

OPINION OF ADVOCATE GENERAL

MENGOTZI

delivered on 8 May 2007¹

I — Introduction

1. By orders of 21 and 23 February 2006, the Kammergericht Berlin (Higher Regional Court, Berlin; 'the Kammergericht') sought from the Court under Article 234 EC a preliminary ruling on the interpretation of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan.²

2. Essentially, the Court is asked to rule on the scope of Articles 2(3) and 4(1) of Regulation No 881/2002 in a case concern-

ing the legality of a refusal to register the transfer of ownership of a property in the German Land Register following the inclusion of one of the buyers in the list of persons, groups and entities which, being considered to be associated with Usama bin Laden, the Al-Qaida organisation and the Taliban, are subject to restrictive measures laid down by that regulation in order to prevent the financing of terrorist activity.

II — Legislative background

A — The United Nations Security Council resolutions

3. On 16 January 2002, the United Nations Security Council ('the Security Council') adopted Resolution 1390 (2002) laying down certain measures to be adopted against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and en-

¹ — Original language: Italian.

² — OJ 2002 L 139, p. 9.

ties associated with them, as referred to in the list created pursuant to Security Council Resolutions 1267 (1999) and 1333 (2000), to be updated regularly by the Sanctions Committee of the Security Council ('the Sanctions Committee') established pursuant to Resolution 1267 (1999).

4. Under paragraph 2(a) of Resolution 1390 (2002), all States are to:

'[f]reeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit, by their nationals or by any persons within their territory'.³

6. Paragraph 2(b) of Resolution 1452 (2002) grants States the power to allow the making into accounts subject to the provisions of paragraph 2(a) of Resolution 1390 (2002) of 'payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of Resolutions 1267 (1999), 1333 (2000), or 1390 (2002)', provided that any such sums 'continue to be subject to those provisions'.

7. On 6 July 2004, the Sanctions Committee decided to amend the list of individuals, groups, undertakings and entities associated with them referred to in Resolutions 1267 (1999) and 1333 (2000) and added the following name: 'Aqeel Abdulaziz Al-Aqil'.

B — The legislation of the European Union and the European Community

5. On 20 December 2002, the Security Council adopted Resolution 1452 (2002) allowing specific exceptions to the restrictive measures imposed by Resolution 1390 (2002).

8. On 27 May 2002, in order to give effect to Security Council Resolution 1390 (2002), the Council of the European Union adopted Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisa-

3 — [Footnote not relevant to English translation].

tion and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP.⁴

available, directly or indirectly, to or for the benefit of the individuals, groups, undertakings and entities referred to in Article 1.'

9. Article 3 of Common Position 2002/402, which, by virtue of Article 1, 'applies to Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list' mentioned in point 3 above, provides as follows:

10. As is apparent from recitals 1 to 4 in the preamble thereto, Regulation No 881/2002 was adopted to implement Security Council Resolution 1390 (2002) as far as the territory of the Community is concerned.

11. Article 1 of Regulation No 881/2002 provides:

'The European Community, acting within the limits of the powers conferred on it by the Treaty establishing the European Community:

'For the purpose of this Regulation, the following definitions shall apply:

- shall order the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in Article 1,
- shall ensure that funds, financial assets or economic resources will not be made

1. "funds" means financial assets and economic benefits of every kind, including but not limited to cash, cheques, claims on money, drafts, money orders and other payment instruments; deposits with financial institutions or other entities, balances on accounts, debts and debt obligations; publicly and privately traded securities and debt instruments, including stocks and shares, certificates presenting securities, bonds, notes, warrants, debentures, derivatives contracts; interest, dividends

⁴ — OJ 2002 L 139, p. 4.

or other income on or value accruing from or generated by assets; credit, right of set-off, guarantees, performance bonds or other financial commitments; letters of credit, bills of lading, bills of sale; documents evidencing an interest in funds or financial resources, and any other instrument of export-financing;

but not limited to, by selling, hiring or mortgaging them.'

12. Pursuant to Article 2 of Regulation No 881/2002:

2. "economic resources" means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services;

'1. All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen.

3. "freezing of funds" means preventing 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 use of the funds, including portfolio management;

2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.

4. "freezing of economic resources" means preventing their use to obtain funds, goods or services in any way, including,

3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.'

13. Article 4(1) of Regulation No 881/2002 provides:

‘The participation, knowingly and intentionally, in activities, the object or effect of which is, directly or indirectly, to circumvent Article 2 ..., shall be prohibited.’

14. Article 7(1) of Regulation No 881/2002 authorises the Commission in particular to ‘amend or supplement Annex I on the basis of determinations made by either the ... Security Council or the Sanctions Committee’.

15. Article 9 of Regulation No 881/2002 states:

‘This Regulation shall apply notwithstanding any rights conferred or obligations imposed by any international agreement signed or any contract entered into or any licence or permit granted before the entry into force of this Regulation.’

16. Annex I to Regulation No 881/2002 contains the list of persons, groups and entities referred to in Article 2.

17. On 27 February 2003, in order to implement Security Council Resolution 1452 (2002), the Council adopted Common Position 2003/140/CFSP concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP.⁵ Article 1 thereof states that ‘[w]hen implementing the measures set out in Article 3 of Common Position 2002/402/CFSP, the European Community will provide for the exceptions permitted by United Nations Security Council Resolution 1452 (2002).’

18. On 27 March 2003, the Council then adopted Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002.⁶

19. Article 1 of Regulation No 561/2003 inserts in Regulation No 881/2002 an Article 2a, paragraph 4 of which states:

‘Article 2(2) shall not apply to the addition to frozen accounts of:

- (a) interest or other earnings due on those accounts;

5 — OJ 2003 L 53, p. 62.

6 — OJ 2003 L 82, p. 1.

- (b) payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of UN Security Council resolutions implemented successively through Regulation (EC) No 337/2000 ..., Regulation (EC) No 467/2001 ... or this Regulation.

C — *The relevant German law*

In the same manner as the account to which they are added, such interest, other earnings and payments shall also be frozen.’

22. From a reading of the Kammergericht’s order of 21 February 2006 (‘the order for reference’), the observations of the German Government and the information given at the hearing, the German law relevant to this case would appear to be as follows.

20. On 12 July 2004, the Commission adopted Regulation (EC) No 1277/2004 amending for the 37th time Council Regulation (EC) No 881/2002.⁷ Pursuant to Article 1 of Regulation No 1277/2004 and paragraph (2) of the annex thereto, Annex I to Regulation No 881/2002 was amended to include in the list of ‘natural persons’ in particular the entry: ‘Aqeel Abdulaziz Al-Aqil. Date of birth: 29 April 1949’.

21. Regulation No 1277/2004 entered into force on the date of its publication in the *Official Journal of the European Union*, that is to say, on 13 July 2004.⁸

23. Under German law, sales of property, whether movable or immovable, are effected by means of two separate contracts: the contract of sale properly so called, by which one of the parties (the seller) commits himself to handing over the property and transferring ownership to the buyer and the other (the buyer) to paying the pecuniary consideration to the seller, and the conveyance (*Auflassung*), by which the parties agree upon the transfer of ownership and of the money. However, before ownership of the property can be regarded as effectively transferred, it is necessary for the parties to complete the formalities laid down by law for that purpose.

⁷ — OJ 2004 L 241, p. 12.

⁸ — However, doubtless because of a drafting error, the Italian version of the regulation purports to enter into force on the day following its publication, thus differing from the other language versions, which refer to the date of publication.

24. For transfer of the title to immovable property, German law requires that the parties:

- (a) enter into a contract of sale in the form of a notarial public instrument (Paragraph 311b(1) of the Bürgerliches Gesetzbuch (German Civil Code; ‘the BGB’));
- (b) formally execute the *Auflassung* (‘the conveyance’) before a notary or other competent attestor, either personally or through an agent (Paragraphs 873(1) and (2) and 925(1) of the BGB);
- (c) submit to the Grundbuchamt (Land Registry) an application for registration in the Grundbuch (Land Register) of the transfer of ownership of the immovable property (Paragraph 873(1) of the BGB).

property, but represents, in what might be termed a progressive procedure, the first of three ‘stages’: the signing of a notarial instrument of sale, the signing of a conveyance in the prescribed form and registration of the transfer of ownership in the Land Register — all of which are essential for transfer of ownership of the property.

26. As a result of registration, the transfer of ownership of the immovable property can be said to be perfected, in the sense that, even though at an earlier stage a provisional registration is possible, accompanied by physical handover of the property to the buyer and of the price to the seller, it is only upon registration of the transfer that the buyer acquires the right to dispose of the property by selling it or mortgaging it. The last word thus lies with the Grundbuchamt, which must, pursuant to Paragraph 18(1) of the Grundbuchordnung (Regulation governing land registration), verify that there is no impediment to such registration, whether existing or supervening, such as a prohibition of disposal imposed by law.

25. In other words, under German law the conclusion of a contract for the sale of immovable property — which is merely binding on the parties — is not sufficient to vest the buyer with ownership of the

III — Facts, preliminary questions and procedure

27. By notarial instrument of 19 December 2000, Gerda Möllendorf and Christiane

Möllendorf-Niehuus ('the sellers'), as members of a partnership constituted under civil law, entered into a contract with Salem-Abdul Ghani El-Rafei, Kamal Rafehi and Ageel A. Al-Ageel ('the buyers') for the sale of land and buildings in Berlin-Neukölln.

28. In the same instrument, the parties agreed upon transfer of the ownership of the immovable property to the buyers and authorised registration thereof in the Land Register. They also agreed that the sale price of DEM 2 375 000, or EUR 1 214 318,22, was to be deposited by 15 February 2001 in a trust account of the attesting notary Karl Alich ('the notary') for subsequent payment to the sellers at the time of provisional registration of the transfer in the Land Register, pending final registration.

29. In compliance with the contract of sale, the buyers deposited the sale price in a trust account of the notary.

30. On 8 March 2001, the transfer of ownership was provisionally registered in the Land Register.

31. In May 2001, according to the evidence given by the notary to the Court at the hearing on 8 March 2007, the price was paid to the sellers and possession of the immovable property was transferred to the buyers.

32. By decision of 29 October 2003, the local Grundbuchamt rejected the application for final registration submitted by the notary on 22 January of the same year on account of failure to produce the requisite supplementary documentation within the time-limit laid down by letter of 28 March 2003

33. As from 13 July 2004, Mr Ageel A. Al-Ageel ('buyer No 3') was included in the list in Annex I to Regulation No 881/2002.

34. On 9 December 2004, the notary, on the basis of the notarial act of sale already lodged there, submitted to the Grundbuchamt a new application for final registration of the transfer in favour of the buyers. However, by decision of 21 April 2005, the Grundbuchamt, having ascertained that the name of buyer No 3 appeared in the list in Annex I to Regulation No 881/2002, refused to effect the registration, relying on the combined provisions of Articles 2(3) and 4(1) of that regulation.

35. On 3 May 2005, the notary, on behalf of the sellers, submitted a complaint against that decision to the Grundbuchamt. The latter, on its own initiative, referred the complaint to the Landgericht Berlin (Berlin District Court; 'the Landgericht'), which rejected it by order of 27 September 2005.

36. On 7 October 2005, the notary, again acting on behalf of the sellers, challenged the Landgericht's order before the Kammergericht.

37. In support of his appeal, the notary claimed, first, that the contested order infringed upon the sellers' right to property as enshrined in Paragraph 14 of the German Constitution, the sellers not being mentioned in Annex I to Regulation No 881/2002.

38. Second, he claimed that the transaction in question, for which a substantial price had been agreed and already paid, fell outside the scope of Article 2(3) of Regulation No 881/2002. He submitted that it was clear from the terms 'be made available ... to' and 'be made available for the benefit of' appearing in that provision that the latter applied only to those acts-in-the-law where there is no economic balance between the consideration given and the consideration received in return.

39. Finally, the notary claimed that any declaration as to the nullity of the sale contract would create on the part of the buyers, contrary to recital 7 and Article 2(1) of Regulation No 881/2002, a right to recover the price paid, enforceable against the sellers.

40. The Kammergericht considered it necessary, for the purposes of its decision, to seek a preliminary ruling from the Court of Justice.

41. In its order for reference, the Kammergericht observed that, under German law, the right to enter into an agreement for the transfer of ownership, deriving from the legal right of disposal and the right to exercise that power, must still exist at the time of registration in the Land Register even where, as in this case, the buyer and the seller signed the conveyance at the same time as they signed the notarial deed, and remained bound by it.

42. The national court stated that in the event of a restriction of the power of disposal being imposed after conclusion of the contract of sale and the signing of the conveyance, but before the date of registration of

the transfer of ownership in the Land Register, the Grundbuchamt must, as a matter of principle, take account of that restriction.

43. It also observed that because, under German law, the existence of an impediment to registration would prevent implementation of the conveyance by the sellers, the latter would be obliged, under Paragraphs 275 and 323 of the BGB, to repay the sale price to the buyers, unless prohibited from doing so by Article 2(2) of Regulation No 881/2002.

44. Finally, it stated that the real issue to be dealt with was the scope of Articles 2(3) and 4(1) of Regulation No 881/2002, it being necessary to ascertain whether those provisions gave rise to a relative prohibition of disposal, which applied also to the sale of immovable property to a person listed in Annex I to that regulation and operated without exceptions even in cases where the act of disposal is carried out in performance of a contract of sale signed — and indeed already put into effect — by the other party before the publication of that regulation, or whether those provisions are applicable, as the sellers assert, only where the consideration given is not worth the same as the property transferred.

45. As regards repayment of the sale price, in a supplementary order of 23 February

2006, the Kammergericht observed that it cannot be inferred from Articles 2(1) to (3) and 4(1) of Regulation No 881/2002 that any power exists to order the seller to pay the sale price where the seller did not, when the contract was concluded or the sale price received, have notice that the buyer was subject to restrictive measures.

46. In the same order, the Kammergericht expressed doubts, finally, as to whether, in cases where there is more than one buyer or — as in this case — where they are members of a partnership, the right to restitution of the sale price must be frozen totally or only to the extent of the participation of the buyers who are subject to restrictive measures.

47. Therefore, the Kammergericht stayed its proceedings pending a preliminary ruling from the Court of Justice on the following questions:

‘(1) Do the provisions of Articles 2(3) and 4(1) of Council Regulation (EC) No 881/2002 of 27 May 2002 prohibit property from being conveyed in performance of a sale and purchase agreement to a natural person listed in Annex I to that regulation?

(2) If Question 1 is to be answered in the affirmative: does Regulation ... No 881/2002 prohibit the entry in the Land Register necessary for transferring ownership in the property also when the underlying sale and purchase agreement has been concluded, and the conveyance declared binding, before publication of the restriction on disposal in the *Official Journal of the European Communities*, and the contractual purchase price to be paid by the natural person listed in Annex I to the regulation, as buyer, has already been

(a) deposited in the notarial trust account, or

(b) paid to the seller?’

48. Pursuant to Article 23 of the Statute of the Court of Justice, the Italian and German Governments and the Commission submitted written observations.

49. At the hearing on 8 March 2007, oral argument was presented by Ms Möllendorf and Ms Möllendorf-Niehuus, the notary Mr Alich, and representatives of the German Government and of the Commission.

IV — Legal analysis

A — Preliminary considerations

50. By Question 1, the national court seeks a ruling as to whether Articles 2(3) and 4(1) of Regulation No 881/2002 prohibit the conclusion, in performance of a contract of sale, of a conveyance of immovable property in favour of a person listed in Annex I to that regulation.

51. By Question 2, on the other hand, the national court seeks a ruling as to whether, in the event of an affirmative answer to Question 1, the provisions of that regulation prevent registration of such a transfer in the Land Register even where, before the date on which they became applicable to the buyer, not only had the contract of sale been signed but the conveyance had already been executed and the sale price had already been either deposited in a notary’s trust account or paid to the seller.

52. Notwithstanding its twofold form, the reference for a preliminary ruling essentially seeks clarification of the scope of Articles

2(3) and 4(1) of Regulation No 881/2002, in order to ascertain whether, where a contract for the sale of immovable property has been concluded before the inclusion of the buyer in the list in Annex I to that regulation, those prohibitions prevent the perfection of acts, such as a conveyance and the registration of the transfer of ownership in the Land Register, which are necessary for the completion of that transfer in implementation of that contract. The Court is also asked to clarify whether it may be relevant, as regards the non-application of those prohibitions to such acts, first, that, for transfer of ownership of the property, provision was made for consideration (the sale price) that was of adequate worth to pass from the buyer and, second, that that consideration was given over (in the form of a deposit in the notarial trust account or payment to the seller) before the buyer was included in the abovementioned list.

53. Question 1, which seeks to ascertain whether Articles 2(3) and 4(1) of Regulation No 881/2002 prohibit such a registration, would seem, at first sight, to raise problems of admissibility, from the point of view of its relevance to the decision to be given in this specific case. It is common ground that, in the present case, the transfer of ownership was formalised before the notary on the same day (19 December 2000) as the notarial act of sale, that is to say long before the date (13 July 2004) on which the prohibitions in question became applicable to buyer No 3.

Since a prohibition is intended to preclude conduct and not to remove the effects of such conduct (otherwise it would not be a prohibition but a provision of a different kind) — in other words, it operates as regards the future — it would appear, given that the act referred to in Question 1 (the transfer of ownership) was in this case brought into being before the prohibition became applicable, that the question is hypothetical and therefore inadmissible.

54. However, some doubt in that connection arises in relation to certain considerations put forward by the national court regarding the characteristics of the transfer of ownership under German law.

55. In the order for reference, it is stated that under German law ‘the authorisation agreement, deriving from the substantive legal power of disposal and the authority to exercise that power, must still exist at the time of registration; [even] ... if the agreement — as in this case — has become binding’.

56. It is not clear whether in making that statement the national court means that, although already formalised before the

notary and therefore binding on the parties, a transfer of ownership cannot be regarded as fully and finally perfected until it is registered in the Land Register, so that a restriction on the power to dispose of the property sold (such as might possibly derive from Articles 2(3) and 4(1) of Regulation No 881/2002) coming into being pending such registration would prevent the perfecting of that agreement.

57. From a different standpoint, which is suggested to me by certain passages of the written observations submitted by the German Government, it might be concluded that the national court has submitted Question 1 with a view to being able, in the event of an affirmative answer, to assimilate the restriction laid down in Articles 2(3) and 4(1) of Regulation No 881/2002 to a statutory prohibition of disposal within the meaning of German law, which might operate, at least when certain conditions are fulfilled, in such a way as to render void, as being contrary to law (Paragraph 134 of the BGB), an act which was concluded before the prohibition came into being.

58. The information furnished to the Court concerning the applicable German legislation is not sufficient to enable the relevance of Question 1 to the decision to be given by the Kammergericht to be ascertained. But that does not mean that the question must be considered inadmissible.

59. In accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for by Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling.⁹ It is only possible to reject a request from a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.¹⁰

60. However, it seems to me, in the light of the considerations set out in points 54 to 57 above, that there are no grounds for considering those conditions to be fulfilled, and therefore in my opinion Question 1 may be regarded as admissible.

9 — Case C-415/93 *Bosman and Others* [1995] ECR I-4921, paragraph 59; Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 16; and Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125, paragraph 15.

10 — *Bosman and Others*, paragraph 61; *Bronner*, paragraph 17; and *Asnef-Equifax*, paragraph 17.

61. Moreover, Question 1 does not display specific features requiring it to be treated differently from Question 2. I shall therefore consider the two questions together.

63. The focus should therefore be on the scope of Article 2(3) of Regulation No 881/2002, a provision under which '[n]o economic resources shall be made available, directly or indirectly, to, or for the benefit of [any person] ... listed in Annex I, so as to enable [such a person] to obtain funds, goods or services'.

B — Examination of the questions referred by the national court

62. Let me first observe, in line with the Commission, that Article 4(1) of Regulation No 881/2002, referred to in the preliminary questions, does not seem at all relevant to the decision to be given in the case before the national court. I do not see, in fact — and in any event the national court does not sufficiently clarify the matter — in what way the prohibition imposed by that provision, that is to say of 'participation, knowingly and intentionally, in activities, the object or effect of which is, directly or indirectly, to circumvent Article 2', might be applicable to the present case. The prohibition in question is directed at 'circumvention' of the prohibitions in Article 2 and there is nothing in the file to show how, in the present case, the acts examined in the preliminary questions, that is to say the conveyance and the registration of the transfer of ownership in the Land Register (or the application for registration sent to the competent authority), might amount to circumvention of that kind.

64. It should be noted, in the first place, that the immovable property covered by the sale contract in question constitutes an 'economic resource' for the purposes of the application of that provision. Under Article 1(2) of Regulation No 881/2002, for the purposes of that regulation 'economic resources' means 'assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services'. Land with buildings, of the kind sold in this case, is an immovable property which can of course be used to obtain funds, goods or services, for example by letting or transfer of the property for valuable consideration.

65. The focal point of Article 2(3) of Regulation No 881/2002 is the fact of '[making resources] available ... to' and '[making resources] available for the benefit of' certain persons. Those terms are sufficiently broad to encompass, in my opinion, any act liable to enable the beneficiary, at least potentially, to obtain economic enjoyment of the resource (in other words, to

obtain funds, goods or services), including therefore those acts which, even if carried out for the declared purpose of allowing the beneficiary to make personal use thereof (for example, residential leasing of an immovable property), may nevertheless in fact — in view of the impossibility of monitoring, after the event, the specific use made of the property — allow the beneficiary to obtain economic enjoyment of the assets in question regardless of the form adopted and the conditions laid down.

66. Admittedly, in some language versions of Regulation No 881/2002 (for example, the French and English versions), the wording of the last part of Article 2(3) might give the impression that acts whereby resources are made available to or for the benefit of certain persons but do not enable them to obtain funds, goods or services are not caught by the prohibition. However, it does not seem to me that such a distinction is justified.

67. First of all, it is difficult to imagine acts whereby an economic resource is made available to someone or for his benefit which are not in some way or another liable to enable the beneficiary, if not in law at least in fact, to obtain funds, goods or services.

68. Second, the text of Security Council Resolution 1390 (2002), which Regulation No 881/2002 is intended to implement in the Community legal order, militates against such a distinction. It should be remembered that, for the purposes of interpreting a provision of Community law, account must be taken not only of the letter of the provision but also of its context and of the aims pursued by the legislation of which it forms part.¹¹ In order to determine the scope of a Community provision adopted in implementation of a Security Council resolution, it is necessary also to take account of the wording and purpose of the latter.¹²

69. The text of paragraph 2(a) of Resolution 1390 (2002) leaves no room for any doubt. Under that provision, no funds, financial assets or economic resources may be ‘made available, directly or indirectly’, for the benefit of the persons referred to in point 3 above. That prohibition, which is framed in such a way as to ensure that those persons cannot derive benefit from such funds, assets or resources, therefore seeks to prevent any availability thereof for those persons, with no scope for any possible distinction to be drawn.

11 — Case 337/82 *St. Nikolaus Brennererei* [1984] ECR 1051, paragraph 10, and Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 22.

12 — Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraphs 13 and 14.

70. That said, I would observe that Article 2(3) of Regulation No 881/2002, by prohibiting in general terms, in observance of the text of Resolution 1390 (2002), the making available of economic resources to the persons mentioned in Annex I to that regulation, imposes a relative prohibition of disposal that of course covers every act which, under the national law of a Member State, may be prescribed for the transfer of ownership, or even mere possession, of immovable property.

itself problematical, of the 'fair price' of a property; above all, it would be easy to evade that prohibition by including fraudulent terms when drafting contracts. Second, the fact that a transaction (for example, a sale) may be characterised by economic equilibrium between the contractual performances does not mean that a person appearing in that list who thereby secures availability of a property will not nevertheless be able to obtain, by a subsequent act of disposal of the property, sums that may be greater than those expended in completing that transaction.

71. In my opinion, the fact that the property in question has been made available (in this case sold) against payment of a consideration which may be regarded as adequate is entirely irrelevant. The lack of an economic imbalance between the consideration and counter-consideration is not something for which Article 2(3) of Regulation No 881/2002 makes any provision. It is the making available of the property that is prohibited as such, regardless therefore of the economic values at stake.

73. In line with the submissions of the Italian and German Governments, and of the Commission, I also consider that the fact that, this case being concerned with immovable property, the contract of sale was concluded before the date on which the prohibition in Article 2(3) of Regulation No 881/2002 became applicable to the buyer does not prevent that prohibition from applying to those acts which, on that date, still remained to be perfected for the purposes of transferring ownership, such as, for example, the conveyance of the property and, in any event, the registration of the transfer of ownership in the Land Register.

72. That, moreover, is entirely understandable. First, if it were made conditional upon a finding of economic imbalance between the agreed contractual performances (favouring the person appearing in the list in Annex I to the regulation), application of the prohibition would not be automatic, although that is what is required for effective pursuit of the objectives of Regulation No 881/2002, but would be dependent on an evaluation, in

74. As rightly observed by the Commission, that view is supported by Article 9 of Regulation No 881/2002, according to which '[t]his Regulation shall apply notwithstanding

any rights conferred or obligations imposed by any international agreement signed or any contract entered into or any licence or permit granted before the entry into force of this Regulation’.

75. That provision implies, in my opinion, that the prohibition in Article 2(3) of Regulation No 881/2002 may also operate in such a way as to prevent the performance of obligations, and satisfaction of the corresponding rights, deriving from a contract concluded before the entry into force of the regulation or in any event, if later, before the inclusion of the buyer in the list in Annex I.

76. That interpretation is based on consideration of all the language versions of Regulation No 881/2002, which shows that those versions (the Greek and the Dutch) in which Article 9 is framed in such a way as to imply precisely the contrary interpretation, whereby the prohibitions imposed by the regulation apply *without prejudice to* (rather than *notwithstanding*) the rights and obligations deriving from agreements, contracts, licences or permissions pre-dating the entry into force of that regulation, are totally isolated.

77. I also consider it noteworthy that where the Community legislature, in regulations by

which it introduced prohibitions of a similar nature, sought to exempt from the application of the prohibitions the performance of contracts concluded before a specified date, it did so expressly. For example, in Regulation No 3155/90¹³ — Article 1(1) of which, giving effect to Security Council Resolution 661 (1990), extended the embargo imposed by Regulation No 2340/90 against Iraq and Kuwait to the provision of non-financial services having the object or effect of favouring the economy of such countries — it was made clear in Article 1(2) that ‘[t]he prohibition shall not apply to ... non-financial services resulting from contracts or amendments to contracts concluded before the entry into force of the ban laid down in Regulation (EEC) No 2340/90, where their execution began before that date’. On that occasion therefore, the Community legislature expressly allowed performance of contracts concluded before a specified date, albeit imposing the precondition that, by that date, implementation thereof should at least have started.

78. The approach adopted in Article 9 of Regulation No 881/2002, on the other hand, clearly consists in establishing that the effect of the prohibitions laid down by that regulation extends to the performance of contracts concluded before the entry into force of that regulation or, if later (as in this

13 — Council Regulation (EEC) No 3155/90 of 29 October 1990 extending and amending Regulation (EEC) No 2340/90 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 304, p. 1).

case), the date on which the name of one of the contracting parties was included in the list in Annex I. That, moreover, is consistent with the objective pursued by Regulation No 881/2002, which is immediately to prevent persons associated with Usama bin Laden, the Al-Qaida network or the Taliban from having any financial or economic resources at their disposal, in order to prevent the financing of terrorist activities. That objective would be less efficiently pursued if such persons were allowed to complete transactions entered into before their names were included in the list in Annex I.

Moreover, Article 2a — inserted in Regulation No 881/2002 by Regulation No 561/2003 in order to implement in the Community Security Council Resolution 1452 (2002) — merely reproduces verbatim, in paragraph 4, the wording of paragraph 2 of that resolution, which, as emphasised by the Commission, does not provide for any exception of that kind.¹⁴

79. That approach is subject to only one exception, expressly provided for in Article 2a(4)(b) of Regulation No 881/2002, which excludes the application of the prohibition of making funds available laid down in Article 2(2) of that regulation to the payment into frozen accounts of 'payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject' to freezing, without prejudice, of course, to the freezing of the sums thus paid.

81. As regards, next, the possible impact of payment of the sale price before the prohibition in Article 2(3) of Regulation No 881/2002 came into force, I would observe that such a circumstance cannot lead to the conclusion that the prohibition does not apply to subsequent acts of contractual performance. As we have seen, Article 9 of the regulation does not make any exception for the performance of contracts concluded on a date prior to the prohibition, in contrast to the provisions of Article 1(2) of Regulation No 3155/90 (see point 77 above), even where the performance of such contracts commenced before the prohibition came into force.

80. Article 2a(4) does not however lay down any analogous rule allowing an economic resource such as immovable property to be made available, without prejudice to its subsequent freezing, when to do so merely constitutes performance of a contract concluded before the prohibition referred to in Article 2(3) of the regulation came into force.

14 — The failure to include an exception for the making available of property in performance of a contract pre-dating the prohibition — without prejudice to the freezing of the property itself in accordance with Article 2(1) of Regulation No 881/2002 — may be explained by the fact that such freezing (a term defined in Article 1(4) of the regulation) does not imply physical dispossession but only, in essence, a prohibition of using the property in order to obtain funds, goods or services. Therefore, in contrast to the freezing of funds paid into bank accounts, which prevents the account holder from using the funds paid into it, the freezing of property does not adequately ensure that the property made available to the beneficiary cannot in any event be used by him in such a way as to obtain funds, goods or services.

82. I consider therefore that the literal, contextual and teleological interpretation of Article 2(3) of Regulation No 881/2002 suggests that the two preliminary questions should be answered to the effect that that provision prohibits

would as a result attach to the sellers, under German law, to repay the sale price to the buyer. The referring court wonders whether such difficulties might not prompt the conclusion that the prohibition in Article 2(3) of Regulation No 881/2002 does not apply to a registration in the Land Register which represents implementation of a contract of sale concluded by the buyer before that prohibition came into force.

— both the conclusion of an agreement for the transfer of ownership of immovable property to a person listed in Annex I to the regulation, in implementation of a contract of sale entered into before that person was included in the list,

— and the registration of that transfer in the Land Register, in implementation of a contract of sale and an agreement for transfer of ownership, both of which were concluded before that inclusion in the list,

and that is so regardless of whether there is an economic balance between the value of the property sold and the agreed sale price, even if that price has been paid into a notarial trust account or paid to the seller before the date of inclusion in the list.

83. However, the national court states that such an approach would give rise to legal difficulties concerning the obligation which

84. Before examining the difficulties alluded to, I must emphasise that even if, in this case, that regulation prevents transcription of the transfer in question in favour of buyer No 3, it does not in itself bring about the nullity or cancellation of the sale contract and the conveyance entered into between the parties before that buyer was entered in the above-mentioned list or, therefore, the sellers' obligation to repay the sale price. The prohibition of making economic resources available to buyer No 3 is a measure of an urgent and temporary nature, which is valid only for such time as the name of that buyer remains on the list, and, as already indicated, that list is subject to regular periodical updating. The regulation in question therefore allows national law to operate, in a case such as this, by establishing consequences other than nullity or the cancellation of prior acts-in-the-law, such as suspension of the procedure for registration and recognition

that such acts are capable of constituting a valid basis for the subsequent exercise by the buyers of those rights that do not presuppose registration in the Land Register and which had already been acquired through partial execution of those acts prior to the supervening prohibition imposed by the regulation.

85. A different approach would be necessary, should it be the case — which it is not the responsibility of the Court to verify — that, under German law, the coming into being of that prohibition, *which temporarily prevents registration*, has the effect of rendering void or cancelling the contract of sale and the conveyance, with a resultant obligation to repay the price already paid. Any difficulties which might arise in such a case cannot of course have any impact on the interpretation of the scope of any provisions of that regulation.

86. Having given that clarification, I shall examine the difficulties evoked by the national court, not without emphasising, however, that the dispute pending before it is concerned with the legality of the refusal of a public authority to register the transfer of ownership of the immovable property in question in the Land Register, not the repayment of the sale price.

87. In the first place, the national court observes that execution of the sellers'

obligation to return the sale price (an obligation which, for the reasons indicated in the foregoing points, I shall regard as hypothetical) might conflict with the prohibition of making available funds laid down in Article 2(2) of Regulation No 881/2002.

88. It seems to me that there are no real difficulties in that regard. As we have seen, Article 2a(4)(b) of that regulation allows the payment into frozen accounts of funds owing under contracts, agreements or obligations that arose prior to the date on which those accounts were frozen. In any event, the impossibility, under Article 2(2), of making the sale price available to a buyer listed in Annex I cannot prompt a different answer to the two preliminary questions from the Kammergericht but may merely be a reason for seeking a practical solution under German law which might allow the sellers to fulfil their obligation of repayment without, however, infringing the last-mentioned provision.

89. Second, the national court has doubts as to the way in which the Article 2(2) prohibition of making funds available would operate in relation to repayment of the sale

price, where the purchase was made by more than one person or — as in this case — a partnership, and only one of those persons appears in the list in question.

90. Like the German Government, I would point out that the solution to such a problem must be sought in domestic law, as long as the requirements of the regulation are complied with, and such a problem cannot have any impact on the interpretation of the regulation or, therefore, on the answer to be given to the questions submitted to the Court.

91. However, I think it may be useful to point out that, for the purpose of determining how the sellers might fulfil their obligation to return the sale price to the buyers, which must be a matter of domestic law, help may be found in the provisions of Articles 5(1)(a) and 8 of Regulation No 881/2002.

92. Article 5(1)(a) of Regulation No 881/2002 requires, among others, 'natural ... persons', '[w]ithout prejudice to the applicable rules concerning reporting, confidentiality and professional secrecy', to

'provide immediately any information which would facilitate compliance with this Regulation, such as accounts and amounts frozen in accordance with Article 2, to the competent authorities of the Member States listed in Annex II where they are resident or located, and, directly or through these competent authorities, to the Commission'. It may be inferred from the above, in this case, that the sellers, to the extent to which they are required under national law to repay the sale price to the buyers, have an obligation to give notice to the Deutsche Bundesbank (mentioned as the competent authority for Germany in Annex II) of the existence of their obligation to repay the sale price to buyer No 3.

93. Article 8 of Regulation No 881/2002 places on the Commission and the Member States an obligation to disclose to each other 'relevant information at their disposal in connection with this Regulation, in particular information received in accordance with Article 5 and in respect of violation and *enforcement problems* and judgments handed down by national courts'.¹⁵

94. If, therefore, actual difficulties arise for the national authorities in determining the

¹⁵ — Emphasis added.

procedure to be followed in the present case regarding repayment of the sale price to the buyers, those authorities may give notice thereof to the Commission and seek with it an appropriate solution by virtue of the duty of sincere mutual cooperation incumbent on the Member States and the Commission under Article 10 EC.

produce income for the buyers. The restriction on their right to dispose of their property deriving from application to this case of the prohibitions in Regulation No 881/2002 would not therefore be proportionate to the aim pursued by that regulation.

95. Finally, there remains to be examined the question, raised at the hearing by the sellers and notary, of the compatibility of applying to the present case the prohibition in Article 2(3) of Regulation No 881/2002 with the fundamental right of the sellers to dispose of their own property.

96. The sellers allege that they have already spent the proceeds of sale to repay debts and finance the restructuring of other buildings. The obligation to repay the sale price to the buyers, resulting from the impossibility of completing the transfer of ownership, would, they say, create great difficulties for them, and refusal of the request for registration would not be conducive to the fight against terrorism, given that the property in question has for years housed a mosque and does not

97. The notary, for his part, stated that possession of the property was transferred to the buyers with effect from May 2001 and that since then they have had enjoyment of it and been able to use it in the economic sense, for example by renting it out. What the buyers are not entitled to do, in the absence of registration of the transfer of ownership in the Land Register, is to resell or mortgage the property. Execution of the sale contract by registration of the transfer would not change the situation as regards the possibility of economic enjoyment of the property by the buyers. Registration would be a prelude to freezing of the immovable property, which would prevent the sale or mortgaging of it, and would thus involve a lesser risk to security and public order than the present situation, where use of the property by the buyers could not be frozen, since it is not registered in their name. According to the notary, therefore, the prohibition of effecting registration in this case would essentially result in the freezing of the sellers' property, which would not be consistent with the principle of proportionality, since the objective of Regulation

No 881/2002 would be more efficiently pursued if registration were allowed.

98. In that connection, I would point out that, according to settled case-law, the fundamental right to property, protected in the Community legal order on the basis of the principles common to the constitutions of the Member States and incorporated in the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, is not an absolute right and its exercise may be subject to restrictions justified by objectives in the general interest pursued by the Community, provided that such restrictions do not constitute interference with the rights of the owner which is intolerable and disproportionate to the aims pursued, in such a way as to impinge upon the very substance of the right to property.¹⁶

99. As the Court observed in *Bosphorus*,¹⁷ any restrictive measure of an economic nature has, by definition, consequences which affect the right to property, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of those measures.

100. I would also observe that the importance of the objectives pursued by Regulation No 881/2002 is such as to justify possible negative consequences, even of a substantial nature, for certain operators.¹⁸ The fight against international terrorism, in particular by means of exclusion measures against all those who have been identified as being associated with members of the Taliban or the Al-Qaida organisation and are regarded as having participated in the financing, planning, facilitation, preparation or perpetration of terrorist acts (see recital 3 in the preamble to that regulation), is clearly a fundamental public-interest objective, pursued not only by the European Community but also, on a world scale, by the international community under the auspices of the United Nations.

101. In view of that objective, I, like the Commission and the German Government, consider that application of the prohibition in Article 2(3) of Regulation No 881/2002 in the present case in such a way as to prevent registration of the transfer of title to the immovable property in question to the buyers cannot, in the light of the information provided by the national court, be regarded as an intolerable and disproportionate restriction on the sellers' right to property.

¹⁶ — See Case 44/79 *Hauer* [1979] ECR 3727, paragraphs 17 and 23, and *Bosphorus*, paragraph 21.

¹⁷ — Paragraph 22.

¹⁸ — See, by analogy, *Bosphorus*, paragraph 23.

102. The difficulties complained of by the sellers concerning the supposed obligation to repay the sale price are not, moreover, as I have indicated above, a direct consequence of the regulation or of the abovementioned prohibitions but rather derive from the application of provisions of domestic law. In that connection, it is useful to bear in mind that, because the requirements inherent in the protection of fundamental rights in the Community legal order are also binding on the Member States when they implement the Community rules in question, those States are in any event required, so far as is possible, to apply those rules in accordance with those requirements.¹⁹ It will therefore be incumbent on the competent national authorities, in determining the civil consequences under domestic law of the temporary impossibility of effecting registration as a result of Regulation No 881/2002, to interpret and apply the provisions of national law in a manner consonant with the requirements of the protection of fundamental rights.²⁰

103. Some more serious doubt as to the proportionality of the restriction represented

by application of the prohibition in Article 2(3) of Regulation No 881/2002 in the present case so as to prevent registration may nevertheless arise in relation to a factual circumstance to which the national court did not refer in its order for reference but which, on the other hand, the sellers and the notary raised at the hearing. I refer to the claim that the buyers have been in possession of the property in question since May 2001, that is to say, long before the measures provided for in Regulation No 881/2002 became applicable to buyer No 3.

104. In that regard, I would observe that, if that situation is confirmed (a matter for the national court), the property will have been available to the buyers, within the meaning of Article 2(3) of Regulation No 881/2002, since before that time. The notary contended before the Court of Justice that the only thing that perfection of the sale by registration would additionally confer on the buyers, as compared with the present situation, would be the power to sell and mortgage the property. However, that is a power the exercise of which would in any event be suspended by the freezing of economic resources imposed by Article 2(1) of Regulation No 881/2002, the Land Registry being unable to agree to registration (in a legally effective manner) of transactions of that kind in respect of property frozen in that way.

¹⁹ — Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19.

²⁰ — I would also observe that, even in a case where domestic law rendered void or cancelled the sale contract and required the sellers to repay the sale price already received, the latter, still being the owners of the property, could sell it again and thereby obtain funds to be used for the repayment of any debt, for which reason their legal position would not be intolerably impaired.

105. Therefore, whilst the notary's contention that registration of the transfer of ownership in question would make it possible more effectively to prevent the financing of terrorist activity than if registration were refused would seem unacceptable — it is clear, in fact, that the freezing of economic resources referred to in Article 2(1) of Regulation No 881/2002 would at present extend to the property at issue if the latter were available to, among others, buyer No 3, regardless of the fact that the sellers remained the owners of it — the question may be asked whether the application in this case of the prohibition in Article 2(3) of that regulation so as to prevent registration might not, ultimately, amount to a restriction of the sellers' right to property which is not really necessary for the purposes of the public-interest objective pursued. That is so because the registration in question would not specifically confer on buyers, in view of the other provisions of Article 2(1) of the regulation, any entitlement to obtain greater utility from the property than they have enjoyed since a time prior to the inclusion of one of them in the list in Annex I.

the circumstances are such that it should be resolved by the Court in the present preliminary-ruling proceedings. Not only does that question fall outside the scope of the Kammergericht's order for reference but in addition there is no certainty, on the basis of the documents before the Court, that possession of the property in question was, as alleged at the hearing, actually transferred to the buyers on a date before the inclusion of buyer No 3 in the list in Annex I; nor has a sufficient account been given of the relevant provisions of German law such as to facilitate an assessment as to whether or not the requested registration would in fact enhance the buyers' economic enjoyment of the property, as compared with the present situation and having regard to the freezing of economic resources under Article 2(1) of the regulation.

106. However, although the question is undoubtedly delicate, I do not consider that

107. It will therefore be for the national court, before giving its decision in the proceedings brought by the notary on the basis of the answer to be given by the Court of Justice to the two preliminary questions, to clarify those matters of fact and of law and, in the light thereof, to consider whether application of the prohibition in Article 2(3) of the regulation so as to preclude registration constitutes a restriction on the exercise of the sellers' right to property that is consonant with the principle of proportionality.

V — Conclusion

108. In the light of the foregoing considerations, I propose that the Court give the following answer to the questions submitted to it by the Kammergericht Berlin by orders of 21 and 23 February 2006:

Article 2(3) of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, prohibits

- both the conclusion of an agreement for the transfer of ownership of immovable property to a person listed in Annex I to the regulation, in implementation of a contract of sale entered into before that person was included in the list,

- and the registration of that transfer in the Land Register, in implementation of a contract of sale and an agreement for transfer of ownership, both of which were concluded before that inclusion in the list,

and that is so regardless of whether there is an economic balance between the value of the property sold and the agreed sale price, even if that price has been paid into a notarial trust account or paid to the seller before the date of inclusion in the list.