot include a person or group in the Article 2(3) list because it has a press report stating 'he did it' or 'he said he did it'. Such a decision cannot satisfy the conditions of Common Position 2001/931. Nor is it reconcilable with the rule of law.

101. It may be objected that insisting that the Council may not rely on inculpatory information that is readily available in the public domain is too formalistic and rigorous an approach. In my opinion, that objection must fail.

102. It is worth recalling that the consequences of listing are very serious. Funds and other financial assets or economic resources are frozen. The 'freezing of funds, other financial assets and economic resources' means '... the prevention of any move, transfer, alteration, use of or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management'. (79) For a person, entity or group that is named in the Article 2(3) list, normal economic life is suspended. It does not seem unreasonable to insist that, where such are the consequences, the procedures followed should be rigorous and should respect fundamental rights of the defence and effective judicial protection.

103. Furthermore, it is difficult to imagine how precisely to 'carve out' an exception to the principle that the Council may not rely on information about new attacks available in the public domain as a basis for showing that there are grounds for keeping a person, group or entity on the Article 2(3) list. Where does one draw the line? Is one piece of 'solid' evidence enough or, if more than one isolated item is needed, how many are required? Does a public statement by a known, named spokesman for the group (assuming always that such a person exists) that expressly claims responsibility for an attack have the necessary probative value? Could that same probative value be ascribed to a public statement by someone purporting to speak on behalf of the group? What would the position be if there were press reports suggesting that the individual who committed the attack (and who died during its commission, so that he cannot be questioned) is alleged to have been 'inspired' by the group, or to 'have sworn allegiance' to it? Does that make the group sufficiently responsible that its name should be maintained on the Article 2(3) list?

104. It is of course inevitable that the Council will obtain information, in the normal course of events, regarding the (possible) involvement of persons or groups in terrorist acts and activities. The source of that information might be public or private. The duty of sincere cooperation, upon which the two-tier system laid down in Common Position 2001/931 is based, requires the Council to

inform the Member States of information and evidence that becomes known to it and which it considers might be relevant to competent authorities. It is true that Common Position 2001/931 does not, as such, contain a requirement that when Member States receive such information from the Council, they must forthwith take the necessary steps to trigger a new formal decision by a competent authority regarding the facts and persons covered by the information that the Council has communicated to them. That said, the same duty of sincere cooperation — as I see it — would nevertheless oblige Member States to respond appropriately to a request from the Council seeking evaluation of the information communicated. Obviously, when engaging in the six-monthly review process the Council would in such cases have to factor in sufficient time to seek and obtain a response from the Member State(s) in question in relation to the information that it had communicated. That seems an acceptable price to pay for ensuring respect for fundamental rights of defence and effective judicial protection.

105. If the Council were to be permitted to rely on grounds based on facts and evidence found elsewhere than in decisions of competent authorities, I also entertain doubts as to how such a process would work in practice.

106. Let us suppose that the Council has available to it material from a reliable or original source (whether public or not) purporting to contain or record a statement of the person or group concerned to the effect that it acknowledges (past or future) involvement in terrorist acts or activities that the Council deem to be covered under Article 1(2) and (3) of Common Position 2001/931. At the most, the Council could make a preliminary finding, based on that material, that it possessed a sufficiently solid factual basis for deciding that there continued to be grounds for maintaining that person or group on the Article 2(3) list (irrespective of any relevant decisions of competent authorities). The Council would then have to include that information and evidence in the statement of reasons communicated to the party adversely affected prior to the adoption of a subsequent decision within the meaning of Article 1(6) of Common Position 2001/931. (80) Is it likely in practice that that party would expressly accept the (adverse) facts put to it by the Council? Yet that would be the only basis on which the Council could validly either (i) rely on those facts in the absence of a (previous or new) decision of a competent authority or (ii) combine those facts with a previous decision of a competent authority on which it had already relied. I confess to a degree of scepticism as to whether the person or group concerned would have any interest in furnishing the Council with such convenient express confirmation.

107. I therefore cannot subscribe to a permissive rule that would allow the Council, in order to keep a person or group on the Article 2(3) list, to rely on ‘facts’ that are public knowledge and evidence thereof found in press articles or from the internet. The public character of a fact and the public availability of evidence pertaining to it are as such an insufficient basis for accepting an exception to the general rule that the Council must rely on decisions of competent authorities. Finally, I should like to emphasise that my position applies only to decisions whereby the Council *maintains* a person or group on the Article 2(3) list. The Council is not constrained by the same limitations in deciding to *remove* a person or group from that list.

108. I therefore also reject the second argument in support of the second ground of appeal.

Was the General Court justified in annulling the contested measures?

109. By its final argument in support of the second ground, the Council essentially argues that, if it could not rely on open source material, then the conclusion should have been that there was no change in the factual situation and that, therefore, it could continue to list the LTTE. If that is right, it follows that the General Court should not have annulled the contested regulations because of, inter alia, its refusal to uphold the Council’s reliance on open source material.

110. I do not agree.

111. First, the General Court annulled the contested regulations, in so far as they concern the LTTE, because the Council infringed *both* Article 1 of Common Position 2001/931 *and* the obligation to state reasons.

112. Second, I do not accept the logic underlying the Council's argument that, because no account can be taken of the more recent acts as documented in the press, it therefore follows that there has been no change in the factual situation and thus that the LTTE could be kept on the Article 2(3) list. I have already explained why I consider there to be no basis for presuming that there are grounds for keeping a listed person or group on the list until the factual situation is changed in such a manner that there are (positive) reasons to remove that person or group from the list. As time passes, the factual situation necessarily changes. Even where there is no other or newer decision of a competent authority (covering other facts), the Council must nonetheless review whether, based on the facts and evidence in the decision on which it previously relied, there continues to be a risk of involvement in terrorist acts and therefore a ground for listing. That also implies that, in the present case, the Council needed to explain why the 2001 UK proscription order continued to be a sufficient basis for its decision and the General Court should have addressed that argument. The General Court's findings in relation to the 2001 UK proscription order are the subject of the Council's third ground of appeal.

Conclusion

113. I therefore reject the second ground of appeal as unfounded.

Third ground of appeal

114. The Council's *third ground of appeal* is that the General Court erred by not concluding that the listing of the LTTE could stand on the basis of the 2001 UK proscription order. Before the General Court, the Council had argued that that order was sufficient in itself.

115. The Council's first argument here is that the General Court had already accepted in previous cases that same order to be a decision of a competent authority within the meaning of Article 1(4) of Common Position 2001/931. (81) That is true (nor does it appear to have been contested) and indeed, at paragraph 120 of the judgment under appeal, the General Court expressly relied on that case-law in accepting that that order was a decision of a competent authority. Paragraphs 205 and 206 of the judgment under appeal, on which the Council relies in advancing this argument, in fact concern the General Court's position as regards the Council's reliance on acts, as grounds for its decision to maintain the LTTE on the Article 2(3) list, that had *not* been the subject of a decision by a competent authority.

116. The Council's second argument is that the General Court erred, at paragraphs 206 to 208 of the judgment under appeal, in finding that the Council could not rely on the 2001 UK proscription order without having access to the facts and determinations underlying that decision. As I see it, the General Court made no such finding. In the paragraphs cited, the General Court addressed an argument of the Council and the Commission addressing why the grounds of the contested regulations do not refer to specific decisions of competent authorities examining and upholding the acts on which the Council relied at the start of its statement of the grounds (that is to say, as the General Court put it, a series of acts of violence which the Council took from the press and the internet and imputed to the LTTE). The institutions argued that the LTTE could and should have challenged the restrictive measures at national level. The General Court rejected those arguments because: (i) where the Council uses terrorist acts as a factual basis for its own decision, the Council

must identify, in the grounds for its decision, the decisions of competent national authorities specifically examining and finding proven those terrorist acts; (82) (ii) those arguments confirmed that the Council had in fact relied on information which it derived from the press and the internet; (83) and (iii) those arguments suggested that the national decisions on which the Council relied might not be based on any specific act of terrorism, if no dispute had been raised by the party concerned. (84) Contrary to the Council's allegations, nothing in those paragraphs (and certainly not in paragraph 206) suggests that the General Court required the Council to have before it all the elements relied upon by the Home Secretary when proscribing the LTTE.

117. It is likewise in that context that the Council's arguments about whether a party such as the LTTE is obliged to seek judicial review before national courts must be understood. However, those arguments are immaterial to the Council's third ground of appeal which concerns in essence the General Court's failure to decide that the contested regulations were nonetheless valid because they were based on the 2001 UK proscription order.

118. It is implicit in the Council's third ground of appeal that, having upheld the LTTE's first plea only in so far as it concerned the Indian authorities and discarded the Council's reliance on acts that had not been the subject of decisions of competent authorities, the General Court should nonetheless have found the 2001 UK proscription order to constitute a sufficient basis for the contested regulations. It would then follow that defects regarding the other reasons could not justify annulling those regulations.

119. The General Court's findings as regards the decisions of national authorities to which the contested regulations did refer (thus, in particular, the 2001 UK proscription order) in essence seek to answer the question whether the acts which the Council imputed to the LTTE in the first and second paragraphs of the grounds for the contested regulations — which the General Court found to be the factual statement of reasons and to have had a decisive role in the Council's assessment (85) — were the subject of those decisions. Quite evidently, they could not be because the decisions predated the imputed acts. (86)

120. Whilst the General Court accepted that the Council cited, in the grounds for Implementing Regulations Nos 83/2011 through to 125/2014, the initial national decisions (in particular, the 2001 UK proscription order), it found that the Council had stated only that those decisions remained in force. (87)

121. The General Court did not draw, in express terms, any conclusions from that fact. Thus, whilst the Council is wrong to allege that the General Court erred in law by finding that the 2001 UK proscription order could not, or no longer, be a valid decision of a competent authority, it is less clear whether the General Court in fact neglected to address the question (which was clearly before it, based on the LTTE's arguments in support of its fourth to sixth pleas, taken together with the second plea) whether the Council based the contested regulations not so much on decisions of competent authorities as on a list of acts directly attributed by the Council to the LTTE. (88)

122. It might be possible to reject the third ground of appeal on the basis that since the General Court annulled the contested regulations, it must impliedly have concluded that, putting aside the Indian decision and the various acts subsequent to the adoption of the initial decision which the Council attributed to the LTTE without reference to decisions of competent authorities, the 2001 UK proscription order could not be an independent and sufficient basis for the contested regulations.

123. However, in my view, that reading of the judgment under appeal is too generous. I agree with the Council that, having found that some of the reasons advanced could not justify the decision to

keep the LTTE on the list and should therefore be annulled, the General Court had to go on expressly to examine the other reasons and verify whether one of those reasons was sufficient in itself to support the decision. (89) Only if those other reasons were also not sufficiently detailed and specific to form the basis for listing could the contested regulations be annulled. However, the General Court here omitted to make such findings. The General Court's reasoning was in essence limited to a finding of fact, namely that the Council had merely cited the earlier national decisions and stated that they remained valid. For that reason, the third plea should be upheld and the decision of the General Court should be set aside.

124. Fortunately, the state of the proceedings in the present case permits the Court to give, in accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, final judgment in the matter. In the context of the fifth and sixth pleas, the LTTE argued that the statement of the grounds for the contested regulations was incomplete; that statement did not enable it to mount an effective defence and the Court to review those regulations.

125. I have explained elsewhere in this Opinion why I consider that the General Court rightly concluded that the Council could not, when deciding to keep the LTTE on the Article 2(3) list, rely (in its statement of reasons) on (i) decisions of authorities of third States without stating the grounds for deciding that those decisions were adopted subject to standards of fundamental rights protection equivalent to those that apply, as a matter of EU law, to decisions taken by authorities of the Member States and (ii) various new acts that had not been assessed and established by decisions of competent authorities. That leaves the question of whether it was sufficient for the Council to state, in the grounds for the contested regulations, either that the initial decisions of the competent authorities, in particular the 2001 UK proscription order, remained valid or that a decision of a competent authority had been taken.

126. For the reasons which I have already explained, (90) I consider that that was not sufficient. I therefore conclude that the contested measures must be annulled on that ground. In these circumstances, it is unnecessary for this Court to examine the other pleas advanced by the LTTE at first instance.

Conclusion

127. In the light of all the above considerations, I conclude that the Court should:

- uphold the appeal of the Council of the European Union;
- set aside the judgment of the General Court in Joined Cases T-208/11 and T-508/11;
- annul Council Implementing Regulations (EU) No 83/2011 of 31 January 2011, No 687/2011 of 18 July 2011, No 1375/2011 of 22 December 2011, No 542/2012 of 25 June 2012, No 1169/2012 of 10 December 2012, No 714/2013 of 25 July 2013, No 125/2014 of 10 February 2014 and No 790/2014 of 22 July 2014 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 Implementing Regulations (EU) Nos 610/2010, 83/2011, 687/2011, 1375/2011, 542/2012, 1169/2012, 714/2013 and 125/2014 in so far as those measures concerned the Liberation Tigers of Tamil Eelam;
- order, in accordance with Articles 138(3) and 184(1) of the Rules of Procedure of the Court of Justice, the Council to bear its own costs and two thirds of the costs of the Liberation Tigers of Tamil Eelam incurred in this appeal;
- order, in accordance with Articles 138(3) and 184(1) of the Rules of Procedure of the Court of

Justice, the Liberation Tigers of Tamil Eelam to bear its remaining costs incurred in this appeal;

- order, in accordance with Articles 138(1) and 184(1) of the Rules of Procedure of the Court of Justice, the Council to pay its own costs and those of the Liberation Tigers of Tamil Eelam at first instance; and
- order, in accordance with Articles 140(1) and 184(1) of the Rules of Procedure of the Court of Justice, the French, Netherlands and United Kingdom Governments and the European Commission to bear their own costs.

[1](#) – Original language: English.

[2](#) – Judgment of 16 October 2014, *LTTE v Council*, EU:T:2014:885.

[3](#) – See point 15 below.

[4](#) – Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93), as amended. See recital 2.

[5](#) – Point 1(a) and (c) of UNSC Resolution 1373 (2001).

[6](#) – See point 6 below.

[7](#) – A ‘terrorist act’ is one of the intentional acts listed in Article 1(3) of Common Position 2001/931, 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. See further Case C-158/14 *A and Others* in which I shall deliver my Opinion on 29 September 2016.

[8](#) – Regulation 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), as amended.

[9](#) – Council Common Position of 29 May 2006 updating Common Position 2001/931 and repealing Common Position 2006/231/CFSP (OJ 2006 L 144, p. 25).

[10](#) – Council Decision of 29 May 2006 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2005/930/EC (OJ 2006 L 144, p. 21). See Article 1 and item 2.17 of the new list introduced by that regulation.

[11](#) – See point 16 below.

[12](#) – That is to say, the action in Case T-208/11.

[13](#) – Implementing Regulation of 31 January 2011 implementing Article 2(3) of Regulation No 2580/2001 repealing Implementing Regulation (EU) No 610/2010 (OJ 2011 L 28, p. 14).

[14](#) – That is to say, the action in Case T-508/11.

[15](#) – Implementing Regulation of 18 July 2011 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulations (EU) No 610/2010 and (EU) No 83/2011 (OJ 2011 L 188, p. 2).

[16](#) – Implementing Regulation of 22 December 2011 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation No 687/2011 (OJ 2011 L 343, p. 10).

[17](#) – Implementing Regulation of 25 June 2012 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation No 1375/2011 (OJ 2012 L 165, p. 12).

[18](#) – Implementing Regulation of 10 December 2012 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation No 542/2012 (OJ 2012 L 337, p. 2).

[19](#) – Implementing Regulation of 25 July 2013 implementing Article 2(3) of Regulation No 2580/2001, and repealing Implementing Regulation No 1169/2012 (OJ 2013 L 201, p. 10).

[20](#) – Implementing Regulation of 10 February 2014 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation No 714/2013 (OJ 2014 L 40, p. 9).

[21](#) – Implementing Regulation of 22 July 2014 implementing Article 2(3) of Regulation No 2580/2001, and repealing Implementing Regulation No 125/2014 (OJ 2014 L 217, p. 1).

[22](#) – Paragraphs 104 and 110 of the judgment under appeal.

[23](#) – At paragraphs 105 and 106 of the judgment under appeal, the General Court referred to the Court's judgment of 15 November 2012, *Al-Aqsa v Council and Netherlands v Al-Aqsa*, C-539/10 P and C-550/10 P, EU:C:2012:711 ('judgment in *Al-Aqsa*'), paragraphs 66 to 77, and to its own judgments of 9 September 2010, *Al-Aqsa v Council*, T-348/07, EU:T:2010:373, paragraph 88, and of 23 October 2008, *People's Mojahedin Organization of Iran v Council*, T-256/07, EU:T:2008:461 ('judgment of the General Court in *PMOI*'), paragraphs 144 and 145.

[24](#) – Paragraph 107 of the judgment under appeal.

[25](#) – Paragraph 113 of the judgment under appeal.

[26](#) – Paragraphs 126 to 136 of the judgment under appeal.

[27](#) – Paragraphs 131 to 140 of the judgment under appeal. The General Court relied on the judgment of 30 September 2009, *Sison v Council*, T-341/07, EU:T:2009:372, paragraphs 93 and 95.

[28](#) – Paragraph 141 of the judgment under appeal.

[29](#) – Paragraph 152 of the judgment under appeal.

[30](#) – Paragraph 155 of the judgment under appeal.

[31](#) – Paragraphs 157 to 165 of the judgment under appeal.

[32](#) – Described at paragraphs 167 to 172 of the judgment under appeal.

[33](#) – Paragraph 186 of the judgment under appeal.

[34](#) – Paragraphs 187 to 195 of the judgment under appeal.

[35](#) – Paragraph 196 of the judgment under appeal.

[36](#) – In particular, paragraphs 199 to 201 of the judgment under appeal.

[37](#) – Paragraphs 197 and 198 of the judgment under appeal.

[38](#) – Paragraphs 203 and 204 of the judgment under appeal.

[39](#) – Paragraphs 204 and 208 of the judgment under appeal.

[40](#) – Paragraphs 209 to 214 of the judgment under appeal.

[41](#) – Paragraphs 215 and 216 of the judgment under appeal.

[42](#) – Paragraphs 217 and 218 of the judgment under appeal.

[43](#) – See point 50 below.

[44](#) – Paragraph 225 of the judgment under appeal.

[45](#) – The Commission’s written observations were limited to the second and third pleas. It stated that it fully agreed with the Council’s submissions regarding the first plea.

[46](#) – Judgment of the General Court in *PMOI*, paragraph 144.

[47](#) – See, for example, judgment of 21 December 2011, *France v People’s Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 72.

[48](#) – Judgment of 1 March 2016, *National Iranian Oil Company v Council*, C-440/14 P, EU:C:2016:128, paragraph 55.

[49](#) – Judgment of 28 November 2013, *Council v Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776 (‘judgment in *Kala Naft*’), paragraph 72 and the case-law cited.

[50](#) – See, for example, judgment of 15 November 2012, *Council v Bamba*, C-417/11 P, EU:C:2012:718 (‘judgment in *Council v Bamba*’), paragraphs 49 and 50 and the case-law cited. On the purpose of the Court’s review, see the judgment of 18 July 2013, *Commission and Others v Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518 (‘judgment in *Kadi II*’), paragraph 119 and the case-law cited.

[51](#) – See, generally, judgment in *Kadi II*, paragraph 100 and the case-law cited. See also judgment in *Council v Bamba*, paragraph 49 and the case-law cited.

[52](#) – See, for example, judgment in *Council v Bamba*, paragraph 60 and the case-law cited.

[53](#) – See, for example, judgment in *Council v Bamba*, paragraph 52.

[54](#) – See the judgment in *Kadi II*, paragraph 116 and the case-law cited.

[55](#) – See, for example, judgment in *Council v Bamba*, paragraph 53 and the case-law cited.

[56](#) – See also my Opinion in *France v People’s Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:482, points 198 to 201 and 207.

[57](#) – See also my Opinion in *France v People’s Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:482, point 136.

[58](#) – See, generally, judgments in *Kadi II*, paragraph 116 and the case-law cited; *Council v Bamba*, paragraph 52; and *Al-Aqsa*, paragraph 142.

[59](#) – See, for example, judgment in *Council v Bamba*, paragraph 60 and the case-law cited.

[60](#) – Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraph 191 and the case-law cited. On what such exceptional circumstances might be, see judgment of 5 April 2016, *Aranyosi*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 88 to 104.

[61](#) – See my Opinion in *France v People’s Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:482, point 202.

[62](#) – According to that provision: ‘The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them.’

[63](#) – See, for example, judgment in *Kadi II*, paragraph 100 and the case-law cited.

[64](#) – See, in particular, points 86 to 96 below.

[65](#) – Judgment in *Al-Aqsa*, paragraph 81. See also paragraph 68.

[66](#) – Judgment in *Al-Aqsa*, paragraph 104.

[67](#) – See also the judgment of the General Court in *PMOI*, paragraph 110.

[68](#) – Judgment of the General Court in *PMOI*, paragraph 112. It also follows that the lack of a decision of a competent authority cannot be justified on the grounds that, because a person or group is (already) included in the Article 2(3) list, it is less likely that that person or group will commit terrorist acts and therefore be subject to decisions of competent authorities.

[69](#) – Judgment in *Al-Aqsa*, paragraph 69.

[70](#) – Judgment in *Al-Aqsa*, paragraph 82.

[71](#) – Judgment in *Al-Aqsa*, paragraph 83.

[72](#) – Judgment in *Al-Aqsa*, paragraph 111; see also paragraph 90.

[73](#) – That was the case in the judgment in *Al-Aqsa*, paragraphs 83 to 90.

[74](#) – As regards a different type of sanction, see, by analogy, the judgment in *Kadi II*, paragraph 156.

[75](#) – See also my Opinion in *France v People’s Mojahedin Organization of Iran*, C-27/09 P,

EU:C:2011:482, point 89.

[76](#) – See points 60 to 73 above.

[77](#) – Judgment in *Al-Aqsa*, paragraph 69.

[78](#) – Judgment in *Al-Aqsa*, paragraph 68.

[79](#) – Article 1(2) of Regulation No 2580/2001.

[80](#) – Judgment in *Kadi II*, paragraph 113 and the case-law cited.

[81](#) – In particular, judgment of the General Court in *PMOI*, paragraph 144.

[82](#) – Paragraph 206 of the judgment under appeal.

[83](#) – Paragraph 207 of the judgment under appeal.

[84](#) – Paragraph 208 of the judgment under appeal.

[85](#) – Paragraph 202 of the judgment under appeal.

[86](#) – Paragraph 195 of the judgment under appeal.

[87](#) – Paragraph 196 of the judgment under appeal.

[88](#) – See paragraph 155 of the judgment under appeal.

[89](#) – Judgment in *Kala Naft*, paragraph 72 and the case-law cited.

[90](#) – See points 77 to 91 above.