



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

10 July 2014*

(Appeal — Non-contractual liability — Omissions on the part of the Court of Auditors — Claim for compensation for harm caused — Principle of the presumption of innocence — Principle of sincere cooperation — Powers — Conduct of preliminary investigations)

In Case C-220/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 April 2013,

Kalliopi Nikolaou, residing in Athens (Greece), represented by V. Christianos and S. Paliou, dikigoroi,
appellant,

the other party to the proceedings being:

Court of Auditors of the European Union, represented by T. Kennedy and I. Ní Riagáin Düro, acting as Agents, and P. Tridimas, Barrister,
defendant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, M. Berger, S. Rodin and F. Biltgen, Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 January 2014,

after hearing the Opinion of the Advocate General at the sitting on 20 March 2014,

gives the following

* Language of the case: Greek.

Judgment

- 1 By her appeal, Ms Nikolaou seeks the setting aside of the judgment in *Nikolaou v Court of Auditors*, T-241/09, EU:T:2013:79 (‘the judgment under appeal’), by which the General Court dismissed her action for damages seeking compensation for the harm purportedly suffered as a result of irregularities and infringements of EU law allegedly committed by the Court of Auditors in the course of an internal investigation.

Background to the dispute

- 2 Ms Nikolaou was a Member of the Court of Auditors from 1996 to 2001. According to a report published on 19 February 2002 by the daily newspaper *Europa Journal*, Mr Staes — a Member of the European Parliament — had in his possession information concerning unlawful activities attributable to Ms Nikolaou during her mandate as a Member of the Court of Auditors.
- 3 By letter of 18 March 2002, the Secretary-General of the Court of Auditors (‘the Secretary-General’) sent the Director-General of the European Anti-Fraud Office (OLAF) a file containing information relating to those activities, of which both the President of the Court of Auditors and the Secretary-General had become aware. The Secretary-General also asked OLAF to tell him whether it was appropriate to inform Ms Nikolaou of the investigation into her activities, in accordance with Article 4 of Decision 99/50 of the Court of Auditors concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any other illegal activity detrimental to the financial interests of the Communities.
- 4 By letter of 8 April 2002, the President of the Court of Auditors informed Ms Nikolaou that, following the article published in *Europa Journal*, OLAF was conducting an internal investigation. By letter of 26 April 2002, the Director-General of OLAF informed Ms Nikolaou that, as a result of the information OLAF had received from Mr Staes, and on the basis of a preliminary investigation file prepared by the Secretary-General, an internal investigation had been opened with which she was requested to cooperate.
- 5 Ms Nikolaou was interviewed by staff from OLAF on 24 May 2002. On 17 October 2002, the Internet site *European Voice* published a report stating, in particular, that OLAF was on the point of completing the investigation concerning Ms Nikolaou. Similar reports were published in the Greek press. By letter of 28 October 2002, OLAF told Ms Nikolaou that that investigation had been closed and that the final report had been sent, together with the relevant information, to the Secretary-General and to the Luxembourg judicial authorities. By letter of 10 February 2004, the Court of Auditors sent Ms Nikolaou an abridged version of OLAF’s final report.
- 6 According to the final report of 28 October 2002, the information concerning Ms Nikolaou had been provided to Mr Staes by two officials from the Court of Auditors, one of whom had been a member of Ms Nikolaou’s Private Office. The accusations examined concerned: (i) sums of money that Ms Nikolaou had received from her staff as loans; (ii) allegedly false statements regarding applications for leave to be carried over by the Head of her Private Office, which had resulted in the latter being paid refunds of approximately EUR 28 790 in respect of leave not taken in 1999, 2000 and 2001; (iii) the use of Ms Nikolaou’s official car for purposes not provided for under the relevant rules; (iv) the issuing of orders to Ms Nikolaou’s chauffeur to undertake journeys for purposes not contemplated by the relevant rules; (v) the policy of permitting absenteeism within her Private Office; (vi) activities of a commercial nature and approaches to persons in senior positions for the purposes of facilitating such activities on the part of her family members; (vii) fraud committed in connection with a competitive examination; and (viii) fraud relating to the entertainment expenses received by Ms Nikolaou.

- 7 OLAF found that, in relation to the applications by the Head of Ms Nikolaou's Private Office to carry over leave, it was possible that offences categorisable as forgery, use of false documents and false pretences had been committed. According to the final report, it was possible that Ms Nikolaou and members of her Private Office had committed criminal offences in connection with sums of money that she had received, according to the persons involved, as loans. That being so, OLAF — acting in accordance with 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) (OJ 1999 L 136, p. 1) — passed the information to the Luxembourg judicial authorities, so that they could investigate the evidence that might indicate that criminal offences had been committed.
- 8 As regards the other accusations, with the exception of the alleged fraud committed in connection with a competitive examination, OLAF highlighted possible irregularities or questions concerning Ms Nikolaou's conduct and suggested to the Court of Auditors that it take 'corrective measures' with regard to Ms Nikolaou, together with measures to improve internal controls within the Court of Auditors.
- 9 On 26 April 2004, Ms Nikolaou was interviewed at a 'restricted' meeting of the Court of Auditors, with a view to the application of Article 247(7) EC. By letter of 13 May 2004 ('the letter of 13 May 2004'), the President of the Court of Auditors explained that, as regards the referral of the case to the Court of Justice of the European Union for the purposes of Article 247(7) EC, on the ground that Ms Nikolaou had allegedly solicited and obtained personal loans from members of her Private Office, the unanimity required under Article 6 of the Rules of Procedure of the Court of Auditors, as laid down on 31 January 2002, had not been reached at the meeting held on 4 May 2004. The President of the Court of Auditors added in that connection that a substantial majority of the members of the Court of Auditors regarded Ms Nikolaou's conduct as wholly inappropriate. As regards the holiday leave of the Head of Ms Nikolaou's Private Office, the President of the Court of Auditors stated that, as the case was before the Luxembourg courts, the Court of Auditors had postponed its decision pending the outcome of the related proceedings.
- 10 By the judgment in *Nikolaou v Commission*, T-259/03, EU:T:2007:254, the General Court ordered the Commission of the European Communities to pay Ms Nikolaou compensation in the amount of EUR 3 000 following the publication of certain information relating to OLAF's investigation.
- 11 By judgment of 2 October 2008 ('the judgment of 2 October 2008'), the *Chambre correctionnelle du tribunal d'arrondissement de Luxembourg* (Criminal Chamber of the District Court, Luxembourg) acquitted Ms Nikolaou and the Head of her Private Office of the charges of forgery and use of false documents, and of making false statements, and the alternative charges of the unlawful retention of allowances and grants, as well as the further alternative charge of fraud. That court held essentially that certain explanations provided by the Head of the Private Office and by Ms Nikolaou cast doubt on the evidence collected by OLAF and by the Luxembourg judicial police suggesting that the Head of the Private Office had taken several days of undeclared leave in 1999, 2000 and 2001. That court concluded that the accuracy of the facts adduced by the prosecution had not been established beyond all doubt and that, since the slightest doubt must be resolved in favour of the defendant, Ms Nikolaou should be acquitted of the charges against her. According to the preamble to the judgment of 2 October 2008, Ms Nikolaou and the Head of her Private Office had been sent before the Criminal Chamber of the Luxembourg District Court by order of the Pre-trial Chamber of that court, confirmed by judgment of the Pre-trial Chamber of the *Cour d'appel* (Court of Appeal) of 29 January 2008. In the absence of an appeal, the judgment of 2 October 2008 became final.
- 12 By letter of 14 April 2009, Ms Nikolaou asked the Court of Auditors to place a notice relating to her acquittal in all Belgian, German, Greek, Spanish, French and Luxembourg newspapers and to inform the other EU institutions accordingly. Alternatively, if the Court of Auditors chose not to do so, Ms Nikolaou sought payment of EUR 100 000 by way of compensation for non-material damage, an

amount that she undertook to use for the purposes of publishing those notices herself. Ms Nikolaou also put the following requests to the Court of Auditors: (i) to pay her EUR 40 000 by way of compensation for non-material damage caused by the proceedings before the Luxembourg courts and EUR 57 771.40 by way of compensation for material damage caused by those proceedings; (ii) to reimburse her for all the costs incurred, in particular before the examining magistrate and the Luxembourg Tribunal d'arrondissement; and (iii) to compensate her for the costs incurred as a result of the procedure before the Court of Auditors.

- 13 By letter of 7 July 2009, the President of the Court of Auditors sent Ms Nikolaou the decision adopted on 2 July 2009 in response to those requests. By that decision, the arguments put forward in the abovementioned letter of 14 April 2009 were rejected and Ms Nikolaou was informed that the Court of Auditors had 'sought 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 of Justice]' in order to obtain a ruling on whether Ms Nikolaou had failed to fulfil her obligations under the EC Treaty and on the need to apply penalties. In that regard, the Court of Auditors informed Ms Nikolaou of the reasons why it had decided not to refer the matter to the Court of Justice, one of which was her acquittal pursuant to the judgment of 2 October 2008 and the fact that no damage had been sustained by the Community budget, given that the sum paid but not owed to the Head of her Private Office had been paid back.

The 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, Ms Nikolaou brought an action for damages, claiming that the Court of Auditors should be ordered to pay EUR 85 000, plus interest with effect from 14 April 2009, as compensation for the non-material damage caused by 'acts' and omissions attributable to that institution, an amount that Ms Nikolaou undertook to use to publish a notice concerning her acquittal.
- 15 In support of that action, Ms Nikolaou put forward six pleas in law, alleging serious infringement by the Court of Auditors of the rules of EU law conferring rights on individuals. Ms Nikolaou also submitted that there was a direct causal link between that infringement and the non-material and material damage that she had suffered as a result.
- 16 The General Court dismissed that action, holding that the Court of Auditors had not committed any of the infringements of EU law alleged.
- 17 In so far as is relevant for the purposes of the present appeal, the General Court held, first of all, in paragraphs 27 to 31 of the judgment under appeal, that the 'actions' of the Court of Auditors in relation to the preliminary investigation were not unlawful, since that institution had not infringed the requirements arising from Articles 2 and 4 of Decision 99/50, interpreted together; nor had it infringed the rights of the defence or the principle of impartiality.
- 18 In particular, in paragraph 29 of that judgment, the General Court found that the preliminary investigation to which Article 2 of Decision 99/50 refers is intended, on the one hand, to enable the Secretary-General to determine whether the evidence brought to his attention gives rise to a presumption of the existence of irregularities detrimental to the financial interests of the European Union and, on the other, to forward to OLAF, in accordance with Article 7(1) of Regulation No 1073/1999, a report enabling it to determine whether it is necessary to open an internal investigation under the second paragraph of Article 5 of that regulation. The General Court therefore held that, as that preliminary investigation was not intended to result in findings being made about the person under investigation, the obligation under the second sentence of the first paragraph of Article 4 of Decision 99/50 does not concern the 'actions' of the Secretary-General in the context of Article 2 of Decision 99/50.

- 19 Similarly, in paragraph 30 of the judgment under appeal, the General Court found that, since the communications received in the letters of 8 and 26 April 2002 met the requirements under the first sentence of the first paragraph of Article 4 of Decision 99/50, there was no basis for Ms Nikolaou's submission that that provision had been infringed because the Court of Auditors had not interviewed her before forwarding to OLAF the report containing the information that the Secretary-General had gathered about her.
- 20 Second, in paragraph 32 of the judgment under appeal, the General Court held that Ms Nikolaou's assertion that the Court of Auditors had used forged documents was unfounded. In that connection, it found that the document concerned — namely, a request to carry over annual leave from the Head of Ms Nikolaou's Private Office, dated 20 November 2001 — was not among the documents that made up the preliminary file sent to OLAF. In any event, the General Court observed that, even assuming that the Court of Auditors had in fact sent that document to OLAF or to the Luxembourg authorities, that did not mean that the Court of Auditors had acted in bad faith with regard to the authenticity of Ms Nikolaou's signature.
- 21 Third, the General Court held, in paragraphs 43 to 47 of the judgment under appeal, that the failure of the Court of Auditors to adopt a decision formally acquitting Ms Nikolaou of all charges against her following the judgment of 2 October 2008 was not vitiated by illegality.
- 22 First of all, in paragraph 45 of that judgment, the General Court found that Ms Nikolaou had been acquitted on the basis of doubts arising as a result of certain explanations given by the Head of her Private Office. Consequently, according to the General Court, the ground for acquittal did not imply that the charges against Ms Nikolaou were completely unfounded, but rather, as the Luxembourg Tribunal d'arrondissement had stated, that they had not been established 'beyond the shadow of a doubt'.
- 23 Next, in paragraph 46 of the judgment under appeal, the General Court held that it was exclusively for the national judicial authorities to examine the criminal aspects of those accusations, and for the Court of Justice to examine the disciplinary aspects under Article 247(7) EC. According to the General Court, the Court of Auditors was not competent, therefore, to give a decision in that regard.
- 24 Lastly, in paragraph 47 of the judgment under appeal, the General Court found that it could not be inferred from the fact that there was no referral to the Court of Justice under Article 247(7) EC that the Court of Auditors considered the charges against Ms Nikolaou to be entirely without foundation. Under Article 6 of the Rules of Procedure of the Court of Auditors, that referral had to be decided unanimously. The General Court therefore held that, whilst it was true that the lack of referral implied that unanimity was not reached, that was not tantamount to a position on the part of the Court of Auditors regarding the accuracy of the facts. In that context, commenting on the remark in the letter of 13 May 2004, the General Court found that 'it was not inappropriate for the President of the Court of Auditors to indicate to [Ms Nikolaou] that the vast majority of its Members regarded her conduct as unacceptable, thereby preventing the lack of referral to the [Court of Justice] from being construed as a denial of the accuracy of the charges, which was not a true reflection of the situation'.
- 25 Fourth, the General Court held, in paragraph 49 of the judgment under appeal, that no obligation for the Court of Auditors to publish Ms Nikolaou's acquittal could be inferred from the duty to provide assistance.

Forms of order sought

- 26 By her appeal, Ms Nikolaou claims that the Court should:
- set aside the judgment under appeal and refer the case back to the General Court for judgment; and
 - order the Court of Auditors to pay the costs.
- 27 The Court of Auditors contends that the Court should:
- dismiss the appeal as in part inadmissible and in part unfounded; and
 - order Ms Nikolaou to pay the costs of the proceedings.

The appeal

- 28 Ms Nikolaou relies on four grounds of appeal.

First ground of appeal

Arguments of the parties

- 29 By her first ground of appeal, Ms Nikolaou submits that the principle of the presumption of innocence, laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union and Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, is a procedural guarantee which is not limited to the pre-trial phase, but also applies after the trial. Accordingly, that principle should be interpreted as precluding a decision of a Court of the European Union casting doubt on the innocence of a person who has been charged where that person has been exonerated beforehand by a decision of a national criminal court which has become final (see ECHR Case *Vassilios Stavropoulos v. Greece*, no. 35522/04, § 39, 27 September 2007).
- 30 In the light of those considerations, Ms Nikolaou argues that, in paragraph 45 of the judgment under appeal, the General Court infringed that principle by holding that the ground of acquittal based on the existence of doubts, adopted by the Tribunal d'arrondissement Luxembourg, '[did not imply] that the charges against [Ms Nikolaou] [were] wholly without foundation'.
- 31 According to Ms Nikolaou, such an infringement inevitably affects the validity of the judgment under appeal, in so far as it was decisive for the purposes of determining, in paragraphs 44 and 49 of that judgment, the lawfulness of the fact that the Court of Auditors had not adopted a decision formally acquitting Ms Nikolaou of all charges against her following the judgment of 2 October 2008, or published in the press a notice of Ms Nikolaou's acquittal.
- 32 The Court of Auditors contends that the first ground of appeal is predicated on the assumption that the Court of Auditors or the General Court undertook a re-examination of the merits of the judgment of 2 October 2008. That premiss is incorrect.

33 At the time when the decision of 2 July 2009, referred to in paragraph 13 above, was adopted, the Court of Auditors took note of that judgment and drew the necessary inferences in the exercise of its own powers, which did not include the possibility of publishing Ms Nikolaou's acquittal. Similarly, the General Court recognised and complied with the content of that judgment concerning the consequences of a criminal nature.

Findings of the Court

34 By the first ground of appeal, Ms Nikolaou submits that the General Court acted in breach of the principle of the presumption of innocence by holding, in paragraph 45 of the judgment under appeal, that the ground of acquittal adopted in the judgment of 2 October 2008 '[did] not imply that the charges against [Ms Nikolaou] [were] wholly without foundation' but, that 'they [had] not been established "beyond the shadow of a doubt"'. According to Ms Nikolaou, that error should cause that judgment to be set aside to the extent that, if it had not contravened that principle, the General Court would have recognised, in paragraphs 44 and 49 of that judgment, the unlawfulness of the failure by the Court of Auditors to adopt a decision formally acquitting Ms Nikolaou of all charges against her, following the judgment of 2 October 2008, and to publish her acquittal in the press.

35 In that connection, it must be recalled that the principle of the presumption of innocence, laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union, which corresponds to Article 6(2) and (3) of the European Convention on the Protection of Human Rights and Fundamental Freedoms, may be infringed in particular if, by its reasoning, a judgment reflects the opinion that a person is guilty of an offence after the criminal proceedings have been closed by his acquittal (see ECHR Cases *Allenet de Ribemont v. France*, 10 February 1995, Series A no. 308; *Daktaras v. Lithuania*, no. 42095/98, § 41 to 44, ECHR 2000-X and *Teodor v. Romania*, no. 46878/06, § 36 and 37, 4 June 2013).

36 In the present case, as the Advocate General stated in point 57 of his Opinion, it must be observed that the reasoning of the General Court set out in paragraph 45 of the judgment under appeal gives the impression that Ms Nikolaou may be guilty of a criminal offence, on the basis of the same facts as those in respect of which she had been definitively acquitted by the judgment of 2 October 2008.

37 Consequently, it must be held that those findings constitute a clear breach of the principle of the presumption of innocence.

38 That being so, it must nevertheless be noted that the breach of that principle cannot cause the judgment under appeal to be set aside, in so far as the findings made in paragraphs 44 and 49 of that judgment as to the lawfulness of the omissions of which the Court of Auditors is accused are, in any event, well founded on another ground, set out separately in paragraph 46 of the judgment under appeal (see, to that effect, judgments in *JCB Service v Commission*, C-167/04 P, EU:C:2006:594, paragraph 186, and *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 233).

39 On the basis of the latter ground, the General Court rightly held that it is, on the one hand, 'exclusively for the national judicial authorities to examine the criminal aspects of the accusations' made against a former Member of the Court of Auditors and, on the other hand, for the Court of Justice to examine 'the disciplinary aspects under Article 247(7) EC', the Court of Auditors itself not being competent to adopt a decision formally acquitting Ms Nikolaou of all charges brought against her, whether in relation to the disciplinary or the criminal aspects, or to publish her acquittal in the press.

40 Furthermore, that finding is also consistent with the principles devolving from the settled case-law relating to the independent nature of disciplinary proceedings before the Court of Justice, for the purposes of Article 247(7) EC, in relation to national criminal proceedings (judgment in *Commission v*

Cresson, C-432/04, EU:C:2006:455, paragraphs 120 and 121). As the Advocate General also observed in points 71 to 73 of his Opinion, it is clear from that case-law that, like the Court of Justice itself, the Court of Auditors, as the authority responsible for referring the matter to the Court, is not bound by the legal characterisation of the facts made in the course of national criminal proceedings. Accordingly, in the present case, the Court of Auditors was not under an obligation, following the judgment of 2 October 2008, to adopt the acts or the conduct relied on by Ms Nikolaou.

- 41 In the light of the foregoing considerations, the first ground of appeal must be rejected as ineffective.

Second ground of appeal

Arguments of the parties

- 42 By her second ground of appeal, Ms Nikolaou submits that the General Court acted in breach of the principle of sincere cooperation, laid down in Article 4(3) TEU, and which it was under a duty to observe with regard to the Luxembourg Tribunal d'arrondissement.
- 43 In that connection, Ms Nikolaou — referring to the order in *Zwartveld and Others*, C-2/88 EU:C:1990:315, paragraph 17, and the judgment in *Ireland v Commission*, C-339/00, EU:C:2003:545, paragraphs 71 and 72 — submits that that principle imposes a duty of mutual cooperation not only on Member States, but also on institutions of the European Union and, by extension, on all the organs of the European Union, including its judicial bodies.
- 44 That said, Ms Nikolaou argues, however, that the General Court neither respected the judgment of 2 October 2008 nor took due account of that judgment.
- 45 First of all, in paragraphs 44 and 45 of the judgment under appeal, the General Court interpreted the facts relating to Ms Nikolaou's conduct completely differently from the appraisal undertaken by the Tribunal d'arrondissement Luxembourg.
- 46 Next, the assessment made in paragraph 35 of the judgment under appeal, according to which the management of the entire annual leave system is based on the hierarchical superior's duty to check the presence of staff under his authority is manifestly contrary to the findings set out in the judgment of 2 October 2008, according to which there is no obligation on staff of private offices to keep a register of leave.
- 47 Lastly, the General Court held, in paragraph 38 of the judgment under appeal, that the shortcomings of the system for recording and monitoring leave that was in place at the Court of Auditors at the material time could not justify abandoning all investigation or prosecution of Ms Nikolaou, even though it was specifically the shortcomings in the leave management system that had led to her acquittal by the Tribunal d'arrondissement Luxembourg.
- 48 In answer to those arguments, the Court of Auditors contends that the second ground of appeal is based on a failure to understand the respective roles of the institutions concerned and the scope of Article 4(3) TEU.
- 49 In accordance with the case-law deriving from the judgment in *Commission v Cresson* EU:C:2006:455, the General Court did not question the judgment of 2 October 2008, but simply carried out an independent assessment of certain facts already analysed in the course of the criminal proceedings at national level in the context of the examination of the non-contractual liability, if any, of the Court of Auditors. Accordingly, the difference in the assessment of certain factual circumstances reflects the independent nature of each of the two sets of judicial proceedings.

Findings of the Court

- 50 By her second ground of appeal, Ms Nikolaou submits that the General Court acted in breach of the principle of sincere cooperation, which it was under a duty to observe with regard to the Luxembourg Tribunal d'arrondissement, in that — in paragraphs 44 and 45 and in paragraphs 35 and 38 of the judgment under appeal — its assessment of certain factual elements diverged from the findings made in the judgment of 2 October 2008.
- 51 In that connection, it must be recalled that the principle of sincere cooperation — which, before the entry into force of the Lisbon Treaty, was laid down in Article 10 EC and which is now laid down in Article 4(3) TEU — involves an obligation, for Member States, to take all measures necessary to guarantee the application and effectiveness of EU law and imposes on the institutions of the European Union duties of mutual respect and assistance with regard to the Member States in carrying out the tasks flowing from the Treaties (see, to that effect, judgments in *First and Franex*, C-275/00, EU:C:2002:711, paragraph 49, and *Ireland v Commission*, EU:C:2003:545, paragraph 71).
- 52 In carrying out those tasks, Article 235 EC, read together with Article 225(1) EC, expressly confers jurisdiction on the Court of Justice and the General Court to hear and determine actions seeking compensation for damage brought under the second paragraph of Article 288 EC, which covers the non-contractual liability of the Community. According to settled case-law, that jurisdiction is exclusive, the Community Courts having to verify, for the Community to be non-contractually liable, the satisfaction of a cumulative set of conditions, namely, the unlawfulness of the conduct alleged against the institutions, the fact of damage and the existence of a causal link between the conduct of the institution and the damage complained of (see judgment in *Commission v Systran and Systran Luxembourg*, C-103/11 P, EU:C:2013:245, paragraph 60 and the case-law cited).
- 53 Furthermore, as regards, in particular, the first of those conditions, the Court has stated on many occasions that a sufficiently serious breach of a rule of law intended to confer rights on individuals must be established (see judgment in *Bergaderm and Goupil*, C-352/98 P, EU:C:2000:361, paragraph 42), namely a manifest and grave disregard by the institution concerned of the limits of its discretion (see, to that effect, judgments in *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 55, and *Commission v CEVA and Pfizer*, C-198/03 P, EU:C:2005:445, paragraph 64).
- 54 It accordingly follows from those principles that the action for damages relating to the Community's non-contractual liability for actions or omissions on the part of its institutions was established as an independent form of judicial remedy, having its own particular place in the system of means of redress and subject to conditions for its use formulated in the light of its specific purpose (see, inter alia, judgments in *Lütticke v Commission*, 4/69, EU:C:1971:40, paragraph 6, and *Unifrex v Council and Commission*, 281/82, EU:C:1984:165, paragraph 11).
- 55 Accordingly, as the Commission also observed in its written submissions, although findings made in criminal proceedings relating to facts which are the same as those investigated in the course of a procedure based on Article 235 EC may be taken into account by the Community Court hearing the case, the latter is not bound by the legal characterisation of the facts made by the criminal court; rather, it is for the Community Court, exercising its discretion to the full, to undertake an independent examination of those facts in order to determine whether the conditions to be satisfied in order for the Community to incur non-contractual liability have been met (see, by analogy, judgment in *Commission v Cresson* EU:C:2006:455, paragraphs 120 and 121).
- 56 In the light of those considerations, it must therefore be held that Ms Nikolaou's allegations that, in paragraphs 44 and 45 and 35 and 38 of the judgment under appeal, the General Court acted in breach of the principle of sincere cooperation, are entirely baseless.

- 57 In those paragraphs of the judgment under appeal, the General Court did not fail in its duty of institutional respect with regard to the Luxembourg Tribunal d'arrondissement, in so far as it made findings in respect of certain facts already analysed in the judgment of 2 October 2008 solely in order to determine the lawfulness of the omissions of which the Court of Auditors was accused in the dispute concerning the Community's non-contractual liability and not with the intention of assessing whether the criminal charges against Ms Nikolaou were well founded.
- 58 It follows that the second ground of appeal must be dismissed as unfounded.

Third ground of appeal

Arguments of the parties

- 59 By her third ground of appeal, Ms Nikolaou submits that the judgment under appeal is vitiated by lack of jurisdiction on the part of the General Court, by reason of the fact that it ruled on matters outside the limits of its jurisdiction under the Treaties.
- 60 In the first place, Ms Nikolaou argues that, in paragraph 45 of the judgment under appeal, the General Court acted as if it were 'a criminal court of appeal' when it addressed the substantive criminal law issue of the implications, if any, of the ground of acquittal 'based on doubt' adopted by the judgment of 2 October 2008.
- 61 In the second place, Ms Nikolaou submits that the General Court acted like a 'disciplinary tribunal' and, furthermore, endorsed an incorrect understanding of the powers of the Court of Auditors, holding in paragraph 47 of the judgment under appeal, with regard to the remark made in the letter of 13 May 2004, that 'it was not inappropriate for the President of the Court of Auditors to indicate to [Ms Nikolaou] that the vast majority of Members of the Court of Auditors regard[ed] her conduct as unacceptable'.
- 62 In that connection, Ms Nikolaou states that, since, under Article 247(7) EC, the Court is the only institution with jurisdiction to rule on the disciplinary offences complained of in respect of a Member of the Court of Auditors, the General Court was not entitled to rule for those purposes on the conduct of which Ms Nikolaou was accused in that letter or to rule that the content of that letter was lawful.
- 63 The Court of Auditors contends that that ground of appeal must be rejected as being in part inadmissible, in that it simply repeats the arguments relied on at first instance regarding the letter of 13 May 2004, and in part unfounded, in so far as the General Court did not cast doubt on the judgment of 2 October 2008, since it is possible, depending on the nature of the judicial body hearing the case and the type of legal proceedings, for assessment of the same conduct to lead to different conclusions.

Findings of the Court

- 64 By her third ground of appeal, Ms Nikolaou submits that the General Court infringed the rules of jurisdiction under the Treaties. In the first place, Ms Nikolaou argues that, in paragraph 45 of the judgment under appeal, the General Court examined the merits of the criminal charges brought against her and the ground of acquittal adopted by the judgment of 2 October 2008. In the second place, Ms Nikolaou argues that, in paragraph 47 of the judgment under appeal, the General Court wrongly examined the remark of a disciplinary nature made in the letter of 13 May 2004 and asserted that the content of that letter was lawful, thereby infringing the limits not only of its own powers, but also those of the Court of Auditors.

- 65 It must be held that those allegations arise from an incorrect reading of the judgment under appeal.
- 66 As regards the first part of this ground of appeal, it suffices to note that, in paragraph 45 of the judgment under appeal, the General Court did not analyse the facts on which the criminal charges against Ms Nikolaou were based; nor did it examine the ground of acquittal adopted by the judgment of 2 October 2008, with the aim of casting doubt on the final outcome of that judgment or having the criminal proceedings at national level reopened.
- 67 However, as noted in paragraphs 56 and 57 above, remaining within the limits of its exclusive jurisdiction in relation to the non-contractual liability of the Community, the General Court merely referred to the same factual elements as those taken into account in the criminal proceedings, and solely for the purposes of responding to Ms Nikolaou's arguments that the Court of Auditors had acted unlawfully in not adopting a decision, following the judgment of 2 October 2008, formally acquitting her of all charges.
- 68 In paragraph 45 of the judgment under appeal, the General Court did not — contrary to the assertions made by Ms Nikolaou — act as 'a criminal court of appeal', but remained within the limits of its own jurisdiction.
- 69 As regards the second part of the third ground of appeal, it must be stated, first, that the reasoning followed in paragraph 47 of the judgment under appeal is also an answer to Ms Nikolaou's argument, based on an unfavourable and superfluous remark made in the letter of 13 May 2004, that the Court of Auditors acted in breach of the principle of impartiality and the duty of care.
- 70 Accordingly, in analysing that remark in the context of the action for damages before it, the General Court did not rule, from a disciplinary point of view, on the conduct of which Ms Nikolaou was accused and did not exceed the limits of its jurisdiction in respect of the Community's non-contractual liability.
- 71 On the other hand, as regards the content of the letter of 13 May 2004, it must be observed that, as the Advocate General also states in point 84 of his Opinion, that content was rightly limited to communicating the result of the vote of the Members of the Court of Auditors in their meeting to decide whether to refer the matter to the Court of Justice under Article 247(7) EC and, accordingly, that content did not involve any assessment from the disciplinary point of view of the conduct of which Ms Nikolaou was accused.
- 72 Given that the referral to the Court of Justice could have been legitimately decided, in accordance with the principles deriving from the relevant case-law, on the basis of the supposed 'lack of a certain degree of gravity' (see, to that effect, *Commission v Cresson* EU:C:2006:455, paragraph 72), it was open to the Court of Auditors to indicate that the unanimity necessary for those purposes, under Article 6 of its rules of procedure, had not been reached, even though the vast majority of its members were critical of the conduct complained of in point (i) of that letter.
- 73 Moreover, as was confirmed by all the parties at the hearing before the Court, the remark made in that letter remained strictly personal and was not divulged to the press.
- 74 It is clear from those considerations that, by holding that the content of the letter of 13 May 2004 was lawful, the General Court in no way attributed disciplinary powers to the Court of Auditors that that institution does not have; nor did it fail to have regard to the limits of its own jurisdiction, since it did not act as if it were 'a disciplinary tribunal'.
- 75 In the light of the foregoing considerations, the third ground of appeal must be rejected as unfounded.

Fourth ground of appeal

Arguments of the parties

- 76 By the first part of her fourth ground of appeal, Ms Nikolaou submits that the General Court misinterpreted and misapplied the rules governing the non-contractual liability of the Community. In paragraph 32 of the judgment under appeal, the General Court added an extra condition, not required by the case-law, namely the requirement that the institution concerned must have acted in 'bad faith'.
- 77 By the second part of this ground of appeal, Ms Nikolaou submits that the General Court erred in law in its interpretation of the second paragraph of Article 2 of Decision 99/50, read together with the first paragraph of Article 4 of that decision.
- 78 First, according to Ms Nikolaou, the General Court wrongly held, in paragraph 30 of the judgment under appeal, that it was unnecessary to inform Ms Nikolaou that a preliminary investigation had been opened concerning her and that the letters of 8 and 26 April 2002, which merely informed Ms Nikolaou that OLAF had opened an internal investigation, satisfied the requirements laid down in the first sentence of the first paragraph of Article 4 of that decision. Second, Ms Nikolaou argues that the General Court wrongly accepted, in paragraph 29 of that judgment, that the failure of the Court of Auditors to divulge to her the content of the report drawn up during the preliminary investigation or to hear her before sending the report to OLAF was in no way unlawful for the purposes of the second sentence of the first paragraph of Article 4 of that decision.
- 79 According to the Court of Auditors, this ground of appeal must be declared inadmissible, since it consists in a mere repetition of the arguments relied on at first instance and accordingly constitutes a request for a review of the facts of the case.
- 80 In any event, in paragraph 32 of the judgment under appeal, the General Court did not add any supplementary condition for the establishment of the Community's non-contractual liability. Nor did it err in its reading of the second paragraph of Article 2 of Decision 99/50, since that provision did not require the person suspected of irregularities to be informed that a preliminary investigation had been opened, but merely required the Secretary General to forward the information gathered in such an investigation to OLAF as soon as possible.

Findings of the Court

- 81 By the first part of the fourth ground of appeal, Ms Nikolaou submits that the General Court erred in law in its interpretation of the conditions for the establishment of the Community's non-contractual liability, by holding in paragraph 32 of the judgment under appeal that the communication to OLAF or to the Luxembourg authorities of a document dated 20 November 2001 from the Head of Ms Nikolaou's Private Office, on which the signature was probably forged, did not mean that the Court of Auditors had acted in bad faith regarding the authenticity of Ms Nikolaou's signature.
- 82 In that connection, it suffices to note that the General Court reached that conclusion as an alternative, after making the principal finding that that document did not appear in the report on the preliminary investigation sent by the Court of Auditors to OLAF and had not been forwarded to the Luxembourg authorities.
- 83 Accordingly, in the absence of any challenge to that finding of fact in the appeal, the first part of the fourth ground of appeal must be rejected as ineffective.

- 84 By the second part of the fourth ground of appeal, Ms Nikolaou submits that the General Court misinterpreted the second paragraph of Article 2 of Decision 99/50, read together with the first paragraph of Article 4 of that decision, in that it held, first, in paragraph 30 of the judgment under appeal, that the letters of 8 and 26 April 2002, having informed Ms Nikolaou of the opening of OLAF's internal investigation, and not of the preliminary investigation, satisfied the requirements laid down in the first sentence of the first paragraph of Article 4 of that decision and, second, in paragraph 29 of that judgment, that the second sentence of the first paragraph of Article 4 of that decision did not oblige the Court of Auditors to disclose to Ms Nikolaou the content of the report drawn up in the preliminary investigation or to hear her before sending the report to OLAF.
- 85 In that connection, it must be recalled that the second paragraph of Article 2 of Decision 99/50 provides that the Secretary General 'shall transmit without delay to [OLAF] any evidence which gives rise to a presumption that [irregularities] exist', such as fraud, corruption or any other illegal activity detrimental to the financial interests of the Communities and 'shall conduct a preliminary investigation, without prejudice to the internal investigations conducted by [OLAF]'.
- 86 In order to answer the first argument raised in support of the second part of the fourth plea, it is necessary, in the absence of express provision in Article 2 of Decision 99/50, to determine first of all whether the obligation to give information referred to in the first sentence of the first paragraph of Article 4 of Decision 99/50 also extends to the preliminary investigation; and then, if the answer is affirmative, to determine the nature of that obligation; and, lastly, to ascertain whether, in the present case, Ms Nikolaou was in fact so informed.
- 87 As regards the examination of those points, it must be held that, without in any way specifying the type of investigation referred to, the first sentence of the first paragraph of Article 4 of that decision simply states that, where the possible implication of a Member, official or servant of the Court of Auditors emerges, the person concerned must be informed 'rapidly', so long as that would not be harmful to the investigation.
- 88 It follows that, even supposing that that provision also concerns the preliminary investigation, it should be noted that it does not lay down an obligation to inform immediately, as soon as the investigation begins, and it tempers the obligation by requiring that the efficiency of the investigation must not be impaired.
- 89 That being so, it must be held that in the present case, contrary to the assertions made by Ms Nikolaou, by the letter of 26 April 2002, she was in fact informed not only that an internal investigation had been opened but also that a preliminary investigation had been carried out by the Court of Auditors and that the Secretary General had sent the related file to OLAF.
- 90 Accordingly, in the absence of allegations by Ms Nikolaou claiming that the letter was delayed, it must be held that — as the Advocate General also noted in point 96 of his Opinion — the communication contained in that letter reconciles the principle of rapid notification of the person concerned with the need to ensure the effectiveness of both the preliminary and the internal investigations.
- 91 It follows that the General Court did not err in law in holding, in paragraph 30 of the judgment under appeal, that the communications made by the letters of 8 and 26 April 2002 satisfied the requirements laid down in the first sentence of the first paragraph of Article 4 of Decision 99/50.
- 92 Those clarifications having been made, in order to gauge the soundness of the second argument relied on in support of the second part of the present ground of appeal, it must be determined whether the preliminary investigation is, in any event, covered by the obligation to inform, laid down in the second sentence of the first paragraph of Article 4 of that decision, under which 'conclusions referring by name to a Member ... may not be drawn once the investigation has been completed without the

interested party having been enabled to express his views on all the facts which concern him' and, accordingly, whether Ms Nikolaou had to be heard before that investigation was closed and the file forwarded to OLAF.

- 93 For those purposes, since there is no clear indication in the wording of the second sentence of the first paragraph of Article 4 of that decision, the specific characteristics of the preliminary investigation must be examined.
- 94 As the Court of Auditors explained at the hearing before the Court, such an investigation constitutes a preliminary phase of collecting and evaluating information relating to allegations of irregularities received by the Secretary General, the aim of which is to verify the credibility of the information provided in support of those allegations, before collating it in a file and sending it either to the Appointing Authority or to OLAF, in order for an internal investigation to be undertaken.
- 95 It follows that — as the Advocate General also observed in point 93 of his Opinion — the preliminary investigation is not intended to reach conclusions regarding the person concerned.
- 96 In those circumstances, the General Court did not err in law, in paragraph 29 of the judgment under appeal, by analysing the aim of that investigation and by holding that the obligation under the second sentence of the first paragraph of Article 4 of Decision 99/50 does not concern acts by the Secretary General in the course of that investigation.
- 97 Accordingly, the second part of the fourth ground of appeal must be rejected in its entirety as unfounded.
- 98 In the light of the foregoing considerations, the fourth ground of appeal must be rejected as being in part ineffective and in part unfounded, and the appeal must be dismissed.

Costs

- 99 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where an appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, which applies to the procedure on appeal by virtue of Article 184(1) of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ms Nikolaou has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Ms Kalliopi Nikolaou to pay the costs.**

[Signatures]