II

(Non-legislative acts)

REGULATIONS

COUNCIL IMPLEMENTING REGULATION (EU) 2023/449

of 2 March 2023

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], and 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 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) 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 in accordance with the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the date following that 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, 2 March 2023.

For the Council
The President
E. BUSCH

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

ANNEX

In Annex I to Regulation (EU) No 208/2014, Section B (Rights of defence and the right to effective judicial protection) is replaced by the following:

'B. **Rights of defence and the 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

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 19 April 2021 ordering detention in custody of Mr Zakharchenko, as well as the ruling of the Pecherskyi District Court of Kyiv City dated 10 August 2021 granting permission to carry out a special pre-trial investigation in criminal proceeding No 42016000000002929. Those decisions of the investigating judges confirm the status of suspect of Mr Zakharchenko and highlight that the suspect is hiding from the investigation to avoid criminal liability.

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. Additionally, on 11 May 2021, Ukraine sent a request for international legal assistance to the Russian Federation to establish the whereabouts of Mr Zakharchenko, which was rejected by Russia on 31 August 2021.

The Council has information that on 9 February 2022 the pre-trial investigation in criminal proceeding No 42016000000002929 was completed and on 5 August 2022, following the fulfilment of the requirements of the Criminal Procedure Code of Ukraine, the Prosecutor General's Office sent an indictment to the Pecherskyi District Court of Kyiv City for the consideration of the merits of the case.

Based on the information provided by the Ukrainian authorities, Mr Zakharchenko has not involved a defence counsel in the criminal proceedings in Ukraine but an assigned defence counsel represented his interests. 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.

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 19 April 2021 ordering detention in custody on Mr Ratushniak as well as the ruling of the Pecherskyi District Court of Kyiv City dated 10 August 2021 granting permission to carry out a special pre-trial investigation in criminal proceeding No 42016000000002929. Those decisions of the investigating judges confirm the status of suspect of Mr Ratushniak and highlight that the suspect is hiding from the investigation to avoid criminal liability.

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. Additionally, on 11 May 2021 Ukraine sent a request for international legal assistance to the Russian Federation to establish the whereabouts of Mr Ratushniak, which was rejected by Russia on 31 August 2021.

The Council has information that on 9 February 2022 the pre-trial investigation in criminal proceeding No 42016000000002929 was completed and, on 5 August 2022, following the fulfilment of the requirements of the Criminal Procedure Code of Ukraine, the Prosecutor General's Office sent an indictment to the Pecherskyi District Court of Kyiv City for the consideration of the merits of the case.

Based on the information provided by the Ukrainian authorities, Mr Ratushniak has not involved a defence counsel in the criminal proceedings in Ukraine but an assigned defence counsel represented his interests. 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.

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 fact that the defence was notified about the completion of the pre-trial investigation in criminal proceeding No 42016000000003393 on 28 March 2019 and was provided access to the materials for familiarisation. On 11 October 2021, the National Anti-Corruption Bureau of Ukraine additionally informed the defence lawyers of Mr Kurchenko about the completion of the pre-trial investigation and the provision of access to the materials of the pre-trial investigation for familiarisation. The Council received

information that the National Anti-Corruption Bureau of Ukraine filed a motion to establish a term for the review by the defence party in order to address the delay of the defence party in reviewing the materials of the pre-trial investigation. The Council was informed that the High Anti-Corruption Court of Ukraine in its decision dated 27 June 2022 set a time limit until 1 December 2022 for the defence party to complete the familiarisation process, after which they are considered to have exercised their right to access the materials. On 7 December 2022, the Specialised Anti-Corruption Prosecutor's Office sent the indictment to the High Anti-Corruption Court of Ukraine for the consideration of the merits of the case.

In relation to criminal proceeding No 12014160020000076, in its decision of 18 September 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. On 20 December 2021, the Kyivskyi District Court of Odesa City granted permission to carry out a special pre-trial investigation in absentia. Furthermore, on 20 October 2021 the Kyivskyi District Court of Odesa City dismissed the appeal of the lawyers to cancel the resolution of the prosecutor on the suspension of the pre-trial investigation dated 27 July 2021.

The Council has information that the Ukrainian authorities took measures to search for Mr Kurchenko. On 13 May 2021, the Main Department of the National Police in Odessa Region forwarded the request to the Ukrainian Bureau of Interpol and Europol to publish a Red Notice concerning Mr Kurchenko, which is under consideration. 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.

The Council was informed that on 6 May 2022 the pre-trial investigation in criminal proceeding No 12014160020000076 was completed and on 1 August 2022 the Odessa Region Prosecutor's Office sent an indictment to the Prymorskyi District Court of Odesa City for the consideration of the merits of the case.

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.'.