



Reports of Cases

Case T-295/19

Oleksandr Viktorovych Klymenko

v

Council of the European Union

Judgment of the General Court (Fifth Chamber), 25 June 2020

(Common foreign and security policy — Restrictive measures taken having regard to the situation in Ukraine — Freezing of funds — List of persons, entities and bodies covered by the freezing of funds and economic resources — Maintenance of the applicant's name on the list — Council's obligation to verify that the decision of an authority of a third State was taken in accordance with the rights of the defence and the right to effective judicial protection)

1. *European Union — Judicial review of the legality of the acts of the institutions — Restrictive measures taken having regard to the situation in Ukraine — Freezing of funds of persons involved in the misappropriation of public funds and of natural or legal persons, bodies or organisations associated with them — Scope of the review*
(Art. 275, second para., TFEU; Charter of Fundamental Rights of the European Union, Arts 47 and 48; Council Decision (CFSP) 2019/354; Council Regulation (EU) 2019/352)

(see paragraphs 59, 60, 85)

2. *Common foreign and security policy — Restrictive measures taken having regard to the situation in Ukraine — Decision to freeze funds — Adoption or maintenance on the basis of judicial proceedings conducted by the authorities of a third State in relation to the misappropriation of public funds or abuse of office by a public office-holder — Lawfulness — Condition — National decision adopted in accordance with the rights of the defence and the right to effective judicial protection — Council's verification obligation — Obligation to state reasons — Scope — Third State that has acceded to the European Convention on Human Rights — Irrelevant*
(Decision 2014/119/CFSP, as amended by Decision (CFSP) 2019/354, annex; Council Regulations No 208/2014 and 2019/352, Annex I)

(see paragraphs 62-65)

3. *Acts of the institutions — Statement of reasons — Obligation — Scope — Essential formality distinct from the merits of the decision*
(Art. 296 TFEU)

(see paragraph 69)

4. *Common foreign and security policy — Restrictive measures taken having regard to the situation in Ukraine — Decision to freeze funds — Adoption or maintenance on the basis of judicial proceedings conducted by the authorities of a third State in relation to the misappropriation of public funds or abuse of office by a public office-holder — Conditions — National decision adopted in accordance with the rights of the defence and the right to effective judicial protection — Obligation on the competent EU authority to establish, in the event of challenge, that the grounds held against the persons or entities concerned are well-founded — Council’s obligation to verify observance of the rights in question — Infringement (Decision 2014/119/CFSP, as amended by Decision (CFSP) 2019/354, annex; Council Regulations No 208/2014 and 2019/352, Annex I)*

(see paragraphs 71, 73-80, 82, 83, 85, 86, 91, 92, 94, 103)

5. *EU law — Principles — Right to effective judicial protection — Duty to act within a reasonable time — Restrictive measures taken having regard to the situation in Ukraine — Judicial proceedings in a third country serving as the basis for the decision to adopt the restrictive measures — Council’s verification obligation — Scope (Charter of Fundamental Rights of the European Union, Art. 47)*

(see paragraphs 96-100)

Résumé

In its judgment in *Klymenko v Council* (T-295/19), delivered on 25 June 2020, the General Court annulled several Council acts¹ relating to restrictive measures adopted in view of the situation in Ukraine which had extended the temporal validity of the list of persons, entities and bodies subject to those restrictive measures, in so far as the name of the applicant, the former Minister for Revenue and Duties of Ukraine, was maintained on that list.

The judgment was delivered in the context of proceedings relating to the restrictive measures adopted against certain persons, entities and bodies in view of the situation in Ukraine following the suppression of the demonstrations in Kiev in February 2014. The applicant’s name had been placed on the list at issue on the ground that he was the subject of preliminary investigations in Ukraine for offences relating to the misappropriation of public funds and their unlawful transfer out of Ukraine. His name was maintained on the list on the ground that he was the subject of criminal proceedings brought by the Ukrainian authorities for misappropriation of public funds or assets and for abuse of office as a public office-holder. By the contested acts, the Council had extended the applicant’s inclusion on the list at issue on identical grounds. The contested acts also stated that the applicant’s rights of defence and right to effective judicial protection had been observed in the course of those criminal proceedings, as was evidenced by a decision of the examining magistrate in charge of the proceedings.

In support of his action, the applicant claimed, inter alia, that the Council had failed to verify that the Ukrainian authorities had observed his rights of defence and his right to effective judicial protection and had therefore made an error of assessment by adopting the contested acts.

¹ The annulment was sought of Council Decision (CFSP) 2019/354 of 4 March 2019 amending Decision 2014/119/CFSP (OJ 2019 L 64, p. 7) and Council Implementing Regulation (EU) 2019/352 of 4 March 2019 implementing Regulation (EU) No 208/2014 (OJ 2019 L 64, p. 1).

The Court noted, first of all, that the Courts of the European Union must review the lawfulness of all Union acts in the light of fundamental rights. While the Council may base the adoption or the maintenance of restrictive measures on a decision of a third State, it must verify that that decision was taken in accordance, *inter alia*, with the rights of the defence and the right to effective judicial protection in the State in question. The Court also clarified that, while the fact that a third State is among the States which have acceded to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') entails review, by the European Court of Human Rights ('the ECtHR'), of the fundamental rights guaranteed by the ECHR, that fact cannot render that verification requirement superfluous.

In the present case, the Court recalled that, although the Council had mentioned, with reference to its duty to state reasons, the reasons for which it considered the decision of the Ukrainian authorities to initiate and conduct criminal proceedings for the misappropriation of public funds to have been adopted in accordance with the rights in question, the duty to state reasons had to be distinguished from the examination of the merits of the statement of reasons, which goes to the substantive legality of the contested acts, of which the Court ensures the review.

The Court held, first of all, that it was not apparent from the decision of the examining magistrate of 5 October 2018 that the applicant's rights had been guaranteed, and nor was it apparent from the documents in the file that the Council had considered the information provided by the applicant.

The Court then clarified that, even though the Council claims that a judicial review was carried out in Ukraine during the conduct of the criminal proceedings and that several judicial decisions adopted in that context show that it was able to verify the respect of the rights in question, such decisions are not capable, alone, of establishing that the decision of the Ukrainian judicial authorities to conduct criminal proceedings on which the maintenance of the restrictive measures is based, was taken in accordance with the rights of defence and the right to effective judicial protection. All the judicial decisions referred to by the Council fall within the scope of the criminal proceedings which justified the inclusion and maintenance of the applicant's name on the list and are merely incidental in the light of those proceedings, since they are either restrictive or procedural in nature.

Lastly, the Court stated that the Council does not explain how the existence of those decisions permits the inference that the protection of the rights in question was guaranteed, even though the Ukrainian criminal proceedings, which were the basis of the restrictive measures at issue in 2014, were still at the preliminary investigation stage. In that connection, the Court referred to the ECHR and the Charter of Fundamental Rights of the European Union, according to which the principle of the right to effective judicial protection includes, *inter alia*, the right to a hearing within a reasonable time. The Court pointed out that the ECtHR had already held that infringement of that principle could be established, *inter alia*, where the investigation stage of criminal proceedings has been characterised by a certain number of periods of inactivity attributable to the authorities responsible for the investigation. The Court noted that, where a person has been subject to the restrictive measures at issue for several years, on account of the same criminal proceedings brought in the relevant third State, the Council is required to explore in greater detail the question of a possible breach by the authorities of that person's fundamental rights. Therefore, the Council should, at the very least, have indicated the reasons for which it was entitled to take the view that those rights had been respected in terms of whether the applicant's case had been heard within a reasonable time.

Consequently, the Court found that it had not been established that the Council had assured itself that the Ukrainian judicial authorities had complied with the applicant's rights of defence and his right to effective judicial protection in the criminal proceedings on which the Council had based its decision. It followed that the Council had made an error of assessment by maintaining the applicant's name on the list at issue.