Council of the
European Union

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NOTE

From :	General Secretariat of the Council
To :	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 23/c/03/14

Delegations will find attached:

Attachments to annex 3 of document 11561/14 (confirmatory application No 23/c/03/14)

TO THE PRESIDENT AND MEMBERS OF THE GENERAL COURT OF THE EUROPEAN UNION

Lodged on 14 May 2014 pursuant to Articles 263 and 275 of the Treaty on the Functioning of the European Union by

VIKTOR FEDOROVYCH YANUKOVYCH

Applicant

of Ap. 13, Bld. 5, 15 Obolonska Naberezhna, Kyiv, Ukraine represented by Tom Beazley QC of the Bar of England and Wales and by Joseph Hage Aaronson LLP, law firm registered in England & Wales with registered number OC382231 authorised and regulated by the Solicitors Regulation Authority, with an address for service at Joseph Hage Aaronson LLP, 7th floor, 280 High Holborn, London, WC1V 7EE, telephone: +44 (0)20 7851 8888, fax: +44 (0)20 7117 1838, email: tbeazley@jha.com (copy to manderson@jha.com and eeccles@jha.com).

v.

COUNCIL OF THE EUROPEAN UNION

Defendant

Application for annulment in respect of Council Decision 2014/119/CFSP of 5 March 2014, as amended, and Council Regulation (EU) 208/2014 of 5 March 2014, as amended, insofar as they apply to the Applicant.

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I. INTRODUCTION

1. The Applicant applies ("the Application"), pursuant to Articles 263 and 275 of the Treaty on the Functioning of the European Union (the **"TFEU"**), to annul (a) Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (**"the Decision"**) as amended by Council Decision 2014/216/CFSP of 14 April 2014 implementing Decision 2014/119/CFSP, and (b) Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (**"the Regulation"**) as amended by Council Regulation (EU) No 381/2014 of 14 April 2014 implementing Regulation No 208/2014, insofar as they apply to the Applicant. Nothing in this Application or its associated evidence should be taken as accepting that the so-called "*interim regime*" in parts of Ukraine, or any elements of it, is in any way legitimate. That so-called "*interim regime*" is illegitimate. It unlawfully took whatever power it may have from time to time from the democratically elected President and Government of Ukraine by the use and threat of illegal force, and by an illegal and unconstitutional coup. References in this Application to the "*interim regime*", "*interim Government*" or "*interim President and Government*" of Ukraine are without prejudice to the Applicant's position that he is the extant and democratically elected President, and that his Government is the extant

and democratically elected Government, of Ukraine. If the Council of the European Union (**"the Council"**) in making the Decision or the Regulation relied in any way on the authority or legitimacy of the so-called "*interim regime*" or any person or entity purporting to act for it, then such reliance was misplaced and wrong. Further, nothing in his Application or its associated evidence is or is to be treated as, a waiver of the Applicant's immunity referred to below.

2. The Decision and the Regulation (as amended) are at **Annexes A.1, A.2, A.3** and **A.4** respectively to this Application. The Application is supported by the evidence contained in the Annexes, including the Applicant's witness statement (**Annex A.5**) and such further evidence as is annexed to that document.

3. By this Application the Applicant seeks the annulment of the Decision and the Regulation insofar as they relate to him. The grounds for annulment are that, in including the Applicant in those measures, the Council has failed to act in accordance with its legal obligations in the following ways[1] (which are developed more fully below).

3.1. The Council lacked a proper legal basis for the Decision and the Regulation (§§18 to 30 below);

3.2. The Council misused its power (§§31 to 34 below);

3.3. The Council failed to state reasons (§§35 to 42 below);

3.4. The Council failed to fulfil criteria (§§43 to 49 below);

3.5. The Council made manifest errors of assessment (§§50 to 53 below);

3.6. The Applicant's defence rights have been breached and/or he has been denied effective judicial protection (§§54 to 64 below); and

3.7. The Applicant's right to property has been breached (§§65 to 73 below).

I. PARTIES

Applicant: Viktor Fedorovych Yanukovych

[1] For the avoidance of doubt, the Applicant relies on all arguments raised in this Application, regardless of the context in which they appear.

Address:	Ap. 13, Bld. 5, 15 Obolonska Naberezhna, Kyiv, Ukraine
Representatives:	Tom Beazley QC and Joseph Hage Aaronson LLP of 7th Floor, 280 High Holborn, London WC1V 7EE, United Kingdom
Defendant:	Council of the European Union

II. SUBJECT-MATTER

A. Background to the Decision and the Regulation, and the timing of the Application

4. The Decision and the Regulation, each dated 5 March 2014, were published in the Official Journal of the European Union on 6 March 2014. The background to the Decision (**Annex A.1, page 1**) and the Regulation (**Annex A.3, page 1**) are mentioned in some detail at §§27 - 28 and 34 of this Application. While the recitals to the Decision and the Regulation identify "*human rights violations*" and "*the misappropriation of Ukrainian State funds*" as the purported bases for these instruments, the Applicant does not accept that this is so. The Applicant believes and will submit[2] that the real reason for the imposition of sanctions was to advance the Council's agenda of closer political integration between the EU and Ukraine by undermining the position of the democratically elected Government and the Applicant's position that had not endorsed this vision.

5. Article 263 provides, "*the proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be*". The Applicant does not consider or believe that he was notified personally of the Decision and the Regulation, but cannot risk that such might be alleged against him. Accordingly, the Applicant is instituting this Application within that two month period from the publication of the measures as extended by 10 days on account of distance (pursuant to Article 102 of the General Court's Rules of Procedure), and thus in time whether he was personally notified or not.

B. The Decision

6. The Decision states that the Council of the EU,

> *"Having regard to the Treaty on European Union, and in particular Article 29 thereof*[3]*,*
> *Whereas:*
> *(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] See the Applicant's statement, particularly §17-20, 25-26 at **Annex A.5 pages 5-7**. The Applicant has also by his said statement verified all the facts and matters set out in this application.
[3] *"The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions."*

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

(3) Further action by the Union is needed in order to implement certain measures,

HAS ADOPTED THIS DECISION:

Article 1

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."* **(Annex A.1, page 1)**

7. The Annex to the Decision lists the Applicant, identified as *"born on 9 July 1950, former President of Ukraine"*, and provides the following "*statement of reasons*": *"Person subject to criminal proceedings in Ukraine to investigate crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine"* **(Annex A.1, page 3)**. The date of listing is stated as "*6.3.2014*" **(Annex A.1, page 3)**.

C. The Regulation

8. The Regulation states that the Council of the EU:

"Having regard to the Treaty on the Functioning of the European Union, and in particular Article 215[4] *thereof,*

Having regard to [the Decision],

Having regard to the joint proposal of the High Representative of the Union for Foreign Affairs and Security Policy and of the European Commission,

Whereas:

....

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[4] Article 215:

"1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards." (emphasis added)

(2) On 3 March 2014, the Council agreed to focus restrictive measures on the freezing and recovery of assets of persons identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations in Ukraine,

(3) On 5 March 2014, the Council adopted [the Decision]

....

Article 2

*1. All funds and economic resources belonging to, owned, held or controlled by any natural or legal person, entity or body as listed in Annex I shall be frozen."***(Annex A.3, page 1)**.

9. The Annex to the Regulation lists the Applicant, identified as *"born on 9 July 1950, former President of Ukraine"*, and provides the following "*statement of reasons*": *"Person subject to criminal proceedings in Ukraine to investigate crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine"***(Annex A.3, page 6)**. The date of listing is stated as "*6.3.2014*" **(Annex A.3, page 6)**.

D. Action for annulment (Articles 263 and 275 TFEU)

10. This Application is brought for the annulment of the Decision and the Regulation, insofar as they apply to the Applicant, and pursuant to the jurisdiction of the General Court to hear and to determine at first instance actions or proceedings referred to in Articles 263 and 275 TFEU (see Article 256 TFEU).[5]

11. It follows, from Articles 263 and 275, that the General Court has jurisdiction to review the legality of **both** the Decision and the Regulation, which are of direct and individual concern to the Applicant. The Court's jurisdiction to review the legality of the Decision arises pursuant to Article 275 TFEU, since the Decision provides for restrictive measures against the Applicant, and was stated to be adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union (the **"TEU"**) (see the preamble to the Decision which refers to Article 29, which is part of Chapter 2, Title V TEU). The Court's jurisdiction to review the legality of the Regulation arises pursuant to Article 263 TFEU, since it is a legislative act/act of the Council intended to produce legal effects vis-à-vis third parties.

III. FORM OF ORDER SOUGHT

12. As mentioned above, the Applicant seeks the annulment, insofar as they apply to the Applicant, and on an expedited basis, of:

    12.1. the Decision; and

    12.2. the Regulation.

[5] For the avoidance of doubt: although by this application the Applicant seeks only the annulment of the Decision and the Regulation (insofar as they apply to the Applicant), and costs, the Applicant fully reserves his right to seek damages and any other remedies, by way of other, future, claims arising out of or in connection with the Decision and the Regulation.

13. The Applicant also seeks his costs.

IV. PLEAS IN LAW AND MAIN ARGUMENTS

14. It is important to recall the standard of review to be applied in this case.

15. The Court of Justice held in its judgment in Kadi I that the EU judicature must *"ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law"*,[6] and has confirmed in E and F that the possibility of *"an adequate review by the courts"* of the substantive legality of an EU freezing measure, *"particularly as regards the verification of the facts and the evidence and information relied upon in support of the listing"* is indispensable.[7]

16. This Court applied this standard of review in Kadi II, and confirmed that asset-freezing measures of this kind must be subjected to a *"full and rigorous judicial review"*,[8] endorsing the *"intensive"* standard of *"full review"* applied in the three People's Mojahedin Organisation of Iran v Council cases: T-228/02 (**"OMPI I"**), T-256/07 (**"PMOI I"**), and T-284/08 (**"PMOI II"**).[9] In those cases (and in Kadi I and Kadi II) this Court and the Court of Justice have made it clear that judicial review of EU asset-freezing measures:

16.1. is *"imperative"* as a procedural safeguard;[10]

16.2. must be *"strict"*, in order to offset the restrictions imposed by asset-freezing measures;[11]

16.3. includes an assessment of *"the facts and circumstances relied on as justifying"* such a measure and, it follows, a consideration of whether the measure is proportionate;[12]

16.4. requires *"the Council to present that evidence for review by the courts"* of the EU;[13]

16.5. involves a *"review of lawfulness"* which is *"not limited to an appraisal of the abstract 'probability' of the grounds relied on, but must include the question*

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[6] Joined Cases C-402/05P and C-415/05P Yassin Abdullah Kadi v Council [2008] ECR I-6351 (**"Kadi I"**) §326 (emphasis added).
[7] Case C-550/09 E and F [2010] ECR I-6213 (**"E and F"**) §57.
[8] Case T-85/09 Yassin Abdullah Kadi [2010] ECR II-55177 (**"Kadi II"**) §§149-151.
[9] Case T-228/02 Organisation des Modjahedines du peuple d'Iran v Council [2006] ECR II-4665 (**"OMPI I"**); Case T-256/07 People's Mojahedin Organization of Iran v Council [2008] ECR II-3019 (**"PMOI I"**); Case T-284/08 People's Mojahedin Organization of Iran v Council [2008] ECR II-3487 (**"PMOI II"**).
[10] OMPI I §155 (emphasis added).
[11] OMPI I §155 (emphasis added).
[12] OMPI I §154; PMOI II §74; Case T-509/10 Manufacturing Support & Procurement Kala Naft Co., Tehran (25 April 2012) (**"Naft"**) §123; Case T-421/11 Qualitest FSE v Council (3 October 2011) §55; Case T-494/10 Bank Saderat Iran v Council (5 February 2013) (**"Bank Saderat Iran"**) §105, emphasis added)
[13] Case T-390/08 Bank Melli Iran v Council [2009] ECR II-3967 (**"Bank Melli Iran 390/08"**) §§37, 107

whether those grounds are supported, to the requisite legal standard, by concrete evidence and information";[14]

16.6. includes an assessment of whether "*the facts are materially accurate*",[15] "*whether the evidence relied on is factually accurate, reliable and consistent, ... also ... whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it*"[16] or whether there has been a "*manifest error of assessment*";[17]

16.7. involves a "*substantive assessment*" of "*the evidence and information on which that assessment is based*" as well as the "*apparent merits of the contested measure*";[18] and

16.8. includes an assessment of whether, having regard to all the circumstances, there exist "*reasonable grounds*" for a listing decision.[19] This question "*falls beyond all question within the bounds of the judicial review that the Community judicature may carry out of a decision to freeze funds*".[20]

17. The Applicant submits that the Court should apply that close degree of scrutiny and "*full review*" to the following grounds of annulment in this case. In support of the action, the Applicant relies on the following seven pleas of law, which are developed in detail below.

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[14] Case T-439/10 and T-440/10 *Fulmen* and *Fereydoun Mahmoudian v Council and Commission* (21 March 2012) ("***Fulmen***") §97 (emphasis added).
[15] *OMPI I* §159 (emphasis added).
[16] *Kadi II* §142.
[17] *OMPI I* §159 (emphasis added).
[18] *OMPI I* §154; *PMOI II* §74; *Kadi II* §§129, 135 and 143 (emphasis added).
[19] *PMOI I* §143 (emphasis added).
[20] *PMOI I* §§141.

A. The First Plea: Lack of Legal Basis

(i) Strict review by the General Court

18. Controlling the boundaries of the EU's actions is one of the fundamental tasks of the Court (see, for example, Advocate General Maduro's Opinion in Case-58/08 *Vodafone*[21]).

19. The General Court must, therefore, review strictly the appropriateness of the legal base(s) relied on by the Council. This is not an area where the Council enjoys any margin of appreciation: the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure.[22] This is especially so in a case such as this: brought by an individual affected by a measure of the Council. This factor makes it imperative that that the Court should anxiously scrutinise the actions of the Council to preserve the very different *"balance of power"* considerations (see again, for example, Advocate General Maduro's Opinion in *Vodafone*, above, albeit in a slightly different context) and, in particular, to safeguard the rights of the individual.

20. The Applicant submits that Article 29 TEU is not a proper legal basis for the Decision, as explained below. It is critical to appreciate that the complaint made against the Applicant did not (and for that matter could not properly) identify the Applicant as an individual having undermined the rule of law, human rights, or democracy in Ukraine (within the meaning of Article 23 TEU and the general provisions in Article 21(2) TEU). As the Decision was invalid, the Council could not rely on Article 215(2) TFEU to enact the Regulation.

(ii) The conditions for relying on Article 29 TEU

21. The Decision is stated to be made pursuant to Article 29 TEU. Article 29 TEU is part of Title V. Title V contains two Chapters (Chapter 1, General Provisions on the Union's External Action and Chapter 2, Specific Provisions on the Common Foreign and Security Policy) and spans Articles 21-46.

22. The EU applies sanctions in pursuit of the specific objectives of the Common Foreign and Security Policy ("**CFSP**"), as set out in Article 21 TEU. Decisions made pursuant to Article 29 must pursue the specific objectives of the CFSP as set out in Article 21.

23. Article 21 provides,

> *"1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: **democracy, the rule of law**, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality*

[21] Case C-58/08 *R (Vodafone Ltd) v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999 ("***Vodafone***") §34.
[22] *Kadi I* §182.

and solidarity, and respect for the principles of the United Nations Charter and ***international law****.*

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****;*
(c) ***preserve peace, prevent conflicts and strengthen international security****…*

3. ***The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies****."* (emphasis added)

24. Article 23 TEU, in Chapter 2 of Title V, provides, *"The Union's action on the international scene, pursuant to this Chapter,* ***shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1****."* (emphasis added)

25. The Council's "*Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*" (2012) **("the 2012 Guidelines")** explain,

> *"Within the framework of the Common Foreign and Security Policy, the Council may decide to impose restrictive measures against third countries, entities or individuals. These measures* ***must be consistent with CFSP objectives, as set out in Article 21 of the Treaty on European Union*** *(TEU)."* (§2; emphasis added)
>
> *"In general terms, restrictive measures are imposed by the EU to bring about a change in policy or activity by the target country, part of country, government, entities or individuals,* ***in line with the objectives set out in the CFSP Council Decision****. Accordingly, the EU will adapt the restrictive measures as a result of developments with regard to the objectives of the CFSP Council Decision. …*
>
> ***The objective of each measure should be clearly stated and consistent with the Union's overall strategy in the area concerned. Both the overall strategy and the specific objective should be recalled in the introductory paragraphs of the Council legal instrument through which the measure is imposed****. The restrictive measures do not have an economic motivation. The EU should seek to ensure that objectives are consistent with wider EU/UN and regional policies and measures."* (§§4-5; emphasis added) **(Annex A.6, page 5-6)**

(iii) The conditions for relying on Article 29 TEU are not fulfilled by the Decision

26. The "*statement of reasons*" for the Applicant's designation in the Annex to the Decision, as amended, states, *"Person subject to criminal proceedings in Ukraine to*

investigate crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine" (**Annex A.1, page 3**). Even if, which is denied for the reasons set out below, these grounds for designation were properly made and supported with evidence, they did not come within the principles and objectives of the CFSP set out in Article 21 TEU. The Decision is not consistent with the relevant Article 21 objectives, and fails to comply, adequately or at all, with them. It therefore lacks a legal basis.

27. **First**, the Decision fails to pursue the two objectives which are expressly invoked on its face. Thus:

27.1. The Recital, §2, states that the restrictive measures have been imposed on *"persons identified as responsible for the misappropriation of Ukrainian State funds* ***and*** *persons responsible for human rights violations"* (emphasis added) *"with a view to"* achieving the two objectives of *"consolidating and supporting the rule of law and respect for human rights in Ukraine"* (**Annex A.1, page 1**).

27.2. Although respect for human rights is invoked as one of the two objectives sought to be achieved by the imposition of sanctions: (a) nowhere in the Decision is there any description of what human rights are alleged to have been violated, when or by whom (cf. the vague reference to "*violence*" in Recital §1, without any consideration of whether it was warranted in self-defence or otherwise justified[23]); (b) nowhere in the Decision or its accompanying Annex is any person identified as being the target of restrictive measures **because** of any alleged responsibility for human rights violations. The "*statement of reasons*" for every single person identified in the Annex relates to alleged misappropriation or illegal transfer of Ukrainian State funds (**Annex A.1, pages 3-5** and **Annex A.2, pages 2-3**); and (c) no explanation is provided as to what the alleged misappropriation or illegal transfer of State funds has to do with "*respect for human rights in Ukraine*".

27.3. Similarly, although the rule of law in Ukraine is invoked as an objective: (a) nowhere in the Decision is there any description of the provenance of the misappropriation and illegal transfer allegations, what is supposed to have been misappropriated or transferred or when; and (b) no explanation is provided as to how the sanctions are supposed to achieve the aim of *"consolidating and supporting the rule of law... in Ukraine"* (**Annex A.1, page 1**). (This is despite the fact that the construction and interpretation of sanctions is highly fact-sensitive. Cf. the instruments relating to the Tunisian situation which were considered in Case T-200/11 *Al-Matri v Council of the EU* (28 May 2013) (***"Al-Matri"***)[24] and in Case T-187/11 *Trabelsi v Council of the EU* (28 May 2013) (***"Trabelsi"***), §92).

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[23] The Decision appears to ignore altogether other important dimensions of human rights viz., for example, the obligation on a State to respect the right to life (see, e.g., Article 2 of the European Convention on Human Rights ("ECHR")). The obligation to respect the right to life requires, amongst other things, that a State take appropriate steps to protect and preserve life. That necessarily includes taking appropriate police, or other, action in relation to civil strife or unrest.

[24] See in particular the Court's comments at §46.

27.4. Indeed, the history of the Decision reveals that misappropriation and illegal transfer were added to the Decision and the Regulation at a very late stage, and that the Council's initial purported rationale for the imposition of sanctions was supposed human rights violations, violence and use of excessive force. Thus:

27.4.1. The initial agreement on sanctions was reached at an EU Foreign Affairs Council meeting in Brussels on 20 February 2014, and the alleged concern at that stage was described as follows: "*The Council held an extraordinary meeting to discuss the situation in Ukraine. It was appalled and deeply dismayed by the deteriorating situation in Ukraine and in that light decided as a matter of urgency to introduce targeted sanctions against those responsible for human rights violations, violence and use of excessive force.*" The document goes on, "*In light of the deteriorating situation, the EU has decided as a matter of urgency to introduce targeted sanctions including asset freeze and visa ban* [sic] *against those responsible for human rights violations, violence and use of excessive force....The Council tasked the relevant Working Parties to make the necessary preparations immediately. The scale of implementation will be taken forward in the light of developments in Ukraine.*"[25]

27.4.2. Also on 20 February 2014, a "*Brussels source*" stated that the Council would start to draw up a sanctions list with the help of Kiev-based ambassadors on 21 February 2014. The UK Foreign Minister William Hague, commenting on the steps being taken, stated, "*some people are responsible for the violence and so we have decided to introduce targeted measures and targeted sanctions involving visa bans and asset freezes on those individuals who are responsible*".[26] According to the Italian Foreign Minister Emma Bonino, the initially agreed sanctions were targeted at individuals "*with blood on their hands*", i.e. those whom the EU believed to be responsible for the recent violence in Ukraine.[27]

27.4.3. Notably, embezzlement and/or misappropriation and/or illegal transfer of Ukrainian State funds (let alone judicial proceedings or investigations of crimes connected therewith) were not identified as rationales (whether sole or partial) for the EU's implementation of restrictive measures in response to the situation in Ukraine.

27.4.4. The sanctions that had been agreed in principle were not immediately implemented. On 24 February 2014, European Commission spokesman

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[25] Press Release 6767/14, 3300th Council Meeting, Brussels, 20 February 2014 http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/141113.pdf **(Annex A.7, pages 2 and 7)**

[26] 'EU foreign ministers agree sanctions against Ukrainian officials', *The Guardian*, 21 February 2014, http://www.theguardian.com/world/2014/feb/20/ukraine-eu-foreign-ministers-agree-sanctions-officials **(Annex A.8, page 2)**

[27] 'EU agrees sanctions against Ukraine', *The Telegraph*, 20 February 2014, http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10652114/EU-agrees-sanctions-against-Ukraine.html **(Annex A.9, page 2)**

Olivier Bailly stated, "*following the conclusion of last Thursday's Council of Foreign Affairs Ministers, working parties have been tasked to start immediately the preparation work for sanctions and work on the specific scope that these sanctions could cover. This technical work is happening concretely, also today, but of course the scope and the final decision, as it's foreseen in the conclusion, will be decided in light of the events in Ukraine. So I cannot be more precise on the scope and the final decision that will be taken, but the technical work continues.*"[28] The work being undertaken was being progressed in accordance with the 20 February 2014 decision of the Council, and therefore could only have been targeting supposed human rights violations, violence and use of excessive force.

27.4.5. Also on 24 February 2014, the Commission and the High Representative for Foreign Affairs and Security Policy, Baroness Catherine Ashton, published their '*Joint Proposal for a Council Regulation concerning restrictive measures in view of the situation in Ukraine*'.[29] This proposal attached a draft regulation without identifying any individuals in Annex 1, but it is otherwise in substantially the same form as the Regulation that was finally issued on 5 March 2014. However, the proposal does not contain **any** of the references to misappropriation or transfer which were belatedly included in the Regulation at Recitals §§2 and 4, and Article 3(1) (**Annex A.3, pages 1 and 3**). Instead, the **sole** focus of the proposal is on targeting those responsible for supposed human rights violations.

27.4.6. On 25 February 2014, the Deputy Head of the Delegation of the EU to Ukraine is reported as commenting that work was still on-going on preparing the sanctions list of "*Ukrainian officials apparently responsible for violating human rights and the loss of life in Ukraine*".[30]

27.4.7. Thereafter, it is to be inferred that it became apparent to the EU that it would be **wrong** to rely on alleged human rights violations, violence and use of excessive force as a basis for targeting members of the Ukrainian Government. Evidence had emerged that the Applicant (who is President of Ukraine) and his Government **had not** been responsible for the recent violence in Ukraine. In a discussion between Baroness Ashton and Estonian Foreign Minister Urmas Paet (both members of the Council on Foreign Affairs) that was not intended for publication

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[28] 'Midday press briefing from 24/02/2014', EU Commission Audiovisual Services, 24 February 2014 http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I086596 (**Annex A.10, page 1**)

[29] 'Joint proposal for a Council Regulation concerning Restrictive measures in view of the situation in Ukraine' (6902/14), 24 February 2014 http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206902%202014%20INIT; http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206902%202014%20ADD%201 (**Annex A.11**)

[30] 'Carlsson: EU sanctions for Ukrainian officials should be warning to others', *Kyiv Post*, 25 February 2014 http://www.kyivpost.com/content/ukraine/carlsson-eu-sanctions-for-ukrainian-officials-should-be-warning-to-others-337589.html (**Annex A.12**)

but which was later leaked to the media, Mr Paet commented (on 26 February 2014) that as a result of recent investigations into the violence "***there is a stronger and stronger understanding that behind snipers*** [alleged to have been responsible for the recent violence] ***it was not Yanukovych, it was somebody from the new coalition***" (emphasis added). Baroness Ashton replied, "*I think we do want to investigate. I didn't pick that up, that's interesting. Gosh.*"[31] It was presumably because of such evidence that the Council restricted itself to a more equivocal position and later stated, in its press release of 17 March 2014, "*All human rights violations and acts of violence need to be properly investigated*".[32]

27.4.8. However, despite the discovery that there was no proper basis to make allegations of human rights violations, violence and use of excessive force against the Applicant and members of the Ukrainian Government the Council did not halt the sanctions implementation process. On 3 March 2014, the EU Foreign Affairs Council announced "*Recalling its conclusions of 20 February 2014, the Council agreed to swiftly work on the adoption of restrictive measures for the freezing and recovery of assets of persons identified as responsible for the misappropriation of State funds, and the freezing of assets of persons responsible for human rights violations*".[33] Despite the reference to the decision of 20 February 2014, this was the **first time** that the Council included misappropriation of State funds as a possible basis for the imposition of EU sanctions (and no reference was even then made to supposed illegal transfer of Ukrainian State funds). The proper conclusion is that the misappropriation (and later illegal transfer) basis was belatedly advanced in order to prop up the decision to implement restrictive measures, in circumstances where there was no proper basis for alleging that the Ukrainian government was responsible for human rights violations, violence and use of excessive force.

27.4.9. In its press release of 5 March 2014, the Council then announced "*As agreed at the Foreign Affairs Council of 3 March, the Council today*

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[31] 'Ukraine crisis: bugged call reveals conspiracy theory about Kiev snipers', *The Guardian*, 5 March 2014, http://www.theguardian.com/world/2014/mar/05/ukraine-bugged-call-catherine-ashton-urmas-paet; **(Annex A.13, page 2)** 'Estonia: Leaked Ashton Ukraine Conversation 'Authentic', Radio Free Europe: Radio Liberty, 5 March 2014, http://www.rferl.org/content/ukraine-ashton-conversation-leaked/25286848.html **(Annex A.14)**

[32] Press Release 7764/14, 3304th Council Meeting, Brussels, 17 March 2014 http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/141614.pdf **(Annex A.15, page 9)**

[33] Council Conclusions on Ukraine, Foreign Affairs Council Meeting, Brussels, 3 March 2014 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/141291.pdf **(Annex A.16, page 2)** There appears to have been some discussion of such steps by **other** bodies in the preceding days. For example, on 27 February 2014 the European Parliament made a call for "*an investigation into the massive embezzlement of state funds and assets by the cronies and 'family' of ousted President Yanukovych, [and] for the freezing of all their assets pending clarification of how they were acquired*" (European Parliament Resolution 2014/2595 (RSP) of 27 February 2014 on the situation in Ukraine http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0170+0+DOC+XML+V0//EN) **(Annex A.17, page 2)**

adopted EU sanctions focussed on the freezing and recovery of misappropriated Ukrainian state funds. Today's decision targets 18 persons identified as responsible for such misappropriation."[34] The announcement makes no reference to human rights abuses or violence, or use of excessive force, even though this had been the focus of the whole process from 20 February 2014.

27.4.10. Similarly, in the Decision and the Regulation that were adopted on the same day, misappropriation of Ukrainian State funds (and now illegal transfer as well) were the **sole** grounds relied on in the "*statement of reasons*" (**Annex A.1, page 3-5** and **Annex A.3, page 6-8**) regarding the Applicant and, indeed, all other individuals listed in the Annex. In addition, this was also the first time that the Council identified the grounds for imposing sanctions in connection with the situation in Ukraine as being based on alleged criminal investigations and/or criminal proceedings carried out by the local authorities, as opposed to basing its decision on its **own assessment** of the underlying facts.

27.4.11. Based on the facts summarised above, the Applicant submits that it appears that, having belatedly, but **rightly**, determined that there was no proper basis or evidence to target these individuals on the basis of (alleged) human rights violations, violence and the excessive use of force, the Council has, instead, alleged that there are criminal investigations and/or criminal proceedings in Ukraine regarding the alleged "*misappropriation*" (embezzlement and illegal transfers), in order to achieve the same end. The Council's **political** objectives, and not human rights/the rule of law, have therefore been the driving force behind the Decision and the Regulation. Unfortunately for the Applicant, this sanctions process has all the hallmarks of a process which has been staged for political gain, rather than a process which is a proportionate response to legitimate and well-founded Article 21 concerns: see further below, §§35-42, 43-49 and 50-53 in particular.

28. **Secondly**, the Decision fails to achieve the other CFSP objectives identified in Article 21(2)(b); it fails to "*consolidate and support democracy ... [and] the principles of international law*". This is for at least the following reasons:

28.1. The premise of the Decision is that the Applicant is no longer the President of Ukraine. He is described in the Annex as being the "*former President*" (**Annex A.1, page 3**). Not only do the Decision and the Regulation completely fail to explain this description but this designation is, both as a matter of fact and as a matter of Ukrainian constitutional law, wrong: see further below, §28.4.

28.2. Another Council Decision, of 14 April 2014, providing macro-financial assistance to Ukraine (2014/215/EU) (**"the Macro-Finance Decision"**), confirms this. The preamble states:

[34] Press Release 7281/14, 'EU freezes misappropriated Ukrainian State funds', Brussels, 5 March 2014 https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/141324.pdf (**Annex A.18, page 1**)

"(1)...On 21 November 2013, the Cabinet of Ministers of Ukraine decided to suspend the signing of the Association Agreement. However, since the resignation of the Ukrainian government in February 2014, the current Ukrainian government has declared its willingness to sign the Association Agreement in the near future. On 6 March 2014, the European Council declared in its Statement on Ukraine its commitment to sign very shortly all political chapters of the Association Agreement, and to unilaterally adopt measures allowing Ukraine to benefit substantially from the DCFTA.

...

(3) Following the resignation of the previous government, a new interim President and a new government were appointed by the Ukrainian Parliament on 22 and 27 February 2014 respectively. *..."* (emphasis added) **(Annex A.19, page 1)**

28.3. The Decision and the Macro-Finance Decision do not explain either the basis or the source for the Council's asserted views: (a) that the Ukrainian Government *"resigned"*; or (b) that the Applicant is now the *"former President"*. Both of these statements are wrong, both factually and as a matter of Ukrainian law.[35] Thus:

28.4. As a matter of fact:

28.4.1. The Applicant and the Ukrainian Government were elected and appointed democratically in 2010.

28.4.2. That the relevant elections were legitimate and democratic is apparent from at least the following. First, the electoral process satisfied all the legal and procedural requirements of the Constitution of Ukraine ("**the Constitution**"); it was formally approved as such by the Central Election Commission of Ukraine, and has never been challenged before the Constitutional Court of Ukraine. Second, large numbers of international observers were present to monitor the elections and assess their adherence to democratic norms. Observers were sent by, amongst others, the Organisation for Security and Cooperation in Europe (OSCE), the NATO Parliamentary Assembly, the Council of Europe, as well as a multitude of European and North American NGOs. The EU also sent its own contingent of election monitors. According to the OSCE and other international organisations, the elections were free and fair and corresponded with democratic standards.[36] Following the

[35] In this Application, the Applicant asserts his understanding of Ukrainian law. However, the Applicant expressly reserves his position to refer to further Ukrainian law, including by way of evidence, if that proves necessary, e.g. if any of the Ukrainian law asserted by him becomes a contested issue between the parties.

[36] 'World Digest: International observers say Ukrainian election was free and fair', *Washington Post*, 9 February 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/08/AR2010020803583.html; **(Annex A.20)** 'European Parliament president greets Ukraine on conducting free and fair presidential election', *Kyiv Post*, 9 February 2010, http://www.kyivpost.com/content/politics/european-parliament-president-greets-ukraine-on-co-59077.html **(Annex A.21)**

elections, official spokespersons of the EU "*congratulated Ukraine on holding free and fair presidential elections*".[37]

28.4.3. Indeed, it is undoubtedly because the Applicant's Government was the democratically elected Government of Ukraine, and that he was the democratically elected President, that the EU had sought, prior to later February/March 2014, to develop and to intensify relations with it and him through various frameworks, in particular by continuing the negotiation of the Association Agreement, including a discussion on a Deep and Comprehensive Free Trade Area, as referred to in the Macro-Finance Decision (§28.2 above). To this end, the Association Agreement was initialled in the course of 2012, and preparations were made for its final conclusion shortly thereafter.[38]

28.4.4. However, on 21 November 2013, the Parliament and the Cabinet of Ministers of Ukraine decided to suspend the signing of the Association Agreement. Following this decision, and the Government's decision to focus its immediate attention on agreeing closer cooperation with Russia, the EU decided to stop properly co-operating with the Applicant's Government, the EU having failed to obtain what it sought. As a months-long series of protests began, overwhelmingly focused in Kiev, the EU explicitly endorsed this uprising against the democratically elected Ukrainian Government and the Applicant, which and whom the EU had previously supported (when it had thought it was in its interests to do so).[39]

28.4.5. As the protests continued, the protesters became increasingly hostile, culminating in violent confrontations with the police (see footnote 23 above regarding the State's obligation, including pursuant to human rights law, to respect the right to life and protect the lives/security/safety of its citizenry by taking appropriate steps to quell violence etc). The large number of **police** deaths and injuries are highly material here, as is the statement by Foreign Minister Paet referred to above in §27.4.7 that there was a stronger and stronger understanding that it had been somebody from **the so-called "*interim regime*" and not the Applicant** who was behind the violence. (**Annex A.13, page 2**) Following this, on 21 February 2014, the Applicant held lengthy negotiations with the major opposition leaders which led to the signing

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[37] 'EU endorses Ukraine election result', *EU Observer*, 8 February 2010, http://euobserver.com/foreign/29431 (**Annex A.22, page 1**)

[38] The Association Agreement is a extremely large document of over 3000 pages. As it is an instrument signed by the EU, and in any event publicly accessible (http://eeas.europa.eu/ukraine/assoagreement/assoagreement-2013_en.htm), it is not annexed to the Application.

[39] Committees Committee on Foreign Affairs Press Release, 'Key MEPs warn Ukraine authorities not to use force against pro-Europe protestors', 26 November 2013, http://www.europarl.europa.eu/pdfs/news/expert/infopress/20131126IPR26201/20131126IPR26201_en.pdf (**Annex A.23**);
'European parliament voiced support for Euromaidan', *Kyiv Post*, 11 December 2013, http://www.kyivpost.com/content/ukraine/european-parliament-voiced-support-for-euromaidan-333445.html (**Annex A.24**)

of an agreement on the resolution of the political crisis ("**the February Agreement**") (**Annex A.25**). In the February Agreement, the Applicant and his Government conceded to many substantial demands of the protesters; this included, among other things, agreeing to hold early presidential elections by December 2014 at the latest (the term of the Applicant's presidency was otherwise set to expire in 2015). The February Agreement was mediated by European Union officials, including the foreign ministers of France, Germany, and Poland, who signed the document as witnesses. Strikingly, the February Agreement provided, in clause 4, for "[i]*nvestigation into recent acts of violence will be conducted under joint monitoring from the authorities, the opposition and the Council of Europe*" (**Annex A.25, pages 1-2**). It was therefore accepted by all those involved with the February Agreement that the responsibility for the acts of violence was certainly **not capable** of being then attributed to the Applicant or his Government and that an investigation was needed.

28.4.6. It was a further requirement of the February Agreement that each side "*undertake serious efforts for the normalisation of life in the cities and villages by withdrawing from administrative and public buildings and unblocking streets, city parks and squares*" (**Annex A.25, page 2**). While police and State Security forces were withdrawn in accordance with this undertaking, protest leaders, including those who rejected the February Agreement and called for the Applicant's resignation, failed to carry out the same measures. Indeed, in the course of the same day, i.e. 21 February 2014, opposition activists advanced, and gained control over some of the major government buildings in central Kiev. Many members of the Government, including the Applicant, withdrew from the city. It was against this backdrop that a vote on a purported resolution to impeach the Applicant, Resolution 757-VII, took place in the Verkhovna Rada of Ukraine on 22 February 2014 (**"the Resolution"**) (**Annex A.26**).

28.4.7. Insofar as the Resolution purported to remove the Applicant from office it was and is ineffective. The wording of the Resolution, which mandates that he "*should be considered as not executing his obligations*", is at most of purported declaratory effect only, and could not affect the position or powers of the Applicant, even if it had been passed in a legal and constitutionally correct manner (**Annex A.26**).

28.4.8. Even if this had not been the case, in accordance with Article 108 of the Constitution (**Annex A.27**), there are only four grounds for the early termination of a President's powers prior to the expiry of his term: (i) resignation; (ii) inability to exercise powers for reasons of health; (iii) removal from office by the procedure of impeachment; or (iv) death.

28.4.9. As to (i), (ii) and (iv): the Resolution does not purport to advance any of these grounds, and it could not have done so. The Applicant had not,

and has not, resigned;[40] he was, and is, not unable to exercise his powers for reasons of health,[41] and he was, and is, not dead.

28.4.10. As to (iii): if the Resolution purported to remove the Applicant from office by the procedure of impeachment, then it failed to achieve that aim. Not only does the Resolution fail to identify this as being the purpose of the purported vote, but the Resolution also fails to comply with the procedure of impeachment. Thus: first, the Resolution refers to the Applicant as having "*dissociated from execution of his constitutional powers in a non-constitutional way*" (**Annex A.26, page 1**). This is wrong. The Applicant had (and has) not '*dissociated*' himself from his powers. At the time at which the Resolution was passed, 22 February 2014, the Applicant remained (and remains) the head of the democratically elected Ukrainian Government. Secondly, *'[dissociation] from execution of ...constitutional powers in a non-constitutional way'* is not a basis for early termination of a President's powers under Article 108 or any other provision of the applicable Constitution. Thirdly, the Resolution refers to "*circumstances of extreme necessity*", but there is no provision in the Constitution by which the procedures for the impeachment of a President can occur other than in accordance with the procedure prescribed by Article 111 (**Annex A.30**) (see below), even in circumstances of extreme necessity and, fourthly, the Resolution fails to comply with that specified procedure regarding impeachment:

(a) Pursuant to Article 111, the procedure to impeach a President can only be brought "*in the event that he or she commits state treason or other crime*". The Resolution (rightly) does not allege or identify any such offence as having been committed by the Applicant. It follows that the basic precondition that is necessary for there to be an impeachment is missing.

(b) The procedure to impeach a President requires a detailed set of steps to be taken, including the following:
- the adoption of a decision to initiate the procedure (approved by the majority of the constitutional composition of the Verkhovna Rada);
- the appointment of a special temporary investigatory commission (whose composition includes a special prosecutor and special investigators);
- an investigation by this special temporary investigatory commission;
- consideration of the conclusions and proposals of the temporary investigatory commission at a meeting of the

[40] Which, pursuant to Article 109 of the Constitution, would, in any event, only take effect from the moment he personally announced a statement of resignation at a meeting of the Verkhovna Rada. (**Annex A.28, page 1**)
[41] Which, pursuant to Article 110 of the Constitution, would, in any event, only take effect following a detailed procedure including a petition to the Supreme Court of Ukraine and several votes of the Verkhovna Rada. (**Annex A.29, page 1**)

Verkhovna Rada, and approval of its findings through the adoption of a decision on the accusation of the President of Ukraine by a vote of no less than two-thirds of its constitutional composition of the Verkhovna Rada;
- review of the case by the Constitutional Court of Ukraine;
- review of the case by the Supreme Court of Ukraine;
- receipt by the Verkhovna Rada of the Courts' opinion to the effect that the acts of which the President is accused contain elements of state treason or other crime and that the impeachment process has been validly complied with;
- adoption of a decision on the removal of the President from office by the procedure of impeachment by the Verkhovna Rada by no less than three-quarters of its constitutional composition.

(c) None of these steps were taken by the Verkhovna Rada when it purported to pass the Resolution.

(d) Furthermore, the Resolution was not validly passed: a vote under Article 111 (i.e. effecting impeachment) would have had to be approved by no less than three-quarters of the constitutional composition of the Verkhovna Rada. The constitutional composition of the Verkhovna Rada is 450 deputies. Accordingly, any such vote would have to be approved by at least three quarters of this figure. According to the session minutes timed at 10:04:18, only 248 deputies were registered to vote in the meeting which resulted in the Resolution (**Annex A.31, page 1**), whereas according to the written registration for the meeting, 290 deputies were present (**Annex A.31, page 16**). So, regardless of which source is used, there was an insufficient number of deputies present in the first place. According to the session minutes timed at 17:11:55, 328 deputies voted in favour of the resolution (**Annex A.31, pages 6 and 33**). However, leaving aside the remarkable fact that more deputies voted than were actually present, it remains clear that even the number of deputies that voted is less than the required number. The requirement for a three-quarters majority was **not** met.

28.4.11. The Resolution is therefore illegal, unconstitutional and ineffective in removing the Applicant from his office. He remains the President of Ukraine, and is recognised as such by Russia, among others.

28.4.12. Furthermore, the validity of the Resolution is irreparably compromised because it was passed by the Verkhovna Rada under duress. Thus:

(a) Armed protesters immediately outside (and possibly inside) the parliamentary building prevented deputies from voting freely on the measure. Throughout 22 February 2014, armed protesters in military fatigues (many of them affiliated with the right-wing extremist organisation '*Right Sector*') controlled the area around

the Verkhovna Rada. On the evening of 22 February, Andriy Parubiy, one of the leaders of the '*Euromaidan*' movement and the Secretary of the National Security and Defence Council of Ukraine under the current so-called '*interim regime*', made the following statements from a stage on the nearby Maidan square: "*Maidan maintains complete control of Kyiv*" and "*we have now taken control of the entire governmental district. Seventh Sotnia* [division of insurgents] *of Maidan Samoborana is in the Verkhovna Rada. Commandant Maxym Bourbak is representing us in the VR.*" He also made statements to the effect "*there is a division of Right Sector (Pravyi Sector) near the VR; while Cabinet of Ministers and the Presidential Administration are also being guarded by Maidan's sotnias.*"[42] According to other press reports, on 22 February 2014 "*the emboldened opposition took control of central Kiev and key government and parliament positions ... Key government buildings were without police protection.*"[43] Various images evidence the presence of large numbers of protesters immediately next to the parliament building, controlling its entrances.[44]

(b) Around the time of the vote on the Resolution, Members of Parliament (**"MPs"**) of the Applicant's Party of Regions were subject to intimidation and, in some cases, physical attacks by protesters. Those assaulted on 22 February 2014 included Party of Regions MPs and loyalists Vitaly Grushevsky[45] and Nestor Shufrych.[46] Just the day before, the leader of the right-wing organisation Right Sector, Dmytro Yarosh, had made an announcement on his Facebook page that effectively instructed his followers to *"terminate"* any activity of the Party of Regions and Communist Party of Ukraine "*by all available methods*", all this at a time when large numbers of Right Sector activists were present

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[42] 'Parubiy: The Maidan today fully controls Kiev', *Ukrayinska Pravda*, 22 February 2014 (**Annex A.32, page 1**), http://www.pravda.com.ua/news/2014/02/22/7015623/

[43] 'Ukraine government on verge of collapse', *Al Jazeera*, 22 February 2014, http://www.aljazeera.com/news/europe/2014/02/ukraine-government-verge-collapse-201422213757684211.html; (**Annex A.33, page 1**) 'Protestors take control of Kiev as President flees capital', *Fox News*, 22 February 2014, http://nation.foxnews.com/2014/02/22/protesters-take-control-kiev-president-flees-capital (**Annex A.34**)

[44] Image of protesters outside the Verkhovna Rada building, *Ukrayinska Pravda*, 22 February 2014, http://img.pravda.com/images/doc/0/4/04e7adb-600-verkhovna-rada.jpg; (Annex A.35, page 1) Image of activists at the entrance of the Verkhovna Rada building, *Ukrayinska Pravda*, 22 February 2014, http://img.pravda.com/images/doc/d/5/d552f42-1897785-758828117463111-911327605-n--1-.jpg; (**Annex A.35, page 2**) 'Parliament now on hands of #maidan', *Twitter.com*, 22 February 2014, https://twitter.com/mattfrej/status/437158232952680448/photo/1 (**Annex A.35, page 3**)

[45] 'Ukraine: Tymoshenko freed as President denounces 'coup' – 22 February as it happened', *The Guardian*, 23 February 2014 http://www.theguardian.com/world/2014/feb/22/ukraine-crisis-uncertainty-after-yanukovych-signs-deal-live-updates; (**Annex A.36, page 5**) 'Umbruch in der Ukraine – Aktivisten attackieren Vitaly Grushevsky, ein Mitglied von Janukowitschs "Partei der Regionen", vor dem Parlamentsgebäude', *Süddeutsche Zeitung*, 22 February 2014, http://www.sueddeutsche.de/politik/umbruch-in-der-ukraine-timoschenko-in-freiheit-janukowitsch-verlaesst-kiew-1.1895780-6 (**Annex A.36**)

[46] 'How Shufrych was dragged to the Maidan', *YouTube.com*, 22 February 2014, http://www.youtube.com/watch?v=aVb7I5RND7s (**Annex A.36, page 45**)

immediately outside the Verkhovna Rada building. He also posted: "*Party of Regions and the Communist Party of Ukraine are criminal groups whose activities must be terminated... In this respect, the Central Staff of the Right Sector commands all their local troops to make every effort to stop the anti-citizen activities of the criminal gangs. All available methods should be used. We also appeal to the supporters of the "Right Sector" movement to act similarly and, depending on available forces and capabilities, to stop activities of these groups.*"[47]

28.5. As a matter of Ukrainian law: the steps taken by the so-called "*interim President and government*" are patently illegal and unconstitutional. This is because the appointment of all senior governmental figures (including, but not limited to the appointment of members of the Cabinet of Ministers) and all laws passed require the passage of a resolution by the Verkhovna Rada. Such resolutions are only legal when signed by the President of Ukraine, and the Applicant has not in fact signed any such resolution since departing from Kiev on 21 February 2014. Accordingly all such resolutions are illegal and unconstitutional, and any executive powers exercised by any person purportedly appointed by such resolutions (including the so-called "*Acting President*" Oleksandr Turchynov and his so-called "*Cabinet of Ministers*") are similarly fatally flawed. In the circumstances, the measures taken by the so-called "*interim regime*" are lacking any constitutional basis.

28.6. For these reasons, it is both factually and legally wrong for the Council to assert, in the Decision (and the Macro-Finance Decision) and without any reference to any source of information – that the President is the "*former President*" and that his Government "*resigned*" **(Annex A.1, page 3 and A.19, page 1)**. As the Macro-Finance Decision shows, the EU continues to seek to develop its relationship with Ukraine and – for this political end - it appears to be assisting and communicating with the so-called "*interim President and government*". The Applicant infers from this that the so-called "*interim President and government*" are probably the ultimate source of the EU and the Council's erroneous statements in the Decision and the Macro-Finance Decision. The so-called "*interim President and government*" are not objective or impartial, and cannot be and/or ought not to be relied upon as a source of information regarding matters in which they have such an obviously partisan and vested interest.

28.7. In any event, regardless of the identity of the Council's source of information: by supporting and communicating with the so-called "*interim President and government*", who have not been lawfully or properly elected into power, and who took what power they had by illegal force, the Council is acting contrary to the rule of law and democratic principles.

28.8. It is also acting contrary to international law for at least the following four reasons.

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[47] 'The Party of Regions and the Communist Party of Ukraine are criminal groups whose activities must be terminated (Order of the Central Staff of the "Right Sector")', *Facebook.com*, 21 February 2014, https://www.facebook.com/dyastrub/posts/599627140114174?stream_ref=10 **(Annex A.37, page 1)**

28.9. **First,** the imposition of sanctions against the Applicant, and his designation as "*former President of Ukraine*" and as a "*person responsible for the misappropriation of Ukrainian State funds*", constitute an unlawful interference in the internal affairs of Ukraine. This principle of international law has been articulated and commented upon as follows:

> "***The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.***
>
> *No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.*
>
> *No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or other armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."*[48]

28.10. The importance of this principle has been emphasised by the International Court of Justice in *Military and Paramilitary Activities*.[49]

28.11. The choice of government is a matter within the domestic jurisdiction of Ukraine. The Council has no right to intervene in such matters. That is, however, what it has done by way of, amongst other things, the Decision and the Regulation. In particular, by imposing sanctions against the Applicant (and others), the Council has used a method of economic coercion to intervene in a matter which is, pursuant to the principle of State sovereignty, one for Ukraine to decide freely. Financial sanctions imposed on a democratically elected Head of State even if in exile perforce prevent (and at the very least seriously impede) him from exercising his public functions, pursuant to his democratic mandate.

28.12. The Council's unlawful interference in the internal affairs of Ukraine by means of economic coercion is compounded by its designation of the Applicant as "*former President of Ukraine*" in the Annex to the Decision and Annex 1 to the Regulation, and as a "*person responsible for the misappropriation of Ukrainian State funds*" in Article 1(1) of the Decision and 3(1) of the Regulation. By publicly designating the Applicant in this manner, the Council has effectively

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[48] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, annexed to United Nations General Assembly Resolution 2625 (XXV), 24 October 1970, *Official Records of the General Assembly*, Twenty-fifth session, Supplement No. 18, UN doc. A/8018, p. 123 (**Annex A.38, pages 6-7**).

[49] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, [1986] I.C.J. Reports 14 § 202.

sought to influence the opinion of the international community of States (at least) no longer to regard the Applicant as the Head of State of Ukraine, and to galvanise international support for the so-called "*interim regime*" which illegally sought to depose the Applicant and his democratically elected Government.

28.13. Further, the so-called "*interim regime*" in Ukraine does not satisfy the requirements for recognition under international law. Distinguished legal commentators have described the criteria for the recognition of governments as follows:

> *"As with recognition of new states, so also with recognition of governments the decision is not one determined solely by political considerations on the part of the recognising state.* ***A government which is in fact in control of the country and which enjoys the habitual obedience of the bulk of the population with a reasonable expectancy of permanence, can be said to represent the state in question and as such to be deserving of recognition.*** *The preponderant practice of states, in particular that of the United Kingdom, in the recognition of governments has been based on the* ***principle of effectiveness*** *thus conceived.*
>
> *... It is in practice impossible to insist on the perpetuation of any existing regime by the refusal to recognise its revolutionary successor* ***which is effectively established****, nor does state practice deny recognition to governments with unconstitutional origins* ***once they are effectively established****, and constitutional legitimacy cannot be regarded as an established requirement for the recognition of governments."*(emphasis added).[50]

28.14. The Decision is dated 5 March 2014. Thus, the Council was purporting, less than a fortnight after the Applicant was forced to leave Ukraine on 24 February 2014, to designate him as the "*former President*" and to recognise the so-called "*interim regime*". It certainly cannot be said that in early March 2014 the so-called "*interim regime*" enjoyed the *"habitual obedience of the bulk of the population with a reasonable expectancy of permanence"*. This is underlined by current events at the time from which it is impossible to infer obedience, let alone **habitual** obedience, and which plainly do not support the notion of a reasonable expectancy of permanence. These include:

28.14.1. the persistence of separatist movements in parts of the country (especially Crimea, the South and East), whose spokespersons have frequently stated that the illegitimacy of the so-called "*interim regime*" in Kiev has been a primary motivation of their secessionist projects;

28.14.2. recurrent mass demonstrations against the new authorities in large parts of the country. From 23 February 2014 onwards, a large number of anti-so-called "*interim regime*" protests were held in Ukraine's

[50] *Oppenheim's International Law*, Volume 1, pp.150 – 153 (**Annex A.39, pages 2, 4-5**).

southern and eastern regions. These protests were particularly prominent in Crimea.[51] However, such protests were not limited to this region, and in the first days of March in particular, mass demonstrations took place and government buildings were stormed in vital cities in the south and east of Ukraine. Pro-Russian and anti-so-called "*interim regime*" demonstrations took place in eleven Ukrainian cities on 1 March 2014, including in Odessa, Dnipropetrovsk, Kharkiv, and Donetsk. In Kharkiv, a crowd of thousands of demonstrators stormed an administration building on 1 March 2014 in a melee that left two dead and 100 hospitalised. In Donetsk, protesters took control of the regional legislative building on 3 March 2014, demanding greater autonomy from Kiev.[52] A commonly voiced expectation at the time was that "*the new government may not last long*".[53] These protests can hardly be said to have abated in the months that followed;

28.14.3. the defection of senior State personnel, such as the head of the Ukrainian Navy, who had himself been appointed by the new so-called "*interim regime*".

28.15. **Second**, the imposition of sanctions amounts to an attack on the Applicant's immunity *ratione personae*. The International Court of Justice has held that "*in international law it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State ... enjoy immunities from jurisdiction in other States, both civil and criminal*".[54] A Head of State enjoys "*full immunity from criminal jurisdiction and inviolability*", which protects him "*against any act of authority of another State which would hinder him ... in the performance of his ... duties*".[55] The imposition of sanctions constitutes a constraining act of authority to which the Applicant (and any property which he might have in the EU) has been subjected. Regardless of whether the Applicant actually has any funds or economic resources in the EU, the Decision and the Regulation are coercive measures. In the *Arrest Warrant* case, the International Court of Justice held that the mere publication and circulation of an arrest warrant by the Belgian authorities "*effectively infringed*" the immunity of the incumbent Minister of Foreign Affairs of the Democratic Republic of Congo, even though no steps by third States to enforce the arrest warrant had been taken.[56] In line with the Council's Best Practices on the implementation of

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[51] 'Violence erupts in Ukraine as pro-Russian protesters clash with Kyiv supporters', *Euronews*, 23 February 2014, http://www.euronews.com/2014/02/23/violence-erupts-in-ukraine-as-pro-russian-protesters-clash-with-kyiv-supporters/ (**Annex A.40, page 1**)

[52] 'From Russia, 'Tourists' Stir the Protests', *The New York Times*, 3 March 2014, http://www.nytimes.com/2014/03/04/world/europe/russias-hand-can-be-seen-in-the-protests.html?_r=0 (**Annex A.41, page 3**)

[53] 'Protest Leaders Pick Activists for 'Government of Unity'', *The Wall Street Journal*, 26 February 2014, http://online.wsj.com/news/articles/SB10001424052702304071004579407372408125640 (**Annex A.42, page 2**)

[54] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, [2002] I.C.J. Reports 3 ("***Arrest Warrant***") §51; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, [2008] I.C.J. Reports 177 ("***Certain Questions of Mutual Assistance***") §170.

[55] *Arrest Warrant* §54.

[56] *Arrest Warrant* §71.

sanctions, Member States must respect the immunity conferred on the Applicant as a matter of international law.[57]

28.16. **Third**, the Decision and the Regulation are contrary to the obligation to respect the inviolability, honour and dignity of Heads of State. The legal duty to protect the dignity of a State's representative is a rule of customary international law, reflected in Article 29 of the Vienna Convention on Diplomatic Relations, which is "*necessarily applicable to Heads of State.*"[58] Further support for this duty is provided in a resolution adopted by the Institut de droit international at its meeting in Vancouver in 2001, on '*Immunities from Jurisdiction and Execution of Heads of State and Government in International Law*', according to which the authorities of a foreign State must take "*all reasonable steps…to prevent any infringement of a [Head of State's] person, liberty or dignity*".[59] States, and by parity of reasoning groups of States, and international bodies, such as the EU and its Council and Court, have an obligation to protect the honour and dignity of the Applicant, in connection with his inviolability. The publication of the Decision **(Annex A.1, page 3)** and the Regulation **(Annex A.3, page 6)**, which refer to the Applicant as "*former President of Ukraine*", and which identify him as a "*person responsible for the misappropriation of Ukrainian State funds*" and their illegal transfer constitutes a violation of his dignity, and, as such, an international wrong **(Annex A.1, page 1 and Annex A.3, page 3)**.

28.17. **Fourth**, by subjecting the Applicant to the same procedure as the other listed persons, the Council has failed to act in accordance with the international courtesies due to a foreign Head of State. In *Certain Questions of Mutual Assistance*, the International Court of Justice held that "*an apology would have been due from France*" by reason of the failure of an instructing judge in France to act in accordance with the courtesies due to a foreign Head of State.[60] In *Certain Questions of Mutual Assistance*, Judge Clément invited the Djiboutian President to give evidence simply by sending him a facsimile and by setting him an extremely short deadline without consultation to appear in her office.[61] In the present case, no courtesies have been shown in the manner in which (a) the Applicant was notified of the Decision and the Regulation (in that, quite apart from anything else, he was not notified of the Decision and the Regulation at all), (b) the Applicant was forced to make a request for information, evidence and documents relevant to the making of the Decision and the Regulation (to which no proper response has been provided by the Council), and (c) his name was included in the Annex to the Decision and Annex 1 to the Regulation. To the contrary, all of the steps taken by the Council in implementing the restrictive measures have exposed the Applicant, to unacceptable infringements of his basic rights of fairness and due process: see further below, §§54-64.

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[57] Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures, Document 8666/1/08, 24 April 2008 §40. **(Annex A.43, page 16)**

[58] *Certain Questions of Mutual Assistance* §174.

[59] Institut de droit international, '*Immunities from Jurisdiction and Execution of Heads of State and Government in International Law*', Session of Vancouver, 2001, Article 1. **(Annex A.44, page 2)**

[60] *Certain Questions of Mutual Assistance* §173.

[61] *Certain Questions of Mutual Assistance* §172.

29. For the reasons outlined above, the Applicant submits that the Decision, adopting sanctions against the Applicant, is not consistent with the expressly invoked objectives (e.g. democracy; rule of law; respect for human rights) in it. Nor is the Decision consistent with other objectives in Article 21(2)(b). The Decision therefore lacks a legal basis.

(iv) The conditions for relying on Article 215 TFEU were not fulfilled because there was no valid decision under Chapter 2 of Title V TEU

30. Article 215 TFEU requires a valid decision under Chapter 2 of Title V TEU. Where no such valid decision exists, there is no basis for enacting a regulation under Article 215(3). For the reasons set out in §§18-29 above, the Decision lacks legal basis and is invalid. For that reason, it was not open to the Council to rely on Article 215 TFEU and it follows that the Regulation is invalid (see *Al-Matri* §76). In fact, the criticisms set out above of the Decision apply equally to, and should themselves invalidate, the Regulation as well.

B. The Second Plea: Misuse of Power

31. In 2012 the European Parliament adopted a recommendation *"on a consistent policy towards regimes against which the EU applies restrictive measures, when their leaders exercise their personal and commercial interests within EU borders"* (**"the 2012 Recommendation"**). The 2012 Recommendation emphasises the importance of imposing sanctions *"regardless of political, economic and security interests"* and recommends that the Council:

> *"Build an efficient sanctions policy*
> ...
> *(m) to ensure that there are no double standards when deciding on restrictive measures or sanctions and that these are applied regardless of political, economic and security interests ..."* (**Annex A.45, pages 4-5**)

32. In *PMOI I* the General Court stated, *"As the Court of Justice and the Court of First Instance have repeatedly held, a measure is vitiated by misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than those pleaded or of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case"* (§151).

33. As outlined above, the objectives invoked by the Decision and the Regulation for the purpose of imposing sanctions on the Applicant purport to relate to the rule of law and respect for human rights in Ukraine. As shown above, the Decision and the Regulation are not actually consistent with those objectives and the Decision and the Regulation accordingly lack a legal basis.

34. In fact, the Council's purpose, in implementing the Decision (and, therefore, the Regulation) was and is, in the Applicant's submission, to try to seek favour with the so-called *"interim regime"* of Ukraine so that Ukraine proceeds, in particular, with the framework outlined in the preamble to the Macro-Finance Decision, which the EU is so

anxious to pursue. The following objective, relevant and consistent evidence (*Bank Melli Iran 390/08* §121) shows that this self-serving political purpose, and not the rationales stated on the face of the Decision, is the real purpose behind the imposition of sanctions by the Decision. The starting point is to recall (see above, §28.4.3) that until the events in February 2014 the Applicant and his Government were not considered to be anything other than the proper, democratically elected representatives of the Ukrainian people. They were repeatedly wooed by the EU only to be confronted with a volte-face after they decided not to pursue the EU's agenda regarding future interaction between Ukraine and the EU. Following this the Applicant and his Government were characterised by the Council as villains, and arbitrarily and unfairly subjected to sanctions.

34.1. As described in more detail at §27 above, the comments made by EU officials in the period between 20 February 2014 and 6 March 2014 demonstrate the implausibility of the reasons relied on by the Council in the Decision (and, therefore, also the Regulation).

34.2. The Applicant was not aware on 6 March 2014, and remains unaware, of any criminal proceedings in Ukraine that are being advanced against him for "*embezzlement of State funds and their illegal transfer abroad*"**(Annex A.5, page 6)**. It is to be inferred that the criminal proceedings identified by the Council in the Decision and Regulation, if they existed at all (which is not accepted), were manufactured solely for the purpose of providing the Council with ostensible grounds to include the Applicant on the sanctions list.

34.3. Even when the Applicant's Government was obviously in power, it appears that the EU was attempting to deploy these sanctions to maximise its **political** influence with those in power in Ukraine. For example:

34.3.1. it appears that EU officials did not initially intend to include the Applicant on the list of individuals to be sanctioned, when they first agreed to the imposition of sanctions on 20 February 2014. At the time, a European diplomat justified this by stating that "*Yanukovych must be left with a way out. We cannot make him a complete pariah or the purchase is lost and he is pushed into Russia's arms*".[62] It is at least difficult to reconcile such obvious political strategizing with the ostensible stated purpose of the sanctions at the time, i.e. to target those held responsible for human rights violations; and

34.3.2. following the attempted seizure of power by the so-called "*interim regime*", the Council's position changed and it appears that the Council's working group drew up its list of targeted individuals based on the input from opposition leaders.[63]

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[62] 'EU agrees sanctions against Ukraine', *The Telegraph*, 20 February 2014, http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10652114/EU-agrees-sanctions-against-Ukraine.html **(Annex A.46, page 2)**

[63] 'EU considering sanctions on eight Yanukovych officials', *EU Observer*, 26 February 2014, http://euobserver.com/justice/123280 **(Annex A.47, page 3)**

34.4. In fact, the aim of engendering an EU-friendly Ukrainian government appears to have been the rationale for the entire approach taken by the Council in this period. By way of further example, having previously worked extensively to broker the February Agreement (**Annex 25**), which might have allowed a phased handover of power to a more supportive regime, and having in fact signed the same, the EU disregarded it entirely once attempts were made to overthrow the Applicant and his Government. When Baroness Ashton responded on 25 February 2014 to the question "*Is the agreement from last Friday signed in Kiev by leaders of Ukrainian government, opposition and EU foreign ministers still valid?*", she simply commented "*We have seen that this country has moved on and our role is to support and help*".[64] The EU was therefore prepared to disregard both the illegitimacy of the undemocratic so-called "*interim regime's*" attempted seizure of power and the obligations it assumed under the February Agreement, in order to benefit from the opportunity to negotiate immediately with a malleable "*regime*" in Ukraine.

34.5. The aim of this "*support and help*" was in particular to ensure the signing of the Association Agreement (that had been at least postponed by the Government of the Applicant) whilst the Applicant's political opponents, who were in favour of this Agreement, had some degree of power and crucially, therefore, prior to 25 May 2014 (the date for new Ukrainian elections). On 6 March 2014, the very day on which the list of individuals targeted by EU sanctions was published, President of the European Council Herman Van Rompuy announced "*We stand by Ukraine, and reiterated the European commitment to signing the Association Agreement. Today we decided that as a matter of priority we will sign very shortly the political chapters. This means: before the Ukrainian elections of 25 May. We also commit to provide Ukraine with strong financial backing. The immediate priority in this field is restoring macro-economic stability. President Barroso will I am sure say more about the EU assistance package– I will just say we asked ministers to start work immediately. We intend to adopt special trade measures to allow Ukraine to benefit substantially soon from the advantages of the Free Trade Area. We remain committed to the visa liberalisation process, to encouraging contacts between the citizens of the EU and of Ukraine. We stand ready to assist also on energy security. Finally, we welcome our foreign ministers' decision to freeze and recover misappropriated (or stolen) State assets.*"[65] Renewed progress on the implementation of the Association Agreement, to be achieved through agreement with the so-called "*interim regime*", was therefore the **centrepiece** of the EU's relationship with Ukraine following the attempted seizure of power by the so-called "*interim regime*". As Mr Van Rompuy's speech acknowledges, it was **fundamental** to this new relationship that the political provisions of the Association Agreement were signed as soon as possible and prior to 25 May 2014. No reason is given in Mr Van Rompuy's

[64] 'Remarks by EU High Representative Catherine Ashton at the end of her visit to Ukraine', European Union External Action, 25 February 2014 (140225/01), http://www.eeas.europa.eu/statements/docs/2014/140225_01_en.pdf (**Annex A.48, page 3**)

[65] Press Release EUCO 55/14 'Remarks by President of the European Council Herman Van Rompuy following the extraordinary meeting of EU heads of State or Government on Ukraine' 6 March 2014 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141373.pdf (**Annex A.49, page 2**)

speech for the unseemly haste in signing the political provisions of the Association Agreement before new elections. Indeed, it is wrong that the EU would rush to the conclusion of such an agreement with a so-called "*interim regime*" rather than with any government elected after the 25 May 2014 elections and which could theoretically provide a democratic mandate needed for such a significant step (this is only theoretical, since the only true democratic mandate would remain with the Applicant's Government).

34.6. On 21 March 2014 the EU and the so-called "*interim regime*" signed the political provisions of the Association Agreement into force. The Applicant's democratically elected Government had refused to sign this agreement only months before. The EU's real concern appears to have been to take full advantage of the opportunity to secure greater political and economic influence over Ukraine through the signature of the Association Agreement. In his Statement on the signing of this agreement, Mr Van Rompuy described this action as a "*gesture*" that on the part of the EU recognises "*the popular yearning* [in Ukraine]*...for a European way of life*".[66] In circumstances where opposition to the so-called "*interim regime*" and its Eurocentric policies was overwhelming in large parts of the country, and there had been no election, this is a telling illustration of the extent of the EU's interference in the domestic political affairs of Ukraine for the purpose of advancing the EU's geopolitical agenda.

34.7. Given this approach by the EU, it is not surprising, but inconsistent, that the Council has taken no steps to address the human rights violations now being committed by the so-called "*interim regime*" in its attempts to suppress the disturbances occurring in the East and South of the country. In contrast to the restraint shown by the Applicant's Government in response to the Maidan protests (such as allowing months of extreme rebel activity in, and paralysing, the centre of Kiev, and rabble rousing speeches there by foreign visitors, including major politicians from the Western powers, none of which can even be envisaged being permitted in EU capitals or Washington), the so-called *"interim regime"*, reacting to on-going and widespread protests across the country against its "*rule*", has actually and swiftly taken the step of ordering Ukraine's armed forces to act against its own citizens, causing serious and ever growing numbers of casualties.[67] Military-grade weaponry, tanks, and military helicopters have been employed in order to subdue lightly-armed self-defence militias and/or civilian protesters. It is noteworthy that the so-called "*interim regime*" has now purported to accept the jurisdiction of the

[66] Press Release EUCO 68/14, 'Statement by President of the European Council Herman Van Rompuy at the occasion of the signing ceremony of the political provisions of the Association Agreement between the European Union and Ukraine', 21 March 2014 (http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141733.pdf) **(Annex A.50, page 1)**

[67] 'Ukraine Says 30 Pro-Russian Insurgents Killed', *ABC News*, 6 May, 2014 **(Annex A.51, page 1)** (http://abcnews.go.com/International/print?id=23601293); 'Ukraine: deadly clashes in Mariupol as Vladimir Putin visits annexed Crimea', *The Guardian*, 9 May 2014 **(Annex A.51, pages 2-5)** (http://www.theguardian.com/world/2014/may/09/ukraine-putin-crimea-victory-day-mariupol/print)

International Criminal Court for a very short period which **excludes** the period from which it started to assert some power as a so-called "*interim regime*".[68]

C. The Third Plea: Failure to State Reasons

35. The Council has failed to comply with its obligation to state reasons in the Decision and the Regulation.

36. Article 296 TFEU provides *"Legal acts shall state the reasons on which they are based ..."*. As the Court in Case C-417/11 Council of the EU v Bamba [2013] 1 CMLR 53 (**"Bamba"**) explained,

> *"The statement of reasons required by Article 296 TFEU must disclose in a **clear and unequivocal fashion** the reasoning followed by the institution which adopted the measure in such a way as to enable the person concerned to ascertain the reasons for the measures and to enable the court having jurisdiction to exercise its power of review ...*
>
> *... where the person concerned is not afforded the opportunity to be heard before the adoption of an initial decision to freeze funds, compliance with the obligation to state reasons is all the more important because it constitutes the **sole safeguard** enabling the person concerned, at least after the adoption of that decision, to make effective use of the legal remedies available to him in order to challenge the lawfulness of that decision.*
>
> *Therefore, the statement of reasons for an act of the Council which imposes a measure freezing funds must ... identify **the actual and specific reasons** why the Council considers, in the exercise of its discretion, that that measure must be adopted in respect of the person concerned.*
>
> *The statement of reasons ... must, however, be **appropriate to the act at issue and the context in which it was adopted**."* (§§50-53) (emphasis added)

37. The reasoning for the measure *"must be provided to the person concerned by the measure before the latter brings an action against it. **Non-compliance with the duty to state reasons cannot be regularised by the fact that the person concerned becomes cognisant thereof during proceedings before the EU judicature**"* (Case T-15/11 Sina Bank v Council of the EU (11 December 2012) §56, emphasis added, citing Bank Melli Iran 390/08, §80) and note also the Court's conclusion in Sina Bank at §62.

38. The 2012 Guidelines (see above, §25) explain, in relation to *"lists of targeted persons and entities"*,

> *"The decision to subject a person or entity to targeted restrictive measures requires **clear criteria, tailored to each specific case**, for determining which*

[68] Press Release ICC-CPI-20140417-PR997, 'Ukraine accepts ICC jurisdiction over alleged crimes committed between 21 November 2013 and 22 February 2014', 17 April 2014 (**Annex A.51A**) (http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr997.aspx)

persons and entities may be listed, which should also be applied for the purpose of removal from the list...

Proposals for listing must be accompanied by ***accurate, up-to-date and defendable statements of reasons****...*" (§§15-18; emphasis added) **(Annex A.6, page 9)**

39. Both the Decision and the Regulation contain the same "*statement of reasons*" in relation to the Applicant, **(Annex A.1, page 3** and **Annex A.3, page 6)** i.e. *"Person subject to criminal proceedings in Ukraine to investigate crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine"*. This "*statement of reasons*" is inappropriate and deficient for at least the following reasons:

39.1. **First**, it fails to disclose in a clear fashion the reasoning followed by the Council. Thus, the Applicant does not know, from the Decision or the Regulation: (a) what proceedings are being referred to; (b) where, when and by whom they were instituted; and (c) which crimes he is being investigated for. These are not reasons which would be likely to pass muster within the domestic jurisdiction of EU Member States as providing a proper basis for sanctions against individuals and an asset freeze. Compare, for example:

39.1.1. The statement of reasons in *Bamba*, which the Court upheld as being sufficient to enable the applicant in that case to challenge their validity and to enable the Court to review their legality (§63): in that case the sanctions were applied to *"persons or entities ... who are obstructing the process of peace and national reconciliation, and in particular who are jeopardising the proper outcome of the electoral process, or held by entities owned or controlled directly or indirectly by them or by any persons acting on their behalf or at their direction"* (§15) and the applicant was included by reference to the following statement of reasons: *"Director of the Cyclone group which publishes the newspaper 'Le Temps': Obstruction of the peace and reconciliation processes through public incitement to hatred and violence and through participation in disinformation campaigns in connection with the 2010 presidential election"* (§20).

39.1.2. The consideration by the Court of Justice of the statement of reasons in Case C-584/10 *European Commission and others v Kadi* [2014] 1 CMLR 24 §§141-149 ("***Kadi II GC***"). The Court of Justice held that *"the allegation that Mr Kadi had been the owner in Albania of several firms which funnelled money to extremists or employed those extremists in positions where they controlled the funds of those firms, up to five of which received working capital from Usama bin Laden, is insufficiently detailed and specific given that it contains no indication of the identity of the firms concerned, of when the alleged conduct took place and of the identity of the "extremists" who allegedly benefitted from that conduct."* (§141) The other reasons were considered sufficiently detailed where they, for example, identified *"the entity concerned and Mr Kadi's role in relation to it, together with mention of an alleged link between that entity, on the one hand, and Usama bin Laden and*

Al-Qaeda, on the other" (§143) and contained *"the necessary detail concerning the time and context of the appointment in question and information on the individuals involved in the allegation that that appointment was connected with Usama bin Laden"* (§145).

39.2. **Secondly**, it fails to disclose whether the Applicant is alleged to be a *"person responsible for human rights violations"*. This is not an allegation made in the "*statement of reasons*" relating to the Applicant, but it is clearly identified as being one of the two purported objectives of the Decision and the Regulation (**Annex A.1, page 1** and **Annex A.3, page 1 and 3**). It is unclear why (and wrong that) this "*objective*" has been retained when human rights violations are not actually alleged against **any** one of the individuals listed in the Annex (including the Applicant).

40. In *Bank Saderat Iran*, where the applicant was alleged to have provided financial services to entities involved in Iran's nuclear programme, the General Court held to be excessively vague the reason that the applicant provided financial services to "*entities subject to UN Security Council Resolution 1737 (2006)*". Although a list of such entities was annexed to the said UN Security Council Resolution, the Council breached its duty to provide reasons by failing to identify the specific entities alleged to have received services from the applicant.[69]

41. The breach of the duty to provide reasons is even clearer in the present case:

41.1. **First**, the Council does not specify how the particular proceedings relied on involve an allegation that the Applicant misappropriated Ukrainian State funds and illegally transferred them outside Ukraine.

41.2. **Secondly**, there is no suggestion of a reason as to how the proceedings in question demonstrate that the Applicant is responsible for human rights violations.

42. In short, the reason provided is too vague (and formulaic) to be properly responded to, refuted, or reviewed by this Court, and it is not even specific to the Applicant because the identical reason is given for seven other individuals in the Annex.

D. The Fourth Plea: Failure to Fulfil Criteria for Inclusion

43. The criteria for applying the restrictive measures are set out in Article 1(1) of the Decision (**Annex A.1, page 1**) and Article 3(1) of the Regulation (**Annex A.3, page 3**). In order to be listed, a person must be someone who has been "*identified as responsible*" for the misappropriation of Ukrainian State funds or human rights violations in Ukraine, or a person associated with anyone properly so identified.

44. First, the only reason given for the listing of the Applicant is that he is said to be subject to "*criminal proceedings*" (**Annex A.1, page 3** and **Annex A.3, page 6**) in Ukraine to investigate crimes in connection with the embezzlement of Ukrainian State

[69] *Bank Saderat Iran*.

funds and their illegal transfer outside Ukraine. This is not a reason that complies with the criteria for listing; it is not a reason that alleges that the Applicant was a person responsible for the misappropriation of Ukrainian State funds (embezzlement and illegal transfer) or human rights violations in Ukraine, or was properly to be regarded as sufficiently associated with a person properly so identified.

45. **Secondly**, the statement of reasons for listing the Applicant, set out at entry 1 of the Annex to the Decision and Annex 1 to the Regulation, allege that the Applicant is "*subject to criminal proceedings*" in Ukraine. This ground does not even fall within the ambit of the broadest category of the five possible categories identified by the General Court in *Ezz* because the Applicant is not aware of steps actually taken to commence any criminal case against him for alleged misappropriation or embezzlement or illegal transfer of State funds, and has not in fact been served with notice of any such case. In addition, "*criminal proceedings*" could not have been commenced against him by the time at which the Decision and the Regulation were imposed, or at all, as a result of the Applicant's immunity from suit. The Applicant is immune from suit under Ukrainian law, since as President he has immunity from all proceedings during his term of office (which has not ended). This right derives from Article 105 of the Constitution (**Annex A.52, page 1**), the right is not qualified and it is not capable of being waived in any circumstances whilst he remains in office. Further, as a matter of customary international law, which is part of Ukrainian law, the Applicant enjoys immunity *rationae personae*, as mentioned above. It would be contrary to both Ukrainian and international law for any "*criminal proceedings*" against him to be treated as effective. In *Ezz*, the relevant criteria were that a person must be someone who has been "*identified as responsible for misappropriation of Egyptian state funds*" or be a person "*associated with them*".[70] The General Court considered (although this is not accepted as correct by the Applicant) that these criteria must "*be interpreted broadly*" as being directed at five separate categories of persons.[71] In order to be "*identified as responsible*", the General Court held that the person in question must be found guilty, or be subject to a formal criminal prosecution or some other form of "*judicial proceedings*" linked to investigations concerning the misappropriation of State funds. None of these apply here, even if the *Ezz* interpretation is correct.

46. Significantly, the legality of the decision to freeze assets is to be assessed in the light of the information available to the Council when the decision was adopted.[72] The Applicant has never, to the best of his knowledge and belief, been subject to criminal proceedings for misappropriation of Ukrainian State funds/illegal transfer.[73]

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[70] Decision 2011/172/CFSP of 21 March 2011, Article 1(1); Regulation No 270/2011 of 21 March 2011, Article 2(1). The reason for listing Mr Ezz was that he was alleged to be a "[p]*erson subject to judicial proceedings by the Egyptian authorities in respect of the misappropriation of State Funds on the basis of the United Nations Convention against corruption*".

[71] *Ezz* §67.

[72] *Al-Matri* §72.

[73] If the Applicant was sanctioned on the basis that he was current associate or family member of a government figure, this is not properly set out and is in any event incorrect. The Applicant does not meet the requirements to be included on this basis as set out in the relevant legal authorities, including Article 215 TFEU, *Kadi I*, Case C-376/10 *Tay Za v Council* [2012] 2 CMLR 27 and Case T-362/04 *Leonard Minin v Commission* [2007] ECR II-2003.

47. Based on the foregoing, in this case there are at least two manifest errors of assessment/failures to observe the criteria in the Decision and the Regulation.

47.1. **First**, as noted above, the Decision and the Regulation purport to impose sanctions against *"persons **identified** as **responsible** for the misappropriation of Ukrainian State funds"* (**Annex A.1, page 1** and **Annex A.3, page 1**) (emphasis added). As to this:

47.1.1. There is no ambiguity in these criteria, viz., it means that the individuals against whom the sanctions are directed, i.e. the people listed in the Annex, have been *"identified as responsible for the misappropriation of Ukrainian State funds"*.

47.1.2. The clear connotation of this is that the people listed in the Annex have been identified, by some form of legitimate and reliable process (it should be a trial, or at least some form of proper objective judicial process), as being responsible for the misappropriation alleged.

47.1.3. The Applicant has never, to the best of his knowledge and belief, been identified by any judicial or other relevant body as being responsible for the misappropriation of Ukrainian State funds/illegal transfer. In any case, "*criminal proceedings*" could not have been commenced against the Applicant as he has presidential immunity from suit (see §45 above).

47.1.4. The Decision and the Regulation do not specify which body has identified him as being responsible as alleged. Indeed, to the contrary: the Annexes to both instruments make it clear that no such conclusion has been reached since the "*statement of reasons*" is simply that the Applicant is *"subject to criminal proceedings in Ukraine to investigate crimes"* (see above, §§7, 9).

47.1.5. The Applicant has, therefore, been wrongly included in the Annex. He is not a person who has been identified as being responsible for the misappropriation alleged and therefore he should be removed from the Annex.

48. **Secondly**, and in the alternative, as to the "*statement of reasons*" itself:

48.1. The Applicant is alleged to be a *"Person subject to criminal proceedings in Ukraine to investigate crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine"* (**Annex A.1, page 3** and **Annex A.3, page 6**). As noted above, neither the Decision nor the Regulation provides any details whatsoever as to (a) what is alleged to have been misappropriated; (b) by whom; (c) when; (d) what illegal transfers are alleged to have been made; (e) by whom; (f) when; (g) what criminal proceedings are being referred to; (h) where, when and by whom they were instituted; (i) what stage these criminal proceedings have reached; and (j) which crimes he is being investigated for. Although the Ukrainian Criminal Code once contained a crime of "*embezzlement of state or municipal assets in gross amounts*" (Article 86-1,

until 2001) (**Annex A.53, page 1**), and a crime of "*illegal opening and usage of foreign currency accounts outside Ukraine*" (Article 208, until 2011) (**Annex A.54, page 1**), the supposed criminal activities identified in the "*statement of reasons*" do not even exist as discrete and readily identifiable criminal offences under current Ukrainian law.

48.2. By a letter dated 14 April 2014 the Applicant wrote to the Council requesting as a matter of urgency "*all Information, Evidence and Documents relevant to the making of the Decision and the Regulation, and to the inclusion of* [the Applicant]*'s name in the Annex to the Decision and Annex 1 to the Regulation*" (**Annex A.55**), and advancing a number of more specific requests covering the specific issues identified above. Chasing letters were sent to the Council on 17 April 2014 (**Annex A.56**) and 30 April 2014 (**Annex A.57**). A response was received from the Council only on 12 May 2014, when it stated that, "*in view of the particular complexity of the examination*" (**Annex A.58**), it was extending the time limit for responding to the Applicant's request by 15 working days. For the reasons stated at the start of this Application, it is therefore necessary for the Applicant to file the Application prior to the receipt of information from the Council. The Council must have been well aware that the Applicant would need to do so and, therefore, must have been well aware of the negative consequences for the Applicant of the Council's delay in responding to the Applicant's proper requests.

48.3. As the Applicant explains in his evidence at **Annex A.5, pages 6-7**, to the best of his knowledge and belief he has not been notified of any pending or instituted criminal proceedings against him in Ukraine relating to the misappropriation of Ukrainian State funds (embezzlement or illegal transfer). In the circumstances, the Applicant does not appear to be the subject of any such proceedings in Ukraine, and indeed, due to his presidential immunity the Applicant cannot be the subject of such proceedings.

48.4. Furthermore, there is no basis for any such allegations, let alone any such proceedings to be instituted against him, because he has not misappropriated any Ukrainian State funds/illegally transferred them.

49. The criterion for inclusion set out in Article 1(1) of the Decision and Article 3(1) of the Regulation is therefore not satisfied. Neither the Decision, or the Regulation, or any other instrument gives the Council power to freeze the Applicant's funds simply because he is alleged (if, which is denied, he is) to be subject to "*criminal proceedings*" in Ukraine.

E. The Fifth Plea: Manifest Error of Assessment

50. It is clear from the case law cited at §16 above that review by this Court, in an action for annulment, includes an assessment of the facts and circumstances relied on as justifying the decision to continue the freeze, including whether the facts are materially accurate, and whether there has been a manifest error of assessment.

51. As noted above, this Court has found that "*the review of lawfulness which must be carried out ... is not limited to an appraisal of the abstract 'probability' of the grounds*

relied on, but must include the question whether those grounds are supported, to the requisite legal standard, by concrete evidence and information".[74] This review involves a "*substantive assessment*" of "*the evidence and information on which that assessment is based*" as well as the "*apparent merits of the contested measure*".[75]

52. Further, the Council may not merely rely on the allegations presented to it by a Member State or third country. The Council is required to satisfy itself that the allegations are valid. The Council must conduct its own examination of the accuracy of the allegations which are put to it by the party seeking the restrictive measures. In the absence of its own examination, the Council relies impermissibly on "*mere unsubstantiated allegations*".[76]

53. As noted above, the reasons given for the Applicant's inclusion in the contested measures are insufficient to meet the criteria. In deciding to include the Applicant in the contested measures, the Council has manifestly erred in its assessment. The Applicant relies on the points made above in this regard. In addition: based on the information now available to the Applicant (and the Court), there is nothing to suggest that the Council checked the relevance and validity of any such evidence concerning the Applicant as was submitted to it (from sources unknown) before it adopted the Decision and the Regulation (the Court has previously criticised the Council for similar failings: see Case T-496/10 *Bank Mellat* §100-101). Had the Council done so, it would have been clear that there was no and certainly no "*concrete*" evidence demonstrating that the allegations were "*materially accurate*". Therefore the Council did not carry out a genuine assessment of the circumstances of the case. Insofar as the Council adopted proposals submitted by unknown third parties, as the Court made clear in *Fulmen* the adoption of unsubstantiated allegations is not permitted. This must hold especially true if allegations emanate from partisan sources (who are seeking to usurp power) with a clear incentive to make allegations for improper purposes. Since the Council has not timeously responded to the Applicant's requests for information (see above, §48.2) the Applicant is unable to develop this submission further at this stage. He fully reserves all of his rights to do so, if he considers it necessary, at a later stage in the proceedings.

F. The Sixth Plea: Breach of Defence Rights/ Effective Judicial Protection

54. It is part of the settled case-law of the Court that:

> *"The principle of respect for the rights of the defence requires, first, that the entity concerned must be informed of the evidence adduced against it to justify the measure adversely affecting it. Secondly, it must be afforded the opportunity effectively to make known its view on that evidence (see, by analogy, Organisation des Modjahedines du peuple d'Iran v Council ...)*
>
> *Consequently, as regards an initial measure whereby the funds of an entity are frozen, unless there are compelling reasons touching on the security of the European Union or of its Member States or the conduct of their international relations which preclude it, the evidence adduced against that entity should*

[74] *Fulmen* §97.
[75] *OMPI I* §154; *PMOI II* §74; *Kadi II* §§129, 135, 143.
[76] *Fulmen* §§98-103.

be disclosed to it either concomitantly with or as soon as possible after the adoption of the measure concerned.

... the principle of effective judicial protection is a general principle of European Union law, stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the [European Convention on Human Rights] and in Article 47 of the Charter of Fundamental Rights of the European Union ... The effectiveness of judicial review means that ***the European Union authority in question is bound to disclose the grounds for a restrictive measure to the entity concerned, so far as possible, either when that measure is adopted or, at the very least, as swiftly as possible after that decision****, in order to enable the entity concerned to exercise, within the periods prescribed, its right to bring an action"* (Case T-492/10 Melli Bank plc v Council of the EU, not yet reported, 20 February 2013 §§52-56; emphasis added; see also Kadi II GC [2014] §§135-137).

55. The rights of defence and the right to effective judicial protection are particularly important because of the potentially devastating effects of an asset-freeze of the type imposed under the Decision and the Regulation. In Kadi I and Kadi II, this Court noted the *"considerable"* restriction of the exercise of the applicant's right to property and that measures of this kind *"have a marked and long-lasting effect on the fundamental rights of the persons concerned"*.[77] The Advocate General in Kadi I observed that *"...the indefinite freezing of someone's assets constitutes a far-reaching interference with the peaceful enjoyment of property. The consequences for the person concerned are potentially devastating, even where arrangements are made for basic needs and expenses"*.[78] The damaging impact on the Applicant's reputation must also be taken into account.

56. Although the measures are provisional in the sense that no final finding of guilt is made by the Council, they are indefinite in scope and far-reaching in application. Even if an applicant ultimately succeeds in clearing his name in proceedings in a third country, he will not automatically be compensated by the EU for the damage caused by the restrictive measures in the (lengthy) interim (we refer again to the Applicant's express reservation at footnote 5 above regarding possible future claims for damages/other remedies). Even after the restrictive measures have been lifted, there is evidence that financial institutions refuse to provide services to the persons concerned.[79]

57. The EU courts have made it clear precisely what steps the EU institutions must take, and the standards with which they must comply, in order to safeguard rights of defence when adopting asset-freezing measures. The Courts have stated in particular that:

    57.1. a listing decision must be based on *"serious and credible"*[80] *"concrete evidence and information"*;[81]

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[77] Kadi I §358; Kadi II §151.
[78] Kadi I §47.
[79] The UK Independent Reviewer of Terrorism Legislation (Second Report on the Operation of the Terrorist Asset-Freezing Act 2010) §§5.2-5.10. **(Annex A.59, pages 22-24)**
[80] PMOI I §131.
[81] Fulmen §97.

57.2. it must be made on the basis of *"precise information or material in the relevant file"* (and, it follows, that the measure taken must be a proportionate response to the information in the relevant file);[82]

57.3. the statement of reasons must provide sufficient information to make it possible to determine whether the act is well founded or vitiated by error, and (in the case of a decision to continue an asset-freeze) must indicate the *"actual and specific reasons"* why the asset-freeze remains justified;[83]

57.4. the institutions must communicate the *"grounds"* on which a person has been subjected to restrictive measures;[84]

57.5. those on whom the measures are imposed must have *"full knowledge of the relevant facts"*;[85]

57.6. they must be informed of the *"evidence adduced against them"* to justify the restrictive measures;[86]

57.7. these are all *"requirements in respect of proof"*;[87]

57.8. the institutions must not adopt restrictive measures which do not *"guarantee"* the communication of the inculpatory evidence against the individuals;[88] and

57.9. the institutions may not base their decisions to freeze funds on information or material in a file which cannot be communicated to the EU judicature whose task is to review the lawfulness of that decision.[89]

58. In *Kadi II*, the General Court held that the applicant's rights of defence and to effective judicial protection were violated because the Commission had observed them only in *"the most formal and superficial sense"*. The Commission had not called into question the UN Sanction Committee's findings in the light of the applicant's observations; the *"few pieces of information"* and *"imprecise allegations"* were *"clearly insufficient"* to have enabled the applicant *"to launch an effective challenge to the allegations against him"*; and the Commission had *"made no real effort to refute the exculpatory evidence advanced by the applicant in the few cases in which the allegations against him were sufficiently precise to permit him to know what was being raised against him."* The asset-freezing measure had been adopted *"without any real guarantee being given as to the disclosure of the evidence used against the applicant or as to his actually being properly heard in that regard"*.[90]

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[82] *PMOI I* §131.
[83] *OMPI I* §§138, 144; *PMOI I* §176.
[84] *Kadi I* §336.
[85] *Kadi I* §337.
[86] *Kadi I* §346.
[87] *PMOI II* §56.
[88] *Kadi I* §352.
[89] *PMOI II* §73; *Fulmen* §§99-101
[90] *Kadi II* §§171-184.

59. The same principles, and essential conclusions, apply to the present case. The contested measures themselves expressly envisage that the rights of the defence are to be respected: the Decision, Article 2(3) (**Annex 1, page 2**); the Regulation, Recital §6 and Article 14 (**Annex 3, pages 1, 5**).

60. The Council in any event accepts that rights of defence apply:

60.1. Sanctions must be imposed with "*full respect of human rights and the rule of law*" and should "*reduce to the maximum extent possible any adverse humanitarian effects*".[91]

60.2. Restrictive measures "*must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy. The measures imposed must always be proportionate to their objective ... and should, in particular, be drafted in light of the obligation under Article 6(3) TEU for the EU to respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of Union law*".[92]

61. The necessity for robust procedural safeguards in cases involving restrictive measures, including those imposed in pursuit of a sanctions policy as against a third country, is reflected in the TFEU. Article 205 TFEU requires the EU's action on the international scene to be conducted in accordance with the rule of law, human rights and fundamental freedoms, and Article 215(3) TFEU requires restrictive measures to be accompanied by "*necessary provisions on legal safeguards*".

62. The Applicant submits that, in adopting the Decision and the Regulation, the Council has again fallen far short of these obligations, in the following respects:

62.1. At no stage has the Applicant been given "*serious and credible*" "*concrete evidence and information*" in support of a case which would justify restrictive measures against him.

62.2. The Applicant has not even been given particularised allegations of the alleged criminal proceedings that are said (wrongly) to justify his inclusion in the restrictive measures, let alone "*serious and credible*" or "*concrete evidence*" to that effect.

62.3. The only case against him is a vague and general assertion that he is subject to such proceedings. This does not give the Applicant or the court sufficient information, let alone "*full knowledge of the facts*" to make it possible meaningfully to refute the allegations and for them to be properly tested.

62.4. The contested measures have been adopted without including safeguards that would have ensured that the Applicant was given a full statement of reasons, including the evidence against him, with precise information and material said

[91] Secretariat of the Council of the EU, Basic Principles on the Use of Restrictive Measures (Sanctions), Document 10198/1/04, 7 June 2004. (**Annex A.60, page 3**)
[92] The 2012 Guidelines, §§9-10. (**Annex A.6, page 7**)

to justify the asset freeze, and with a guarantee that he would be properly heard and his views taken into account. The Decision does not contain those safeguards; it simply provides for grounds to be set out and permits observations to be made.

62.5. It is all the more reprehensible that the contested measures fail to do so given that they were enacted *after* the judgment of the Court of Justice in *Kadi I*. In that case the institutions violated the applicant's rights of defence where he was included on the basis of allegations that he was connected with bin Laden or Al Qaeda; the position is *a fortiori* in the present case where no allegation of misconduct of that kind has been made.

63. The Council has failed to provide "*serious and credible*" "*concrete evidence and information*" even when requested to do so, on multiple occasions, by the Applicant. Indeed, the Council has failed to provide any evidence or information at all in response to these requests. The Applicant is accordingly unable to exercise his rights of defence meaningfully, and this Court is unable effectively to review his inclusion in the measures. This situation is again particularly unacceptable, given that these measures were enacted after the clear statements in the *Kadi* cases making clear to the institutions that they cannot simply list people in restrictive measures without these safeguards.

64. Finally here, the Applicant submits that the present process for challenging the imposition of sanctions is incompatible with the principles of equality of arms and *audi alteram partem*. It is therefore contrary to Article 47 of the Charter of the Fundamental Rights of the European Union. These principles are a corollary of the very concept of a fair hearing.[93] Equality of arms implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.[94] The Court has held that the principle of *audi alteram partem* must apply to **all parties** to proceedings before the EU Courts, whatever their legal status.[95] The process for challenging the Decision and the Regulation in the present case is unfair: for example, individuals are expected to lodge their challenge in an unrealistically short and unduly pressured timeframe; this is difficult not just because of the practical difficulties in securing trans-national legal representation, but can be exacerbated in some cases by difficulties in arranging payments to be made for legal services. The compressed timeframe is also unfair insofar as such individuals are expected to lodge the complete dossier of evidence on which they rely in response to sanctions. Such evidence may need to be compiled, as in the Applicant's case, without proper knowledge of information from the Council regarding the imposition of sanctions in the first place, and with difficulty of accessing relevant witnesses. Furthermore, although such individuals are placed in the invidious position of challenging sanctions under such difficult, time-sensitive conditions, the remainder of the process is conducted at a slow pace; and, of course, throughout this leisurely process they remain subjected to the sanctions, so there is no urgency for an application to annul such as might justify the time limit. Thus, based on previous cases, the Applicant understands that his challenge is unlikely to be heard by the Court for

[93] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533 ("*Sweden v API*") §88.
[94] Case C-199/11 *Europese Gemeenschap v Otis NV* (6 November 2012) §71.
[95] *Sweden v API* §89.

many months and may take over a year. The process is therefore undeniably and unfairly lop-sided. As a result, the procedural position of the Applicant is fundamentally undermined, contrary to the principles of equality of arms and *audi alteram partem*.

G. The Seventh Plea: Breach of Right to Property

65. The Court of Justice in *Kadi I* stated that "*fundamental rights form an integral part of the general principles of law whose observance the Court ensures*", "*respect for human rights is a condition of the lawfulness of Community acts*", and "*measures incompatible with respect for human rights are not acceptable in the Community*".[96]

66. Article 17(1) of the Charter of Fundamental Rights of the EU provides for the right to property.

67. Pursuant to Article 52(3) of the Charter of Fundamental Rights of the EU, Article 17(1) is to be construed consistently with Article 1 of Protocol 1 ECHR.

68. The right to property may only be restricted in the public interest, provided that the interference is not disproportionate or intolerable, and does not impair the very substance of the right.[97]

69. A reasonable relationship of proportionality must exist between the means employed and the aim sought to be realised, and a fair balance must be struck between the demands of the public interest and the interest of the individual concerned.[98] The procedural requirements inherent in Article 1 of Protocol 1 ECHR require that the procedures for imposing a measure restricting the right to property must afford the person concerned a reasonable opportunity of putting his case to the competent authorities and this "*safeguard*" is required by EU law also.[99]

70. The asset-freezing measures under the Decision and the Regulation constitute very severe restrictions on the Applicant's rights to his property. The effect is not only to freeze any of his assets within the EU but also to injure his reputation.

71. For this reason, the justification for the interference must be particularly strong.

72. In view of the severity of the restrictions involved, the Applicant contends that the Decision and the Regulation are an unjustified and disproportionate restriction on his property rights, given in particular that:

    72.1. They were imposed without proper safeguards enabling the Applicant to put his case effectively to the Council, as outlined above.

    72.2. The Applicant's inclusion is not on the basis of reasons that satisfy the criterion set out in the Decision and the Regulation.

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[96] *Kadi I* §§283-284.
[97] *Kadi I* §355; Case C-70/10 *Scarlet Extended SA v SABAM* (24 November 2011).
[98] *Kadi I* §360.
[99] *Kadi II* §192.

72.3. In any event, the Council has not demonstrated that a total asset freeze (opposed, for example, to one limited or linked to the amount the alleged sum allegedly "*misappropriated*") is the least onerous means of ensuring such an objective, nor that the very significant harm to the Applicant is justified and proportionate. In particular, the Council has failed to provide any reference point regarding the scale of alleged misappropriation. Absent any such attempt at quantifying the alleged misappropriation, a total asset freeze is wholly disproportionate.

72.4. Further, the Applicant relies in support of this ground of annulment on the reasons given in relation to the pleas in law above.

73. Overall, the Council has not demonstrated that a total asset freeze was the least onerous means of ensuring any legitimate objective, nor that the very significant harm to the Applicant is justified and proportionate.

V. CONCLUSION

74. For the reasons set out above, the Applicant respectfully requests that the General Court determine this Application on an expedited basis, annul the Decision and the Regulation insofar as it relates to him and order the Council to pay the costs of the proceedings.

For and on behalf of the Applicant

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14 May 2014