



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 20 March 2014¹

Case C-220/13 P

Kalliopi Nikolaou

v

Court of Auditors of the European Union

(Appeal — Decision 99/50 of the Court of Auditors — Preliminary investigation — Internal investigation by OLAF — Presumption of innocence — Sincere cooperation — Jurisdiction of the General Court)

1. By her appeal, Mrs Nikolaou seeks the annulment of the judgment of the General Court of 20 February 2013 *Nikolaou v Court of Auditors*,² whereby the General Court dismissed the action for compensation for the harm allegedly caused to the appellant as a result of certain irregularities and infringements of EU law committed in her regard by the Court of Auditors.

I – Legal background

2. Article 2 of Decision 99/50 of the Court of Auditors, of 16 December 1999, concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any other illegal activity detrimental to the Communities' financial interests, provides as follows:

'Any official or servant of the Court [of Auditors] who becomes aware of evidence which gives rise to a presumption of the existence within the institution of possible cases of fraud, corruption or any other illegal activity detrimental to the financial interests of the Communities shall inform without delay the Secretary-General of the Court [of Auditors].³

The Secretary-General shall transmit without delay to the [European Anti-Fraud] Office (OLAF) and to the President of the Court [of Auditors], who shall transmit the information to the Member responsible for the section to which the official or agent belongs, any evidence which gives rise to a presumption that the irregularities referred to in the first paragraph exist and shall conduct a preliminary investigation, without prejudice to the internal investigations conducted by [OLAF].

...

Members, officials or servants shall in no way suffer inequitable or discriminatory treatment as a result of having communicated the information referred to in the preceding paragraphs.'

1 — Original language: French.

2 — Case T-241/09, 'the judgment under appeal'.

3 — The 'Secretary-General'.

3. The first paragraph of Article 4 of Decision 99/50 provides as follows:

‘Where the possible implication of a Member, official or servant of the Court [of Accounts] emerges, the interested party shall be informed rapidly as long as this would not be harmful to the investigation. In any event, conclusions referring by name to a Member, official or servant may not be drawn once the investigation has been completed without the interested party’s having been enabled to express his views on all the facts which concern him.’

II – Background to the dispute

4. The appellant was a Member of the Court of Auditors between 1996 and 2001. According to a report which appeared in the daily newspaper *Europa Journal* on 19 February 2002, the MEP Mr Staes was in possession of information concerning illegal activities on the part of the appellant during her term of office at the Court of Auditors.

5. By letter of 18 March 2002, the Secretary-General transmitted to the Director-General of OLAF a file containing pertinent facts, of which he himself and the President of the Court of Auditors had become aware. Furthermore, the Secretary-General asked OLAF to let him know whether the appellant should be informed of the existence of an investigation concerning her, pursuant to Article 4 of Decision 99/50.

6. By letter of 8 April 2002, the President of the Court of Auditors informed the appellant of the existence of an internal investigation being conducted by OLAF as a result of the article that had appeared in *Europa Journal*. By letter of 26 April 2002, the Director-General of OLAF informed the appellant that, following the information provided to OLAF by Mr Staes and on the basis of a preliminary investigation report drawn up by the Secretary-General, an internal investigation had been initiated, with which the appellant was asked to cooperate.

7. According to OLAF’s final report of 28 October 2002, the information concerning the appellant had been passed to Mr Staes by two members of staff of the Court of Auditors, one of whom worked in the appellant’s private office. The allegations examined related, first, to sums of money which the appellant had allegedly received from members of her staff by way of loans; second, to alleged false statements regarding transfer requests concerning a number of days’ leave for her Head of Private Office which resulted in refunds of around EUR 28 790 being given to the latter in respect of a number of days’ leave not taken for the years 1999, 2000 and 2001; third, to use of the official car for purposes not contemplated by the relevant rules; four, to ordering the appellant’s chauffeur to undertake journeys for purposes not covered by the relevant rules; five, to persistent absenteeism in the appellant’s private office; six, to activities of a commercial nature and approaches to persons in senior positions for the purpose of facilitating such activities on the part of her family members; seven, to fraud committed in connection with a competition, and eight, to fraud relating to entertainment expenses received by the appellant.

8. OLAF concluded that there was a possibility that infringements tantamount to forgery, use of false documents and false pretences had been committed in relation to the applications from the appellant’s Head of Private Office for transfers of leave. According to the final report, criminal offences may have been committed by the appellant and the members of her private office in relation to sums of money received by the appellant, according to the persons implicated, by way of loans. Therefore, OLAF informed the Luxembourg authorities, pursuant to Article 10(3) of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF),⁴ so that they could investigate the facts which might indicate that criminal offences had been committed.

4 — OJ 1999 L 136, p. 1.

9. In regard to the accusations other than that of fraud committed in connection with a competition, OLAF discovered possible irregularities or questions concerning the appellant's conduct and suggested that the Court of Auditors should take disciplinary measures with respect to her, in addition to measures to improve the institution's system of internal controls.

10. On 26 April 2004, the appellant was questioned at a restricted session of the Court of Auditors with a view to the possible application of Article 247(7) EC. In a letter of 13 May 2004, the President of the Court of Auditors stated, in connection with the referral of the matter to the Court of Justice under Article 247(7) EC, on the ground that the appellant had sought and obtained personal loans from members of her private office, that the unanimity required by Article 6 of the Rules of Procedure of the Court of Auditors, as adopted on 31 January 2002, had not been reached at a meeting held on 4 May 2004. The President of the Court of Auditors added in this regard that the vast majority of the Court's Members considered that the appellant's conduct was entirely inappropriate. As regards the leave owing to the appellant's Head of Private Office, the President of the Court of Auditors indicated that, since the case was still pending before the Luxembourg authorities, the Court of Auditors had deferred its decision pending the outcome of the relevant procedures.

11. In a judgment of 2 October 2008, the Tribunal d'arrondissement de Luxembourg (Luxembourg District Court), (Criminal Division) acquitted the appellant and her Head of Private Office of the charges of forgery, use of forged documents, and false statements, in the alternative, of unlawful retention of allowances and grants and, in the further alternative, of fraud (the 'judgment of 2 October 2008'). The Tribunal d'arrondissement found, in essence, that certain explanations given by the appellant's Head of Private Office and by the appellant cast doubt on the evidence collected by OLAF and by the Luxembourg judicial police for the purpose of showing that the Head of Private Office had taken several days of undeclared leave during the period 1999 to 2001. The Tribunal d'arrondissement therefore concluded that the material existence of the facts underlying the charges laid against the appellant had not been established beyond doubt and that, since any doubt should stand to benefit the accused, the appellant should be acquitted of the charges laid against her. In the absence of an appeal, the judgment of 2 October has become final.

12. In a letter of 14 April 2009, the appellant requested the Court of Auditors to publish a notice of her acquittal in all the newspapers in Luxembourg, Germany, Greece, France, Spain and Belgium and to inform the other EU institutions accordingly. In the alternative, if the Court of Auditors failed to effect such publication, the appellant sought payment of EUR 100 000 by way of compensation for non-material damages, a sum which she undertook to use for the purpose of publishing the relevant notices herself. The appellant asked the Court of Auditors, first, to pay her EUR 40 000 by way of compensation for the non-material damage caused by the proceedings before the Luxembourg courts and EUR 57 771.40 by way of compensation for the material damage caused by the same proceedings and, second, to reimburse her for all costs incurred before the Examining Magistrate and the Tribunal d'arrondissement, Luxembourg, in addition to the costs incurred as a result of the proceedings before the Court of Auditors.

13. In a letter of 7 July 2009, the President of the Court of Auditors transmitted to the appellant the decision which had been taken in response to those requests. First, that decision rejected the arguments raised in the letter of 14 April 2009 and, second, it informed the appellant that the Court of Auditors had tried to determine, on the basis of the information at its disposal, whether the facts were of sufficient gravity to justify referring the matter to the Court in order to obtain a ruling on whether the former Member had failed to fulfil her obligations under the EC Treaty and on the need to apply any penalties. In this connection, the Court of Auditors informed the appellant of the reasons why it had decided not to refer the matter to the Court, which included in particular the appellant's acquittal under the judgment of 2 October 2008 and the lack of damage caused to the Community

budget as a result of the amount unduly paid to her Head of Private Office, Mr Koutsouvelis.⁵

III – Proceedings before the General Court and the judgment under appeal

14. By application lodged at the Registry of the General Court on 16 June 2009, the appellant brought an action for damages seeking an order that the Court of Auditors should pay the sum of EUR 85 000 plus interest from 14 April 2009 by way of compensation for the non-material damage suffered as a result of that institution's acts and omissions, a sum that she undertook to use for the purpose of publishing her acquittal.

15. In support of her application, the appellant first entered six pleas concerning the serious infringements by the Court of Auditors of EU provisions which confer rights on individuals. She then claimed that a direct causal link existed between that infringement and the non-material and material damage suffered as a result of the infringement.

16. The General Court dismissed the action on the grounds that the Court of Auditors had not committed any of the alleged infringements of EU law.

17. In particular, in so far as it is relevant for this appeal, the General Court concluded, in paragraphs 27 to 32 of the judgment under appeal, that the action of the Court of Auditors in relation to the preliminary investigation was not unlawful. By transmitting to OLAF the file containing the initial information collected before hearing the appellant, that institution had not infringed either the requirements arising from a combined interpretation of Articles 2 and 4 of Decision 99/50 or the appellant's rights of defence or the principle of impartiality.

18. In paragraphs 44 to 47 of the judgment under appeal, the General Court answered the complaints relating, on the one hand, to the Court of Auditors' failure to adopt a formal decision acquitting the appellant of all accusations against her as a result of the judgment of 2 October 2008 and, on the other hand, to the uncomplimentary and unnecessary remark, in the letter of the President of the Court of Auditors of 13 May 2004, concerning the position expressed by a majority of the Members of the institution. The paragraphs at issue are worded as follows:

'44 It must be pointed out that the omission of which the Court of Auditors is accused is not unlawful.

45 In this regard, it must be pointed out, first, that the applicant was acquitted on the basis of doubts arising, according to the judgment of 2 October 2008, as a result of certain explanations provided by her Head of Private Office during the public hearing. Without needing to express a view on the reasonableness of the doubts raised by the Tribunal d'arrondissement, Luxembourg, it must be held that this ground for acquittal does not imply that the charges against the applicant are completely unfounded but, as that court stated, that they have not been established "beyond doubt".

46 Second, as the Court of Auditors points out, it is for the national judicial authorities alone to examine any criminal aspects of the charges and for the Court of Justice to examine the disciplinary aspects under Article 247(7) EC. Thus, the Court of Auditors was not competent to give a decision in this regard.

47 Third, it cannot be inferred from the fact that there was no referral to the Court of Justice under the latter provision that the Court of Auditors considers that the charges against the applicant are entirely without foundation. Pursuant to Article 6 of the Court of Auditors' Rules of

⁵ — Points 47 to 49 of the letter of 7 July 2009.

Procedure, as adopted on 31 January 2002, such a referral is to be decided unanimously. Therefore, whilst it is true that the failure to make a referral implies that unanimity was not reached, this is not tantamount to a position on the part of the Court of Auditors regarding the accuracy of the facts. Accordingly, it was not inappropriate for the President of the Court of Auditors to indicate to the applicant that the vast majority of its Members regarded her conduct as unacceptable, thereby preventing the failure to refer the matter to the Court being regarded as a denial of the accuracy of the charges, which was not a true reflection of the situation.'

19. Finally, the General Court answered the plea that the Court of Auditors should, by virtue of its duty to provide assistance, have issued communications to the press and to the other institutions regarding the applicant's acquittal. The General Court held, for the reasons set out in paragraphs 45 and 46 of the judgment under appeal, that no obligation to publish the applicant's acquittal could be inferred from the duty to provide assistance.

IV – Grounds of appeal and main arguments

20. The appellant relies on four grounds in support of her appeal.

21. By her first ground of appeal, the appellant submits that the General Court breached the principle of a presumption of innocence, as enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union (the 'Charter') and in Article 6(2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the 'ECHR'). This principle guarantees, inter alia, that a court of the Union may not cast doubt on the innocence of a person who has been charged where that person has previously been exonerated by a decision of a national criminal court which has become final. It follows that the General Court erred when stating in paragraphs 43 to 46 and paragraph 49 of the judgment under appeal that the failure of the Court of Auditors to adopt a decision indicating that a charge against the applicant was definitely not going to be brought before the Court of Justice and restoring her good name, was not 'unlawful'.

22. In particular, the appellant criticises the wording of paragraph 45 of the judgment under appeal and takes the view that the General Court's assessment in that paragraph constitutes a serious breach of the principle of the presumption of innocence. It follows from the case-law of the European Court of Human Rights that the acquittal of the appellant on the ground that doubt subsisted cannot have any effect on the General Court's duty not to base its judgment on the relevant ground for acquittal.

23. The Court of Auditors contends that the first ground of appeal is founded on a misunderstanding of the scope of Article 6(2) ECHR and of Article 48(1) of the Charter. The presumption of innocence applies in respect of a person who is charged before a court which is called upon to decide on that person's guilt or innocence on the basis of the charges brought against him. In the context of the proceedings concerning non-contractual liability brought by the appellant, her guilt in terms of Luxembourg criminal law was not at issue. Therefore, the General Court could not breach the principle of the presumption of innocence.

24. Furthermore, that ground is based on the incorrect premise that the Court of Auditors and the General Court conducted a review of the merits of the judgment of 2 October 2008. The Court of Auditors considers, by contrast, that each institution, duly exercising its own jurisdiction in regard to the case, accepted that judgment and drew the necessary conclusions for the purposes of their own decision-making processes. In particular, the General Court regarded the judgment of 2 October 2008 as factual evidence which it needed to take into account when examining the lawfulness of the acts or omissions of the Court of Auditors.

25. The Court of Auditors infers from paragraphs 120 to 122 of the Court's judgment in *Commission v Cresson*,⁶ that, whilst accepting that the Tribunal d'arrondissement, Luxembourg, concluded that the accuracy of certain facts alleged in relation to the appellant had not been established beyond doubt and that the persons concerned should therefore be acquitted of the criminal charges against them under Luxembourg law, there was nothing to prevent the General Court from taking a different view of those same facts when examining the possible non-contractual liability of the Court of Auditors under EU law. In so doing, the General Court had not cast doubt on the judgment of 2 October 2008 or infringed the appellant's right to a presumption of innocence before that Court.

26. By her second ground, the appellant claims that the General Court breached the principle of sincere cooperation, enshrined in Article 4(3) TEU, with the Tribunal d'arrondissement, Luxembourg, by misrepresenting the latter's arguments and assessments.

27. According to the appellant, that principle implies that, where a national court has delivered a judgment which has become final whereby a person has been acquitted of the charges against him, the institutions of the European Union, including the General Court, are required to respect that judgment and not to deprive it of its effectiveness.

28. Although the facts at issue are identical to those on which the Tribunal d'arrondissement gave its judgment, the General Court infringed the principle of sincere cooperation by making a completely different assessment of those same facts.

29. Furthermore, in paragraph 35 of the judgment under appeal, the General Court contradicted the conclusions of the Tribunal d'arrondissement, Luxembourg, when it stated that 'the management of any system of leave is based on the obligation of the line manager to check the presence of the staff under his authority and to ensure that any absence complies with the relevant rules concerning leave' and that '[t]hat obligation is not affected by a lack of an integrated system which is capable of verifying, independently of the line manager, whether the declared number of days' leave not taken each year is accurate'.

30. Finally, the appellant maintains that the General Court failed to comply with the judgment of 2 October 2008 to the extent that it held, in paragraph 38 of the judgment under appeal, that 'the defective nature of the Court of Auditors' system of recording and monitoring leave in force at the material time cannot justify abandoning all investigations or prosecutions vis-à-vis [the appellant]', whereas it is precisely the defective nature of the Court of Auditors' leave system which led to the her acquittal.

31. In response to these arguments, the Court of Auditors contends that the second ground is based on a misunderstanding of the respective roles of the institutions concerned and of the scope of Article 4(3) TEU. The General Court did not re-assess the judgment of 2 October 2008 nor did it challenge the verdict. The different assessment of certain facts can be explained by the different contexts of the two disputes, namely criminal proceedings under national law, on the one hand, and a non-contractual liability claim under EU law, on the other.

32. By her third ground of appeal, the appellant maintains that the judgment under appeal is vitiated by a lack of jurisdiction on the part of the General Court, since it gave a decision on matters which exceeded its jurisdiction under the Treaties.

6 — Case C-432/04 [2006] ECR I-6387.

33. First, although the General Court accepts, in paragraph 46 of the judgment under appeal, that it is solely for the national judicial authorities to examine the criminal aspects of the charges against the appellant, it exceeded its jurisdiction under the Treaties by reviewing, in paragraph 45 of the judgment under appeal, the merits of the ground for acquittal based upon the existence of doubt.

34. On the other hand, the General Court also exceeded the limits of its jurisdiction by making the statements in paragraph 47 of the judgment under appeal. Since the Court of Justice is the only institution which has jurisdiction to rule on the disciplinary charges resulting from the conduct of Members of the Court of Auditors, the General Court exceeded its jurisdiction, like the Court of Auditors in its letter of 13 May 2004, in giving even the slightest hint of unacceptable conduct on the part of the appellant.

35. The Court of Auditors contends that the third ground of appeal should be rejected in part as being inadmissible, in that it merely reiterates the arguments put forward at first instance in relation to the letter of 13 May 2004, and in part as being unfounded.

36. In connection with the latter contention, it claims, once again, that the General Court did not call into question the judgment of 2 October 2008. An assessment of the same conduct could lead to different outcomes depending on the forum concerned.

37. By her fourth ground of appeal, the appellant claims that the General Court incorrectly interpreted and applied the conditions for establishing non-contractual liability on the part of the European Union. In relation to the use of false documents, the General Court added an unnecessary supplementary condition ('bad faith') when it concluded, in paragraph 32 of the judgment under appeal, that 'the possible transmission of the document in question by the Court of Auditors, either to OLAF or to the Luxembourg authorities, does not mean that the institution acted in bad faith regarding the authenticity of the applicant's signature'.

38. In addition, the General Court committed an error in law when interpreting Article 2, second paragraph, of Decision 99/50, read in conjunction with the first paragraph of Article 4 thereof, to the extent that it concluded that the mere communication to the appellant of the fact that an internal investigation was being conducted by OLAF was sufficient and that it was not therefore necessary to provide the appellant with information about the preliminary investigation conducted by the Court of Auditors.

39. According to the Court of Auditors, the allegations contained in the fourth ground of appeal must be declared inadmissible because they ask the Court to review the facts of the case and then they merely reiterate the arguments put forward at first instance, particularly regarding the complaint of lack of notification of the preliminary investigation.

40. In terms of the substance, the General Court did not add any supplementary condition, in paragraph 32 of the judgment under appeal, relating to the non-contractual liability of the European Union, by stating that the mere transmission of a document to OLAF or to the Luxembourg authorities was not indicative of bad faith on the part of the Court of Auditors as regards the authenticity of the appellant's signature. Likewise, the General Court did not err in its reading of Article 2, second paragraph, of Decision 99/50 because that provision does not impose an obligation to communicate the opening of a preliminary investigation to the person suspected of irregular conduct, but merely requires the Secretary-General to transmit without delay to OLAF the information collected in connection with such an investigation.

V – Analysis

41. I will examine together, initially, the first to third grounds of appeal submitted by the appellant in so far as the arguments developed in support of those grounds overlap or refer to the same paragraphs in the judgment under appeal. I will then go on to examine the fourth ground of appeal.

A – The grounds of appeal based on breach of the principle of the presumption of innocence and of the principle requiring sincere cooperation, and on the General Court’s lack of jurisdiction

42. In essence, the first three grounds seek to challenge the reasoning adopted by the General Court in paragraphs 44 to 49 of the judgment under appeal.

43. It is important to bear in mind the claims that the General Court was attempting to address in that part of the judgment under appeal.

44. First, the appellant complained that the Court of Auditors had failed to adopt a formal decision completely clearing her following the judgment of 2 October 2008, since conclusive evidence of conduct justifying a referral to the Court of Justice under Article 247(7) EC had not been supplied. In her view, the Court of Auditors should, by means of such a decision, formally have refrained from referring the matter to the Court of Justice under the latter provision.

45. Second, the appellant criticised the President of the Court of Auditors for breaching the principle of impartiality and the duty to provide assistance by including in his letter of 13 May 2004 an uncomplimentary and unnecessary remark concerning the opinion expressed by the majority of the Members of that institution.

46. Third, the appellant maintained that, in line with its duty of assistance, the Court of Auditors should have issued communications to the press and to the institutions concerning her acquittal.

47. I would point out straight away that the General Court was quite correct, in my view, to dismiss these three claims by the appellant.

48. However, as the latter contends, the General Court’s line of reasoning in paragraph 45 of the judgment under appeal presents a problem in terms of the presumption of innocence.

49. Pursuant to Article 48(1) of the Charter: ‘[e]veryone who has been charged shall be presumed innocent until proved guilty according to law’. This provision corresponds to Article 6(2) ECHR. Under Article 52(3) of the Charter, the right to the presumption of innocence has the same meaning and scope as the corresponding right laid down by the ECHR.

50. The presumption of innocence must be guaranteed upstream and downstream of criminal proceedings. Article 6(2) ECHR also aims to ‘protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged’.⁷ The guarantee of the right to the presumption of innocence following criminal proceedings can also be explained by the fact that ‘[w]ithout protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair trial guarantees of Article 6[(2) ECHR] could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person’s reputation and the way in which that person is perceived by the public’.⁸

7 — See Eur. Court HR, *Allen v. the United Kingdom*, judgment of 12 July 2013, § 94.

8 — *Idem*.

51. The European Court of Human Rights has therefore held that ‘the scope of Article 6[(2) ECHR] is not limited to pending criminal proceedings, but may be extended to judicial decisions handed down after criminal proceedings have been discontinued ... or after an acquittal ..., to the extent that the questions raised in such cases are a corollary and supplementary to the criminal proceedings concerned in which the applicant was “the accused”’.⁹ The European Court of Human Rights therefore seeks to verify whether, ‘by their action, the grounds of their decisions or the language used in their reasoning’,¹⁰ the national authorities and courts which are called upon to give a decision following a judgment in criminal proceedings ‘cast doubts on the innocence of the applicant thereby infringing the principle of the presumption of innocence’.¹¹

52. As follows, inter alia, from the judgment of the European Court of Human Rights of 27 September 2007 in *Vassilios Stavropoulos v. Greece*, ‘nor is the expression of doubts as to the innocence of an accused person acceptable following an acquittal which has become final’.¹² According to the case-law of that Court, ‘once an acquittal has become final — even in the case of an acquittal on the benefit of the doubt under Article 6[(2) ECHR] — the expression of doubts regarding guilt, including doubts based on the grounds for acquittal, are no longer compatible with the presumption of innocence’.¹³

53. In that same judgment, the European Court of Human Rights held that, ‘in accordance with the principle of *in dubio pro reo*, which is a specific expression of the principle of the presumption of innocence, there should be no qualitative difference between an acquittal for lack of evidence and an acquittal resulting from a finding that the person’s innocence was beyond doubt. No distinction is made between acquittals on the basis of the reasons given by the criminal court. On the contrary, in the context of Article 6[(2) ECHR], the operative provisions of an acquittal judgment must be complied with by any other authority ruling directly or indirectly on the criminal liability of the person concerned’.¹⁴

54. In the light of that case-law, the wording of paragraph 45 of the judgment under appeal seems to me to be debatable.

55. I would point out at this juncture that the General Court emphasised, first, that the appellant had been ‘acquitted on the basis of doubts arising, according to the judgment of 2 October 2008, as a result of certain explanations provided by her Head of Private Office during the public hearing’. The General Court continued by saying that ‘[w]ithout needing to express a view on the reasonableness of the doubts raised by the Tribunal d’arrondissement, Luxembourg, it must be held that these grounds for acquittal do not imply that the charges against the applicant are completely unfounded but, as the court stated, that they have not been established “beyond doubt”’.

56. In that part of its reasoning, the General Court relies on the ground for acquittal of criminal charges and on the fact that acquittal was on the benefit of the doubt in order to justify the failure of the Court of Auditors to adopt a formal decision clearing the appellant of all charges. It therefore uses the ground for acquittal for the purpose of denying the existence of an error on the part of the Court of Auditors and derives a consequence for its assessment of the merits of the action for compensation. To sum up, the reasoning which emerges from paragraph 45 of the judgment under appeal is that, since the appellant was acquitted on the benefit of the doubt and since that ground is not sufficient to remove all basis for the charges against her, the Court of Auditors was correct to refuse to adopt a formal decision clearing her of all charges following the judgment of 2 October 2008.

9 — See Eur. Court HR, *Teodor v. Romania*, judgment of 4 June 2013, § 37 and case-law cited.

10 — *Ibidem*, paragraph 40.

11 — *Idem*.

12 — Paragraph 38 and case-law cited.

13 — *Idem*.

14 — Eur. Court HR, *Vassilios Stavropoulos v. Greece*, § 39. See also Eur. Court HR, *Tendam v. Spain*, judgment of 13 July 2010, § 39.

57. By formulating its reasoning in this way, the General Court gives the impression that it regards an acquittal on the benefit of the doubt as having less force than an acquittal based on a more direct declaration of the appellant's innocence. It undermines the decision arrived at by the criminal court, thereby also casting doubts on the innocence of the appellant.

58. By breaching the principle of the presumption of innocence in this way, the General Court has therefore erred in law.

59. However, in my opinion, this finding does not mean that the judgment under appeal must be set aside. It is settled case-law that, if the ground of a judgment of the General Court discloses an infringement of EU law but its operative part is shown to be well founded on other legal grounds, the appeal must be dismissed.¹⁵

60. I would point out in this connection that the General Court correctly indicated, in paragraph 46 of the judgment under appeal, that 'it is for the national judicial authorities alone to examine any criminal aspects of the charges and for the Court of Justice to examine the disciplinary aspects under Article 247(7) EC'. It therefore concluded quite correctly that '[t]he Court of Auditors was not competent to give a decision in this regard'.

61. It is clear that the Court of Auditors is not entitled to adopt an acquittal decision, either at a criminal level or at a disciplinary level. Furthermore, the Court of Auditors was certainly not required to publish the appellant's acquittal. Therefore, the General Court was correct to dismiss these two claims on the part of the appellant, based on the reasoning set out in paragraph 46 of the judgment under appeal.

62. The only power possessed by the Court of Auditors in the context of this case was to decide whether or not to refer the matter to the Court of Justice, under Article 247(7) EC, for a decision on the existence of a failure for the purposes of that provision on the part of a Member of the Court of Auditors.

63. I would stress, in this connection, that the reasoning of the General Court would have been more cogent and more comprehensive if it had placed more emphasis on the autonomous nature of criminal and disciplinary proceedings.

64. Both at first instance and in the context of this appeal, the appellant's arguments have been based to a large extent on the idea that there is a kind of automatic corollary between the existence of an acquittal in criminal proceedings and the adoption by the Court of Auditors of a decision to refrain from referring the matter to the Court of Justice under Article 247(7) EC.

65. That reasoning on the part of the appellant is fundamentally flawed, as can be inferred from the case-law of the European Court of Human Rights and from that of this Court.

66. First, it is clear from the case-law of the European Court of Human Rights that the right to a presumption of innocence in the case of acquittal of a criminal charge or discontinuation of criminal proceedings does not prevent the subsequent institution of disciplinary proceedings or actions for compensation on the basis of the same facts.

¹⁵ — See, inter alia, Case C-221/10 P *Artedogan v Commission* [2012] ECR, paragraph 94 and case-law cited.

67. The European Court of Human Rights has held that disciplinary bodies may make independent assessments of the facts in the cases before them where the constitutive elements of the disciplinary and criminal offences are not identical.¹⁶ Accordingly, a finding that facts cannot be classified as a criminal offence does not prevent the institution of disciplinary proceedings on the basis of those same facts. From the point of view of the right to a presumption of innocence, the only limitation is that, during the disciplinary proceedings, no doubt may be cast on the innocence of the person concerned vis-à-vis the criminal proceedings.

68. Furthermore, as regards claims for compensation, the European Court of Human Rights accepted, in its judgment of 11 February 2003¹⁷ in *Ringvold v. Norway* that ‘the compensation issue was to be the subject of a separate legal assessment based on criteria and evidentiary standards which in several important respects differed from those that applied to criminal liability’.¹⁸ The European Court of Human Rights therefore held that, ‘while exoneration from criminal liability ought to stand in the compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof’.¹⁹

69. Second, following the same line of reasoning, in its judgment in *Commission v Cresson*, cited above, the Court emphasised the autonomous nature of criminal proceedings, on the one hand, and of proceedings under Article 213(2) EC to punish an infringement of the obligations arising from the office of Member of the European Commission, on the other hand.

70. In that judgment, the Court held that it was not ‘bound by the legal characterisation of the facts made in the context of the criminal proceedings’²⁰ and that it was for the Court, ‘exercising its discretion to the full, to investigate whether the conduct complained of in proceedings brought under Article 213(2) EC constitutes a breach of the obligations arising from the office of Member of the Commission’.²¹ The Court concluded that the decision of the *Chambre du conseil* of the *Tribunal de première instance de Bruxelles* (Court of First Instance, Brussels) (Belgium) to the effect that there was no evidence of criminal conduct on Ms Cresson’s part could not bind the Court.²²

71. This reasoning, based on the autonomous nature of criminal and disciplinary proceedings, can be transposed to the procedure which was laid down, at the material time, in Article 247(7) EC and which now appears in Article 286(6) TFEU. It follows that, when the Court is called upon to examine whether or not a Member of the Court of Auditors has breached the obligations arising from his office, it is not bound by a judgment in criminal proceedings acquitting the person concerned.

72. For the same reason, based on the autonomous nature of criminal and disciplinary proceedings, the Court of Auditors, as the authority responsible for referring the matter to the Court, cannot be bound by that judgment in criminal matters. In particular, for the purpose of providing a clear answer to the appellant’s argument, the existence of an acquittal in criminal proceedings cannot prevent the Court of Auditors from applying to the Court under Article 286(6) TFEU. In such circumstances the Court of Auditors retains its discretion as to whether to refer the matter to the Court.

73. It can be inferred from these elements that criminal proceedings before a national court and proceedings under Article 247(7) EC, now under Article 286(6) TFEU, are different, not only in terms of their subject-matter and their purpose, but also in terms of their character and the degree of evidence required. Although the two sets of proceedings are based on the same factual circumstances,

16 — See, inter alia, Eur. Court HR, *Vanjak v. Croatia*, judgment of 14 January 2010, § 69 to 72.

17 — *Reports of Judgments and Decisions* 2003-II.

18 — Paragraph 38.

19 — *Idem*.

20 — Paragraph 121.

21 — *Idem*.

22 — Paragraph 122.

they are independent, such that, subject to the requirement not to call into question the ruling of the criminal court, an acquittal in the criminal proceedings does not prevent the Court of Auditors from referring the matter to the Court, nor does it prevent the latter from giving a decision on the existence of a breach of the obligations arising from the office of Member of the Court of Auditors.

74. In the present case, it is clear from the file that the Tribunal d'arrondissement, Luxembourg, considered, in its judgment of 2 October 2008, that the facts, as established, could not be classified as constituting a criminal offence under Luxembourg law.

75. However, the assessment made by the Tribunal d'arrondissement, Luxembourg, does not mean that the Court of Auditors had to conclude that it was prevented from bringing an action before the Court of Justice concerning the irregularities relating to leave management. On the one hand, the degree of reliability of the facts or evidence required for classifying an action as a criminal offence is not necessarily the same as for classifying an action as a breach of obligations arising from the office of Member of the Court of Auditors. Furthermore, and in any event, it is for the Court alone, in the context of a referral under Article 286(6) TFEU, to examine, where necessary, the degree of authority to be afforded to a final judgment of a national court in criminal proceedings.

76. It follows that the Court of Auditors' refusal to adopt a formal acquittal decision and to recognise an automatic link between the acquittal in criminal proceedings and a referral to the Court under Article 247(7) EC was entirely justified and it cannot be challenged, in the context of this appeal, by arguing that the General Court's rejection of the appellant's claim that such a refusal is unlawful constitutes a breach of the principle of the presumption of innocence or a breach of the principle of sincere cooperation.

77. The Court of Auditors was acting consistently with the autonomous nature of criminal and disciplinary proceedings and was exercising its discretion when it attempted to determine, on the basis of the information at its disposal, whether the facts of which the appellant was accused were of sufficient gravity²³ to justify referring the matter to the Court under Article 247(7) EC. As indicated in its letter of 7 July 2009, when the Court of Auditors decided not to refer the leave management issue to the Court, it not only took into account the appellant's acquittal in criminal proceedings but also other parameters.²⁴

78. I will now examine the appellant's contentions regarding paragraph 47 of the judgment under appeal.

79. In that paragraph, the General Court is responding to the appellant's contention that the President of the Court of Auditors breached the principle of impartiality and the duty of assistance by including, in his letter of 13 May 2004, an uncomplimentary and unnecessary remark concerning the position expressed by a majority of the Members of the institution.

80. According to the appellant, the General Court exceeded the limits of its jurisdiction, and endorsed an erroneous interpretation of the jurisdiction of the Court of Auditors where it held, in that paragraph, that 'it was not inappropriate for the President of the Court of Auditors to indicate to the applicant that the vast majority of the Members of that institution regarded her conduct as unacceptable, thereby preventing the lack of referral to the Court being regarded as a denial of the accuracy of the charges'.

23 — *Commission v Cresson*, cited above, paragraph 72.

24 — These other parameters, which figure in paragraph 48 of that letter, are as follows: the 'fact that, in view of the reimbursement of the sum unduly paid to Mr Koutsouvelis, no damage was caused to the Community budget', the 'time which has elapsed since the events in question', the appellant's 'infirmary' and the 'stress to which she was subjected owing to the duration of the criminal proceedings'.

81. It is important to note that the passage in the letter of 13 May 2004 which contains the disputed remark only concerns allegations relating to personal loans made to the appellant. That aspect of the case was not covered by the criminal proceedings which led to the judgment of 2 October 2008. Therefore the appellant's acquittal in the criminal proceedings is not relevant for the purpose of an examination of paragraph 47 of the judgment under appeal.

82. That said, the General Court was, in my view, acting within its jurisdiction when it took the view, first, that failure to refer the matter to the Court did not mean that it denied the accuracy of the facts and, second, that the President of the Court of Auditors was justified in making the disputed comment to the appellant.

83. The assessment in paragraph 47 of the judgment under appeal constitutes a response by the General Court to the appellant's claim that the comment made by the President of the Court of Auditors in his letter of 13 May 2004 breached the principle of impartiality and the duty of assistance. Thus, by expressing its view on this issue in the context of the action for non-contractual liability before it, the General Court did not exceed the limits of its jurisdiction.

84. Moreover, the failure of the Court of Auditors to refer the matter to the Court of Justice indicates that not all the Members of the former considered that the irregularity at issue was of sufficient gravity to warrant a referral to the Court under Article 247(7) EC. The finding that unanimity had not been obtained on that matter is not indicative of a lack of any irregularity. In this connection, it should be noted, by analogy with proceedings involving Members of the Commission, that the Court held in *Commission v Cresson*, that censure under Article 213(2) EC requires a breach of a certain degree of gravity.²⁵ Therefore, the President of the Court of Auditors was competent, without breaching the principle of impartiality or the duty of assistance, to make clear to the appellant the outcome of the vote and to indicate to her that the majority of the Members of the Court of Auditors had expressed the view that her conduct, whilst not sufficiently serious to warrant referral to the Court of Justice under Article 247(7) EC, was entirely inappropriate. It should also be noted that the letter of 13 May 2004 was only addressed to the appellant and that there is nothing in the file to indicate that it was communicated to persons other than the addressee.

85. I therefore consider that the General Court did not commit an error of law in its reasoning in paragraph 47 of the judgment under appeal. I will merely point out that the General Court should, strictly, have reiterated the characterisation of the appellant's conduct as it appeared in the letter of 13 May 2004, namely as 'entirely inappropriate',²⁶ rather than referring to it as 'unacceptable'. However, that difference in wording is not sufficient, in my view, to justify a finding of an error of law. I would also point out that, in this regard, the appellant merely made a comment in her application, without inferring any direct consequence in terms of the existence of an error of law.²⁷

86. Finally, I consider that paragraphs 35 and 38 of the judgment under appeal cannot be censured from the point of view of the principle of sincere cooperation. The General Court held, quite rightly and without calling into question the judgment of 2 October 2008, that the defective nature of the Court of Auditors' system of recording and monitoring leave did not affect the line manager's duty to verify the presence of staff under his authority and to ensure that all absences complied with the rules concerning leave, and could not justify an abandonment of all investigations or prosecutions vis-à-vis the appellant.

87. As my examination of the first to third grounds of appeal invoked by the appellant does not lead me to suggest that the Court should set aside the judgment under appeal, I will now go on to examine the fourth ground of appeal.

25 — Paragraph 72.

26 — See paragraph 8 of the judgement under appeal.

27 — See footnote 1 of the appeal.

B – The fourth ground of appeal, concerning incorrect interpretation and application of EU law as regards the conditions for non-contractual liability of the European Union and as regards Decision 99/50

88. According to the appellant, the General Court committed an error of law when interpreting the second paragraph of Article 2 of Decision 99/50, read together with the first paragraph of Article 4 thereof, to the extent that it concluded that merely communicating to the appellant that an internal investigation was being conducted by OLAF was sufficient and that it was therefore unnecessary to inform her about the preliminary investigation conducted by the Court of Auditors.

89. Contrary to the appellant's view, the General Court considered, quite correctly in my opinion, in paragraphs 29 and 30 of the judgment under appeal, that Article 4 of Decision 99/50 did not require the Court of Auditors to disclose to the appellant the content of the preliminary investigation file established pursuant to Article 2 of that decision, nor to hear the appellant prior to transmitting that file to OLAF.

90. Article 2, second paragraph, of Decision No 99/50 entrusts the Secretary-General with the duty of transmitting to OLAF without delay any facts that give rise to a presumption of irregularities and of conducting a preliminary investigation without prejudice to any internal investigations conducted by OLAF.

91. As the General Court emphasised in paragraph 29 of the judgment under appeal, the purpose of the preliminary investigation referred to in that provision is, on the one hand, to enable the Secretary-General to assess whether the information brought to his knowledge leads to a presumption of irregularities which threaten the financial interests of the Union and, on the other hand, to transmit to OLAF, under Article 7(1) of Regulation No 1073/1999, a file which enables the latter to determine whether an internal investigation should be opened under Article 5, second paragraph, thereof.

92. The preliminary investigation is therefore the phase during which information concerning allegations of irregularities is gathered and verified in order to assess whether an internal investigation should be opened. In other words, the information supporting such allegations must be verified in order to establish its plausibility prior to its communication to the competent authorities for the purpose of an internal investigation, in this case to OLAF.

93. To the extent that a preliminary investigation does not aim to reach conclusions regarding the person concerned, the General Court found quite correctly, in paragraph 29 of the judgment under appeal, that the obligation under the second sentence of the first paragraph of Article 4 of Decision No 99/50 did not concern the action of the Secretary-General under Article 2 of that decision.

94. During this preliminary phase of gathering and assessing the information to support the allegations of irregularities, the risk of pressure being exerted on witnesses is particularly high. It is therefore essential that the search for truth and the effectiveness of the preliminary investigation should not be hampered.

95. In this connection it is worth noting, in so far as the first sentence of the first paragraph of Article 4 of Decision No 99/50 may be taken to concern the internal investigation as well as the preliminary investigation, that that provision contains an important proviso concerning the rule that a person suspected of irregularities must be informed rapidly about the possibility of his or her personal implication, namely that the person is to be informed 'as long as this would not be harmful to the investigation'.

96. It is common ground that the appellant was informed, by letters of 8 and 26 April 2002, of the opening of the OLAF investigation, of the purpose of that investigation, of the identity of those conducting the investigation and of the fact that they were inviting the appellant to cooperate. Furthermore, the appellant was informed, by letter of 26 April 2002, that a preliminary investigation had been conducted by the Court of Auditors and that the relevant file had been forwarded to OLAF. These communications comply with the requirements of the first sentence of the first paragraph of Article 4 of Decision No 99/50, in so far as they reconcile the principle of rapid notification of the person concerned with the need to guarantee the effectiveness of the investigation. I would also point out that being informed rapidly is not synonymous with being informed immediately or as soon as the investigation has commenced.

97. The appellant's arguments, which seek to cast doubt on the reasoning adopted by the General Court in paragraphs 29 and 30 of the judgment under appeal, are therefore unfounded.

98. The same applies to the complaint that, in paragraph 32 of the judgment under appeal, the General Court incorrectly interpreted and applied EU law as regards the conditions for non-contractual liability. It is sufficient in this regard to point out that the General Court's opinion that 'the possible transmission of the document in question by the Court of Auditors either to OLAF or to the Luxembourg authorities does not mean that the institution acted in bad faith regarding the authenticity of the appellant's signature' was expressed by way of a subsidiary consideration. The General Court found, primarily, that it was not proven that the document at issue, of which the authenticity of the signature was disputed, had been transmitted to OLAF or to the Luxembourg authorities. In the absence of any challenge to that finding, this last complaint must be held to be irrelevant.

99. It follows from the foregoing that the fourth ground of appeal must be rejected as unfounded. The appeal must therefore be dismissed.

VI – Conclusion

100. In the light of all the foregoing considerations, I propose that the Court should:

- dismiss the appeal, and
- order Mrs Kalliopi Nikolaou to pay the costs of the proceedings.