



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber, Extended Composition)

24 October 2018*

(Civil service — Officials — Director-General of OLAF — Decision waiving the applicant's immunity from legal proceedings — *Lis pendens* — Act adversely affecting a person — Obligation to state reasons — Duty of assistance and duty to have regard to the welfare of officials — Legitimate expectations — Rights of the defence)

In Case T-29/17,

RQ, official of the European Commission, represented by É. Boigelot, lawyer,

applicant,

v

European Commission, represented by K. Banks, J.-P. Keppenne and J. Baquero Cruz, acting as Agents,

defendant,

ACTION under Article 270 TFEU for annulment of Commission Decision C(2016) 1449 final of 2 March 2016 concerning a request to waive the applicant's immunity from legal proceedings and, so far as necessary, of Commission Decision Ares(2016) 5814495 of 5 October 2016 rejecting the applicant's complaint against the first decision,

THE GENERAL COURT (Seventh Chamber, Extended Composition),

composed of V. Tomljenović, President, E. Bieliūnas (Rapporteur), A. Marcoulli, R. Barents and A. Kornezov, Judges,

Registrar: G. Predonzani, Administrator,

having regard to the written part of the procedure and further to the hearing on 12 April 2018,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

Facts

- 1 In May 2012, the company Swedish Match, a manufacturer of tobacco products, lodged a complaint with the European Commission containing serious allegations concerning the involvement of Mr John Dalli, the Commissioner responsible for health and consumer protection, in attempted bribery. According to the company that lodged the complaint, a Maltese businessman, Mr Silvio Zammit, had used his relationship with Mr Dalli to attempt to obtain a financial benefit from that company and from the association European Smokeless Tobacco Council (ESTOC) in exchange for his intervention seeking to influence a potential legislative proposal on tobacco products, to the advantage of the tobacco industry. The complaint mentioned, inter alia, a telephone conversation that had taken place on 29 March 2012 between the Secretary-General of ESTOC and Mr Zammit, during which the latter requested the payment of a very large sum in exchange for a meeting with Mr Dalli, a preparatory step for Mr Dalli to potentially take action to the advantage of the tobacco industry.
- 2 The European Anti-Fraud Office (OLAF) opened an administrative investigation, registered under reference OF/2012/0617, on the subject of the complaint. On the basis of evidence collected during the first stage of the investigation, OLAF thought it might be suitable to ask the Secretary-General of ESTOC to have a new telephone conversation with Mr Zammit, capable of providing additional evidence, which would enable the next stages of the investigation to be better planned and allow the facts concerning the reported attempted bribery to be confirmed or disproved and, as the case may be, to define the scope of the attempted bribery. The Secretary-General of ESTOC confirmed her willingness to cooperate with OLAF to that effect.
- 3 The second telephone conversation between Mr Zammit and the Secretary-General of ESTOC took place on 3 July 2012. The Secretary-General of ESTOC made the call using, with the consent of and in the presence of the applicant, RQ, Director-General of OLAF, a mobile telephone on OLAF premises. The telephone conversation was recorded by OLAF and reported in the final report of the investigation, adopted by OLAF on 15 October 2012.
- 4 On 13 December 2012, after the administrative investigation was closed, Mr Dalli lodged criminal complaints, with an application to join the proceedings as a party claiming civil damages, before the Belgian courts, in which he invoked, inter alia, the charge of unlawful recording of telephone communications. Those complaints led the first Belgian investigating magistrate to request the Commission, by letter of 19 March 2013, to waive the inviolability of the archives connected to the acts under investigation and to waive the duty of confidentiality of the officials who participated in the investigation. On 21 November 2013, the Director-General of OLAF agreed to waive the duty of confidentiality of the members of the OLAF investigation team and its head of unit.
- 5 By letters of 21 November 2014 and 6 February 2015, respectively, the first investigating magistrate and the second investigating magistrate — who replaced the first — asked the Commission to waive, in the context of a judicial investigation seeking to establish whether the unlawful recording of telephone communications had in fact taken place, the immunity of four OLAF staff members, including the applicant, for the purpose of hearing them as accused persons. The Commission replied, namely by letters of 19 December 2014 and 3 March 2015, asking for a more detailed explanation which would enable it to come to a decision in full knowledge of the relevant facts.

- 6 The Belgian Public Prosecutor's Office then took over the case and, by letter of 23 June 2015 ('the letter of 23 June 2015'), repeated the request to waive immunity, which had in the meantime been restricted to the applicant. The Belgian Public Prosecutor set out certain facts that, according to him, showed that there were indications in the investigation conducted by OLAF that the unlawful recording of telephone communications punishable by law had taken place. In that regard, he referred, *inter alia*, to a witness statement made by the Secretary-General of ESTOC to the Belgian judicial authorities that OLAF had recorded, in the applicant's office, a telephone conversation between the Secretary-General and Mr Zammit, without the latter's knowledge. That conversation had, moreover, been relayed on speaker-phone, so that all persons present were able to hear it.

The contested decision

- 7 In those circumstances, on 2 March 2016, the Commission adopted Decision C(2016) 1449 final concerning a request to waive the applicant's immunity from legal proceedings ('the contested decision'). By that decision, the Commission waived in part the applicant's immunity from legal proceedings, in accordance with the second paragraph of Article 17 of Protocol No 7 on the privileges and immunities of the European Union (OJ 2010 C 83, p. 266), that is, concerning the allegations of fact relating to the monitoring of a telephone conversation referred to in the letter of 23 June 2015, and rejected the request to waive immunity in respect of other allegations.
- 8 In the grounds of the contested decision, the Commission first stated that it was required under Article 17 of Protocol No 7 to satisfy itself that a waiver of immunity would not harm the interests of the European Union and, more specifically, the independence and proper functioning of the institutions, offices, bodies and agencies of the European Union. According to the Court's case-law, this is the only substantive criterion that would enable a waiver of immunity to be refused. Otherwise, immunity should be waived systematically, as Protocol No 7 does not permit EU institutions to verify whether the national legal proceedings underlying the request are well founded or fair.
- 9 Next, the Commission pointed out, in recital 10 of the contested decision, that it was appropriate to take into consideration the highly specific legal framework governing OLAF investigations. Thus, by Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1), the EU legislature conferred powers of investigation on OLAF that the latter, although connected to the Commission, exercises in full independence, including from the Commission itself. That specific regulatory framework requires the Commission to satisfy itself that, by granting the request to waive immunity, it does not hinder the independence and proper functioning of OLAF as an independent EU anti-fraud investigation office, failing which the EU judicature could declare its actions unlawful further to an action brought by the official concerned on the basis of Article 17(3) of Regulation No 883/2013.
- 10 The Commission went on to explain, in recital 11 of the contested decision, that it could waive the immunity of the Director-General of OLAF only if it were informed, with sufficient clarity and precision, of the reasons for which the judicial authority that issued the request was of the view that the allegations against him could, if appropriate, warrant his being heard as an accused person. Failing that, any person concerned by an OLAF investigation could, by making manifestly unfounded allegations against its Director-General, succeed in bringing the functioning of that office to a standstill, which would be contrary to the interests of the European Union. In the present case, regarding the allegations of unlawful recording of telephone conversations, the Commission stated that, further to the letter of 23 June 2015, it now had very clear and specific indications showing that the judicial authority that issued the request could reasonably — and, in any event, without acting in an arbitrary or abusive manner — consider that the allegations against the applicant warranted his being investigated. In those circumstances, it would be contrary to the principle of sincere

cooperation with the national authorities to refuse to waive the applicant's immunity. The Commission was therefore, in its opinion, required to grant the request to waive immunity in respect of those allegations.

- 11 The Commission nevertheless observed, in recital 14 of the contested decision, that the applicant enjoyed a presumption of innocence and that the decision to waive his immunity was in no way a judgement of whether the allegations against him were well founded or whether the national proceedings were fair. In addition, it pointed out, in recital 15 of the contested decision, that the applicant was entitled to claim legal assistance from the Commission on the basis of the first paragraph of Article 24 of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), covering legal and lawyers' fees, in the event that the investigation against him by the Belgian authorities should result in proceedings that led him to incur costs.
- 12 In Article 1(1) of the contested decision, the Commission therefore decided to waive the applicant's immunity from legal proceedings only as regards the allegations of fact referring to the monitoring of the telephone conversation that took place on 3 July 2012. In Article 1(2) it rejected, by contrast, the request as concerned the other allegations of fact.

Facts subsequent to the contested decision

- 13 The contested decision was notified to the applicant on 11 March 2016.
- 14 In March and April 2016, the Commission issued public statements in which it repeated that the applicant continued to enjoy its trust and the presumption of innocence. In addition, it stated publicly that the contested decision affected neither the running of OLAF nor the authority of the applicant as the Director-General of OLAF.
- 15 Moreover, upholding the applicant's request, the Commission granted him, as from 1 April 2016, the assistance provided for in the first paragraph of Article 24 of the Staff Regulations for the payment of his lawyer's fees in connection with the criminal proceedings initiated by the Belgian authorities.
- 16 Finally, by letter of 12 April 2016, the Belgian Public Prosecutor's Office requested that the Commission waive the applicant's duty of confidentiality so that he could be heard. That request was granted by letter of the Commission of 28 April 2016.
- 17 Moreover, on 10 June 2016, the applicant lodged a complaint against the contested decision in accordance with Article 90(2) of the Staff Regulations.
- 18 That complaint was rejected by Decision Ares(2016) 5814495 of the Commission's appointing authority of 5 October 2016 ('the appointing authority's decision').

Procedure and forms of order sought

- 19 The applicant brought the present action by application lodged at the Court Registry on 17 January 2017.
- 20 By letter of 8 February 2017, the Commission requested that the proceedings be stayed pursuant to Article 69(d) of the Rules of Procedure of the General Court until a final ruling is given in Case T-251/16, *Director-General of OLAF v Commission*.
- 21 On 16 March 2017, the President of the Seventh Chamber of the General Court, after having heard the applicant, rejected the request to stay proceedings.

- 22 On the proposal of the Seventh Chamber of the General Court, the Court decided to refer the case to a Chamber sitting in extended composition pursuant to Article 28 of the Rules of Procedure.
- 23 The applicant claims that the Court should:
- annul the contested decision;
 - so far as necessary, annul the appointing authority’s decision, and
 - order the Commission to pay the costs.
- 24 The Commission contends that the Court should:
- dismiss the action, and
 - order the applicant to pay the costs.

Law

- 25 In support of his action, the applicant raises five pleas in law, alleging, first, infringement of Article 23 of the Staff Regulations and the second paragraph of Protocol No 7 together with manifest errors of assessment concerning the waiver of immunity from legal proceedings, secondly, infringement of Article 24 of the Staff Regulations and breach of the duty to have regard to the welfare of officials, thirdly, infringement of the obligation to state reasons, fourthly, infringement of the principle of the protection of legitimate expectations, and, fifthly, infringement of the rights of the defence.
- 26 The Commission had initially questioned the admissibility of the action by reason of, first, the fact that proceedings on the same issue are pending in Case T-251/16 and, secondly, that there was no act adversely affecting the applicant.
- 27 At the hearing, the Commission stated that it was withdrawing the first objection of admissibility based on the fact that proceedings on the same issue are pending on account of the applicant’s termination of service as Director-General of OLAF, formal note of which was taken in the minutes of the hearing.
- 28 In the present case, the Court takes the view that it is appropriate to define the subject matter of the action before examining, first, the second objection of inadmissibility raised by the Commission, alleging that there is no act adversely affecting the applicant, and, secondly, the substance of the case, first ruling, in that context, on the fifth plea in law, alleging infringement of the rights of the defence.

Subject matter of the action

- 29 By his second head of claim, the applicant claims that the Court should annul, so far as necessary, the appointing authority’s decision.
- 30 It is settled case-law that claims directed against the rejection of a complaint have the effect of bringing before the Court the act against which the complaint was submitted and as such lack any independent content. The Court therefore finds that the subject matter of the second head of claim for annulment of the appointing authority’s decision and that of the first head of claim for annulment of the contested decision is the same (see, to that effect, judgment of 20 November 2007, *Ianniello v Commission*, T-205/04, EU:T:2007:346, paragraph 27 and the case-law cited).

31 It follows that this action for annulment must be regarded as directed against the contested decision alone.

Admissibility of the action

32 In support of its second objection of inadmissibility, alleging that there is no act adversely affecting the applicant, the Commission contends that Article 11(a) of Protocol No 7 does not confer any individual right to immunity from legal proceedings upon EU officials. The wording, context and purpose of Article 17 of the Protocol appear to preclude such an interpretation.

33 It adds that, with regard to the official, the decision to waive immunity is at the very most a preparatory measure which merely enables the national proceedings to proceed as normal. The national final criminal decision alone is liable to have an effect on the legal position of the official, if it results in a conviction.

34 Lastly, the Commission submits that the judgment of 13 January 2010, *A and G v Commission* (F-124/05 and F-96/06, EU:F:2010:2), declaring that the waiver of an official's immunity from legal proceedings constitutes an act adversely affecting the official or member of staff concerned, is an isolated judgment of the Civil Service Tribunal, confirmed by neither the General Court nor the Court of Justice.

35 The applicant submits that, according to case-law, the contested decision, to the extent that it waives his immunity, is an act adversely affecting him against which he can lodge a complaint and subsequently bring an action before the Court.

36 It should be borne in mind that only measures the legal effects of which are binding on and capable of affecting directly and immediately the interests of an official by bringing about a distinct change in his legal position constitute measures that adversely affect the official (see judgment of 23 November 2016, *Alsteens v Commission*, T-328/15 P, not published, EU:T:2016:671, paragraph 113 and the case-law cited).

37 While the privileges and immunities conferred on the European Union by Protocol No 7 have a functional character, in that they are intended to avoid any interference with the functioning and independence of the European Union, the fact remains that they have been expressly accorded to Members of the European Parliament and to officials and other staff of the EU institutions. The fact that the privileges and immunities have been provided in the public interest of the European Union justifies the power given to the institutions to waive the immunity where appropriate but does not mean that these privileges and immunities are granted to the European Union exclusively and not also to its officials, to other staff and to Members of the Parliament. Therefore the Protocol confers an individual right on the persons concerned, compliance with which is ensured by the system of remedies established by the Treaty (see judgment of 17 January 2013, *Gollnisch v Parliament*, T-346/11 and T-347/11, EU:T:2013:23, paragraph 58 and the case-law cited).

38 The immunity from legal proceedings provided for by Article 11 of Protocol No 7 protects officials and members of staff from prosecution by the authorities of the Member States for acts performed in their official capacity. Hence, a decision to waive the immunity of an official or member of staff alters his legal position, simply because it removes that protection, re-establishing his status as a person who is subject to the general law of the Member States and thus laying him open, without the necessity for any intermediary rule, to measures, inter alia those ordering detention and the bringing of legal proceedings, imposed by the general law (see judgment of 13 January 2010, *A and G v Commission*, F-124/05 and F-96/06, EU:F:2010:2, paragraph 231 and the case-law cited).

- 39 The discretion left to the national authorities, following the waiver of immunity, as regards the resumption or discontinuance of proceedings brought against an official or member of staff has no bearing on the fact that his legal position is directly affected, since the effects attached to the decision to waive immunity are restricted to the removal of the protection he enjoyed on account of his status as an official or member of staff, which does not involve any additional implementing measure (see judgment of 13 January 2010, *A and G v Commission*, F-124/05 and F-96/06, EU:F:2010:2, paragraph 232 and the case-law cited).
- 40 It follows from the foregoing that the decision by which the Commission waived the applicant's immunity from legal proceedings constitutes an act adversely affecting him.
- 41 That finding cannot be called into question by the Commission's arguments.
- 42 In the first place, it is necessary to reject the Commission's argument that the judgment of 16 December 1960, *Humblet v Belgian State* (6/60-IMM, EU:C:1960:48), which concerned the exemption of EU officials and other staff from all national taxes on salaries, wages and emoluments paid by the European Union, does not confirm that an official can bring proceedings against an institution's decision to waive his immunity. In that judgment, the Court of Justice considered that the purpose of an action brought under Article 16 of the Protocol on the privileges and immunities of the European Coal and Steel Community (ECSC) of 18 April 1951 was to protect the privileges and immunities set out in that protocol without distinguishing between the various privileges and immunities granted to EU officials and other staff. It thus stated, generally, that although the privileges and immunities were granted 'solely in the interests of the Community', it must not be forgotten that they were expressly granted 'to the officials of institutions of the Community'. Lastly, it held that it is the Protocol itself, not a specific article of that protocol, that creates individual rights for the persons concerned. Therefore, nothing in that judgment allows it to be considered that distinctions should be made between the various categories of privileges and immunities granted to EU officials and other staff.
- 43 In the second place, as regards the judgment of 15 October 2008, *Mote v Parliament* (T-345/05, EU:T:2008:440), although it is true that, as argued by the Commission, it concerned the situation of a Member of Parliament and not an official, it is nonetheless the case that, in that judgment, the General Court specifically decided to follow, by analogy, the approach taken in the judgment of 16 December 1960, *Humblet v Belgian State* (6/60-IMM, EU:C:1960:48), even though that judgment concerned an official. Consequently, the Commission's argument that it is not possible to apply, by analogy, the judgment of 15 October 2008, *Mote v Parliament* (T-345/05, EU:T:2008:440), to the present case has no basis in law.
- 44 In the third and last place, the mere fact that the judgment of 13 January 2010, *A and G v Commission* (F-124/05 and F-96/06, EU:F:2010:2), is in fact the only case-law concerning both immunity from legal proceedings and officials, as the Commission submits, is not sufficient to disregard the principles established therein. As the other arguments put forward by the Commission in order to conclude that a decision to waive immunity from legal proceedings is not a decision adversely affecting a person have been rejected, there is no reason to depart from the precedent created by that judgment.
- 45 Consequently, it is appropriate to reject the plea of inadmissibility raised by the Commission, alleging that decisions to waive immunity from legal proceedings do not adversely affect officials and other staff on the ground that they do not alter in any way their legal position.

Substance

- 46 In support of his fifth plea, alleging infringement of the rights of the defence, the applicant raises three complaints alleging, first, infringement of the right to be heard, secondly, failure to observe the principle of the presumption of innocence and breach of the duty of impartiality and, thirdly, breach of the duty of due diligence.
- 47 It is appropriate to examine the first complaint, alleging infringement of the right to be heard.
- 48 In that regard, the applicant criticises the Commission for not having heard him prior to adopting the contested decision, even though it is an act adversely affecting him and he should have been heard pursuant to Article 41(2)(a) of the Charter of Fundamental Rights of the European Union ('the Charter').
- 49 He argues that the Commission incorrectly invokes the protection of investigative confidentiality to justify the fact that he was not heard, even though the Commission had informed him that a request to waive immunity had been made and he argues, moreover, that investigative confidentiality would not have been breached if he had been heard, since the facts for which he could have provided explanations had been made public by Mr Dalli or even by the Belgian courts.
- 50 The Commission submits that the national case was subject to investigative confidentiality and that any breach of that confidentiality was punishable under Article 458 of the Belgian Criminal Code, so that it could not hear the applicant before making its decision without infringing the national criminal law applicable. The Commission does, however, state that it asked the competent national authorities whether it was possible to communicate information contained in the letter requesting the waiver of immunity to the officials concerned or, at the very least, to the Director-General of OLAF, but the second investigating magistrate categorically refused.
- 51 The leak of information to the press mentioned by the applicant, the amount of time that has elapsed since the events of the case took place, or the subsequent disclosure of that information to the applicant further to the authorisation by the Belgian authorities to do so, do not alter that analysis in any way. Since the Belgian authorities continued to impose investigative confidentiality, the Commission would not have been able to hear the applicant effectively without communicating to him the various documents exchanged during the proceedings.
- 52 In that regard, it should be borne in mind that, according to settled case-law, respect for the rights of the defence, especially the right to be heard, in all proceedings initiated against a person which may lead to a measure adversely affecting him, is a fundamental principle of EU law which must be guaranteed, even when there are no rules governing the procedure in question. That principle, moreover, has been enshrined in Article 41(2)(a) of the Charter (see judgment of 17 January 2013, *Gollnisch v Parliament*, T-346/11 and T-347/11, EU:T:2013:23, paragraph 175 and the case-law cited).
- 53 Under that principle, the person concerned must have had the opportunity, before the decision relating to him was adopted, to put forward his point of view effectively on the correctness and relevance of the facts and circumstances on the basis of which the decision was adopted (see judgment of 17 January 2013, *Gollnisch v Parliament*, T-346/11 and T-347/11, EU:T:2013:23, paragraph 176 and the case-law cited).
- 54 It follows that, in accordance with those principles, a decision cannot be adopted on the basis of elements of fact and circumstances on which the person concerned was unable to put forward his point of view in an effective manner before the decision was adopted (judgment of 17 January 2013, *Gollnisch v Parliament*, T-346/11 and T-347/11, EU:T:2013:23, paragraph 177).

- 55 Nevertheless, it is also in accordance with the Court's settled case-law that fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes the very substance of the rights guaranteed (see judgment of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, paragraph 43 and the case-law cited).
- 56 In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of the fundamental right at issue. In addition, in compliance with the principle of proportionality, such limitation may be made only if it is necessary and genuinely meets objectives of general interest recognised by the European Union.
- 57 In the present case, it is not disputed by the parties, as stated both in their written submissions and at the hearing, that the applicant was not heard by the Commission before the contested decision was adopted. It is therefore necessary to ascertain whether the limitation on the right to be heard at issue in the present case is provided for by law, genuinely meets objectives of general interest recognised by the European Union and is necessary and proportionate to the objective to be attained, while respecting the essence of the right to be heard.
- 58 The Commission justified the fact that it did not hear the applicant before the contested decision was adopted by the need to preserve investigative confidentiality, as required by the Belgian authorities. In that regard, it mentions Article 458 of the Belgian Criminal Code, to which the investigating magistrate referred in his letter of 21 November 2014 (concerning the first request to waive immunity).
- 59 In that regard, it should be noted that, in Member States where such a measure is provided for, investigative confidentiality is a principle of public policy intended not only to protect investigations, in order to prevent fraudulent consultations and attempts to conceal evidence, but also to protect suspected or accused persons whose guilt has not been established.
- 60 Thus, the fact that the person concerned was not heard can be objectively justified by investigative confidentiality, detailed rules for which are provided for by law, to the extent that it appears to be necessary and proportionate to the objective to be attained, that is, the proper conduct of criminal proceedings.
- 61 In the present case, Article 57(1) and Article 61 ter(1) of the Belgian Code of Criminal Procedure enshrine the principle of investigative confidentiality, while stipulating that exceptions to that principle are provided for by law.
- 62 The Commission cannot therefore be criticised, having regard to the principle of sincere cooperation enshrined in the first paragraph of Article 4(3) TEU, according to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties, for taking account of investigative confidentiality as provided for by the national legislation referred to in paragraph 61 above.
- 63 Accordingly, the fact that the person concerned was not heard can, as a general rule, be objectively justified by investigative confidentiality, pursuant to Article 52 of the Charter.
- 64 It is moreover appropriate to examine whether the fact that the person concerned was not heard appears to be necessary and proportionate to the objective to be attained, that is, that of preserving investigative confidentiality and, ultimately, ensuring the proper conduct of the criminal proceedings.
- 65 In that regard, it should be noted that, as a general rule, omitting to hear the person concerned before waiving his immunity preserves investigative confidentiality.

- 66 Nevertheless, it should be pointed out that if, in duly justified cases, a national authority opposes precise and full disclosure to the person concerned of the grounds which constitute the basis of a request to waive immunity, by invoking reasons of investigative confidentiality, the Commission must, together with the national authorities in accordance with the principle of sincere cooperation, implement measures that are intended to accommodate legitimate considerations of investigative confidentiality and the need to ensure sufficient compliance with the person's fundamental rights, such as the right to be heard (see, by analogy, judgment of 4 June 2013, *ZZ*, C-300/11, EU:C:2013:363, paragraph 57).
- 67 Since the Commission is required to respect the right to be heard when it adopts an act adversely affecting a person, it must pay the utmost attention to the way in which it can accommodate the respect of that right of the person concerned and the legitimate considerations of the national authorities. That weighing-up of interests ensures both that the rights conferred on EU officials and other staff, and, consequently, the interests of the European Union, in accordance with the second paragraph of Article 17 of Protocol No 7, are protected, and that national criminal proceedings are conducted efficiently and smoothly in keeping with the principle of sincere cooperation.
- 68 In that regard, it is appropriate to point out that rules which in the national systems of criminal law prevent the communication to certain persons of documents in the criminal proceedings may be relied upon against the Commission in so far as the same restrictions may be relied upon against the national authorities (judgment of 10 January 1980, *Commission v Italy*, 267/78, EU:C:1980:6, paragraph 22). Thus, a Member State's obligation of cooperation could be limited in that it cannot be required to communicate to the Commission documents in the criminal proceedings that the national authority in question would not communicate even to other authorities of that State.
- 69 The Court finds that, in the present case, the file before the Court does not show that the Commission carried out a weighing-up of interests, as referred to in paragraph 67 above, in the manner required and referred to in paragraph 68 above.
- 70 First, it is apparent from both the written submissions of the parties and the procedural documents that the Commission did not ask the national authorities what risks the prior hearing of the applicant entailed in respect of the preservation of investigative confidentiality and, ultimately, the proper conduct of the criminal proceedings.
- 71 Secondly, although, admittedly, investigative confidentiality can, in some cases, require that the request to waive immunity not be communicated to the person concerned before a decision is made on that request when there is a genuine risk that that person might abscond or destroy evidence, or when the element of surprise is crucial, it is clear that, in the present case, the Belgian authorities did not argue that this might be the case. Moreover, it must be noted that, as is apparent from the file, certain information relating to the ongoing investigation was already public.
- 72 Thirdly, the fact that the Commission submits that it had asked the Belgian investigating magistrates and Public Prosecutor if it was possible to hear the applicant on the subject of their requests to waive immunity, which is indeed confirmed by the correspondence in the annex to the defence, is not sufficient in the present case to find that the Commission correctly weighed up the applicant's interest in being heard and the preservation of investigative confidentiality. The responses of the Belgian national authorities were incomplete when, in accordance with the principle of sincere cooperation required of both the EU institutions and the Member States, they should have been expected to provide more complete responses in order for the Commission to understand the reasons for which they refused to allow the Commission to hear the applicant. In any event, it is not apparent from the file before the Court that the Commission asked the Belgian national authorities whether it was possible for them to draw up a non-confidential version of the requests to waive immunity that could have been communicated to the applicant or, at the very least, to indicate which elements in those requests they regarded as being sensitive. Such communication would have been capable, as the case

may be, of ensuring that the interests in question were appropriately weighed up, with a view to preserving, as far as possible, both investigative confidentiality and the respect of the right to be heard.

- 73 However, the applicant's argument that the Belgian authorities did not prevent all the exchanges between the Commission, the Belgian Public Prosecutor and the Belgian investigating magistrates from being communicated to him is ineffective. As the applicant himself states, those exchanges took place after the contested decision was adopted. It was for the Belgian authorities alone to determine if the situation had changed in such a way that the communication of those exchanges to the applicant was possible, with the result that that fact cannot be used in order to criticise the Commission for not having heard the applicant before the contested decision was adopted.
- 74 It follows from all the foregoing that the fact that the applicant was not heard before the contested decision was adopted goes beyond what is necessary to attain the objective of preserving investigative confidentiality and therefore does not respect the essence of the right to be heard enshrined in Article 41(2)(a) of the Charter.
- 75 Accordingly, the Council has infringed the applicant's right to be heard.
- 76 Moreover, according to the case-law of the Court of Justice, the applicant cannot be required to show that the Commission's decision would have been different in content if the established infringement had not taken place but simply that such a possibility cannot be totally ruled out, since he would have been better able to defend himself had there been no procedural error (see, to that effect, judgment of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware v Council*, C-141/08 P, EU:C:2009:598, paragraph 94 and the case-law cited). In the present case, such a possibility cannot be totally ruled out if the Commission had put the applicant in a position to effectively make his point of view known on the waiver of his immunity from legal proceedings and, more specifically, as observed by the applicant in his written submissions, his point of view on the interests of the European Union and the preservation of his necessary independence as an official serving as Director-General of OLAF.
- 77 Having regard to all the foregoing, the Court upholds the fifth plea in so far as it alleges infringement of the right to be heard and, therefore, annuls the contested decision, without there being any need to examine the other complaints set out in the fifth plea or the other pleas raised by the applicant.

Costs

- 78 Under Article 134(1) of the Rules of Procedure, 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 been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

- 1. Annuls Commission Decision C(2016) 1449 final of 2 March 2016 concerning a request to waive RQ's immunity from legal proceedings;**
- 2. Orders the European Commission to pay the costs.**

Tomljenović
Barents

Bieliūnas

Marcoulli
Kornezov

Delivered in open court in Luxembourg on 24 October 2018.

[Signatures]