JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

9 July 2009 *

In Joined Cases T-246/08 and T-332/08,

Melli Bank plc, established in London (United Kingdom), represented initially by R. Gordon QC, J. Stratford and M. Hoskins, Barristers, and R. Gwynne and T. Din, Solicitors, and subsequently by D. Anderson QC, M. Hoskins and S. Gadhia, Barristers, and D. Murray and M. Din, Solicitors,

applicant,

v

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

defendant,

* Language of the case: English.

supported by

French Republic, represented by G. de Bergues, E. Belliard and L. Butel, acting as Agents,

by

United Kingdom of Great Britain and Northern Ireland, represented by V. Jackson, acting as Agent, assisted by S. Lee, Barrister,

and by

Commission of the European Communities, represented by S. Boelaert and P. Aalto, acting as Agents,

interveners,

APPLICATION, in Joined Cases T-246/08 and T-332/08, for annulment of paragraph 4 of Table B of the Annex to Council Decision 2008/475/EC of 23 June 2008 implementing Article 7(2) of Regulation (EC) No 423/2007 concerning restrictive measures against Iran (OJ 2008 L 163, p. 29) in so far as it relates to Melli Bank plc, and, in Case T-332/08, if necessary, a declaration that Article 7(2)(d) of Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103, p. 1) is inapplicable,

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

composed of I. Pelikánová, President (Rapporteur), K. Jürimäe and S. Soldevila Fragoso, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 20 January 2009,

gives the following

Judgment

Background to the case

1 The applicant, Melli Bank plc, is a public limited company registered and having its registered office in the United Kingdom, authorised and regulated by the Financial Services Authority ('the FSA'). It began to carry on its banking activities in the United Kingdom on 1 January 2002, following the transformation of the branch of Bank Melli Iran ('BMI') in that country. BMI, the parent company wholly owning the applicant, is an Iranian bank controlled by the Iranian State.

The restrictive measures adopted against the Islamic Republic of Iran

2 These cases have been brought in connection with the restrictive measures introduced in order to apply pressure on the Islamic Republic of Iran to end proliferation-sensitive nuclear activities and the development of nuclear weapon delivery systems ('nuclear proliferation').

3 The origin of the regime at issue is to be found in the United Nations. On 23 December 2006 the United Nations Security Council ('the Security Council') adopted Resolution 1737 (2006), the annex to which lists a series of persons and entities involved in nuclear proliferation whose funds and economic resources ('funds') were to be frozen. The list contained in the annex to Resolution 1737 (2006) has subsequently been updated by several resolutions, in particular by Security Council Resolution 1747 (2007) by which the funds of the Iranian Bank Sepah and its subsidiary in the United Kingdom, Bank Sepah International plc, were frozen. Neither BMI nor the applicant has been subject to fund-freezing measures adopted by the Security Council.

4 Furthermore, under paragraph 10 of Security Council Resolution 1803 (2008) of 3 March 2008, the Security Council called upon 'all States to exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad, in order to avoid such activities contributing to [nuclear proliferation]'.

5 So far as the European Union is concerned, Resolution 1737 (2006) was given effect by Council Common Position 2007/140/CFSP of 27 February 2007 concerning restrictive measures against Iran (OJ 2007 L 61, p. 49). Article 5(1) thereof provides for the freezing of all funds belonging to the persons or entities designated in Security Council Resolution 1737 (2006), in subsequent resolutions or pursuant to them, and also all funds owned, held or controlled, directly or indirectly, by those persons or entities. Article 5(1)(b) of Common Position 2007/140 provides, moreover, that those measures are to apply to persons or entities owned or controlled by persons or entities engaged in, directly associated with, or providing support for nuclear proliferation. According to

Article 7(2) of Common Position 2007/140, the list of persons or entities to whom and to which the fund-freezing measures apply, by virtue of Article 5(1)(b) of that Common Position, is to be established and amended by the Council, acting by unanimity.

6 In so far as the powers of the European Community are concerned, Resolution 1737 (2006) was given effect by Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ 2007 L 103, p. 1), the content of which is substantially the same as that of Common Position 2007/140. Thus, Article 7(1) of Regulation No 423/2007 provides for the freezing of the funds of the persons, entities and bodies ('entities') designated by the Security Council. Article 7(2) of that regulation lays down the same provisions with regard to the entities identified as being engaged in nuclear proliferation as provided in Article 5(1)(b) of Common Position 2007/140. In particular, Article 7(2)(d) of the regulation provides for the freezing of the funds of entities owned or controlled by entities identified as engaged in, directly associated with or providing support for nuclear proliferation as referred to in Article 7(2)(a) or (b) of Regulation No 423/2007. The entities to which a measure freezing funds pursuant to Article 7(2) of Regulation No 423/2007 applies are listed in Annex V to that document.

7 By way of derogation from Article 7 of Regulation No 423/2007, Articles 9 and 10 thereof authorise the competent authorities of the Member States, in essence, to release frozen funds in order to enable entities listed in Annex V to honour obligations arising from contracts concluded before the fund-freezing measure was adopted and to cover essential expenses.

8 Article 15(2) of Regulation No 423/2007 provides, first, that the Council, acting by qualified majority, is to establish, review and amend the list in Annex V in full accordance with the determinations made by the Council pursuant to Article 5(1)(b) of Common Position 2007/140 and, second, that the list in Annex V is to be reviewed at regular intervals and at least every 12 months.

9 Article 15(3) of Regulation No 423/2007 requires the Council to state individual and specific reasons for decisions taken pursuant to Article 15(2) of that regulation, and to make them known to the entities concerned.

The contested decision

10 On 23 June 2008 the Council adopted Decision 2008/475/EC implementing Article 7(2) of Regulation No 423/2007 (OJ 2008 L 163, p. 29, 'the contested decision'). As set out in paragraph 4 of Table B in the annex to the contested decision, both BMI and its subsidiaries, including the applicant, were entered in the list in Annex V to the regulation, with the consequence that their funds were frozen.

11 The Council gave the following reasons:

'Providing or attempting to provide financial support for companies which are involved in or procure goods for Iran's nuclear and missile programmes (AIO, SHIG, SBIG, AEOI, Novin Energy Company, Mesbah Energy Company, Kalaye Electric Company and DIO). Bank Melli serves as a facilitator for Iran's sensitive activities. It has facilitated numerous purchases of sensitive materials for Iran's nuclear and missile programmes. It has provided a range of financial services on behalf of entities linked to Iran's nuclear and missile industries, including opening letters of credit and maintaining accounts. Many of the above companies have been designated by [Security Council] Resolutions 1737 and 1747.'

Procedure and forms of order sought

12 By application lodged at the Registry of the Court of First Instance on 25 June 2008, the applicant brought the action in Case T-246/08. By separate documents lodged at the Registry on the same day, the applicant applied, under Article 76a of the Rules of Procedure of the Court of First Instance, for the case to be decided under an expedited procedure and also applied for interim measures, seeking suspension of the operation of paragraph 4 of Table B in the annex to the contested decision.

13 By a new application lodged at the Registry of the Court of First Instance on 15 August 2008, the applicant brought the action in Case T-332/08. By separate documents lodged at the Registry on the same day, the applicant applied, under Article 76a of the Rules of Procedure of the Court of First Instance, for the case to be decided under an expedited procedure, made a fresh application for interim measures, seeking suspension of the operation of paragraph 4 of Table B in the annex to the contested decision, and also applied for Cases T-246/08 and T-332/08 to be joined.

14 By documents lodged at the Registry on 10 July and 6 and 8 August 2008, respectively, the French Republic, the United Kingdom of Great Britain and Northern Ireland ('the United Kingdom') and the Commission of the European Communities applied to intervene in Case T-246/08 in support of the Council. By orders of 5 and 17 September 2008, the President of the Second Chamber of the Court of First Instance granted them leave to intervene.

15 By decisions of 18 July and 16 September 2008, the Court of First Instance (Second Chamber) granted the applications for the cases to be resolved under an expedited procedure, pursuant to Article 76a of the Rules of Procedure, authorising the Member States intervening in the proceedings to submit their statements in intervention.

16 By documents lodged at the Registry on 15 September, 21 October and 7 November 2008, respectively, the United Kingdom, the French Republic and the European

Commission applied to intervene in Case T-332/08 in support of the Council. By orders of 10 October, 17 November and 1 December 2008, the President of the Second Chamber of the Court of First Instance granted them leave to intervene.

17 By orders of the President of the Court of First Instance of 27 August and 17 September 2008, the applications for interim measures submitted by the applicant were dismissed and the costs reserved.

18 In Case T-246/08 the defence was lodged on 30 July 2008, and statements in intervention were lodged by the French Republic and the United Kingdom on 2 October 2008.

19 In Case T-332/08 the defence was lodged on 6 October 2008. The United Kingdom and the French Republic lodged their statements in intervention on 28 October and 8 December 2008, respectively.

20 By order of the President of the Second Chamber of the Court of First Instance of 15 December 2008, Cases T-246/08 and T-332/08 were joined for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

21 On 12 January 2009 the applicant forwarded to the Court a letter from BMI concerning the latter's relations with the entities designated in the contested decision. By decision of 14 January 2009 the Court refused to allow the letter in question to be added to the documents before the Court.

22 At the hearing held on 20 January 2009 the parties presented their oral arguments and answered the questions asked by the Court.

23 The applicant claims that the Court should:

— in Case T-246/08:

— annul paragraph 4, Table B, in the annex to the contested decision in so far as it relates to the applicant;

— order the Council to pay the costs;

— in Case T-332/08:

— annul paragraph 4, Table B, in the annex to the contested decision in so far as it relates to the applicant;

— if the Court should find that Article 7(2)(d) of Regulation No 423/2007 is mandatory in effect, declare that provision inapplicable under Article 241 EC;

— order the Council to pay the costs.

24 The Council contends that the Court should:

— dismiss the applications;

— order the applicant to pay the costs.

25 The United Kingdom and the Commission contend that the Court should dismiss the applications.

26 The French Republic contends that the Court should dismiss the applications and order the applicant to pay the costs.

Law

Admissibility

Admissibility of the applicant's claim that BMI is not engaged in the funding of nuclear proliferation

27 First, it is to be observed that in its applications Melli Bank confines itself to asserting that BMI was not engaged in the funding of nuclear proliferation. Such an assertion cannot satisfy the requirements of Article 44(1)(c) of the Rules of Procedure, which provides that an application must contain a summary of the pleas in law relied upon. It cannot, therefore, be regarded as an admissible plea.

28 Secondly, in reply to a question asked by the Court at the hearing, the applicant argued that if the document it had forwarded to the Court on 12 January 2009 had been admitted to the file, the applicant would have raised the plea that BMI was not engaged in the funding of nuclear proliferation. However, even if such a plea had been put forward, it would in any case be inadmissible.

29 As a matter of fact, neither in the letter accompanying the document sent to the Court on 12 January 2009 nor at the hearing did the applicant put forward any reason why it had been unable to raise the plea in question during the written procedure, when it is quite clear from the grounds reproduced in paragraph 11 above that the Council had relied on BMI's alleged involvement in funding nuclear proliferation in order to adopt the contested decision. That being so, even if the plea in question had been raised in the applicant's letter of 12 January 2009 or yet at the hearing, it would in any case be inadmissible by virtue of Article 48(2) of the Rules of Procedure which states that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact coming to light for the first time in the course of the procedure.

30 Having regard to the foregoing, it must be considered that, inasmuch as the applicant has raised no admissible plea in law challenging the Council's finding that BMI was engaged in the funding of nuclear proliferation, that matter does not fall within the subject-matter of the present disputes.

Admissibility of the plea of illegality raised by the applicant

31 At the hearing the Commission challenged the admissibility of the plea of illegality advanced by the applicant in Case T-332/08, emphasising that that plea had been raised in response to the arguments put forward by the United Kingdom in Case T-246/08. The Commission takes the view that such a procedural technique may have adverse consequences for the sound administration of justice, especially in the context of expedited procedures.

32 It is to be noted, however, that neither the Rules of Procedure nor the case-law exclude the admissibility of a second action for annulment of a measure brought by the same applicant. Its admissibility is, however, made subject to two conditions, that the time-limit should be complied with and that the matter should not be lis pendens, that is to say, pending before another competent court.

33 In this regard, first, it is not disputed that the action in Case T-332/08 was brought within the period prescribed.

34 Secondly, it is clear from the case-law that if an action is to be declared inadmissible on grounds of lis pendens three conditions must be met: the action must be between the same parties, seek the same object and do so on the basis of the same submissions (see,

to this effect, Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 9; the order in Joined Cases 159/84, 267/84, 12/85 and 264/85 *Ainsworth and Others* v *Commission* [1987] ECR 1579, paragraphs 3 and 4; and Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12).

35 In this instance, although the parties to the disputes giving rise to the actions in Case T-246/08 and Case T-332/08 are the same, the first action seeks only annulment of the contested decision, whereas the second seeks also a declaration that Article 7(2) of Regulation No 423/2007 is inapplicable. Likewise, although the first plea in law advanced in Case T-332/08 resembles the first plea in law advanced in Case T-246/08, in that it concerns the alleged breach of the principle of proportionality, it is not however the same, given, in particular, the new question relating to the interpretation of Article 7(2) of Regulation No 423/2007. Furthermore, the second plea raised in Case T-332/08, alleging breach of the obligation to state reasons, differs from the submissions in the application in Case T-246/08. In those circumstances, it cannot be considered that the conditions, laid down in the case-law, for a declaration that the action in Case T-332/08 is inadmissible by reason of lis pendens have been satisfied.

36 Lastly, it is to be noted that, in connection with an expedited procedure, any adverse consequences for the sound administration of justice will affect, in essence, the interests of the party that sought the application of that type of procedure, having regard to the longer periods of time involved when two actions must be brought in succession. In the instant case, it was the applicant that both brought the actions and also requested the expedited procedure, and the applicant was, moreover, aware of those possible adverse consequences, as is apparent from its written pleadings.

37 In light of all the foregoing, the plea of illegality raised by the applicant must be considered to be admissible.

Substance

38 In Case T-246/08, the applicant presents preliminary observations on the rigour of the judicial review to be carried out in the circumstances of the case by the Court and raises two pleas in law, the first alleging breach of the principle of proportionality and the second breach of the principle of non-discrimination.

39 In Case T-332/08 the applicant raises two pleas in law. By the first, it maintains that application of Article 7(2)(d) of Regulation No 423/2007 is not mandatory, the Council enjoying some latitude in giving effect to it. If the Court should, however, consider that that provision must mandatorily be applied, the applicant argues that it offends against the principle of proportionality, and is, therefore, inapplicable by virtue of Article 241 EC. By its second plea, the applicant alleges breach of the duty to state reasons.

40 The Council and the interveners dispute the merits of the pleas in law raised by the applicant.

41 The Court considers that it must examine the preliminary question raised by the applicant before dealing with the question of the interpretation of Article 7(2)(d) of Regulation No 423/2007, which is decisive with regard to the manner in which the claims alleging breach of the principle of proportionality are to be examined.

The rigour of the judicial review

— Arguments of the parties

42 The applicant maintains that the Court ought to undertake a thorough examination of the lawfulness of the contested decision, particularly given the serious consequences stemming therefrom for the applicant.

43 The Council, supported by the United Kingdom, observes that it enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting restrictive economic or financial measures.

— Findings of the Court

44 With regard to the rigour of the judicial review, matters of two kinds must be distinguished within Regulation No 423/2007. On the one hand, the articles of the regulation lay down the general rules defining the methods of implementing the restrictive measures which it introduces. On the other, Annex V, which lists the entities to which the fund-freezing measures adopted under Article 7(2) of that regulation apply, represents a body of measures applying those general rules to specific entities.

45 With regard to the first kind of matter, it is to be borne in mind that the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC and 301 EC, consistent with a common position adopted on the basis of the common

foreign and security policy ('the CFSP'). Because the Community judicature may not, in particular, substitute its assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court must, therefore, be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the assessment of the considerations of appropriateness on which such measures are based (see, by analogy, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council* [2006] ECR II–4665, paragraph 159).

46 With regard to the review of the lawfulness of the decision by which an entity is included in the list in Annex V to Regulation No 423/2007 pursuant to Article 7(2) thereof, it is for the Court to determine, having regard to the pleas for annulment raised by the entity concerned or raised of the Court's own motion, inter alia, that the instant case corresponds to one of the four hypotheses referred to in Article 7(2)(a) to (d) of Regulation No 423/2007. That implies that the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based. The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded (see, by analogy, *Organisation des Modjahedines du peuple d'Iran* v *Council*, paragraph 154).

Interpretation of Article 7(2)(d) of Regulation No 423/2007

— Arguments of the parties

47 The applicant argues that Article 7(2)(d) of Regulation No 423/2007 does not mandatorily apply, that is to say, that it is not to be applied automatically, to all legal persons owned or controlled by entities whose funds have been frozen by virtue of Article 7(2)(a) or (b) of that regulation, the Council enjoying, in its view, discretion on

that head and being bound, therefore, to take into consideration the particular situation of each of the entities in question.

48 In this respect, the applicant argues first that the contrary interpretation is incompatible with the decisions of the Court of First Instance holding that, with regard to the freezing of funds, the competent institution is required to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision (Case T-256/07 *People's Mojahedin Organization of Iran* v *Council* [2008] ECR II-3019, paragraph 139).

49 In the applicant's view, the automatic freezing of funds fails to take account of the particular features of the entity owned or controlled, such as the degree to which it is operationally independent, the supervision exercised over it or the lack of any connection between its activities and nuclear proliferation. It is likewise incompatible with the case-law of the Court of Justice, according to which restrictive measures adopted pursuant to Articles 60 EC and 301 EC may apply only to third countries, that latter concept covering the rulers of such a country and also individuals and entities associated with or controlled, directly or indirectly, by them (Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 166).

50 That a case-by-case examination is required is also borne out, on the one hand, by the Opinion of Advocate General Poiares Maduro in *Kadi and Al Barakaat International Foundation*, and on the other by Article 15(3) of Regulation No 423/2007, in accordance with which specific reasons must be stated in respect of every entity and, consequently, in respect of every entity owned or controlled.

51 Secondly, in the light of the content of Regulation No 423/2007, the automatic freezing of the funds of all subsidiaries owned or controlled is not essential in order to ensure that measures adopted against the parent company are effective. In point of fact, the effect of the provisions of Article 5(1), Article 7(3) and (4), Article 13(1) and Article 16

of Regulation No 423/2007 is that a subsidiary established in the European Union is prevented from acting, directly or indirectly, on instructions from its parent entity.

52 Thirdly, the applicant refers to its own position. Here, it claims, on the one hand, to comply with all the sanctions regimes, restrictive measures and legislation in force. On the other, given that it is both legally and operationally distinct from its parent company and that it is supervised by the FSA, it is not possible for BMI to control it improperly.

53 Fourth and lastly, the applicant maintains that it is not the Council's practice automatically to freeze the funds of all subsidiaries identified as being engaged in nuclear proliferation as provided for in Article 7(2)(a) or (b) of Regulation No 423/2007. BMI is thus the only entity mentioned in the contested decision whose subsidiaries have had their funds frozen, unlike, for example, Iran Electronic Industries, when the latter has six subsidiaries. In the same way, while BMI has about 20 subsidiaries in various sectors of industry, only two of them, including the applicant, have been the subject of a measure to freeze their funds.

54 The applicant argues, in conclusion, that if the application of Article 7(2)(d) of Regulation No 423/2007 were mandatory, it would infringe the principle of proportionality. When the wording of secondary legislation is open to more than one interpretation, preference is to be given to that which is in keeping with the general principles of Community law. That provision must, therefore, according to the applicant, be interpreted as giving the Council discretion as regards freezing the funds of a subsidiary of an entity engaged in nuclear proliferation.

55 The Council, supported by the interveners, submits that Article 7(2)(d) of Regulation 423/2007 provides 'unambiguously' that the freezing of an entity's funds 'uncondi-

tionally' involves freezing the funds of all the entities that are owned or controlled by it, and no discretion whatsoever may be exercised in the matter.

56 On this head, the Council adds that, if the argument that freezing the funds of BMI sufficed to stop the applicant from transferring funds to BMI was correct, freezing of funds could never be justified inasmuch as prohibiting engagement in nuclear proliferation would be enough, without any need to impose measures on entities likely to attempt to circumvent such a prohibition.

57 The Council further observes that BMI and its subsidiaries, including the applicant, form an economic unit, which means that imposing a freeze on the subsidiaries' funds is necessary in order to ensure the effectiveness and coercive effect of the measures adopted in respect of BMI and, ultimately, of the Islamic Republic of Iran. The Council maintains in this connection that because the Community has no extra-territorial jurisdiction the effects of the contested decision will depend mainly on its application to BMI's subsidiaries and branches established in the European Union.

58 To answer the applicant's argument that it did not automatically freeze the funds of all subsidiaries of entities affected by freezing measures, the Council notes further that such subsidiaries can be established at any time, which means that it is not always possible to identify them.

59 The United Kingdom takes the same view as the Council. In addition to the arguments raised by the latter, it relies, firstly, on the wording of Article 7(2)(d) of Regulation No 423/2007, which states that the funds of certain entities 'shall be frozen'. Secondly, it maintains that it would be illogical for Regulation No 423/2007 to provide for different treatment, depending on whether the funds belong to the parent entity or to an entity owned or controlled by it, despite the exercise of actual control by the former over the latter. Thirdly, the argument drawn from Article 15(3) of Regulation No 423/2007 does no more than raise the question whether the Council may simply give specific

individual reasons for the freezing of the parent entity's funds and later on identify the entity owned or controlled as such in Annex V to that regulation, without further reasons.

60 The French Republic, while agreeing with the Council's views, maintains, with regard to the argument drawn from Article 15(3) of Regulation No 423/2007, that the Council is not bound to supply specific individual reasons concerning the subsidiaries of an entity affected by a freezing measure.

— Findings of the Court

61 The first point to be borne in mind is that, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (Case 292/82 *Merck* [1983] ECR 3781, paragraph 12).

62 With regard to the wording of Article 7(2)(d) of Regulation No 423/2007, that provision states that '[a]ll funds … belonging to entities … identified, in accordance with Article 5(1)(b) of Common Position 2007/140 … as being [an entity] owned or controlled by [an entity identified as engaged in nuclear proliferation] shall be frozen'. This wording calls for two comments.

63 First, by reason of the use of the words 'shall be frozen', extension of the fund- freezing measure to entities owned or controlled is obligatory, the Council enjoying no leeway in this respect. Indeed, if the legislature had intended to give the Council such leeway, it would have given expression to its intention by the use of explicit words such as 'may be frozen'.

64 Secondly, when adopting a decision pursuant to Article 7(2)(d) of Regulation No 423/2007, the Council must undertake an evaluation of the facts of the case in order to ascertain which entities are entities owned or controlled.

65 The context of which Article 7(2)(d) of Regulation No 423/2007 forms part, and in particular the broad logic of Article 7(2), bears out the textual analysis of that provision. Inasmuch as the expression 'have been identified' appears in the introductory part of that provision, it must be considered that, like each of the four hypotheses set out in (a) to (d), classification as an entity 'owned or controlled' is the subject of a case-by-case evaluation by the Council.

66 Finally, the interpretation suggested by the textual and contextual analyses is in line with the objective sought by Regulation No 423/2007, namely, the intention of preventing nuclear proliferation and, more generally, to maintain international peace and security, given the seriousness of the risk posed by nuclear proliferation.

67 Having regard to all the foregoing, it must be concluded that Article 7(2)(d) of Regulation No 423/2007 requires the Council to freeze the funds of an entity 'owned or controlled' by an entity identified as engaged in nuclear proliferation as provided for in Article 7(1)(a) or (b) of that regulation, the Council assessing case by case whether the entities concerned are entities 'owned or controlled'.

68 The arguments put forward by the applicant cannot shake that conclusion.

69 First, inasmuch as the Council is called upon to evaluate the classification of an entity 'owned or controlled', it is led to take into account all the relevant aspects of the specific case, such as the degree of operational independence of the entity in question or the possible effect of the supervision to which it is subjected by public authorities. In contrast, the nature of that entity's activities and the possible lack of any link between those activities and nuclear proliferation are not, in this context, a relevant criterion, for the reason for the adoption of a measure freezing funds applying to the entity owned or controlled is not, as paragraph 103 below makes clear, that the latter itself is engaged in nuclear proliferation. Likewise, the fact that the purpose of the restrictive measures adopted by virtue of Regulation No 423/2007 is to stop all financial and technical assistance for the nuclear and missile-development activities of the Islamic Republic of Iran, which pose the risk of nuclear proliferation, necessarily means that those measures were adopted vis-à-vis a third State, with the result that they must be regarded as being compatible with the interpretation of Articles 60 EC and 301 EC given in *Kadi and Al Barakaat International Foundation* v *Council and Commission.*

70 So far as concerns the obligation to state reasons imposed on the Council by Article 15(3) of Regulation No 423/2007, it is apparent from paragraphs 143 to 146 below that the Council is required to indicate the reasons that prompted it to consider that an entity is 'owned or controlled' by an entity identified as engaged in nuclear proliferation and that its funds must, in consequence, be frozen pursuant to Article 7(2)(d) of Regulation No 423/2007. That obligation is, however, without prejudice to the fact that, once it considers that the conditions laid down in that provision have been satisfied, the Council is bound to adopt a measure freezing the funds of the entity concerned.

71 Secondly, the provisions of Regulation No 423/2007 cited by the applicant first prohibit carrying out transactions with entities identified as engaged in nuclear proliferation or engaging in such transactions, next impose a duty of transparency and cooperation with the competent authorities and, lastly, oblige the Member States to provide for sanctions applicable in the case of infringement of that regulation. Those provisions were, it is true, adopted so that the objectives sought by the Council might be attained. None the less, the mere existence of rules prohibiting the carrying-out of transactions with

entities identified as engaged in nuclear proliferation and providing for obligations entailing sanctions does not guarantee that such transactions will not be performed, should the occasion arise, by an entity owned or controlled by an entity identified as engaged in nuclear proliferation. Consequently, that fact does not permit the inference that any additional measure, such as the freezing of the funds of entities owned or controlled by entities identified as engaged in nuclear proliferation, is redundant.

72 Thirdly, the argument drawn from the applicant's particular situation does not concern the interpretation to be made of Article 7(2)(d) of Regulation No 423/2007 but rather an error supposedly made by the Council in applying that provision to the applicant. Those arguments are not, therefore, relevant at this stage of the analysis. They will be examined, as a separate plea in law, later on in this judgment (paragraphs 119 to 129 below).

73 Fourthly, as regards the argument that it is not the Council's practice automatically to freeze the funds of all subsidiaries of entities identified as being engaged in nuclear proliferation as provided for Article 7(2)(a) or (b) of Regulation No 423/2007, it is to be observed, first, that the Council may legitimately, as paragraph 123 below makes clear, not apply Article 7(2)(d) of the regulation to entities which, in its opinion, do not fulfil the conditions for the application of that provision, despite the fact that they are subsidiaries of entities identified as engaged in nuclear proliferation.

74 Next, as the Council and the French Republic observe, it is impossible to identify, in every case, all the entities owned or controlled by an entity identified as engaged in nuclear proliferation.

75 Lastly, even on the assumption that the Council had omitted to adopt measures to freeze the funds of certain entities owned or controlled by entities identified as engaged in nuclear proliferation as provided for in Article 7(2)(a) or (b) of Regulation

No 423/2007, it must be stated, on the one hand, that because the Council is bound to comply with the regulation, any divergent practice of that institution's cannot properly derogate from that act and cannot, with all the more reason, give rise to any legitimate expectations on the part of the entities concerned. On the other hand, while the argument at issue alleges breach of the principle of equal treatment, it is to be borne in mind that the latter must be reconciled with the principle of legality, according to which no one may rely, to his own benefit, on an unlawful act committed in favour of another (Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 160; Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 334; and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 367). Any unlawful conduct by the Council in other cases, supposing it to have been established, cannot, therefore, be relied on to advantage in support of the applicant's position.

76 In those circumstances, the case-law holding that, when the wording of secondary legislation is open to more than one interpretation, preference is to be given to that which renders the provision consistent with the Treaty rather than that which leads to its being incompatible with the Treaty (Case 218/82 *Commission* v *Council* [1983] ECR 4063, paragraph 15) is not relevant. In fact, in the circumstances of this case there is no doubt as to the interpretation of Article 7(2)(d) of Regulation No 423/2007.

77 The applicant's arguments relating to the supposed incompatibility of the interpretation set out in paragraph 67 above with the principle of proportionality will, however, be evaluated later in this judgment, in connection with the examination of the plea of illegality raised against Article 7(2)(d) of Regulation No 423/2007 by the applicant in Case T-332/08.

The plea of illegality raised against Article 7(2)(d) of Regulation No 423/2007

— Arguments of the parties

78 The applicant maintains that Article 7(2)(d) of Regulation No 423/2007 is contrary to the principle of proportionality and must, therefore, be declared inapplicable to the instant case by virtue of Article 241 EC. In consequence, it argues, the contested decision must be annulled for want of a legal basis.

79 In support of its position, the applicant maintains, first, that the arguments set out in paragraphs 48 to 54 above demonstrate that Article 7(2)(d) of Regulation No 423/2007 is incompatible with the principle of proportionality.

80 Secondly, the freezing of the funds of all entities owned or controlled by an entity identified as being engaged in nuclear proliferation as provided for in Article 7(2)(a) or (b) of Regulation No 423/2007 is not logically related to the object of preventing nuclear proliferation and its funding.

81 Here, the applicant begins by noting that it is a United Kingdom bank distinct from its parent company and that it abides by all the applicable rules. It states that it was subject to the same obligations as all other Community banks with regard to the sanctions against the Islamic Republic of Iran and that it complied with them. Inasmuch as it has not been established or claimed that the applicant engaged in the funding of nuclear proliferation, as the grounds relied on in the contested decision do not refer to it expressly and as neither it nor BMI was designated as an entity supporting nuclear proliferation by Security Council Resolution 1803 (2008), automatic application of the fund-freezing measure provided for by Article 7(2)(d) of Regulation No 423/2007 forms no part of the object of preventing nuclear proliferation.

82 Next, freezing the applicant's funds does not impinge on nuclear proliferation, for the applicant is not engaged in its funding and the measures taken are unlikely to alter the Iranian authorities' approach. In this regard, the applicant further claims that it would, in any case, comply with the contested decision in that it concerns BMI and the other entities to which the restrictive measures apply, which means that the only effect of freezing its funds is to prevent it from trading with entities not engaging in nuclear proliferation. Likewise, prohibiting the applicant from trading exerts no economic pressure on the funding of nuclear proliferation, for its chief activity consists of investing capital from Iran in assets abroad.

83 Finally, the applicant considers that the United Kingdom's argument that freezing the funds of entities owned or controlled pursues the objective also of exerting economic pressure on BMI and the Islamic Republic of Iran is incorrect, such an interpretation not being justified in the light of the wording and ambit of Regulation No 423/2007.

84 Third, the freezing of the funds of all the entities owned or controlled by an entity identified as being engaged in nuclear proliferation as provided for in Article 7(2)(a) or (b) of Regulation No 423/2007 is not the least restrictive measure that would make it possible to attain the object of stopping nuclear proliferation or its funding or of exercising vigilance in respect of the applicant.

85 In this context, the applicant claims that the freezing of its funds deprives it of the opportunity to trade, so causing severe damage to its finances and reputation. The application of Article 7(2)(d) of Regulation No 423/2007 represents a disproportionate infringement of the applicant's right to peaceful enjoyment of its property, of its freedom to provide financial services throughout the European Union and of the free movement of capital and payments.

86 Next, Article 7(2)(d) of Regulation No 423/2007 is out of proportion to Resolution 1803 (2008) to which it is intended to give effect. The effects of the contested decision go beyond the requirement laid down in paragraph 10 of that resolution, which merely calls on States to exercise vigilance over the activities of BMI and its subsidiaries.

87 Lastly, while emphasising that current supervisory and control measures are adequate, the applicant maintains that other measures, less restrictive than the freezing of funds, could be applied either individually or cumulatively in order to attain the objective pursued. In its written pleadings the applicant mentioned reinforcing the supervision of its compliance with the restrictive measures, the requiring of increased transparency in respect of its activities, especially as regards the relevant accounts and transactions, the adoption of measures to ensure that its situation is kept under regular review and increasing cooperation with the FSA and the UK financial action task force. At the hearing, it again referred to the prior approval of transactions and to their supervision by an independent agent, and to the total prohibition of all trade with Iran.

88 The Council, supported by the interveners, argues that the freezing of the applicant's funds is linked to the aim of stopping nuclear proliferation, for it is necessary in order to ensure that the measures taken in this regard against the parent company, BMI, are effective and are not circumvented. Here the Council stresses that the applicant is actually controlled by BMI. According to the Council, the applicant's funds could thus be used, directly or indirectly, to provide support for nuclear proliferation, and freezing them is therefore necessary in order, in particular, to prevent the circumventing of the measures affecting BMI by means of transfers made by the applicant to BMI or to other subsidiaries or branches of BMI, if necessary through third parties not known to be connected to BMI.

89 In this regard, the Council notes also that, because the Community has no extraterritorial powers, the effect of the contested decision will depend mainly on its application to BMI's branches and subsidiaries established in the European Union, including the applicant.

90 The Council adds that the alternative measures suggested by the applicant would not ensure that the objective was attained. Thus, obligatory disclosure of relevant account and transaction details would not have any effect with regard to transactions that had already taken place. Likewise, increased cooperation with national authorities would not prevent the carrying-out of transactions through third parties not known to be engaging in nuclear proliferation

91 The Council maintains also that although the applicant suffers some harm as a consequence of the adoption of the contested decision, its existence will not be placed in doubt during the time its funds remain frozen. It points out in that regard the exceptions provided for in Articles 9 and 10 of Regulation No 423/2007, BMI's significant financial reserves and the fact that many commercial banks have gone through periods in which they failed to make profits. As regards the damage to the applicant's reputation, the Council points out that that has already been caused by Resolution 1803 (2008), in which both BMI and its branches and subsidiaries were specifically mentioned.

92 The Council concludes that, having regard to the importance of the preservation of international peace and security, to the Islamic Republic of Iran's refusal to suspend nuclear proliferation, and to the control of the applicant by an entity engaging in the latter, the freezing of the applicant's funds is not disproportionate.

93 In addition to the arguments advanced by the Council, the United Kingdom submits that the purpose of freezing the funds of entities owned or controlled by an entity identified as being engaged in nuclear proliferation as provided for in Article 7(2)(a) or (b) of Regulation No 423/2007 is also to bring economic pressure to bear on BMI and, ultimately, the Islamic Republic of Iran. Continued trading by the applicant would still benefit BMI, both financially and through its reputation and its presence on the market.

94 Similarly, according to the United Kingdom, the contested decision was not adopted to give effect to Resolution 1803 (2008) but to Article 7(2) of Regulation No 423/2007, itself intended to attain the objectives of Resolution 1737 (2006). Furthermore, the fact that the freezing of the applicant's or BMI's funds was not called for in Resolution 1803 (2008) does not mean that the Council could not decide on such a measure.

95 As regards the effects of the contested decision on the applicant, the United Kingdom states that the applicant has already been granted more than a hundred licences under Articles 9 and 10 of Regulation No 423/2007. It follows that the applicant's existence is not in doubt.

96 The French Republic adds that the effectiveness of the less restrictive measures proposed by the applicant requires a relationship of trust with the latter. Such a relationship would be impossible with a company controlled by BMI.

97 Furthermore, according to the French Republic, the fact that the applicant must observe the restrictive measures and that infringement of the rules in force is punishable by criminal penalties is irrelevant. The restrictive measures have in fact a preventive purpose, whereas criminal penalties take effect only after the event. Moreover, although the restrictive measures apply to the applicant, the latter would not itself be implicated if criminal proceedings were to be brought against one of its employees.

— Findings of the Court

98 A preliminary point to be noted here is that this plea of illegality consists of denying the compatibility with the principle of proportionality of one of the general rules determining the procedure for implementing the restrictive measures laid down by Regulation No 423/2007, namely, Article 7(2)(d) of the regulation, which requires the Council, as shown in paragraphs 61 to 67 above, to freeze the funds of entities owned or

controlled by an entity identified as being engaged in nuclear proliferation, as provided for by Article 7(2)(a) or (b) of the regulation. It follows, first, that the considerations set out in paragraph 45 above are applicable so far as concerns the rigour of the review carried out by the Court and, second, that, by analogy with what has been held in paragraph 72 above, the arguments in respect of the relationship between the applicant and BMI, and of the applicant's particular position as a United Kingdom bank, are not relevant to the examination of this plea of illegality. They must, however, be taken into account in the examination of the claim that there was no justification for applying Article 7(2)(d) of Regulation No 423/2007 to the applicant. Those arguments will therefore be considered in paragraphs 119 to 129 below.

99 It must also be found that the reference to Security Council Resolution 1803 (2008) has no bearing on the issue. Application of Article 7(2) of Regulation No 423/2007, unlike Article 7(1), is independent of the adoption of fund-freezing measures by the Security Council. The actual aim of Article 7(2) is to enable the Council to adopt, if it considers it warranted, under its powers conferred by Articles 60 EC and 301 EC, fund-freezing measures directed against entities that are not the subject of similar measures decided on by the Security Council. In consequence, contrary to what the applicant argues, Article 7(2) does not give effect to Resolution 1803 (2008), which means that the content of that resolution does not constitute a criterion having regard to which the compatibility of Article 7(2)(d) of Regulation No 423/2007 with the principle of proportionality must be assessed.

100 According to the case-law, by virtue of the principle of proportionality, which is one of the general principles of Community law, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures should be appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13). It is therefore in the light of those criteria that the applicant's other arguments are to be examined.

101 First, in so far as the applicant's reasoning concerning the interpretation of Article 7(2)(d) of Regulation No 423/2007, summarised in paragraphs 48 to 54 above, is relevant to the examination of that provision's compatibility with the principle of proportionality, it must be rejected for the reasons set out in paragraphs 69 to 76 above.

102 Secondly, with regard to the existence of a link between Article 7(2)(d) of Regulation No 423/2007 and the objective pursued, it is to be observed that the purpose of Regulation No 423/2007 is to stop nuclear proliferation and its funding and so to bring pressure to bear upon the Islamic Republic of Iran to put an end to the activities concerned. That objective forms part of a more general framework of endeavours linked to the maintenance of international peace and security and is, therefore, legitimate, which the applicant does not, moreover, deny.

103 Contrary to what the applicant argues, the freezing of the funds of entities owned or controlled by an entity identified as being engaged in nuclear proliferation, as provided for by Article 7(2)(a) or (b) of Regulation No 423/2007 is linked to the objective defined in the previous paragraph. When the funds of an entity identified as being engaged in nuclear proliferation are frozen, there is a not insignificant danger that that entity may exert pressure on the entities it owns or controls in order to circumvent the effect of the measures applying to it, by encouraging them either to transfer their funds to it, directly or indirectly, or to carry out transactions which it cannot itself perform by reason of the freezing of its funds. That being so, it must be considered that the freezing of the funds of entities owned or controlled by an entity identified as being engaged in nuclear proliferation is necessary and appropriate in order to ensure the effectiveness of the measures adopted vis-à-vis that entity and to ensure that those measures are not circumvented.

104 The existence of the danger just described makes it possible to explain, furthermore, the fact, argued at the hearing, that Regulation No 423/2007 applies to the entities owned or controlled, even though they are not expressly mentioned in recitals 2 and 6 in its preamble, which set out the various restrictive measures at issue. It also makes it possible to explain that the question whether the entity owned or controlled itself engages in nuclear proliferation is irrelevant.

105 The other matters referred to by the applicant cannot alter that conclusion. So, the facts that the entity owned or controlled has not been the subject of disciplinary or regulatory measures in the past and that it has complied with the sanctions regimes and the restrictive measures in force are not relevant in that connection for, so long as a fund-freezing measure did not apply to the parent entity, the latter could, subject to observance of other rules applicable, have the funds of the entities it owns or controls transferred to it and carry out transactions which are from now on incompatible with the restrictive measures adopted. It had, therefore, no reason to put pressure on those entities. Likewise, a declaration by the entity owned or controlled to the effect that it would abide by the consequences of the freezing of its parent entity's funds does not carry sufficient guarantees that any pressure brought to bear by the parent entity would not be effective.

106 On the other hand, the argument advanced by the United Kingdom has to be rejected, that the freezing of the funds of entities owned or controlled also pursues the objective of putting economic pressure on the Islamic Republic of Iran through BMI, by stopping the latter benefiting from the applicant's profits, reputation and position on the market. It is not, in point of fact, the object of the restrictive measures imposed by Regulation No 423/2007 to bring such economic pressure to bear. It may be observed that, while it is indeed the aim of those measures, set out in recitals 2 and 6 in the preamble to Regulation No 423/2007, to put pressure on the Islamic Republic of Iran, they are, nevertheless, precautionary measures designed to prevent nuclear proliferation and its funding. However, nothing in Regulation No 423/2007 permits the inference that those measures are intended to affect the economic situation of the entities concerned, beyond what is essential in order to prevent nuclear proliferation and its funding.

107 Third, as regards the existence of other measures, less restrictive than the freezing of funds, that could be applied either separately or cumulatively in order to attain the objective pursued, it has not been established that the supervision and control measures existing at the time the contested decision was adopted are adequate, in relation to the danger described in paragraph 103 above.

108 Next, the reinforcement of supervision by the competent authorities of compliance with the restrictive measures and greater cooperation with those authorities, the requirement of particular transparency with regard to the applicant's activities and the adoption of measures to ensure that its situation is regularly reviewed are ex post measures concerning transactions already performed and are not, therefore, capable of preventing possible future transactions incompatible with the restrictive measures enacted. Such is all the more the case because if they are to be effective the competent authorities must be able to determine whether the other party to a transaction is linked to BMI or to another entity identified as being engaged in nuclear proliferation.

109 Lastly, as regards the measures mentioned for the first time at the hearing, it must be considered that they cannot be taken into consideration. It was contrary to Articles 48(2) and 76a(3) of the Rules of Procedure that they were referred to during the proceedings without any justification whatsoever being offered. In any event, the practicability of a system of prior authorisation and supervision by an independent agent has not been demonstrated by the applicant. In its opinion, the total prohibition of transactions with Iran is not, on any view, effective in preventing transactions with intermediaries not situated in that country and not known to be associated with BMI.

110 In those circumstances, it must be concluded that the alternative measures suggested by the applicant are not apt to attain the objective pursued.

111 Fourthly, as regards the difficulties caused to the applicant, the case-law makes it clear that the fundamental rights relied on by the latter, namely, the right to property and the right to carry on economic activity, are not absolute rights and that their exercise may be subject to restrictions justified by objectives of public interest pursued by the Community. Thus, any restrictive economic or financial measure entails, ex hypothesi, consequences affecting the right to property and the right to the free exercise of economic activity, so causing harm to parties who have not been found to be

responsible for the situation giving rise to the measures in question. The importance of the aims pursued by the legislation at issue is such as to justify negative consequences, even of a substantial nature, for some operators (see, to this effect, Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraphs 21 to 23, and *Kadi and Al Barakaat International Foundation*, paragraphs 354 to 361).

112 In this regard, it is to be noted that the freedom to carry on economic activity and the right to property of a bank established in the territory of the Community are to a considerable extent restricted by the freezing of its funds. The entity concerned cannot enter into new transactions with its customers or, unless it has received specific authorisation, make any transfer of its funds. None the less, given the prime importance of the preservation of international peace and security, the Court considers that the difficulties caused are not disproportionate to the ends sought.

113 With regard, lastly, to the interference with the free movement of capital and payments pleaded by the applicant, it is to be observed that Article 60 EC, which is one of the measures governing this sphere, expressly authorises the Council to take the necessary urgent measures on the movement of capital and on payments as regards third countries, in accordance with the procedure provided for in Article 301. It is precisely on the basis of those two provisions of the EC Treaty that Regulation No 423/2007 was adopted, which implies that the restrictions entailed by that act form part of the rules circumscribing the free movement of capital and payments guaranteed by the Treaty and cannot, therefore, be incompatible with it.

114 Having regard to all the foregoing, it must be concluded that it has not been established that Article 7(2)(d) of Regulation No 423/2007 is incompatible with the principle of proportionality. Accordingly, the plea of illegality raised by the applicant against that provision must be rejected.

The applicant's classification as an entity 'owned or controlled' as provided for in Article 7(2)(d) of Regulation No 423/2007

— Arguments of the parties

115 The applicant maintains that its particular situation considerably limits any control that might be exercised over it by BMI, so that there is no reason for Article 7(2)(d) of Regulation No 423/2007 to be applied to it.

116 In this connection, it first claims that it is a legal entity distinct from and independent of BMI, which most particularly plays no part in its day-to-day management. Secondly, both the applicant and its directors and employees are subject to Regulation No 423/2007 and to the other restrictive measures, sanctions regimes and legislation applicable and they abide by them. Thirdly, in accordance with the law of England and Wales, the directors of a company owe various duties to the company, not to its shareholders, and the unjustified dismissal of a director would be unlawful. Fourthly, as a bank established in the United Kingdom, the applicant is supervised by the FSA, especially so far as concerns its relations with BMI and the appointment and identity of its management staff. Neither the applicant nor its directors are the subject of regulatory or disciplinary measures taken by the FSA, one of whose purposes is to fight financial crime, including the funding of terrorism and of nuclear proliferation. Fifthly, the applicant proclaims itself willing to enter, if necessary, into an agreement under which none of its directors could be replaced without the consent of the competent authorities.

117 The Council, supported by the interveners, makes reference to the case-law in the sphere of competition law to maintain that the applicant, being wholly owned by BMI, is actually under the latter's control and therefore possesses no real autonomy in determining its course of action. On this head it mentions that, in all likelihood, the applicant's directors have been appointed by BMI, are accountable to it and may be dismissed by it.

118 The United Kingdom adds that the undertaking proposed by the applicant is not sufficient to stop BMI exercising significant control over it, for it is unlikely that the undertaking would be enforceable, it might be withdrawn at any moment and it could not prevail over the applicable rules of the company law of England and Wales.

— Findings of the Court

119 A preliminary point to be noted is that this plea concerns the lawfulness of a decision by which the restrictive measures introduced by Regulation No 423/2007 were applied to a certain entity. That fact implies that the procedure for the judicial review conducted by the Court is that referred to in paragraph 46 above.

120 In the instant case, it is apparent, both from the reasons stated for the contested decision and from the observations made by the Council at the hearing, that the Council decided to apply Article 7(2)(d) of Regulation No 423/2007 to the applicant because the latter was an entity 'owned' by BMI. At first sight the meaning of that concept appears precise, given that it makes reference to BMI's holding in the applicant's capital. However, it is to be observed that, by virtue of the case-law cited in paragraph 61 above, the analysis of the concept in question is not to be based only on the semantic content but must also take into consideration, inter alia, the link between Article 7(2)(d) of Regulation No 423/2007 and the objective pursued by Regulation No 423/2007, as set out in paragraphs 102 and 103 above.

121 In consequence, it remains to examine whether, because it is owned by BMI, it is to a considerable degree likely that the applicant may be prompted to circumvent the measures adopted against its parent entity. In this respect, it is appropriate for the Court to be guided by the case-law in the field of competition concerning whether a subsidiary's conduct constituting an infringement may be ascribed to the parent company. In both cases, the question is whether, because the parent entity wields

decisive influence, the subsidiary may be led to follow the parent's instructions instead of deciding upon its own conduct independently (see, to this effect, Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 133, and Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraph 16), even though the conduct imposed by the parent entity is not of the same kind in the first and second cases.

122 That difference means, moreover, that in interpreting Regulation No 432/2007 the aspects relating to the appointment of staff must be given greater force in comparison with the other aspects taken into account in connection with competition law. In order to have any useful influence on the actions of the entity owned, the pressure brought to bear by the parent entity, mentioned in paragraph 103 above, must essentially be directed at the directors and/or employees of the entity owned.

123 Here, the fact that one entity is wholly owned by another generally means that the latter is entitled to appoint the directors of the former and it may therefore exercise actual control over the persons who form the management of that entity and, ultimately, over all the staff. It is not, however, inconceivable that, in extraordinary circumstances, the application of Article 7(2)(d) of Regulation No 423/2007 to an entity owned, even wholly, by the parent entity may not be justified in the light of other factors counterbalancing the latter's influence over the former.

124 In the instant case it is not disputed that BMI owns all of the applicant's capital and can, therefore, appoint and replace the applicant's directors. It can thus exercise influence over the applicant's staff. There is, accordingly, a not inconsiderable danger that BMI may be in a position to lead the applicant to carry out transactions prohibited by Regulation No 423/2007, by putting pressure either on its directors or, through them, on the other members of its staff. It must, therefore, be ascertained whether the circumstances invoked by the applicant are capable of offsetting that influence

125 On this head, first, the fact that the applicant possesses legal personality and that BMI does not intervene in its day-to-day running is of no relevance. Those facts do not affect the influence exerted by BMI, directly or indirectly, over the applicant's staff.

126 Secondly, the fact that the applicant and its staff have complied with the restrictive measures, sanctions regimes and other legislation in force and have not been the subject of disciplinary or regulatory measures in the past is irrelevant too, for the reasons explained in paragraph 105 above. Likewise, the Court considers that the dissuasive nature of the sanctions to which the members of the applicant's staff would be exposed is insufficient, especially because measures could be taken to disguise the unlawfulness of the transactions concerned, inter alia by having recourse to intermediaries not known to be associated with BMI.

127 Thirdly, by analogy with what has been set out in paragraph 71 above, the mere existence of certain obligations imposed on the directors by virtue of the company law of England and Wales does not guarantee that those obligations will be performed. Because any contravention can be uncovered only after the event, the existence of the obligations in question is unable to ensure a preventative effect equivalent to that of restrictive measures. In so far as the applicant proposes in this connection to submit the appointment of its future directors to the consent of the competent authorities, it is to be observed on the one hand that it has not been established that such a procedure would be feasible and in keeping with the law of England and Wales, and on the other that it would in any case not resolve the situation of the applicant's present directors, who have been appointed by BMI.

128 Fourth and lastly, the essential purpose of the banking supervision performed by the FSA is not to ensure compliance with the restrictive measures imposed on certain entities but to maintain a stable, efficient and fair financial system. Although that purpose includes various aspects relating to financial crime, those are centred on money-laundering, fraud and insider dealing. In contrast, giving effect to the restrictive measures and monitoring their observance, including with regard to the measures imposed by Regulation No 423/2007, is the direct responsibility of HM Treasury, which

has set up a special unit to that end and which is competent also to grant licences under Articles 9 and 10 of Regulation No 423/2007. Accordingly, the FSA's supervision of the applicant, so far as concerns the latter's relations with BMI and the appointment of its directors and of certain other members of its staff, cannot offset the influence exerted over the applicant by its parent entity.

129 Having regard to the foregoing, it must be concluded that the Council was right in considering that Article 7(2)(d) of Regulation No 423/2007 was applicable to the applicant. This plea in law must therefore be rejected.

The plea in law alleging breach of the principle of non-discrimination

— Arguments of the parties

130 The applicant maintains that the contested decision runs counter to 'the principle of non-discrimination' because it, on the one hand, treats the applicant differently from banks in materially the same situation and, on the other, treats it in the same way as banks in a materially different situation.

131 The applicant is thus in a situation that may be compared with that of other United Kingdom banks, in particular the Persia International Bank plc and Bank Saderat plc ('Bank Saderat'), which are also subsidiaries in the United Kingdom of Iranian banks belonging to the Iranian State. The States must, in accordance with Resolution 1803 (2008), exercise vigilance with respect to the three banks, Bank Saderat having been expressly mentioned in the resolution, just like the applicant. In the same way, they all appear in the list of the United States Department of the Treasury enumerating the

banks suspected of carrying out transactions in contravention of the restrictive measures and sanctions regimes in force. The applicant is the only one whose funds have been frozen.

132 In contrast, by reason of the freezing of its funds, the applicant has been subjected to the same treatment as Bank Sepah International, which is however in a materially different situation. Although the Security Council specifically designated the latter in Resolution 1747 (2007) as an entity engaging in nuclear proliferation, it called on the States to exert vigilance only with regard to the applicant, under Resolution 1803 (2008).

133 The Council, supported by the interveners, states that it did not designate the applicant because it was the subsidiary of an Iranian State-owned bank or because it was mentioned in Resolution 1803 (2008) or even because it appeared in the list drawn up by the United States Department of the Treasury. It asserts that in its independent assessment it relied on the fact that BMI provided financial support to companies engaging in nuclear proliferation. The comparison with the Persia International Bank and Bank Saderat is therefore irrelevant.

134 The Council goes on to claim that the applicant is in a situation comparable to that of Bank Sepah International, since both the latter's parent company, Bank Sepah, and BMI have provided support for nuclear proliferation. Freezing their funds and those of their subsidiaries is therefore justified. Here, the Council considers that it is free to adopt autonomous fund-freezing measures going beyond those imposed by the Security Council resolutions, and so to implement its own policy on non-proliferation.

— Findings of the Court

135 According to the case-law, the principle of equal treatment, which constitutes a fundamental principle of law, prohibits comparable situations from being treated differently or different situations from being treated in the same way, unless such difference in treatment is objectively justified (Joined Cases T-222/99, T-327/99 and T-329/99 *Martinez and Others* v *Parliament* [2001] ECR II-2823, paragraph 150).

136 The examination of the previous pleas in law shows that the decisive criterion for giving effect to Article 7(2)(d) of Regulation No 423/2007, and therefore the criterion for comparison applicable in determining whether there has been any breach of the principle of equal treatment, is whether the entity in question is owned or controlled by an entity identified as being engaged in nuclear proliferation, as provided for in Article 7(2)(a) or (b) of that regulation.

137 In this case, BMI has been identified, in the contested decision, as an entity engaged in nuclear proliferation and it has been concluded in paragraph 30 above that the validity of that finding does not form part of the subject-matter of these cases. In the same way, as is apparent from the considerations in paragraphs 119 to 129 above, the applicant is an entity 'owned or controlled' within the meaning of Article 7(2)(d) of Regulation No 423/2007. In those circumstances, even if the Council had in fact omitted to adopt measures to freeze the funds of certain entities owned or controlled by entities identified as being engaged in nuclear proliferation, such as Persia International Bank or Bank Saderat, that fact cannot be relied on with advantage by the applicant, for the reasons explained in paragraph 75 above. The applicant's first head of claim must therefore be rejected.

138 With regard to the second head of claim, it is to be observed that whereas the applicant's funds were frozen pursuant to Article 7(2) of Regulation No 423/2007, the measure applying to the Bank Sepah International was adopted under Article 7(1) of that regulation. That means that this head of claim is of no consequence, for it relates to an

alleged breach of the principle of equal treatment in the application of Article 7(2)(d) of Regulation No 423/2007, the provision at issue having been given effect in only one of the two situations presented by the applicant. Furthermore, the latter has not even claimed that Bank Sepah International's parent entity was not engaged in nuclear proliferation. It has, accordingly, not established that it was in this connection in a factual situation different from that of Bank Sepah International.

139 This plea in law must therefore be rejected.

The plea in law alleging breach of the obligation to state reasons

— Arguments of the parties

140 The applicant notes that Article 15(3) of Regulation No 423/2007 lays down an obligation to state reasons, and also the conditions that must be met by the statement of reasons for a decision ordering the freezing of funds, according to the case-law. It goes on to argue that, in the instant case, it was only in the observations on the application for interim measures submitted in Case T-246/08 R that the Council stated the reason why the applicant's funds had been frozen, namely, because it was controlled by BMI, which was said to have taken part in funding nuclear proliferation, and the freezing of funds was therefore necessary in order to ensure the effectiveness of the measures adopted in respect of BMI. Thus, no reasons were given for the contested decision in so far as it concerns the applicant.

141 In response in this regard to the French Republic's argument that it is unnecessary to identify, in Annex V to Regulation No 423/2007, the entities owned or controlled to which the measures to freeze funds apply, the applicant argues that such an approach

would prevent third parties from ascertaining that they were not dealing with such entities and so carrying out transactions prohibited by that regulation.

142 The Council, supported by the interveners, submits that in so far as the freezing of an entity's funds applies equally to subsidiaries owned or controlled by that entity, there is no need to provide specific reasons for freezing the funds of each of the subsidiaries. It therefore considers that it was sufficient to provide individual and specific reasons in the contested decision with regard to BMI. The French Republic adds here that it is not even necessary for the names of all branches to appear in the decision laying down a fund-freezing measure adopted pursuant to Regulation No 423/2007, for the decision concerned automatically applies to them.

— Findings of the Court

143 The purpose of the obligation to state the reasons for an act adversely affecting a person, as provided for in Article 253 EC and, in this case, more particularly in Article 15(3) of Regulation No 423/2007, is, first, to provide the person concerned with sufficient information to make it possible to determine whether the act is well founded or whether it is vitiated by an error permitting its validity to be contested before the Community courts and, second, to enable the Community judicature to review the lawfulness of the act. The obligation to state reasons thus laid down constitutes an essential principle of Community law which may be derogated from only for overriding reasons. The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him, for failure to do so cannot be remedied by the fact that the person concerned learns the reasons for the measure during the proceedings before the Community courts. Furthermore, observance of the obligation to state reasons is all the more important in the case of an initial decision to freeze an entity's funds because it constitutes the sole safeguard enabling the party concerned to make effective use of the legal remedies available to it to challenge the lawfulness of the decision in question, given that that person has no right to be heard before the decision is adopted (see, to this effect, *Organisation des Modjahedines du peuple d'Iran* v *Council*, paragraphs 138 to 140 and the case-law cited).

144 Consequently, unless overriding considerations involving the security of the Community and its Member States or the conduct of their international relations militate against it, the Council is required, by virtue of Article 15(3) of Regulation No 423/2007, to advise the entity concerned of the actual specific reasons when it adopts a fund-freezing decision such as the contested decision. It must thus mention the matters of fact and law on which the legal justification for the measure depends and the considerations which led it to adopt that measure. So far as is possible, those reasons must be communicated either when the measure at issue is adopted or as soon as may be after it has been adopted (see, to this effect and by analogy, *Organisation des Modjahedines du peuple d'Iran* v *Council*, paragraphs 143 and 148 and the case-law cited).

145 However, the statement of reasons must be appropriate to the measure at issue and the context in which it was adopted. The requirement of a statement of reasons must be assessed in the light of the circumstances of the case, in particular of the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to specify all the relevant matters of fact and law, inasmuch as the adequacy or otherwise of the reasoning is to be evaluated with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for a measure adversely affecting a person are sufficient if it was adopted in circumstances known to that person which enable him to understand the scope of the measure concerning him (*Organisation des Modjahedines du peuple d'Iran* v *Council*, paragraph 141 and the case-law cited).

146 As is made apparent in paragraphs 61 to 67 above, application of Article 7(2)(d) of Regulation No 423/2007, at issue in these proceedings, requires the entity concerned to be owned or controlled by an entity identified as being engaged in nuclear proliferation as provided for in Article 7(2)(a) or (b) of that regulation, the Council determining case by case whether the entity concerned is an entity 'owned or controlled'. In consequence, in addition to indicating the legal basis of the measure adopted, the obligation to state reasons incumbent on the Council relates to that very circumstance. In this context, the French Republic's argument that there is no need to mention, in decisions applying Article 7(2) of the regulation, the names of the entities owned or controlled to which the fund-freezing measures apply must be rejected. If that interpretation were upheld, the entities concerned would be unable either to ascertain by official means that the fund-

freezing measures were applicable to them or to know why the Council considered that they were classified as an entity 'owned or controlled'. In the same way, third parties could not determine the ambit *ratione personae* of the measures taken. Such a situation would be incompatible both with the obligation to state reasons binding on the Council and with the principles of legal certainty and of transparency.

147 In the instant case, the Council has indicated, both in the title of the contested decision and in recital 2 in the preamble thereto, that the measures taken were based on Article 7(2) of Regulation No 423/2007. In point 4 of Table B in the Annex to the contested decision, it found that BMI engaged in nuclear proliferation, relying on the grounds set out in paragraph 11 above. Lastly, in point 4 of Table B in the Annex to the contested decision, it mentioned the applicant among the 'branches and subsidiaries' of BMI.

148 In those circumstances, the Court considers that the statement of reasons for the contested decision, although exceptionally concise, is sufficient having regard to the case-law cited in paragraphs 143 to 145 above. First, the applicant could in the contested decision identify Article 7(2)(d) of Regulation No 423/2007 as the legal basis for the fund-freezing measure affecting it, for, on the one hand, Article 7(2) of that regulation had been mentioned as being the provision implemented and, on the other, the applicant was identified in it as being one of BMI's 'branches and subsidiaries', which signifies that Article 7(2)(d) of the regulation, specifically applicable to entities owned or controlled, and in particular therefore to subsidiaries, had been given effect with regard to the applicant.

149 Secondly, in the contested decision the Council makes plain the reasons why it considered that BMI engaged in nuclear proliferation, as provided for in Article 7(2)(a) or (b) of Regulation No 423/2007.

150 Thirdly, the fact that the applicant was identified as one of BMI's 'branches and subsidiaries' in the contested decision implies that the Council considered that the applicant, because its capital was wholly owned by BMI, was 'owned' by the latter for the purpose of Article 7(2)(d) of Regulation No 423/2007.

151 The conclusion that the reasons stated for the contested decision are sufficient is, furthermore, borne out by the subject-matter of the application in Case T-246/08. In that application, Melli Bank claimed that it was legally and operationally distinct from BMI and that it could not be held responsible for the latter's supposed engagement in nuclear proliferation. It also maintained that the freezing of its funds would not impinge on nuclear proliferation, given that it would in any case comply with the contested decision by freezing all the BMI funds it held and by ceasing all operations with BMI. It follows from that line of argument that the applicant, when it brought its first action, was aware of the link between the freezing of its funds and the engagement in nuclear proliferation laid to the charge of its parent entity, BMI.

152 Having regard to the foregoing, this plea must be rejected and, in consequence, the actions must be dismissed in their entirety.

Costs

153 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the

applicant has been unsuccessful, it must be ordered to pay the costs, including those incurred in the proceedings for interim measures, in accordance with the form of order sought by the Council.

154 Under the first paragraph of Article 87(4), the Member States and institutions which have intervened in the proceedings are to bear their own costs. Accordingly, the United Kingdom of Great Britain and Northern Ireland, the French Republic and the Commission shall bear their own costs, including those incurred in the proceedings for interim measures.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the actions;

2. Orders Melli Bank plc to pay, in addition to its own costs, those incurred by the Council of the European Union, including those incurred in the proceedings for interim measures;

3. Orders the United Kingdom of Great Britain and Northern Ireland, the French Republic and the Commission of the European Communities to bear their own costs, including those incurred in the proceedings for interim measures.

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 9 July 2009.

[Signatures]

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