REGULATIONS

COUNCIL IMPLEMENTING REGULATION (EU) 2021/391

of 4 March 2021

implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine ([1]), in particular Article 14(1) thereof,

Having regard to the proposal from the High Representative of the Union for Foreign Affairs and Security Policy,

Whereas:

(1) On 5 March 2014, the Council adopted Regulation (EU) No 208/2014.

(2) On the basis of a review by the Council, the entries for two persons should be deleted and the information in Annex I to Regulation (EU) No 208/2014 regarding the rights of defence and the right to effective judicial protection should be updated.

(3) Annex I to Regulation (EU) No 208/2014 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Annex I to Regulation (EU) No 208/2014 is amended as set out in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the date of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 March 2021.

For the Council
The President
A. P. ZACARIAS

([1]) OJ L 66, 6.3.2014, p. 1.

ANNEX

Annex I to Regulation (EU) No 208/2014 is amended as follows:

(1) in section A ('List of natural and legal persons, entities and bodies referred to in Article 2'), the entries for the following persons are deleted:

13. Dmytro Volodymyrovych Tabachnyk;

15. Serhiy Hennadiyovych Arbuzov;

(2) section B ('Rights of defence and right to effective judicial protection') is replaced by the following:

'B. Rights of defence and right to effective judicial protection

The rights of defence and the right to effective judicial protection under the Code of Criminal Procedure of Ukraine

Article 42 of the Code of Criminal Procedure of Ukraine ("Code of Criminal Procedure") provides that every person who is suspected or accused in criminal proceedings enjoys rights of defence and the right to effective judicial protection. These include: the right to be informed of the criminal offence of which he has been suspected or accused; the right to be informed, expressly and promptly, of his rights under the Code of Criminal Procedure; the right to have, when first requested, access to a defence lawyer; the right to present petitions for procedural actions; and the right to challenge decisions, actions and omissions by the investigator, the public prosecutor and the investigating judge.

Article 303 of the Code of Criminal Procedure distinguishes between decisions and omissions that can be challenged during the pre-trial proceedings (first paragraph) and decisions, acts and omissions that can be considered in court during preparatory proceedings (second paragraph). Article 306 of the Code of Criminal Procedure provides that 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 defence lawyer or legal representative. Article 308 of the Code of Criminal Procedure provides that complaints regarding failure by the investigator or public prosecutor to respect reasonable time during the pre-trial investigation may be lodged with a superior public prosecutor and must be considered within three days of being lodged. In addition, Article 309 of the Code of Criminal Procedure specifies the decisions of investigating judges that may be challenged on appeal, and that other decisions may be subject to judicial review in the course of preparatory proceedings in Court. Moreover, a number of procedural investigating actions are only possible subject to a ruling by the investigating judge or a Court (e.g. seizure of property under Articles 167 – 175, and measures of detention under Articles 176 – 178, of the Code of Criminal Procedure).

Application of the rights of defence and the right to effective judicial protection of each of the listed persons

1. Viktor Fedorovych Yanukovych

The criminal proceedings relating to the misappropriation of public funds or assets are still ongoing.

The information on the Council's file shows that the rights of defence and the right to effective judicial protection of Mr Yanukovych, including the fundamental right to have his case heard within a reasonable time by an independent and impartial tribunal, were respected in the criminal proceedings on which the Council relied. This is demonstrated in particular by the decision of the High Anti-Corruption Court of Ukraine of 11 August 2020 in which the Court examined the petition of the National Anti-Corruption Bureau of Ukraine and granted permission to apprehend Mr Yanukovych. In the Court's ruling, the investigating judge confirmed that there is a reasonable suspicion for Mr Yanukovych's involvement in a criminal offence relating to misappropriation and confirmed Mr Yanukovych's status as suspect in the criminal proceedings.

The High Anti-Corruption Court also established that Mr Yanukovych has been staying outside Ukraine since 2014. The Court concluded that there were sufficient grounds to believe that Mr Yanukovych was hiding from the pre-trial investigation bodies.

In accordance with the case-law of the European Court of Human Rights, the Council considers that the periods during which Mr Yanukovych has been avoiding investigation must be excluded from the calculation of the period relevant for the assessment of respect for the right to a trial within a reasonable time. The Council therefore considers that the circumstances described in the decision of the High Anti-Corruption Court attributed to Mr Yanukovych have significantly contributed to the length of the investigation.

2. Vitalii Yuriyovych Zakharchenko

The criminal proceedings relating to the misappropriation of public funds or assets are still ongoing.

The information on the Council's file shows that the rights of defence and the right to effective judicial protection of Mr Zakharchenko, including the fundamental right to have his case heard within a reasonable time by an independent and impartial tribunal, were respected in the criminal proceedings on which the Council relied. This is demonstrated in particular by the decisions of the investigating judge of 21 May 2018, 23 November 2018 and 27 November 2019 granting permission to detain Mr Zakharchenko.

Moreover, the Council has information that the Ukrainian authorities took measures to search for Mr Zakharchenko. On 12 February 2020, the investigating body decided to put Mr Zakharchenko on the international wanted list and forwarded the request to the Department of International Police Cooperation of the National Police of Ukraine for entry into the Interpol database.

On 28 February 2020, the pre-trial investigation was resumed and procedural and investigative actions were carried out. The investigating body suspended the pre-trial investigation on 3 March 2020, concluding that Mr Zakharchenko is hiding from the investigating body and from the Court in order to evade criminal liability, that his whereabouts are unknown and that all investigative (search) and procedural actions that can be conducted in the absence of suspects have been conducted. That suspension decision was open to appeal.

No violation of the rights of defence and the right to effective judicial protection can be ascertained in the circumstances where the defence is not exercising those rights.

In accordance with the case-law of the European Court of Human Rights, the Council considers that the periods during which Mr Zakharchenko has been avoiding investigation must be excluded from the calculation of the period relevant for the assessment of respect for the right to a trial within a reasonable time. The Council therefore considers that the circumstances described above attributed to Mr Zakharchenko have significantly contributed to the length of the investigation.

3. Viktor Pavlovych Pshonka

The criminal proceedings relating to the misappropriation of public funds or assets are still ongoing.

The information on the Council's file shows that the rights of defence and the right to effective judicial protection of Mr Pshonka, including the fundamental right to have his case heard within a reasonable time by an independent and impartial tribunal, were respected in the criminal proceedings on which the Council relied. This is demonstrated in particular by the fact that a written notification of suspicion was delivered on 22 December 2014, by the fact that the decision of 16 June 2017 to suspend the criminal proceedings was open to appeal and by the decisions of the investigating judge of 12 March 2018, 13 August 2018 and 5 September 2019 granting permission to detain Mr Pshonka with the purpose of bringing him to the Court to participate in hearing the petition for the application of detention in custody.

The Council has information that the Ukrainian authorities took measures to search for Mr Pshonka. On 24 July 2020, a request for international legal assistance was sent to the competent authorities of the Russian Federation to establish the whereabouts of Mr Pshonka and to interrogate him. That request is still pending. The pre-trial investigation was suspended on 24 July 2020 due to the need to perform procedural actions within the context of international cooperation.

The Russian authorities rejected requests for international legal assistance sent to them in 2016 and 2018.

In its decision of 2 October 2020, the High Anti-Corruption Court of Ukraine dismissed the appeal submitted by Mr Pshonka's lawyer to cancel the notice of suspicion dated 23 December 2014. The Court concluded that the notice of suspicion was served in accordance with the Code of Criminal Procedure of Ukraine and confirmed Mr Pshonka's status as suspect in the criminal proceedings.

On 7 May 2020 and 9 November 2020, the High Anti-Corruption Court of Ukraine rejected a request to open proceedings made on the basis of a complaint by lawyers regarding inaction by the National Anti-Corruption Bureau of Ukraine in the criminal proceedings. The Appellate Chamber of the High Anti-Corruption Court confirmed those decisions on 1 June 2020 and 26 November 2020, respectively.

In accordance with the case-law of the European Court of Human Rights, the Council considers that the periods during which Mr Pshonka has been avoiding investigation must be excluded from the calculation of the period relevant for the assessment of respect for the right to a trial within a reasonable time. The Council therefore considers that the circumstances described in the decision of the High Anti-Corruption Court attributed to Mr Pshonka as well as the earlier non-execution of the requests for international legal assistance have significantly contributed to the length of the investigation.

6. Viktor Ivanovych Ratushniak

The criminal proceedings relating to the misappropriation of public funds or assets are still ongoing.

The information on the Council's file shows that the rights of defence and the right to effective judicial protection of Mr Ratushniak, including the fundamental right to have his case heard within a reasonable time by an independent and impartial tribunal, were respected in the criminal proceedings on which the Council relied. This is demonstrated in particular by the decisions of the investigating judge of 21 May 2018, 23 November 2018 and 4 December 2019 granting permission to detain Mr Ratushniak with the purpose of bringing him to the Court to participate in hearing the petition for the application of detention in custody.

The Council has information that the Ukrainian authorities took measures to search for Mr Ratushniak. On 12 February 2020, the investigating body decided to put Mr Ratushniak on the international wanted list and forwarded the request to the Department of International Police Cooperation of the National Police of Ukraine for entry into the Interpol database.

On 28 February 2020, the pre-trial investigation was resumed with a view to carrying out procedural and investigative actions. The investigating body suspended the pre-trial investigation on 3 March 2020, concluding that Mr Ratushniak is hiding from the investigating bodies and from the Court in order to evade criminal liability, that his whereabouts are unknown and that all investigative (search) and procedural actions that can be conducted in the absence of suspects have been conducted. That suspension decision was open to appeal.

No violation of the rights of defence and the right to effective judicial protection can be ascertained in the circumstances where the defence is not exercising those rights.

In accordance with the case-law of the European Court of Human Rights, the Council considers that the periods during which Mr Ratushniak has been avoiding investigation must be excluded from the calculation of the period relevant for the assessment of respect for the right to a trial within a reasonable time. The Council therefore considers that the circumstances described above attributed to Mr Ratushniak have significantly contributed to the length of the investigation.

7. Oleksandr Viktorovych Yanukovych

The criminal proceedings relating to the misappropriation of public funds or assets are still ongoing.

The information on the Council's file shows that the rights of defence and the right to effective judicial protection of Mr Yanukovych, including the fundamental right to have his case heard within a reasonable time by an independent and impartial tribunal, were respected in the criminal proceedings on which the Council relied.

The Council has information that the Ukrainian authorities took measures to search for Mr Yanukovych, who is staying in the Russian Federation and avoiding investigation.

In accordance with the case-law of the European Court of Human Rights, the Council considers that the periods during which Mr Yanukovych has been avoiding investigation must be excluded from the calculation of the period relevant for the assessment of respect for the right to a trial within a reasonable time. The Council therefore considers that the circumstances described above attributed to Mr Yanukovych have significantly contributed to the length of the investigation.

9. Artem Viktorovych Pshonka

The criminal proceedings relating to the misappropriation of public funds or assets are still ongoing.

The information on the Council's file shows that the rights of defence and the right to effective judicial protection of Mr Pshonka, including the fundamental right to have his case heard within a reasonable time by an independent and impartial tribunal, were respected in the criminal proceedings on which the Council relied. This is demonstrated in particular by the fact that a written notification of suspicion was delivered on 29 December 2014, by the fact that the decision of 16 June 2017 to suspend the criminal proceedings was open to appeal, and by the decisions of the investigating judge of 12 March 2018, 13 August 2018 and 5 September 2019 granting permission to detain Mr Pshonka with the purpose of bringing him to the Court to participate in hearing the petition for the application of detention in custody.

The Council has information that the Ukrainian authorities took measures to search for Mr Pshonka. On 24 July 2020, a request for international legal assistance was sent to the competent authorities of the Russian Federation to establish the whereabouts of the suspect and to interrogate him. That request is still pending. The pre-trial investigation was suspended on 24 July 2020 due to the need to perform procedural actions within the context of international cooperation.

The Russian authorities rejected the request for international legal assistance sent to them in 2018.

In its decision of 8 July 2020, the High Anti-Corruption Court of Ukraine dismissed the appeal submitted by Mr Pshonka's lawyer to cancel the decision of 30 April 2015 to suspend the pre-trial investigation. The Court also concluded that the notice of suspicion was served in accordance with the Code of Criminal Procedure of Ukraine and confirmed Mr Pshonka's status as suspect in the criminal proceedings.

In accordance with the case-law of the European Court of Human Rights, the Council considers that the periods during which Mr Pshonka has been avoiding investigation must be excluded from the calculation of the period relevant for the assessment of respect for the right to a trial within a reasonable time. The Council therefore considers that the circumstances described in the decision of the High Anti-Corruption Court attributed to Mr Pshonka as well as to an earlier non-execution of the request for international legal assistance have significantly contributed to the length of the investigation.

12. Serhiy Vitalyovych Kurchenko

The criminal proceedings relating to the misappropriation of public funds or assets are still ongoing.

The information on the Council's file shows that the rights of defence and the right to effective judicial protection of Mr Kurchenko, including the fundamental right to have his case heard within a reasonable time by an independent and impartial tribunal, were respected in the criminal proceedings on which the Council relied. This is demonstrated in particular by the decision of the investigating judge of 7 March 2018 granting

permission for a special investigation in absentia. Moreover, the defence was notified about the completion of the pre-trial investigation on 28 March 2019 and was provided access to the materials for familiarisation. The Council has information that the familiarisation by the defence is ongoing.

In its decision of 29 April 2020, the Odessa Court of Appeal granted the appeal by the prosecutor and imposed a preventive measure of detention in custody on Mr Kurchenko. The Court also stated that Mr Kurchenko departed Ukraine in 2014 and that his location cannot be established. The Court concluded that Mr Kurchenko is hiding from the pre-trial investigation bodies in order to avoid criminal liability.

The Council was informed that on 29 April 2020 the Ukrainian authorities sent a request for international legal assistance to the Russian Federation, which was returned on 28 July 2020 without execution.

In accordance with the case-law of the European Court of Human Rights, the Council considers that the periods during which Mr Kurchenko has been avoiding investigation must be excluded from the calculation of the period relevant for the assessment of respect for the right to a trial within a reasonable time. The Council therefore considers that the circumstances described in the decision of the Odessa Court of Appeal attributed to Mr Kurchenko as well as the non-execution of the request for international legal assistance have significantly contributed to the length of the investigation.

17. Oleksandr Viktorovych Klymenko

The criminal proceedings relating to the misappropriation of public funds or assets are still ongoing.

The information on the Council's file shows that the rights of defence and the right to effective judicial protection of Mr Klymenko, including the fundamental right to have his case heard within a reasonable time by an independent and impartial tribunal, were respected in the criminal proceedings on which the Council relied. This is demonstrated in particular by the decisions of the investigating judge of 1 March 2017 and 5 October 2018 granting permission for a special investigation in absentia. The Council observes that the defence was notified of the completion of pre-trial investigations in 2017 and 2018, respectively, and has been provided with materials of the criminal proceedings for familiarisation since then. The review and examination by the defence of the large volume of materials available in relation to the pre-trial investigation into criminal proceedings is ongoing. The Council considers that the long period of familiarisation is to be attributed to the defence.'.