ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

11 July 2018 *

(Common foreign and security policy — Restrictive measures taken in view of the situation in Ukraine — Freezing of funds — List of persons, entities and bodies subject to the freezing of funds and economic resources — Retention of the applicant's name on the list — Legal basis — Manifest error of assessment — Rights of defence — Right to effective judicial protection — Right to property — Right to reputation — Plea of illegality)

In Case T-240/16,

Andriy Klyuyev, residing in Donetsk (Ukraine), represented by B. Kennelly, QC, J. Pobjoy, Barrister, R. Gherson and T. Garner, Solicitors,

applicant,

v

Council of the European Union, represented by P. Mahnič Bruni and J.-P. Hix, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU seeking the annulment, first, of Council Decision (CFSP) 2016/318 of 4 March 2016 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2016 L 60, p. 76) and Council Implementing Regulation (EU) 2016/311 of 4 March 2016 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2016 L 60, p. 1) and, second, of Council Decision (CFSP) 2017/381 of 3 March 2017 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2017 L 58, p. 34) and Council Implementing Regulation (EU) 2017/374 of

* Language of the case: English.

3 March 2017 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2017 L 58, p. 1), in so far as the applicant's name was retained on the list of persons, entities and bodies subject to those restrictive measures,

THE GENERAL COURT (Sixth Chamber),

composed of G. Berardis (Rapporteur), President, D. Spielmann and Z. Csehi, Judges,

Registrar: N. Schall, Administrator,

having regard to the written part of the procedure and further to the hearing on 28 February 2018,

gives the following

Judgment

Background to the dispute

1 The present case has been brought against the background of the restrictive measures adopted against certain persons, entities and bodies in view of the situation in Ukraine, following the suppression of demonstrations in Independence Square in Kiev (Ukraine).

2 On 5 March 2014, the Council of the European Union adopted Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 26). On the same day, the Council adopted Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 1).

3 The applicant, Andriy Klyuyev, is the former Head of Administration of the President of Ukraine, Mr Yanukovych.

4 Recitals 1 and 2 of Decision 2014/119 read:

'(1) On 20 February 2014, the Council condemned in the strongest terms all use of violence in Ukraine. It called for an immediate end to the violence in Ukraine, and full respect for human rights and fundamental freedoms. It called upon the Ukrainian Government to exercise maximum restraint and opposition leaders to distance themselves from those who resort to radical action, including violence.

(2) On 3 March 2014, the Council [decided] to focus restrictive measures on the freezing and recovery of assets of persons identified as responsible for the

misappropriation of Ukrainian State funds and persons responsible for human rights violations, with a view to consolidating and supporting the rule of law and respect for human rights in Ukraine.'

5 Article 1(1) and (2) of Decision 2014/119 provides as follows:

'1. All funds and economic resources belonging to, owned, held or controlled by persons having been identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations in Ukraine, and natural or legal persons, entities or bodies associated with them, as listed in the Annex, shall be frozen.

2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies listed in the Annex.'

6 The detailed rules for the freezing of those funds are set out in the subsequent paragraphs of that article.

7 In accordance with Decision 2014/119, Regulation No 208/2014 requires measures for the freezing of funds to be adopted and lays down the detailed rules governing the freezing of funds in terms which are essentially identical to those used in the decision.

8 The names of the persons covered by Decision 2014/119 and Regulation No 208/2014 appear on the list in the annex to Decision 2014/119 and in the identical list in Annex I to Regulation No 208/2014 ('the list') along with, in particular, the reasons for their inclusion on the list.

9 The applicant's name appears on the list, together with the identifying information 'former Head of Administration of President of Ukraine' and the following statement of reasons:

'Person subject to investigation in Ukraine for involvement in crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine.'

10 By application lodged at the Registry of the General Court on 15 May 2014, the applicant brought an action, registered as Case T-340/14, seeking the annulment of Decision 2014/119 and Regulation No 208/2014.

11 On 29 January 2015, the Council adopted Decision (CFSP) 2015/143 amending Decision 2014/119 (OJ 2015 L 24, p. 16) and Regulation (EU) 2015/138 amending Regulation No 208/2014 (OJ 2015 L 24, p. 1).

12 Decision 2015/143 clarified, with effect from 31 January 2015, the criteria for the designation of the persons subject to the freezing of funds. In particular, Article 1(1) of Decision 2014/119 was replaced by the following:

‘1. All funds and economic resources belonging to, owned, held or controlled by persons having been identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations in Ukraine, and natural or legal persons, entities or bodies associated with them, as listed in the Annex, shall be frozen.

For the purpose of this Decision, persons identified as responsible for the misappropriation of Ukrainian State funds include persons subject to investigation by the Ukrainian authorities:

(a) for the misappropriation of Ukrainian State funds or assets, or being an accomplice thereto; or

(b) for the abuse of office as a public office-holder in order to procure an unjustified advantage for him- or herself or for a third party, and thereby causing a loss to Ukrainian State funds or assets, or being an accomplice thereto.’

13 Regulation 2015/138 amended Regulation No 208/2014 in accordance with Decision 2015/143.

14 Decision 2014/119 and Regulation No 208/2014 were subsequently amended by Council Decision (CFSP) 2015/364 of 5 March 2015 (OJ 2015 L 62, p. 25) and by Council Implementing Regulation (EU) 2015/357 of 5 March 2015 implementing Regulation No 208/2014 (OJ 2015 L 62, p. 1), respectively (together, ‘the March 2015 measures’). Decision 2015/364 amended Article 5 of Decision 2014/119, extending the restrictive measures in respect of the applicant until 6 June 2015. Implementing Regulation 2015/357 therefore replaced Annex I to Regulation No 208/2014.

15 By the March 2015 measures, the applicant’s name was retained on the list with the identifying information ‘former Head of Administration of President of Ukraine’ and a new statement of reasons:

‘Person subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets and in connection with the misuse of office by a public office-holder to procure an unjustified advantage for himself or a third party thereby causing a loss to the Ukrainian public budget or assets.’

16 By letter of 6 March 2015, the Council sent the applicant’s lawyers a copy of the March 2015 measures, informing them that the applicant’s name was being retained on the list and responding to their observations of 17 February 2015.

17 On 15 May 2015, the applicant modified the form of order and pleas in law in Case T-340/14 so that his action would also be directed at the annulment of the March 2015 measures, in so far as they concerned him.

18 By application lodged at the Court Registry on the same day, the applicant brought an action, registered as Case T-244/15, seeking the annulment of those measures in so far as they concerned him.

19 By order of 11 September 2015, *Klyuyev* v *Council* (T-244/15, not published, EU:T:2015:706), the Court dismissed the action seeking annulment of the March 2015 measures as manifestly inadmissible by reason of *lis pendens*.

20 By letter of 6 November 2015, the Council sent the applicant a copy of correspondence dated 4 September 2015 from the Prosecutor General's Office of Ukraine ('the PGO') addressed to the High Representative of the European Union for Foreign Affairs and Security Policy. By letter of 30 November 2015, the applicant submitted his observations.

21 By letter of 15 December 2015, the Council sent the applicant a copy of correspondence dated 30 November 2015 from the PGO. In that letter, the Council notified the applicant of its intention to maintain the restrictive measures directed against him and informed him of the time limit for submitting observations for the purpose of the annual review. By letters of 4 January and 3 February 2016, the applicant submitted his observations.

22 On 4 March 2016, the Council adopted Decision (CFSP) 2016/318 amending Decision 2014/119 (OJ 2016 L 60, p. 76) and Implementing Regulation (EU) 2016/311 implementing Regulation No 208/2014 (OJ 2016 L 60, p. 1) (together, 'the March 2016 measures').

23 By the March 2016 measures, the application of the restrictive measures concerning the applicant, among others, was extended to 6 March 2017. The statement of reasons for the applicant's designation, as it appeared in the March 2015 measures, was not amended.

24 By letter of 7 March 2016, the Council informed the applicant that the restrictive measures against him would be maintained. It went on to reply to the observations which the applicant had submitted in previous correspondence and sent him a copy of the March 2016 measures.

25 By judgment of 15 September 2016, *Klyuyev* v *Council* (T-340/14, EU:T:2016:496), the Court annulled Decision 2014/119 and Regulation No 208/2014, in so far as they concerned the applicant, and dismissed the action in respect of the March 2015 measures.

Events subsequent to the bringing of the present action

26 By letter of 12 December 2016, the Council informed the applicant's lawyers that it was considering renewing the restrictive measures against him and enclosed two letters from the PGO, one dated 25 July 2016, the other dated 16 November 2016, reiterating the deadline for submitting observations in connection with the annual

review of the restrictive measures. The applicant submitted such observations to the Council by letter of 12 January 2017.

27 By letter of 9 February 2017, the Council sent the applicant additional documents from the Ukrainian authorities. The applicant himself replied by letter of 14 February 2017.

28 On 3 March 2016, the Council adopted Decision (CFSP) 2017/381 amending Decision 2014/119 (OJ 2017 L 58, p. 34) and Implementing Regulation (EU) 2017/374 implementing Regulation No 208/2014 (OJ 2017 L 58, p. 1, together 'the March 2017 measures').

29 By the March 2017 measures, the application of the restrictive measures concerning, among others, the applicant was extended to 6 March 2018. The statement of reasons for the applicant's designation, as set out in the March 2015 and March 2016 measures, was not amended.

30 By letter of 6 March 2017, the Council informed the applicant that the restrictive measures against him were being maintained. It also responded to the observations which the applicant had formulated in previous correspondence and sent him copies of the March 2017 measures. It also stated the deadline for him to submit observations prior to a decision being taken regarding the possible retention of his name on the list.

Procedure and forms of order sought

31 The applicant brought the present action by application lodged at the Court Registry on 14 May 2016.

32 Upon the alteration of the composition of the chambers of the Court, the Judge-Rapporteur was assigned to the Sixth Chamber, to which this case was consequently allocated.

33 On 22 September 2016, the Council lodged its defence. On 26 September 2016, it submitted a reasoned request, pursuant to Article 66 of the Rules of Procedure of the Court, for the content of certain documents annexed to the application and to the defence not to be cited in documents relating to the case to which the public has access.

34 A reply was lodged on 21 November 2016.

35 A rejoinder was lodged on 2 February 2017.

36 On 6 February 2017, the Council submitted a similar application to that mentioned in paragraph 33 above for the content of certain documents enclosed in the rejoinder not to be cited in the documents relating to the case to which the public has access.

37 The written part of the procedure was closed on that date.

38 By document lodged at the Court Registry on 24 February 2017, the applicant requested that a hearing be held.

39 On 14 May 2017, on the basis of Article 86 of the Rules of Procedure, the applicant submitted a statement of modification so as also to seek annulment of the March 2017 measures, in so far as they concerned him.

40 By document lodged at the Court Registry on 6 June 2017, the Council submitted its observations on the statement of modification.

41 On 15 June 2017, the Council submitted a similar application to that mentioned in paragraph 33 above for the content of certain annexes to the statement of modification and of certain sections of the observations on that statement not to be cited in the documents relating to the case to which the public has access.

42 On a proposal from the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral part of the procedure.

43 The parties made oral submissions and replied to questions put by the Court at the hearing on 28 February 2018.

44 In the light of the modification of the application, the applicant claims that the Court should:

– annul the March 2016 and March 2017 measures in so far as they relate to him;

– order the Council to pay the costs.

45 Following clarifications provided at the hearing in reply to questions from the Court, the Council claims that the Court should:

– dismiss the action;

– in the alternative, if the March 2017 measures must be annulled as regards the applicant, order that the effects of Decision 2017/381 be maintained until the annulment in part of Implementing Regulation 2017/374 takes effect;

– order the applicant to pay the costs.

Law

The claims for annulment of the March 2016 measures, in so far as they concern the applicant

46 In support of his action for annulment, the applicant puts forward, in his application, five pleas in law alleging, first, the lack of a legal basis, second, infringement of the rights under Article 6 TEU, read together with Articles 2 and 3 TEU and of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter'), third, a manifest error of assessment, fourth, infringement of the rights of the defence, the principle of sound administration and the right to effective judicial protection and, fifth, infringement of the right to property and the right to reputation.

47 In the alternative, the applicant raises a plea of illegality under Article 277 TFEU in respect of the designation criterion laid down in Article 1(1) of Decision 2014/119, as amended by Decision 2015/143, and in Article 3(1) of Regulation No 208/2014, as amended by Regulation 2015/138 ('the relevant criterion'). The applicant submits that the relevant criterion lacks a proper legal basis or is disproportionate to the objectives pursued by the measures in question, and claims that that criterion should be declared inapplicable to him.

48 It is appropriate to examine the pleas in the order set out in the application, followed by the plea of illegality pleaded by the applicant in the alternative.

The first plea in law, alleging the absence of a legal basis

49 The applicant claims that Article 29 TEU cannot constitute a valid legal basis for the maintenance of restrictive measures against him in the decisions on the common foreign and security policy (CSFP) that are at issue. Those measures are inconsistent with the objectives referred to in Decision 2014/119, as amended, which are the protection of democracy and of the rule of law and observance of human rights. Since Article 215(2) TFEU presupposes the existence of a valid CFSP decision if regulations are to be adopted on the basis of that provision, Implementing Regulations 2016/311 and 2017/374 equally have no legal basis.

50 First of all, the applicant argues that the Council has failed to provide any evidence to show that he has undermined democracy, the rule of law or human rights in Ukraine, as required by Article 29 TEU. The legal bases used by the Council could support the restrictive measures at issue only if the Council had demonstrated how the applicant's alleged conduct undermined democracy, the rule of law or human rights, or how the freezing of his funds might advance any of those objectives.

51 Second, the applicant maintains that the Council disregarded evidence indicating that the new regime in Ukraine was undermining democracy and the rule of law,

and was flagrantly and systematically violating human rights, both with specific regard to the applicant and in general.

52 More generally, the applicant points to impediments to the proper functioning of the Ukrainian judicial system and to a failure to observe the right to a fair trial. This is compounded by a judiciary lacking independence, which impairs its impartiality, in particular with regard to the prosecution of officials of the former government, as the High Commissioner of the United Nations responsible for a Human Rights Monitoring Mission in Ukraine ('the High Commissioner') recognised in a report covering the period from 16 February to 15 May 2015. Similar findings were made in the United States of America State Department Report into the Ukraine in 2015. The same considerations apply to the PGO, which in addition to not being responsible for its acts is susceptible to political pressure from the current regime, as is apparent from a report published in December 2014 by the Centre for Political and Legal Reforms in Kiev.

53 According to the applicant, the existence of systemic problems within the PGO, which is the sole source on which the Council has systematically and exclusively relied, has been confirmed by the resignation, on 19 February 2016, of the Prosecutor General, Mr V.S., amid allegations of corruption and following pressure from President P.P., which was commended by the Vice President of the United States.

54 Moreover, the applicant submits that the mere fact that Ukraine is a party to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') is not sufficient to ensure that fundamental rights are respected in that country.

55 The applicant also refers to the fact that in October 2014 the Law on government integrity, known as the 'Law on purging the government' ('Law on purging the government'), was extended to cover State officials and enforcement agencies more generally. That law allows certain persons, including judges and prosecutors, to be dismissed from public office on the ground of their past conduct. Serious shortcomings in that law were recognised by the European Commission for Democracy through Law ('the Venice Commission') in an interim opinion of 16 December 2014. In an opinion of 23 March 2015 published jointly with the Directorate-General of Human Rights of the Council of Europe, the Venice Commission again raised concerns as to the independence of the judiciary in Ukraine.

56 Furthermore, the applicant claims that the accusations made against him infringe his right to the presumption of innocence as interpreted by the European Court of Human Rights on numerous occasions. The letters from the PGO on which the Council relies violate that right.

57 The Council disputes the applicant's arguments.

58 As a preliminary matter, the Court notes that the objectives of the EU Treaty concerning the CFSP are stated, in particular, in Article 21(2)(b) TEU, which provides as follows:

‘2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

…

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law …’

59 That objective was mentioned in recital 2 of Decision 2014/119, as set out in paragraph 4 above.

60 It must be ascertained whether the relevant criterion for the persons targeted by the restrictive measures adopted by the Council set out in paragraph 12 above, as applied to the applicant, corresponds to the objective, referred to in recital 2 of Decision 2014/119, of consolidating and supporting the rule of law in Ukraine.

61 In that respect, it must be noted that the case-law has established that objectives such as those mentioned in Article 21(2)(b) TEU were intended to be achieved by an asset-freeze, the scope of which was, as in this case, restricted to the persons identified as being responsible for misappropriation of public funds and to persons, entities or bodies associated with them, that is to say, to the persons whose actions were liable to have jeopardised the proper functioning of public institutions and bodies linked to them (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 85; see also, to that effect, judgments of 27 February 2014, *Ezz and Others* v *Council*, T-256/11, EU:T:2014:93, paragraph 44, and of 14 April 2016, *Ben Ali* v *Council*, T-200/14, not published, EU:T:2016:216, paragraph 68).

62 In that context, it must be noted that respect for the rule of law is one of the primary values on which the European Union is founded, as is stated in Article 2 TEU, and in the preambles to the EU Treaty and to the Charter. Respect for the rule of law constitutes, moreover, a prerequisite for accession to the European Union, pursuant to Article 49 TEU. The concept of the rule of law is also enshrined in the preamble of the ECHR (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 87).

63 The case-law of the Court of Justice and of the European Court of Human Rights and the work of the Council of Europe, through the offices of the Venice Commission, provide a non-exhaustive list of principles and standards which may fall within the concept of the rule of law. Those include the principles of legality, legal certainty and the prohibition of arbitrary exercise of power by the executive, independent and impartial courts, effective judicial review including respect for fundamental rights, and equality before the law (see, in that respect, the Rule of

Law Checklist adopted by the Venice Commission at its 106th Plenary Session (11-12 March 2016)). Furthermore, in the context of EU external action, a number of legal instruments include reference to the fight against corruption as a principle that is within the scope of the concept of the rule of law (see, for example, Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument (OJ 2006 L 310, p. 1)) (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 88).

64 Moreover, it must be observed that the investigation of economic crimes, such as misappropriation of public funds, is an important means of combating corruption, and that the fight against corruption constitutes, in the context of the external action of the European Union, a principle that is within the scope of the rule of law (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 116).

65 However, while it is conceivable that certain conduct pertaining to acts classifiable as misappropriation of public funds may be capable of undermining the rule of law, it cannot be accepted that any act classifiable as misappropriation of public funds, committed in a non-Member State, justifies EU action with the objective of consolidating and supporting the rule of law in that country, using the powers of the European Union under the CFSP. Before it can be established that a misappropriation of public funds is capable of justifying EU action under the CFSP, based on the objective of consolidating and supporting the rule of law, it is, at the very least, necessary that the disputed acts should be such as to undermine the legal and institutional foundations of the country concerned (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 89).

66 It follows that the relevant criterion can be considered to be compatible with legal order of the European Union only to the extent that it is possible to attribute to it a meaning that is compatible with the requirements of the higher rules with which it must comply, and more specifically with the objective of consolidating and supporting the rule of law in Ukraine. Furthermore, a consequence of that interpretation is that the broad discretion enjoyed by the Council in relation to the definition of the general designation criteria can be respected, while review, in principle full review, of the lawfulness of EU measures in the light of fundamental rights is ensured (see judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 90 and the case-law cited).

67 Consequently, the relevant criterion must be interpreted as not concerning, in abstract terms, any act classifiable as misappropriation of public funds, but rather as concerning acts classifiable as misappropriation of public funds or assets which, having regard to the amount or the type of funds or assets misappropriated or to the context in which the offence took place, are, at the very least, such as to undermine the legal and institutional foundations of Ukraine, and in particular the principles of legality, prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law and, ultimately, to undermine

respect for the rule of law in that country. As thus interpreted, that criterion is compatible with and proportionate to the relevant objectives of the EU Treaty (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 91).

68 In the present case, the facts on the basis of which the applicant is being investigated by the Ukrainian authorities concern the misappropriation of significant amounts of public funds, amounting to millions of Ukrainian hryvnias (UAH) in the context of the procedure mentioned in the letters from the PGO on which the Council relied. Furthermore, those offences have a wider context, in that a significant section of the former Ukrainian leadership — to which the applicant belongs as the former head of the Presidential Administration of Ukraine — is suspected of having committed serious crimes in the management of public resources, thereby seriously threatening the legal and institutional foundations of the country and undermining, inter alia, the principles of legality, the prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law (see, by analogy, judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 117).

69 Facilitating the recovery of those funds, together with those allegedly misappropriated by other persons designated by the restrictive measures at issue, falls within the objective of consolidating the rule of law in Ukraine. In that regard, it should be noted, as the Council claims, that the restrictive measures in question facilitate and complement the efforts by the authorities of that country in recovering misappropriated public funds. It follows, in particular, from the letters from the PGO of 4 September and 30 November 2015 that [*confidential*] [1]. Consequently, the Council's decision to freeze funds reinforces the effectiveness of the initiative taken at national level.

70 It follows that, in accordance with the case-law cited in paragraph 61 above, taken as a whole and taking into consideration the role occupied by the applicant within the former Ukrainian leadership, the restrictive measures in question contribute, in an effective manner, to facilitating the prosecution of crimes of misappropriation of public funds that were to the detriment of the Ukrainian institutions and ensure that the Ukrainian authorities can more easily secure restitution of the profits of such misappropriation. That facilitates, in the event that the prosecutions prove successful, the punishment, through the courts of law, of alleged acts of corruption committed by members of the former regime, thereby contributing to the support of the rule of law in that country (see, by analogy, judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 118).

71 As regards the argument that the new Ukrainian government itself undermines the rule of law, it should be noted, as a preliminary matter, that Ukraine has been a Member State of the Council of Europe since 1995 and has ratified the ECHR. In addition, the new Ukrainian regime has been recognised as legitimate by both the

[1] Confidential data omitted.

European Union and the international community (see, to that effect, judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 93).

72 It is true that those circumstances are not sufficient, in themselves, to ensure that the new Ukrainian regime respects the rule of law in every case.

73 However, it must be noted that, in accordance with the case-law, the Court, in its judicial review of restrictive measures, must allow the Council broad discretion for defining the general criteria delineating the category of persons liable to be the subject of such measures (see, to that effect, judgments of 28 November 2013, *Council* v *Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776, paragraph 120, and of 21 April 2015, *Anbouba* v *Council*, C-605/13 P, EU:C:2015:248, paragraph 41).

74 It follows that, in principle, the applicant cannot call into question the Council's political choice to provide support for the new regime, unless it adduces irrefutable evidence of violations of fundamental rights by the new Ukrainian authorities.

75 Although containing criticisms and highlighting certain weaknesses affecting the functioning of the Ukrainian institutions, particularly its judicial system, the evidence on which the applicant relies does not, however, justify the conclusion that the new regime cannot be supported by the European Union.

76 Moreover, the weaknesses in that regard referred to in the documents cited by the applicant are significantly lessened when viewed in the light of the documents cited by the Council in its written submissions and adduced before the Court, which show several improvements made by the new regime.

77 First, as regards the examination of the Law on purging the government by the Venice Commission, the Court notes that the opinion of 16 December 2014, relied on by the applicant, is only an interim opinion of that commission, given that the Venice Commission did not have access, from the Ukrainian authorities, to all the information needed for its examination. However, as a result of these authorities engaging in constructive dialogue for the improvement of the Law on purging the government and, having since given access to the information needed by the Venice Commission to carry out its supervisory role, the Venice Commission adopted a definitive opinion on that law on 19 June 2015. That opinion states that numerous exchanges of views took place and that the Ukrainian authorities proposed amendments to the Law on purging the government. The Venice Commission considers that that law's objectives of protecting society from persons capable of posing a threat to the new democratic regime and fighting against corruption, are legitimate. Although the Venice Commission points to certain areas for improvement and monitoring, it also highlights the improvements that have already been made to that law, notably following the adoption of its interim opinion.

78 In addition, as the Council claims, the Venice Commission's opinion of 24 July 2015 concerning proposed constitutional amendments regarding the judiciary stressed that a new system of prosecution had been proposed and welcomed the fact that the power of the Verkhovna Rada (the Ukrainian parliament) to express no confidence in, and force the resignation of, the Prosecutor General had been removed and the fact that early dismissal from office would only be possible on grounds prescribed by law. The Venice Commission thus considered in that opinion that the proposed reform of the Public Prosecution Office was in line with European standards and with its previous recommendations, and encouraged the Ukrainian parliament to adopt it, despite the fact that one specific recommendation regarding qualified majority voting by the Ukrainian parliament when giving consent to the appointment and dismissal of the Prosecutor General had not been followed.

79 Similarly, in the same opinion, the Venice Commission welcomed the removal of the power of the Ukrainian parliament to appoint judges, the abolition of probationary periods for junior judges as well as abolition of 'breach of oath' as a ground for the dismissal of judges. In the subsequent Secretariat's opinion of 21 December 2015 on the compatibility of the draft Law with the Venice Commission's opinion on the proposed constitutional amendments, the Venice Commission concluded that, with the exception of the recommendation regarding the parliament's voting rules for the election of two members of the High Council of Judiciary and six judges of the Constitutional Court and the nomination and dismissal of the Prosecutor General by the president, all the recommendations formulated in its opinion had been followed. Furthermore, as the Council states, those amendments to the Ukrainian Constitution were ultimately adopted on 2 June 2016.

80 Second, as regards the reports of the High Commissioner on the human rights situation in Ukraine, although the report concerning the period from 16 February to 15 March 2015, in the passage referred to by the applicant, demonstrates, in particular, a concern that threats had been experienced by some Ukrainian judges, it must be noted that that passage concerns only the eastern region of Ukraine, in the throes of a battle for independence. Moreover, that report also mentions the reform of the judicial system which, whilst not perfect, 'brings some positive elements'. Furthermore, as the Council observes, the report of the High Commissioner for the period from 16 February to 16 May 2016 refers to the implementation of the Ukrainian Human Rights Action Plan adopted on 23 November 2015. In addition, that report considers that the establishment, on 29 February 2016, of the State Bureau of Investigation, which is mandated to investigate crimes committed by high-ranking officials, members of law enforcement bodies, judges and members of the National Anti-Corruption Bureau and the Special Anti-Corruption Office of the PGO, is an important step in the creation of an independent criminal justice system.

81 Furthermore, as did the Council, it should also be noted that respect for democratic principles, human rights and fundamental freedoms and for the

principle of the rule of law constitute essential elements of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (OJ 2014 L 161, p. 3). Furthermore, in their cooperation on justice, freedom and security, the parties to the agreement attach particular importance to the consolidation of the rule of law and the reinforcement of institutions.

82 Although that progress does not mean that the Ukrainian system no longer has any deficiencies as regards the observance of fundamental rights, the Court, in view of the broad discretion enjoyed by the Council (see paragraph 73 above), cannot in those circumstances regard as manifestly incorrect the Council's political choice to support the new Ukrainian regime by adopting restrictive measures which apply to, amongst others, members of the former regime who are subject to criminal proceedings for misappropriation of public funds.

83 Furthermore, those considerations do not call into question the possibility open to the applicant of asking the Court to ascertain whether the Council made a manifest error of assessment, or whether the Council infringed the rights of the defence, by maintaining the restrictive measures against the applicant on the basis of information relating to the existence of criminal proceedings against him initiated by the Ukrainian authorities, despite the fact that the applicant accused the Ukrainian authorities, in those proceedings, of breaching fundamental rights generally protected in States governed by the rule of law (see below the findings in relation to the third plea).

84 With regard to the alleged breach of the principle of the presumption of innocence by the PGO in particular, it must be observed that the applicant confines himself to pleading that the Ukrainian authorities have described him as guilty of the alleged offences, despite the fact that he has not been found guilty by any court.

85 In that regard, it must be observed that, despite a few clumsy expressions, the letters from the PGO always refer to ongoing criminal proceedings against the applicant, from which it can be inferred that the PGO is entirely aware of the fact that the applicant is only suspected of having committed the offences in question and that he could be found guilty only if the criminal proceedings at issue result in a conviction, delivered by a court. Thus, read in context, the statements made in the letters from the PGO do not breach the principle of the presumption of innocence. In any event, even if such statements constituted breaches of that principle, it suffices to note that they cannot call into question the legality, still less the existence, of the criminal proceedings from which the Council was able to consider that the applicant satisfied the relevant criterion, nor do they justify the need for the Council to seek to obtain further information from the PGO.

86 Lastly, as regards the political persecution to which the applicant claims to have been subject and, he maintains, were the basis for the criminal proceedings brought against him, it must be noted that he merely makes assertions which cannot suffice to call into question the credibility of the information provided to

the Council by one of the highest Ukrainian judicial authorities (see paragraph 115 below), concerning the charges brought against the applicant in relation to very specific cases of misappropriation of public funds, or suffice to demonstrate that the applicant's particular situation was affected by the problems with regard to the functioning of the Ukrainian judicial system in the course of the proceedings concerning him (see, to that effect and by analogy, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraphs 113 and 114).

87 In the light of all the foregoing considerations, the first plea in law must be rejected in its entirety.

The second plea in law, alleging infringement of the rights under Article 6 TEU, read together with Articles 2 and 3 TEU and of Articles 47 and 48 of the Charter

88 With reference to the case-law, the applicant claims, in essence, that the Council should have verified whether the Ukrainian authorities, in undertaking the investigations which formed the basis for the maintenance of the restrictive measures against him in the March 2016 measures, had ensured protection of his fundamental rights equivalent to that guaranteed under EU law, in particular, under Article 6 TEU, read together with Articles 2 and 3 TEU and of Articles 47 and 48 of the Charter. However, the Council wrongly relied on an irrebuttable presumption that Ukraine observes fundamental rights, even though such a presumption cannot even be applied with regard to the Member States and several pieces of evidence which the applicant provided to the Council allegedly establish that his fundamental rights were seriously breached.

89 The Council disputes the applicant's arguments.

90 The Court points out that the applicant's arguments are based on false premisses.

91 In the first place, as regards the judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865), in particular in paragraphs 104 to 106 of that judgment, the Court of Justice held, in essence, that EU law precludes the application, by the Member States, of a presumption that the Member State responsible for examining an asylum application for the purpose of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) observed EU fundamental rights. Thus, according to the Court of Justice, that presumption may be rebutted if it is established that, because of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State, an asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

92 However, it must be noted that the principles set out in the judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865), are not applicable in the present case, since the applicant has not demonstrated the existence of systemic deficiencies affecting the Ukrainian institutions, in particular its judicial institutions.

93 In the second place, the approach taken by the General Court in the case which gave rise to the judgment of 16 October 2014, *LTTE* v *Council* (T-208/11 and T-508/11, EU:T:2014:885) cannot be applied to the present case.

94 In particular, in that case, Article 1(4) of Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93), which established a mechanism allowing the Council to include a person on a list of those whose funds are to be frozen on the basis of a decision taken by a national authority, where appropriate, of a non-Member State, laid down a criterion for the designation of the persons targeted by the restrictive measures adopted by the Council, which reads as follows:

> 'The list ... shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list.'

95 In the present case, the existence of a prior decision by the Ukrainian authorities is not required by the relevant criterion in order for restrictive measures to be adopted, since the legal proceedings opened by those authorities constitute only the factual basis on which those measures are based. The relevant criterion merely refers to persons 'identified as responsible for the misappropriation of Ukrainian State funds'.

96 In that respect, it must be noted that the wording of the relevant criterion is closer to that of the criterion at issue in the case which gave rise to the judgment of 27 February 2014, *Ezz and Others* v *Council* (T-256/11, EU:T:2014:93). In particular, in paragraph 66 of that judgment, the Court held that that criterion included persons being prosecuted for the 'misappropriation of … State funds', and it did so without examining whether the legal system of the State in question, namely the Arab Republic of Egypt, ensured legal protection comparable to that ensured in the European Union.

97 In any event, it must be noted that there is a major difference between the restrictive measures at issue in the case which gave rise to the judgment of 16 October 2014, *LTTE* v *Council* (T-208/11 and T-508/11, EU:T:2014:885),

which concerned the fight against terrorism, and those which, as in the present case, formed part of the cooperation between the European Union and the new authorities of a non-Member State, namely Ukraine.

98 Indeed, the fight against terrorism, to which the Council contributes by imposing restrictive measures on certain persons or entities, does not necessarily form part of cooperation with the authorities of a non-Member State which has undergone a regime change and which the Council has decided to support. The measures at issue in the present case, however, did form part of such cooperation, as did the measures at issue in the case which gave rise to the judgments of 5 March 2015, *Ezz and Others* v *Council* (C-220/14 P, EU:C:2015:147) and of 27 February 2014, *Ezz and Others* v *Council* (T-256/11, EU:T:2014:93).

99 Thus, if the Council's highly political choice to cooperate with the new Ukrainian authorities — which it considers to be trustworthy — in order to allow them, inter alia, to recover possibly misappropriated public funds 'with a view to consolidating and supporting the rule of law' in Ukraine were subject to the condition that, even though Ukraine was a member of the Council of Europe and had ratified the ECHR, the Ukrainian State had to ensure, immediately after the regime change, a level of protection of fundamental rights equivalent to that ensured by the European Union and its Member States, that would essentially undermine the Council's broad discretion in defining the general criteria delineating the category of persons liable to be the subject of restrictive measures intended to support those new authorities (see paragraph 73 above).

100 In exercising that broad discretion, the Council must therefore be free to take the view that, following the regime change, the Ukrainian authorities should be supported in so far as they improve democracy and respect for the rule of law in Ukraine as compared with the situation that previously prevailed in that country and that one of the means of consolidating and supporting the rule of law consists in freezing the assets of persons identified as being responsible for the misappropriation of funds belonging to the Ukrainian State, including — in accordance with the relevant criterion — persons who are being investigated by the Ukrainian authorities for misappropriation of public funds, or being an accomplice thereto, or for abuse of office, or being an accomplice thereto.

101 Consequently, only if the Council's political decision to support the new Ukrainian regime, including by way of cooperation in the form of the restrictive measures at issue, proved to be manifestly erroneous, in particular because fundamental rights were being systematically violated in that country following the change of regime, could any inconsistency between the protection of fundamental rights in Ukraine and that in place in the European Union have a bearing on the legality of maintaining those measures against the applicant. It follows from the examination of the first and second pleas in law that that is not the case here.

102 Accordingly, the second plea in law must be rejected.

The third plea in law, alleging, in essence, a manifest error of assessment

103 The applicant argues, in essence, that the Council made a manifest error of assessment in concluding that the relevant criterion was satisfied in his case. In that regard, he alleges that the PGO's statements, which the Council accepted without any prior examination and without taking account of the inaccuracies identified by the applicant, do not constitute a sufficiently solid factual basis for his designation, despite the fact that it was incumbent on the Council to justify the merits of the reasons for listing him, taking account of the observations he submitted and of the exculpatory evidence he produced. According to the applicant, the Council should have undertaken additional checks and requested additional evidence from the Ukrainian authorities, which the Council did not do in the present case. This is all the more necessary when it is a question of extending restrictive measures.

104 The applicant submits that, in order to identify him as a person responsible for misappropriating funds within the meaning of the relevant criterion, the Council cannot blindly rubber-stamp the documents submitted to it by the Ukrainian authorities. Furthermore, the Council must show the concrete evidence on which it relied in renewing the restrictive measures against the persons concerned. The applicant asserts that, according to the case-law, the concept of 'misappropriation of funds' should be given an autonomous meaning under EU law, independent of all national legal concepts, meaning that the criterion is satisfied only where funds belonging to the Ukrainian public authorities have been misappropriated. That concept does not encompass all economic offences; rather, it concerns the misappropriation of public funds or assets that are such as to undermine respect for the rule of law in Ukraine.

105 In addition, the applicant submits that, according to the case-law, while the existence of an investigation into the misappropriation of public funds conducted by the national authorities of a non-Member State may be sufficient in order for the relevant criterion to be met, it is still necessary for that investigation to be conducted in a 'judicial context'. In that regard, the PGO cannot be regarded as a 'judicial authority'. According to the applicant, if the relevant criterion were to be given a broader interpretation, first, the person concerned would be deprived of the critical safeguards resulting from judicial oversight and, second, that would amount to conferring on the Ukrainian national authorities the power to hand-pick the persons to be targeted by the restrictive measures at issue.

106 In the present case, the applicant asserts that he should be distinguished from the other persons who are subject to restrictive measures on the ground that he is not under investigation. The pre-trial investigation relating to him has no legal framework whatsoever.

107 As regards the reference in the letter from the PGO of 30 November 2015 [*confidential*], the applicant maintains, first, that the PGO failed to establish any link between [*confidential*]. Second, by referring to the letter from the PGO of

30 November 2015, the Council did not demonstrate that *[confidential]* provided a sufficiently solid factual basis for the applicant's designation.

108 In particular, in order to demonstrate that the information contained in the letters from the PGO mentioned above was inadequate, the applicant refers to a legal opinion from a law professor at the University of Kiev. That opinion states that the prosecution of the applicant is unsustainable. Referring to another legal opinion from a different law professor, the applicant also submits that the PGO committed serious breaches of his procedural rights in [*confidential*]. Consequently, under the Ukrainian Code of Criminal Procedure, the applicant cannot be regarded as a person subject to 'criminal proceedings'.

109 In addition, the applicant points to several inaccuracies and false statements made by the PGO regarding the investigations concerning him, which raise doubts as to the reliability of the PGO. In a judgment of 11 December 2014, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) stated in proceedings concerning the freezing of the applicant's assets in Austria, incidentally, that the allegations made against him by the Ukraine authorities were unsupported and appeared to be based on assumptions. This was confirmed by a letter discontinuing the proceedings against the applicant issued on 4 April 2016 by the Public Prosecutor's Office in Vienna.

110 Moreover, the applicant maintains that a report by an independent investigation into the applicant's business activities and into the company concerned by the criminal proceedings comprehensively rebuts the allegations made by the PGO. Similarly, the report of 28 July 2014 of the audit of the financial and commercial activities of the company in question prepared by the State Financial Inspection (SFI) of Ukraine over the period of 1 January 2008 to 17 June 2014, discloses no breach of legislation or any other wrongdoing by the company.

111 The applicant states that independent checks by the Council are necessary where the Council, first, has received objective and verifiable evidence that demonstrates that the PGO's assessment is false, second, has been provided with a compelling body of evidence that demonstrates that the current regime violates human rights and, third, has had the opportunity to check independently the information supplied by the PGO.

112 The Council disputes the applicant's arguments.

113 As a preliminary matter, the Court notes that, although the Council has a broad discretion when it comes to the general criteria to be taken into consideration for the purpose of adopting restrictive measures, the effectiveness of the judicial review guaranteed by Article 47 of the Charter requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to include or to retain a person's name on a list of persons subject to restrictive measures, the Courts of the European Union are to ensure that that decision, which affects that person individually, is taken on a sufficiently solid factual basis. That entails

checking the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated by sufficiently specific and concrete evidence (see judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 36 and the case-law cited).

114 The case-law does not require the Council to carry out, systematically and on its own initiative, its own investigations or checks for the purpose of obtaining additional information, when it already has information provided by the authorities of a non-Member State in taking restrictive measures against nationals of that country who are subject to judicial proceedings in that country (judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 57).

115 In that regard, it must be noted that the PGO is one of the highest Ukrainian judicial authorities. In that State, it acts as the public prosecutor's office in the administration of criminal justice and conducts pre-trial investigations in the context of criminal proceedings relating, inter alia, to the misappropriation of public funds (see, to that effect, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraphs 45 and 111).

116 It may indeed be inferred, by analogy, from the case-law on restrictive measures adopted with a view to combating terrorism that, in the present case, it was for the Council to examine carefully and impartially the evidence submitted to it by the Ukrainian authorities, in particular the letters from the PGO of 4 September and 30 November 2015, having regard, in particular, to the observations and any exculpatory evidence submitted by the applicant. Furthermore, in the context of the adoption of restrictive measures, the Council must observe the principle of sound administration enshrined in Article 41 of the Charter, which, according to settled case-law, entails the obligation for the competent institution to examine carefully and impartially all the relevant aspects of the individual case (see, by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 58 and the case-law cited).

117 Nonetheless, it is also apparent from the case-law that, in order to assess the nature, form and degree of the proof that the Council may be asked to provide, the nature, specific scope and the objective of the restrictive measures must be taken into account (see judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 59 and the case-law cited).

118 In that regard, as is apparent from recitals 1 and 2 of Decision 2014/119, that decision forms part of a more general EU policy of support for the Ukrainian authorities, which is intended to promote the political stability of Ukraine. It therefore satisfies the objectives of the CFSP, which are defined, in particular, in Article 21(2)(b) TEU, pursuant to which the European Union is to engage in

international cooperation with a view to consolidating and supporting democracy, the rule of law, human rights and the principles of international law (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 60 and the case-law cited).

119 It is against that background that the restrictive measures at issue provide for the freezing of funds and assets of, amongst others, persons who have been identified as being responsible for the misappropriation of Ukrainian public funds. Facilitating the recovery of those funds consolidates and supports the rule of law in Ukraine (see paragraphs 63 to 67 above).

120 It follows that the restrictive measures at issue are not intended to penalise any misconduct in which the persons concerned may have engaged, or to deter them, by coercion, from engaging in such conduct. The sole purpose of those measures is to facilitate the Ukrainian authorities' identification of any misappropriation of public funds that has taken place and to protect the possibility of the authorities recovering those funds. They are, therefore, purely precautionary (see, by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 62 and the case-law cited).

121 Thus, the restrictive measures at issue, which were imposed by the Council on the basis of the powers conferred on it by Articles 21 and 29 TEU, have no criminal law aspect. They cannot therefore be treated in the same way as a decision to freeze assets that has been taken by a national judicial authority of a Member State in the relevant criminal proceedings which respects the safeguards provided by those proceedings. Consequently, the requirements the Council must fulfil with regard to the evidence underpinning the entry of a person on the list of persons whose assets are to be frozen cannot be exactly the same as those which apply to the national judicial authority in the abovementioned case (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 64 and the case-law cited).

122 In the present case, what the Council must check is, first, the extent to which the letters from the PGO on which it relied prove that, as indicated by the grounds for the inclusion of the applicant's name on the list at issue, referred to in paragraph 15 above, the applicant is the subject, in particular, of criminal proceedings brought by the Ukrainian authorities in respect of actions that may be characterised as misappropriation of public funds, and, second, whether those investigations or those proceedings are such that the applicant's actions can be characterised as satisfying the relevant criterion. Only if the Council were unable to verify those matters, would it be incumbent on the Council, in the light of the principle from the case-law set out in paragraph 116 above, to investigate further (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 65 and the case-law cited).

123 Furthermore, in the context of the cooperation governed by the contested measures (see paragraph 119 above), it is not, in principle, for the Council to

examine and assess the accuracy and relevance of the information relied on by the Ukrainian authorities in conducting criminal proceedings in respect of the applicant for conduct that could be characterised as misappropriation of public funds. As explained in paragraph 121 above, in adopting the contested measures, the Council does not itself seek to punish the misappropriation of public funds being investigated by the Ukrainian authorities, but to protect the possibility of the authorities identifying such misappropriation and recovering the funds thus misappropriated. It is therefore for those authorities, in the context of those proceedings, to check the information on which they are relying and, where appropriate, to draw the appropriate conclusions as regards the outcome of those proceedings. Furthermore, as is apparent from paragraph 122 above, the Council's obligations under the contested measures cannot be treated in the same way as those of a national judicial authority of a Member State in the context of asset-freezing criminal proceedings initiated, in particular, in the context of international cooperation in criminal matters (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 66).

124 That interpretation is confirmed by the case-law from which it is apparent that it is not for the Council to check whether the investigations to which the person concerned is subject are well founded, but only to check whether that is the case as regards the decision to freeze funds in the light of the document provided by the national authorities (see, to that effect and by analogy, judgment of 5 March 2015, *Ezz and Others* v *Council*, C-220/14 P, EU:C:2015:147, paragraph 77).

125 Admittedly, the Council cannot, in all circumstances, adopt the findings of the Ukrainian judicial authorities contained in the documents provided by them. Such conduct would not be consistent with the principle of sound administration nor, generally, with the obligation on the part of the EU institutions to respect fundamental rights in the application of EU law, under a combined reading of the first subparagraph of Article 6(1) TEU and Article 51(1) of the Charter (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 67).

126 However, the Council must assess, on the basis of the circumstances of the case, whether it is necessary to investigate further, in particular to seek the disclosure of additional evidence from the Ukrainian authorities if it transpires that the evidence already supplied is insufficient or inconsistent. Information communicated to the Council, either by the Ukrainian authorities themselves or in some other way, might conceivably lead it to doubt the adequacy of the evidence already supplied by those authorities. Furthermore, when availing themselves of the opportunity which the persons concerned must be given to submit their comments on the reasons which the Council intends to use to retain their names on the list at issue, those persons may submit such information, or even exculpatory evidence, which would require the Council to investigate further. In particular, while it is not for the Council to take the place of the Ukrainian judicial authorities in assessing whether the criminal proceedings referred to in the letters from the PGO are well

founded, it is not inconceivable that, in the light, in particular, of the applicant's observations, the Council might be obliged to seek clarification from those Ukrainian authorities with regard to the material on which those investigations are based (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 68).

127 In the present case, as a preliminary point, it must be noted that it is common ground that the letters on which the Council relied are from the PGO and that they refer to criminal proceedings concerning the applicant, in which the dates on which the proceedings were opened, their case numbers and the articles of the Ukrainian Penal Code allegedly infringed, are set out in general terms.

128 The applicant's principal complaints allege that the letters from the PGO do not contain sufficient, or sufficiently concrete, information.

129 In that respect, in the first place, it must be noted that the letter from the PGO dated 4 September 2015, which is one of the principal pieces of evidence on which the Council relied in order to retain the applicant's name on the list when adopting the March 2016 measures, contains, inter alia, the following information:

– [*confidential*].

– [*confidential*].

130 In the second place, it must be observed that the letter from the PGO of 30 November 2015, which is the other piece of evidence on which the Council relied in order to retain the applicant's name on the list when adopting the March 2016 measures, in addition to confirming the information set out in the letter of 4 September 2015, refers, in relation to the same set of facts, to infringement of Article [*confidential*] of the Ukrainian Penal Code [*confidential*].

131 It follows that the letters from the PGO mentioned in paragraphs 129 and 130 above contain information clearly showing, first, that the applicant is subject to criminal proceedings concerning, inter alia, offences under Article 191(5) of the Ukrainian Penal Code, which punishes the misappropriation of State assets and, second, that in connection with the corresponding investigation, [*confidential*]. Although the summary of the facts giving rise to those offences is general and does not describe in detail the mechanisms by which the applicant is suspected of having misappropriated funds from the Ukrainian State, it is sufficiently clear from those letters that the acts which the applicant is alleged to have committed concern *[confidential]* the misappropriation of State assets *[confidential]*. Such conduct is liable to have caused a loss of funds for the Ukrainian State and therefore corresponds to the concept of 'misappropriation of funds' belonging to that State, referred to in the relevant criterion.

132 In that regard, as far as concerns the argument that the relevant criterion was not satisfied since the applicant's name was entered onto the list not on the basis of judicial investigations or proceedings but of a pre-trial investigation, it should be

noted that the effectiveness of a decision to freeze funds would be undermined if the adoption of restrictive measures were made conditional on the criminal convictions of persons suspected of having misappropriated public funds, since those persons would have enough time pending their conviction to transfer their assets to States having no form of cooperation with the authorities of the State of which they are nationals or in which they are resident (see, to that effect, judgment of 19 October 2017, *Yanukovych* v *Council*, C-598/16 P, not published, EU:C:2017:786, paragraph 63 and the case-law cited). Furthermore, where it is established that the person concerned has, as is the case here, been the subject of investigations conducted, in connection with criminal proceedings, by the Ukrainian judicial authorities, for acts of misappropriation of public funds, the precise stage actually reached by those proceedings is not a factor that could justify his exclusion from the category of persons in question (see, to that effect and by analogy, judgment of 14 April 2016, *Ben Ali* v *Council*, T-200/14, not published, EU:T:2016:216, paragraph 124).

133 In the light of the case-law cited in paragraph 132 above and of the margin of discretion enjoyed by the judicial authorities of a non-Member State in conducting criminal proceedings, the fact that the applicant was the subject of a pre-trial investigation, conducted under the authority of the PGO, is not, in itself, such as to lead to a finding of illegality of the measures in question, on the ground that, in those circumstances, the Council ought to have required additional checks from the Ukrainian authorities as regards the actions with which the person concerned was charged, since, as is explained below, the applicant has not put forward any evidence capable of calling into question the grounds set out by the Ukrainian authorities to justify the accusations levelled against him in relation to very specific acts or to demonstrate that his particular situation was affected by the alleged problems in the Ukrainian judicial system (see, to that effect, judgment of 19 October 2017, *Yanukovych* v *Council*, C-598/16 P, not published, EU:C:2017:786, paragraph 64). Nor, in that regard, does the fact that a Ukrainian Prosecutor General resigned following accusations of corruption affect the credibility of the letters from the PGO, since, even after the arrival of a new Prosecutor General, the substance of the offences which the applicant was suspected of having committed remained the same.

134 The Council did not therefore commit any manifest errors of assessment in deciding in the March 2016 measures to retain the applicant's name on the list on the basis of the information contained in the letters from the PGO of 4 September and 30 November 2015 concerning, in particular, the acts of misappropriation of public funds which justified, according to the Ukrainian authorities, the existence of an investigation concerning the applicant.

135 That conclusion cannot be called into question by the exculpatory evidence produced by the applicant or by the other arguments on which he relies.

136 As regards, in the first place, the legal opinions annexed to the application, the Court observes that, according to the case-law, in order to assess the evidential

value of a document, regard should be had to the credibility of the account it contains and regard should also be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable (see, to that effect, judgment of 27 September 2012, *Shell Petroleum and Others* v *Commission*, T-343/06, EU:T:2012:478, paragraph 161 and the case-law cited). In the present case, it should be noted, as the Council pointed out, that those opinions were drawn up for the purpose of the applicant's defence and, as such, are of limited probative value. In any event, they cannot call into question the fact, on which the PGO relies in its letters of 4 September and 30 November 2015, that the applicant is the subject of a pre-trial investigation for the misappropriation of public funds. Those opinions predominately concern issues related to the merits of that investigation, which must, in principle, be assessed by the Ukrainian authorities.

137 In the second place, as regards the decision of the Oberlandesgericht Wien (Higher Regional Court, Vienna), it should be noted, as did the Council, that the decision did not concern national asset-freezing measures, but an order issued by the Vienna State Prosecutor's Office on 26 July 2014 for the disclosure of information on accounts and banking transactions as part of an investigation carried out against many persons, including the applicant, suspected of crimes or offences of money laundering, for the purposes of Austrian legislation on criminal offences and the law on penalties. That decision, concerning criminal offences other than those on which the restrictive measures at issue were based, addresses only incidentally the facts with which the investigation conducted by the PGO is concerned and does not contain any genuine assessment of the charges which the PGO alleges. It follows that such a decision, although handed down by a judicial body of a Member State, was not such as to raise legitimate doubts concerning the outcome of the investigation or the reliability of the information provided by the PGO. As regards the decision of the Public Prosecutor's Office in Vienna, dated 4 April 2016, announcing the discontinuance of the proceedings against the applicant, suffice it to observe that that letter is not relevant since it postdates the March 2016 measures. The legality of a decision to freeze assets is to be assessed in the light of the information available to the Council when the decision was adopted (judgment of 28 May 2013, *Trabelsi and Others* v *Council*, T-187/11, EU:T:2013:273, paragraph 115).

138 In the third place, as regards, first, the audit report drawn up by the FIS at the request of the PGO, dated 28 July 2014, relating to financial and commercial activities of the PJSC Semiconductor Plant referred to in the PGO's allegations, and, second, a report of an independent investigation on the relevant business activities of the applicant and of that company, dated 16 October 2014 and prepared by a team of investigators and independent lawyers ('the Pepper Hamilton Report'), it should be noted that the applicant has not explained how these two reports contradict the information contained in the letters from the PGO in view of the fact that neither a report on the commercial activities of the applicant and of the company in which he is a shareholder nor an audit report on

the company's commercial activity necessarily contains information on the misuse of public funds. In addition, first, the audit report established by the FIS, which moreover does not concern whether the applicant is guilty of the criminal offences covered by the investigation, will necessarily be evaluated by the PGO, since it was drawn up at its request. Second, as regards the Pepper Hamilton Report, it must be noted, as the Council observes, that the report was commissioned by a company owned by the applicant and his brother and was addressed to the latter. Therefore, in the light of the case-law set out in paragraph 136 above, it has only limited probative value.

139 That exculpatory evidence alone cannot therefore justify the need for the Council to seek additional checks.

140 In the fourth place, as regards the argument alleging that no notification of suspicion had been issued to the applicant in the manner prescribed by the Ukrainian Code of Criminal Procedure, it must be observed that the applicant relies on only one legal opinion of a law professor. However, notwithstanding the fact that such an opinion is, as has been stated in paragraph 136 above, of limited probative value, it is apparent from that opinion, as the applicant indeed claims in his pleadings, that the notification of suspicion is allegedly vitiated by irregularities of a purely formal nature.

141 Assuming that a notification of suspicion is in fact unlawful if its effect is that the PGO must issue a new notification in due form, that does not mean that the criminal proceedings to which that notification relates are no longer ongoing.

142 Moreover, even if, because of a formal defect affecting a notification of suspicion, the applicant could not be regarded as a suspect within the meaning of Article 42 of the Ukrainian Penal Code, it would not follow that he was not being investigated by the Ukrainian authorities for the purpose of the relevant criterion. The circumstance that, as a result of an irregular notification, the PGO must proceed with a new notification does not alter the fact that it considers that it had sufficient evidence to suspect the applicant of having misappropriated public funds.

143 Thus, the applicant's complaint concerning formal defects affecting the notifications of suspicion is ineffective.

144 In the last place, as regards the applicant's argument concerning the long period of time that the Council had in which to carry out a full and rigorous review of the evidence on which it relied, suffice it to note, as is apparent from the foregoing, that the Council complied with the obligations incumbent upon it. The scope of those obligations is not determined by the time available to the Council.

145 In the light of the foregoing considerations, the third plea must be dismissed in its entirety.

The fourth plea in law, alleging infringement of the rights of the defence and of the applicant's right to effective judicial protection

146 The applicant notes that the right to sound administration and the right to effective judicial protection are fundamental rights that form part of the general principles of EU law which must be observed in the context of restrictive measures. He claims that, by adopting the March 2016 measures, the Council failed in its procedural obligations, the importance of which has been consistently emphasised in the case-law, to disclose to the person concerned the reasons for which he has been designated and all the evidence on the basis of which it decided to retain his name on the list, to enable him effectively to put forward his observations prior to his name being retained on the list and, where the person concerned has submitted observations, to examine carefully and impartially whether the reasons for his designation are well founded in the light of those observations and of any exculpatory evidence provided with them.

147 More specifically, the applicant maintains, first of all, that at no stage has he been provided with serious, credible or concrete evidence that would justify the imposition of restrictive measures.

148 Next, there is no indication that the Council took into account the observations which he formulated, in particular those of 30 November 2015, 4 January and 3 February 2016 preceding the adoption of the March 2016 measures. The Council merely dismissed, summarily, the arguments which the applicant made in his letter of 7 March 2016, that is to say, after the adoption of those measures.

149 Lastly, the applicant submits that the Council failed to provide him with the actual grounds for his renewed designation in the March 2016 measures. In its letter of 15 December 2015, the Council failed to refer to the precise information in the letter from the PGO of 30 November 2015 on which it relied in maintaining the restrictive measures against him. Consequently, the applicant was unable to formulate observations effectively.

150 The Council disputes the applicant's arguments.

151 As a preliminary point, the Court notes that respect for the rights of the defence, which is affirmed in Article 41(2) of the Charter, includes the right to be heard and the right to have access to the file, whereas the right to effective judicial protection, which is affirmed in Article 47 of the Charter, requires that the person concerned be able to ascertain the reasons upon which the decision taken in relation to him is based (see, to that effect, judgment of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 98 to 100).

152 In addition, it must be noted that, in the case of a subsequent decision to freeze funds by which the inclusion of the name of a person or entity already appearing on the list of persons or entities whose funds are frozen is retained, the adoption of such a decision must, in principle, be preceded by notification of the incriminating

evidence and by allowing the person or entity concerned an opportunity of being heard (see, to that effect, judgment of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 62).

153 That right to a prior hearing applies where the Council has admitted new evidence against the person who is subject to the restrictive measures and retained on the list at issue (judgment of 28 July 2016, *Tomana and Others* v *Council and Commission*, C-330/15 P, not published, EU:C:2016:601, paragraph 67).

154 In the present case, it must be noted that Article 2(2) and (3) of Decision 2014/119 and Article 14(2) and (3) of Regulation No 208/2014 provide that the Council is to communicate its decision, including the grounds for the listing, to the natural or legal person, entity or body concerned, either directly, if the address is known, or by the publication of a notice, providing the opportunity to present observations. Where observations are submitted, or where substantial new evidence is presented, the Council shall review its decision and inform the natural or legal person, entity or body accordingly. Moreover, Article 5(3) of Decision 2014/119 provides that that decision is to be kept under constant review, and Article 14(4) of Regulation No 208/2014 provides that the list is to be reviewed at regular intervals and at least every twelve months. The March 2016 measures are based on the initial restrictive measures, namely Decision 2014/119 and Regulation No 208/2014, and extend the freezing of funds following the Council's review of the list in question.

155 As regards the right to be heard, it must be noted, bearing in mind the principle in the case-law referred to in paragraph 153 above, that the Council, when it retained the applicant's name on the list, relied on new evidence, which had not already been notified to the applicant following his initial designation.

156 First, it must be observed that the reasons stated for the subsequent measures are not the same as those given for the initial inclusion of the applicant's name (see paragraphs 9 and 15 above). Second, the Council relied on new evidence, namely the letters from the PGO of 4 September and 30 November 2015. Accordingly, the Council was required to hear the applicant before adopting the March 2016 measures.

157 It can be seen from the file that, before it adopted those measures, the Council sent the applicant, by letter of 15 December 2015, the letter from the PGO of 30 November 2015 (see paragraph 20 above). In that letter, the Council reminded the applicant of the time limit within which he might submit observations on the annual review of the restrictive measures.

158 The applicant submitted his observations to the Council by letters of 4 January and 3 February 2016. It is true that the Council did not respond to those letters before the adoption of the March 2016 measures. However, it should be noted that, since the grounds for maintaining the restrictive measures had not been amended, and the new evidence, namely the letter from the PGO of 1 December

2015, had not been submitted to him prior to the adoption of the decision to retain his name on the list at issue, the applicant was able to submit relevant observations on the grounds for his designation.

159 In addition, it must be noted that the Council, by letter of 7 March 2016, that is to say almost immediately after the adoption of the decision to retain the applicant's name on the list, responded to the applicant's observations set out in his previous letters, namely those of 30 November 2015 and 4 January and 3 February 2016. In that respect, it rejected certain arguments of the applicant, asserting, inter alia, that the letters from the PGO justified retaining his name on the list. By that letter, the Council also forwarded the applicant the March 2016 measures, informing him of the opportunity to submit further observations.

160 The argument that the Council did not refer to the specific matters in the letter from the PGO of 30 November 2015 on which it relied in deciding to maintain the restrictive measures as regards the applicant is not well founded. It is clear from *[confidential]* that, *[confidential]* of criminal proceedings brought against the applicant, the proceedings relating, in particular, to the misappropriation of public funds *[confidential]* justified maintaining the restrictive measures against the applicant. Moreover, in so far as such an argument must be understood as concerning, in essence, a manifest error of assessment by the Council, the Court notes that those questions have been dealt with in the context of the third plea in law, which has been rejected as unfounded.

161 In the light of those circumstances, the Court finds that the Council discharged its obligations to observe the applicant's rights of defence throughout the procedure culminating in the adoption of the October 2015 measures. The applicant had access to the information and the evidence used to support the decision to maintain the restrictive measures against him prior to their adoption and he was able to submit observations to the Council in a timely manner. It must also be noted that the applicant was able to bring the present action by invoking relevant matters in the file in support of his arguments; the complaint alleging a breach of his right to effective judicial protection may therefore also be rejected.

162 Having regard to the foregoing considerations, the fourth plea in law must be rejected.

The fifth plea in law, alleging infringement of the right to property and of the right to reputation

163 The applicant submits that the restrictive measures taken against him in the March 2016 measures constitute an unjustified and disproportionate restriction of his fundamental rights, namely the right to property and the right to reputation.

164 The applicant alleges that the Council has failed to demonstrate that the freezing of his assets was justified by any legitimate aim, still less that it is proportionate to any such aim. The applicant emphasises in this connection that the allegations

concerning him no longer mention any illegal transfer of funds outside Ukraine. The restrictive measures therefore serve no purpose and are disproportionate, since they cannot assist in the recovery of any misappropriated funds and there is no indication in the case file that funds have been transferred outside Ukraine. The applicant adds that it cannot be inferred that the freezing of all his assets in the European Union was necessary or was the least onerous option available to the Council; the Council did not examine whether a more limited asset freeze might be sufficient to satisfy any claims for the recovery of misappropriated funds, particularly since the evidence specified the particular sums claimed and the Council had a considerable amount of time to enquire into those amounts.

165 The Council disputes the applicant's arguments.

166 Article 17(1) of the Charter states:

'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.'

167 Article 52(1) of the Charter states that any limitation on the exercise of the rights and freedoms recognised by that Charter must be provided for by law and respect the essence of those rights and freedoms and that, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

168 It follows from the case-law that a freezing measure undeniably entails a restriction of the exercise of the right to property (see, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 358).

169 In this case, the applicant's right to property is restricted, since he cannot, in particular, make use of his funds situated within the European Union, unless he obtains specific authorisation, and no funds or other economic resources can be made available, directly or indirectly, to him.

170 However, the right to property, as protected by Article 17(1) of the Charter, does not constitute an unfettered prerogative and may therefore be limited, under the conditions laid down in Article 52(1) of the Charter (see judgment of 27 February 2014, *Ezz and Others* v *Council*, T-256/11, EU:T:2014:93, paragraph 195 and the case-law cited).

171 Consequently, in order to comply with EU law, a limitation on the exercise of the right to property must satisfy three conditions.

172 First, the limitation must be 'provided for by law'. In other words, the measure must have a legal basis. Second, it must refer to an objective of general interest, recognised as such by the European Union. Those objectives include those pursued under the CFSP and referred to in Article 21(2) TEU. Third, the limitation may not be excessive. It must be necessary and proportionate to the end pursued. In addition, the 'essence', that is, the substance, of the right or freedom at issue, must not be impaired (see judgment of 27 February 2014, *Ezz and Others* v *Council*, T-256/11, EU:T:2014:93, paragraphs 197 to 200 and the case-law cited).

173 As regards the first condition, the Court observes that the limitation is 'provided for by law', since retaining the applicant's name on the list corresponds to the relevant criterion, which the March 2016 measures have not altered, and which refers to criminal proceedings brought against a person accused of misappropriation of public funds.

174 As regards the second condition, it must be noted that, as is apparent from the examination of the first plea in law, the March 2016 measures comply with the objective, referred to in Article 21(2)(b) TEU, of 'consolidat[ing] and support[ing] the rule of law'. In so doing, those measures form part of a policy of supporting the Ukrainian authorities, intended to promote both the economic and political stability of Ukraine and, specifically, to assist the authorities of that country in their fight against the misappropriation of public funds.

175 As regards the third condition, it must be recalled that the principle of proportionality, as one of the general principles of EU law, requires that measures adopted by the EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued by the legislation in question. Consequently, 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 (see judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraph 164 and the case-law cited).

176 In accordance with the case-law, the disadvantages caused by restrictive measures are not disproportionate to the objectives pursued, taking into consideration, first, that those measures are inherently temporary and reversible and do not therefore infringe the 'essence' of the right to property and, second, that they may be derogated from in order to cover basic needs, legal costs or even the extraordinary expenses of the persons concerned (see judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraph 169 and the case-law cited).

177 Moreover, restrictive measures effectively assist in establishing the misappropriation of public funds, in addition to facilitating the recovery of those funds, and the applicant has not put forward any argument capable of demonstrating that those measures are not appropriate or that there are other less onerous measures capable of achieving the aims pursued. In that respect, as

regards, in particular, the applicant's argument that a freezing of funds is justified only up to the value of the assets allegedly misappropriated, as established from the information available to, or which should have been available to, the Council, it must be noted that, first, the amounts mentioned in the letters from the PGO of 4 September and 30 November 2015 are merely indicative of the value of the assets alleged to have been misappropriated and, second, any attempt to circumscribe the amount of the funds frozen would be extremely difficult, if not impossible, to implement in practice (see, to that effect, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraph 168).

178 As regards the applicant's argument that the grounds for retaining his name on the list no longer referred to the illegal transfer of public funds outside of Ukraine, the Court observes that, whilst that factor is no longer mentioned in the reasons stated for the listing, as amended by the subsequent measures, it remains the case that the reference to the misappropriation of public funds, if it is well founded, is sufficient to justify the restrictive measures against the applicant (see, to that effect, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraph 163).

179 Finally, as regards the arguments alleging breach of the right to reputation, it must be held that the adoption, by the Council, of the restrictive measures against the applicant does not constitute a disproportionate interference with his reputation.

180 According to settled case-law, like the right to property, the right to reputation is not an absolute right and its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union. Thus, the importance of the aims pursued by the restrictive measures at issue is such as to justify negative consequences, even of a substantial nature, for the reputation of the persons or entities concerned (see judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 168 and the case-law cited).

181 In the present case, it has been established, in the context of the examination of the third plea in law, that the applicant was the subject of criminal proceedings for offences concerning the misappropriation of funds and that his situation corresponded to the relevant criterion, as interpreted in the context of the examination of the first plea in law.

182 In addition, the grounds for the applicant's designation do not mention the specific circumstances of the acts to which those proceedings relate, but merely the Ukrainian authorities' classification of that conduct as criminal, and it must be noted in that respect that the letters from the PGO detailing those acts remain confidential. Furthermore, the Council took care to mention, in those grounds, that criminal proceedings were ongoing against the applicant, with the result that it is clear from those grounds that the applicant has not yet formally been found guilty.

183 In any event, in so far as the maintenance of those measures as regards the applicant may affect his reputation, it must be stated that such effects are not clearly disproportionate in relation to the objectives pursued (see paragraphs 174 to 177 above).

184 Consequently, the fifth plea in law must be rejected in its entirety.

The plea of illegality

185 In the alternative, the applicant raises a plea of illegality, under Article 277 TFEU, concerning the relevant criterion. He maintains that that criterion would lack a proper legal basis or would be disproportionate in the light of the objectives of the measures at issue if it were interpreted as covering a person who is under investigation by the Ukrainian authorities, irrespective of whether there is a court decision or whether there are judicial proceedings, or any holder of public office who has committed an abuse of office, irrespective of the existence of an allegation of misappropriation of public funds.

186 The Council disputes the applicant's arguments.

187 As a preliminary point, the Court observes that, in accordance with the conclusions reached in respect of the first plea in law, the March 2016 measures do not lack a proper legal basis.

188 In addition, it has been noted (in paragraph 65 above) that the relevant criterion ought to have been interpreted as not concerning, in abstract terms, any act classifiable as misappropriation of public funds, but rather as concerning acts classifiable as misappropriation of public funds or assets which, having regard to the amount or the type of funds or assets misappropriated or to the context in which the offence took place, are, at the very least, such as to undermine the legal and institutional foundations of Ukraine, including in particular the principles of legality, prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law and, ultimately, to undermine respect for the rule of law in that country. As thus interpreted, that criterion is compatible with and proportionate to the relevant objectives of the EU Treaty.

189 Furthermore, the EU judicature has held that the identification of a person as being responsible for an offence did not necessarily imply that he had been convicted of the offence (see, to that effect, judgment of 5 March 2015, *Ezz and Others* v *Council*, C-220/14 P, EU:C:2015:147, paragraphs 71 and 72) and that it was for the competent EU authority to establish, in the event of challenge, that the reasons relied on against the person concerned were well founded, and it is not for that person to adduce evidence of the negative, namely that those grounds were not well founded (judgments of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 121, and of 28 November 2013, *Council* v *Fulmen and Mahmoudian*, C-280/12 P, EU:C:2013:775, paragraph 66).

190 In this case, the relevant criterion simply enables the Council to take into account an investigation with respect to acts classifiable as misappropriation of public funds as a factor which may justify, in some cases, the adoption of restrictive measures, without prejudice to the fact that, in the light of the case-law cited in paragraph 189 above and of the interpretation of the relevant criterion set out in particular in paragraph 188 above, the mere fact that a person is being investigated in relation to offences consisting of misappropriation of funds cannot, in itself, justify action by the Council under Articles 21 and 29 TEU (see, to that effect, judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 100).

191 In view of the foregoing, it must be concluded that the relevant criterion is compatible with the objectives of the CFSP, as stated in Article 21 TEU, in so far as it covers persons identified as being responsible for a misappropriation of Ukrainian public funds that is capable of undermining the rule of law in Ukraine (see, to that effect, judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 101).

192 The applicant's plea of illegality must therefore be rejected.

193 In the light of all the foregoing considerations, the action must be dismissed in its entirety in so far as it seeks the annulment of the decision to retain the applicant's name on the list in the March 2016 measures.

The claims for annulment of the March 2017 measures, in so far as they concern the applicant

194 By his statement of modification, the applicant has sought to extend the scope of his action so as to seek the annulment of the March 2017 measures, in so far as they concern him.

195 In support of his application for annulment of the March 2017 measures, the applicant puts forward the same pleas in law as those on which he relied in the application in support of the action for annulment of the March 2016 measures (see paragraph 46 above) as well as the same plea of illegality.

196 It is appropriate to begin by considering the third plea, alleging, in essence, a manifest error of assessment.

197 After pointing out that the grounds relied on in support of retaining the applicant's name on the list were identical to those contained in the March 2016 measures, and that, in the letter of 6 March 2017 justifying the renewal of the designation, the Council had confirmed that it had relied solely on *[confidential]*, the applicant claims that *[confidential]* does not fulfil the designation criteria for two reasons.

198 In the first place, the applicant is subject only to a pre-trial investigation, the length of which also contravenes the provisions of the Ukrainian Code of Criminal Procedure, which is insufficient to satisfy the relevant criterion. In any event, on

the date of his re-designation, the applicant was not involved in any ongoing pre-trial investigation, since the investigation in the criminal proceedings had been formally suspended, first on 22 April 2015, reopened subsequently on 4 March 2016 and again formally suspended the following day, namely on 5 March 2016. The applicant notified the Council of that suspension on numerous occasions.

199 In the second place, as regards the court decisions *[confidential]* referred to in the letters from the PGO, which the Council enclosed in its letter of 9 February 2017, the applicant observes, first, *[confidential]* were delivered *[confidential]* and that the Council failed to explain how they were relevant *[confidential]*, on which its decision was exclusively based. Second, in any event, the existence of those decisions is not capable of calling into question the fact that *[confidential]* was suspended. Third, the decisions do not address the exculpatory evidence adduced by the applicant. Fourth, all of the decisions were delivered without the applicant or his lawyers being present and are based solely on the allegations of the PGO, which were neither analysed nor questioned. Lastly, the letter of 9 February 2017 contains no explanation regarding *[confidential]* in Austria. The Council simply stated that there was no confirmation that *[confidential]* belonged to the applicant, even though the PGO knew that the Austrian authorities had refused *[confidential]*.

200 In the third place, the letters from the PGO of 25 July and of 16 November 2016, on which the Council allegedly based its decision to retain the applicant's name on the list, are not supported by any evidence and do not provide sufficient details concerning *[confidential]*.

201 In any event, the Council has not shown how the PGO's allegations were capable of satisfying the relevant criterion in that the criterion refers only to the misappropriation of public funds or assets capable of undermining the rule of law in Ukraine in view of the amount or type of the misappropriated funds or assets or of the circumstances in which the offence was committed.

202 In that regard, the applicant submits that, despite the significant body of exculpatory evidence which he provided to the Council, and which the Council should have examined with care and impartiality, the Council consistently refused to undertake any investigation or additional checks in that regard. In addition to the numerous items of evidence relied on in the application, the applicant refers to a decision of the Commission for the Control of Interpol's Files of 25 April 2017 informing him that he was not subject to an Interpol red notice.

203 Ultimately, the Council failed to adduce concrete evidence and information sufficient to justify that the applicant's name be retained on the list.

204 First, the Council contends that the period of suspension cannot be included within the maximum period for the pre-trial investigation and that the fact that *[confidential]* was formally suspended as of the date of the re-designation of the

applicant does not demonstrate that the pre-trial investigation against him had ceased.

205 Second, the Council submits that the applicant's claims concerning the alleged infringements of his procedural rights committed in *[confidential]* are irrelevant in the light of the case-law, according to which it is not the task of the Council to conduct its own 'independent' evaluation or to check whether national investigations are well founded.

206 Third, as for the allegedly false information on *[confidential]* in Austria, the Council contends that it is entirely clear from its letter of 9 February 2017 that the information contained in the letter from the PGO of 25 July 2016 concerning *[confidential]* in Austria had not been confirmed and that that was the reason why the information did not reappear in the letter from the PGO of 16 November 2016.

207 Fourth, the Council contends that the type of information provided in the letters from the PGO and the details thereof were more than sufficient to conclude that on the date of the adoption of the March 2017 measures the applicant was the subject *[confidential]* for misappropriate of public funds or assets.

208 Fifth, as regards the decision of the Commission for the Control of Interpol's Files, the Council observes that that document postdates the adoption of the March 2017 measures. In any event, according to the applicant, being subject to an Interpol red notice has never formed part of the designation criteria.

209 As a preliminary matter, the Court notes that the relevant criterion, first, provides that the restrictive measures are to be adopted in respect of persons who have been 'identified as responsible' for the misappropriation of public funds — which includes persons 'subject to investigation by the Ukrainian authorities' for the misappropriation of Ukrainian public funds or assets (see paragraph 12 above) — and, second, must be interpreted as not concerning, in abstract terms, any act classifiable as misappropriation of State funds, but rather as concerning acts classifiable as misappropriation of State funds or public assets such as to undermine the rule of law in Ukraine (see, to that effect, judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 91).

210 In the present case, as has been set out in paragraph 15 above, the applicant's name was retained on the list by means of the March 2017 measures, on the following grounds:

'Person subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets and in connection with the misuse of office by a public office-holder to procure an unjustified advantage for himself or a third party thereby causing a loss to the Ukrainian public budget or assets.'

211 It is common ground that, as regards the March 2017 measures, the Council relied, in deciding to retain the applicant's name on the list, on the letters from the PGO of 25 July and of 16 November 2016.

212 The first ground for retaining the applicant's name on the list and the Council's assessment of the evidence in its possession must therefore be examined.

213 Such an assessment must be made in the light of the principles set out in paragraphs 114 to 126 above.

214 It should be recalled that, in the present case, there is a decision retaining the name of a person on the list and that, in those circumstances, where observations are made by the individual concerned on the summary of reasons, the Council is under an obligation to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those observations and any exculpatory evidence provided with those observations, and that obligation flows from the obligation to observe the principle of sound administration enshrined in Article 41 of the Charter (see paragraph 116 above).

215 In particular, as has been pointed out in paragraph 122 above, the Council must ascertain, first, the extent to which the evidence on which it relied can establish that the applicant's situation is covered by the reason for retaining his name on the list and, second, whether it can be concluded from that evidence that the applicant's actions fall within the scope of the relevant criterion. Only if those matters cannot be verified, is it incumbent on the Council, in the light of the principle from the case-law set out in paragraph 116 above, to investigate further.

216 In that regard, it cannot be excluded that information communicated to the Council, either by the Ukrainian authorities themselves or persons concerned by the measures, or in some other way, might lead it to doubt the adequacy of the evidence already supplied by those authorities. Although, in the present case, it is true that it is not for the Council to take the place of the Ukrainian judicial authorities in assessing whether the pre-trial investigation referred to in the letters from the PGO is well founded, it is not inconceivable, having regard in particular to the observations submitted by the applicant, that that institution should be obliged to seek clarification from the Ukrainian authorities with regard to the material on which the investigation is based.

217 In the present case, the applicant acknowledges that the letters from the PGO refer, in particular, to criminal proceedings for misappropriation of public funds in which a pre-trial investigation relating to him is being carried out. It must therefore be determined whether the Council could consider, without committing a manifest error of assessment, that the information provided by the PGO in connection with those proceedings could continue to substantiate the ground for the applicant's designation.

218 As a preliminary point, it must be noted that, contrary to what the Council claims, the issue is not whether, in the light of the information provided to the Council, it was required to remove the applicant's name from the list, but only whether it was required to take that evidence into account and, where appropriate, to carry out additional checks or to seek clarification from the Ukrainian authorities. In that

regard, it is sufficient that the evidence be capable of giving rise to legitimate doubts, first, as to the outcome of the investigation and, second, as to how reliable and up-to-date the information submitted by the PGO is.

219 In its letter of 6 March 2017, which replied to the observations of the applicant's counsel of 12 January 2017 as well as those of the applicant himself dated 14 February 2017, the Council merely asserts that it does not share the applicant's point of view and that it intends to confirm the restrictive measures against him on the basis of the letters from the PGO of 25 July and 16 November 2016, which were already in the applicant's possession. As to the remainder, the Council confines itself to refuting the applicant's argument that the Council could not rely *[confidential]*, by reiterating that it had sent to the applicant, by letter of 9 February 2017, the *[confidential]*.

220 In the first place, the Court finds that those letters contain several inconsistencies and inaccuracies. First, the Court finds that the letters from the PGO are inconsistent — and not merely in terms of different shades of meaning, as the Council claimed at the hearing — as regards *[confidential]*. Although, as the Council claims, *[confidential]* is not necessary for the purposes of the relevant criterion, nonetheless such information contributes in corroborating the Council's assertion in respect of there being a sufficiently solid factual basis and that, therefore, the Council is entitled to take that listing into account for the purposes of the decision to retain the name of the person concerned on the list. In the present case, the Court notes that in the letter of 16 November 2016, the PGO states that *[confidential]*, whereas, in the letter of 25 July 2016, it was stated that *[confidential]*. Second, the letter from the PGO of 25 July 2016 refers, *[confidential]*, whereas the Prosecutor's Office in Vienna had abandoned the investigations concerning the applicant on 4 April 2016.

221 Although these inconsistencies do not in themselves raise legitimate doubts concerning the outcome of the investigation, they do nevertheless reveal a certain degree of approximation on the part of the PGO, which is capable of casting doubt on the reliability of the information it provided and how up to date it was.

222 In the second place, the Court points out that, in the letter of 16 November 2016, the PGO *[confidential]*. It must be added that, following a request made to the Ukrainian authorities of 12 December 2016, the Council obtained copies *[confidential]*, which the Council then sent to the applicant by letter of 9 February 2017.

223 In the third place, it is apparent from the letter from the Public Prosecutor's Office in Vienna of 4 April 2016 that that office, after examining the supporting documents provided in connection with a request for judicial assistance by the PGO, having also relied on the Pepper Hamilton Report to which it expressly refers, considered that that evidence did not corroborate the allegations made by the Ukrainian authorities investigating the case and that the charges reported in the media that the applicant committed offences punishable in Ukraine, which were at

the root of the large number of cases suspecting money laundering notified in Austria, could not be confirmed, notwithstanding several fact-finding investigations having been carried out (see, to that effect, judgment of 21 February 2018, *Klyuyev* v *Council*, T-731/15, EU:T:2018:90, paragraph 247).

224 In that regard, although restrictive measures do not fall within the ambit of criminal law, the fact remains that, in the present case, the necessary condition for retaining a person's name on the list is that he be identified as involved, inter alia, in the misappropriation of public funds, and a person is considered as such when he is subject to an investigation by the Ukrainian authorities pursuant to criminal proceedings. It follows that if the Council is aware that the prosecutor's office of a Member State of the European Union raises serious doubts, as was the case here, with regard to whether the evidence in support of the investigation by the Ukrainian authorities which provided the basis for the Council's decision to retain the applicant's name on the list is sufficiently substantiated, it is required to make further enquiries of those authorities or, at the very least, seek clarification from them, in order to establish whether the evidence available to it, that is to say, rather vague information, merely confirming the existence of a pre-trial investigation against the applicant, still forms a sufficiently solid factual basis to justify retaining the applicant's name on the list (see, to that effect, judgment of 21 February 2018, *Klyuyev* v *Council*, T-731/15, EU:T:2018:90, paragraph 248).

225 Furthermore, it should also be observed that, in its letter of 9 February 2017, the Council does not provide any explanations regarding *[confidential]*, to which the PGO referred in its letter of 25 July 2016, but not in its letter of 16 November 2016, notwithstanding that the applicant had informed the Council that the Austrian courts and prosecutor had refused to *[confidential]*.

226 Without analysis or explanation, the Council merely cites verbatim the following 'information', which was provided to it by the PGO:

[confidential]

227 Not only does that information not correspond to the information available to the Council, but it refers only to *[confidential]* and not also to *[confidential]*, to which it expressly refers in the letter from the PGO of 25 July 2016.

228 Fourth, in the two letters mentioned in paragraph 219 above, the PGO did not indicate that *[confidential]* was suspended, of which the Council had been informed by the applicant in the observations it had submitted on 12 January and on 14 February 2017, respectively, for the purposes of the annual review of the measures concerning him.

229 In that regard, whilst it is true, as the Council maintains, that the fact that *[confidential]* has been formally suspended does not show that the preliminary investigation against the applicant has been concluded, the fact remains, first, that the Council had been informed by the applicant and not by the PGO, which failed to provide the slightest information in that regard, that the procedure was not

formally ongoing and, second, that such a fact was not irrelevant for the purposes of the Council's decision on maintaining a restrictive measure, which might otherwise extend such a measure against the applicant indefinitely, without his knowledge, which would be inconsistent with the provisional nature of restrictive measures. Moreover, the fact that the PGO confined itself to repeating constantly the same information on the pre-trial investigation without mentioning new information regarding its progress, namely its suspension, weakens the reliability of the information it provided and how up to date it was (see, to that effect, judgment of 21 February 2018, *Klyuyev* v *Council*, T-731/15, EU:T:2018:90, paragraph 251).

230 It follows that the Council should have sought clarification from the Ukrainian authorities on the grounds for the suspension of the procedure and its duration in order to establish whether the relevant criterion was still satisfied in the present case. The fact that the Council subsequently explained, in its observations on the statement of modification, the reasons having led to such a suspension cannot call that conclusion into question. First, the Council has not shown that it knew of those reasons before taking the decision to adopt the March 2017 measures and, second, according to the case file, the Council could not have been aware of that suspension, in so far as the PGO had not informed it and even admitted at the hearing that it became aware of that decision to suspend the proceedings from an annex added to the case file by the applicant. In addition, as regards the Council's submission made at the hearing that the PGO had not been aware of the importance of the information concerns purely procedural aspects of the ongoing investigation and of the need to inform the Council of that information, it is sufficient to find that, in its letter of 16 November 2016, as regards another criminal proceeding, which does not fall within the relevant criterion, the PGO specified *[confidential]*.

231 It follows from all the foregoing that the information on *[confidential]* set out in the letters from the PGO — the only case on which the Council relied in retaining the applicant's name on the list — is incomplete and tainted with inconsistencies such as should have led the Council to doubt whether the evidence available to it was sufficient.

232 In that regard, although in response to a complaint made by the applicant the Council requested the Ukrainian *[confidential]*, nevertheless, as the applicant maintains, all those decisions were made by the *[confidential]* in connection with *[confidential]*, whereas the Council expressly stated that, in retaining the applicant's name on the list, it had relied only on *[confidential]*.

233 It follows that those decisions, whilst particularly detailed as to the factors justifying that the applicant be charged with misappropriation of public funds, do not provide any up-to-date information as to developments in the investigation in *[confidential]*.

234 By contrast, the evidence on which the applicant relied before the adoption of the March 2017 measures, especially when taken together with the exculpatory evidence referred to in paragraphs 137 and 138 above, namely, in particular, the decision of the Oberlandesgericht Wien (Higher Regional Court, Vienna), the audit report drawn up by the FIS and the Pepper Hamilton Report, was such as would raise legitimate doubts on the part of the Council that would justify it making further enquiries of the Ukrainian authorities (see, to that effect, judgment of 21 February 2018, *Klyuyev* v *Council*, T-731/15, EU:T:2018:90, paragraph 254).

235 The Court observes that correspondence from the Commission for the Control of Interpol's Files of 25 April 2017 informing the applicant that the inclusion of his name in Interpol's files was not compliant with its rules and that it should be deleted, relied on by the applicant in his statement of modification, is irrelevant since that document postdates the adoption of the March 2017 measures. The legality of a decision to freeze assets is to be assessed in the light of the information available to the Council when the decision was adopted (judgment of 28 May 2013, *Trabelsi and Others* v *Council*, T-187/11, EU:T:2013:273, paragraph 115).

236 Therefore, the Council should, having regard, first, to the deficiencies in the factual basis on which it relied, and, second, to the exculpatory evidence presented by the applicant, have investigated further and sought clarification from the Ukrainian authorities, in accordance with the case-law cited, in particular, in paragraph 126 above.

237 It follows from all the foregoing that the Council committed a manifest error of assessment in considering that it was not required to take into account the evidence produced by the applicant and the arguments developed by him or to make further enquiries of the Ukrainian authorities, despite the fact that that evidence and those arguments were such as to give rise to legitimate doubts regarding the reliability of the information provided by the PGO in relation to *[confidential]* brought against the applicant.

238 The third plea raised by the applicant in his statement of modification is therefore well founded. Therefore, there is no need to examine the other pleas raised by the applicant in support of his application for annulment of the March 2017 measures, and the action must be upheld inasmuch as it seeks the annulment of the March 2017 measures in so far as they relate to the applicant.

239 In that regard, as far as concerns the application by the Council, in the alternative, that, in the event that Implementing Regulation 2017/374 is annulled in part, the Court declare, for reasons of legal certainty, that the effects of Decision 2017/381 be maintained until the annulment in part of that regulation takes effect, suffice it to note that Decision 2017/381 had effect only until 6 March 2018. Consequently, the annulment in part of Decision 2017/381 by this judgment has no effect on the time following that date, so that it is not necessary to rule on the issue of

maintaining its effets (see, to that effect and by analogy, judgment of 28 January 2016, *Azarov* v *Council*, T-331/14, EU:T:2016:49, paragraphs 70 to 72).

Costs

240 Under Article 134(2) of the Rules of Procedure, where there is more than one unsuccessful party, the Court is to decide how the costs are to be shared.

241 In the present case, since the applicant has been unsuccessful in relation to the claim for annulment made in the application, he must be ordered to pay the costs relating to that claim, in accordance with the form of order sought by the Council. Since the Council has been unsuccessful in relation to the claim for annulment in part of the March 2017 measures made in the statement of modification, it must be ordered to pay the costs relating to that claim, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Annuls Council Decision (CFSP) 2017/381 of 3 March 2017 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine and Council Implementing Regulation (EU) 2017/374 of 3 March 2017 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine in so far as Mr Andriy Klyuyev's name was retained on the list of persons, entities and bodies subject to those restrictive measures;

2. Dismisses the action as to the remainder;

3. Orders Mr Klyuyev to bear his own costs and to pay those incurred by the Council of the European Union in relation to the claim for annulment made in the application;

4. Orders the Council to bear its own costs and to pay those incurred by Mr Klyuyev in relation to the claim for annulment in part of Decision 2017/381 and of Implementing Regulation 2017/374 made in the

statement of modification.

Berardis Spielmann Csehi

Delivered in open court in Luxembourg on 11 July 2018.

E. Coulon

Registrar President

Table of contents