JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

9 June 2021 (*)

(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 Case T-303/19,

Viktor Fedorovych Yanukovych, residing in Rostov-on-Don (Russia), represented by M. Anderson, R. Kiddell, Solicitors, E. Dean and J. Marjason-Stamp, Barristers,

applicant,

v

Council of the European Union, represented by P. Mahnič, A. Vitro and T. Haas, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Council Decision (CFSP) 2019/354 of 4 March 2019 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2019 L 64, p. 7), and of Council Implementing Regulation (EU) 2019/352 of 4 March 2019 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2019 L 64, p. 1), in so far as those acts maintain the applicant's name on the list of persons, entities and bodies subject to those restrictive measures,

THE GENERAL COURT (Fifth Chamber),

composed of D. Spielmann (Rapporteur), President, U. Öberg and O. Spineanu-Matei, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 8 December 2020,

gives the following

Judgment

Background to the dispute

1 The present case has been brought in the context of proceedings relating to 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 Viktor Fedorovych Yanukovych, is the former President of Ukraine.

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) (together, 'the March 2014 acts').

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

'(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 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 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 to be adopted for the freezing of funds and resources as provided for by that decision ('the restrictive measures at issue'), and lays down the detailed rules governing that freezing of funds and resources in terms which are identical, in essence, to those used in that decision.

8 The names of the persons covered by the March 2014 acts are included on the list in the annex to Decision 2014/119 and in Annex I to Regulation No 208/2014 ('the list') together with, inter alia, a statement of the reasons for their listing.

9 The applicant's name appeared on the list with the identifying information 'former President of Ukraine' and the following statement of reasons:

'Person subject to criminal proceedings in Ukraine to investigate crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine.'

10 By application lodged at the General Court Registry on 14 May 2014, the applicant brought an action, registered as Case T-346/14, seeking, inter alia, annulment of the March 2014 acts, 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 amended, as from 31 January 2015, the listing criteria for persons targeted by the freezing of funds, replacing the text of Article 1(1) of Decision 2014/119 with the following:

‘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 No 208/2014 was similarly amended by Regulation 2015/138.

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 replaced Article 5 of Decision 2014/119 by extending the application of the restrictive measures at issue, so far as the applicant was concerned, until 6 March 2016, and replaced the annex to that decision. Implementing Regulation 2015/357 consequently replaced 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 ‘former President of Ukraine’ 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 the form of order sought in Case T-346/14 so as to cover also the annulment of Decision 2015/143, Regulation 2015/138 and the March 2015 acts, in so far as all those acts concerned him.

17 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’).

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

19 By application lodged at the Court Registry on 13 May 2016, the applicant brought an action, registered as Case T-244/16, for annulment of the March 2016 acts in so far as they concerned him.

20 By judgment of 15 September 2016, *Yanukovych* v *Council* (T-346/14, EU:T:2016:497), the General Court annulled the March 2014 acts in so far as they concerned the applicant and dismissed the application for annulment contained in the modification of the application, concerning, first, Decision 2015/143 and Regulation 2015/138 and, secondly, the March 2015 acts.

21 On 23 November 2016, the applicant brought an appeal before the Court of Justice, registered as Case C-598/16 P, against the judgment of 15 September 2016, *Yanukovych* v *Council* (T-346/14, EU:T:2016:497).

22 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’).

23 By the March 2017 acts, the application of the restrictive measures at issue was extended with respect to the applicant until 6 March 2018. The statement of reasons for the applicant's designation, as set out in the March 2015 acts, was not amended.

24 By application lodged at the Court Registry on 12 May 2017, the applicant brought an action, registered as Case T-285/17, for annulment of the March 2017 acts in so far as they concerned him.

25 By judgment of 19 October 2017, *Yanukovych* v *Council* (C-598/16 P, not published, EU:C:2017:786), the Court of Justice dismissed the applicant's appeal by which he sought to have the judgment of 15 September 2016, *Yanukovych* v *Council* (T-346/14, EU:T:2016:497), set aside in part.

26 On 5 March 2018, the Council adopted Decision (CFSP) 2018/333 amending Decision 2014/119 (OJ 2018 L 63, p. 48), and Implementing Regulation (EU) 2018/326 implementing Regulation No 208/2014 (OJ 2018 L 63, p. 5) (together, 'the March 2018 acts').

27 By the March 2018 acts, the application of the restrictive measures at issue was extended with respect to the applicant until 6 March 2019. The statement of reasons for the applicant's designation, as set out in the March 2015 acts, was not amended.

28 By application lodged at the Court Registry on 13 May 2018, the applicant brought an action, registered as Case T-300/18, for annulment of the March 2018 acts in so far as they concerned him.

29 Between November 2018 and February 2019, the Council and the applicant exchanged several letters concerning the possible extension of the restrictive measures at issue with respect to the applicant. In particular, the Council sent the applicant several letters from the Ukrainian Prosecutor General's Office ('the PGO'), including decisions of the investigating judge of the Pechersk District Court in Kiev ('the Pechersk District Court'), concerning the criminal proceedings brought against him on which the Council was basing the proposed extension.

30 On 4 March 2019, the Council adopted Decision (CFSP) 2019/354 amending Decision 2014/119 (OJ 2019 L 64, p. 7), and Implementing Regulation (EU) 2019/352 implementing Regulation No 208/2014 (OJ 2019 L 64, p. 1) (together, 'the contested acts').

31 By the contested acts, the application of the restrictive measures at issue was extended until 6 March 2020, and the applicant's name was maintained on the list with the same statement of reasons as that set out in paragraph 15 above. Furthermore, the annex to Decision 2014/119 and Annex I to Regulation No 208/2014 were subdivided into two sections, the second of which was entitled 'Rights of defence and right to effective judicial protection'. That section contains the following statement with respect to the applicant:

'The information on the Council's file shows that the rights of defence and the right to effective judicial protection of Mr Yanukovych were respected in the criminal proceedings on which the Council relied. This is demonstrated in particular by a number of Court decisions relating to the seizure of property and by a Court decision of 1 November 2018 granting permission for the arrest and summoning and bringing of the suspected to the Court, as well as by a decision of the investigating judge of 8 October 2018 refusing the prosecutor's application for a special pre-trial investigation *in absentia*.'

32 By letter of 5 March 2019, the Council informed the applicant that the restrictive measures at issue were to be maintained against him. The Council replied to the observations set out by the applicant in his letters of 29 November and 18 December 2018 and 28 January and 1 February 2019, and sent him copies of the contested acts. It also informed him of the deadline for submitting observations prior to a decision being taken regarding the possible retention of his name on the list.

Events subsequent to the bringing of the present action

33 By judgment of 11 July 2019, *Yanukovych* v *Council* (T-244/16 and T-285/17, EU:T:2019:502), the General Court annulled the March 2016 acts and the March 2017 acts, in so far as they concerned the applicant.

34 By judgment of 24 September 2019, *Yanukovych* v *Council* (T-300/18, not published, EU:T:2019:685), the General Court annulled the March 2018 acts in so far as they concerned the applicant.

Procedure and forms of order sought

35 By application lodged at the Court Registry on 14 May 2019, the applicant brought an action for annulment of the contested acts.

36 On 2 September 2019, the Council lodged its defence.

37 On 30 September 2019, the Council 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 application and certain passages in the defence not to be reproduced in the documents relating to the case to which the public has access.

38 Following a change in the composition of the Chambers of the General Court, pursuant to Article 27(5) of the Rules of Procedure, the case was allocated to the Fifth Chamber, and a new Judge-Rapporteur was designated.

39 The reply was lodged at the Court Registry on 21 October 2019.

40 The rejoinder was lodged at the Court Registry on 6 December 2019. On the same day, the written part of the procedure was closed.

41 By document lodged at the Court Registry on 30 December 2019, the applicant requested that a hearing be held.

42 By decision of the President of the Fifth Chamber of the General Court of 11 August 2020, the present case and Case T-302/19, *Yanukovych* v *Council*, were joined for the purposes of the oral part of the procedure, pursuant to Article 68 of the Rules of Procedure, the parties having been heard in that respect.

43 Acting on a proposal from the Judge-Rapporteur, the General Court (Fifth Chamber) decided to open the oral part of the procedure and, in the context of measures of organisation of procedure provided for in Article 89(3) of the Rules of Procedure, requested the Council to produce certain documents that were not in the case file. The Council complied with that request within the prescribed period.

44 The hearing originally scheduled for 6 October 2020 was adjourned pursuant to Article 107(2) of the Rules of Procedure.

45 As the Judge-Rapporteur was prevented from acting in the present case, the President of the Court designated a new Judge-Rapporteur sitting in the Fifth Chamber, pursuant to Article 27(1) of the Rules of Procedure. The President of the Chamber also designated another Judge to complete the Chamber, pursuant to Article 17(2) of those rules.

46 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 8 December 2020, which, at the request of the Council and the applicant having been heard, was conducted in part in camera. Following the hearing, the oral part of the procedure was closed and the deliberations commenced.

47 The applicant claims that the Court should:

– annul the contested acts, in so far as they concern him;

– order the Council to pay the costs.

48 The Council contends that the Court should:

– dismiss the action;

– in the alternative, should the contested acts be annulled in so far as they concern the applicant, order that the effects of Decision 2019/354 be maintained until the partial annulment of Implementing Regulation 2019/352 takes effect;

– order the applicant to pay the costs.

Law

49 In support of the action, the applicant relies on seven pleas in law, the first and second, raised together, alleging failure to comply with the criteria for inclusion on the list and a manifest error of assessment; the third, alleging failure to state reasons; the fourth, alleging breach of rights of the defence and of the right to effective judicial protection; the fifth, alleging the lack of a legal basis; the sixth, alleging misuse of power; and the seventh, alleging breach of the right to property.

50 First of all, it is appropriate to examine the first and second pleas together, in so far as the applicant thereby alleges, in particular, that the Council failed to verify that the Ukrainian authorities had respected the applicant's rights of defence and his right to effective judicial protection and that, as a result, the Council made a manifest error of assessment when adopting the contested acts.

51 In the context of those pleas, the applicant, first, recalls that review by the Courts of the European Union extends, in principle, to the assessment of the facts and circumstances invoked by the Council to justify maintaining his name on the list, and to the verification of the evidence and information on which it relied.

52 Secondly, he claims that the letters from the PGO on which the Council relied in order to adopt the contested acts did not afford it a sufficiently solid factual basis on which to include his name on the list, those documents being utterly inadequate, inconsistent, baseless or false.

53 Noting that it is clear from the letter from the Council of 5 March 2019 that, when the Council adopted the contested acts, it relied solely on criminal proceedings [*confidential*], (1) which initially formed part of proceedings [*confidential*] but were separated from them on 25 December 2015, and which relate to the alleged misappropriation [*confidential*], the applicant submits that the Council made manifest errors of assessment, first, by deciding that the pre-trial investigations relating to him constituted a sufficient factual basis for maintaining his name on the list and, secondly, by failing to satisfy itself that his rights of defence and his right to effective judicial protection had been respected. Accordingly, he claims that the decisions of the Ukrainian authorities relied on by the Council do not serve to demonstrate that those rights were respected or, therefore, to justify maintaining the restrictive measures at issue.

54 More specifically, as regards proceedings [*confidential*], he claims that there have been no substantive advances in the investigation, the decision of 1 November 2018 granting permission for his arrest and summoning as a suspect, and for bringing him before the court ('the decision of 1 November 2018'), being merely an extension – one which, moreover, was unlawful because he did not have the status of 'suspect' under Ukrainian law – of a permission already granted in 2015. The only real development, in his submission, relates to the adoption of the decision of the investigating judge of the Pechersk District Court on 8 October 2018 refusing the PGO's application for permission to conduct a special pre-trial investigation *in absentia* ('the decision of 8 October 2018'). That decision, which was favourable to the applicant, in his view impedes both the investigation and the re-submission of the application by the PGO.

In that regard, the applicant also argues that, between December 2017 and February 2019, in order to create the impression that the pre-trial investigation at issue was ongoing, that investigation was transferred a number of times to the National Anti-Corruption Bureau of Ukraine and sent back to the PGO, which finally reopened the investigation and immediately suspended it twice, in January and February 2019, albeit without having jurisdiction to do so. Last, the applicant states that the justification given for suspending the investigation, that is, to establish his whereabouts, was invalid.

55 As regards criminal proceedings [*confidential*], which initially formed part of proceedings [*confidential*] but were separated from them on 18 June 2015, and which relate to the allegedly unlawful financing [*confidential*], the applicant claims that no evidence has been found against him in the context of that investigation since it commenced in March 2014, although the PGO has had permission to proceed in his absence since 27 July 2015. In addition, he notes that those proceedings have been suspended since 25 April 2017 due to the execution of wholly unjustified procedural actions within the framework of international cooperation.

56 Thirdly, the applicant complains that the Council failed to take account of certain arguments and certain evidence put forward before the adoption of the contested acts. First of all, he complains that the Council failed to take into consideration the complete lack of independence of the PGO, which, moreover, had attempted to bribe certain individuals to give false evidence against the applicant by promising to drop charges against them in return, or to secure amendments to the Ukrainian Code of Criminal Procedure (‘the Code of Criminal Procedure’) which specifically covered the applicant’s situation.

57 In that regard, the applicant relies, in particular, on five updated reports of an independent expert, Professor W.B., on a 2017 report of the Group of States against Corruption (GRECO), the Council of Europe’s anti-corruption monitoring body, on the situation in Ukraine, and on the report of the United Nations High Commissioner responsible for the Human Rights Monitoring Mission in Ukraine (‘the High Commissioner’) covering the period from 16 May to 15 August 2018. He goes on to claim that the Ukrainian judiciary is neither independent nor impartial, as evidenced by those reports and by a number of statements and documents. Similarly, he submits that the presumption of his innocence has been consistently violated by public, condemnatory statements made by Ukrainian State officials. Moreover, according to the applicant, several breaches of his procedural and fundamental rights have been committed in the context of the cases brought against him for treason and for the events that took place in Independence Square, which undermines the reliability and credibility of all the allegations and all the information relating to the misappropriation of public funds, which have been made and put forward for purely political purposes. Last, the applicant invokes his immunity from prosecution as a matter of both Ukrainian domestic law and customary international law, which means that he cannot be subject to criminal proceedings.

58 In the reply, he claims that the judicial decisions relied on by the Council do not, as a matter of either fact or law, demonstrate that his rights of defence and his right to effective judicial protection were respected in accordance with the principles identified in the recent case-law of the Court of Justice and of the General Court.

59 First, the Council wrongly sought to rely on the decision of 1 November 2018, which is entirely procedural, since it merely extends an existing measure of restraint. In addition, it is unlawful since the notice of suspicion had not been properly notified to the applicant.

60 Secondly, the decision of 8 October 2018 also is entirely procedural and has already been rejected by the General Court as evidence of verification of the protection of procedural rights in relation to the March 2018 acts, in the case concerning the applicant’s son. The applicant complains that the Council disregarded the fact that the PGO’s application was made in February 2017 and that judgment was not given until several months later, and, moreover, that the Council was content with a short version of that judgment which did not include its reasoning; the full version was not available until 6 September 2019. Thus, the Council cannot properly assert that the applicant’s right to effective judicial protection was respected.

61 Thirdly, as regards the court decisions relating to the seizures of his property, the applicant submits that those decisions were issued between October 2014 and December 2015, well before the adoption of the contested acts, and, moreover, that they were not examined by the Council, which did not have them in its possession, notwithstanding the fact that the applicant claimed that they were unlawful, in so far as the notice of suspicion had not been properly notified to him, so that he was unable to defend himself. Thus, according to the applicant, those decisions cannot be relied on to demonstrate that his rights of defence and his right to effective judicial protection were respected prior to the adoption of the contested acts.

62 In addition, the applicant complains that the Council failed to have regard to the lack of progress in the proceedings at issue, which were suspended and resumed several times without any valid reason.

63 Last, the applicant takes issue with the Council's attitude of disregarding the anomalies in the cases brought for treason and for the events that took place in Independence Square, when, in his submission, the conduct of the Ukrainian authorities in those cases should have diminished the Council's reliance on the information supplied by those authorities when deciding to maintain the applicant's name on the list.

64 The Council contends, in the first place, that it is entitled to rely on the information provided by the PGO in the exercise of its broad discretion in matters of common foreign and security policy (CFSP). Thus, first, it considers that the maintenance of the applicant's listing on the basis of the information contained in the letters from the PGO meets the designation criteria and has a sufficiently solid factual basis that serves to establish that the applicant is subject to criminal proceedings in Ukraine. Secondly, it submits that it took the applicant's observations into account and sought further clarification, which was communicated to the applicant, who was able to make further observations. Thirdly, the Council points out that it is not the task of the Council to verify whether the investigations to which the applicant is subject are well founded. Fourthly and last, as regards compliance with the requirements deriving from the recent case-law of the Court of Justice and of the General Court, the Council states that, contrary to the applicant's submissions, Ukrainian judicial decisions can be relied on as evidence of respect for the applicant's rights of defence and his right to effective judicial protection.

65 According to the Council, the decision of 8 October 2018, which was delivered following a hearing in open court in which the defence lawyers participated, and the decision of 1 November 2018 demonstrate not only the Ukrainian authorities' efforts to progress the investigation but also that they respected the applicant's rights of defence and his right to effective judicial protection. As regards the decisions of the Pechersk District Court relating to seizures of the applicant's property, the Council observes that the applicant has never contested them, nor has he referred to any possible irregularities concerning their adoption.

66 The Council submits that, since it is entitled to rely on evidence provided by the PGO as to the existence of criminal proceedings for misappropriation of public funds, it must be entitled a fortiori to rely on judicial decisions adopted by third-country courts pursuant to codes of procedure that ensure respect for the rights of defence, as evidence of the correct conduct of those criminal proceedings, including as regards respect for the rights of the defence and the right to effective judicial protection, in accordance with the presumption of legality of court decisions, which only another, contrary, court decision can rebut, not mere assertions made by the applicant.

67 In the second place, as regards the applicant's claims concerning the lack of detail and consistency in the PGO's attestations, the Council submits that the only criminal proceedings on which it relied are proceedings [*confidential*] and proceedings [*confidential*].

68 As regards proceedings [*confidential*], it maintains that the information from the PGO continues to provide an adequate basis for maintaining the applicant's name on the list. In response to the applicant's arguments concerning the delay in the pre-trial investigation in that case, the Council states that it checked the grounds for suspension and that the delays were duly justified [*confidential*], referring in that respect to the principles set out in the judgment of 15 November 2018, *Mabrouk* v *Council* (T-216/17, not published, EU:T:2018:779).

69 As regards proceedings [*confidential*], the Council disputes the applicant's claims concerning the lack of progress in the pre-trial investigation. In that regard, it mentions, in particular, the decision of 8 October 2018, the full text of which it had sought to obtain, and states that that decision did not impede conduct of the pre-trial investigation or prevent re-submission by the PGO of the application for a special pre-trial investigation *in absentia*. Consequently, it could continue to rely on those proceedings. The Council also contends that, contrary to the applicant's submissions, it took account of the numerous transfers of the case between various investigative agencies and that it sought further clarification in that regard, which the PGO provided. Thus, in its view, pending a decision of the investigating judge on the applicant's appeal challenging the jurisdiction of the authority that adopted the decision suspending the pre-trial investigation, it was entitled to rely on the information provided by the PGO. The Council also notes that it is clearly indicated [*confidential*] that the proceedings at issue were suspended on 30 July 2018 for reasons related to the whereabouts of the suspect.

70 In the third place, as regards certain other factors which it should supposedly have taken into account, the Council submits that, in view of their very general nature, the applicant's submissions regarding alleged breaches of fundamental rights in the cases brought for treason and for the events that took place in Independence Square cannot call in question the charges in relation to the misappropriation of public funds. Furthermore, it is not for the Council to assess the general claims regarding the independence of the PGO or of the Ukrainian judiciary. As regards the applicant's claim that he could not be subject to criminal proceedings because he enjoys immunity from prosecution, the Council counters, in essence, that it is for the Ukrainian authorities, including the PGO, to assess whether criminal proceedings may be commenced.

71 Last, in its rejoinder, the Council disputes the applicant's interpretation of the case-law of the General Court concerning the legality of the March 2018 acts. According to the Council, that case-law cannot be interpreted as meaning that no account should be taken of procedural decisions of the Ukrainian courts, in particular when verifying whether the Ukrainian authorities had respected the applicant's rights of defence and his right to effective judicial protection in the context of the ongoing criminal investigation. The two questions before the Court are, first, whether the Council's conclusion regarding respect for those rights had a sufficiently solid factual basis, including the evidence which it had or could reasonably have had at the time of the adoption of the contested acts, and, secondly, whether the reasons given for that conclusion were relevant and sufficient.

72 Thus, the Council contends, in essence, that it has amply demonstrated why it did not make a manifest error of assessment in concluding, on the basis of the evidence obtained and through the proactive exercise of its duty of verification, that the applicant's rights had been respected before the Ukrainian courts in the proceedings, which constitute the basis for its decision to maintain the applicant's name on the list.

73 As a preliminary point, it must be noted that the second plea in law must be regarded as alleging an error of assessment, and not a manifest error of assessment. The Council had no discretion to determine whether it had sufficient evidence to assess whether the Ukrainian authorities had respected the applicant's rights of defence and his right to effective judicial protection and whether that evidence was capable of giving rise to legitimate doubts concerning the observance of those rights (see, to that effect and by analogy, judgment of 28 October 2020, *Ben Ali* v *Council*, T-151/18, EU:T:2020:514, paragraph 79 and the case-law cited).

74 Furthermore, it is apparent from well-established 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 EU acts in the light of the fundamental rights forming an integral part of the EU legal order, which include, in particular, the right to effective judicial protection and the rights of the defence, as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter') (see judgments of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 51 and the case-law cited, and of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 59 and the case-law cited).

75 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 maintain 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 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 the question whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, are substantiated (see judgments of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 52 and the case-law cited, and of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 60 and the case-law cited).

76 The adoption and the maintenance of restrictive measures, such as those laid down in the March 2014 acts, 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 judgments of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 53 and the case-law cited, and of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 61 and the case-law cited).

77 Thus, while, under a 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 respected by the authorities of the third State which adopted that decision (see judgments of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 54 and the case-law cited, and of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 62 and the case-law cited).

78 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 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 has 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 judgments of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 55 and the case-law cited, and of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 63 and the case-law cited).

79 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 European Court of Human Rights ('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 78 above (see judgments of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 56 and the case-law cited, and of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 64 and the case-law cited).

80 According to the case-law, 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 judgments of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 57 and the case-law cited, and of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 64 and the case-law cited).

81 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 defence and the right to effective judicial protection of the person against whom the criminal proceedings at issue have been brought and, secondly, refer, in the decision imposing restrictive measures, to the reasons for which it considers that that decision of the third State has been adopted in accordance with those rights (judgment of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 58; see also judgment of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 66 and the case-law cited).

82 It is in the light of those case-law principles that it is necessary to establish whether the Council complied with its obligations in connection with the adoption of the contested acts in so far as those acts concern the applicant.

83 In that regard, it must be noted that the Council referred in the contested acts to the reasons why it had considered that the decision of the Ukrainian authorities to initiate and conduct criminal proceedings against the applicant for misappropriation of public funds or assets had been adopted in accordance with his rights of defence and his right to effective judicial protection (see paragraph 31 above). It is nevertheless necessary to ascertain whether the Council was right to consider that to have been the case.

84 Indeed, examination of the merits of the statement of reasons, which goes to the substantive legality of the contested acts and consists, in this case, in ascertaining whether the evidence relied on by the Council has been established and whether it is capable of demonstrating that the observance of those rights by the Ukrainian authorities has been verified, must be distinguished from the question of the statement of reasons, which concerns an essential procedural requirement and is merely a corollary of the Council's obligation to ensure in advance that those rights are observed (see judgment of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 69 and the case-law cited).

85 The restrictive measures previously adopted were extended and maintained with respect to the applicant by means of the contested acts on the basis of the listing criterion set out in Article 1(1) of Decision 2014/119, as amended by Decision 2015/143, and in Article 3 of Regulation No 208/2014, as amended by Regulation 2015/138 (see paragraphs 12 and 13 above). That criterion covers persons who have been identified as responsible for the misappropriation of Ukrainian State funds, including persons subject to investigation by the Ukrainian authorities.

86 It should be noted that, in deciding to maintain the applicant's name on the list, the Council relied on the fact that he was subject to criminal proceedings initiated by the Ukrainian authorities for offences constituting misappropriation of public funds or assets, which was established by the letters from the PGO and by certain judicial decisions of which the applicant had received copies (see paragraph 29 above).

87 The maintenance of the restrictive measures taken against the applicant was therefore based, as in the cases giving rise to the judgments of 11 July 2019, *Yanukovych* v *Council* (T-244/16 and T-285/17, EU:T:2019:502), and of 24 September 2019, *Yanukovych* v *Council* (T-300/18, not published, EU:T:2019:685), on the decision of the Ukrainian authorities to initiate and conduct criminal-investigation proceedings relating to an offence of misappropriation of Ukrainian State funds.

88 It must also be noted that when, by the contested acts, the Council amended the annex to Decision 2014/119 and Annex I to Regulation No 208/2014, it added a new section, dedicated entirely to the rights of the defence and the right to effective judicial protection, which is subdivided into two parts.

89 The first part of that section contains a simple, general reference to the rights of the defence and the right to effective judicial protection under the Code of Criminal Procedure. In particular, reference is made first of all to the various procedural rights enjoyed by every person who is suspected or accused in criminal proceedings under Article 42 of the Code of Criminal Procedure. It is then stated, first, that, under

Article 306 of the Code of Criminal Procedure, complaints against decisions, acts or omissions of the investigator or public prosecutor must be considered by an investigating judge of a local court in the presence of the complainant or his or her defence lawyer or legal representative. Secondly, it is stated, inter alia, that Article 309 of that code specifies the decisions of investigating judges that may be challenged on appeal. Last, it is made clear that a number of procedural investigating actions, such as the seizure of property and measures of detention, are only possible pursuant to a ruling by the investigating judge or a court.

90 The second part of that section concerns respect for the rights of defence and the right to effective judicial protection of each person listed. As regards the applicant specifically, it is stated that, according to the information on the Council's file, his rights of defence and his right to effective judicial protection were respected in the criminal proceedings on which the Council relied, as is demonstrated, in particular, 'by a number of Court decisions relating to the seizure of property[, the] decision of 1 November 2018 granting permission for the arrest and summoning and bringing of the suspected to the Court, as well as by [the] decision … of 8 October 2018 refusing the prosecutor's application for a special pre-trial investigation *in absentia*' (see paragraph 31 above).

91 In the letter of 5 March 2019 sent to the applicant (see paragraph 32 above), first of all, the Council stated that the letters from the PGO confirmed that the applicant remained subject to criminal proceedings in Ukraine for misappropriation of public funds or assets. Next, it stated, first, that the PGO had provided it with information concerning the alleged lack of progress in proceedings [*confidential*] and that, according to the PGO, dismissal of the motion to proceed *in absentia* did not impede the pre-trial investigation or re-submission of a motion of that kind. Secondly, with regard to the issue of jurisdiction of the investigations bureau, contested by the applicant, the Council noted that the pre-trial investigation in those proceedings had been returned to the investigators of the Department for Special Investigations of the PGO and that, pending the decision of the investigating judge on the applicant's appeal against the resolution on suspension of those proceedings also on grounds of lack of jurisdiction, it was entitled to rely on the information and evidence provided by the PGO. Last, as regards respect for the applicant's rights of defence and right to effective judicial protection, the Council referred specifically only to those proceedings [*confidential*], stating that it was apparent from the court decisions relating to the seizure of the applicant's property, from the decision of 8 October 2018, which had been delivered in an open-court session with the participation of defence lawyers, and the decision of 1 November 2018 that those rights had been respected.

92 It follows that, although, in its letter of 5 March 2019, the Council mentioned in generic terms the criminal proceedings to which the applicant was subject in Ukraine, proceedings [*confidential*] are the only proceedings in respect of which it shows that it did in fact check that the applicant's rights of defence and his right to effective judicial protection were respected.

93 However, it should be noted that the Council also refers, in entirely generic terms, both in the reasons given in the contested acts and in that letter, to a 'number of Court decisions relating to the seizure of property'.

94 In that regard, it must be observed at the outset that the Council has failed to show to what extent all those decisions demonstrate that the applicant's rights of defence and his right to effective judicial protection were respected in proceedings [*confidential*] or proceedings [*confidential*], the latter being the only relevant proceedings, apart from proceedings [*confidential*], in which, according to the information provided by the PGO, orders were made for the applicant's property to be seized. As stated in paragraphs 77 and 78 above, the Council was required, in this case, before deciding to maintain the restrictive measures at issue, to verify whether the decision of the Ukrainian judicial authorities to initiate and conduct criminal-investigation proceedings in relation to offences constituting the misappropriation of public funds or assets allegedly committed by the applicant had been taken in accordance with those rights of the applicant (see, to that effect, judgment of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 78).

95 From that perspective, the judicial decisions mentioned in paragraph 90 above cannot be identified as being decisions to initiate and conduct an investigation procedure justifying the maintenance of the restrictive measures. That said, it may be accepted that, from a substantive point of view, since those decisions – at least those of 8 October and 1 November 2018, which are relevant from a temporal perspective – were delivered by a court, they were actually taken into account by the Council as the factual basis justifying the maintenance of the restrictive measures at issue (see, to that effect and by analogy, judgment of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 79).

96 It is therefore necessary to ascertain whether the Council was right to conclude that those two decisions and the decisions relating to the seizures of the applicant's property demonstrated that his rights of defence and right to effective judicial protection were observed.

97 As regards, in the first place, the decision of 8 October 2018, it should be pointed out, contrary to the Council's contention, that it is not clear from that decision, which does not include any statement of reasons, that those rights were safeguarded for the applicant in the present case. In that regard, while it is true, as the Council notes in its letter of 5 March 2019 (see paragraph 91 above), that that decision was adopted following a hearing in open court in which defence lawyers participated and that, by that decision, the investigating judge refused the application for a special pre-trial investigation *in absentia* submitted by the PGO on 28 February 2017, the fact remains that it is not apparent from the documents in the file in the present proceedings that the Council took into consideration the applicant's observations regarding that decision and the possible grounds for its adoption, which the applicant had communicated to it in his letters of 29 November and 18 December 2018 and 28 January and 1 February 2019.

98 The applicant had argued, first, that the conditions for granting permission for *in absentia* proceedings, as provided for by Article 297-2 of the Code of Criminal Procedure, were not met in the present case, as his name was not on the international wanted-persons list of the International Criminal Police Organisation (Interpol), and, secondly, that the decision of 8 October 2018 breached his right to effective judicial protection, since no appeal could be brought against it. He had also indicated, in particular, that, in the absence of a reasoned decision, the Council should have had regard to the grounds for rejection of an identical application from the PGO in relation to his son, in the same proceedings, by a decision delivered on 7 February 2018 by the same investigating judge. The applicant had argued that the rejection of that application had been determined by issues related, in particular, to the fact that the notice of suspicion had not been properly notified, which meant that his son did not have the status of suspect, and, more generally, to the fact that the evidence adduced by the PGO to show that his son was evading prosecution and that he was suspected of having committed the offence alleged was not sufficient. Furthermore, the applicant stated in his letter of 29 November 2018 that, in paragraph 63 of his report concerning the period from 16 May to 15 August 2018, the High Commissioner had stated that *in absentia* proceedings in Ukraine were not in line with international human rights standards. Whereas those proceedings should have been preceded by proper notification of the accused and should have provided the opportunity for a full retrial after the person concerned had been located by the authorities, none of those requirements was provided for in the Code of Criminal Procedure, which, according to the High Commissioner, negatively impacted the rights of the defence.

99 However, first, it is not apparent from the documents in the file that the Council did ascertain the extent to which the decision of 8 October 2018 was consistent with the articles of the Code of Criminal Procedure expressly mentioned in the first part of the section of the contested acts relating to the rights of the defence and the right to effective judicial protection in the annex to Decision 2014/119 and Annex I to Regulation No 208/2014, as amended by the contested acts (see paragraph 89 above), which establish, inter alia, the right of a suspect to 'challenge decisions, actions and omissions by the investigator, the public prosecutor and the investigating judge' (see, to that effect and by analogy, judgment of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 82).

100 Secondly, it is not possible to determine from the documents in the file on what basis the Council found that a decision such as the decision of 8 October 2018 could demonstrate that the applicant's rights of defence and his right to effective judicial protection were respected in proceedings [*confidential*].

101 Admittedly, it is true, as the Council points out, that the decision does not authorise the opening of a special pre-trial investigation *in absentia* but refuses it and therefore, as such, is a decision that is favourable to the applicant. However, that factor alone is not sufficient to establish that the Council verified compliance by the Ukrainian authorities with the rights of defence and the right to judicial protection of the applicant (see, to that effect, judgment of 11 July 2019, *Klyuyev* v *Council*, T-305/18, not published, EU:T:2019:506, paragraphs 83 to 85).

102 As noted in paragraphs 77 and 78 above, the Council must satisfy itself that those rights were complied with at the time of the adoption of the decision by the third State in question on which it intends to rely, namely, in the present case, the decision of a Ukrainian authority, having jurisdiction in that regard, to initiate and conduct criminal-investigation proceedings concerning the applicant. Thus, the Council could not disregard the reasons that led to the refusal of the application of the PGO, which is the investigating authority, since that application could have proved, for example, to be fallacious or lacking any foundation in law.

103 That is particularly true in the present case, in which the Council merely relied on a short form of the decision that did not include a statement of reasons and which was adopted by the investigating judge of the Pechersk District Court in response to an application submitted by the PGO on 28 February 2017 that was necessarily based on evidence obtained up to that date, thus two years before the contested acts were adopted.

104 In those circumstances, the Council could not be content with the sparse or imprecise information available to it and made an 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 (see, to that effect and by analogy, judgment of 21 February 2018, *Klyuyev* v *Council*, T-731/15, EU:T:2018:90, paragraphs 253 to 257).

105 Furthermore, although it does not have any bearing on the present case, in so far as the full version of the decision of 8 October 2018 was not available at the time of the adoption of the contested acts, not having been made available to the applicant's lawyers in Ukraine until 6 September 2019, it must nevertheless be pointed out that it is apparent from the full version of that decision that the conditions laid down in Article 297-2 of the Code of Criminal Procedure for granting permission to investigate *in absentia* were not met in the present case. First, it was held that the notice of suspicion had not been properly notified and that, consequently, the applicant did not have the status of suspect. Secondly, it was noted that the PGO had not proved that the applicant was evading prosecution, since the PGO knew where he was in Russia. Thirdly, it was concluded that the PGO did not have jurisdiction to make such an application because the National Anti-Corruption Bureau of Ukraine was the competent investigating agency, and that the PGO had failed to establish the existence of circumstances that would constitute reasonable grounds for suspecting the applicant of having committed the alleged offence.

106 In the second place, as regards the decision of 1 November 2018, it should be noted at the outset that this was not included in the case file. The only information concerning that decision that could be gleaned from the file was the information contained in the letter from [*confidential*], that is to say, that the decision in question was one that extended the period of validity of the permission for the applicant's arrest, summoning and bringing before a court, the only such decision mentioned in that letter and to which the decision of 1 November 2018 could refer being that delivered by the Pechersk District Court on 8 July 2015.

107 The decision of 1 November 2018 granting permission for the arrest and summoning of the applicant and for bringing him before a court, and the decision, with the same content, of the investigating judge of the Pechersk District Court of 8 July 2015 were produced by the Council in response to a measure of organisation of procedure adopted by the General Court.

108 It is apparent from the letter which the PGO sent to the Council on 4 August 2020 enclosing those two decisions that, contrary to what was suggested by the [*confidential*] letter [*confidential*] (see paragraph 106 above), the decision of 1 November 2018 did not constitute an extension of the decision of 8 July 2015, the latter having ceased to have effect on 8 January 2016.

109 Accordingly, it must be held that, prior to the adoption of the contested acts, the Council was not in possession of the decision of 1 November 2018 and that, in order to justify the assertion that the applicant's rights of defence and his right to effective judicial protection had been respected, it relied solely, as the Council itself acknowledged at the hearing, on the reference [*confidential*] made to that decision [*confidential*].

110 At the hearing, the Council remained unable to explain on what evidence it had relied for its assertion, in the statement of reasons for the contested acts in relation to the applicant (see paragraph 31 above), that the decision of 1 November 2018 demonstrated, in particular, that the applicant's rights of defence and his right to effective judicial protection had been respected in the criminal proceedings on which the Council had relied. By contrast, it contended that there was another, similar decision in the case file on which it was entitled to rely, and that it had referred to the decision of 1 November 2018 in error.

111 In that regard, it must also be noted that the decision of 1 November 2018 refers to a decision with the same content, delivered on 3 May 2015 by the investigating judge of the Pechersk District Court, the validity of which expired on 2 November 2018, and not to the abovementioned decision of 8 July 2015, to which [*confidential*] referred [*confidential*] (see paragraph 108 above).

112 Consequently, it must be held that the information provided by the PGO, on which the Council relied, was imprecise and incorrect and, moreover, that the Council at the very least disregarded the content of the decision of 3 May 2015, the effects of which the decision of 1 November 2018 sought to extend.

113 In those circumstances, while the decision of 1 November 2018 could, as the Council contends, in the abstract, support the conclusion that the applicant had the status of suspect and, moreover, that a judge had found there to be sufficient evidence, within the meaning of Article 177(2) of the Code of Criminal Procedure, to show that there were reasonable grounds to suspect the applicant of having committed the criminal offence in question, that decision cannot demonstrate, in itself, that the applicant's rights of defence and his right to effective judicial protection were respected.

114 It follows that the Council was wrong to find that the decision of 1 November 2018, which it did not examine before adopting the contested acts, could demonstrate that the applicant's rights of defence and his right to effective judicial protection were respected. Furthermore, if it had examined that decision and the decision of 8 July 2015, it would have been able to identify a number of inconsistencies in the attestations of the PGO and, in consequence, seek additional information from the Ukrainian authorities.

115 It should, moreover, also be noted, first, that the decision of 1 November 2018 was adopted in response to a motion submitted by the PGO on the same day and following a hearing also held on 1 November 2018, in camera and without the involvement of a defence representative but in the presence of the prosecutor, and, secondly, that no appeal could be brought against that decision by the applicant. Furthermore, it is not apparent from the documents in the file that the Council did ascertain the extent to which that decision could, in the abstract, be consistent with compliance with the provisions of the Code of Criminal Procedure mentioned in the first part of the section relating to the rights of the defence and the right to effective judicial protection in the annex to Decision 2014/119 and Annex I to Regulation No 208/2014, as amended by the contested acts.

116 As regards, in the third and last place, the court decisions concerning seizures of the applicant's property, which also do not appear in the case file and which were never examined by the Council, as the Council conceded at the hearing, it should be noted that, according to the information given by the PGO, they were delivered by the Pechersk District Court between October 2014 and December 2015 in proceedings

[*confidential*], and between February 2015 and July 2016 in proceedings [*confidential*], that is to say, well before the adoption of the contested acts.

117 It follows that those decisions, the legality of which had, moreover, been challenged by the applicant in a number of respects and in respect of which the Council itself acknowledged at the hearing that they have limited evidential value, are not sufficient to establish that the decision of the Ukrainian judicial authorities, on which the Council intended to rely in order to maintain, for the period from March 2019 to March 2020, the restrictive measures at issue vis-à-vis the applicant, was adopted in accordance with his rights of defence and his right to effective judicial protection (see, to that effect and by analogy, judgment of 23 September 2020, *Arbuzov* v *Council*, T-289/19, not published, EU:T:2020:445, paragraph 84). Furthermore, the Court has previously had the opportunity to rule on those decisions in the cases which gave rise to the judgments of 11 July 2019, *Yanukovych* v *Council* (T-244/16 and T-285/17, EU:T:2019:502, paragraphs 71 and 90 to 93), and of 24 September 2019, *Yanukovych* v *Council* (T-300/18, not published, EU:T:2019:685, paragraphs 83 and 93 to 96), which were not contested by the Council. In those judgments, it was held that those decisions were not capable of demonstrating that the applicant's rights of defence and his right to effective judicial protection had been respected in the proceedings at issue.

118 In any event, it must also be noted that all the Ukrainian judicial decisions referred to above fall within the scope of the criminal proceedings that justified the inclusion and maintenance of the applicant's name on the list and are merely incidental in relation to those proceedings since they are either restrictive or procedural in nature. Such decisions, which may serve at most to establish the existence of a sufficiently solid factual basis, in that, in accordance with the applicable listing criterion, the applicant was subject to criminal proceedings relating to an offence of misappropriation of Ukrainian State funds or assets, are not ontologically capable, alone, of demonstrating 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, which it is for the Council to verify, in accordance with the case-law recalled in paragraph 78 above (see, to that effect, judgments of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 94, and of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraphs 91 and 92).

119 Moreover, the Council does not refer to any document in the file of the procedure which resulted in the adoption of the contested acts that would show that it examined the court decisions on which it relies and was able to conclude from them that the essence of the applicant's procedural rights had been complied with. On the other hand, as has already been pointed out in paragraphs 106 and 116 above, it is apparent from the case file that the Council was not in possession of either the decision of 1 November 2018 or the decisions relating to the seizure of the applicant's property and only had a short version of the decision of 8 October 2018 that did not include a statement of reasons.

120 The mere reference by the Council to letters and statements of the Ukrainian authorities in which those authorities set out the manner in which the applicant's fundamental rights had been respected and gave assurances in that regard cannot suffice for the view to be taken that the decision to maintain his name on the list has a sufficiently solid factual basis, within the meaning of the case-law cited in paragraph 78 above (see, to that effect, judgment of 3 December 2020, *Saleh Thabet and Others* v *Council*, C-72/19 P and C-145/19 P, not published, EU:C:2020:992, paragraph 44).

121 In that regard, it must also be observed that the Council was under an obligation to carry out such verification irrespective of any evidence adduced by the applicant to show that, in the present case, the applicant's rights of defence and his right to effective judicial protection had been infringed, the mere possibility of invoking an infringement of those rights before the Ukrainian courts pursuant to provisions of the Code of Criminal Procedure not being sufficient in itself to demonstrate that those rights were respected by the Ukrainian judicial authorities (see, to that effect, judgment of 11 July 2019, *Klyuyev* v *Council*, T-305/18, not published, EU:T:2019:506, paragraph 72).

122 That conclusion cannot be called in question by the Council's argument that the applicant has not put forward any evidence capable of demonstrating that his particular situation had been affected by the alleged problems of the Ukrainian judicial system. According to settled case-law, it is the task of the competent EU authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded (see, to that effect, judgment of 3 December 2020, *Saleh Thabet and Others* v *Council*, C-72/19 P and C-145/19 P, not published, EU:C:2020:992, paragraph 45 and the case-law cited).

123 Nor, moreover, does the Council explain how, in particular, the mere existence of the decisions referred to in paragraph 90 above would permit the inference that respect for the applicant's rights of defence and his right to effective judicial protection was guaranteed. In that regard, it must be noted that, as the applicant had argued on numerous occasions in the letters sent to the Council, proceedings [*confidential*] and proceedings [*confidential*] – which were originally initiated in 2014 and were currently both suspended, in the case of proceedings [*confidential*] after having been transferred several times between various investigation bureaux – were still at the pre-trial investigation stage, with the result that they had not been brought before a Ukrainian court for consideration of the merits, the Ukrainian court having been seised only of procedural matters, notwithstanding the fact that the Pechersk District Court had delivered a decision on 27 July 2015 granting the PGO permission to proceed *in absentia* in proceedings [*confidential*].

124 The second paragraph of Article 47 of the Charter, which is the standard by reference to which the Council must assess the observance of the right to effective judicial protection (see judgments of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 47 and the case-law cited, and of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 96 and the case-law cited), provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

125 In so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, such as those provided for by Article 6 thereof, their meaning and scope are, under Article 52(3) of the Charter, the same as those laid down by the ECHR.

126 In that regard, it should be noted that, in its interpretation of Article 6 of the ECHR, the ECtHR has stated that the purpose of the reasonable time principle is, inter alia, to protect persons charged with a criminal offence against excessive procedural delays and to avoid leaving them in a state of uncertainty about their fate for too long, and that that principle underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility (see ECtHR, 7 July 2015, *Rutkowski and Others v. Poland*, CE:ECHR:2015:0707JUD007228710, § 126 and the case-law cited). The ECtHR has also held that breach of that principle may be established, inter alia, where the investigation stage of criminal proceedings has been characterised by a certain number of periods of inactivity attributable to the authorities responsible for that investigation (see, to that effect, ECtHR, 6 January 2004, *Rouille v. France*, CE:ECHR:2004:0106JUD005026899, §§ 29 to 31; 27 September 2007, *Reiner and Others v. Romania*, CE:ECHR:2007:0927JUD000150502, §§ 57 to 59; and 12 January 2012, *Borisenko v. Ukraine*, CE:ECHR:2012:0112JUD002572502, §§ 58 to 62).

127 It is also clear from the case-law that, where a person has been the subject of restrictive measures for several years, and that this has been on account, essentially, of the continuing conduct of the same preliminary investigation by the PGO, the Council is required to verify whether that person's fundamental rights, and therefore his or her right to be tried within a reasonable time, have been respected by the Ukrainian authorities before it decides whether or not to extend those measures again (see, to that effect, judgments of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 99, and of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 99; see also, to that effect and by analogy, judgment of 28 October 2020, *Ben Ali* v *Council*, T-151/18, EU:T:2020:514, paragraph 114 and the case-law cited).

128 The arguments set out by the PGO in its letters, unsupported by any evidence, which are endorsed to some extent by the Council, that the lack of any developments in the proceedings at issue was justified, inter alia, by their suspension pending responses to a number of requests for international legal assistance [*confidential*], are not such as to call that conclusion in question. As the applicant points out, the two sets of proceedings on which the Council relied were suspended and reopened several times and for different reasons, without any credible justification for doing so having been given by the PGO.

129 Furthermore, the Council's argument that suspensions in a criminal investigation over several years have been accepted by the General Court if they are due to procedural actions conducted within the framework of international cooperation, which it derives from the judgment of 15 November 2018, *Mabrouk* v *Council* (T-216/17, not published, EU:T:2018:779, paragraph 54), is not relevant for two reasons.

130 First, it must be noted that that judgment was delivered before delivery of the judgment of 19 December 2018, *Azarov* v *Council* (C-530/17 P, EU:C:2018:1031) (see, to that effect, judgment of 28 October 2020, *Ben Ali* v *Council*, T-151/18, EU:T:2020:514, paragraphs 96 to 98), which provided significant clarification with respect to the Council's obligation to verify whether the right to be tried within a reasonable time, which, as has been pointed out in paragraph 124 above, is a component of the right to effective judicial protection, was respected in the judicial proceedings forming the basis for the adoption of restrictive measures. Secondly, in the case that gave rise to the judgment of 15 November 2018, *Mabrouk* v *Council* (T-216/17, not published, EU:T:2018:779), the situation was different from that of the present case, in so far as the documents available to the Council demonstrated both that there was in fact procedural activity in the judicial investigation of the case involving the applicant and, in particular, that procedural steps were taken by the authorities concerned in connection with international letters rogatory (see, to that effect, judgment of 28 October 2020, *Ben Ali* v *Council*, T-151/18, EU:T:2020:514, paragraphs 146 and 147). However, that is not the case here, since the Council relied only on the [*confidential*] attestations which refer in generic terms to procedural steps taken within the framework of international cooperation.

131 The Council should at the very least have indicated the reasons for which, notwithstanding the applicant's arguments as set out in paragraph 123 above, it was able to conclude that the applicant's right to effective judicial protection before the Ukrainian judicial authorities had been complied with so far as concerned respect for his right to have his case heard within a reasonable time (see, to that effect and by analogy, judgment of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 100).

132 It cannot therefore be concluded, having regard to the documents in the file, that the information available to the Council at the time of the adoption of the contested acts enabled it to verify whether the decision of the Ukrainian judicial authorities to initiate and conduct the criminal proceedings at issue had been taken and implemented in accordance with the applicant's right to effective judicial protection and his right to have his case heard within a reasonable time.

133 It must also be noted in that regard that the well-established case-law according to which, in the event of the adoption of a decision to freeze funds, such as the decision adopted in respect of the applicant in the contested acts, it is not for the Council or the Courts of the European Union to verify whether or not the investigation of the person concerned by those restrictive measures in Ukraine was 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, cannot be interpreted as meaning that the Council is not required to verify whether the decision of the third State on which it intends to base the adoption of those restrictive measures was taken in accordance with the rights of the defence and the right to effective judicial protection (see, to that effect, judgments of 11 July 2019, *Yanukovych* v *Council*, T-244/16 and T-285/17, EU:T:2019:502, paragraph 94 and the case-law cited; of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 102 and the case-law cited; and of 25 June 2020, *Klymenko* v *Council*, T-295/19, EU:T:2020:287, paragraph 102 and the case-law cited).

134 Last, the Court must reject the Council's argument, reiterated at the hearing, that, in essence, it is not for the Council to call in question the decisions of the Ukrainian courts, which enjoy a kind of presumption of

legality, not least by virtue of the cooperation and assistance agreements that exist between the European Union and Ukraine in the field of justice.

135 While it is true, as the Council claims, that it is entitled to rely on judicial decisions as evidence of the existence of criminal proceedings relating to allegations against the applicant of misappropriation of public funds, the same cannot be said as regards evidence of the proper conduct of those criminal proceedings, including as regards respect for his rights of defence and his right to effective judicial protection. As noted in paragraph 78 above, in order to ensure that there is a sufficiently solid factual basis for maintaining the applicant's name on the list, the Council must verify not only whether there are ongoing judicial proceedings concerning the applicant for conduct that could be characterised as misappropriation of public funds, but also whether, in the context of those proceedings, those rights of the applicant were respected (see, to that effect, judgment of 28 October 2020, *Ben Ali* v *Council*, T-151/18, EU:T:2020:514, paragraph 153 and the case-law cited).

136 That is particularly so where, as in this case, the Council was not in possession of most of the decisions on which it intended to rely and, moreover, the applicant raised doubts as to whether his rights had been respected in the context of the adoption of the judicial decisions on which the Council intended to rely. In any event, it is not inconceivable that, having regard in particular to the observations submitted by the applicant, that institution should be obliged to seek clarification from the Ukrainian authorities regarding respect for those rights (see, to that effect, judgment of 21 February 2018, *Klyuyev* v *Council*, T-731/15, EU:T:2018:90, paragraph 240), which has not been the case here.

137 In the light of all of the foregoing considerations, it has not been established that the Council satisfied itself, prior to the adoption of the contested acts, that the Ukrainian judicial authorities complied with the applicant's rights of defence and his right to effective judicial protection in the criminal proceedings on which the Council relied. It follows that, in deciding to maintain the applicant's name on the list, the Council made an error of assessment.

138 In those circumstances, the contested acts must be annulled, in so far as they relate to the applicant, without it being necessary to examine the other pleas in law and the other arguments put forward by the applicant.

139 Having regard to the claim put forward by the Council in the alternative (see the second indent of paragraph 48 above), seeking, in essence, to have the effects of Decision 2019/354 maintained until the expiry of the period allowed for bringing an appeal against the present judgment, in so far as Implementing Regulation 2019/352 might be annulled to the extent that it concerns the applicant, and, in the event that an appeal might be brought in that respect, until the decision ruling on that appeal, it is sufficient to note that Decision 2019/354 was effective only until 6 March 2020. Consequently, the annulment of that decision by the present judgment has no effect on the period after that date, so that it is not necessary to rule on the question of maintaining the effects of that decision (see, to that effect, judgment of 24 September 2019, *Yanukovych* v *Council*, T-300/18, not published, EU:T:2019:685, paragraph 105 and the case-law cited).

Costs

140 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 (Fifth Chamber)

hereby:

1. **Annuls Council Decision (CFSP) 2019/354 of 4 March 2019 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) 2019/352 of 4 March 2019 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 Viktor Fedorovych 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 pay the costs.**

Spielmann Öberg Spineanu-Matei

Delivered in open court in Luxembourg on 9 June 2021.

E. Coulon S. Papasavvas

Registrar President

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* Language of the case: English.

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1 Confidential information omitted.