Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber, extended composition)

15 September 2016*

(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 — Inclusion of the applicant's name — Obligation to state reasons — Legal basis — Rights of the defence — Right to effective judicial protection — Misuse of power — Failure to comply with the listing criteria — Manifest error of assessment — Right to property)

In Case T-348/14,

Oleksandr Viktorovych Yanukovych, residing in Donetsk (Ukraine), represented by T. Beazley QC, P. Saini QC and S. Fatima QC, J. Hage and K. Howard, Barristers, and C. Kennedy, Solicitor,

applicant,

v

Council of the European Union, represented initially by E. Finnegan and J.-P. Hix, and subsequently by J.-P. Hix and P. Mahnič Bruni, acting as Agents,

defendant,

supported by

European Commission, represented by S. Bartelt and D. Gauci, acting as Agents,

intervener,

APPLICATION under Article 263 TFEU seeking the annulment of (i) Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 26) and Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 1) as amended, respectively, by Council Implementing Decision 2014/216/CFSP of 14 April 2014, implementing Decision 2014/119 (OJ 2014 L 111, p. 91) and by Council Implementing Regulation (EU) No 381/2014 of 14 April 2014 implementing Regulation No 208/2014 (OJ 2014 L 111, p. 33); (ii) Council Decision (CFSP) 2015/143 of 29 January 2015 amending Decision 2014/119 (OJ 2015 L 24, p. 16) and Council Regulation (EU) 2015/138 of 29 January 2015 amending Regulation No 208/2014 (OJ 2015 L 24, p. 1), and (iii) Council Decision (CFSP) 2015/364 of 5 March 2015 amending Decision 2014/119 (OJ 2015 L 62, p. 25) and Council Implementing Regulation (EU) 2015/357 of 5 March 2015 implementing Regulation No 208/2014 (OJ 2015 L 62, p. 1), in so far as the applicant's name was included or maintained in the list of persons, entities and bodies subject to those restrictive measures,

* Language of the case: English.

THE GENERAL COURT (Ninth Chamber, extended composition),

composed of G. Berardis (Rapporteur), President, O. Czúcz, I. Pelikánová, A. Popescu and E. Buttigieg, Judges,

Registrar: L. Grzegorczyk, Administrator,

having regard to the written procedure and further to the hearing on 29 April 2016,

gives the following

Judgment

Background to the proceedings

1 The applicant, Mr Oleksandr Viktorovych Yanukovych, is a businessman and the son of the former President of Ukraine, Mr Viktor Fedorovych Yanukovych.

2 The present case has been brought against the background of the restrictive measures adopted in view of the situation in Ukraine following the suppression of demonstrations in Independence Square in Kiev (Ukraine) in February 2014.

3 On 5 March 2014 the Council of the European Union adopted, on the basis of Article 29 TEU, Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 26). On the same date, the Council adopted, on the basis of Article 215(2) TFEU, Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 1).

4 Recital (2) in the preamble of Decision 2014/119 states:

‘On 3 March 2014, the Council agreed to focus restrictive measures on the freezing and recovery of assets of persons identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations, with a view to consolidating and supporting the rule of law and respect for human rights in Ukraine.’

5 Article 1(1) and (2) of Decision 2014/119 provide:

‘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.’

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 the adoption of measures for the freezing of funds and lays down the detailed rules governing that freezing in terms essentially identical to those of that decision.

8 The persons affected by Decision 2014/119 and Regulation No 208/2014 (together: 'the March 2014 acts') are named in the Annex to Decision 2014/119 and in Annex I to Regulation No 208/2014, each of which contains an identical list ('the list'), together with, inter alia, a statement of reasons for their listing.

9 The applicant was listed, with the identifying information 'son of former President [Yanukovych], businessman' and the following reason is stated:

'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 On 6 March 2014 the Council published in the *Official Journal of the European Union* a notice for the attention of the persons subject to the restrictive measures provided for in the March 2014 acts (OJ 2014 C 66, p. 1). According to that notice, '[t]he persons concerned may submit a request to the Council, together with supporting documentation, that the decision to include them on the ... list should be reconsidered'.

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

12 In the course of correspondence in 2014, the applicant contended that his listing was not well founded and requested that the Council should reconsider. He also requested access to the information and evidence supporting that listing.

13 The Council replied to the applicant's request that it reconsider. The Council maintained that, in its view, the restrictive measures relating to the applicant were still justified for the reasons given in the statement of reasons in the March 2014 acts. As regards the request for access to the applicant's file, the Council sent to him a number of documents from his file, including documents from the Ukrainian authorities of 3 March 2014 ('the letter of 3 March 2014'), 8 July 2014 and 10 October 2014.

14 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) (together: 'the January 2015 acts').

15 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 public funds or assets or being an accomplice thereto; or

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

16 Regulation 2015/138 amended Regulation No 208/2014 to conform to Decision 2015/143.

17 By letter of 2 February 2015, the Council informed the applicant that it intended to maintain the imposition on him of the restrictive measures and sent to him a document from the Ukrainian authorities dated 30 December 2014 ('the letter of 30 December 2014'), informing him that it was open to him to submit observations. By letter of 17 February 2015, the applicant asked the Council to reconsider and to provide to him any other material that justified the Council's position.

18 On 5 March 2015 the Council adopted Decision (CFSP) 2015/364, amending Decision 2014/119 (OJ 2015 L 62, p. 25), and Implementing Regulation (EU) 2015/357, implementing Regulation No 208/2014 (OJ 2015 L 62, p. 1) (together: 'the March 2015 acts').

19 Decision 2015/364 amended Article 5 of Decision 2014/119, by extending the application of the restrictive measures in respect of the applicant until 6 March 2016. Consequently, Decision 2015/364 and Implementing Regulation 2015/357 replaced the list.

20 Following those amendments, the applicant's name was maintained on the list with the identifying information 'son of former President, businessman' and the following new statement of reasons:

'Person subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.'

21 By letter of 6 March 2015, the Council informed the applicant that the restrictive measures against him were being maintained.

22 Decision 2014/119 and Regulation No 208/2014 were subsequently amended, respectively, by Council Decision (CFSP) 2016/318 of 4 March 2016 (OJ 2016 L 60, p. 76) and by Council Implementing Regulation (EU) 2016/311 of 4 March 2016 implementing Regulation No 208/2014 (OJ 2016 L 60, p. 1).

23 Decision 2016/318 amended Article 5 of Decision 2014/119 by extending the application of the restrictive measures in respect of the applicant until 6 March 2017.

Procedure and forms of order sought by the parties

24 By application lodged at the Registry of the General Court on 14 May 2014, the applicant brought the present action.

25 On 22 September 2014 the Council lodged its defence. It then lodged, on 26 September 2014, an addendum to the annexes to the defence and, on 3 October 2014, an additional document. The Council also submitted a reasoned application, in accordance with the second subparagraph of Article 18(4) of the Instructions to the Registrar of the General Court, requesting that the content of a certain document not be disclosed in the documents pertaining to this case to which the public has access The applicant submitted his objections to the request for confidential treatment.

26 By document lodged at the Court's Registry on 16 September 2014 the European Commission sought leave to intervene in the present proceedings in support of the form of order sought by the Council. By order of 12 November 2014, the President of the Ninth Chamber of the Court granted that application

for leave to intervene. By document lodged on 22 December 2014, the Commission lodged its statement in intervention. The applicant and the Council lodged their observations on that statement within the period allowed.

27 By document lodged at the Court Registry on 16 September 2014, Ukraine applied for leave to intervene in the present proceedings in support of the form of order sought by the Council. By letter lodged at the Court Registry on 24 December 2014, Ukraine informed the Court that it was withdrawing its application to intervene. By order of 11 March 2015, the President of the Ninth Chamber of the General Court ordered that Ukraine be removed from the register as an applicant to intervene.

28 The reply and the rejoinder were lodged, respectively, by the applicant on 21 November 2014 and by the Council on 15 January 2015.

29 By document lodged at the Court Registry on 8 April 2015 the applicant modified his form of order, so that his action should also be directed to the annulment of Decision 2015/143, Regulation 2015/138, Decision 2015/364 and Implementing Regulation 2015/357, in so far as those acts concern him. The other parties submitted their observations within the period allowed. By document lodged at the Court Registry on 30 November 2015, the applicant submitted further evidence.

30 On the proposal of the Ninth Chamber, the Court decided, pursuant to Article 28 of the Court's Rules of Procedure of Court, to refer the case to a formation sitting with a greater number of Judges.

31 On hearing the report of the Judge-Rapporteur, the Court (Ninth Chamber, extended composition) decided to open the oral stage of the procedure.

32 By decision of 5 April 2016 of the President of the Ninth Chamber, extended composition, of the Court, the parties having been heard, this case and Case T-346/14, *Yanukovych* v *Council*, were joined for the purposes of the oral procedure, in accordance with Article 68 of the Rules of Procedure.

33 The parties presented oral argument and replied to questions put by the Court at the hearing on 29 April 2016.

34 The applicant claims that the Court should:

— annul (i) Decision 2014/119, as amended by Implementing Decision 2014/216, and Regulation No 208/2014, as amended by Implementing Regulation No 381/2014, (ii) Decision 2015/143 and Regulation 2015/138, and (iii) Decision 2015/364 and Implementing Regulation 2015/357, in so far as they concern him;

— order the Council to pay the costs.

35 The Council, supported by the Commission, contends that the Court should:

— dismiss the action;

— in the alternative, should the March 2014 acts be partly annulled, order that the effects of Decision 2014/119 be maintained as regards the applicant until the partial annulment of Regulation No 208/2014 takes effect and, should the March 2015 acts be partly annulled, order that the effects of Decision 2014/119, as amended, be maintained as regards the applicant until the partial annulment of Regulation No 208/2014, as amended by Implementing Regulation 2015/357 takes effect;

— order the applicant to pay the costs.

Law

1. *The claims for annulment of the March 2014 acts, as amended, respectively, by Implementing Decision 2014/216 and Implementing Regulation No 381/2014, in so far as they concern the applicant*

36 In support of his action seeking the annulment of the March 2014 acts, as amended by Implementing Decision 2014/216 and Implementing Regulation No 381/2014, the applicant relies on seven pleas in law. The first claims the lack of a legal basis. The second claims a misuse of power. The third claims a failure to state reasons. The fourth claims failure to comply with the listing criteria. The fifth claims a manifest error of assessment. The sixth claims infringement of the rights of the defence and of the right to an effective legal remedy, and the seventh is a claim of breach of the right to property.

37 By his fourth plea in law, which the Court will examine first, the applicant argues, inter alia, that his listing for the sole reason that he is the subject of an investigation does not satisfy, in the light of the relevant case-law, the criteria laid down in the March 2014 acts, which refer to 'persons identified as responsible' for the misappropriation of public funds, and, in any event, that the Council has failed to discharge the burden of proof.

38 Further, in his statement of modification of the application, the applicant argues that, for the period from 31 January to 6 March 2015, that is to say, from the entry into force of the January 2015 acts until the entry into force of the March 2015 acts, the original reasons for his listing again do not satisfy the listing criteria, as amended by Decision 2015/143.

39 The Council, supported by the Commission, contends, first, that, in accordance with the relevant case-law, it is for the Council itself to identify persons who may be considered to be responsible for the misappropriation of public funds, on the basis of consistent information, and that it was appropriate to interpret the term 'identified' broadly, so as to include, among others, persons subject to criminal prosecution for such conduct.

40 The Council argues, second, that the evidence in its possession confirms that criminal proceedings had been started against the applicant and that it had been established that public funds of sizeable amounts had been embezzled and transferred illegally outside Ukraine. The Council rejects, moreover, any indiscriminate application of an alleged obligation to verify that the legislation of the State concerned protects the rights of the defence and the right to effective judicial protection.

41 In that regard, it must be borne in mind that, while the Council has a broad discretion as regards 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 of Fundamental Rights of the European Union 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 particular person's name on a 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, to that effect, judgment of 21 April 2015, *Anbouba* v *Council*, C-605/13 P, EU:C:2015:248, paragraphs 41 and 45 and the case-law cited).

42 In the present case, the criterion laid down in Article 1(1) of Decision 2014/119 provides that restrictive measures are to be adopted against persons who have been identified as responsible for the misappropriation of public funds. Furthermore, it is clear from recital (2) of that decision that the Council adopted those measures 'with a view to consolidating and supporting the rule of law ... in Ukraine'.

43 The name of the applicant was included in the list on the ground that he was a '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'.

44 In support of the reason stated for the applicant's listing, the Council relies on the letter of 3 March 2014. The first part of that letter states that the 'law-enforcement agencies of Ukraine' have launched a number of criminal proceedings to investigate criminal acts committed by former senior officials, whose names are listed immediately below, and that the investigation into the abovementioned offences made it possible to establish the misappropriation of large amounts of public funds and their subsequent unlawful transfer out of Ukrainian territory. The second part adds that 'the investigation verifies the involvement of other senior officials representing former authorities in the same sort of crimes', and that it was intended that they should be notified shortly of the opening of that investigation. The names of those other persons, one of them being the applicant, are listed immediately below.

45 It is not disputed that that was the sole basis for the applicant's identification 'as responsible for the misappropriation of Ukrainian State funds' within the meaning of Article 1(1) of Decision 2014/119. The letter of 3 March 2014 is, within the body of evidence lodged by the Council in these proceedings, the only evidence that precedes the March 2014 acts and, therefore, the lawfulness of those acts must be assessed solely with regard to that evidence.

46 The Court must hold that, while that letter emanates from a high judicial authority of a third country, the letter contains no more than a vague and general statement linking the name of the applicant, among other former senior officials, to an investigation which, in essence, had established the fact that public funds had been embezzled. The letter does not provide any details as to the establishment of the acts which the investigation conducted by the Ukrainian authorities was in the process of determining and, still less, as to the applicant's individual liability, even presumed, in respect of those acts (see, to that effect, judgment of 28 January 2016, *Azarov* v *Council*, T-332/14, not published, EU:T:2016:48, paragraph 46; see also, by analogy, judgment of 26 October 2015, *Portnov* v *Council*, T-290/14, EU:T:2015:806, paragraphs 43 and 44).

47 It should further be noted that, in contrast to the case that gave rise to the judgment of 27 February 2014, *Ezz and Others* v *Council* (T-256/11, EU:T:2014:93, paragraphs 57 to 61), upheld on appeal by the judgment of 5 March 2015, *Ezz and Others* v *Council* (C-220/14 P, EU:C:2015:147), relied on by the Council, in the present case the Council did not have any information regarding the acts or conduct specifically imputed to the applicant by the Ukrainian authorities and, moreover, the letter of 3 March 2014, even if it is examined in its context, cannot constitute a sufficiently solid factual basis, within the meaning of the case-law cited in paragraph 41 above, for including the applicant's name on the list on the ground that he was identified 'as responsible' for the misappropriation of public funds (see, to that effect, judgment of 26 October 2015, *Portnov* v *Council* (T-290/14, EU:T:2015:806, paragraphs 46 to 48).

48 Irrespective of the stage reached in the proceedings to which the applicant was deemed to be subject, the Council could not adopt restrictive measures against him without knowing the acts of misappropriation of public funds which the Ukrainian authorities specifically alleged against him. Only with knowledge of such acts would the Council have been in a position to determine that they were capable, first, of being categorised as misappropriation of public funds and, secondly, of undermining the rule of law in Ukraine, the consolidation and support of which, as recalled in

paragraph 42 above, constitutes the objective pursued by the adoption of the restrictive measures at issue (judgments of 28 January 2016, *Klyuyev* v *Council*, T-341/14, EU:T:2016:47, paragraph 50, and of 28 January 2016, *Azarov* v *Council*, T-331/14, EU:T:2016:49, paragraph 55).

49 Moreover, it is for the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded (judgments of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 120 and 121, and of 28 November 2013, *Council* v *Fulmen and Mahmoudian*, C-280/12 P, EU:C:2013:775, paragraphs 65 and 66).

50 In the light of all the foregoing, the Court must conclude that the inclusion of the applicant's name on the list does not rest on a factual basis that is sufficient to guarantee compliance with the criteria for the designation of persons to be subject to the restrictive measures at issue laid down by Decision 2014/119.

51 Further, it is clear that that illegality persisted until the entry into force of the March 2015 acts, whereby the list was replaced and the reasons stated for the applicant's listing were amended.

52 In the light of that conclusion, there is no need to give a ruling on the applicant's claim that the listing of his name by the March 2014 acts should be declared to be illegal for the period from 31 January to 6 March 2015, that is to say from the entry into force of the January 2015 acts and until the entry into force of the March 2015 acts. Given the annulment of the March 2014 acts, in so far as they concern the applicant, he is deemed not to have been subject to the restrictive measures in that period.

53 Consequently, the fourth plea in law must be upheld and Decision 2014/119, as amended by Implementing Decision 2014/216, must be annulled, in so far as it concerns the applicant, and there is no need to give a ruling on the other pleas in law.

54 As a consequence of the annulment of Decision 2014/119, the Court must also annul, in so far as it concerns the applicant, Regulation No 208/2014, as amended by Implementing Regulation No 381/2014, given that, under Article 215(2) TFEU, that regulation presupposes the adoption of a decision in accordance with Chapter 2 of Title V of the EU Treaty.

2. *The claims for annulment of the March 2014 acts, as amended by the January 2015 acts and the March 2015 acts, in so far as they concern the applicant*

55 By his statement of modification of his form of order, the applicant sought to extend the scope of his action so that it should be directed to the annulment of the January 2015 and March 2015 acts, in so far as they concern him.

56 In its observations on the statement of modification of the form of order sought, the Council contended, first, that the Court did not have jurisdiction under Article 275 TFEU to rule on the extension of the form of order to Decision 2015/143, which was adopted, inter alia, on the basis of Article 29 TEU, and secondly, that the extension of the form of order to Regulation 2015/138 was inadmissible due to the applicant's lack of *locus standi*. For the remainder, the Council argues that the modification of the application is not well founded.

The jurisdiction of the Court to examine the lawfulness of Decision 2015/143

57 It must be observed that, as is apparent from, inter alia, examination of the first plea in law below, the applicant, while not formally pleading illegality under Article 277 TFEU, claims that the listing criterion is not compatible with the objectives of the EU Treaty, within the form of order seeking the

annulment of the March 2015 acts that maintained his listing. Since Decision 2015/143 constitutes precisely an amendment of that listing criterion, the Court must hold that, when the applicant seeks the annulment of that decision, his aim is, in fact, to rely on a plea of illegality that supports his form of order seeking the annulment of the March 2015 acts (see, by analogy, judgment of 6 September 2013, *Post Bank Iran* v *Council*, T-13/11, EU:T:2013:402, paragraph 37).

58 In that regard, it must be borne in mind that the second paragraph of Article 275 TFEU provides explicitly that, by derogation from the first paragraph of Article 275 TFEU, the Courts of the European Union have jurisdiction 'to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the [EU] Treaty'. Thus, contrary to what the Council maintains, that provision is directed at all Council decisions relating to restrictive measures against natural or legal persons, falling within Chapter 2 of Title V of the EU Treaty, without making any distinction between decisions of general application or individual decisions. In particular, it does not preclude the possibility of challenging, by way of an objection, the legality of a general provision, in support of an action for annulment brought against an individual restrictive measure (judgment of 16 July 2014, *National Iranian Oil Company* v *Council*, T-578/12, not published, EU:T:2014:678, paragraphs 92 and 93; see also, to that effect, judgment of 28 January 2016, *Azarov* v *Council*, T-331/14, EU:T:2016:49, paragraph 62).

59 Accordingly, contrary to the Council's submission, the Court has jurisdiction to examine the legality of Decision 2015/143 in so far as it amends Article 1(1) of Decision 2014/119.

60 That plea of illegality will therefore be examined in the context of the first plea in law, in support of the form of order seeking annulment of the March 2015 acts, wherein the applicant claims that the listing criterion applied with respect to him is not compatible with the objectives of the EU Treaty.

The plea of inadmissibility on the ground that the applicant has no locus standi *in relation to Regulation 2015/138*

61 As regards the plea of inadmissibility on the ground that the applicant has no *locus standi*, raised by the Council in relation to Regulation 2015/138, it must be observed that Regulation No 208/2014 was amended by Regulation 2015/138 only to the extent that the designation criteria with respect to fund-freezing imposed on those responsible for the misappropriation of Ukrainian State funds were clarified.

62 Regulation 2015/138 does not specifically name the applicant and moreover was not adopted following a full review of the list. That act concerns only the general listing criteria, applicable to objectively determined situations and having legal effects in relation to categories of persons and entities envisaged in a general and abstract manner, and not the inclusion of the applicant's name in the list. Consequently, that act is not of direct or individual concern to the applicant and he is not entitled to modify his claims to seek the annulment of that act (see judgment of 28 January 2016, *Azarov* v *Council*, T-331/14, EU:T:2016:49, paragraphs 64 and 65 and the case-law cited).

63 The Council's submission must therefore be accepted and the action must be dismissed as being inadmissible, in so far as it seeks the annulment of Regulation 2015/138.

Substance

64 In support of his application for annulment of the March 2014 acts, as amended by the January 2015 acts and the March 2015 acts, the applicant relies on seven pleas in law. The first claims the lack of a legal basis. The second claims a misuse of power. The third claims a failure to state sufficient reasons.

The fourth claims failure to comply with the listing criteria. The fifth claims a manifest error of assessment. The sixth claims infringement of the rights of the defence and of the right to effective judicial protection, and the seventh is a claim of breach of the right to property.

65 The Court will examine, first, the sixth plea in law, on infringement of the rights of the defence and of the right to effective judicial protection, then the third plea in law, on the breach of the duty to state reasons, and, last, the other pleas in law, in numerical order.

The sixth plea in law: infringement of the rights of the defence and of the right to effective judicial protection

66 By his sixth plea in law, the applicant complains that he was not properly consulted before his name was maintained on the list and, more specifically, that he was given insufficient time and insufficient information to challenge the decision to maintain his listing.

67 The Council, supported by the Commission, disputes the applicant's arguments.

68 First, it must be recalled that respect for the rights of the defence, which is affirmed in Article 41(2)(a) of the Charter of Fundamental Rights of the European Union, to which the EU Treaty attaches the same legal value as the treaties, includes the right to be heard and the right to have access to the file, whereas the right to effective judicial protection, which is affirmed in Article 47 of the Charter, requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based (see, to that effect, judgment of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 98 to 100).

69 It follows that, in the context of the adoption of a decision maintaining a person, entity or body in a list of persons, entities or bodies subject to restrictive measures, the Council must respect the right of that person, entity or body to a prior hearing where new evidence, namely evidence which was not included in the initial listing decision, is admitted against him or it, in the decision maintaining his or its listing (judgment of 4 June 2014, *Sina Bank* v *Council*, T-67/12, not published, EU:T:2014:348, paragraph 68 and the case-law cited; see, to that effect, judgment of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 62).

70 In this case, it must be observed that the maintenance of the applicant's name on the list following the March 2015 acts is based solely on the letter of 30 December 2014.

71 In that regard, it must also be recalled that, before adopting the decision to maintain the applicant's listing, the Council sent to the applicant the letter of 30 December 2014 (see paragraph 17 above). Further, by letter of 2 February 2015, the Council informed the applicant that it intended to maintain the restrictive measures against him, and informed him that it was open to him to submit observations (see paragraph 17 above).

72 It follows that the applicant had access to the information and evidence that led the Council to maintain the restrictive measures against him and that he was in a position to formulate, in good time, observations (see paragraph 17 above).

73 Moreover, the applicant has failed to demonstrate that the alleged difficulties concerning the information received and the time available to respond to the Council's claims prevented him from modifying his form of order in good time or from developing arguments in support of his defence.

74 It follows from the foregoing that the disclosure of evidence in the course of the procedure was sufficient to ensure that the applicant could exercise his rights of defence and his right to effective judicial protection.

75 The sixth plea in law must therefore be rejected.

The third plea in law: breach of the duty to state reasons

76 By his third plea in law, the applicant argues that the statement of reasons for his listing provides no details of the acts at issue and on the proceedings concerning him to substantiate the allegation that he was responsible for the misappropriation of public funds and their illegal transfer outside Ukraine.

77 The Council disputes the applicant's arguments.

78 First, it must be recalled that the statement of reasons required by Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights must be appropriate to the nature of the contested act and to the context in which it was adopted. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the person concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case (see judgment of 14 April 2016, *Ben Ali* v *Council*, T-200/14, not published, EU:T:2016:216, paragraph 94 and the case-law cited.

79 It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. Accordingly, the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him. Moreover, the degree of precision of the statement of the reasons for a measure must be weighed against practical realities and the time and technical facilities available for taking the measure (see judgment of 14 April 2016, *Ben Ali* v *Council*, T-200/14, not published, EU:T:2016:216, paragraph 95 and the case-law cited).

80 In particular, the statement of reasons for an asset-freezing measure cannot, in principle, consist merely of a general, stereotypical formulation. Subject to the qualifications stated in paragraph 79 above, such a measure must, on the contrary, indicate the actual and specific reasons why the Council considers that the relevant legislation is applicable to the person concerned (see judgment of 14 April 2016, *Ben Ali* v *Council*, T-200/14, not published, EU:T:2016:216, paragraph 96 and the case-law cited).

81 In this case, first, it must be observed that, following the model of the initial statement of reasons for listing, the statement of reasons as amended by the March 2015 acts (see paragraph 20 above) sets out the factors on which the applicant's listing is based, namely the fact that he is subject to criminal proceedings by the Ukrainian authorities with respect to the misappropriation of public funds or assets.

82 Further, the decision to maintain the measures against the applicant was made in a context that was known to him, in that he had been acquainted, in the course of the correspondence relating to this case, with the letter of 30 December 2014, on which the Council relied as justification for maintaining the restrictive measures against him, the Council providing by means of that letter details concerning his listing (see, to that effect, judgments of 15 November 2012, *Council* v *Bamba*, C-417/11 P, EU:C:2012:718, paragraphs 53 and 54 and the case-law cited, and of 6 September 2013, *Bank Melli Iran* v *Council*, T-35/10 and T-7/11, EU:T:2013:397, paragraph 88), and in particular a detailed description of what he was alleged to have done.

83 Second, as regards the claim that the statement of reasons for listing is stereotypical, it must be observed that, while the considerations within that statement of reasons are the same as those on the basis of which restrictive measures were imposed on the other natural persons who are listed, they are designed nonetheless to describe the particular situation of the applicant, who, no less than other individuals, has been, according to the Council, subject to judicial proceedings linked to investigations concerning the misappropriation of Ukrainian State funds (see, to that effect, judgment of 27 February 2014, *Ezz and Others* v *Council*, T-256/11, EU:T:2014:93, paragraph 115).

84 In the light of all the foregoing, it must be concluded that the March 2014 acts, as amended by the January 2015 and March 2015 acts, state to the requisite legal standard the matters of fact and law on which, according to the Council, those acts are based.

85 The third plea in law must therefore be rejected.

The first plea in law: absence of legal basis

86 By his first plea in law, the applicant claims that Decision 2014/119, as amended by the January 2015 and March 2015 acts, is not compatible with the objectives stated in Article 29 TEU and therefore lacks a legal basis, and that, in view of the invalidity of Decision 2014/119, Regulation No 208/2014, as amended by the January 2015 and March 2015 acts, is also invalid, since there is no valid decision adopted in accordance with Chapter 2 of Title V of the EU Treaty to permit reliance on Article 215 TFEU.

87 The Council disputes the applicant's arguments.

– The applicant's main argument: the disproportionality of the listing criterion in the light of the objectives of the EU Treaty

88 In his main argument, the applicant claims, in essence, that Decision 2014/119 does not pursue either its two declared objectives, namely consolidating and supporting the rule of law and ensuring respect for human rights in Ukraine, or the other objectives of the Common Foreign and Security Policy (CFSP) stated in Article 21(2)(b) TEU. The applicant adds that the amendment made to the statement of reasons with respect to him by the March 2015 acts, following the extension of the listing criterion by the January 2015 acts, was not justified, since the Council has not proved that he had undermined democracy, the rule of law or human rights in Ukraine or the sustainable economic or social development of Ukraine.

89 The Court must therefore examine whether the listing criterion stated in Article 1(1) of Decision 2014/119, as amended by Decision 2015/143, is compatible with the objectives of the CFSP and, more specifically, whether that criterion is proportionate to the abovementioned objectives.

90 First, it must be recalled that the objectives of the EU Treaty concerning the CFSP are stated, in particular, in Article 21(2)(b) TEU, as follows:

'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations in order to: … consolidate and support democracy, the rule of law, human rights and the principles of international law'.

91 Next, it must be observed that recital (2) of Decision 2014/119 is worded as follows:

'On 3 March 2014, the Council agreed to focus restrictive measures on the freezing and recovery of assets of persons identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations, with a view to consolidating and supporting the rule of law and respect for human rights in Ukraine.'

92 On that basis, the listing criterion stated in Article 1(1) of Decision 2014/119, as amended by Decision 2015/143, is as follows:

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

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

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

93 Last, it must be observed that the reason stated for the applicant's listing, following the March 2015 acts, is as follows:

'Person subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.'

94 As a preliminary point, it is evident, as acknowledged by the Council in its written pleadings, that the restrictive measures against the applicant were adopted solely with the objective of consolidating and supporting the rule of law in Ukraine. Accordingly, the applicant's arguments that the listing criterion stated by Decision 2014/119 does not achieve other CFSP objectives are ineffective.

95 The Court must therefore determine whether the listing criterion laid down in Decision 2014/119 and amended by Decision 2015/143, referring to persons identified as responsible for the misappropriation of Ukrainian State funds, corresponds to the objective, stated in that decision, of consolidating and supporting the rule of law in Ukraine.

96 In that regard, it must be recalled that the case-law developed with respect to restrictive measures in view of the situations in Tunisia and in Egypt has established that objectives such as those mentioned in Article 21(2)(b) and (d) TEU were intended to be achieved by an asset-freeze the scope of which was, as in this case, restricted to the persons identified as being responsible for misappropriation of State funds and to persons, entities or bodies associated with them, that is to say, to the persons whose actions are liable to have jeopardised the proper functioning of public institutions and bodies linked to them (see, to that effect, judgments of 28 May 2013, *Trabelsi and Others* v *Council*, T-187/11, EU:T:2013:273, paragraph 92; 27 February 2014, *Ezz and Others* v *Council*, T-256/11, EU:T:2014:93, paragraph 44; and 14 April 2016, *Ben Ali* v *Council*, T-200/14, not published, EU:T:2016:216, paragraph 68).

97 In this case, it is evident, first, that the listing criterion relies, as far as the applicant is concerned, on offences constituting 'misappropriation of public funds' and, second, that that criterion exists within a legal framework that is clearly circumscribed by Decision 2014/119 and the pursuit of the relevant objective of the EU Treaty to which it refers, stated in recital (2) of that decision, namely that of consolidating and supporting the rule of law in Ukraine.

98 In that regard, it must be recalled that respect for the rule of law is one of the primary values on which the European Union is founded, as is stated in Article 2 TEU, and in the preambles of the EU Treaty and of the Charter of Fundamental Rights. Respect for the rule of law constitutes, moreover, a prerequisite of accession to the European Union, pursuant to Article 49 TEU. The concept of the rule of law is also enshrined in the preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

99 The case-law of the Court of Justice and of the European Court of Human Rights, and the work of the Council of Europe, by means of the European Commission for Democracy through Law, provide a non-exhaustive list of principles and standards which may fall within the concept of the rule of law. That list includes: the principles of legality, legal certainty and the prohibition on arbitrary exercise of power by the executive; independent and impartial courts; effective judicial review, extending to respect for fundamental rights, and equality before the law (see, in that regard, the rule of law checklist adopted by the European Commission for Democracy through Law at its 106th Plenary Session (Venice, 11-12 March 2016)). Further, in the context of European Union external action, a number of legal instruments include reference to the fight against corruption as a principle within the scope of the concept of the rule of law (see, for example, Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument (OJ 2006 L 310, p. 1)).

100 However, while it is conceivable that certain conduct pertaining to acts classifiable as misappropriation of public funds may be capable of undermining the rule of law, it cannot be accepted that any act classifiable as misappropriation of public funds, committed in a third country, justifies European Union action with the objective of consolidating and supporting the rule of law in that country, using the powers of the Union under the CFSP. Before it can be established that a misappropriation of public funds is capable of justifying European Union action under the CFSP, based on the objective of consolidating and supporting the rule of law, it is, at the very least, necessary that the disputed acts should be such as to undermine the legal and institutional foundations of the country concerned.

101 In that context, the listing criterion can be considered to be compatible with the European Union legal order only to the extent that it is possible to attribute to it a meaning that is compatible with the requirements of the higher rules with which it must comply, and more specifically with the objective of consolidating and supporting the rule of law in Ukraine. Further, a consequence of that interpretation is that the broad discretion enjoyed by the Council in relation to the definition of the general listing criteria can be respected, while review, in principle full review, of the lawfulness of European Union acts in the light of fundamental rights is ensured (see, to that effect, judgment of 16 July 2014, *National Iranian Oil Company* v *Council*, T-578/12, not published, EU:T:2014:678, paragraph 108 and the case-law cited).

102 Consequently, that criterion must be interpreted as meaning that it does not concern, in abstract terms, any act classifiable as misappropriation of public funds, but rather that it concerns the misappropriation of public funds or assets which, having regard to the amount or the type of funds or assets misappropriated or to the context in which the offence took place, are, at the very least, such as to undermine the legal and institutional foundations of Ukraine, and in particular the principles of legality, the prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law and, ultimately, undermining respect for the rule of law in that country (see paragraph 100 above). As thus interpreted, the listing criterion is compatible with and proportionate to the relevant objectives of the EU Treaty.

– The other arguments relied on by the applicant

103 First, the applicant argues that the objective of consolidating and supporting the rule of law was taken into consideration for the first time at a late stage, namely in the conclusions of 3 March 2014 of the Foreign Affairs Council on Ukraine.

104 To the extent that, by that argument, the applicant suggests that political considerations led to his being listed, it must be observed that the argument as to the lateness of reference to the objective of consolidating and supporting the rule of law is not sufficient in itself to demonstrate that, when the March 2014 acts were adopted, the Council did not base that adoption on the objective, declared and legitimate, of consolidating and supporting the rule of law in Ukraine, and that that objective was not the reason why the measures against the applicant were maintained by the March 2015 acts.

105 To the extent that, by that argument, the applicant is, in fact, putting forward a submission that there was a misuse of power, suffice it to state that that is the subject of the examination of the second plea in law below.

106 Second, the applicant argues that the extension of the listing criterion by the January 2015 acts (see paragraph 15 above) cannot properly be interpreted to mean that a mere investigation is sufficient for that criterion to be met. Otherwise, the Council delegates to the Ukrainian authorities the power to decide on the imposition of EU restrictive measures, and there is no review by the European Union.

107 In that regard, while the Courts of the European Union have determined that the identification of a person as being responsible for an offence does not necessarily require that person to be convicted of the offence (see, to that effect, judgment of 5 March 2015, *Ezz and O*thers v *Council*, C-220/14 P, EU:C:2015:147, paragraphs 71 and 72), the fact remains that it is apparent, from the case-law cited in paragraph 49 above, that it is for the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded.

108 In this case, the listing criterion stated by the March 2014 acts, as amended by the January 2015 acts, enables the Council, in accordance with the judgment of 27 February 2014, *Ezz and Others* v *Council* (T-256/11, EU:T:2014:93), to take into account an investigation with respect to acts classifiable as misappropriation of State funds as a factor that might justify, in certain cases, the adoption of restrictive measures, without prejudice to the fact that, in the light of the case-law cited in paragraph 107 above and the interpretation of the listing criterion in paragraphs 89 to 102 above, the mere fact that a person is under investigation in relation to offences of misappropriation of funds cannot, in itself, justify action by the Council under Articles 21 and 29 TEU. Accordingly, the listing criterion cannot be interpreted as being a delegation to the Ukrainian authorities of the power to decide on the imposition of measures.

109 Third, the applicant argues that the extension of the criterion by the January 2015 acts, so as to include the 'persons subject to investigation by the Ukrainian authorities ... (b) for the abuse of office as a public office-holder in order to procure an unjustified advantage for him- or herself or for a third party, and thereby causing a loss to Ukrainian public funds or assets, or being an accomplice thereto', does not correspond to the CFSP objectives.

110 Suffice it to state that this extension of the listing criterion is of no relevance in this case, since the applicant was listed for the sole reason that he was the subject of criminal proceedings brought by the authorities in relation to the embezzlement of public funds or assets and not for abuse of office as a public office-holder.

111 Fourth, the applicant seeks to challenge the lawfulness of the change of regime in Ukraine, following the events of February 2014. He argues that there is ample evidence to demonstrate that the current regime in Ukraine is itself undermining democracy and the rule of law, and is violating, and is prepared systematically to violate, human rights, and he states that he will be unable to obtain fair, independent or unbiased treatment from the Ukrainian investigating or judicial authorities. He asserts, first, that the rights of the defence and the right to a fair trial do not exist in Ukraine and, second that the human rights situation in that country is deplorable.

112 In that regard, it must be borne in mind that Ukraine has been a Member State of the Council of Europe since 1995 and has ratified the Convention for the Protection of Human Rights and Fundamental Freedoms, and that the new Ukrainian regime has been recognised as legitimate by both the European Union and the international community. The Council therefore did not err in relying on evidence provided to it by a high judicial authority of that country as to the existence of criminal proceedings relating to allegations that the applicant had embezzled public funds or assets, and in not challenging the legality and legitimacy of the regime and the Ukrainian judicial system.

113 Admittedly, it cannot be ruled out that, where an applicant produces evidence capable of demonstrating that what he is accused of is manifestly false or distorted, it will be the duty of the Council to verify the information submitted to it and to request, where necessary, additional information or evidence.

114 However, in this case, the applicant claims, first, that he is the victim of political persecution, as demonstrated by the number of charges made with respect to him, some of the charges being false and politically motivated, second, that numerous public statements have been made by members of the current regime describing the applicant as guilty of various crimes and, third, that there have been procedural irregularities in the legal proceedings brought against him. More generally, he questions the legitimacy of the new Ukrainian regime, and the impartiality of the Ukrainian judicial system, and also the human rights situation in Ukraine.

115 Those factors were not however either capable of calling into question the cogency of the charges made with respect to the applicant in relation to very specific cases of embezzlement of public funds, a matter which is examined in relation to the fourth plea in law below, or sufficient to demonstrate that the applicant's particular situation was affected by the problems he identifies in the Ukrainian judicial system, in the course of the proceedings concerning him that were the basis for the imposition of restrictive measures on him. Accordingly, in the circumstances of this case, the Council was not obliged to undertake an additional verification of the evidence submitted to it by the Ukrainian authorities.

116 Moreover, in so far as an examination of the applicant's arguments would require the Court to give a ruling on the lawfulness of the interim regime in Ukraine and to examine the merits of the assessments made by various international bodies in that regard, including the Council's political assessments, it is clear that such an examination is not within the scope of the review to be carried out by the Court of the acts which are the subject matter of this case (see, to that effect, judgment of 25 April 2013, *Gbagbo* v *Council*, T-119/11, EU:T:2013:216, paragraph 75).

– Conclusion on the first plea in law

117 In the light of all the foregoing, it must be concluded that the listing criterion stated in Article 1(1) of Decision 2014/119, as amended by Decision 2015/143, is compatible with the objectives of the CFSP, as stated in Article 21 TEU, to the extent that it covers persons identified as responsible for a misappropriation of Ukrainian State funds that is capable of undermining the rule of law in Ukraine.

118 The same conclusion must be reached with respect to the form of order seeking the annulment of Regulation No 208/2014. That regulation imposes a fund-freezing measure provided for by a decision adopted in accordance with Chapter 2 of Title V of the EU Treaty and therefore complies with Article 215 TFEU, since there exists a valid decision for the purposes of that article.

119 The first plea in law must therefore be rejected.

The second plea in law: misuse of power

120 By his second plea, the applicant claims that the true objective pursued by the Council by means of the restrictive measures in question was that of seeking favour with the so-called interim regime in Ukraine with the aim of producing an EU-friendly Ukrainian government, that being a political objective of the European Union, and not the objective of consolidating and supporting the rule of law in Ukraine. That, he argues, is confirmed by the fact that the Council has failed to demonstrate the existence of any criminal proceedings against the applicant for misappropriation of public funds and their illegal transfer outside Ukraine.

121 Particularly with respect to the January and March 2015 acts, the misuse of power is all the more evident, according to the applicant, from the fact that, first, the Council extended the listing criteria instead of removing the applicant's name from the list and, second, by extending those criteria, it essentially gave the Ukrainian Government complete control over those criteria.

122 The Council disputes the applicant's arguments.

123 As a preliminary point, it must be recalled that an act is vitiated by misuse of power only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see judgment of 14 October 2009, *Bank Melli Iran* v *Council*, T-390/08, EU:T:2009:401, paragraph 50 and the case-law cited).

124 In this case, it must be observed that the March 2014 acts, as initially worded and as amended by the January 2015 and March 2015 acts, provided for restrictive measures against persons identified as being responsible for the misappropriation of Ukrainian State funds, with a view to supporting the rule of law in Ukraine.

125 In accordance with the conclusions reached in relation to the first plea in law, it is clear, first, that the objective pursued by Decision 2014/119 corresponds to one of the objectives set out in Article 21(2)(b) TEU and, second, that such an objective is intended to be achieved by means of the measures at issue.

126 Consequently, the applicant has not demonstrated that, in adopting the March 2014 acts or in amending them by the January 2015 and March 2015 acts, the Council was principally pursuing an aim other than that of consolidating and supporting the rule of law in Ukraine.

127 That conclusion is not called into question by the circumstance, suggested by the applicant, that the restrictive measures in question may also have promoted, *de facto* or intentionally, a rapprochement between Ukraine and the European Union.

128 Further, it must also be observed that the alleged absence of any criminal proceedings or the existence of a mere pre-trial investigation in Ukraine are circumstances which are not sufficient to support the claim that the Council misused its power, since the Council, relying on a solid factual basis, as is evident from examination of the fourth plea in law (see paragraphs 131 to 153 below), had knowledge of the acts the applicant was alleged to have committed and since those acts could justify action with the aim of consolidating and supporting the rule of law in Ukraine.

129 Similarly, contrary to what is asserted by the applicant, it must, first, be observed that, by the January 2015 acts, the Council did not extend the listing criteria, but did no more than clarify the concept of 'misappropriation of funds' and that, in any event, the clarification of the listing criterion is of no relevance to the assessment of the lawfulness of the applicant's initial listing by means of the March 2014 acts (see paragraphs 50 to 52 above) and therefore did not entail that he should be delisted. Second, as was stated in paragraph 108 above, the listing criterion cannot be interpreted as being a delegation to the Ukrainian authorities of the power to decide on the imposition of the restrictive measures in question.

130 The second plea in law must therefore be rejected.

The fourth plea in law: non-compliance with the listing criteria

131 By his fourth plea in law, the applicant argues that the inclusion of his name on the list did not comply with the listing criteria laid down by Decision 2014/119, as amended by Decision 2015/143.

132 The Council disputes the applicant's arguments.

– The applicant's main argument

133 By his main argument, the applicant claims, in essence, that the reasons stated for the inclusion of his name on the list, as amended by the March 2015 acts, fail to satisfy the listing criteria, as amended by the January 2015 acts.

134 First, it must be observed that, as from 7 March 2015, the applicant was subject to new restrictive measures introduced by the March 2015 acts on the basis of the listing criterion stated in Article 1(1) of Decision 2014/119 as 'clarified' by the January 2015 acts. Decision 2015/364 is not merely a confirmatory act, but constitutes an autonomous decision, adopted by the Council on the conclusion of the periodical review provided for in the third subparagraph of Article 5 of Decision 2014/119.

135 The Court must therefore examine the lawfulness of the inclusion of the applicant's name on the list by the March 2015 acts, taking into consideration, first, the listing criterion, as 'clarified' by the January 2015 acts, then, the reasons stated for the listing and, last, the evidence on which that listing was based.

136 As regards, first, the listing criterion, it must be recalled that that criterion, as amended by the January 2015 acts, provides that the restrictive measures in question are to be imposed on, among others, persons 'identified as responsible' for the misappropriation of Ukrainian State funds, that category including persons 'subject to investigation by the Ukrainian authorities' for the misappropriation of Ukrainian public funds or assets (see paragraph 15 above). Further, as was explained in relation to the first plea in law, that criterion must be interpreted as meaning that it does not cover, in abstract terms, any act of misappropriation of public funds, but rather acts classifiable as misappropriation of public funds or assets that are such as to undermine respect for the rule of law in Ukraine (see paragraph 102 above).

137 As regards, next, the reasons stated for the applicant's listing, it must be recalled that, as from 7 March 2015, the applicant was listed for the reason that he was subject to 'criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets' (see paragraph 20 above).

138 As regards, last, the evidence on which the listing of the applicant was based, it must be observed, as recognised by the Council, that the lawfulness of the reasons stated for the applicant's listing, as amended, must be assessed primarily in the light of the letter of 30 December 2014, which gives an account of progress in the various investigations concerning the applicant.

139 That letter gives an account of a pre-trial investigation within the framework of criminal proceedings initiated with respect to the applicant and concerning acts classifiable as misappropriation of public funds which are the basis for the applicant being named on the list. That investigation concerned, more specifically, two criminal offences: evasion of taxes and other compulsory payments, achieved by, inter alia, forgery of documents, and an attempted misappropriation of public funds through a fictitious tax credit in relation to value-added tax.

140 That being the case, in the first place, it must be stated that that letter, which is the evidence on the basis of which the Council adopted the March 2015 acts, provides sufficient proof of the fact that, on the date of adoption of the March 2015 acts, the applicant was the subject of criminal proceedings for misappropriation of public funds or assets.

141 In the second place, the Court must therefore determine whether maintaining the applicant's listing following the March 2015 acts by reason of the fact that he was the subject of criminal proceedings for such offences satisfies the listing criterion, as clarified by the January 2015 acts and as interpreted in relation to the first plea in law (see paragraph 136 above).

142 Taking into consideration the offences the applicant is alleged to have committed, as described in the letter of 30 December 2014, it must be observed that the prosecution of economic crimes, such as misappropriation of public funds, is an important means of combating corruption, and that the fight against corruption constitutes, in the context of the external action of the European Union, a principle within the scope of the rule of law (see paragraph 99 above).

143 It must further be observed that the offences that the applicant is alleged to have committed have a wider context, in which a significant part of the former Ukrainian leadership is suspected of having committed serious crimes in the management of public resources, thereby seriously threatening the legal and institutional foundations of the country and undermining, inter alia, the principles of legality, prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law (see paragraphs 100 to 102 above).

144 It follows that, taken as a whole and taking into consideration the proximity of the applicant to the Ukrainian leadership and, more particularly, to the former President, the restrictive measures in question contribute, in an effective manner, to facilitating the prosecution of crimes constituting misappropriation of public funds that were to the detriment of the Ukrainian institutions and ensure that the Ukrainian authorities can more easily secure restitution of the profits of such misappropriation. That facilitates, in the event that the prosecutions are successful, the punishment, through the courts of law, of alleged acts of corruption committed by members of the former regime, thereby helping to support the rule of law in that country (see, to that effect, the case-law referred to in paragraph 96 above).

145 It must therefore be concluded that the inclusion of the applicant's name on the list, by means of the March 2015 acts, on the basis of the evidence provided in the letter of 30 December 2014, complies with the listing criterion, as amended by the January 2015 acts and interpreted in the light of the objective on which it is based, namely the objective of consolidating and supporting the rule of law in Ukraine.

– The other arguments raised by the applicant

146 First, the applicant argues that he was the subject of a mere investigation which, since it was not part of judicial proceedings, did not satisfy the listing criterion.

147 In that regard, it must be recalled that the listing criterion set out in the March 2014 acts, as amended by the January 2015 acts, enables the Council to take account of an investigation with respect to acts classifiable as misappropriation of public funds as a factor that can justify, in appropriate cases, the adoption of restrictive measures. Further, it is clear that it was the task of the Council to verify whether the reasons adopted with respect to the person concerned were well founded, relying on a sufficient factual basis, within the meaning of the case-law cited in paragraph 41 above, irrespective of whether the pre-trial investigation to which the applicant was subject was part of actual judicial proceedings within the meaning of the Ukrainian Code of Criminal Procedure (see, to that effect, judgments of 28 January 2016, *Klyuyev* v *Council*, T-341/14, EU:T:2016:47, paragraph 50, and 28 January 2016, *Azarov* v *Council*, T-331/14, EU:T:2016:49, paragraph 55).

148 Admittedly, the opening of judicial proceedings under the Ukrainian Code of Criminal Procedure may constitute a factor that the Council can take into account in order to establish the existence of facts that justify the adoption of restrictive measures at Union level and to allow an assessment of the need to adopt such measures with a view to ensuring that action taken by the national authorities is effective. The fact remains that it is the Council that is responsible for the adoption of restrictive measures, and that the Council must decide independently whether it is necessary and appropriate to adopt such measures, in the light of the CFSP objectives, irrespective of whether a request for such measures is made by the authorities of the third country concerned and irrespective of other measures taken by those authorities at national level, provided that the Council relies on a solid factual basis, within the meaning of the relevant case-law (see paragraph 41 above).

149 Next, the applicant argues, first, that, contrary to what is stated in the letter of 30 December 2014, the evasion of taxes and other compulsory payments does not constitute misappropriation of public funds and, second, that there is no evidence for the charge, mentioned in that letter, that he had attempted to misappropriate public funds, and that charge, since it relates to an attempted offence, does not satisfy the listing criterion.

150 However, while it is to be regretted that the Council did not obtain more detailed information with respect to the charges brought with respect to the applicant, the arguments raised by him do not call into question either the existence of the investigation undertaken by the Ukrainian authorities or the reality of the acts that are the subject matter of the investigation undertaken by the Ukrainian authorities and which led the Council to adopt the restrictive measures at issue. Those arguments represent rather a challenge to matters of procedure, such as the absence of actual 'judicial proceedings', or the rebuttal of charges brought by those authorities with respect to the applicant, including the classification under Ukrainian criminal law of the acts he is accused of having committed, an issue which pertains to the question of whether the allegations are well founded.

151 In that regard, it was the task of the Council not to verify whether the investigations to which the applicant was subject were well founded, but only to verify whether the decision to freeze funds was well founded in the light of the evidence available (see, to that effect, judgment of 5 March 2015, *Ezz and Others* v *Council*, C-220/14 P, EU:C:2015:147, paragraph 77).

152 Last, the applicant argues that the Council should have undertaken a particularly rigorous review of the factual basis for the adoption of the restrictive measures in this case, taking into consideration the specific situation of Ukraine. He refers, in particular, to the following circumstances: (i) the fact that Ukraine is not a European Union Member State; (ii) the political motivation of the allegations made against him; (iii) the absence of progress in the criminal proceedings in question; (iv) the absence of any balanced or fair process of pre-charge decision-making in Ukraine; (v) the fact that the Ukrainian courts have established that some of the information sent by the Ukrainian authorities was false, and (vi) the fact that the Council had a period of time to adduce or verify the evidence and information to justify the applicant's re-designation.

153 Those arguments have already been rejected in the examination of the first plea in law (see paragraphs 111 to 116 above). In so far as they seek to establish that the Council committed a manifest error of assessment in that regard, those arguments are dealt with in the examination of the fifth plea in law below.

The fifth plea in law: manifest error of assessment

154 By his fifth plea in law, the applicant claims that the Council cannot properly rely solely on allegations that are submitted to it by a Member State or by a third country and that it is bound to examine itself the truth of the allegations submitted to it. The Council, he submits, therefore manifestly erred in its assessment by relying on unsupported allegations in order to include and maintain the applicant's name on the list

155 The Council disputes the applicant's arguments.

156 It is clear that, in the light of the case-law referred to in paragraph 41 above, the Council discharged the burden of proof upon it. When the March 2015 acts were adopted, the Council had in its possession more substantiated information concerning the acts classifiable as misappropriation of public funds which justified, according to the Ukrainians authorities, the opening of investigations with respect to the applicant. The Council became aware of those acts by means of, inter alia, the letter of 30 December 2014, which was sent to the applicant before the adoption of the March 2015 acts.

157 Further, since the applicant's listing was based on an act of the Ukrainian judicial authorities described in the letter of 30 December 2014, namely the opening of investigations into offences constituting misappropriation of public funds, the Council cannot be criticised for not having verified that information which came from the highest judicial authorities in the country and which confirmed the existence of those investigations was correct and substantiated (see paragraphs 111 to 116 above).

158 Moreover, it was the task of the Council not to verify whether the investigations to which the applicant was subject were well founded, but only to verify whether the decision to freeze funds was well founded in the light of those investigations (see, to that effect, judgment of 5 March 2015, *Ezz and Others* v *Council*, C-220/14 P, EU:C:2015:147, paragraph 77), which the Council did when it adopted the March 2015 acts, on the basis of evidence that confirmed the existence of criminal proceedings with respect to acts, described in detail, classifiable as misappropriation of public funds.

159 In the light of the foregoing, the fifth plea in law must be rejected.

The seventh plea in law: breach of the right to property

160 By his seventh plea in law, the applicant claims, first, that the restrictive measures were imposed on him without there being adequate safeguards to enable him to state his defence to the Council. Second, the adoption of those measures was contrary to the listing criterion. Third, the statement of reasons for listing did not cover the offence of effecting the illegal transfer of Ukrainian State funds outside Ukraine. Fourth, the Council failed to demonstrate that a total freeze of assets, as opposed to a partial freeze, was proportionate in this case, given that, in the first place, it was not apparent from the charges brought with respect to the applicant that the real property allegedly misappropriated had been sold or could no longer be otherwise recovered and, in the second place, that fund freezing was not justified to an extent that exceeded the value of the property allegedly misappropriated, as that value is indicated in the letter of 30 December 2014

161 The Council disputes the applicant's arguments.

162 It is clear, at the outset, that the first and second arguments were dealt with and rejected in the examination of the sixth and the fourth pleas in law, respectively.

163 The Court must also reject the applicant's third argument, that the reasons stated for the listing no longer include the offence of illegal transfer of Ukrainian State funds outside Ukraine. Although the illegal transfer of State funds is no longer included in the reasons stated for the listing, as amended by the March 2015 acts, it remains the case that the reference to the misappropriation of public funds, if well founded, is sufficient, in itself, to justify the restrictive measures against the applicant.

164 As regards the fourth argument, to the effect, in essence, that the restrictive measures are disproportionate, it must be recalled that the principle of proportionality, as one of the general principles of EU law, requires that measures adopted by the EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued by the legislation in question. Consequently, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see judgment of 27 February 2014, *Ezz and Others* v *Council*, T-256/11, EU:T:2014:93, paragraph 205 and the case-law cited).

165 In this case, it is true that the applicant's right to property is restricted, since he cannot, inter alia, make use of his funds situated within the European Union, unless he obtains specific authorisation, and that no funds or other economic resources can be made available, directly or indirectly, to him.

166 In that regard, at the outset, it must be recalled, as has been established in relation to the first and fourth pleas in law, that, first, the listing criterion, stated in Article 1(1) of Decision 2014/119, as amended by Decision 2015/143, is compatible with the CFSP objectives and, secondly, that the applicant's listing is compatible with the listing criterion (see paragraphs 89 to 117 and 135 to 145 above).

167 Next, the Court must also reject the applicant's argument that, on the one hand, there is no claim that the real property that was allegedly misappropriated has been sold or can no longer be otherwise recovered and, on the other, there is no justification for a freezing of funds that exceed the value of the assets allegedly misappropriated, as that value is indicated in the letter of 30 December 2014.

168 It is clear, as stated by the Council, that the figures mentioned in that letter are merely indicative of the value of the assets alleged to have been misappropriated and, further, any attempt to circumscribe the amount of the funds frozen would be extremely difficult, if not impossible, to implement in practice.

169 Moreover, the disadvantages caused by the restrictive measures are not disproportionate to the objectives pursued, taking into consideration, first, the fact that those measures are inherently temporary and reversible and do not therefore infringe the 'essential content' of the right to property, and, second, that they may be derogated from in order to cover basic needs, legal costs or even the extraordinary expenses of the persons concerned (see, to that effect, judgment of 27 February 2014, *Ezz and Others* v *Council*, T-256/11, EU:T:2014:93, paragraph 209).

170 The Court must therefore reject the seventh plea in law and, consequently, dismiss the action in its entirety, in so far as it seeks the annulment of the decision to maintain the applicant's listing by means of the March 2015 acts.

Maintaining the effects of Decision 2014/119

171 In the alternative, in the event of the annulment in part of the March 2014 acts, the Council asks the Court, for reasons of legal certainty, to declare that the effects of Decision 2014/119 should be maintained until the annulment in part of Regulation No 208/2014 takes effect. The Council also

requests that, in the event of the annulment in part of the March 2015 acts, the effects of Decision 2014/119, as amended, should be maintained until the partial annulment of Regulation No 208/2014, as amended by Implementing Regulation 2015/357, takes effect.

172 The applicant contests the Council's request.

173 It must be recalled that the Court has, on the one hand, annulled Decision 2014/119 and Regulation No 208/2014, in their initial versions, in so far as they concern the applicant, and, on the other, has dismissed the action in so far as it is directed against Regulation 2015/138 and the March 2015 acts, in so far as they concern the applicant.

174 In that regard, it must be observed that, as was stated in paragraph 134 above, Decision 2015/364 is not a mere confirmatory act but constitutes an autonomous decision, adopted by the Council following a regular review, as provided for in the third paragraph of Article 5 of Decision 2014/119. That being the case, while the annulment of the March 2014 acts, in so far as they concern the applicant, entails the annulment of the applicant's listing for the period prior to the entry into force of the March 2015 acts, it is not, on the other hand, capable of calling into question the lawfulness of that listing for the period subsequent to that entry into force.

175 Consequently, there is no need to give a ruling on the Council's request that the effects of Decision 2014/119 be maintained.

Costs

176 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.

177 In the present case, since the Council has been unsuccessful in relation to the claim for annulment made in the application, it must be ordered to pay the costs relating to that claim, in accordance with the form of order sought by the applicant. Since the applicant has been unsuccessful in relation to the claim for annulment made in the statement modifying the form of order sought, he must be ordered to pay the costs relating to that claim, in accordance with the form of order sought by the Council.

178 In addition, under Article 138(1) of the Rules of Procedure, the Member States and institutions which intervened in the proceedings are to bear their own costs. The Commission must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber, extended composition)

hereby:

1. **Annuls — until the entry into force of Council Decision (CFSP) 2015/364 of 5 March 2015 amending Decision 2014/119 and Council Implementing Regulation (EU) 2015/357 of 5 March 2015 implementing Regulation No 208/2014 — Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, as amended by Council Implementing Decision 2014/216/CFSP of 14 April 2014 implementing Decision 2014/119, and Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, as amended by Council Implementing Regulation (EU) No 381/2014 of 14 April 2014 implementing Regulation No 208/2014, in so far as Mr Oleksandr Viktorovych Yanukovych was named in the list of persons, entities and bodies subject to those restrictive measures;**

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

3. **Orders the Council of the European Union to bear its own costs and to pay the costs incurred by Mr Yanukovych, with respect to the claim for annulment stated in the initiating application;**

4. **Orders Mr Yanukovych to bear his own costs and to pay the costs incurred by the Council, with respect to the claim for annulment stated in the statement of modification of the form of order sought;**

5. **Orders the European Commission to bear its own costs.**

Berardis Czúcz Pelikánová

Popescu Buttigieg

Delivered in open court in Luxembourg on 15 September 2016.

[Signatures]

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