JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

11 July 2019 (*)

(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 — Maintenance of the applicant's name on the list — Council's obligation to verify that the decision of an authority of a third State was taken in accordance with the rights of the defence and the right to effective judicial protection)

In Joined Cases T−245/16 and T−286/17,

Oleksandr Viktorovych Yanukovych, residing in Donetsk (Ukraine), represented by T. Beazley QC, E. Dean and J. Marjason-Stamp, Barristers,

applicant,

v

Council of the European Union, represented by P. Mahnič 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 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 maintained 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: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 3 October 2018,

gives the following

Judgment

Background to the dispute

1 The present cases have been brought in the context of the restrictive measures adopted against certain persons, entities and bodies in view of the situation in Ukraine following the suppression of the demonstrations in Independence Square in Kiev (Ukraine) in February 2014.

2 The applicant, Mr Oleksandr Viktorovych Yanukovych, is the son of the former President of Ukraine and a businessman.

3 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).

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

‘(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 agreed 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 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 governing that freezing of funds are laid down in Article 1(3) to (6) of Decision 2014/119.

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 that freezing of funds in terms which are, in essence, identical to those used in the decision.

8 The names of the persons covered by those acts appear on the identical list contained in the Annex to Decision 2014/119 and in Annex I to Regulation No 208/2014 (‘the list’) together with, inter alia, the reasons for their listing.

9 The applicant’s name was on the list along with the identifying information ‘son of former President, businessman’ 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 Court Registry on 14 May 2014, the applicant brought an action, registered as Case T−348/14, seeking, inter alia, the annulment of Decision 2014/119 and Regulation No 208/2014 in so far as they concerned him.

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 public 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 public funds or assets, or being an accomplice thereto.’

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

14 On 5 March 2015, the Council adopted Decision (CFSP) 2015/364 amending Decision 2014/119 (OJ 2015 L 62, p. 25) and Implementing Regulation (EU) 2015/357 implementing Regulation No 208/2014 (OJ 2015 L 62, p. 1) (together, ‘the March 2015 acts’). Decision 2015/364, first, replaced Article 5 of Decision 2014/119, by extending the application of the restrictive measures, in so far as the applicant was concerned, until 6 March 2016, and, second, amended the Annex to that decision. Implementing Regulation 2015/357 consequently amended Annex I to Regulation No 208/2014.

15 By the March 2015 acts, the applicant’s name was maintained on the list with the identifying information ‘son of the former President, businessman’ and the following new statement of reasons:

‘Person subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.’

16 On 8 April 2015, the applicant modified his forms of order in Case T−348/14 so that they would also cover the annulment of Decision 2015/143, Regulation 2015/138 and the March 2015 acts, in so far as those acts concerned him.

17 By letter of 6 November 2015, the Council sent to the applicant a letter 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 26 November 2015, the applicant submitted his observations.

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

19 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 acts’).

20 By the March 2016 acts, the application of the restrictive measures was extended to 6 March 2017. The statement of reasons for the applicant’s designation, as set out in the March 2015 acts, was not amended.

21 By letter of 7 March 2016, the Council informed the applicant that the restrictive measures against him were to be maintained and it then replied to the observations which the applicant had made in previous correspondence and sent him the March 2016 acts. Furthermore, it notified the applicant of the time limit for submitting observations prior to a decision being taken regarding the possible maintenance of his name on the list.

22 By judgment of 15 September 2016, *Yanukovych* v *Council* (T−348/14, EU:T:2016:508), the General Court annulled Decision 2014/119 and Regulation No 208/2014, in so far as they concerned the applicant, and dismissed the application for annulment, contained in the amendment to the originating application, concerning, first, Decision 2015/143 and Regulation 2015/138 and, second, the March 2015 acts.

23 On 23 November 2016, the applicant brought an appeal before the Court of Justice of the European Union, registered as Case C−599/16, against the judgment of 15 September 2016, *Yanukovych* v *Council* (T−348/14, EU:T:2016:508).

24 By letter of 12 December 2016, the Council informed the applicant's legal representatives 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 time limit for submitting observations in connection with the annual review of the restrictive measures. The applicant submitted such observations to the Council by letter of 11 January 2017.

25 On 3 March 2017, 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 acts').

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

27 By letter of 6 March 2017, the Council informed the applicant that the restrictive measures against him were to be maintained. It replied to the observations which the applicant had set out in previous correspondence and sent him the March 2017 acts. Furthermore, it notified the applicant of the time limit for submitting observations prior to a decision being taken regarding the possible maintenance of his name on the list.

Procedure and forms of order sought

28 By application lodged at the Court Registry on 13 May 2016, the applicant brought an action for annulment, registered as Case T−245/16, against the March 2016 acts.

29 On 12 September 2016, the Council lodged the defence in Case T−245/16. On 22 September 2016, in that same case, it submitted a reasoned application, under Article 66 of the Rules of Procedure of the General Court, for the content of certain documents annexed to the originating application and certain paragraphs of the defence not to be cited in the documents relating to the case to which the public has access.

30 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was appointed to the Sixth Chamber, to which Case T−245/16 was, consequently, assigned.

31 In Case T−245/16, the reply and the rejoinder were lodged at the Court Registry on 28 October 2016 and 13 January 2017.

32 On 13 January 2017, the written part of the procedure in Case T−245/16 was closed.

33 On 20 January 2017, the Council submitted a similar application to that referred to in paragraph 29 above for the content of certain documents annexed to the rejoinder in Case T−245/16 not to be cited in the documents relating to that case to which the public has access.

34 By document lodged at the Court Registry on 3 February 2017, the applicant requested that a hearing be held in Case T−245/16.

35 By letter lodged at the Court Registry on 1 March 2017, the applicant submitted, under Article 85(3) of the Rules of Procedure, new evidence to be added to the file in Case T−245/16. By letter lodged at the Court Registry on 3 April 2017, the Council submitted its observations on that new evidence.

36 By application lodged at the Court Registry on 12 May 2017, the applicant brought an action for annulment, registered as Case T−286/17, against the March 2017 acts.

37 By judgment of 19 October 2017, *Yanukovych* v *Council* (C−599/16 P, not published, EU:C:2017:785), the Court of Justice dismissed the applicant's appeal seeking to have the General Court's judgment of 15 September 2016, *Yanukovych* v *Council* (T−348/14, EU:T:2016:508) set aside in part.

38 On 27 October 2017, the Court asked the parties to state their views, first, on the possible effect of the judgment of 19 October 2017, *Yanukovych* v *Council* (C−599/16 P, not published, EU:C:2017:785), on Case T−245/16 and Case T−286/17 and, second, on the possible joinder of those cases for the purpose of the oral part of the procedure and the judgment.

39 The applicant and the Council lodged their replies to those measures of organisation of procedure on 9 and 10 November 2017, respectively. As regards the possible joinder of Cases T−245/16 and T−286/17, the applicant submits that it may only be warranted, if at all, for the purposes of the oral part of the procedure. The Council defers to the discretion of the Court.

40 On 10 November 2017, the Council lodged the defence in Case T−286/17.

41 In the context of that case, on 20 November 2017, the Council submitted an application similar to that mentioned in paragraph 29 above for the content of certain documents annexed to the originating application and certain paragraphs of the defence not to be cited in the documents relating to that case to which the public has access.

42 On 24 November 2017, the Court decided that a second exchange of pleadings in Case T−286/17 was not necessary. By letter of 6 December 2017, the applicant submitted a reasoned request, under Article 83(2) of the Rules of Procedure, asking the Court to authorise the parties to supplement the file in the case with a reply and a rejoinder. By decision of 19 December 2017, the Court granted that request and set a deadline for the lodging of the reply.

43 Accordingly, the reply and the rejoinder in Case T−286/17 were lodged at the Court Registry on 22 January 2018 and 8 March 2018.

44 On 8 March 2018, the written part of the procedure in Case T−286/17 was closed.

45 On 16 March 2018, the Council submitted an application similar to that referred to in paragraph 29 above for the content of certain documents annexed to the rejoinder in Case T−286/17 not to be cited in the documents relating to that case to which the public has access.

46 By letter lodged at the Court Registry on 16 May 2018, the applicant submitted an application under Article 85(3) of the Rules of Procedure to include new evidence in the file in Case T−286/17. By letter lodged at the Court Registry on 6 June 2018, the Council submitted its observations on that new evidence.

47 By decision of the President of the Sixth Chamber of the General Court of 10 July 2018, Case T−245/16, *Yanukovych* v *Council*, and Case T−286/17, *Yanukovych* v *Council*, were joined for the purpose of the oral part of the procedure and of the decision which closes the proceedings, on the basis of Article 68 of the Rules of Procedure, the parties having been heard in that respect.

48 By letter lodged at the Court Registry on 28 September 2018, the applicant lodged observations on the report for the hearing.

49 The parties presented oral argument and replied to the questions put to them by the General Court at the hearing on 3 October 2018, which, at the request of the Council, after having heard the applicant, was conducted in part *in camera*.

50 At the hearing, the Council presented observations on the report for the hearing, formal note of which was made in the minutes of the hearing.

51 By judgment of 19 December 2018, *Azarov* v *Council* (C−530/17 P, EU:C:2018:1031), the Court of Justice set aside the judgment of 7 July 2017, *Azarov* v *Council* (T−215/15, EU:T:2017:479) and annulled the March 2015 acts, in so far as they concerned the applicant in the case giving rise to that judgment.

52 On account of the potential impact of the Court of Justice's ruling in the judgment of 19 December 2018, *Azarov* v *Council* (C−530/17 P, EU:C:2018:1031), in the present cases, by order of 7 January 2019, the General Court (Sixth Chamber) decided to reopen the oral part of the procedure pursuant to Article 113(2) (b) of the Rules of Procedure in order to enable the parties to express their views in that regard.

53 Accordingly, on 10 January 2019, the General Court invited the parties, in the context of the measures of organisation of procedure laid down in Article 89 of the Rules of Procedure, to submit their observations on the consequences to be drawn, in the present cases, from the judgment of 19 December 2018, *Azarov* v *Council* (C−530/17 P, EU:C:2018:1031). The parties complied with that request within the time allowed.

54 The applicant claims in Case T−245/16 and in Case T−286/17 that the Court should:

– annul the March 2016 acts and the March 2017 acts (together, 'the contested acts'), in so far as they concern him;

– order the Council to pay the costs.

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

– dismiss the actions;

– order the applicant to pay the costs.

Law

Admissibility of the reference to other documents

56 It must be noted that the applicant refers, in his pleadings relating to the application for annulment of the March 2016 acts, to the documents lodged before the General Court in the context of the case giving rise to the judgment of 15 September 2016, *Yanukovych* v *Council* (T−348/14, EU:T:2016:508) and, in his pleadings relating to the application for annulment of the March 2017 acts, to those documents as well as those lodged in the context of the application for annulment of the March 2016 acts, which he attaches as an annex.

57 As the Council rightly points out, it must be noted that, in order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself. It is settled case-law that, although the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed to it, a general reference to other documents cannot compensate for the lack of essential elements which, under Article 21 of the Statute of the Court of Justice of the European Union and Article 76(1)(d) of the Rules of Procedure, must be included in the application itself (see, to that effect, judgments of 15 June 2017, *Al-Faqih and Others* v *Commission*, C−19/16 P, EU:C:2017:466, paragraph 54 and the case-law cited, and of 18 January 2012, *Djebel — SGPS* v *Commission*, T−422/07, not published, EU:T:2012:11, paragraph 42 and the case-law cited).

58 Consequently, the applicant's general reference to the pleadings lodged either in earlier cases or Case T−245/16, in the context of Case T−286/17, must be regarded as inadmissible.

Substance

59 In support of his applications for annulment of the contested acts, the applicant relies on seven pleas in law, alleging: (i) lack of a legal basis; (ii) misuse of power; (iii) failure to state reasons; (iv) failure to fulfil the listing criteria; (v) manifest error of assessment; (vi) breach of the rights of the defence and of the right to effective judicial protection; and (vii) breach of the right to property.

60 It is appropriate to examine, first of all, the fourth plea in law, alleging failure to fulfil the criteria for the inclusion of the applicant's name on the list.

61 In the context of the fourth plea, the applicant claims that the reasons for the inclusion of his name on the list do not fulfil the criteria for applying restrictive measures set out in the contested acts.

62 In particular, the applicant claims that the issue of a notification of suspicion or the opening of a mere pre-trial investigation concerning him are not sufficient to consider that he is responsible for the alleged conduct. Since compliance of pre-trial investigations with procedural law is monitored by the PGO — which, according to the applicant, does not provide the required guarantees of independence and impartiality — the Council should also have carried out additional checks in that regard. Moreover, the applicant states that no progress has been made in the pre-trial investigations to which he is subject since the adoption of the restrictive measures at issue.

63 Indeed, the PGO's letters on which the Council relied do not demonstrate either that the applicant falls within one of the categories of persons identified in the judgment of 27 February 2014, *Ezz and Others* v *Council* (T−256/11, EU:T:2014:93). Even on the assumption that, in the present case, the level of judicial involvement was sufficient, particularly as regards the seizures of the applicant's property and the authorisation of preventive detention measures directed against him, such involvement cannot be regarded as reliable and adequate in terms of that case-law since the Ukrainian judicial system does not provide the required guarantees of independence and impartiality, even in the light of the case-law of the European Court of Human Rights ('ECtHR').

64 According to the applicant, the fact that the Council is not in a position to assess the applicant's guilt or innocence or whether the investigations concerning him are well founded does not relieve it of its obligation to respect the rights and observe the principles guaranteed under the Charter of Fundamental Rights of the European Union in the exercise of its powers and, consequently, to verify whether and the extent to which his fundamental rights were protected in Ukraine.

65 Compliance by the Council with the obligation to undertake a full and rigorous review and to ensure that any decision imposing a restrictive measure is taken on a sufficiently solid factual basis is all the more crucial in the present case in the light of (i) the fact that Ukraine is not a Member State of the European Union; (ii) the political motivation of the allegations made against the applicant; (iii) the absence of any meaningful progress in the criminal proceedings on which the applicant's listing is based; (iv) the absence

of any balanced or fair procedure prior to drawing up charges in Ukraine; and (v) the period of time that the Council has had to verify the evidence and information justifying the applicant's re-listing.

66 In response to a written question of the General Court (see paragraph 53 above), the applicant states that the Court of Justice's reasoning and conclusion in the judgment of 19 December 2018, *Azarov* v *Council* (C−530/17 P, EU:C:2018:1031) are of significant importance in the present case since the circumstances which triggered the Council's verification obligation in the case giving rise to that judgment are, in essence, identical to those leading to the adoption of the contested acts. Thus, first, the applicant complains that the Council did not verify, by submitting that it was not under an obligation to do so, whether the decision of the Ukrainian authorities, on which it intended to rely in order to maintain the applicant's name on the list, had been adopted in accordance with the applicant's rights of defence and his right to effective judicial protection. Second, it criticises the Council for failing to indicate, in the statement of reasons justifying the maintenance of his name on the list, the reasons why the Council considered that that decision of the Ukrainian authorities had been adopted in accordance with those rights. Moreover, the Council's letters of 7 March 2016 and 6 March 2017, notifying the applicant of the renewal of the restrictive measures against him, fail to mention such reasons.

67 The Council contends that the decision to list, and subsequently maintain the applicant's name on the list, on the basis of the information contained in the PGO's letters, fulfils the listing criteria and is founded on a sufficiently solid basis making it possible to establish that the applicant is the subject of criminal proceedings for misappropriation of public funds.

68 As regards the applicant's argument that the PGO does not bear the judicial hallmarks of independence and impartiality, the Council submits that the pre-trial investigation, which is conducted by the PGO under judicial oversight, is a stage in criminal proceedings. Furthermore, the purpose of the restrictive measures would not be achieved if it were not possible for them to be adopted in respect of persons subject to a pre-trial investigation for their involvement in crimes, such as those of which the applicant is accused.

69 As regards the applicant's claim based on the absence of any meaningful progress in the criminal proceedings against him, the Council contends, in essence, that what matters is that the proceedings are pending at the time of the adoption of the contested acts and that the alleged lack of progress in one of those proceedings is attributable to the applicant, who evaded justice.

70 In reply to the claim that the Council cannot legitimately rely on criminal proceedings without having first verified the extent to which the applicant's fundamental rights had been protected in Ukraine, the Council argues, first, that the applicant has not demonstrated that his rights were actually infringed. Second, it is not apparent from the case-law that the Council is required to verify compliance with the right to effective judicial protection by the third State whose judicial authority issued the attestations which the Council relies on in order to adopt restrictive measures, such as those at issue. Third, the applicant is still entitled to defend himself in the criminal proceedings against him and in the proceedings before the ECtHR, which does not prevent the Council, pending the outcome of those proceedings, from relying on the existence of the ongoing proceedings when deciding to impose restrictive measures.

71 More generally, the Council recalls that, according to the case-law, it is not obliged to carry out systematically its own investigations or verifications in order to obtain further clarifications when it relies on information provided by the authorities of a third State to take restrictive measures against nationals of that state who are the subject of judicial proceedings in that state. Such verifications are necessary only where the information received is insufficient or inconsistent. In this case, the Council contends that it did indeed verify whether the decision to freeze funds affecting the applicant was well founded in the light of the criminal proceedings in Ukraine for misappropriation of funds.

72 In response to a written question of the Court (see paragraph 53 above), the Council contends that, even though it has not given any indication to that effect in the statement of reasons, it was aware that there had been judicial oversight in Ukraine during the criminal investigations concerning the applicant. It is apparent from the PGO's letters referred to in paragraphs 17, 18 and 24 above that judicial decisions

concerning the applicant were adopted in Ukraine, such as the seizures of his property ordered by the Petschersk District Court (Kiev) and a preventive detention measure adopted by that court. According to the Council, those examples show that, when it relied on the decisions of the Ukrainian authorities referred to in the PGO's letters, it was able to verify that such decisions had been taken in accordance with the applicant's rights of defence and his right to effective judicial protection.

73 It is apparent from settled case-law that, in a review of restrictive measures, the Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the EU legal order, which include, in particular, respect for the rights of the defence and the right to effective judicial protection (see judgment of 19 December 2018, *Azarov* v *Council*, C−530/17 P, EU:C:2018:1031, paragraphs 20 and 21 and the case-law cited).

74 The effectiveness of the judicial review guaranteed by Article 47 of the Charter of Fundamental Rights requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to include or to maintain a person's name on the 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 a verification of 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, are substantiated (see judgment of 19 December 2018, *Azarov* v *Council*, C−530/17 P, EU:C:2018:1031, paragraph 22 and the case-law cited).

75 The adoption and the maintenance of restrictive measures, such as those laid down in Decision 2014/119 and Regulation No 208/2014, as amended, taken against a person who has been identified as responsible for the misappropriation of funds of a third State are based, in essence, on the decision of an authority of that state, which was competent to make it, to initiate and conduct criminal investigation proceedings concerning that person and relating to an offence of misappropriation of public funds (see, to that effect, judgment of 19 December 2018, *Azarov* v *Council*, C−530/17 P, EU:C:2018:1031, paragraph 25).

76 In addition, whereas, under the listing criterion, such as that referred to in paragraph 12 above, the Council can base restrictive measures on the decision of a third State, the obligation, on that institution, to respect the rights of the defence and the right to effective judicial protection means that it must satisfy itself that those rights were complied with by the authorities of the third State which adopted that decision (see, to that effect, judgment of 19 December 2018, *Azarov* v *Council*, C−530/17 P, EU:C:2018:1031, paragraphs 26, 27 and 35).

77 In that regard, the Court of Justice states that the requirement for the Council to verify that the decisions of third States, on which it intends to rely, have been taken in accordance with those rights is designed to ensure that the adoption or the maintenance of the measures for the freezing of funds occurs only on a sufficiently solid factual basis and, accordingly, to protect the persons or entities concerned. Thus, the Council cannot conclude that the adoption or the maintenance of such measures is taken on a sufficiently solid factual basis before having itself verified that the rights of the defence and the right to effective judicial protection were complied with at the time of the adoption of the decision by the third State in question on which it intends to rely (see, to that effect, judgment of 19 December 2018, *Azarov* v *Council*, C−530/17 P, EU:C:2018:1031, paragraphs 28 and 34 and the case-law cited).

78 Moreover, although it is true that the fact that a third State is among the States which acceded to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), entails review, by the ECtHR, of the fundamental rights guaranteed by the ECHR, which, in accordance with Article 6(3) TEU, form part of EU law as general principles, that fact cannot render superfluous the verification requirement referred to in paragraph 77 above (see, to that effect, judgment of 19 December 2018, *Azarov* v *Council*, C−530/17 P, EU:C:2018:1031, paragraph 36).

79 The Court of Justice also held that the Council must refer, if only briefly, in the statement of reasons relating to the adoption or the maintenance of restrictive measures against a person or entity, to the reasons why it considers the decision of the third State on which it intends to rely to have been adopted in accordance with the rights of the defence and the right to effective judicial protection. Thus, it is for the Council, in order to fulfil its obligation to state reasons, to show, in the decision imposing the restrictive measures, that it has verified that the decision of the third State on which those measures are based was taken in accordance with those rights (see, to that effect, judgment of 19 December 2018, *Azarov* v *Council*, C−530/17 P, EU:C:2018:1031, paragraphs 29 and 30 and the case-law cited).

80 Ultimately, when it bases the adoption or the maintenance of restrictive measures, such as those in the present case, on the decision of a third State to initiate and conduct criminal proceedings for misappropriation of public funds or assets by the person concerned, the Council must, first, ensure that, at the time of the adoption of that decision, the authorities of that third State have complied with the rights of the defence and the right to effective judicial protection of the person against whom the criminal proceedings at issue have been brought and, second, refer to, in the decision imposing restrictive measures, the reasons for which it considers that that decision of the third State has been adopted in accordance with those rights.

81 It is in the light of those case-law principles that it is necessary to examine whether the Council complied with those obligations.

82 In the first place, it must be noted that the applicant is subject to new restrictive measures adopted by means of the contested acts on the basis of the listing criterion set out in Article 1(1) of Decision 2014/119, as clarified in Decision 2015/143, and in Article 3 of Regulation No 208/2014, as clarified in Regulation 2015/138 (see paragraphs 12 and 13 above). That criterion provides for the freezing of funds of persons who have been identified as responsible for the misappropriation of public funds, including persons subject to investigation by the Ukrainian authorities.

83 It is common ground that the Council, in order to decide to maintain the applicant's name on the list, relied on the fact that he was subject to 'criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets', which was evidenced by the PGO's letters of 4 September and 30 November 2015, as regards the March 2016 acts, and by the PGO's letters of 25 July and 16 November 2016, as regards the March 2017 acts.

84 The maintenance of the restrictive measures taken against the applicant was therefore based, as in the case giving rise to the judgment of 19 December 2018, *Azarov* v *Council* (C−530/17 P, EU:C:2018:1031), on the PGO's decision to initiate and conduct criminal investigation proceedings concerning an offence of misappropriation of Ukrainian State funds.

85 In the first place, the fact remains that the statement of reasons for the contested acts relating to the applicant (see paragraphs 15, 20 and 26 above) does not include a single reference to the fact that the Council verified compliance, by the Ukrainian judicial authorities, with the applicant's rights of defence and his right to effective judicial protection and that, therefore, such a failure to refer to those reasons amounts to an early indication that the Council did not carry out such a verification.

86 In the second place, it must be noted that none of the information contained in the almost identical letters of 7 March 2016 (see paragraph 21 above), as regards Case T−245/16, and of 6 March 2017 (see paragraph 27 above), as regards Case T−286/17, makes it possible to consider that the Council had information relating to compliance with the rights at issue by the Ukrainian authorities so far as concerns the criminal proceedings against the applicant and, even less so, that the Council had assessed such information, in order to verify that those rights had been sufficiently complied with by the Ukrainian judicial authorities at the time of the adoption of the decision to initiate and conduct criminal investigation proceedings concerning an offence of misappropriation of public funds or assets committed by the applicant. In those letters, as in the case giving rise to the judgment of 19 December 2018, *Azarov* v *Council* (C−530/17 P, EU:C:2018:1031, paragraph 24), the Council merely stated that the PGO's letters,

supplied to the applicant beforehand (see paragraphs 18 and 24 above) showed that the applicant continued to be subject to criminal proceedings for misappropriation of public funds or assets. Furthermore, the fact that Ukraine is one of the States that has acceded to the ECHR, expressly mentioned by the Council in its letters and in its pleadings, does not render verification of compliance with the applicant's rights of defence and his right to effective judicial protection superfluous (see paragraph 78 above).

87 In the third place, it must be observed that, contrary to its claims, the Council was under an obligation to carry out that verification irrespective of any evidence adduced by the applicant to show that, in the present case, his personal situation had been affected by the problems which he pointed out relating to the functioning of the judicial system in Ukraine. In any event, although the applicant had claimed on numerous occasions, by adducing specific evidence, that the Ukrainian judicial authorities had infringed his rights of defence and his right to effective judicial protection and that the situation in Ukraine was generally incompatible with the existence of sufficient guarantees in that regard, the Council did not show that it had verified compliance with such rights. On the contrary, it repeatedly stated in its pleadings that it was not under any obligation to do so and that such obligation did not stem either from the case-law principles laid down in the judgment of 26 July 2017, *Council* v *LTTE* (C−599/14 P, EU:C:2017:583), relied on by the applicant.

88 In the fourth place, in the reply to the question relating to the impact of the judgment of 19 December 2018, *Azarov* v *Council* (C−530/17 P, EU:C:2018:1031), on the present cases, the Council put forward only the arguments summarised in paragraph 72 above.

89 In that regard, first, it must be noted that the Council accepts that the statement of reasons for the contested acts does not cover the issue of compliance with the rights of the defence and the right to effective judicial protection in the light of the decision to initiate and conduct the criminal proceedings justifying the inclusion and maintenance of the applicant's name on the list.

90 Second, it must be noted that the Council claims that it is clear from the files before the Court in the present cases that the conduct of the criminal investigations had been subject to judicial oversight in Ukraine. More specifically, according to the Council, the existence of judicial decisions adopted in the context of the criminal proceedings against the applicant shows that, when it relied on the decision of the Ukrainian authorities referred in the PGO's letters, (i) it was able to verify that that decision had been taken in accordance with the rights of the defence and the right to effective judicial protection and (ii) it checked that a certain number of judicial decisions in the context of those criminal proceedings had been taken in accordance with those rights.

91 All the judicial decisions mentioned by the Council fall within the scope of the criminal proceedings which justified the inclusion and maintenance of the applicant's name on the list and are merely incidental in the light of those proceedings, since they are restrictive in nature. It is true that those decisions are capable of supporting the Council's argument concerning the existence of a sufficiently solid factual basis, namely the fact that, in accordance with the listing criterion, the applicant was subject to criminal proceedings concerning, inter alia, an offence of misappropriation of Ukrainian State funds or assets. However, such decisions are not ontologically capable, alone, of demonstrating, as the Council maintains, that the decision of the Ukrainian judicial authorities to initiate and conduct those criminal proceedings, on which the maintenance of the restrictive measures directed against the applicant is, in essence, based, was taken in accordance with his rights of defence and his right to effective judicial protection.

92 In any event, the Council is not in a position to refer to any document in the file of the procedure which resulted in the adoption of the contested acts showing that it examined the decisions of the Ukrainian courts on which it relies now and from which it was able to conclude that the essence of the applicant's rights of defence and his right to effective judicial protection had been complied with.

93 It cannot therefore be found that the information available to the Council at the time of the adoption of the contested acts enabled it to verify that the decision of the Ukrainian judicial authorities had been taken in accordance with those rights as they apply to the applicant.

94 Furthermore, in that regard, it must also be noted, as the Court of Justice made clear in the judgment of 19 December 2018, *Azarov* v *Council* (C−530/17 P, EU:C:2018:1031), that the case-law of the Court of Justice — according to which, in particular, in the event of the adoption of a decision to freeze funds such as that adopted in respect of the applicant, it is not for the Council or General Court to verify whether or not the investigations to which the person concerned by those measures was subject were well founded, but only to verify whether that was the case in relation to the decision to freeze funds in the light of the document or documents on which that decision was based (see, to that effect, judgments of 5 March 2015, *Ezz and Others* v *Council*, C−220/14 P, EU:C:2015:147, paragraph 77; of 19 October 2017, *Yanukovych* v *Council*, C−599/16 P, not published, EU:C:2017:785, paragraph 69; and of 19 October 2017, *Yanukovych* v *Council*, C−598/16 P, not published, EU:C:2017:786, paragraph 72) — cannot be interpreted as meaning that the Council is not required to verify that the decision of the third State on which it intends to base the adoption of restrictive measures was taken in accordance with the rights of the defence and the right to effective judicial protection (see, to that effect, judgment of 19 December 2018, *Azarov* v *Council*, C−530/17 P, EU:C:2018:1031, paragraph 40 and the case-law cited).

95 In the light of the foregoing, it has not been established that the Council, prior to the adoption of the contested acts, verified that the Ukrainian judicial authorities complied with the applicant's rights of defence and his right to effective judicial protection.

96 In those circumstances, the contested acts must be annulled, in so far as they concern the applicant, without it being necessary to examine the other pleas in law and arguments put forward by the applicant or the requests for confidential treatment submitted by the Council.

Costs

97 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to pay the costs, 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) 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, 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, as well as 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 the name of Mr Oleksandr Viktorovych Yanukovych was maintained on the list of persons, entities and bodies subject to those restrictive measures;**

2. **Orders the Council of the European Union to bear its own costs and to pay those incurred by Mr Yanukovych.**

Berardis Spielmann Csehi

Delivered in open court in Luxembourg on 11 July 2019.

E. Coulon G. Berardis

Registrar President

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* Language of the case: English.