Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

25 June 2020*

(Common foreign and security policy — Restrictive measures taken having regard to the situation in Ukraine — Freezing of funds — List of persons, entities and bodies covered by 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-295/19,

Oleksandr Viktorovych Klymenko, residing in Moscow (Russia), represented by M. Phelippeau, lawyer,

applicant,

v

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

defendant,

APPLICATION under Article 263 TFEU seeking the 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 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, President, O. Spineanu-Matei and R. Mastroianni (Rapporteur), Judges,

Registrar: E. Coulon,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

1 The present case has arisen 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 Oleksandr Viktorovych Klymenko, held the post of Minister for Revenue and Charges 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 date, 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 read 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 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 governing them, in terms which are identical, in essence, to those used in that decision.

8 The names of the persons covered by Decision 2014/119 and Regulation No 208/2014 appear on the list in the annex to that decision and in Annex I to that regulation (‘the list’) together with, inter alia, the reasons for their listing. Initially, the applicant’s name did not appear on the list.

9 Decision 2014/119 and Regulation No 208/2014 were amended by Council Implementing Decision 2014/216/CFSP of 14 April 2014 implementing Decision 2014/119 (OJ 2014 L 111, p. 91) and by Council Implementing Regulation (EU) No 381/2014 of 14 April 2014 implementing Regulation No 208/2014 (OJ 2014 L 111, p. 33) ('the April 2014 acts').

10 By the April 2014 acts, the applicant's name was added to the list, with the identifying information 'former Minister of Revenues and Charges' and the following statement of reasons:

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

11 By application lodged at the Court Registry on 30 June 2014, the applicant brought an action, registered as Case T-494/14, seeking, inter alia, the annulment of the April 2014 acts, in so far as they concerned him.

12 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).

13 Decision 2015/143 specified the criteria, effective from 31 January 2015, for selecting the persons covered by the freezing of funds. In particular, Article 1(1) of Decision 2014/119 was replaced by the following:

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

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

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

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

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

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

16 By the March 2015 acts, the applicant's name was maintained on the list, with the identifying information 'former Minister of Revenues and Charges' 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 for the abuse of office by a public office-holder in order to procure an unjustified advantage for himself or for a third party and thereby causing a loss to Ukrainian public funds or assets.'

17 By application lodged at the Registry of the General Court on 15 May 2015, the applicant brought an action, registered as Case T-245/15, seeking, inter alia, the annulment of the March 2015 acts, in so far as they concerned him.

18 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').

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

20 By a statement lodged at the Court Registry on 28 April 2016, the applicant modified the application in Case T-245/15, in accordance with Article 86 of the Rules of Procedure of the General Court, so as also to request the annulment of the March 2016 acts, in so far as they applied to him.

21 By order of 10 June 2016, *Klymenko* v *Council* (T-494/14, EU:T:2016:360), adopted on the basis of Article 132 of the Rules of Procedure, the Court upheld the action referred to in paragraph 11 above, declaring it manifestly well founded, and therefore annulled the April 2014 acts, in so far as they related to the applicant.

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 was extended to 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 a statement lodged at the Court Registry on 27 March 2017, the applicant again modified the application in relation to Case T-245/15, so as also to request the annulment of the March 2017 acts, in so far as they concerned him.

25 By judgment of 8 November 2017, *Klymenko* v *Council* (T-245/15, not published, EU:T:2017:792), the General Court dismissed all of the applicant's claims, as referred to in paragraphs 17, 20 and 24 above.

26 On 5 January 2018, the applicant brought an appeal before the Court of Justice, registered as Case C-11/18 P, against the judgment of 8 November 2017, *Klymenko* v *Council* (T-245/15, not published, EU:T:2017:792).

27 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').

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

29 By application lodged at the Court Registry on 30 April 2018, the applicant brought an action, registered as Case T-274/18, seeking annulment of the March 2018 acts, in so far as they concerned him.

30 Between December 2018 and February 2019, the Council and the applicant exchanged several letters concerning the possible extension of the restrictive measures at issue in relation to the applicant. In particular, the Council sent to the applicant copies of several letters from the Ukrainian Prosecutor General's Office ('the PGO') concerning the criminal proceedings brought against him, on which the Council was basing the proposed extension.

31 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').

32 By the contested acts, the application of the restrictive measures at issue was extended to 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 16 above, along with a clarification worded as follows:

'The information on the Council's file shows that the rights of defence and the right to effective judicial protection of Mr Klymenko were respected in the criminal proceedings on which the Council relied. This is demonstrated in particular by the decision of the investigating judge of 5 October 2018 granting permission for a special investigation *in absentia*.'

33 By letter of 5 March 2019, the Council informed the applicant that the restrictive measures against him were being maintained. The Council replied to the observations which the applicant had set out in his letters of 19 December 2018, 21 January and 4 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

34 Bu judgment of 11 July 2019, *Klymenko* v *Council* (T-274/18, EU:T:2019:509), the General Court annulled the March 2018 acts in so far as they concerned the applicant.

35 By judgment of 26 September 2019, *Klymenko* v *Council* (C-11/18 P, not published, EU:C:2019:786), the Court of Justice set aside, first, the judgment of 8 November 2017, *Klymenko* v *Council* (T-245/15, not published, EU:T:2017:792) (see paragraph 25 above), and, second, annulled the March 2015, March 2016 and March 2017 acts in so far as they concerned the applicant.

Procedure and forms of order sought

36 By application lodged at the Court Registry on 3 May 2019, the applicant brought the present action.

37 On 29 July 2019, the Council lodged its defence.

38 The written procedure was concluded on 20 September 2019, without the applicant having lodged a reply within the prescribed period.

39 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, to which a new Judge-Rapporteur was assigned.

40 On 20 November 2019, by way of measures of organisation of procedure under Article 89 of the Rules of Procedure, the General Court invited the parties to submit observations on the consequences to be drawn in the present case from the judgment of 11 July 2019, *Klymenko* v *Council* (T-274/18,

EU:T:2019:509), and from the judgment of 26 September 2019, *Klymenko* v *Council* (C-11/18 P, not published, EU:C:2019:786) respectively. The parties complied with that measure within the prescribed period.

41 Under Article 106(3) of the Rules of Procedure, if no request for a hearing has been submitted by the parties within three weeks of service of notification of the conclusion of the written procedure, the Court may decide to rule on the action without an oral 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 procedure.

42 The applicant claims, in essence, that the Court should:

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

– order the Council to pay the costs.

43 The Council contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs;

– 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.

Law

44 In support of his action, the applicant puts forward five pleas in law, alleging, first, breach of the duty to state reasons, second, infringement of the rights of the defence and of the right to effective judicial protection, third, the lack of a legal basis, fourth, an error of assessment, and, fifth, infringement of the right to property.

45 First of all, it is appropriate to begin by examining the second and fourth pleas together, in so far as they allege, inter alia, that the Council failed to verify that the Ukrainian authorities had observed the applicant's rights of defence and his right to effective judicial protection and that, as a result, the Council made an error of assessment on adopting the contested acts.

46 In the context of those pleas, the applicant, relying on the judgment of 19 December 2018, *Azarov* v *Council* (C-530/17 P, EU:C:2018:1031), argues, in particular, that the Council failed to verify whether the decision issued by the PGO, on which the Council had relied when maintaining the restrictive measures against him, had been taken in accordance with his rights of defence and his right to effective judicial protection.

47 In that regard, the applicant complains that the checks which the Council carried out were inadequate and that it arbitrarily dismissed the observations which he had submitted on the various documents communicated by the PGO.

48 More specifically, the applicant submits that the decision of the investigating judge of the Petchersk District Court of Kiev of 5 October 2018 ('the decision of the investigating judge of 5 October 2018') granting permission for a special investigation *in absentia* to be conducted with regard to him was not, contrary to the Council's claim, adopted in accordance with the rights of the defence and the right to effective judicial protection, as enshrined, in particular, in Articles 6 and 13 of the Convention

for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR') and in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). First, that decision was not amenable to appeal and, second, it was adopted in breach of the requirements of the Ukrainian Code of Criminal Procedure ('the Code of Criminal Procedure'). The applicant emphasises that, although he informed the Council of that, the latter failed to carry out any thorough enquiry into the matter.

49 Moreover, the applicant submits that the length of the proceedings against him in Ukraine is not reasonable, within the meaning of Article 6(1) ECHR and that, even after the decision of the investigating judge of 5 October 2018, it is clear that the sole aim of the Ukrainian authorities is to justify the maintenance of the restrictive measures at issue.

50 Since commencing the preliminary investigation, the authorities responsible for it, in the absence of evidence, have merely delayed the investigation and have failed to take any decision either to bring the case before a court or to close the proceedings, thereby infringing the Code of Criminal Procedure.

51 The Council contends, in particular, that, as is apparent from its letter of 5 March 2019, it considered the applicant's observations, investigated whether they were well founded and, having regard to the information received from the PGO, concluded that there were sufficient grounds to maintain the applicant's name on the list. As regards its correspondence with the applicant, the Council submits that it investigated the arguments which he raised, putting specific questions to the PGO and obtaining clarification from it. In addition, the applicant exercised his right to be represented by a lawyer in Ukraine in the proceedings against him and exercised his rights effectively, so much so that he was sometimes successful in his actions.

52 Moreover, the letters which the applicant sent to the Council do not show that he availed himself of the means of legal challenge available to him under the Code of Criminal Procedure in certain procedural situations, such as where an investigation is suspended or where an investigation is not concluded within the prescribed period.

53 The Council also points out that a number of judicial decisions have been adopted concerning the applicant, including the grant by the investigating judge of the Petchersk District Court of Kiev of an order for the applicant's detention pending his appearance in court, the grant, on 1 March 2017, of permission to conduct an investigation in connection with the proceedings bearing the reference 42017000000000113 ('Case 113') and the decision to grant permission for a special investigation *in absentia* in connection with the proceedings bearing the reference 42014000000000521 ('Case 521'). Furthermore, it is apparent from other evidence, such as the notification given on 21 April 2017 to the applicant's lawyers informing them of the conclusion of the judicial investigation and allowing them access to the file, that the applicant's rights of defence and right to effective judicial protection were observed in the proceedings conducted against him.

54 Thus, the applicant's lawyers have been adequately informed of the ongoing proceedings, However, they rely on the fact that he is not in Ukraine to allege procedural defects and to avoid his appearing in court.

55 In short, the Council considers that it was able to verify that a certain number of decisions taken during the conduct of criminal proceedings were adopted in accordance with the applicant's right of defence and right to effective judicial protection.

56 As regards the applicant's arguments concerning the excessive length of the investigations and the fact that he has not been charged, the Council observes that it requested and obtained clarification on the matter from the Ukrainian authorities and that the investigations in Case 113 and in Case 521 were closed in 2017 and October 2018 respectively, which shows that the proceedings did progress.

57 The Council further contends that, contrary to the applicant's claim, it relied on a sufficiently solid factual basis, in that it provided evidence proving, first, the existence of criminal proceedings against the applicant concerning the misappropriation of Ukrainian State funds and, second, the observance of the rights of the defence and of the right to a fair trial.

58 Finally, in its reply to the question referred to in paragraph 40 above, the Council argued that it is apparent from all the correspondence with the applicant that it checked with the PGO the arguments which he put forward in his letters, asking precise questions and obtaining further clarification.

59 According to settled case-law, 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, inter alia, the right to effective judicial protection and the rights of the defence, as enshrined in Articles 47 and 48 of the Charter (see judgment of 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 40 and the case-law cited; see also, to that effect, judgment of 26 September 2019, *Klymenko* v *Council*, C-11/18 P, not published, EU:C:2019:786, paragraphs 21 and 22 and the case-law cited).

60 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 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 41 and the case-law cited).

61 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 judgment of 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 42 and the case-law cited).

62 Thus, while, under the listing criterion, such as that referred to in paragraph 13 above, the Council can base restrictive measures on the decision of a third State, the obligation on that institution to observe the rights of the defence and the right to effective judicial protection means that it must satisfy itself that those rights were observed by the authorities of the third State which adopted that decision (see judgment of 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 43 and the case-law cited).

63 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 rests on a sufficiently solid factual basis before having itself verified whether the rights of the defence and the right to effective judicial protection were observed at the time of the adoption of the decision by the third State in question on which it intends to rely (see judgment of 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 44 and the case-law cited).

64 Moreover, although it is true that the fact that a third State is among the States which have acceded to 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 63 above (see judgment of 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 45 and the case-law cited).

65 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 judgment of 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 46 and the case-law cited).

66 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, second, refer, in the decision imposing restrictive measures, to the reasons why it considers that that decision of the third State was adopted in accordance with those rights (see judgment of 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 47).

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

68 As a preliminary point, it must be noted that, although the Council stated in the contested acts (see paragraph 32 above) why it considered that the decision of the Ukrainian authorities to initiate and conduct criminal proceedings against the applicant for the misappropriation of public funds or assets was adopted in accordance with the rights of the defence and the right to effective judicial protection, it is nevertheless necessary to verify whether the Council was correct in its view that those authorities observed those rights of the applicant in the proceedings on which the contested acts are based.

69 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 (see, to that effect, judgment of 15 November 2012, *Council* v *Bamba*, C-417/11 P, EU:C:2012:718, paragraphs 60 and 61) and is merely a corollary of the Council's obligation to ensure in advance that those rights are observed.

70 The applicant was made the subject of 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 13 and 14 above). That criterion provides for the freezing of funds of persons who have been identified as responsible for the misappropriation of public funds belonging to the Ukrainian State, including persons subject to investigation by the Ukrainian authorities.

71 It must be observed that the Council, in deciding 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 constituting the misappropriation of public funds or assets and connected with an abuse of office, which were evidenced by the PGO's letters of which the applicant received copies (see paragraph 30 above).

72 The maintenance of the restrictive measures taken against the applicant was therefore based, as in the cases giving rise to the judgment of 26 September 2019, *Klymenko* v *Council* (C-11/18 P, not published, EU:C:2019:786), and the judgment of 11 July 2019, *Klymenko* v *Council* (T-274/18, EU:T:2019:509), on the decision of the Ukrainian authorities to initiate and conduct criminal investigation proceedings concerning an offence of misappropriation of Ukrainian State funds.

73 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 entirely devoted to the rights of the defence and the right to effective judicial protection, which is divided into two parts.

74 The first part 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, first of all, reference is made 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. Next, first, it is stated that, under Article 306 of the Code of Criminal Procedure, complaints against decisions, actions or omissions of the investigator or public prosecutor must be considered by an investigating judge or a local court in the presence of the complainant or his defence lawyer or legal representative. Second, it is stated, inter alia, that Article 309 of that code specifies which decisions of investigating judges may be challenged on appeal. Lastly, it is stated that a number of procedural investigating actions, such as the seizure of property and measures of detention, are only possible subject to a ruling by the investigating judge or a court.

75 The second part of the section concerns the application of the rights of defence and the right to effective judicial protection of each of the listed persons. As regards the applicant specifically, it is stated that, according to the information in 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 the decision of the investigating judge of 5 October 2018 (see paragraph 32 above).

76 It should also be noted that, in its letter of 5 March 2019 (see paragraph 33 above) the Council, first, confined itself to stating that the letters from the PGO established that the applicant was still the subject of Case 113 and Case 521 for misappropriation of public funds or assets and, second, as regards observance of the applicant's rights of defence and right to effective judicial protection, made express reference only to Case 521, adding that it was clear from the decision of the investigating judge of 5 October 2018 that those rights had been observed in this case. The observance of those rights followed from the fact that that decision had been taken on the conclusion of a hearing in public session in which the defence had participated. In addition, it was found at the hearing that the applicant was a suspect in those criminal proceedings, that his name was entered on a 'wanted persons list', that the prosecution had proven reasonable suspicion and that there were reasons to believe that the applicant was hiding from the authorities in charge of the preliminary investigation.

77 It follows that, although in its letter of 5 March 2019 (see paragraph 33 above) the Council also mentioned Case 113, Case 521 is the only case in relation to which the Council confirms that it actually verified the observance of the applicant's rights of defence and right to effective judicial protection.

78 In that regard, it must be observed, as a preliminary point, that the Council has failed to demonstrate in what way the decision of the investigating judge of 5 October 2018, which is a purely procedural measure, evidences observance of the applicant's rights of defence and right to effective judicial protection in the course of Case 521. As stated in paragraphs 61 and 62 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 and abuse of office by a public office-holder had been taken in accordance with those rights of the applicant.

79 From that perspective, the decision of the investigating judge of 5 October 2018, which is merely incidental to Case 521, cannot be identified, at least not formally, as being a decision 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 it was adopted by a judge, that decision was actually taken into account by the Council as the factual basis justifying the maintenance of the measures at issue. It is therefore necessary to ascertain whether the Council was right to conclude that that decision demonstrated that the applicant's rights of defence and right to effective judicial protection had been observed.

80 Contrary to what the Council claims, it is not clear from the decision of the investigating judge of 5 October 2018 that the applicant was guaranteed those rights in this case. In that regard, although it is true that, as the Council emphasised in its letter of 5 March 2019 (see paragraph 33 above), that decision was adopted on the conclusion of a hearing in public session attended by a representative of the defendant, that the investigating judge concluded at the hearing that the applicant was a suspect, that his name was entered on a 'wanted persons list', that the prosecution had proven reasonable suspicion and that there were reasons to believe that the applicant was hiding from the authorities in charge of the preliminary investigation, the fact remains that the documents in the file do not show that the Council examined the information which the applicant communicated to it in his letters of 19 December 2018 and 4 February 2019.

81 The applicant had argued, and had documents to show, first, that, contrary to the information given by the PGO to the investigating judge, his name was not on the international wanted persons list drawn up by the International Criminal Police Organisation (Interpol) ('the Interpol list'), second, that, at the hearing before that judge, the applicant had been represented not by the lawyers he had appointed, but by a court-appointed lawyer who proved unable to mount an adequate defence and, third, that the conditions for granting permission for an *in absentia* procedure were not met in this case and the decision of the investigating judge of 5 October 2018 infringed the right to effective judicial protection in that it was not open to appeal.

82 In that regard, first, it should be noted that it is not apparent from the documents in the file that the Council ascertained the extent to which a decision, such as the decision in this case, which is not open to appeal, is consistent with Article 42 of the Code of Criminal Procedure, which is expressly referred to in the section of the contested acts that deals with the rights of the defence and the right to effective judicial protection (see paragraph 74 above), in accordance with which a suspect has the right to 'challenge decisions, actions and omissions by the investigator, the public prosecutor and the investigating judge'.

83 Second, it does not appear from the documents in the file that the Council checked why the applicant was not represented by the lawyers he had appointed, but by a court-appointed lawyer, despite the information the applicant had given to the Council.

84 More specifically, it is true, as the Council states, that, in January 2019, in response to the request it made of the Ukrainian authorities concerning, inter alia, whether the applicant had been represented by a lawyer at the hearing before the investigating judge, the Council received the PGO's letter of

22 January 2019, which stated that the applicant had been defended by a lawyer from the centre for free legal assistance whom the investigating judge had appointed of his own motion. However, it must be noted, first, that, in his letter of 4 February 2019, sent within the period prescribed by the Council in response to the Council's letter of 25 January 2019, the applicant complained that he had not been represented by the lawyers he had appointed, and did not complain that he had lacked legal representation and, second, that the Council simply accepted the PGO's answer, which, moreover, merely reproduced in large part the investigating judge's decision, without actually taking into account the elements relied on by the applicant regarding the investigating judge's appointment of a public defender.

85 It is apparent from the investigating judge's decision of 5 October 2018 that he was aware that the applicant had appointed a lawyer, inasmuch as the judge confirms that he had sent that lawyer a new notice of suspicion drawn up on 6 March 2018. In those circumstances, the Council, whose task it is to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded (see, to that effect, judgment of 26 September 2019, *Klymenko* v *Council*, C-11/18 P, not published, EU:C:2019:786, paragraph 38 and the case-law cited), did not in this case discharge its duty to ensure that the applicant's rights of defence had been observed in Case 521.

86 Third, it is not apparent from the documents in the file, first, what information the investigating judge relied on in concluding that the applicant's name was on the Interpol list or, secondly, what reasons led the Council to accept the mere assertions of the PGO and the investigating judge in that regard, despite all the documents the applicant had sent to it showing that his name was not on the Interpol list.

87 Moreover, that last aspect is not without importance in the assessment of whether the applicant's rights of defence and right to effective judicial protection have been observed, in the light of Article 297-4 of the Code of Criminal Procedure, in accordance with which the fact of inclusion on an inter-state or international wanted persons list is one of the two conditions that must be established by the public prosecutor when seeking permission to initiate *in absentia* proceedings.

88 It must be noted in this connection that, in his decision of 5 October 2018, the investigating judge mentioned those two conditions, without however ruling expressly on the condition relating to the inclusion of the name of the person concerned on the list. As for the PGO, it must be noted that it merely stated, in its letter of 22 January 2019, that the applicant's name had been entered on an international wanted persons list on 5 June 2014 and that the corresponding information had been recorded in the file of the Secretary General of Interpol but had subsequently been blocked pending examination of the complaint because of the challenges put forward by the applicant.

89 Fourth, as regards observance of the applicant's right to be tried within a reasonable period of time, the PGO's letters do not demonstrate why, given the applicant's prolonged absence from Ukraine, of which the Ukrainian authorities were aware, an application to initiate *in absentia* proceedings was not put before the investigating judge until 9 July 2018, that is to say, more than four years after the preliminary investigation was commenced.

90 It must also be noted that the full version of the decision to initiate *in absentia* proceedings was produced by the PGO in response to a question put by the Council on 18 January 2019 and that, prior to adopting the contested acts, neither was the Council informed by the Ukrainian authorities of the state of progress of Case 521, in light of the decision granting permission for *in absentia* proceedings, nor did the Council take the initiative to ask the Ukrainian authorities for information in that regard. Moreover, in its letter of 22 January 2019, the PGO merely stated that a formal charge against the applicant would be sent to the court once the defence had familiarised itself with the ongoing criminal proceedings.

91 As regards the argument which the Council seeks to draw from the fact that other judicial decisions have been adopted concerning the applicant (see paragraph 53 above), it must be noted, as was held in the case which gave rise to the judgment of 11 July 2019, *Klymenko* v *Council* (T-274/18, EU:T:2019:509, paragraph 81), that those decisions fall within the scope of the criminal proceedings which justified the inclusion and maintenance of the applicant's name on the list and are merely incidental in the light of those proceedings, since they are either restrictive or procedural in nature.

92 Such decisions, which may at most serve to establish 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, 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.

93 Moreover, as regards the fact that the applicant admits that he was given access, on 21 April 2017, to the PGO's file on him, it must be held that that is a necessary condition, but certainly not a sufficient condition for concluding that his rights of defence and his right to effective judicial protection were observed (see, to that effect, judgment of 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 88).

94 In any event, the Council does not refer to any document in the file for the proceedings which led to the adoption of the contested acts that shows that it examined the decisions of the Ukrainian courts, to which it makes a merely general reference, and from which it was able to conclude that the essence of the applicant's procedural rights had been complied with.

95 Nor has the Council explained in what way the existence of those judicial decisions supports the conclusion that the protection of the rights in question had been guaranteed, when, as the applicant pointed out in the letters he sent to the Council, Case 521, which had been brought in April 2014 and related to facts which allegedly occurred between 2011 and 2014, was still at the preliminary investigation stage and the case at issue had been brought before the Ukrainian court not for consideration of the merits, but, at most, only in connection with procedural matters.

96 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, 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 (see, to that effect, judgment of 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 84 and the case-law cited).

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

98 In that regard, it must be noted that, in its interpretation of Article 6 ECHR, first, the ECtHR has held 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 prevent them from being left in a state of uncertainty about their fate for too long, and also 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). Second, the ECtHR has also held that infringement of that principle could 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).

99 It is also clear from the case-law that, where a person has been the subject of restrictive measures for several years, on account, essentially, of the continuing conduct of the same preliminary investigation by the PGO, the Council is required to explore in greater detail the question of the possible infringement of that person's fundamental rights 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).

100 Therefore, in the present case, the Council should, at the very least, have indicated why, despite the applicant's arguments set out in paragraph 95 above, it considered that the applicant's right to effective judicial protection before the Ukrainian judicial authorities, which is clearly a fundamental right, had been respected in so far as concerns the question of whether his case had been heard within a reasonable time. (see, to that effect, judgment of 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 87).

101 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 had been taken in accordance with the applicant's right to effective judicial protection and his right to have his case heard within a reasonable period.

102 Furthermore, in that regard, it must also be noted that the 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, it is not for the Council or EU judicature to verify whether or not the investigations to which the person concerned by those measures was subject were well founded, but only to verify whether that was the case in relation to the decision to freeze funds in the light of the document or documents on which that decision was based, 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 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 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 90 and the case-law cited).

103 In the light of all the foregoing considerations, it has not been established that the Council, prior to the adoption of the contested acts, assured itself that the Ukrainian judicial authorities had 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.

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

105 With regard to the Council's alternative claim (see the third indent of paragraph 43 above), seeking, in essence, that the effects of Decision 2019/354 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 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 judgment of 11 July 2019, *Klymenko* v *Council*, T-274/18, EU:T:2019:509, paragraph 93 and the case-law cited).

Costs

106 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 Oleksandr Viktorovych Klymenko 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 Spineanu-Matei Mastroianni

Delivered in open court in Luxembourg on 25 June 2020.

[Signatures]