Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

21 February 2018 *

(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 — Duty to state reasons — Legal basis — Factual basis — Manifest error of assessment — Rights of defence — Right to property — Right to reputation — Proportionality — Protection of fundamental rights equivalent to that guaranteed in the European Union — Plea of illegality)

In Case T-731/15,

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

applicant,

v

Council of the European Union, represented by Á. de Elera-San Miguel Hurtado and J.-P. Hix, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU seeking the annulment of (i) Council Decision (CFSP) 2015/1781 of 5 October 2015 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2015 L 259, p. 23) and Council Implementing Regulation (EU) 2015/1777 of 5 October 2015 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2015 L 259, p. 3), (ii) Council Decision (CFSP) 2016/318 of 4 March 2016 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2016 L 60, p. 76) and Council Implementing Regulation (EU) 2016/311 of 4 March 2016 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2016 L 60, p. 1) and (iii) Council Decision (CFSP) 2017/381 of 3 March 2017 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2017 L 58, p. 34) and Council Implementing Regulation (EU) 2017/374 of 3 March 2017 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2017 L 58, p. 1), in so far as the applicant's name was retained on the list of persons, entities and bodies subject to those restrictive measures,

* Language of the case: English.

THE GENERAL COURT (Sixth Chamber),

composed of G. Berardis (Rapporteur), President, D. Spielmann and Z. Csehi, Judges,

Registrar: L. Grzegorczyk, Administrator,

having regard to the written part of the procedure and further to the hearing on 28 June 2017,

gives the following

Judgment [1]

Background to the dispute

1 The present case has been brought against the background of the restrictive measures adopted against certain persons, entities and bodies in view of the situation in Ukraine, following the suppression of demonstrations in Independence Square in Kiev (Ukraine).

2 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).

3 The applicant, Sergiy Klyuyev, is a Ukrainian businessman and the brother of Andriy Klyuyev, the former head of the Presidential Administration of Ukraine. He is also a member of the Verkhovna Rada (Ukrainian Parliament).

4 Recitals 1 and 2 of Decision 2014/119 read:

‘(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 [decided] 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 provided as follows:

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

2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies listed in the Annex.’

1 Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

6 The detailed rules for the freezing of those funds are set out in the subsequent paragraphs of that article.

7 In accordance with Decision 2014/119, Regulation No 208/2014 requires measures for the freezing of funds to be adopted and lays down the detailed rules governing the freezing of funds in terms which are essentially identical to those used in the 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 Decision 2014/119 and in the identical list in Annex I to Regulation No 208/2014 ('the list') along with, in particular, the reasons for their inclusion on the list.

9 The applicant's name appeared on the list, together with the identifying information 'businessman, brother of Mr [Andriy Klyuyev]' 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.'

10 By application lodged at the Registry of the General Court on 12 May 2014, the applicant brought an action, registered as Case T-341/14, seeking the annulment of Decision 2014/119 and Regulation No 208/2014 in so far as they related to 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 criteria for the designation of the persons subject to 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 State 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 State 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 (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. Decision 2015/364 amended Article 5 of Decision 2014/119, extending the restrictive measures in respect of the applicant until 6 June 2015. Implementing Regulation 2015/357 therefore replaced Annex I to Regulation No 208/2014.

15 By Decision 2015/364 and Implementing Regulation No 2015/357 the applicant's name was maintained on the list with the identifying information 'brother of Mr [Andriy Klyuyev], businessman' and the new statement of reasons:

'Person subject to investigation by the Ukrainian authorities for involvement in the misappropriation of public funds or assets and in the abuse of public office as 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. Person associated with a designated person [Andriy Petrovych Klyuyev] subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.'

16 On 5 June 2015, the Council adopted Decision (CFSP) 2015/876 amending Decision 2014/119 (OJ 2015 L 142, p. 30) and Implementing Regulation (EU) No 2015/869 implementing Regulation No 208/2014 (OJ 2015 L 142, p. 1). Decision 2015/876, first, replaced Article 5 of Decision 2014/119, extending the application of the restrictive measures, in so far as the applicant was concerned, until 6 October 2015 and, second, amended the annex to that decision. Implementing Regulation 2015/869 consequently amended Annex I to Regulation No 208/2014.

17 By Decision 2015/876 and Implementing Regulation No 2015/869, the applicant's name was maintained on the list with the identifying information 'brother of Mr [Andriy Klyuyev], businessman' and the new statement of reasons:

'Person subject to investigation by the Ukrainian authorities for involvement in the misappropriation of public funds. Person associated with a designated person [Andriy Petrovych Klyuyev] subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.'

18 By letter of 31 July 2015, the Council sent the applicant a letter [*confidential*] [2] dated 26 June 2015 ('the letter of 26 June 2015'). In that letter, the Council informed the applicant of its intention to maintain the restrictive measures directed against him and informed him of the period of time within which he might submit observations on the matter. By letter of 31 August 2015, the applicant submitted his observations.

19 On 5 October 2015, the Council adopted Decision (CFSP) 2015/1781 amending Decision 2014/119 (OJ 2015 L 259, p. 23) and Implementing Regulation (EU) 2015/1777 implementing Regulation No 208/2014 (OJ 2015 L 259, p. 3) (together 'the October 2015 Acts'). Decision 2015/1781, first, replaced Article 5 of Decision 2014/119, extending the application of the restrictive measures, in so far as the applicant is concerned, until 6 March 2016 and, second, amended the annex to that decision. Implementing Regulation 2015/1777 consequently amended Annex I to Regulation No 208/2014.

20 By Decision 2015/1781 and Implementing Regulation No 2015/1777 the applicant's name was maintained on the list with the identifying information 'brother of Mr [Andriy Klyuyev], businessman' and the new statement of reasons:

'Person subject to criminal proceedings by the Ukrainian authorities for involvement in the misappropriation of public funds or assets. Person associated with a designated person [Andriy Petrovych Klyuyev] subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.'

2 Confidential data omitted.

21 By letter of 6 October 2015, the Council sent the applicant's lawyers copies of the October 2015 Acts, informing them that the applicant's name was being maintained on the list and responding to their observations of 31 August 2015. In addition, the Council enclosed with that letter another letter [*confidential*] dated 3 September 2015.

Events subsequent to the bringing of the present action

22 By letter of 15 December 2015, the Council sent the applicant a letter [*confidential*] dated 1 December 2015, informing him of the deadline for submitting observations in that regard.

23 By judgment of 28 January 2016, *Klyuyev* v *Council* (T-341/14, EU:T:2016:47), the General Court annulled Decision 2014/119 and Regulation No 208/2014 in so far as they concerned the applicant.

24 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').

25 By the March 2016 Acts, the application of the restrictive measures concerning inter alia the applicant was extended to 6 March 2017. The statement of reasons for the applicant's designation, as set out in the October 2015 Acts, was not amended.

26 By letter of 7 March 2016, the Council informed the applicant that the restrictive measures against him were being maintained. It also responded to the observations which the applicant had formulated in his earlier letters and sent him copies of the March 2016 Acts.

27 By letter of 12 December 2016, the Council informed the applicant's lawyers that it was considering renewing the restrictive measures against him and enclosed two letters [*confidential*], one dated 25 July 2016, the other dated 16 November 2016 ('the letters of 25 July and 16 November 2016'), reiterating the deadline for submitting observations in connection with the annual review of the restrictive measures. The applicant submitted such observations to the Council by letter of 12 January 2017.

28 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').

29 By the March 2017 Acts, the application of the restrictive measures concerning, inter alia, the applicant was extended to 6 March 2018. The statement of reasons for the applicant's designation, as set out in the October 2015 and March 2016 Acts, was not amended.

30 By letter of 6 March 2017, the Council informed the applicant that the restrictive measures against him were being maintained. It also responded to the observations which the applicant had formulated in his earlier letters and sent him copies of the March 2017 Acts. It also stated the deadline for him to submit observations prior to a decision being taken regarding the possible retention of his name on the list.

Procedure and forms of order sought

31 The applicant brought the present action by application lodged at the Registry of the General Court on 12 December 2015.

32 On 9 March 2015, the Council lodged its defence. On the same day, it submitted a reasoned request, pursuant to Article 66 of the Rules of Procedure of the Court, for the content of certain annexes to the application and of an annex to the defence not to be cited in documents relating to the case to which the public had access.

33 A reply was lodged on 29 April 2016.

34 On 13 May 2016, under Article 86 of the Rules of Procedure, the applicant submitted a first statement of modification in order to include a claim for the annulment of the March 2016 Acts in so far as they concerned him.

35 A rejoinder was lodged on 27 June 2016.

36 On 5 July 2016, the Council submitted its observations on the first statement of modification.

37 The written part of the procedure was closed on 11 July 2016.

38 By document lodged at the Court Registry on 26 July 2016, the applicant requested that a hearing be held.

39 Upon the alteration of the composition of the chambers of the General Court, the Judge-Rapporteur was assigned to the Sixth Chamber, to which this case was consequently allocated.

40 On a proposal of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral part of the procedure.

41 By letter of 24 February 2017, the applicant requested the postponement of the hearing fixed for 6 April 2017. On 1 March 2017, the President of the Sixth Chamber of the General Court granted that request and decided to postpone the hearing until 18 May 2017.

42 On 4 May 2017, the applicant submitted a second statement of modification so as to seek the annulment of the March 2017 Acts in so far as they concerned him.

43 By letter lodged at the Court Registry on 8 May 2017, the Council requested, first, an extension of the time limit for submitting observations on the second statement of modification and, second, if appropriate, the postponement of the hearing fixed for 18 May 2017. On 10 May 2017, the President of the Sixth Chamber of the Court decided to postpone the hearing until 28 June 2017.

44 On 14 June 2017, the Council submitted its observations on the second statement of modification.

45 By letter lodged at the Court Registry on 15 June 2017, the applicant requested, pursuant to Article 85(3) of the Rules of Procedure, permission to lodge a copy of the decision [*confidential*] of 5 March 2016 to suspend [*confidential*].

46 On 16 June 2017, the Council submitted a request similar to that referred to in paragraph 32 above, to the effect that the content of certain annexes to the second statement of modification and of the observations relating to that statement not be cited in the documents relating to this case to which the public might have access.

47 By letter lodged at the Court Registry on 23 June 2017, the Council pleaded the inadmissibility of the applicant's offer of evidence on the ground that it was out of time.

48 The parties presented oral argument and replied to questions put by the Court at the hearing on 28 June 2017.

49 In the light of the first and second modifications of the application, the applicant claims that the Court should:

– annul the October 2015, the March 2016 and the March 2017 Acts in so far as they relate to him;

– order the Council to pay the costs.

50 Following clarifications provided at the hearing in reply to questions from the Court, the Council claims that the Court should:

– dismiss the action;

– in the alternative, if the March 2017 Acts must be annulled as regards the applicant, to order that the effects of Decision 2017/381 be maintained until the partial annulment of Implementing Regulation 2017/374 takes effect;

– order the applicant to pay the costs.

Law

The claims for annulment of the October 2015 and March 2016 Acts, in so far as they concern the applicant

51 In support of his action for annulment, the applicant put forward, in his application, five pleas in law alleging, first, the lack of a legal basis, second, a manifest error of assessment, third, infringement of the rights of the defence and of the right to effective judicial protection, fourth, a failure to provide adequate reasons, and fifth, infringement of the right to property and of the right to reputation. By the first modification of the application, the applicant also put forward, as regards the March 2016 Acts, a plea which he described as a new plea alleging infringement of his rights under Article 6 TEU, read together with Articles 2 and 3 TEU, and under Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter').

52 In the alternative, the applicant raises a plea of illegality under Article 277 TFEU in respect of the designation criterion laid down in Article 1(1) of Decision 2014/119, as amended by Decision 2015/143, and Article 3(1) of Regulation No 208/2014, as amended by Regulation 2015/138 ('the designation criterion'). The applicant submits that the designation criterion lacks a proper legal basis or is disproportionate to the objectives pursued by the acts in question, and claims that it should be declared inapplicable to him.

53 First of all, it is necessary to examine the fourth plea, followed by the first plea and the other pleas in the order set out in the application, then the plea raised in the first modification of the application and, finally, the plea of illegality pleaded by the applicant in the alternative.

[…]

The second plea in law, alleging, in essence, a manifest error of assessment

86 The applicant argues, in essence, that the Council made a manifest error of assessment in concluding that the relevant criterion was satisfied in his case. In that regard, he alleges that [*confidential*] statements, which the Council accepted without any prior examination and without taking account of the inaccuracies identified by the applicant, do not constitute a sufficiently solid factual basis for his designation, despite the fact that it was incumbent on the Council to establish the merits of the

reasons for listing him, taking account of the observations he submitted and the exculpatory evidence he produced. According to the applicant, the Council should have undertaken additional checks and requested additional evidence from the third country authorities. This is all the more necessary when it is a question of extending restrictive measures. In addition, there is no evidence that the applicant is 'associated' in any way with his brother, Mr Andriy Klyuyev, nor that the latter has been identified as responsible for misappropriation of public funds. The fact that he is a relative is not sufficient. In addition, the applicant emphasises that the Council has subjected him to a succession of unusually short restrictive measures, which indicates a concern on the Council's part as regards the evidence required to justify lengthier measures.

87 First of all, according to the applicant, the letters [*confidential*] of 26 June and 3 September 2015, concerning the October 2015 Acts, and the letter of 1 December 2015, concerning the March 2016 Acts, form the only evidence relied on by the Council and they, in turn, are not supported by any specific, concrete evidence. The Council also failed to adduce any evidence that the facts alleged by [*confidential*] in those letters were capable of undermining the rule of law in Ukraine.

88 The applicant submits that, according to the case-law, while the existence of an investigation into the misappropriation of funds conducted by the national authorities of a non-Member State may be sufficient in order for the designation criterion to be met, it is still necessary for that investigation to be conducted in a 'judicial context'. In that regard, [*confidential*] cannot be regarded as a 'judicial authority'. According to the applicant, if the designation criterion were to be given a broader interpretation, first, the person in question would be deprived of the critical safeguards resulting from judicial oversight and, second, that would amount to conferring on the Ukrainian national authorities the power to hand-pick the persons to be targeted by the restrictive measures at issue. [*confidential*].

89 In particular, in order to demonstrate that the information contained in the letter of 3 September 2015 — which simply repeats the content of the letter of 26 June 2015 — was inadequate, the applicant refers to a legal opinion from a law professor at the University of Kiev. That opinion states that the prosecution brought against the applicant is unsustainable. Referring to another legal opinion from a different law professor, the applicant also maintains that [*confidential*] committed serious breaches of his procedural rights in the context of [*confidential*]. Consequently, under the Ukrainian Code of Criminal Procedure, the applicant cannot be regarded as a person subject to 'criminal proceedings'. According to the applicant, these opinions contain objective, detailed evidence that the Council could easily have verified.

90 In addition, the applicant points to several inaccuracies and false statements made by [*confidential*] regarding investigations concerning him, which raise doubts as to the reliability of [*confidential*]. In a judgment of 11 December 2014, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) stated, incidentally, that the allegations made against him by the Ukraine authorities were unsupported and appeared to be based on assumptions in proceedings concerning the freezing of the applicant's assets in Austria. This was confirmed by a letter discontinuing the proceedings against the applicant issued on 4 April 2016 by the Public Prosecutor's Office in Vienna.

91 Moreover, a report following an independent investigation into the applicant's business activities and into the company concerned by the criminal proceedings comprehensively rebuts the allegations made by [*confidential*]. Similarly, the report of 28 July 2014 of the audit of the financial and commercial activities of the company in question prepared by the State Financial Inspection (SFI) of Ukraine over the period 1 January 2008 to 17 June 2014, discloses no breach of legislation or any other wrongdoing by the company.

92 Next, according to the applicant, the Council has disregarded the fact that the new Ukrainian Government is itself undermining the rule of law and human rights, both as regards the applicant's specific situation and in general.

93 As regards his own specific situation, the applicant maintains that he has been victim of political persecution, the Ukrainian authorities having initiated unfounded and malicious investigations against him, and that those authorities infringed his right to be presumed innocent. The letters from [*confidential*] on which the Council relies are evidence of that infringement, [*confidential*] also being required to apply the principle and refrain from publicly accusing persons under investigation, as is clear from the case-law of the ECtHR.

94 The applicant also describes the various stages which preceded the decision of the Verkhovna Rada to withdraw his parliamentary immunity. He relies, in particular, on a legal opinion from another law professor, which concludes that each and every stage in the procedure leading to the withdrawal of his immunity was marked by illegality, and that the final decision was unlawful.

95 As regards the general situation in Ukraine, the applicant submits that the new government took specific measures to impede the proper functioning of the judicial system in that country and to undermine the rule of law. In particular, as the High Commissioner of the United Nations responsible for a Human Rights Monitoring Mission in Ukraine ('the High Commissioner') recognised, in a report covering the period from 16 February to 15 May 2015, the Ukrainian judiciary lacked independence and suffered intimation and threats which impaired its impartiality, in particular with regard to the prosecution of officials of the former Government. Similar findings were made in the United States of America State Department Report into the Ukraine in 2015. Moreover, the mere fact that Ukraine is a party to the ECHR is not sufficient to ensure that fundamental rights are respected in that country.

96 In addition, the applicant cites a Ukrainian law passed in October 2014, known as the 'Law on purging the government', making it possible to dismiss from public office certain persons, including judges and prosecutors, on the grounds of their past conduct, especially where it was favourable to the former President, Mr Viktor Yanukovych. Serious shortcomings in that law were recognised by the Venice Commission in an interim opinion of 16 December 2014. In an opinion of 23 March 2015 published jointly with the Directorate-General of Human Rights of the Council of Europe, the Venice Commission again raised concerns as to the independence of the judiciary in Ukraine.

97 As regards the existence of systemic problems [*confidential*], confirmed by the resignation, on 19 February 2016, of the Prosecutor General, Mr Viktor Shokin, following pressure from the President, Mr Petro Poroshenko, amid allegations of corruption, that resignation being commended by the Vice President of the United States of America.

98 Lastly, the applicant observes that the need for the Council to undertake a strict, full and rigorous review, and to ensure that any decision imposing a restrictive measure be taken on a sufficiently solid factual basis, is particularly acute in the present case, given, first, the period of time that the Council has had in which to adduce or verify evidence and information that might justify maintaining his name on the list in question and, second, the information which he provided, both before the Court and the Council, in order to demonstrate the weakness of the evidence relied on by the latter.

99 The Council disputes the applicant's arguments.

100 As a preliminary matter, the Court notes that, although the Council has a broad discretion when it comes to the general criteria to be taken into consideration for the purpose of adopting restrictive measures, 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 by sufficiently specific and concrete evidence (see judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 36 and the case-law cited).

101 The case-law does not require the Council to carry out, systematically and on its own initiative, its own investigations or checks for the purpose of obtaining additional information, when it already has information provided by the authorities of a third country in taking restrictive measures against nationals of that country who are subject to judicial proceedings in that country (judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 57).

102 In that regard, it must be noted that the PGO is one of the highest Ukrainian judicial authorities. In that State, it acts as the public prosecutor's office in the administration of criminal justice and conducts pre-trial investigations in the context of criminal proceedings relating, inter alia, to the misappropriation of public funds (see, to that effect, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraphs 45 and 111).

103 It may indeed be inferred, by analogy, from the case-law on restrictive measures adopted with a view to combating terrorism that, in the present case, it was for the Council to examine carefully and impartially the evidence submitted to it by the Ukrainian authorities, [*confidential*], having regard, in particular, to the observations and any exculpatory evidence submitted by the applicant. Furthermore, in the context of the adoption of restrictive measures, the Council must observe the principle of good administration enshrined in Article 41 of the Charter, which, according to settled case-law, entails the obligation for the competent institution to examine carefully and impartially all the relevant aspects of the individual aspects of the individual case (see, by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 58 and the case-law cited).

104 Nonetheless, it is also apparent from the case-law that, in order to assess the nature, form and degree of the proof that the Council may be asked to provide, the nature, specific scope and the objective of the restrictive measures must be taken into account (see judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 59 and the case-law cited).

105 In that regard, as is apparent from recitals 1 and 2 of Decision 2014/119, that decision forms part of a more general EU policy of support for the Ukrainian authorities which is intended to promote the political stability of Ukraine. It therefore satisfies the objectives of the CFSP, which are defined, in particular, in Article 21(2)(b) TEU, pursuant to which the European Union is to engage in international cooperation with a view to consolidating and supporting democracy, the rule of law, human rights and the principles of international law (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 60 and the case-law cited).

106 It is against that background that the restrictive measures at issue provide for the freezing of funds and assets of, amongst others, persons who have been identified as being responsible for the misappropriation of Ukrainian public funds. Facilitating the recovery of those funds consolidates and supports the rule of law in Ukraine (see paragraphs 76 to 80 above).

107 It follows that the restrictive measures at issue are not intended to penalise any misconduct in which the persons concerned may have engaged, or to deter them, by coercion, from engaging in such conduct. The sole purpose of those measures is to facilitate the Ukrainian authorities' identification of any misappropriation of public funds that has taken place and to protect the possibility of the authorities recovering those funds. They are, therefore, purely precautionary (see, by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 62 and the case-law cited).

108 Thus, the restrictive measures at issue, which were imposed by the Council on the basis of the powers conferred on it by Articles 21 and 29 TEU, have no criminal-law aspect. They cannot, therefore, be treated in the same way as a decision to freeze assets that has been taken by a national judicial authority of a Member State in the relevant criminal proceedings and respecting the safeguards provided by those proceedings. Consequently, the requirements the Council must fulfil with regard to the evidence underpinning the entry of a person's name on the list of persons whose assets are to be frozen cannot be exactly the same as those which apply to the national judicial authority in the abovementioned case (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 64 and the case-law cited).

109 In the present case, what the Council must verify is, first, the extent to which the letters [*confidential*] on which it relied prove that, as indicated by the grounds for the inclusion of the applicant's name on the list at issue, referred to in paragraphs 18 and 20 above, the applicant is the subject, in particular, of investigations or criminal proceedings brought by the Ukrainian authorities in respect of actions that may be characterised as misappropriation of public funds, and, secondly, whether those investigations or those proceedings are such that the applicant's actions can be characterised as satisfying the relevant criterion. Only if the Council were unable to verify those matters, would it be incumbent on the Council, in the light of the principle from the case-law set out in paragraph 103 above, to investigate further (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 65 and the case-law cited).

110 Furthermore, in the context of the cooperation governed by the acts in question (see paragraph 105 above), it is not, in principle, for the Council itself to examine and assess the accuracy and relevance of the information relied on by the Ukrainian authorities in conducting criminal proceedings in respect of the applicant for conduct that could be characterised as misappropriation of public funds. As explained in paragraph 107 above, in adopting the acts in question, the Council does not itself seek to punish the misappropriation of public funds being investigated by the Ukrainian authorities, but to protect the possibility of the authorities identifying such misappropriation and recovering the funds thus misappropriated. It is therefore for those authorities, in the context of those proceedings, to verify the information on which they are relying and, where appropriate, to draw the appropriate conclusions as regards the outcome of those proceedings. Furthermore, as is apparent from paragraph 108 above, the Council's obligations under the acts in question cannot be treated in the same way as those of a national judicial authority of a Member State in the context of asset-freezing criminal proceedings initiated, in particular, in the context of international cooperation in criminal matters (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 66).

111 That interpretation is confirmed by the case-law from which it is apparent that it is not for the Council to verify whether the investigations to which the person concerned is subject are well founded, but only to verify whether that is the case as regards the decision to freeze funds in the light of the document provided by the national authorities (see, to that effect and by analogy, judgment of 5 March 2015, *Ezz and Others* v *Council*, C-220/14 P, EU:C:2015:147, paragraph 77).

112 Admittedly, the Council cannot, in all circumstances, adopt the findings of the Ukrainian judicial authorities contained in the documents provided by them. Such conduct would not be consistent with the principle of good administration nor, generally, with the obligation on the part of the EU institutions to respect fundamental rights in the application of EU law, under a combined reading of the first subparagraph of Article 6(1) TEU and Article 51(1) of the Charter of Fundamental Rights (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 67).

113 However, the Council must assess, on the basis of the circumstances of the case, whether it is necessary to investigate further, in particular to seek the disclosure of additional evidence from the Ukrainian authorities if it transpires that the evidence already supplied is insufficient or inconsistent.

Information communicated to the Council, either by the Ukrainian authorities themselves or in some other way, might conceivably lead it to doubt the adequacy of the evidence already supplied by those authorities. Furthermore, when availing themselves of the opportunity which the persons concerned must be given to submit their comments on the reasons which the Council intends to use to maintain their names on the list at issue, those persons may submit such information, or even exculpatory evidence, which would require the Council to investigate further. In particular, while it is not for the Council to take the place of the Ukrainian judicial authorities in assessing whether the criminal proceedings referred to in the letters [*confidential*] are well founded, it is not inconceivable that, in the light, in particular, of the applicant's observations, the Council might be obliged to seek clarification from those Ukrainian authorities with regard to the material on which those investigations are based (see, to that effect and by analogy, judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 68).

114 In the present case, as a preliminary point, it must be noted that it is common ground that the letters on which the Council relied are [*confidential*] refer to criminal proceedings concerning the applicant, in which the dates on which the proceedings were opened, their case numbers and the articles of the Ukrainian Penal Code allegedly infringed, are set out in general.

115 The applicant's principal complaints allege that the letters [*confidential*] of 26 June, 3 September and 1 December 2015 do not contain sufficient, or sufficiently concrete, information.

116 In that respect, in the first place, it must be noted that the letter [*confidential*] dated 26 June 2015 – which is one of the principal pieces of evidence on which the Council relied in order to maintain the applicant's name on the list when adopting the October 2015 Acts – contains, inter alia, the following information:

– *[confidential]*

– *[confidential]*

117 In the second place, it must be observed that the letter of 3 September 2015 – which is the other piece of evidence on which the Council relied in order to maintain the applicant's name on the list when adopting the October 2015 Acts – contains similar information and also shows that, [*confidential*] (see paragraph 82 above).

118 In the third place, the letter [*confidential*] of 1 December 2015 — which is the main piece of evidence on which the Council relied in order to maintain the applicant's name on the list when adopting the March 2016 Acts — in addition to confirming the information set out in the letter of 3 September 2015 refers, for the first time in relation to the same set of facts, to infringement of Article [*confidential*] of the Ukrainian Penal Code [*confidential*].

119 It follows that the letters [*confidential*] mentioned in paragraphs 115 to 118 above contain information clearly showing, first, that the applicant is subject to an investigation concerning, inter alia, offences under Article [*confidential*] of the Ukrainian Penal Code, which punishes the misappropriation of State assets, and, second, [*confidential*]. Although the summary of the facts giving rise to those offences is general and does not describe in detail the mechanisms by which the applicant is suspected of having misappropriated funds from the Ukrainian State, it is sufficiently clear from those letters that the acts which the applicant is alleged to have committed concern the misappropriation [*confidential*]. Such conduct is liable to have caused the loss of funds for the Ukrainian State and therefore corresponds to the concept of the misappropriation of public funds, referred to in the relevant criterion.

120 In that regard, as far as concerns the applicant's argument that the relevant criterion was not satisfied since his name was entered onto the list not on the basis of judicial investigations or proceedings but of a pre-trial investigation, it should be noted that the effectiveness of a decision to freeze funds would

be undermined if the adoption of restrictive measures were made conditional on the criminal convictions of persons suspected of having misappropriated public funds, since those persons would have enough time pending their conviction to transfer their assets to States having no form of cooperation with the authorities of the State of which they are nationals or in which they are resident (see, to that effect, judgment of 5 March 2015, *Ezz and Others* v *Council*, C-220/14 P, EU:C:2015:147, paragraph 71). Furthermore, where it is established that the person in question has, as is the case here, been the subject of investigations conducted, in connection with criminal proceedings, by the Ukrainian judicial authorities, for acts of misappropriation of public funds, the precise stage actually reached by those proceedings is not a factor that could justify his exclusion from the category of persons in question (see, to that effect and by analogy, judgment of 14 April 2016, *Ben Ali* v *Council*, T-200/14, not published, EU:T:2016:216, paragraph 124).

121 In the light of the case-law cited in paragraph 120 above and to the margin of discretion enjoyed by the judicial authorities of a non-Member State in conducting criminal proceedings, the fact that the applicant was the subject of a pre-trial investigation [*confidential*] is not, in itself, such as to lead to a finding of illegality of the acts in question, on the ground that, in those circumstances, the Council ought to have required additional verifications from the Ukrainian authorities as regards the actions with which the person concerned is charged, since, as will be explained below, the applicant has not put forward any evidence capable of calling into question the grounds set out by the Ukrainian authorities to justify the accusations levelled against him in relation to very specific acts or to demonstrate that his particular situation was affected by the alleged problems in the Ukrainian judicial system. Nor, in that regard, does the fact that a Ukrainian Prosecutor General resigned following accusations of corruption affect the credibility [*confidential*].

122 The Council did not therefore commit any manifest errors of assessment in deciding to maintain the applicant's name on the list in the October 2015 and March 2016 Acts, on the basis of the information contained in the letters [*confidential*] of 26 June, 3 September and 1 December 2015 concerning, in particular, the acts of misappropriation of public funds which justified [*confidential*] the existence of an investigation concerning the applicant. In that regard, the applicant's plea relating to the alleged lack of evidence that he was 'associated' with his brother, Mr Andriy Klyuyev, is ineffective. The applicant's name is included on the list not solely by reason of family ties with his brother, but also due to criminal proceedings conducted by the Ukrainian authorities relating to his personal involvement in acts amounting to misappropriation of public funds.

123 That conclusion cannot be called into question by the exculpatory evidence produced by the applicant or by the other arguments on which he relies.

124 As regards, in the first place, the legal opinions annexed to the application, the Court observes that, according to case-law, in order to assess the evidential value of a document, regard should be had to the credibility of the account it contains and regard should also be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable (see, to that effect, judgment of 27 September 2012, *Shell Petroleum and Others* v *Commission*, T-343/06, EU:T:2012:478, paragraph 161 and the case-law cited). In the present case, it should be noted, as the Council pointed out, that those opinions were drawn up for the purpose of the applicant's defence and, as such, are of limited probative value. In any event, they cannot call into question the fact [*confidential*] that the applicant is the subject of a pre-trial investigation for the misappropriation of public funds. Those opinions predominately concern issues related to the merits of that investigation, which must, in principle, be assessed by the Ukrainian authorities.

125 In the second place, as regards the decision of the Oberlandesgericht Wien (Higher Regional Court, Vienna), it should be noted, as did the Council, that the decision did not concern national asset-freezing measures, but an order issued by the Vienna State Prosecutor's Office on 26 July 2014 for the disclosure of information on accounts and banking transactions as part of an investigation

carried out against many persons, including the applicant, suspected of crimes or offences of money laundering, for the purposes of the Austrian criminal legislation and the law on penalties. That decision, concerning criminal offences other than those on which the restrictive measures at issue were based, addresses only incidentally the facts with which the investigation [*confidential*] is concerned [*confidential*]. It follows that such a decision, although handed down by a judicial body of a Member State, was not such as to raise legitimate doubts concerning the outcome of the investigation or the reliability of the information provided [*confidential*]. As regards the decision of the Public Prosecutor's Office in Vienna, dated 4 April 2016, announcing the discontinuance of the proceedings against the applicant, suffice it to observe that that letter is not relevant since it postdates the March 2016 Acts. The legality of a decision to freeze assets is to be assessed in the light of the information available to the Council when the decision was adopted (judgment of 28 May 2013, *Trabelsi and Others* v *Council*, T-187/11, EU:T:2013:273, paragraph 115).

126 In the third place, as regards, first, the audit report drawn up by the FIS at the request [*confidential*], dated 28 July 2014, relating to financial and commercial activities of PJSC Semiconductor Plant [*confidential*], and, second, a report of an independent investigation on the relevant business activities of the applicant and of that company, dated 16 October 2014 and prepared by a team of investigators and independent lawyers ('the Pepper Hamilton Report'), it should be noted that the applicant has failed to explain how these two reports contradict the information contained in [*confidential*], in view of the fact that both a report on the commercial activities of the applicant and of the company in which he is a shareholder and an audit report on the company's commercial activity do not necessarily contain information on the misuse of public funds. [*confidential*]. Second, as regards the Pepper Hamilton Report, it must be noted, as the Council observes, that the report was commissioned by a company owned by the applicant and his brother and addressed to the latter, and that therefore, in the light of the case-law set out in paragraph 124 above, it has only limited probative value.

127 That exculpatory evidence alone cannot therefore justify the need for the Council to seek additional verifications.

128 In the fourth place, the alleged irregularities vitiating the decision of the Verkhovna Rada to lift the applicant's immunity do not affect the legality of maintaining the applicant's name on the list, since the lifting of parliamentary immunity is not a pre-requisite for the adoption of a restrictive measure against a natural person, and any irregularities of this type must be addressed within the Ukrainian system.

129 In the fifth place, as regards the argument alleging that no notification of suspicion had been issued to the applicant in the manner prescribed by the Ukrainian Code of Criminal Procedure, it must be observed that the applicant relies on only one legal opinion of a law professor. However, notwithstanding the fact that such an opinion is, as has been stated in paragraph 124 above, of limited probative value, it is apparent from that opinion, as the applicant indeed claims in his pleadings, that the notification of suspicion is allegedly vitiated by irregularities of a purely formal nature.

130 Assuming that the notification of suspicion is in fact unlawful, if its effect is that [*confidential*] must issue a new notification in due form, that does not mean that the criminal proceedings to which that notification relates are no longer ongoing.

131 Even if, moreover, because of a formal defect affecting the notification of suspicion, the applicant could not be regarded as a suspect within the meaning of Article 42 of the Ukrainian Penal Code, it would not follow that he was not the subject of an investigation by the Ukrainian authorities for the purpose of the relevant criterion. The circumstance that, as a result of an irregular notification, [*confidential*] must proceed with a new notification does not alter the fact that it considers that it had sufficient evidence to suspect the applicant of having misappropriated public funds.

132 Thus, the applicant's complaint concerning formal defects affecting the notification of suspicion is ineffective.

133 In the sixth place, with regard to the alleged breach of the principle of the presumption of innocence [*confidential*] in particular, it must be observed that the applicant confines himself to pleading that the Ukrainian authorities have described him as guilty of the alleged offences, despite the fact that he has not been found guilty by a court.

134 In that regard, it must be observed that, despite a few clumsy expressions, the [*confidential*] letters always refer to ongoing criminal proceedings against the applicant, which leads to the conclusion that [*confidential*] the applicant is only suspected of having committed the offences in question and that he could be found guilty only if the criminal proceedings at issue result in a conviction, delivered by a court. Thus, read in context, the statements made [*confidential*] do not breach the principle of the presumption of innocence. In any event, even if such statements constituted breaches of that principle, it suffices to note that they cannot call into question the legality, still less the existence, of the criminal proceedings which allowed the Council to consider that the applicant satisfied the relevant criterion, nor do they justify the need for the Council to seek to obtain further information [*confidential*].

135 In the seventh place, as regards the argument that the new Ukrainian government itself undermines the rule of law, it should be noted, as a preliminary matter, that Ukraine has been a Member State of the Council of Europe since 1995 and has ratified the ECHR. In addition, the new Ukrainian regime has been recognised as legitimate by both the European Union and the international community (see, to that effect, judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 93).

136 It is true that those circumstances are not sufficient, in themselves, to ensure that the new Ukrainian regime respects the rule of law in every case.

137 However, it must be noted that, in accordance with the case-law, the Court, in its judicial review of restrictive measures, must allow the Council a broad discretion for defining the general criteria delineating the category of persons liable to be the subject of such measures (see, to that effect, judgments of 28 November 2013, *Council* v *Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776, paragraph 120, and of 21 April 2015, *Anbouba* v *Council*, C-605/13 P, EU:C:2015:248, paragraph 41).

138 It follows that, in principle, the applicant cannot call into question the Council's political choice to provide support for the new Ukrainian regime, unless it adduces irrefutable evidence of violations of fundamental rights by the new Ukrainian authorities.

139 Although containing criticisms and highlighting certain weaknesses affecting the functioning of the Ukrainian institutions, particularly its judicial system, the evidence on which the applicant relies does not justify the conclusion that the new regime cannot be supported by the European Union.

140 Moreover, the weaknesses in that regard referred to in the documents cited by the applicant are significantly lessened when viewed in the light of the documents cited by the Council in its written submissions and adduced before the Court, which show several improvements made by the new regime.

141 As far as concerns the examination of the 'Law on purging the government' by the Venice Commission, the Court notes that the opinion of 16 December 2014, relied on by the applicant, is only an interim opinion of that commission, given that the Venice Commission did not have access, from the Ukrainian authorities, to all the information needed for its examination. However, as a result of these authorities engaging in a constructive dialogue for the improvement of the 'Law on purging

the government' and, having since given access to the information needed by the Venice Commission to carry out its mission, the Venice Commission adopted a definitive opinion on that law on 19 June 2015. That opinion states that numerous exchanges of views took place and that the Ukrainian authorities proposed amendments to the 'Law on purging the government'. The Venice Commission considers that that law's objectives of protecting society from persons capable of posing a threat to the new democratic regime and fighting against corruption, are legitimate. Although the Venice Commission points to certain areas for improvement and monitoring, it also highlights the improvements that have already been made to that law, notably following the adoption of its interim opinion.

142 As far as concerns the reports of the High Commissioner on the human rights situation in Ukraine, although the report concerning the period from 16 February to 15 May 2015, in the passage referred to by the applicant, demonstrates a concern that threats had been experienced by some Ukrainian judges, it must be noted, as the Council observes, that that passage concerns only the eastern region of Ukraine, in the throes of a battle for independence, where threats come from political activists supporting Ukraine's unity. Moreover, that report also mentions the reform of the judicial system which, whilst not perfect, 'brings some positive elements'. Furthermore, the subsequent reports relating to 2015 and early 2016 refer to continuous improvements in the field of human rights, in particular through the preparation and adoption on 23 November 2015 of the first national human rights action plan, following the recommendations made by the High Commissioner and by the Venice Commission, in various areas. In addition, as was noted in the report of the High Commissioner covering the period from 16 February to 16 May 2016, the Ukrainian Government formally established the State Bureau of Investigation, which is mandated to investigate crimes committed by high-ranking officials, members of law enforcement, judges and members of the National Anti-Corruption Bureau and the Special Anti-Corruption Office of the PGO.

143 Although that progress does not mean that the Ukrainian system no longer has any deficiencies as regards the observance of fundamental rights, the Court, in view of the broad discretion enjoyed by the Council (see paragraph 137 above), cannot in those circumstances regard as manifestly incorrect the Council's political choice to support the new Ukrainian regime by adopting restrictive measures which apply to, amongst others, members of the former regime who are subject to criminal proceedings for misappropriation of public funds.

144 In the eighth place, as regards the political persecution to which the applicant claims to have been subject and, he maintains, were the basis for the criminal proceedings brought against him, it must be noted that he merely makes assertions which cannot suffice to call into question the credibility of the information [*confidential*] concerning the charges brought against the applicant in relation to very specific cases of misappropriation of public funds, or suffice to demonstrate that the applicant's particular situation was affected by the problems with regard to the functioning of the Ukrainian judicial system in the course of the proceedings concerning him (see, to that effect and by analogy, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraphs 113 and 114).

145 In the ninth place, as regards the applicant's argument concerning the long period of time that the Council had in which to carry out a full and rigorous review of the evidence on which it relied, suffice it to note, as is apparent from the foregoing, that the Council complied with the obligations incumbent upon it. The scope of those obligations is not determined by the time available to the Council.

146 In the light of the foregoing considerations, the second plea must be dismissed in its entirety.

[…]

The claims for annulment of the March 2017 Acts, in so far as they concern the applicant

216 By his second statement of modification, the applicant has sought to extend the scope of his action so as to seek the annulment of the March 2017 Acts, in so far as they concern him.

217 In support of his application for annulment of the March 2017 Acts, the applicant puts forward six pleas in law, namely the five pleas contained in the application in support of the action for annulment of the October 2015 Acts (see paragraph 51 above) as well as the new plea he raised in his first statement of modification in support of the action for annulment of the March 2016 Acts (see paragraph 192 above).

218 It is appropriate to begin by considering the second plea, alleging a manifest error of assessment.

219 After pointing out that the grounds relied on in support of maintaining the applicant's name on the list were identical to those contained in the October 2015 and March 2016 Acts, and that, in the letter of 6 March 2017 justifying the renewal of the designation, the Council had confirmed that it had relied solely on [*confidential*], the applicant claims that [*confidential*] does not fulfil the designation criteria for two reasons.

220 In the first place, the applicant is merely the subject of a pre-trial investigation, which is not sufficient to satisfy the relevant criterion. In any event, that investigation is unlawful by reason of the fact that the applicant has never been validly served with any written notification of suspicion in respect of [*confidential*]. As of the date of his re-designation, there was no ongoing pre-trial investigation involving the applicant, since the investigation in those proceedings had been formally suspended since 5 October 2015. [*confidential*]. Furthermore, the information contained in the letters [*confidential*] are unreliable. First, the letter [*confidential*] of 25 July 2016 states that [*confidential*], despite the fact that the Austrian public prosecutor's office, like the Austrian courts, refused to attach the applicant's property, of which [*confidential*] was fully aware and of which the Council had been informed. Second, the letter [*confidential*] of 16 November 2016 contains no reference to any [*confidential*]. In any event, the alleged existence of [*confidential*] in connection with the pre-trial investigation in [*confidential*] cannot call into question the fact that that investigation has been suspended since 5 October 2015.

221 In the second place, the letters [*confidential*] of 25 July and of 16 November 2016, on which the Council allegedly based its decision to maintain the applicant's name on the list, are not supported by any evidence and do not provide sufficient details concerning the documents covered by the investigation and the applicant's alleged personal involvement. In addition, they are materially inaccurate. In particular, they are contradictory as regards [*confidential*].

222 In any event, the Council has not shown how the [*confidential*] allegations were capable of satisfying the relevant criterion in that the criterion refers only to the misappropriation of public funds or assets capable of undermining the rule of law in Ukraine in view of the amount or type of the misappropriated funds or assets or of the circumstances in which the offence was committed.

223 In that regard, the applicant submits that, despite the significant body of exculpatory evidence which he provided to the Council, and which the Council should have examined with care and impartiality given the political context in Ukraine and the fact that the Council relied solely on a suspended pre-trial investigation, the Council consistently refused to undertake any investigation or additional verifications in that regard.

224 Ultimately, the Council failed to adduce concrete evidence and information sufficient to justify that the applicant's name be maintained on the list.

225 The Council contends both that the grounds for the applicant's designation fall within the designation criteria and are founded on a sufficiently solid factual basis and that it did not commit any errors of assessment in relying, in particular, on the letters [*confidential*] of 25 July and of 16 November 2016.

226 First, the Council observes that those letters [*confidential*]. The legal opinion on which the applicant relies to support his argument that the notification of suspicion had not been validly served is of limited probative value.

227 Second, the fact that [*confidential*] was formally suspended as of the date of the re-designation of the applicant does not demonstrate, for the purposes of Article 280 of the Ukrainian Code of Criminal Procedure, that the pre-trial investigation against him had ceased.

228 Third, the Council maintains that the information contained in the [*confidential*] letters [*confidential*] was reliable.

229 Fourth, the Council contends that the type of information provided in the letters [*confidential*] and the details thereof were more than sufficient to conclude that on the date of the adoption of the March 2017 Acts the applicant was the subject of criminal proceedings for misappropriate of public funds or assets and was associated with Andriy Klyuyev who was himself designated under the same acts.

230 Fifth, the Council disputes the applicant's argument that the letters [*confidential*] are 'materially inaccurate'. The information to which the applicant refers does not concern [*confidential*]. In any event, being subject to a [*confidential*] is not part of the designation criteria.

231 Sixth, according to the Council, it is clear from the letters [*confidential*]. Therefore, the offences for which the applicant is being investigated could be characterised as misappropriation of public funds or assets capable of undermining the rule of law in Ukraine.

232 Seventh, as regards the argument that the Council did not engage with the exculpatory evidence, it points out that, according to settled case-law, it is not obliged to conduct its own independent additional investigation or an in-depth examination concerning the facts under criminal investigation in the third country concerned. The verification as to whether an investigation is well founded concerns matters which can be properly addressed only within the context of the relevant criminal proceedings by the national authorities, including, in the case of Ukraine, proceedings before the ECtHR. As regards, in particular, the decision of the Oberlandesgericht Wien (Higher Regional Court, Vienna), the Council observes that that court was concerned with the disclosure of information on bank accounts and on banking transactions and that the findings of that court were not capable of demonstrating that the information in the letters [*confidential*] were manifestly false or distorted. Furthermore, whilst acknowledging that the Oberlandesgericht Wien (Higher Regional Court, Vienna) found that the material provided by the Ukrainian authorities to the Austrian authorities from 2010 to 2014 was scanty, the Council nevertheless maintains that this certainly cannot demonstrate that the letters [*confidential*] were insufficient for the purposes of the Council's proceedings leading to the adoption of the March 2017 Acts. Therefore no additional verification was required in this respect.

233 As a preliminary matter, the Court notes that the relevant criterion, first, provides that the restrictive measures are to be adopted in respect of persons who have been 'identified as responsible' for the misappropriation of public funds – which includes persons 'subject to investigation by the Ukrainian authorities' for the misappropriation of Ukrainian public funds or assets (see paragraph 12 above) – and, second, must be interpreted as meaning that it does not concern, in abstract terms, any act classifiable as misappropriation of State funds, but rather that it concerns acts classifiable as misappropriation of State funds or public assets such as to undermine the rule of law in Ukraine (see, to that effect, judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 91).

234 In the present case, the applicant's name was maintained on the list by means of the March 2017 Acts, on the following grounds:

'Person subject to criminal proceedings by the Ukrainian authorities for involvement in the misappropriation of public funds or assets. Person associated with a designated person [Andriy Petrovych Klyuyev] subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.'

235 It is common ground that, as regards the March 2017 Acts, the Council relied, in deciding to maintain the applicant's name on the list, on the letters [*confidential*]. Furthermore, the Council has provided no evidence [*confidential*] concerning the designation of Mr Andriy Klyuyev, with whom the applicant was identified as 'associated', as a person involved in the misappropriation of funds belonging to the Ukrainian State within the meaning of the relevant criterion.

236 Thus, the Council has not substantiated, by sufficiently specific and concrete evidence, the second ground for maintaining the applicant's name on the list, namely that he is a person 'associated', within the meaning of the relevant criterion, with a person subject to criminal proceedings for the misappropriation of public funds. The first ground for maintaining the applicant's name on the list thus remains to be examined, that is to say, the fact that he is a person subject to criminal proceedings by the Ukrainian authorities for his involvement in the misappropriation of public funds or assets and the Council's assessment of the evidence in its possession.

237 Such an assessment must be made in the light of the principles set out in paragraphs 100 to 113 above.

238 It should be recalled that, in the present case, there is a decision maintaining the name of a person on the list and that, in those circumstances, when observations are made by the individual concerned on the summary of reasons, the Council is under an obligation to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those observations and any exculpatory evidence provided with those observations, and that obligation flows from the obligation to observe the principle of good administration enshrined in Article 41 of the Charter (see paragraph 103 above).

239 In particular, as has been pointed out in paragraph 109 above, the Council must verify, first, the extent to which the evidence on which it relied can establish that the applicant's situation is covered by the reason for maintaining his name on the list and, second, whether it can be concluded from that evidence that the applicant's actions fall within the scope of the relevant criterion. Only if those matters cannot be verified, is it incumbent on the Council, in the light of the principle from the case-law set out in paragraph 103 above, to investigate further.

240 In that regard, it cannot be excluded that information communicated to the Council, either by the Ukrainian authorities themselves or persons concerned by the measures, or in some other way, might lead it to doubt the adequacy of the evidence already supplied by those authorities. Although, in the present case, it is true that it is not for the Council to take the place of the Ukrainian judicial authorities in assessing whether the pre-trial investigation referred to in the letters [*confidential*] is well founded, it is not inconceivable, having regard in particular to the observations submitted by the applicant, that that institution should be obliged to seek clarification from the Ukrainian authorities with regard to the material on which that investigation is based.

241 In the present case, the applicant acknowledges that the letters [*confidential*] refer, in particular, to criminal proceedings in which a pre-trial investigation relating to him is being carried out. It must therefore be determined whether the Council could consider, without committing a manifest error of assessment, that the information provided [*confidential*] in connection with those proceedings could continue to substantiate the ground for the applicant's designation.

242 As a preliminary point, it must be noted that the issue is not whether, in the light of the information provided to the Council, the Council was required to remove the applicant's name from the list, but only whether it was required to take that evidence into account and, where appropriate, to carry out additional verifications or seek clarification from the Ukrainian authorities. In that regard, it is sufficient that the evidence be capable of giving rise to legitimate doubts, first, as to the outcome of the investigation and, second, as to how reliable and up-to-date the information submitted [*confidential*] is.

243 In its letter of 6 March 2017, which replied to the applicant's observations of 12 January 2017, the Council merely asserts that it does not share the applicant's point of view and that it intends to confirm the restrictive measures against him. Moreover, it does not specify which evidence it took into account in reaching the conclusion that it did not share the applicant's point of view, and it confirms that it did not rely on any other evidence beyond the letters [*confidential*] of 25 July and of 16 November 2016, which were already in the applicant's possession.

244 In the first place, the Court finds that those letters contain a number of inconsistencies and inaccuracies. First, in the letter of 25 July 2016, [*confidential*] indicates, for the first time, without specifying any reasons, that [*confidential*] was severed from [*confidential*], although that severance had been effected on [*confidential*], as stated in the letter itself. Second, the inconsistency between the two letters [*confidential*]. Third, the letter [*confidential*] of 25 July 2016 refers, inter alia, [*confidential*], whereas the Prosecutor's Office in Vienna abandoned the investigations concerning the applicant on 4 April 2016.

245 Although these inconsistencies do not in themselves raise legitimate doubts concerning the outcome of the investigation, they do nevertheless reveal a certain degree of approximation [*confidential*], which is capable of casting doubt on the reliability of the information [*confidential*] and how up-to-date it was.

246 In the second place, the Court finds that, in the letter of 16 November 2016, [*confidential*].

247 In the third place, it is apparent from the letter from the Public Prosecutor's Office in Vienna of 4 April 2016 that that office, after examining the supporting documents provided in connection with a request for judicial assistance [*confidential*], having also relied on the Pepper Hamilton Report to which it expressly refers, considered that that evidence did not corroborate the allegations made [*confidential*] and that the charges reported in the media that the applicant and his brother committed offences punishable in Ukraine, which were at the root of the large number of cases suspecting money laundering notified in Austria, could not be confirmed, notwithstanding several fact-finding investigations having been carried out.

248 In that regard, although, as the Council submits, restrictive measures do not fall within the ambit of criminal law, the fact remains that, in the present case, the necessary condition for maintaining a person's name on the list is that he be identified as involved, inter alia, in the misappropriation of public funds, and a person is considered as such when he is subject to an investigation by the Ukrainian authorities. It follows that if the Council is aware that the prosecutor's office of a Member State of the European Union raises serious doubts, as was the case here, with regard to whether the evidence in support of the investigation by the Ukrainian authorities which provided the basis for the Council's decision to maintain the applicant's name on the list is sufficiently substantiated, it is required to make further enquiries of those authorities or, at the very least, seek clarification from them, in order to establish whether the evidence available to it, that is to say, rather vague information, merely confirming the existence of a pre-trial investigation against the applicant, still forms a sufficiently solid factual basis to justify the maintenance of the applicant's name on the list.

249 Fourth, in the two letters mentioned in paragraphs 246 and 247 above, [*confidential*] did not indicate that [*confidential*] was suspended, of which the Council had been informed by the applicant in the observations it had submitted on 12 January 2017 for the purposes of the annual review of the measures concerning him.

250 As a preliminary point, it should be noted that the Council has pleaded the inadmissibility of the applicant's offer of evidence before the hearing, pursuant Article 85(3) of the Rules of Procedure, namely the decision [*confidential*] of 5 March 2016 suspending [*confidential*], on the ground that it is out of time and the delay in its submission is not justified. By contrast, the Council, first, does not dispute that the applicant had informed it, within the time limit for submitting observations for the purposes of the annual review of the restrictive measures, of that suspension and, second, does not claim that it did not take that information into account, in its review, on the ground that it was considered not to be sufficiently substantiated or credible. It follows that there is no need to rule on the admissibility of that document, since its examination is not necessary for the purposes of determining whether the Council should have sought information regarding the suspension of the procedure from the Ukrainian authorities.

251 In that regard, whilst it is true, as the Council maintains, that the fact that [*confidential*] has been formally suspended does not show that the preliminary investigation against the applicant ceased, the fact remains, first, that the Council had been informed by the applicant [*confidential*] that the procedure was not formally ongoing and, second, that such a fact was not irrelevant for the purposes of the Council's decision on maintaining a restrictive measure, which might otherwise extend such a measure against the applicant indefinitely, without his knowledge, which would be inconsistent with the provisional nature of restrictive measures. Moreover, the fact that [*confidential*] confined itself to repeating constantly the same information on the pre-trial investigation without mentioning new information regarding its progress, namely its suspension, weakens the reliability of the information [*confidential*] provided and how up to date it was.

252 It follows that the Council should have sought from the Ukrainian authorities clarification on the reasons for the suspension of the procedure and its duration in order to establish whether the relevant criterion was still satisfied in the present case.

253 It follows from all the foregoing that the information on [*confidential*] set out in the letters [*confidential*] — [*confidential*] — is incomplete and tainted with inconsistencies such as should have led the Council to doubt whether the evidence available to it was sufficient.

254 By contrast, the evidence the applicant relied on before the adoption of the March 2017 Acts, especially when taken together with the exculpatory evidence referred to in paragraphs 125 and 126 above, namely, in particular, the decision of the Oberlandesgericht Wien (Higher Regional Court, Vienna), the audit report drawn up by the FIS and the Pepper Hamilton Report, was such as would raise legitimate doubts on the part of the Council that would justify it making further enquiries of the Ukrainian authorities.

255 Therefore, the Council should, having regard, first, to the deficiencies in the factual basis on which it relied, and, second, to the exculpatory evidence presented by the applicant, have investigated further and sought clarification from the Ukrainian authorities, in accordance with the case-law cited, in particular, in paragraph 113 above.

256 It follows from all the foregoing that the Council committed a manifest error of assessment in considering that it was not required to take into account the evidence produced by the applicant and the arguments developed by him or to make further enquiries of the Ukrainian authorities, despite the fact that that evidence and those arguments were such as to give rise to legitimate doubts regarding the reliability of the information provided [*confidential*].

257 The second plea raised by the applicant in his second statement of modification is therefore well founded. Therefore, there is no need to examine the other pleas raised by the applicant in support of his application for annulment of the March 2017 Acts, or the objection of illegality pleaded in the alternative, and the action must be upheld inasmuch as it seeks the annulment of the March 2017 Acts in so far as they relate to the applicant.

Maintaining the effects of Decision 2017/381

258 In the alternative, the Council asks the Court, in the event that Implementing Regulation 2017/374 is annulled in part, to declare, for reasons of legal certainty, that the effects of Decision 2017/381 be maintained until the annulment in part of Implementing Regulation 2017/374 takes effect.

259 Under the first paragraph of Article 60 of the Statute of the Court of Justice of the European Union, an appeal is not to have suspensory effect. The second paragraph of that article provides, however, that, by way of derogation from Article 280 TFEU, decisions of the General Court declaring a regulation to be void are to take effect only as from the date of expiry of the period for lodging an appeal or, if an appeal is lodged within that period, as from the date of its dismissal.

260 In the present case, Implementing Regulation No 2017/374 is in the nature of a regulation, since it provides that it is binding in its entirety and directly applicable in all Member States, which corresponds to the effects of a regulation as provided for in Article 288 TFEU (see, to that effect, judgment of 21 April 2016, *Council* v *Bank Saderat Iran*, C-200/13 P, EU:C:2016:284, paragraph 121).

261 The second paragraph of Article 60 of the Statute of the Court of Justice of the European Union is therefore applicable in the present case (judgment of 21 April 2016, *Council* v *Bank Saderat Iran*, C-200/13 P, EU:C:2016:284, paragraph 122).

262 Finally, as regards the temporal effects of the annulment of Decision 2017/381, it must be recalled that, under the second paragraph of Article 264 TFEU, the Court may, if it considers it necessary, state which of the effects of the act which it has declared void are to be considered definitive.

263 In the present case, a difference between the date when the annulment of Implementing Regulation 2017/374 takes effect and that of Decision 2017/381 would be liable to seriously jeopardise legal certainty, since both acts impose identical measures on the applicant. The effects of Decision 2017/381 must therefore be maintained as regards the applicant until the annulment of Implementing Regulation No 2017/374 takes effect.

Costs

264 Under Article 134(2) of the Rules of Procedure, where there is more than one unsuccessful party the Court is to decide how the costs are to be shared.

265 In the present case, since the applicant has been unsuccessful in relation to the claims for annulment made in the application and in the first statement of modification, he must be ordered to pay the costs relating to those claims, in accordance with the form of order sought by the Council. Since the Council has been unsuccessful in relation to the claim for annulment in part of the March 2017 Acts made in the second statement of modification, it must be ordered to pay the costs relating to that claim, 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) 2017/381 of 3 March 2017 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) 2017/374 of 3 March 2017 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 Sergiy Klyuyev's name was retained on the list of persons, entities and bodies subject to those restrictive measures;**

2. **Orders the effects of Article 1 of Decision 2017/381 and of Article 1 of Implementing Regulation 2017/374 to be maintained in respect of Mr Klyuyev until the date of expiry of the period for bringing an appeal, as provided for in the first paragraph of Article 56 of the Statute of the Court of Justice of the European Union, or, if an appeal is brought within that period, until the date of dismissal of that appeal;**

3. **Dismisses the action as to the remainder;**

4. **Orders Mr Klyuyev to bear his own costs and to pay those incurred by the Council of the European Union in relation to the claims for annulment made in the application and in the first statement of modification;**

5. **Orders the Council to bear its own costs and to pay those incurred by Mr Klyuyev in relation to the claim for annulment in part of Decision 2017/381 and of Implementing Regulation 2017/374 made in the second**

statement of modification.

Berardis Spielmann Csehi

Delivered in open court in Luxembourg on 21 February 2018.

E. Coulon
Registrar

President

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