Date of acceptance : 21/02/2018

ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
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DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
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EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
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EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

LUXEMBOURG

-819890-

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

21 February 2018 *[1]

(Common foreign and security policy — Restrictive measures taken in view of the situation in Ukraine — Freezing of funds — List of persons, entities and bodies subject to the freezing of funds and economic resources — Maintenance of the applicant's name on the list — Duty to state reasons — Legal basis — Factual basis — Manifest error of assessment — Rights of defence — Right to property — Right to reputation — Proportionality — Protection of fundamental rights equivalent to that guaranteed in the European Union — Plea of illegality)

In Case T-731/15,

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

applicant,

v

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

defendant,

APPLICATION under Article 263 TFEU seeking the annulment of (i) Council Decision (CFSP) 2015/1781 of 5 October 2015 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2015 L 259, p. 23) and Council Implementing Regulation (EU) 2015/1777 of 5 October 2015 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in

* Language of the case: English.

[1] This judgment will be published by extract.

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

THE GENERAL COURT (Sixth Chamber),

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

Registrar: L. Grzegorczyk, Administrator,

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

gives the following

Judgment

Background to the dispute

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

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

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

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

'(1) On 20 February 2014, the Council condemned in the strongest terms all use of violence in Ukraine. It called for an immediate end to the violence in Ukraine, and full respect for human rights and fundamental freedoms. It called upon the Ukrainian Government to exercise maximum restraint and opposition leaders to distance themselves from those who resort to radical action, including violence.

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

5 Article 1(1) and (2) of Decision 2014/119 provided as follows:

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

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

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

7 In accordance with Decision 2014/119, Regulation No 208/2014 requires measures for the freezing of funds to be adopted and lays down the detailed rules governing the freezing of funds in terms which are essentially identical to those used in the decision.

8 The names of the persons covered by Decision 2014/119 and Regulation No 208/2014 appear on the list in the annex to Decision 2014/119 and in the identical list in Annex I to Regulation No 208/2014 ('the list') along with, in particular, the reasons for their inclusion on the list.

9 The applicant's name appeared on the list, together with the identifying information 'businessman, brother of Mr [Andriy Klyuyev]' and the following statement of reasons:

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

10 By application lodged at the Registry of the General Court on 12 May 2014, the applicant brought an action, registered as Case T-341/14, seeking the annulment of Decision 2014/119 and Regulation No 208/2014 in so far as they related to him.

11 On 29 January 2015, the Council adopted Decision (CFSP) 2015/143 amending Decision 2014/119 (OJ 2015 L 24, p. 16) and Regulation (EU) 2015/138 amending Regulation No 208/2014 (OJ 2015 L 24, p. 1).

12 Decision 2015/143 clarified, with effect from 31 January 2015, the criteria for the designation of the persons subject to the freezing of funds. In particular, Article 1(1) of Decision 2014/119 was replaced by the following:

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

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

a) for the misappropriation of Ukrainian State funds or assets, or being an accomplice thereto; or

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

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

14 Decision 2014/119 and Regulation No 208/2014 were subsequently amended by Council Decision (CFSP) 2015/364 of 5 March 2015 (OJ 2015 L 62, p. 25) and by Council Implementing Regulation (EU) 2015/357 of 5 March 2015 implementing Regulation No 208/2014 (OJ 2015 L 62, p. 1), respectively. Decision 2015/364 amended Article 5 of Decision 2014/119, extending the restrictive measures in respect of the applicant until 6 June 2015. Implementing Regulation 2015/357 therefore replaced Annex I to Regulation No 208/2014.

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

'Person subject to investigation by the Ukrainian authorities for involvement in the misappropriation of public funds or assets and in the abuse of public office as a public office-holder in order to procure an unjustified advantage for himself or for a third party and thereby causing a loss to Ukrainian public funds or assets. Person associated with a designated person [Andriy Petrovych Klyuyev] subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.'

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

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

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

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

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

[2] Confidential data omitted.

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

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

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

Events subsequent to the bringing of the present action

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

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

24 On 4 March 2016, the Council adopted Decision (CFSP) 2016/318 amending Decision 2014/119 (OJ 2016 L 60, p. 76) and Implementing Regulation (EU) 2016/311 implementing Regulation No 208/2014 (OJ 2016 L 60, p. 1, together 'the March 2016 Acts').

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

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

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

measures. The applicant submitted such observations to the Council by letter of 12 January 2017.

28 On 3 March 2017, the Council adopted Decision (CFSP) 2017/381 amending Decision 2014/119 (OJ 2017 L 58, p. 34) and Implementing Regulation (EU) 2017/374 implementing Regulation No 208/2014 (OJ 2017 L 58, p. 1, together 'the March 2017 Acts').

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

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

Procedure and forms of order sought

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

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

33 A reply was lodged on 29 April 2016.

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

35 A rejoinder was lodged on 27 June 2016.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- annul the October 2015, the March 2016 and the March 2017 Acts in so far as they relate to him;
- order the Council to pay the costs.

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

- dismiss the action;

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

– order the applicant to pay the costs.

Law

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

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

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

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

The fourth plea in law, alleging a failure to provide adequate reasons

54 The applicant maintains, in essence, that the statements of reasons concerning him set out in the October 2015 and March 2016 Acts fail to identify the actual and specific reasons for imposing restrictive measures on him. The statements of reasons merely replicate the language of the designation criterion set out in those acts, and are therefore merely general and stereotypical. The deficiencies in the statements of reasons were not cured either by the letters [*confidential*] of 26 June, 3 September and 1 December 2015, which were vague and imprecise. It therefore cannot be determined clearly which of the charges referred to in those letters the Council relied on when designating him. Such deficiencies are particularly

striking given the significant period of time that the Council had in which to formulate a fuller statement of reasons after the applicant's initial designation and in the light of the complaints raised by the applicant, particularly as there was no urgent risk of the dissipation of assets.

55 The Council disputes the applicant's arguments.

56 Under the second paragraph of Article 296 TFEU, 'legal acts shall state the reasons on which they are based ...'

57 Under Article 41(2)(c) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties, the right to good administration includes, inter alia, 'the obligation of the administration to give reasons for its decisions'.

58 It is settled case-law that the statement of reasons required by Article 296 TFEU and Article 41(2)(c) of the Charter must be appropriate to the nature of the contested measure 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 it 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).

59 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 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. Second, the degree of precision of the statement of 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).

60 In particular, the statement of reasons for an asset-freezing measure cannot, in principle, consist merely of a general, stereotypical formulation. Subject to the reservations set out in paragraph 59 above, such a measure must, on the contrary, identify the actual and specific reasons why the relevant rules are 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).

61 Finally, it must be borne in mind that the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. The

reasoning in a measure is a formal statement of the grounds on which that measure is based. If those grounds are vitiated by errors, the latter will vitiate the substantive legality of the measure, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect (see judgment of 5 November 2014, *Mayaleh* v *Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraph 96 and the case-law cited).

62 In the present case, it must be noted that the statement of reasons given for maintaining the applicant's name on the list at issue (see paragraphs 18 to 21 above) is specific and concrete and sets out the factors which constitute the basis for that decision, namely, first, that he was subject to criminal proceedings brought by the Ukrainian authorities for the misappropriation of public funds or assets and, second, that he is associated with a designated person, namely his brother, Mr Andriy Klyuyev, who is also subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.

63 In addition, the decision to maintain the restrictive measures in respect of the applicant was taken in a context known to the applicant, who had been informed, in the exchanges with the Council, inter alia of the letters [*confidential*] of 26 June, 3 September and 1 December 2015, on which the Council based its decision to maintain those measures (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). Those letters specify the authority responsible for the investigation, the case numbers of the criminal proceedings brought against the applicant, the dates on which those proceedings were opened, the alleged offences regarding the applicant, the other persons and bodies concerned and the amount of public funds allegedly misappropriated, the relevant articles of the Ukrainian Penal Code, the attachment of assets carried out and the fact that the applicant was informed in writing that he was a suspect.

64 As regards the applicant's argument relating to the allegedly stereotypical nature of the statement of reasons, it must be observed that, while the considerations within that statement are the same as those on the basis of which restrictive measures were imposed on the other natural persons who are included in the list, they are nonetheless designed to describe the particular situation of the applicant, who, like other individuals, has been, according to the Council, subject to judicial proceedings in connection with investigations concerning the misappropriation of Ukrainian public funds (see, to that effect, judgments of 27 February 2014, *Ezz and Others* v *Council*, T-256/11, EU:T:2014:93, paragraph 115, and of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraph 82).

65 As regards the applicant's other arguments, suffice it to note that they relate to the merits of the reasons set out in paragraph 20 above and therefore, in accordance with the case-law cited in paragraph 61 above, they must not be examined in the context of the present plea, but rather in that of the first and second pleas.

66 In the light of the foregoing considerations, it must be concluded that the October 2015 and March 2016 Acts state to the requisite legal standard the matters of fact and law on which, according to the Council, those acts are based.

67 In the light of the foregoing considerations, the fourth plea in law must be rejected.

The first plea in law, alleging the absence of a legal basis

68 The applicant claims that Article 29 TEU cannot constitute a valid legal basis for the maintenance of restrictive measures against him in the decisions falling within the scope of the common foreign and security policy (CSFP) that are at issue. Since Article 215(2) TFEU presupposes the existence of a valid CFSP decision if regulations are to be adopted on the basis of that provision, Implementing Regulations 2015/1777 and 2016/311 equally have no legal basis.

69 First of all, the applicant argues that the Council has failed to provide any evidence to show that he has undermined democracy, the rule of law or human rights in Ukraine or how the freezing of his funds might advance any of those objectives. Second, the Council disregarded the evidence indicating that the new regime in Ukraine is undermining democracy and the rule of law, and is flagrantly and systematically violating human rights, both with specific regard to the applicant and in general.

70 The Council disputes the applicant's arguments.

71 As a preliminary matter, the Court notes that the objectives of the EU Treaty concerning the CFSP are stated, in particular, in Article 21(2)(b) TEU, as follows:

'2. 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:

...

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law ...'

72 That objective was mentioned in recital 2 of Decision 2014/119, as set out in paragraph 4 above.

73 It must be verified whether the relevant criterion set out in paragraph 12 above, as applied to the applicant, corresponds to the objective, referred to in recital 2 of Decision 2014/119, of consolidating and supporting the rule of law in Ukraine.

74 In that respect, it must be noted that the case-law has established that objectives such as those mentioned in Article 21(2)(b) 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 public 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 (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 85; see also, to that effect, judgments of 27 February 2014, *Ezz and Others* v *Council*, T-256/11, EU:T:2014:93, paragraph 44, and of 14 April 2016, *Ben Ali* v *Council*, T-200/14, not published, EU:T:2016:216, paragraph 68).

75 In that context, it must be noted 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 to the EU Treaty and to the Charter. 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 ('the ECHR') (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 87).

76 The case-law of the Court of Justice and of the European Court of Human Rights ('the ECtHR'), and the work of the Council of Europe, through the offices of the European Commission for Democracy through Law ('the Venice Commission'), provide a non-exhaustive list of principles and standards which may fall within the concept of the rule of law. Those include the principles of legality, legal certainty and the prohibition of arbitrary exercise of power by the executive, independent and impartial courts, effective judicial review including respect for fundamental rights, and equality before the law (see, in that respect, the Rule of Law Checklist adopted by the Venice Commission at its 106th Plenary Session (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 that is 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)) (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 88).

77 Moreover, 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 that is within the scope of the rule of law (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 116).

78 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 (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 89).

79 It follows that the designation 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 judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 90 and the case-law cited).

80 Consequently, the designation criterion must be interpreted as not concerning, in abstract terms, any act classifiable as misappropriation of public funds, but rather as concerning acts classifiable as 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, prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law and, ultimately, to undermine respect for the rule of law in that country. As thus interpreted, that criterion is compatible with and proportionate to the relevant objectives of the EU Treaty (judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 91).

81 In the present case, as the Council correctly points out, the letters [*confidential*], on which it relied when reviewing the measures taken against the applicant, show that the applicant was the subject of investigations and then of criminal proceedings initiated by the Ukrainian authorities against him since he is suspected of having committed certain economic offences [*confidential*]. Furthermore, those offences have a wider context, in that a significant section of the former Ukrainian leadership – to which the applicant also belongs, as a member of parliament and brother of Mr Andriy Klyuyev, who was the former head of the Presidential Administration of Ukraine – 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, the prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before

the law (see, to that effect and by analogy, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraph 142).

82 Facilitating the recovery of those funds, together with that of those allegedly misappropriated by other persons designated by the restrictive measures at issue, falls within the objective of consolidating the rule of law in Ukraine. In that regard, it should be noted that the restrictive measures in question facilitate and complement the efforts by the authorities of that country in recovering misappropriated public funds. [*confidential*]. Since the measures taken by the [*confidential*] cannot affect the funds that the applicant holds within the European Union, the Council's decision to freeze funds reinforces the effectiveness of the initiative taken at national level.

83 It follows that, in accordance with the case-law cited in paragraph 74 above, taken as a whole and taking into consideration the applicant's position within the former Ukrainian leadership, the restrictive measures in question contribute, in an effective manner, to facilitating the prosecution of crimes of 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 prove successful, the punishment, through the courts of law, of alleged acts of corruption committed by members of the former regime in Ukraine, thereby contributing to the support of the rule of law in that country (see, by analogy, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraph 143).

84 The applicant's arguments in respect of his personal situation and the general situation in Ukraine, which broadly correspond to similar arguments developed in relation to the second plea in law, are assessed and rejected in the context of the second plea (see paragraphs 128, 133 to 144 below).

85 In the light of all of the foregoing, the first plea must be dismissed.

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

86 The applicant argues, in essence, that the Council made a manifest error of assessment in concluding that the relevant criterion was satisfied in his case. In that regard, he alleges that [*confidential*] statements, which the Council accepted without any prior examination and without taking account of the inaccuracies identified by the applicant, do not constitute a sufficiently solid factual basis for his designation, despite the fact that it was incumbent on the Council to establish the merits of the reasons for listing him, taking account of the observations he submitted and the exculpatory evidence he produced. According to the applicant, the Council should have undertaken additional checks and requested additional evidence from the third country authorities. This is all the more necessary when it is a question of extending restrictive measures. In addition, there is no evidence that the applicant is 'associated' in any way with his brother, Mr Andriy Klyuyev,

nor that the latter has been identified as responsible for misappropriation of public funds. The fact that he is a relative is not sufficient. In addition, the applicant emphasises that the Council has subjected him to a succession of unusually short restrictive measures, which indicates a concern on the Council's part as regards the evidence required to justify lengthier measures.

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

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

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

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

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

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

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

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

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

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

the Council of Europe, the Venice Commission again raised concerns as to the independence of the judiciary in Ukraine.

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

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

99 The Council disputes the applicant's arguments.

100 As a preliminary matter, the Court notes that, although the Council has a broad discretion when it comes to the general criteria to be taken into consideration for the purpose of adopting restrictive measures, the effectiveness of the judicial review guaranteed by Article 47 of the Charter requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to include or to maintain a person's name on the list of persons subject to restrictive measures, the Courts of the European Union are to ensure that that decision, which affects that person individually, is taken on a sufficiently solid factual basis. That entails a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, are substantiated by sufficiently specific and concrete evidence (see judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 36 and the case-law cited).

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

102 In that regard, it must be noted that the PGO is one of the highest Ukrainian judicial authorities. In that State, it acts as the public prosecutor's office in the administration of criminal justice and conducts pre-trial investigations in the

context of criminal proceedings relating, inter alia, to the misappropriation of public funds (see, to that effect, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraphs 45 and 111).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

– [*confidential*]

– [*confidential*]

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

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

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

120 In that regard, as far as concerns the applicant's argument that the relevant criterion was not satisfied since his name was entered onto the list not on the basis of judicial investigations or proceedings but of a pre-trial investigation, it should be noted that the effectiveness of a decision to freeze funds would be undermined if the adoption of restrictive measures were made conditional on the criminal convictions of persons suspected of having misappropriated public funds, since those persons would have enough time pending their conviction to transfer their assets to States having no form of cooperation with the authorities of the State of which they are nationals or in which they are resident (see, to that effect, judgment of 5 March 2015, *Ezz and Others* v *Council*, C-220/14 P, EU:C:2015:147, paragraph 71). Furthermore, where it is established that the person in question has, as is the case here, been the subject of investigations conducted, in connection

with criminal proceedings, by the Ukrainian judicial authorities, for acts of misappropriation of public funds, the precise stage actually reached by those proceedings is not a factor that could justify his exclusion from the category of persons in question (see, to that effect and by analogy, judgment of 14 April 2016, *Ben Ali* v *Council*, T-200/14, not published, EU:T:2016:216, paragraph 124).

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

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

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

124 As regards, in the first place, the legal opinions annexed to the application, the Court observes that, according to case-law, in order to assess the evidential value of a document, regard should be had to the credibility of the account it contains and regard should also be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable (see, to that effect, judgment of 27 September 2012, *Shell Petroleum and Others* v *Commission*, T-343/06, EU:T:2012:478, paragraph 161 and the case-law cited). In the present case, it should be noted, as the Council pointed out, that those opinions were drawn up for the purpose of the applicant's defence and, as

such, are of limited probative value. In any event, they cannot call into question the fact [*confidential*] that the applicant is the subject of a pre-trial investigation for the misappropriation of public funds. Those opinions predominately concern issues related to the merits of that investigation, which must, in principle, be assessed by the Ukrainian authorities.

125 In the second place, as regards the decision of the Oberlandesgericht Wien (Higher Regional Court, Vienna), it should be noted, as did the Council, that the decision did not concern national asset-freezing measures, but an order issued by the Vienna State Prosecutor's Office on 26 July 2014 for the disclosure of information on accounts and banking transactions as part of an investigation carried out against many persons, including the applicant, suspected of crimes or offences of money laundering, for the purposes of the Austrian criminal legislation and the law on penalties. That decision, concerning criminal offences other than those on which the restrictive measures at issue were based, addresses only incidentally the facts with which the investigation [*confidential*] is concerned [*confidential*]. It follows that such a decision, although handed down by a judicial body of a Member State, was not such as to raise legitimate doubts concerning the outcome of the investigation or the reliability of the information provided [*confidential*]. As regards the decision of the Public Prosecutor's Office in Vienna, dated 4 April 2016, announcing the discontinuance of the proceedings against the applicant, suffice it to observe that that letter is not relevant since it postdates the March 2016 Acts. The legality of a decision to freeze assets is to be assessed in the light of the information available to the Council when the decision was adopted (judgment of 28 May 2013, *Trabelsi and Others* v *Council*, T-187/11, EU:T:2013:273, paragraph 115).

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

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

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

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

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

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

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

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

134 In that regard, it must be observed that, despite a few clumsy expressions, the [*confidential*] letters always refer to ongoing criminal proceedings against the applicant, which leads to the conclusion that [*confidential*] the applicant is only suspected of having committed the offences in question and that he could be found guilty only if the criminal proceedings at issue result in a conviction, delivered by a court. Thus, read in context, the statements made [*confidential*] do not breach the principle of the presumption of innocence. In any event, even if such statements constituted breaches of that principle, it suffices to note that they cannot call into question the legality, still less the existence, of the criminal

proceedings which allowed the Council to consider that the applicant satisfied the relevant criterion, nor do they justify the need for the Council to seek to obtain further information [*confidential*].

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

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

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

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

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

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

141 As far as concerns the examination of the 'Law on purging the government' by the Venice Commission, the Court notes that the opinion of 16 December 2014, relied on by the applicant, is only an interim opinion of that commission, given that the Venice Commission did not have access, from the Ukrainian authorities, to all the information needed for its examination. However, as a result of these authorities engaging in a constructive dialogue for the improvement of the 'Law on purging the government' and, having since given access to the information needed by the Venice Commission to carry out its mission, the Venice Commission adopted a definitive opinion on that law on 19 June 2015. That opinion states that numerous exchanges of views took place and that the Ukrainian authorities proposed

amendments to the 'Law on purging the government'. The Venice Commission considers that that law's objectives of protecting society from persons capable of posing a threat to the new democratic regime and fighting against corruption, are legitimate. Although the Venice Commission points to certain areas for improvement and monitoring, it also highlights the improvements that have already been made to that law, notably following the adoption of its interim opinion.

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

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

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

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

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

The third plea in law, alleging infringement of the rights of the defence and of the right to effective judicial protection

147 The applicant claims that, by adopting the October 2015 and March 2016 Acts, the Council failed in its procedural obligations, the importance of which has been consistently emphasised in the case-law, to disclose to the person concerned the reasons for which he has been designated and all the evidence on the basis of which it decided to maintain his name on the list, to enable him effectively to put forward his observations prior to his name being maintained on the list and, where the person concerned has submitted observations, to examine carefully and impartially whether the reasons for his designation are well founded in the light of those observations and any exculpatory evidence provided with them.

148 More specifically, the applicant maintains, first of all, that at no stage has he been provided with serious, credible or concrete evidence that would justify the imposition of restrictive measures.

149 Next, there is no indication that the Council took into account the observations which he formulated, in particular those of 31 August 2015 preceding the adoption of the October 2015 Acts and those contained in the letters of 30 November 2015, 4 January and 3 February 2016 preceding the adoption of the March 2016 Acts. The Council just dismissed, summarily, the arguments which the applicant made in his letter of 7 March 2016, that is to say, after the adoption of the March 2016 Acts.

150 Lastly, the applicant submits, in his first statement of modification, that the Council failed to provide him with the actual grounds for his renewed designation in the March 2016 Acts. In the letter of 15 December 2015, the Council failed to identify the precise information [*confidential*] on which it relied in maintaining the restrictive measures against him. Consequently, the applicant was unable to formulate observations effectively.

151 The Council disputes the applicant's arguments.

152 As a preliminary point, the Court notes that respect for the rights of the defence, which is affirmed in Article 41(2) of the Charter, 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 1000).

153 In addition, it must be noted that, in the case of a subsequent decision to freeze funds by which the inclusion of the name of a person or entity already appearing on the list of persons or entities whose funds are frozen is maintained, the adoption of such a decision must, in principle, be preceded by notification of the incriminating evidence and by allowing the person or entity concerned an opportunity of being heard (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).

154 That right to a prior hearing applies where the Council has admitted new evidence against the person who is subject to the restrictive measures and who is maintained on the list at issue (see, to that effect, judgment of 28 July 2016, *Tomana and Others* v *Council and Commission*, C-330/15 P, not published, EU:C:2016:601, paragraph 67).

155 In the present case, it must be noted that Article 2(2) and (3) of Decision 2014/119 and Article 14(2) and (3) of Regulation No 208/2014 provide that the Council is to communicate its decision, including the grounds for listing, to the natural or legal person, entity or body concerned, either directly, if the address is known, or by the publication of a notice, providing the opportunity to present observations. Where observations are submitted, or where substantial new evidence is presented, the Council shall review its decision and inform the natural or legal person, entity or body accordingly. Moreover, Article 5(3) of Decision 2014/119 provides that that decision is to be kept under constant review, and Article 14(4) of Regulation No 208/2014 that the list is to be reviewed at regular intervals and at least every twelve months. The October 2015 and March 2016 Acts are based on those initial acts, namely Decision 2014/119 and Regulation No 208/2014, and extend the freezing of the funds following the review by the Council of the list in question.

156 As regards the right to be heard, it must be noted, bearing in mind the principle in the case-law referred to in paragraph 154 above, that the Council, when it maintained the applicant's name on the list at issue, relied on new evidence, which had not already been notified to the applicant following his initial designation.

157 First, it must be observed that the reasons stated for the subsequent acts are not the same as those given for the initial inclusion of the applicant's name (see paragraphs 9 and 20 above). In addition, the Council relied on new evidence, namely the letters [*confidential*] of 26 June, 3 September and 1 December 2015. Accordingly, the Council was required to hear the applicant before adopting the October 2015 and March 2016 Acts.

158 First of all, as regards the October 2015 Acts, it can be seen from the case file that, by letter of 31 July 2015, that is to say before the adoption of the October 2015 Acts (see paragraph 18 above), the Council informed the applicant that it intended to maintain the restrictive measures against him. In that letter, the Council asserted that it considered it appropriate to maintain the restrictive measures against the applicant in view of the fact that [*confidential*] had confirmed the existence of ongoing criminal proceedings concerning him and that it had sent to him [*confidential*]. The Council thus referred to the letter of 26 June 2015 as evidence justifying maintaining the applicant's name on the list at issue, which it communicated to the applicant by the letter of 31 July 2015. It also gave the applicant the opportunity to submit observations.

159 By letter of 31 August 2015, the applicant wrote to the Council, presenting it with additional observations in support of his request that the inclusion of his name on the list be reconsidered.

160 After the adoption of the October 2015 Acts, by letter of 6 October 2015, the Council responded to the applicant's observations in the letter of 31 August 2015, explaining that the proceedings were still ongoing and that it could rely on that information in maintaining the measures (see paragraph 21 above). In addition, the Council forwarded the October 2015 Acts to him and gave him the opportunity to submit further observations. The Council also enclosed in that letter the letter [*confidential*] of 3 September 2015.

161 In the light of those circumstances, it must be held that the Council discharged its obligations concerning observance of the applicant's rights of defence during the procedure culminating in the adoption of the October 2015 Acts. The applicant had access to the information and the evidence used to support the decision to maintain the restrictive measures against him prior to their adoption and he was able to submit observations to the Council in a timely manner. In addition, contrary to his assertions, it is clear from the case file that the Council took account of those observations, by providing a response which, although lacking in detail, contained substantive information, thus demonstrating that it had examined those observations. It must also be noted that the applicant was able to bring the present action by invoking relevant matters in the file in support of his arguments; the complaint alleging a breach of his right to effective judicial protection may therefore also be rejected.

162 Second, a similar conclusion may be reached as regards the March 2016 Acts. It can be seen from the file that, before it adopted those acts, the Council sent the applicant, by letter of 15 December 2015, the [*confidential*] letter of 1 December 2015 (see paragraph 22 above). In that letter the Council reminded the applicant of the time limit within which he might submit observations on the annual review of the restrictive measures.

163 The applicant submitted such observations to the Council by letters of 4 January and 3 February 2016. It is true that the Council did not respond to those letters

before the adoption of the March 2016 Acts. However, it should be observed that, since the grounds for maintaining the restrictive measures concerning the applicant are the same as those in the October 2015 Acts, and the new evidence, namely the letter [*confidential*] of 1 December 2015, was submitted to him prior to the adoption of the decision to maintain his name on the list at issue, the applicant was able to submit relevant observations on those grounds.

164 In addition, it must be noted that the Council, by letter of 7 March 2016, that is to say almost immediately after the adoption of the decision to maintain the applicant's name on the list at issue, not only informed him of that decision, but also responded to the applicant's observations set out in his letters of 30 November 2015 and 4 January, 3 and 10 February 2016. In that respect, it rejected certain arguments of the applicant, asserting, inter alia, that the letters [*confidential*] justified maintaining his name on the list, and considered the opinions the applicant enclosed with those letters, first, as irrelevant, inasmuch as they cannot be substituted for the assessment made by the Ukrainian judicial authorities, and, second, as having mitigated probative value, inasmuch as they were given at the request of the applicant. By that letter, the Council also forwarded the applicant the March 2016 Acts and informed him of the opportunity to submit further observations.

165 Third, the argument that the Council did not identify the specific matters [*confidential*] on which it relied in deciding to maintain the restrictive measures as regards the applicant is not well founded. It is clear from that letter that, of the [*confidential*] sets of criminal proceedings brought against the applicant, the proceedings relating, in particular, to the misappropriation of public funds [*confidential*] justified maintaining the restrictive measures regarding the applicant. Moreover, in so far as such an argument must be understood as concerning, in essence, a manifest error of assessment by the Council or an infringement of the obligation to state reasons, suffice it to note that those questions have been dealt with in the context of the second and fourth pleas in law, which have been held to be unfounded.

166 Having regard to the foregoing considerations, the third plea in law must be rejected.

The fifth plea in law, alleging infringement of the right to property and of the right to reputation

167 The applicant submits that the restrictive measures taken against him in the October 2015 and March 2016 Acts constitute an unjustified and disproportionate restriction of his fundamental rights, namely the right to property and the right to reputation.

168 First of all, he maintains that the restrictive measures were imposed without any procedural safeguards enabling him to put his case effectively to the Council.

169 Next, the applicant alleges that the measures have had a far-reaching impact on him, both on his own business and that of his family, and on his reputation and goodwill worldwide.

170 Lastly, the applicant alleges that the Council has failed to demonstrate that the freezing of his assets was justified by any legitimate aim, still less that it is proportionate to any such aim. The applicant emphasises in this connection that the allegations concerning him no longer mention any illegal transfer of funds outside Ukraine. The restrictive measures therefore serve no purpose and are disproportionate, since they cannot assist in the recovery of any misappropriated funds and there is no indication in the case file that funds had been transferred outside Ukraine. The applicant adds that it cannot be inferred that the freezing of all his assets in the European Union was necessary or was the least onerous option available to the Council; it did not examine whether a more limited asset freeze might be sufficient to satisfy any claims for the recovery of misappropriated funds, particularly since the evidence specified the particular sums claimed and the Council had a considerable amount of time to enquire into those amounts.

171 The Council disputes the applicant's arguments.

172 Article 17(1) of the Charter states:

'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.'

173 Article 52(1) of the Charter states that any limitation on the exercise of the rights and freedoms recognised by that Charter must be provided for by law and respect the essence of those rights and freedoms and that, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

174 It follows from the case-law that a freezing measure undeniably entails a restriction of the exercise of the right to property (see, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 358).

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

176 However, the right to property, as protected by Article 17(1) of the Charter, does not constitute an unfettered prerogative and may therefore be limited, under the conditions laid down in Article 52(1) of the Charter (see judgment of 27 February

2014, *Ezz and Others* v *Council*, T-256/11, EU:T:2014:93, paragraph 195 and the case-law cited).

177 Consequently, in order to comply with EU law, a limitation on the exercise of the right to property must satisfy three conditions.

178 First, the limitation must be 'provided for by law'. In other words, the measure must have a legal basis. Second, it must refer to an objective of general interest, recognised as such by the European Union. Those objectives include those pursued under the CFSP and referred to in Article 21(2) TEU. Third, the limitation may not be excessive. It must be necessary and proportionate to the end pursued. In addition, the 'essence', that is, the substance, of the right or freedom at issue, must not be impaired (see judgment of 27 February 2014, *Ezz and Others* v *Council*, T-256/11, EU:T:2014:93, paragraphs 197 to 200 and the case-law cited).

179 As regards the first condition, the Court observes that the limitation is 'provided for by law', since maintaining the applicant's name on the list corresponds to the relevant criterion, which the October 2015 and March 2016 Acts have not altered, and which refers in particular to the existence of an investigation brought against a person accused of misappropriation of public funds.

180 As regards the second condition, it must be noted that, as is apparent from the examination of the first plea in law, the October 2015 and March 2016 Acts comply with the objective, referred to in Article 21(2)(b) TEU, of 'consolidat[ing] and support[ing] the rule of law'. In so doing, those acts form part of a policy of supporting the Ukrainian authorities, intended to promote both the economic and political stability of Ukraine and, in particular, to assist the authorities of that country in their fight against the misappropriation of public funds.

181 As regards the third condition, 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 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraph 164 and the case-law cited).

182 In accordance with the case-law, the disadvantages caused by the restrictive measures are not disproportionate to the objectives pursued, taking into consideration, first, that those measures are inherently temporary and reversible and do not therefore infringe the 'essence' 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 judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraph 169 and the case-law cited).

183 Moreover, the restrictive measures at issue effectively assist in establishing the misappropriation of public funds, in addition to facilitating the recovery of those funds in Ukraine, and the applicant has not put forward any argument capable of demonstrating that those measures are not appropriate or that there are other less onerous measures capable of achieving the aims pursued.

184 In that respect, as regards the applicant's argument that a freezing of funds is justified only up to the value of the assets allegedly misappropriated, as established from the information available to, or which should have been available to, the Council, it must be noted that, first, the amounts mentioned in the letters of 3 September and 1 December 2015 are merely indicative of the value of the assets alleged to have been misappropriated and, second, any attempt to circumscribe the amount of the funds frozen would be extremely difficult, if not impossible, to implement in practice (see, to that effect, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraph 168).

185 As regards the applicant's argument that the grounds for maintaining his name on the list no longer referred to the illegal transfer of public funds outside of Ukraine, the Court observes that, whilst that factor is no longer mentioned in the reasons stated for the listing, as amended by the subsequent acts, it remains the case that the reference to the misappropriation of public funds, if it is well founded, is sufficient to justify the restrictive measures against the applicant (see, to that effect, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, EU:T:2016:497, paragraph 163).

186 Finally, as regards the arguments alleging breach of the right to reputation, it must be held that the adoption, by the Council, of the restrictive measures against the applicant does not constitute a disproportionate interference with his reputation.

187 According to settled case-law, like the right to property, the right to reputation is not an absolute right and its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union. Thus, the importance of the aims pursued by the restrictive measures at issue is such as to justify negative consequences, even of a substantial nature, for the reputation of the persons or entities concerned (see judgment of 30 June 2016, *Al Matri* v *Council*, T-545/13, not published, EU:T:2016:376, paragraph 168 and the case-law cited).

188 In the present case, it has been established, in the context of the examination of the second plea in law, that the applicant is the subject of criminal proceedings for offences concerning the misappropriation of funds and that his situation corresponds to the relevant criterion, as interpreted in the context of the examination of the first plea in law.

189 In addition, the grounds for the applicant's designation do not mention the specific circumstances of the acts to which those proceedings relate, but merely mention the Ukrainian authorities' classification of that conduct as criminal, and it must be

noted in that respect that the letters [*confidential*] remain confidential. Furthermore, the Council took care to mention, in those grounds, that criminal proceedings were ongoing against the applicant, with the result that it is clear from those grounds that the applicant has not yet formally been found guilty.

190 In any event, in so far as the maintenance of those measures as regards the applicant may affect his reputation, it must be stated that such effects are not clearly disproportionate in comparison with the objectives pursued (see paragraphs 180 to 184 above).

191 Consequently, the fifth plea in law must be rejected in its entirety.

The sixth plea in law, alleging infringement of rights under Article 6 TEU, read together with Articles 2 and 3 TEU, and under Articles 47 and 48 of the Charter

192 By this plea in law, which he describes as a new plea, the applicant argues, in connection with his first statement of modification, that the Council should have verified whether the Ukrainian authorities, in adopting the decisions which formed the basis for the maintenance of the restrictive measures against him by means of the March 2016 Acts, ensured protection of his fundamental rights equivalent to that guaranteed under EU law, in particular, Article 6 TEU, read together with Articles 2 and 3 TEU, and Articles 47 and 48 of the Charter. However, the Council wrongly relied on an irrebuttable presumption that Ukraine observes fundamental rights, even though such a presumption cannot even be applied with regard to the Member States. In that context, the applicant refers to the judgments of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865), and of 16 October 2014, *LTTE* v *Council* (T-208/11 and T-508/11, EU:T:2014:885.

193 The Council disputes the applicant's arguments.

194 The Court points out that the applicant's arguments are based on false premisses.

195 In the first place, as regards the judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865), inter alia in paragraphs 104 to 106 of that judgment, the Court of Justice held, in essence, that EU law precludes the application, by the Member States, of an irrebuttable presumption that the Member State responsible for examining an asylum application for the purpose of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) observed the fundamental rights of the European Union. Thus, according to the Court of Justice, that presumption may be rebutted if it is established that, because of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State, an asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

196 However, it must be noted that the principles set out in the judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865), are not applicable in the present case, since the applicant has not demonstrated the existence of systemic deficiencies affecting the Ukrainian institutions, in particular the judicial institutions.

197 In the second place, the approach taken by the General Court in the case which gave rise to the judgment of 16 October 2014, *LTTE* v *Council* (T-208/11 and T-508/11, EU:T:2014:885) cannot be transposed to the present case.

198 In particular, in the case that gave rise to the judgment of 16 October 2014, *LTTE* v *Council* (T-208/11 and T-508/11, EU:T:2014:885), Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93), which established a mechanism allowing the Council to include a person on a list of those whose funds are to be frozen on the basis of a decision taken by a national authority, where appropriate, of a third country, laid down a criterion for the designation of the persons targeted by the restrictive measures adopted by the Council which read as follows:

'The list ... shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list.'

199 In the present case, the existence of a prior decision by the Ukrainian authorities is not required by the relevant criterion in order for restrictive measures to be adopted, since the legal proceedings opened by those authorities constitute only the factual basis on which those measures are based. The relevant criterion merely refers to persons 'identified as responsible for the misappropriation of Ukrainian State funds'.

200 In that respect, it must be noted that the wording of the relevant criterion is closer to that of the criterion at issue in the case that gave rise to the judgment of 27 February 2014, *Ezz and Others* v *Council* (T-256/11, EU:T:2014:93). In particular, in paragraph 66 of that judgment, the Court held that that criterion included persons being prosecuted for the 'misappropriation of ... State funds', and it did so without examining whether the legal system of the State in question, namely the Arab Republic of Egypt, offered legal protection comparable to that offered in the European Union.

201 In any event, it must be noted that there is a major difference between restrictive measures at issue in the case that gave rise to the judgment of 16 October 2014,

LTTE v *Council* (T-208/11 and T-508/11, EU:T:2014:885), which concerned the fight against terrorism, and those which, as in the present case, formed part of the cooperation between the European Union and the new authorities of a third State, namely Ukraine.

202 Indeed, the fight against terrorism, to which the Council contributes by imposing restrictive measures on certain persons or entities, does not necessarily form part of cooperation with the authorities of a third State which has undergone a regime change and which the Council has decided to support. The measures at issue in the present case, however, did form part of such cooperation, as did the measures at issue in the case which gave rise to the judgments of 5 March 2015, *Ezz and Others* v *Council* (C-220/14 P, EU:C:2015:147) and of 27 February 2014, *Ezz and Others* v *Council*, (T-256/11, EU:T:2014:93).

203 Thus, if the Council's highly political choice to cooperate with the new Ukrainian authorities — which it considers to be trustworthy — in order to allow them, inter alia, to recover possibly misappropriated public funds 'with a view to consolidating and supporting the rule of law' in Ukraine were subject to the condition that, even though Ukraine was a member of the Council of Europe and had ratified the ECHR, the Ukrainian State had to ensure, immediately after the regime change, a level of protection of fundamental rights equivalent to that offered by the European Union and its Member States, that would essentially undermine the Council's broad discretion in defining the general criteria delineating the category of persons liable to be the subject of restrictive measures intended to support those new authorities (see paragraph 137 above).

204 In exercising that broad discretion, the Council must therefore be free to take the view that, following the regime change, the Ukrainian authorities should be supported in so far as they improve democracy and respect for the rule of law in Ukraine as compared with the situation that previously prevailed in that country and that one of the means of consolidating and supporting the rule of law consists in freezing the assets of persons identified as being responsible for the misappropriation of funds belonging to the Ukrainian State, including — in accordance with the relevant criterion — persons who are the subject of an investigation by the Ukrainian authorities for misappropriation of public funds, or being an accomplice thereto, or for abuse of office, or being an accomplice thereto.

205 Consequently, only if the Council's political decision to support the new Ukrainian regime, including by way of cooperation in the form of the restrictive measures at issue, proved to be manifestly erroneous, in particular because fundamental rights are being systematically violated in that country following the change of regime, could any inconsistency between the protection of fundamental rights in Ukraine and that in place in the European Union have a bearing on the legality of maintaining those measures against the applicant. It follows from the examination of the first and second pleas in law that that is not the case here.

206 Accordingly, the sixth plea in law must be rejected.

The plea of illegality

207 In the alternative, the applicant raises a plea of illegality, under Article 277 TFEU, concerning the relevant criterion. He maintains that that criterion would lack a proper legal basis if it were to be interpreted as covering a person who is under investigation by the Ukrainian authorities, irrespective of whether there is a judicial decision or whether there are judicial proceedings, or any holder of public office who has committed an abuse of office, irrespective of the existence of an allegation of misappropriation of public funds. In his reply, the applicant disputes the Council's argument that the designation criterion should cover all persons subject to pre-trial investigation, since that would mean conferring on a Ukrainian authority, [*confidential*], the power to select the persons to be targeted by the restrictive measures.

208 The Council disputes the applicant's arguments.

209 As a preliminary point, the Court observes that, in accordance with the conclusions reached in respect of the first plea in law, the October 2015 and March 2016 Acts do not lack a proper legal basis.

210 In addition, it has been noted (see paragraph 80 above) that the relevant criterion must be interpreted as not concerning, in abstract terms, any act classifiable as misappropriation of public funds, but rather as concerning acts classifiable as 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, prohibition of arbitrary exercise of power by the executive, effective judicial review and equality before the law and, ultimately, to undermine respect for the rule of law in that country. Thus interpreted, that criterion is compatible with and proportionate to the relevant objectives of the EU Treaty.

211 Furthermore, it must be borne in mind that the EU judicature has held that the identification of a person as being responsible for an offence does not necessarily imply that he has been convicted of the offence (see, to that effect, judgment of 5 March 2015, *Ezz and Others* v *Council*, C-220/14 P, EU:C:2015:147, paragraphs 71 and 72) and 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 it is not for that person to adduce evidence of the negative, namely that those grounds 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, paragraph 121, and of 28 November 2013, *Council* v *Fulmen and Mahmoudian*, C-280/12 P, EU:C:2013:775, paragraph 66).

212 In this case, the relevant criterion simply 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 public funds as a factor which may justify, in some cases, the adoption of restrictive measures, without prejudice to the fact that, in the light of the case-law cited in paragraph 211 above and the interpretation of the listing criterion set out in particular in paragraph 210 above, the mere fact that a person is the subject of an investigation relating to offences consisting of misappropriation of funds cannot, in itself, justify action by the Council under Articles 21 and 29 TEU (see, to that effect, judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 100).

213 In view of the foregoing, it must be concluded that the relevant criterion is compatible with the objectives of the CFSP, as stated in Article 21 TEU, in so far as it covers persons identified as being responsible for a misappropriation of Ukrainian public funds that is capable of undermining the rule of law in Ukraine (see, to that effect, judgment of 15 September 2016, *Klyuyev* v *Council*, T-340/14, EU:T:2016:496, paragraph 101).

214 The applicant's plea of illegality must therefore be rejected.

215 In the light of all the foregoing considerations, the action must be dismissed in its entirety in so far as it seeks the annulment of the decision to maintain the applicant's name on the list in the October 2015 and March 2016 Acts.

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

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

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

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

219 After pointing out that the grounds relied on in support of maintaining the applicant's name on the list were identical to those contained in the October 2015 and March 2016 Acts, and that, in the letter of 6 March 2017 justifying the renewal of the designation, the Council had confirmed that it had relied solely on

[*confidential*], the applicant claims that [*confidential*] does not fulfil the designation criteria for two reasons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

238 It should be recalled that, in the present case, there is a decision maintaining the name of a person on the list and that, in those circumstances, when observations are made by the individual concerned on the summary of reasons, the Council is under an obligation to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those observations and any exculpatory evidence provided with those observations, and that obligation flows from the

obligation to observe the principle of good administration enshrined in Article 41 of the Charter (see paragraph 103 above).

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

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

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

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

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

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

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

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

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

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

249 Fourth, in the two letters mentioned in paragraphs 246 and 247 above, [*confidential*] did not indicate that [*confidential*] was suspended, of which the Council had been informed by the applicant in the observations it had submitted

on 12 January 2017 for the purposes of the annual review of the measures concerning him.

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

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

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

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

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

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

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

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

Maintaining the effects of Decision 2017/381

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

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

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

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

262 Finally, as regards the temporal effects of the annulment of Decision 2017/381, it must be recalled that, under the second paragraph of Article 264 TFEU, the Court

may, if it considers it necessary, state which of the effects of the act which it has declared void are to be considered definitive.

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

Costs

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

265 In the present case, since the applicant has been unsuccessful in relation to the claims for annulment made in the application and in the first statement of modification, he must be ordered to pay the costs relating to those claims, in accordance with the form of order sought by the Council. Since the Council has been unsuccessful in relation to the claim for annulment in part of the March 2017 Acts made in the second statement of modification, it must be ordered to pay the costs relating to that claim, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Annuls Council Decision (CFSP) 2017/381 of 3 March 2017 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine and Council Implementing Regulation (EU) 2017/374 of 3 March 2017 implementing Regulation (EU) No 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine in so far as Mr Sergiy Klyuyev's name was retained on the list of persons, entities and bodies subject to those restrictive measures;**

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

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

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

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

Berardis Spielmann Csehi

Delivered in open court in Luxembourg on 21 February 2018.

E. Coulon G. Berardis

Registrar President

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