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 Case T-305/18,

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

applicant,

v

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

defendant,

APPLICATION under Article 263 TFEU seeking the annulment of Council Decision (CFSP) 2018/333 of 5 March 2018 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2018 L 63, p. 48) and of Council Implementing Regulation (EU) 2018/326 of 5 March 2018 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2018 L 63, p. 5), 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: E. Coulon,

gives the following

Judgment

Background to the dispute

1 The present case has 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 Andriy Klyuyev, is the former Head of Administration of the President of Ukraine, Mr Yanukovych.

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 the adoption of the restrictive measures at issue and lays down detailed rules for implementing those measures, in terms which are essentially identical to those used in that decision.

8 The names of the persons covered by Decision 2014/119 and Regulation No 208/2014 (together, ‘the March 2014 acts’) appear on the list contained in the Annex to that decision and in Annex I to that regulation (‘the list’), together with, inter alia, a statement of reasons for their inclusion on the list.

9 The applicant’s name appears on the list along with the identifying information ‘former Head of Administration of [the] 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 Court Registry on 15 May 2014, the applicant brought an action, registered as Case T−340/14, seeking, inter alia, the 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 clarified, with effect from 31 January 2015, the listing criteria for persons against whom the freezing of funds is directed. 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 Decision 2014/119 and Regulation No 208/2014 were subsequently amended by Council Decision (CFSP) 2015/364 of 5 March 2015 amending Decision 2014/119 (OJ 2015 L 62, p. 25) and by Council Implementing Regulation (EU) 2015/357 of 5 March 2015 implementing Regulation No 208/2014 (OJ 2015 L 62, p. 1), respectively (together, ‘the March 2015 acts’). Decision 2015/364 amended Article 5 of Decision 2014/119 by extending the restrictive measures, so far as the applicant was concerned, until 6 June 2015. Consequently, Implementing Regulation 2015/357 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 Head of Administration of [the] 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 and in connection with the misuse of office by a public office-holder to procure an unjustified advantage for himself or a third party thereby causing a loss to the Ukrainian public budget or assets.’

16 By separate document lodged at the Court Registry on 15 May 2015, the applicant modified his application in Case T-340/14, in accordance with Article 48 of the Rules of Procedure of the General Court of 2 May 1991, so that it would also cover the annulment of the March 2015 acts, in so far as those acts concerned him.

17 By application lodged at the Court Registry on the same day, the applicant brought an action, registered as Case T-244/15, seeking the annulment of the March 2015 acts, in so far as they concerned him.

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

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 application lodged at the Court Registry on 14 May 2016, the applicant brought an action, registered as Case T−240/16, seeking, inter alia, the annulment of the March 2016 acts, in so far as they concerned him.

22 By judgment of 15 September 2016, *Klyuyev* v *Council* (T−340/14, EU:T:2016:496), the Court annulled the March 2014 acts, in so far as they concerned the applicant, and dismissed the action in so far as they related to the March 2015 acts.

23 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').

24 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.

25 By separate document lodged at the Court Registry on 14 May 2017, the applicant modified his application in Case T−240/16, in accordance with Article 86 of the Rules of Procedure, so that it would also cover the annulment of the March 2017 acts, in so far as those acts concerned him.

26 By letter of 20 October 2017, the Prosecutor General's Office of Ukraine ('the PGO') informed the Council of the status of the proceedings against the applicant.

27 By letters of 28 and 30 November 2017, the applicant and his representatives respectively explained why his designation should not be renewed and asked the Council to confirm whether it intended to designate him once more and, in the affirmative, to indicate the updated reasons and the evidence supporting those reasons.

28 By letter of 18 December 2017, the Council sent to the applicant's representatives updated attestations, dated 20 October 2017, issued by the PGO. By letter of 10 January 2018, the applicant's representatives submitted their observations in that regard and also asked the Council a certain number of questions.

29 On 16 January 2018, the Council sent the PGO's letter of 5 January 2018, which answered a request for information from the European External Action Service (EEAS), to the applicant's representatives and asked them to take a position.

30 On 25 January 2018, the applicant sent the Council a personal letter in response to the additional information provided by the latter.

31 On 5 February 2018, the Council sent the PGO's letter of 31 January 2018, which answered a request for information from the EEAS, to the applicant's representatives and asked them to take a position.

32 On 15 February 2018, the applicant sent the Council a personal letter in response to the additional information provided by the latter.

33 By letter of 2 March 2018, the applicant's representatives claimed that the grounds of the judgment of 21 February 2018, *Klyuyev* v *Council* (T−731/15, EU:T:2018:90), concerning the applicant's brother, applied in a similar manner to his situation and the Council should draw the conclusion that his name should not be maintained on the list.

34 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 contested acts').

35 By the contested acts, the application of the restrictive measures was extended to 6 March 2019. The statement of reasons for the applicant's designation, as set out in the March 2015 acts, the March 2016 acts and the March 2017 acts, was not amended.

36 By letter of 8 March 2018, the Council informed the applicant's representatives that the restrictive measures against him were being maintained. It replied to the observations which the applicant had set out in previous correspondence and sent him the contested acts. In addition, 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.

Events subsequent to the action being brought

37 By judgment of 11 July 2018, *Klyuyev* v *Council* (T−240/16, not published, EU:T:2018:433), the Court annulled the March 2017 acts, in so far as they concerned the applicant, and dismissed the action in so far as it concerned the March 2016 acts.

38 The contested acts were subsequently amended by Council Decision (CFSP) 2019/354 of 4 March 2019 amending Decision 2014/119 (OJ 2019 L 64, p. 7) and by Council Implementing Regulation (EU) 2019/352 of 4 March 2019 implementing Regulation No 208/2014 (OJ 2019 L 64, p. 1). Decision 2019/354 amended Article 5 of Decision 2014/119, by extending the application of the restrictive measures in respect of some of the persons whose names had been included on the list, until 6 March 2020. Consequently, Implementing Regulation 2019/352 replaced Annex I to Regulation No 208/2014.

39 As a result of those amendments, the name of the applicant no longer appears on the list.

Procedure and forms of order sought

40 By application lodged at the Court Registry on 16 May 2018, the applicant brought the present action seeking the annulment of the contested acts, in so far as they related to him.

41 By a separate document lodged at the Court Registry the same day, the applicant brought an application for interim measures, registered as Case T−305/18 R.

42 On 26 July 2018, the Council lodged the defence.

43 The reply and the rejoinder were lodged at the Court Registry on 14 September and 30 October 2018, respectively. On 30 October 2018, the written part of the procedure was closed.

44 By order of 28 November 2018, *Klyuyev* v *Council* (T−305/18 R, not published, EU:T:2018:849), the application for interim measures was dismissed on grounds of lack of urgency and costs were reserved.

45 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.

46 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 case, the General Court decided, in the context of the measures of organisation of procedure laid down in Article 89 of the Rules of Procedure, to ask the parties a written question in order to invite them to explain their views on the consequences to be drawn from that judgment in the present case. The parties complied with that request within the time allowed.

47 Under Article 106(3) of the Rules of Procedure, if no request for a hearing has been submitted by the parties within 3 weeks after service of notification of the close of the written part of the procedure, the General Court may decide to rule on the action without an oral part of the procedure. In the present case, since the Court considers that it has sufficient information available to it from the material in the file, it has decided, in the absence of such a request, to give a decision on the action without an oral part of the procedure.

48 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.

49 The Council contends that the Court should:

– dismiss the action;

– in the alternative, should the contested acts be annulled as regards the applicant, order that the effects of Decision 2018/333 be maintained until the partial annulment of Implementing Regulation 2018/326 takes effect;

– order the applicant to pay the costs.

Law

50 In support of the action, the applicant relies on four pleas in law alleging: (i) a manifest error of assessment on the ground that the Council concluded that the designation criterion was satisfied; (ii) infringement of the rights under Article 6 TEU, read together with Articles 2 and 3 TEU and of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter') because the Council assumed that judicial proceedings in Ukraine respected fundamental rights; (iii)

infringement of his rights of defence, the principle of good administration and the right to effective judicial protection; and (iv) infringement of the right to property and the right to reputation.

51 First of all, it is appropriate to examine the second plea in law.

52 According to the applicant, it follows from Article 2, Article 3(5) and Article 6 TEU that the European Union is bound to promote, in all of its actions, respect for the fundamental rights set out in the Charter. In that regard, it relies on case-law to claim, in essence, that the Council ought to have verified whether the Ukrainian authorities, when they decided to initiate and conduct the pre-trial investigation for misappropriation of public funds — which was the basis for the maintenance of the restrictive measures at issue brought against him — had ensured that his rights of defence and right to effective judicial protection were protected to a degree equivalent to that guaranteed at EU level. By contrast, the Council assumed, without any verification, that the Ukrainian authorities had respected the applicant's fundamental rights, namely the right to effective judicial protection, the right to a fair trial and the right to the presumption of innocence, despite the detailed evidence to the contrary that the applicant had provided to the Council.

53 By referring to certain passages of the first plea in law, the applicant also claims that, in the light of the criteria established by the case-law of the European Court of Human Rights ('the ECtHR'), the total duration of the pre-trial investigation of which he is the subject, which was moreover suspended for most of the time during the last 4 years, is not justified and infringes the right to be tried 'within a reasonable time', guaranteed by Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

54 In response to a written question put by the General Court (see paragraph 46 above), the applicant notes, first of all, that he has always taken the view that the case-law establishing that it is for the Council, before acting on the basis of a decision of an authority of a third State, concerning, inter alia, the initiation and conduct of judicial investigations and proceedings, to verify that that decision was adopted in accordance with the fundamental rights of the Union, is applicable to all cases imposing restrictive measures. Next, he claims that the principles stemming from the judgment of 19 December 2018, *Azarov* v *Council* (C−530/17 P, EU:C:2018:1031), which confirm the Council's obligation to carry out that verification, apply in the present case and that the Council did not carry out any verification of compliance with the fundamental rights of the Union before adopting the decision to maintain his name on the list, nor indicate, in the statement of reasons justifying that decision or in the letter of 8 March 2018, the elements from which it may be deduced that that verification had been carried out. Moreover, the fact that the Council failed to carry out any verification corresponds to the position it has held throughout the proceedings and according to which it is under no such obligation.

55 According to the Council, in its case-law, the Court has already rejected the proposition that the Council must, each time it relies on information provided by authorities of third States, verify that the national legislation in question adequately protects the rights of defence and provides effective judicial protection. Moreover, the applicant has not demonstrated that his rights were actually and specifically infringed, nor claimed or demonstrated that he sought to address the alleged infringements within the Ukrainian judicial system.

56 As regards the applicant's criticism that the criminal proceedings against him have been going on for too long, the Council contends that, according to case-law, first, it is not, in principle, required to assess whether criminal proceedings comply with the procedural rules applicable under Ukrainian law and, second, it is not in the Council's remit to rule on the duration of an investigation, when the Ukrainian authorities confirm that criminal proceedings are ongoing. Furthermore, the PGO's letter

of 31 January 2018 expressly sets out, in response to a request for information from the EEAS, the periods during which the investigation concerning the applicant was suspended on numerous occasions and the reasons for those suspensions, namely the execution of requests for international legal assistance and the fact that those authorities did not know the applicant's whereabouts, and that, in any event, the period during which the proceedings were not suspended did not exceed the maximum period of 12 months laid down in the Ukrainian code of criminal procedure.

57 In response to a written question put by the Court (see paragraph 46 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 letter referred to in paragraphs 26, 29 and 31 above that judicial decisions were adopted in Ukraine in respect of the applicant, such as seizures of property and the notification of a change to the suspicion previously notified and the notification of a new suspicion in the criminal proceedings concerning him, as well as the decision of the Petschersk District Court (Kiev) on 12 February 2018 to refer back to the PGO the application for permission to conduct a special pre-trial investigation *in absentia* against the applicant. According to the Council, those elements 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.

58 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).

59 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 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).

60 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).

61 In addition, whereas, under the listing criterion, as 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).

62 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).

63 Moreover, although it is true that the fact that a third State is among the States which acceded to 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 62 above (see, to that effect, judgment of 19 December 2018, *Azarov* v *Council*, C−530/17 P, EU:C:2018:1031, paragraph 36).

64 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 the 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).

65 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.

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

67 At the outset, 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.

68 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 brought by the Ukrainian authorities for offences amounting to misappropriation of public funds or assets and in connection

with the misuse of office, which was evidenced by the PGO's letters, a copy of which the applicant had received (see paragraphs 26, 29 and 31 above).

69 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.

70 In the first place, the fact remains that, as the Council accepted in its response to the question referred to in paragraph 46 above, the statement of reasons for the contested acts relating to the applicant (see paragraphs 15 and 35 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.

71 In the second place, it must be noted that none of the information contained in the letter of 8 March 2018, by which the Council notified the applicant of the contested acts, 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 concerned 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 the letter of 8 March 2018, 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 28, 29 and 31 above) showed that the applicant continued to be subject to criminal proceedings for misappropriation of public funds or assets.

72 In the third place, it must be observed that, contrary to its claims, the Council was under an obligation to verify compliance with the rights of the defence and the right to effective judicial protection 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 its pleadings, the Council indicated, in essence, that any alleged infringement of the applicant's right to effective judicial protection and his rights of defence by the Ukrainian authorities could only be invoked before the courts of that country. 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.

73 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 case, the Council put forward only the arguments summarised in paragraph 57 above.

74 In that regard, first, it must be noted that the Council admits 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 the maintenance of the applicant's name on the list.

75 Second, it must be noted that the Council claims that it is clear from the file before the Court in the

present case that the conduct of the criminal investigations had been subject to judicial oversight in Ukraine. More specifically, according to the Council, the existence of several 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.

76 Thus, all the judicial decisions mentioned by the Council fall within the scope of the criminal proceedings which justified the inclusion and the maintenance of the applicant's name on the list and are merely incidental in the light of those proceedings, since they are either restrictive or procedural 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.

77 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.

78 Indeed, the Council does not even seek to explain how the existence of those decisions makes it possible to consider that the protection of the rights at issue had been guaranteed, when, as the applicant had claimed on numerous occasions in the letters sent to the Council, the criminal proceedings against him, which were opened in May 2014 and referred to facts which allegedly occurred in 2010, were still at the pre-trial investigation stage and had been brought before a Ukrainian court for the consideration not of the substance but of, at most, mere procedural questions.

79 In that regard, it should be noted that Article 6(1) ECHR provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. That right relates to the principle of effective judicial protection which has, moreover, been reaffirmed in Article 47 of the Charter (see, to that effect, judgment of 16 July 2009, *Der Grüne Punkt — Duales System Deutschland* v *Commission*, C-385/07 P, EU:C:2009:456, paragraphs 177 and 179).

80 In addition, the ECtHR noted, first, that the purpose of the reasonable time principle was, inter alia, to protect a person charged with a criminal offence against excessive procedural delays, to avoid leaving that person in a state of uncertainty about his or her fate too long and to prevent delays which might jeopardise the effectiveness and credibility of the administration of justice (see ECtHR, 7 July 2015, *Rutkowski and Others v. Poland*, CE:ECHR:2015:0707JUD007228710, § 126 and the case-law cited) and, second, that infringement of that principle could be established, inter alia, when the investigation stage of criminal proceedings was characterised by a certain number of periods of inactivity attributable to the authorities with competence to conduct 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).

81 Furthermore, it follows from the case-law that, where a person has been subject to restrictive measures for several years, on account, in essence, of the same preliminary investigation conducted by the PGO, the Council is required to explore in greater detail the question of a possible infringement of the fundamental rights of that person by the Ukrainian authorities (see, to that effect, judgment of 30 January 2019, *Stavytskyi* v *Council*, T-290/17, EU:T:2019:37, paragraph 132).

82 In the present case, as was noted by the applicant in his letters and his pleadings, the proceedings on which the Council relied in relation to him were proceedings No 42015000000000748, which had been separated, on 21 April 2015, from proceedings No 42014000000000368 ('proceedings No 368'), opened in May 2014. Proceedings No 42015000000000748, which had been suspended, during the whole period — with the exception of 2 days — from 21 April 2015 to 9 October 2017, were joined again to proceedings No 368 on 9 October 2017, following the PGO's decision to change the suspicion originally notified to the applicant and to notify him of a new one. Proceedings No 368 were then suspended on 17 November 2017, reopened on 30 November 2017, and suspended again on 1 December 2017, before being reopened on 9 December 2017, and finally suspended one last time on 11 January 2018 up to the adoption of the contested acts.

83 Although the Council carried out additional verifications with the Ukrainian authorities in order to be informed of the reasons that justified the suspensions referred to in paragraph 82 above, the fact remains that it merely accepted the explanations given by the PGO, namely that the reasons for those suspensions were linked to the search for the applicant and to the execution of requests for legal assistance, even though he had informed it, first, that in proceedings No 42014000000001025, which did not relate to misappropriation of public funds, the Petschersk District Court had dismissed, on 25 January 2017, an application for permission to initiate a special pre-trial investigation concerning him, by considering that the fact that he had been in hiding for a period of over 6 months in order to avoid criminal liability was not confirmed by the documents provided in support of that application. Second, the applicant also informed the Council, before the adoption of the contested acts, that that court had dismissed, on 12 February 2018, the PGO's application for permission to initiate a special pre-trial investigation *in absentia* in criminal proceedings No 368. The periods of inactivity in the investigation were therefore attributable, according to the applicant, to the competent Ukrainian authorities.

84 Therefore, in the present case, the Council should have at the very least indicated the reasons for which, despite the applicant's arguments set out in paragraphs 78 and 83 above, it could consider that the applicant's right to effective judicial protection before the Ukrainian judicial authorities, which is clearly a fundamental right, had been complied with so far as concerns the question of establishing whether his case had been heard within a reasonable time.

85 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 the applicant's rights to effective judicial protection and to have his case heard within a reasonable time.

86 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 in Ukraine 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).

87 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.

88 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 him.

89 With respect to theCouncil's alternative claim (see paragraph 49, second indent, above), seeking, in essence, that the effects of Decision 2018/333 be maintained until the expiry of the period of time allowed for bringing an appeal and, in the event that an appeal is lodged, until the decision ruling on that appeal, it is sufficient to observe that Decision 2018/333 was effective only until 6 March 2019. 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 6 June 2018, *Arbuzov* v *Council*, T−258/17, EU:T:2018:331, paragraph 107 and the case-law cited).

Costs

90 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, including those incurred in relation to the proceedings for interim measures, 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) 2018/333 of 5 March 2018 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) 2018/326 of 5 March 2018 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, in so far as Mr Andriy Klyuyev's name was 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 Klyuyev, including those relating to the proceedings for interim measures.

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.