Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

18 June 2020*

(Appeal – Civil service – Officials – Director-General of the European Anti-Fraud Office (OLAF) – Immunity from legal proceedings – Decision waiving immunity – Act adversely affecting a person – Rights of the defence)

In Case C-831/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 21 December 2018,

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

appellant,

the other party to the proceedings being:

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

applicant at first instance,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, S. Rodin, D. Šváby, K. Jürimäe and N. Piçarra, Judges,

Advocate General: E. Sharpston,

Registrar: V. Giacobbo-Peyronnel, administrator,

having regard to the written procedure and further to the hearing on 5 September 2019,

after hearing the Opinion of the Advocate General at the sitting on 19 December 2019,

gives the following

* Language of the case: French.

Judgment

1 By its appeal, the European Commission asks the Court to set aside the judgment of the General Court of the European Union of 24 October 2018, *RQ* v *Commission* (T-29/17, EU:T:2018:717; 'the judgment under appeal'), whereby the Court annulled Commission Decision C(2016) 1449 final of 2 March 2016 concerning a request to waive RQ's immunity from legal proceedings ('the decision at issue').

Legal context

Protocol No 7

2 Under Article 11(a) of Protocol (No 7) on the Privileges and Immunities of the European Union (OJ 2010 C 83, p. 266; 'Protocol No 7'):

'In the territory of each Member State and whatever their nationality, officials and other servants of the Union shall:

(a) subject to the provisions of the Treaties relating, on the one hand, to the rules on the liability of officials and other servants towards the Union and, on the other hand, to the jurisdiction of the Court of Justice of the European Union in disputes between the Union and its officials and other servants, be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office …'

3 Article 17 of Protocol No 7 provides:

'Privileges, immunities and facilities shall be accorded to officials and other servants of the Union solely in the interests of the Union.

Each institution of the Union shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Union.'

4 According to Article 18 of Protocol No 7:

'The institutions of the Union shall, for the purpose of applying this Protocol, cooperate with the responsible authorities of the Member States concerned.'

The Staff Regulations

5 Article 23 of the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides:

'The privileges and immunities enjoyed by officials are accorded solely in the interests of the Union. Subject to … Protocol [No 7], officials shall not be exempt from fulfilling their private obligations or from complying with the laws and police regulations in force.

When privileges and immunities are in dispute, the official concerned shall immediately inform the appointing authority.

…’

6 Article 90(2) of the Staff Regulations states:

‘Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act affecting him adversely, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months. …

…

The authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision dismissing it, against which an appeal may be lodged under Article 91.’

Background to the dispute and the decision at issue

7 The background to the dispute is set out in paragraphs 1 to 18 of the judgment under appeal and may, for the purposes of the present proceedings, be summarised as follows.

8 In 2012, a manufacturer of tobacco products lodged a complaint with the Commission which contained serious allegations of attempted bribery involving a member of the Commission. The European Anti-Fraud Office (OLAF), of which RQ was at that time the Director-General, opened an administrative investigation in order to carry out the necessary checks and controls.

9 On the basis of evidence collected during the first stage of that investigation, OLAF thought it might be appropriate to ask a witness to conduct a telephone conversation, which could provide additional evidence, with a person ostensibly involved in the alleged attempted bribery.

10 That telephone conversation took place on 3 July 2012. The witness made a telephone call, with the consent of and in the presence of RQ, using a mobile telephone on OLAF premises. That telephone conversation was recorded by OLAF and reported in its final report of the investigation.

11 After the closure of that administrative investigation, a criminal complaint was lodged before a Belgian court, relying inter alia on the alleged unlawful interception of telephone communications. For the purposes of investigating that complaint, the competent Belgian investigating magistrate asked the Commission to waive the immunity of RQ, in order to question him as an accused person. Since the Commission sought further details, the Belgian public prosecutor informed it of certain facts stemming from the investigation conducted by OLAF which might be considered to be evidence that unlawful interception of telephone communications punishable by law had taken place.

12 It was in those circumstances that, on 2 March 2016, the Commission acceded to the request of the Belgian courts and adopted the decision at issue, whereby, in accordance with the second paragraph of Article 17 of Protocol No 7, the Commission waived RQ’s immunity from legal proceedings in connection with allegations of fact relating to the monitoring of a telephone conversation.

13 It is apparent from the grounds of the decision at issue that the Commission took the view that the competent national authorities had provided it with very clear and specific indications, allowing it to consider that the allegations against RQ warranted his being investigated and that it would therefore be contrary to the principle of sincere cooperation with the national authorities to refuse to waive his immunity.

14 The decision at issue was communicated to RQ on 11 March 2016. In accordance with Article 90(2) of the Staff Regulations, he lodged a complaint against that decision, which was rejected by the appointing authority on 5 October 2016.

The procedure before the General Court and the judgment under appeal

15 By application lodged at the Registry of the General Court on 17 January 2017, RQ brought an action for annulment of the decision at issue and of the decision of 5 October 2016.

16 By the judgment under appeal, the Court annulled the decision at issue.

17 In paragraph 45 of that judgment, the Court, at the outset, dismissed the plea of inadmissibility of the action raised by the Commission, alleging that, since decisions to waive the immunity from legal proceedings of officials and other servants of the European Union do not alter their legal position, the decision at issue does not constitute an act adversely affecting a person.

18 In that regard, the Court inter alia noted, in paragraph 37 of that judgment, that 'the fact that the privileges and immunities [with which Protocol No 7 is concerned] 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 … Protocol [No 7] confers an individual right on the persons concerned, compliance with which is ensured by the system of remedies established by the Treaty'.

19 In paragraph 38 of the judgment under appeal, the Court added that 'a decision to waive the immunity of an official or member of staff alters his [or her] legal position, simply because it removes that protection, re-establishing his [or her] status as a person who is subject to the general law of the Member States and thus laying him [or her] 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'.

20 On the substance of the dispute, the Court examined, in the first place, the fifth plea in law of RQ's action, alleging infringement of the rights of the defence. That plea consisted of three parts, relating, first, to infringement of the right to be heard, secondly, to failure to observe the principle of the presumption of innocence and breach of the duty of impartiality and, thirdly, to breach of the duty of due diligence. For the reasons set out in paragraphs 52 to 76 of the judgment under appeal, the Court upheld the first part of that plea and, consequently, annulled the decision at issue, without examining the other parts of that plea or the other pleas in the application.

21 In paragraph 52 of the judgment under appeal, the Court recalled the settled case-law according to which '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'. It stated, in paragraphs 55 and 56 of that judgment, that, also in accordance with settled case-law, fundamental rights, such as respect for the rights of the defence, may be restricted, provided that the restrictions are provided for by law, respect the essence of the fundamental right at issue, 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.

22 In paragraph 57 of that judgment, having noted that it was common ground that RQ had not been heard before the decision at issue was adopted, the Court stated that it was necessary to ascertain whether, in the present case, the limitation on the right to be heard satisfied those conditions.

23 Having stated, in paragraph 58 of the judgment under appeal, that the Commission had justified that limitation on the right to be heard by the need to preserve the confidentiality of the investigation conducted by the Belgian authorities, as required by the Belgian law invoked by those authorities, the Court, noting that Belgian law affirmed the principle of investigative confidentiality, held, in paragraph 63 of that judgment, that 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 of Fundamental Rights of the European Union ('the Charter').

24 The Court then examined whether the fact that RQ was not heard was necessary and proportionate to preserving investigative confidentiality and ensuring the proper conduct of the criminal proceedings. It pointed out, in paragraphs 66 and 67 of the judgment under appeal, that if a national authority opposes specific 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 which make it possible to weigh up, on the one hand, respect for the right of the person concerned to be heard before the adoption of an act adversely affecting him or her and, on the other hand, legitimate considerations of investigative confidentiality.

25 The Court held, in paragraph 69 of the judgment under appeal, that it did not appear from the file before the Court that the Commission had carried out such a weighing-up of interests when adopting the decision at issue. In that regard, the Court relied on three elements referred to in paragraphs 70 to 72 of that judgment. First, it noted that the Commission had not asked the national authorities why the prior hearing of the applicant entailed risks in respect of the preservation of investigative confidentiality. Secondly, it stated that the Belgian authorities had made no reference to any serious risk that the person concerned might undermine the proper conduct of the investigation, thereby justifying the non-communication to him of the request to waive his immunity. Thirdly, it pointed to the incompleteness of the Belgian authorities' responses to the Commission's request to hear RQ concerning their requests to waive immunity and found that, in any event, the Commission had not asked them whether it was possible to draw up a non-confidential version of those requests that could have been communicated to RQ.

26 Moreover, in paragraph 76 of that judgment, the Court held that it cannot be totally excluded that the decision at issue could have had a different content if RQ's right to be heard had been observed, since RQ could have effectively made his point of view known on the waiver of his immunity and, more specifically, on the interests of the European Union and the preservation of his necessary independence as an official serving as Director-General of OLAF.

Forms of order sought by the parties before the Court of Justice

27 The Commission requests that the Court:

– set aside the judgment under appeal;

– give final judgment in the matter by dismissing RQ's application, order him to pay the costs of the proceedings before the General Court and the Court of Justice, and

– in the alternative, if the state of the proceedings does not permit the Court of Justice to give judgment, refer the case back to the General Court for a new judgment on the action.

28 RQ contends that the Court should:

– dismiss the appeal in its entirety as manifestly inadmissible and, at the very least, unfounded, and

– order the Commission to pay the costs, including those incurred at first instance.

The appeal

29 The Commission puts forward three grounds in support of its appeal. The first ground of appeal alleges an error of law committed by the Court when it ruled that the decision at issue constitutes an act adversely affecting a person. The second ground of appeal, put forward in the alternative, relates to an error of law by the Court in the interpretation and application of Article 41(2)(a) of the Charter and Article 4(3) TEU. The third ground of appeal, put forward in the further alternative, relates to an error of law by the Court in the characterisation of the Commission's 'conduct'.

The first ground of appeal, alleging an error of law committed by the General Court in classifying the decision at issue as an 'act adversely affecting a person'

Arguments of the parties

30 By its first ground of appeal, the Commission submits that the Court erred in law in holding that decisions to waive immunity, such as the decision at issue, adversely affect officials of the European Union and may be challenged before the Courts of the European Union.

31 In the first place, the Commission argues that the General Court was wrong to consider that it could rely on settled case-law, although that question of law has never brought before the Court of Justice.

32 More specifically, the Commission submits, first, that, in the judgment of 16 December 1960, *Humblet* v *Belgian State* (6/60-IMM, EU:C:1960:48), the Court did not rule on the question of whether or not a decision to waive immunity was in the nature of an act adversely affecting a person, in so far as it based its reasoning on Article 16 of the Protocol on the Privileges and Immunities of the ECSC. However, that provision has no equivalent in Protocol No 7.

33 Secondly, as regards the judgments of 15 October 2008, *Mote* v *Parliament* (T-345/05, EU:T:2008:440), and of 17 January 2013, *Gollnisch* v *Parliament* (T-346/11 and T-347/11, EU:T:2013:23), the Commission points out that they concerned Members of the European Parliament and not officials of the European Union. However, the immunity of Members of Parliament is not of the same nature and does not have the same scope as the immunity of officials and other servants of the European Union.

34 In the second place, the Commission takes the view that it follows from the wording, context and purpose of Article 17 of Protocol No 7 that the decision to waive the immunity of an official does not adversely affect him or her, since it alters the legal position not of the official concerned but only of the European Union and the Member State requesting the waiver.

35 It is apparent from that article, which is confirmed both by the order of 13 July 1990, *Zwartveld and Others* (C-2/88-IMM, EU:C:1990:315, paragraph 19), and by Article 343 TFEU, that the protection of immunity from legal proceedings is granted to the European Union itself and that it must be waived as a general rule, unless it is contrary to the interests of the European Union. Similarly, Article 23 of the Staff Regulations, the only provision of the Staff Regulations referring to the privileges and immunities of officials, confirms, as is clear from its actual wording, that those privileges and immunities are 'accorded solely in the interests of the Union'.

36 Moreover, the purpose of Article 17 of Protocol No 7 is to protect the European Union itself in extreme cases where the performance of its tasks is jeopardised by the action of national courts.

37 The Commission therefore criticises the Court for having held that Protocol No 7 creates individual rights for the benefit of the persons concerned. With regard to the official concerned, the decision to waive his immunity from legal proceedings should be regarded as a preparatory measure, which merely removes a procedural obstacle to the normal conduct of national court proceedings. The national final criminal decision alone is liable to have a real effect on the legal position of that official, if it results in a conviction. Moreover, in the context of the national proceedings, that official could still challenge the validity of the decision to waive immunity and the national court would be obliged, in case of doubt, to refer a question to the Court for a preliminary ruling. The Commission takes the view that such a decision is analogous to an OLAF decision opening an investigation against an official or forwarding, at the end of an investigation, its final report to the national judicial authorities. According to settled case-law, such acts are of a preparatory nature and cannot be the subject of an action for annulment.

38 Accordingly, the Commission takes the view that the Court's reasoning, set out in paragraph 38 of the judgment under appeal, that a decision to waive the immunity of an official or member of staff alters his or her legal position, simply because it removes that protection he or she enjoyed under Article 11 of Protocol No 7 against proceedings brought by the authorities of Member States, is the result of a misapprehension of immunity understood as being an individual right.

39 RQ argues that the first ground of appeal must be dismissed as inadmissible. In its view, the Commission reiterates the same arguments as those put forward at first instance and thus seeks, in reality, simply to obtain a re-examination of the application submitted to the General Court, a matter which falls outside the jurisdiction of the Court of Justice.

40 In the alternative, RQ submits that the Court did not err in law in classifying the decision at issue as an act adversely affecting a person.

Findings of the Court

41 As a preliminary point, it must be observed that, contrary to RQ's claims, the first ground of appeal is admissible.

42 Indeed, provided that an appellant challenges the interpretation or application of EU law by the Court, the points of law examined at first instance may be discussed again in the course of an appeal. If an appellant could not thus base his or her appeal on pleas in law and arguments already relied on before the Court, an appeal would be deprived of part of its purpose (judgment of 20 September 2016, *Mallis and Others* v *Commission and ECB*, C-105/15 P to C-109/15 P, EU:C:2016:702, paragraph 36 and the case-law cited).

43 By its first ground of appeal, the Commission challenges the Court's interpretation and application of EU law, which resulted in that Court holding, contrary to the arguments put forward before it by the Commission, that the decision at issue constituted an act adversely affecting RQ which may be the subject of an action for annulment.

44 As regards the substance of the Commission's first ground of appeal, it is appropriate to point out that an applicant is adversely affected, for the purposes of Article 90(2) of the Staff Regulations, only by measures which produce binding legal effects such as to affect his or her interests by bringing about a distinct change in his or her legal position (judgment of 14 September 2006, *Commission* v *Fernández Gómez*, C-417/05 P, EU:C:2006:582, paragraph 42; see, to that effect, judgments of 21 January 1987, *Stroghili* v *Court of Auditors*, 204/85, EU:C:1987:21, paragraphs 6 and 9; and of 14 February 1989, *Bossi* v *Commission*, 346/87, EU:C:1989:59, paragraph 23).

45 However, as the Court pointed out in paragraph 38 of the judgment under appeal, a decision to waive the immunity of an official, such as the decision at issue, alters that official's legal position, simply because it removes the protection conferred on that official by the immunity from legal proceedings provided for in Article 11(a) of Protocol No 7, re-establishing his or her status as a person who is subject to the general law of the Member States and laying him or her open, without the necessity for any intermediary measure, to measures, inter alia those ordering detention and the bringing of legal proceedings, imposed by the general law.

46 Consequently, in so far as the immunity from legal proceedings conferred on an EU official by Article 11(a) of Protocol No 7 is waived by decision of the appointing authority of his or her institution, which thereby alters his or her legal position, the Commission is wrong to maintain that the Court could not adopt a solution similar to that set out in the judgment of 15 October 2008, *Mote* v *Parliament* (T-345/05, EU:T:2008:440).

47 It is true that the privileges and immunities which Protocol No 7 grants to the European Union have a functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the European Union, which means, in particular, that the privileges, immunities and facilities accorded to officials and other servants of the European Union are accorded solely in the interests of the European Union (order of 13 July 1990, *Zwartveld and Others*, C-2/88-IMM, EU:C:1990:315, paragraphs 19 and 20).

48 Nevertheless, a decision to waive an EU official's immunity brings about a distinct change in that official's legal position, by depriving him or her of the benefit of that immunity, and consequently constitutes an act adversely affecting him or her.

49 Moreover, it is clear from the case-law referred to in paragraph 44 of the present judgment that a measure is classified as an 'act adversely affecting' an official not only where it infringes or affects an individual right conferred on that official but, more generally, where it brings about a distinct change in his or her legal position.

50 It follows that the question whether Article 11(a) of Protocol No 7 confers 'an individual right on the persons concerned', as the Court noted in paragraph 37 of the judgment under appeal, is irrelevant to the classification of a decision to waive an official's immunity as an act adversely affecting a person. The same applies to the question of the Court's interpretation, in paragraph 42 of the judgment under appeal, of the judgment of 16 December 1960, *Humblet* v *Belgian State* (6/60-IMM, EU:C:1960:48).

51 It is also necessary to dismiss the Commission's line of argument that a decision to waive an official's immunity must be classified as a 'preparatory act', since, as the Advocate General essentially stated in point 61 of her Opinion, the change in the legal position of the person concerned results from the adoption of a decision such as the decision at issue. That decision brings to an end the procedure relating to the waiver of the immunity of the official concerned, without providing for the adoption by the institution to which the official belongs of a subsequent act which he or she would be in a position to challenge.

52 The reasoning set out in paragraph 38 of the judgment under appeal, whereby the Court considered that a decision to waive the immunity of an official or member of staff of the European Union alters his or her legal position, is sufficient to justify classification of the decision at issue as an 'act affecting him [or her] adversely' within the meaning of Article 90(2) of the Staff Regulations.

53 Accordingly, paragraphs 37 and 42 of the judgment under appeal must be regarded as setting out grounds included purely for the sake of completeness, with the result that the part of the Commission's line of argument relating to them must be dismissed as ineffective (see, to that effect, judgments of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 68, and of 29 November 2012, *United Kingdom* v *Commission*, C-416/11 P, not published, EU:C:2012:761, paragraph 45).

54 In the light of all the foregoing considerations, the first ground of appeal must be dismissed as unfounded.

The second ground of appeal, alleging an error of law in the interpretation and application of Article 41(2)(a) of the Charter and Article 4(3) TEU

Arguments of the parties

55 By its second ground of appeal, the Commission submits that the Court misinterpreted the right to be heard, by holding, in paragraphs 66 and 67 of the judgment under appeal, that the Commission was required to weigh up, on the one hand, the right to be heard of the official concerned and, on the other hand, the confidentiality of the investigation. The Commission essentially argues that the broad interpretation of the right to be heard adopted by the Court 'leads to a systematic and unjustified interference by the EU institutions in the inherent jurisdiction of the Member States' judicial authorities'.

56 In that regard, the Commission points out that it was on an exceptional basis that its exchanges took place with the national authorities concerning RQ, in the light of the position he held as the Director-General of OLAF at the time of the request to waive immunity. It points out that, 'in accordance with its usual practice', it conducts no exchanges with national authorities or the official concerned, so as to comply with the strict requirement of confidentiality, connected with the confidentiality of the investigation. The weighing-up of the interests involved, as required by the judgment under appeal, calls into question the consistent practice of all the EU institutions and bodies.

57 The Commission further submits that the Court, although it requires such a weighing-up of interests, does not set out the consequences of that balancing exercise, in particular where the institution concerned considers that the interest in being heard of the official in question takes precedence over the preservation of investigative confidentiality. Thus, the Court does not state whether the institution concerned could, in breach of national law, decide to hear the official concerned or whether that institution should refuse to waive his immunity for that reason.

58 The Commission adds that the requirement for a weighing-up of interests, as envisaged in paragraphs 66 and 67 of the judgment under appeal, infringes the principles of mutual trust and sincere cooperation. Where the national authorities object to the Commission's request to hear the official concerned, the Commission cannot review the national authorities' assessment concerning an issue of national criminal law or replace that assessment with its own. That line of argument is supported by the order of 13 July 1990, *Zwartveld and Others* (C-2/88-IMM, EU:C:1990:315, paragraph 18).

59 Finally, the Commission argues that there is no need for a prior hearing of the official concerned, since the institution is obliged to waive his immunity, save where this is contrary to the interests of the European Union. However, the official cannot determine or influence the interests of the European Union by reference to his individual situation.

60 RQ pleads the inadmissibility of the second ground of appeal, on the ground that the Commission thereby merely reiterates the pleas put forward at first instance.

61 In the alternative, RQ submits that this ground of appeal is unfounded.

Findings of the Court

62 For the same reasons as those set out in paragraph 42 of the present judgment, it is necessary to dismiss the objection of inadmissibility raised by RQ against the second ground of appeal.

63 By its second ground of appeal, the Commission claims that the Court, in essence, erred in law in holding, in paragraphs 66 and 67 of the judgment under appeal, that the Commission was required to weigh up, on the one hand, the right to be heard of the official concerned by a request to waive immunity for the purposes of a criminal investigation and, on the other hand, the confidentiality of the criminal investigation. In such a context, it is permissible for the Commission to raise before the Court of Justice arguments which the Commission had already put forward before the General Court and which had been dismissed by the latter.

64 As regards the substance of the second ground of appeal, it must be recalled that observance of the rights of the defence is a fundamental principle of EU law (judgment of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraph 81, and the case-law cited).

65 With regard, more particularly, to the right to be heard in all proceedings, a right that is inherent in that fundamental principle and is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect of both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 thereof, which guarantees the right to good administration (judgment of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraph 82 and the case-law cited).

66 Article 41(2)(a) provides that the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.

67 As follows from its very wording, that provision is of general application. Accordingly, the right to be heard must be observed in all proceedings which are liable to culminate in a measure adversely affecting a person, even where the applicable legislation does not expressly provide for such a procedural requirement. Furthermore, that right guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely (see, to that effect, judgment of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraphs 84 to 87 and the case-law cited).

68 Thus, having correctly found that the decision at issue constitutes an act adversely affecting the official concerned, as follows from the dismissal of the first ground of appeal, the Court did not err in law in holding, in paragraphs 52 to 54 of the judgment under appeal, that the Commission was obliged to hear that official before adopting a decision to waive his immunity.

69 Admittedly, as recalled in paragraph 47 of the present judgment, the immunity of officials and servants of the European Union resulting from Protocol No 7 is functional in nature and serves exclusively to safeguard the interests of the European Union, by preventing any interference with its functioning and independence.

70 However, although that circumstance may limit the arguments which the official concerned can validly put forward to convince the institution to which he belongs not to waive his immunity, it cannot, contrary to what the Commission maintains, justify not hearing that official before waiving his immunity. Such a decision would directly infringe the settled case-law, referred to in paragraph 67 of the present judgment.

71 That said, it must also be observed that Article 52(1) of the Charter allows for limitations on the exercise of the rights recognised by the Charter, including the right to be heard enshrined in Article 41 thereof. However, Article 52(1) of the Charter requires that any limitation must be provided for by law and respect the essence of the fundamental right in question. It also requires that, subject to the principle of proportionality, any such limitation is necessary and genuinely meets objectives of general interest recognised by the European Union.

72 In the present case, the Court found, in paragraph 61 of the judgment under appeal, that the provisions of the code d'instruction criminelle belge (Belgian Code of Criminal Procedure) enshrine the principle of investigative confidentiality, while stipulating that exceptions to that principle are provided for by law.

73 Moreover, in paragraph 59 of that judgment, the Court 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.

74 In the light of those considerations, the Court held, in paragraph 63 of the judgment under appeal, that the absence of a prior hearing of an official concerned by a request to waive immunity for the purposes of a criminal investigation concerning him or her 'can, as a general rule, be … justified by investigative confidentiality, pursuant to Article 52 of the Charter', since, as the Court noted in paragraph 65 of that judgment, 'as a general rule, omitting to hear the person concerned before waiving his [or her] immunity preserves investigative confidentiality'.

75 In its analysis of the proportionality and necessity of such a measure, the Court pointed out, in paragraph 66 of that judgment, that where, '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 …, 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'.

76 The Court thus held, in paragraph 67 of the judgment under appeal, that the Commission had to weigh respect for the right to be heard of the official concerned by a request to waive immunity against the national authorities' considerations, so as to ensure both that the rights conferred on the official concerned and the interests of the European Union, in accordance with Protocol No 7, are protected and that national criminal proceedings are conducted efficiently and smoothly.

77 Contrary to what the Commission claims, the Court's reasoning on that point is not vitiated by an error of law.

78 Although, as is clear from the judgment under appeal, the Court has not ruled out the possibility that an institution might adopt a decision to waive immunity without hearing the person concerned, the fact remains that such a possibility must be available only in exceptional, duly justified cases.

79 It cannot be presumed that every criminal investigation systematically entails a risk of attempts to conceal evidence by the persons concerned, or fraudulent consultations between them, which would justify not informing them in advance of the existence of an investigation concerning them.

80 It follows that the Court correctly held, in paragraph 66 of the judgment under appeal, that, before the Commission concludes that there is an exceptional case justifying the waiver of the immunity of the person concerned without first hearing him [or her], that institution must, in accordance with the principle of sincere cooperation with the national authorities concerned, implement measures ensuring, at the same time, that the right of the person concerned to be heard is respected, without jeopardising the interests which investigative confidentiality is intended to safeguard.

81 Contrary to what the Commission claims, the obligation to carry out such a weighing-up of interests does not infringe the principles of mutual trust and sincere cooperation between the Commission and the national authorities.

82 Indeed, the weighing-up of interests referred to in paragraph 66 of the judgment under appeal allows the Commission to comply both with the procedural requirements which may be imposed on the national authorities concerned and, as far as possible, with the right of the person concerned to be heard. In exceptional cases, that balancing exercise also allows the Commission to justify the impossibility of hearing the person concerned prior to the waiver of his or her immunity, in the light of the interests which would be jeopardised by such a hearing.

83 Furthermore, as regards the Commission's argument, set out in paragraph 57 of the present judgment, that the Court failed to specify what the response to a request for a waiver of immunity should be in the event that the weighing-up of interests envisaged in paragraph 67 of the judgment under appeal leads the Commission to consider that the right of the person concerned to be heard takes precedence over investigative confidentiality, it is sufficient to point out that, having concluded that the required balancing exercise had not been carried out in the present case, the Court did not have to give a ruling on that situation.

84 It follows from all the foregoing considerations that the second ground of appeal must be dismissed.

The third ground of appeal, alleging an incorrect assessment by the General Court of the procedure followed by the Commission when adopting the decision at issue

Arguments of the parties

85 By its third ground of appeal, the Commission submits that the Court, having incorrectly assessed the procedure followed by the Commission when adopting the decision at issue, erred in law in finding that the Commission had failed to weight up the interests involved, as required by paragraphs 66 and 67 of the judgment under appeal.

86 In particular, the Commission takes the view that, assuming that the requirement for such a weighing-up of interests is well-founded, it should be held that the Commission had, in the present case, carried out the required review in any event. It submits that it adopted the decision at issue only after it had had several exchanges with the Belgian authorities, had obtained detailed explanations from the Belgian public prosecutor, had carried out an on-the-spot examination of the case file of the criminal proceedings and, lastly, had consulted an expert in Belgian criminal law.

87 Moreover, the Commission complains that, in paragraph 71 of the judgment under appeal, the Court set out requirements which were disproportionate to the measures that the Commission ought to have contemplated in order to respect RQ's right to be heard. It argues that those measures would automatically lead to undue interference by the EU institutions in the functioning of national criminal justice.

88 Finally, the Commission challenges the reasoning, set out in paragraph 76 of the judgment under appeal, to the effect that it cannot be totally excluded that the Commission's decision would have been different in content if RQ had been placed in a position effectively to put forward his point of

view on the interests of the European Union and the preservation of his necessary independence as Director-General of OLAF. According to the Commission, first, the fact that RQ was Director-General of OLAF was irrelevant in so far as he had brought his action in a personal capacity and, secondly, the position of the official concerned cannot determine or influence the assessment of the interest of the European Union, which falls within the exclusive competence of the institutions.

89 RQ takes the view that this ground of appeal relates to factual assessments by the Court and must therefore be dismissed as inadmissible. In the alternative, RQ submits that this ground of appeal is unfounded.

Findings of the Court

90 The line of argument put forward by the Commission in support of the third ground of appeal consists, in essence, of two parts.

91 By the first part of this ground of appeal, the Commission submits that the Court erred in law in so far as it held, in paragraph 74 of the judgment under appeal, that the fact that RQ was not heard before the decision at issue was adopted went beyond what was necessary to attain the objective of preserving investigative confidentiality and, in consequence, did not respect the essence of the right to be heard enshrined in Article 41(2)(a) of the Charter.

92 It must be observed out that, by that line of argument, the Commission is calling into question not the Court's assessment of the facts, but the legal characterisation of those facts. In particular, the Commission argues that the Court, on the basis of the file before it, wrongly held, in paragraph 74 of the judgment under appeal, that the Commission had infringed RQ's right to be heard, thereby committing an error of law.

93 Therefore, contrary to RQ's claims, the first part of the third ground of appeal is admissible. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them (judgment of 6 April 2006, *General Motors* v *Commission*, C-551/03 P, EU:C:2006:229, paragraph 51 and the case-law cited).

94 As regards the substance of that first part of the ground of appeal, it should be noted that, in paragraph 69 of the judgment under appeal, the Court held that, in the present case, the Commission had not carried out a weighing-up of interests consistent with that referred to in paragraphs 67 and 68 of that judgment.

95 The Court based its assessment on the findings set out in paragraphs 70 to 72 of the judgment under appeal, according to which, first, the Commission neither asked the competent Belgian authorities to specify the reasons why a hearing of RQ before any waiver of his immunity would entail risks in respect of the preservation of investigative confidentiality nor requested that those authorities provide a non-confidential version of their request to waive immunity which could be communicated to RQ. Secondly, those authorities do not mention any circumstances capable of justifying non-communication of the request to waive his immunity, such as a risk that RQ might abscond or destroy evidence. Thirdly and finally, the Belgian authorities' responses to the Commission's requests were incomplete and did not explain their refusal to allow the Commission to hear RQ on the request to waive his immunity.

96 In the light of those findings of a factual nature, which cannot be called into question at the appeal stage unless there has been a distortion of the facts and evidence, which the Commission has not alleged in the present case (see, to that effect, judgment of 18 March 2010, *Trubowest Handel and Makarov* v *Council and Commission*, C-419/08 P, EU:C:2010:147, paragraphs 30 and 31 and the case-law cited), the Court did not err in law in holding, in paragraph 74 of the judgment under appeal, that the fact that the applicant was not heard before the decision at issue was adopted went beyond what was necessary to attain the objective sought and therefore infringed the right to be heard enshrined in Article 41(2)(a) of the Charter.

97 In that context, the Commission cannot complain that the Court overlooked the fact that the Commission had engaged in exchanges with the competent Belgian authorities. Those exchanges were taken into consideration by the Court, which nevertheless concluded, in its sovereign assessment of the facts, that, contrary to the Commission's claims, the explanations obtained by the Commission following those exchanges were incomplete and not sufficiently detailed.

98 Similarly, in order to call into question the merits of the General Court's assessment, the Commission cannot rely on the fact that it had carried out an on-the-spot examination of the case file of the criminal proceedings and had consulted an expert in Belgian criminal law. Even if those facts were established, they cannot, in any event, suffice to show that RQ's right to be heard was respected. The Commission does not claim to have relied before the Court on elements which were obtained from the examination of the case file of the national criminal proceedings, or from the consultation with the Belgian expert, and which were capable of justifying the fact that RQ was not heard.

99 Lastly, nor can the Commission rely on the argument, set out in paragraph 87 of the present judgment, that, in essence, the Court, in paragraph 71 of the judgment under appeal, imposed disproportionate requirements for waiving an official's immunity without first hearing him, in that they would result in an interference by the EU institutions in the functioning of a Member State's criminal justice system.

100 In that regard, it should be noted that, in paragraph 71 of the judgment under appeal, the Court, even though it referred by way of example to a number of circumstances in which it was possible to envisage waiving an official's immunity without first hearing him or her, essentially found that, in the procedure which led to the adoption of the decision at issue, the Belgian authorities had not put forward sufficient evidence to justify such a procedure.

101 However, the obligation imposed on the Commission to obtain from the national authorities sufficiently persuasive evidence to justify a serious infringement of the right to be heard, such as the evidence referred to by the Court by way of example, cannot be regarded as disproportionate. This is particularly true since, contrary to the Commission's claim, the provision of such evidence does not, by its very nature, constitute interference with the procedure of the Member State concerned, which, like the Commission, is bound by the obligation of sincere cooperation laid down in Article 4(3) TEU, in accordance with 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.

102 Consequently, the first part of the third ground of appeal must be dismissed as unfounded.

103 As regards the second part of this ground of appeal, it should first of all be noted that the Commission, by that part, does not call into question the assessment of the facts made by the Court, but submits that the Court, in essence, committed an error of law in that it held, in

paragraph 76 of the judgment under appeal, that it cannot be ruled out that, if RQ had been put in a position to make his point of view known on the waiver of his immunity, the decision at issue would have been different in content.

104 Thus, for the same reasons as set out in the first part of the third ground of appeal, the second part of this ground of appeal is admissible.

105 As regards the substance of that second part, it should be recalled that, according to the settled case-law of the Court, an infringement of the rights of the defence, in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different (judgments of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 79 and the case-law cited, and of 14 June 2018, *Makhlouf* v *Council*, C-458/17 P, not published, EU:C:2018:441, paragraph 42 and the case-law cited).

106 In that regard, the Court stated that an appellant who relies on infringement of his or her rights of defence cannot be required to show that the decision of the EU institution concerned would have been different in content but simply that such a possibility cannot be totally ruled out (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).

107 The assessment of that question must, moreover, be made in the light of the factual and legal circumstances of each case (see, to that effect, judgment of 10 September 2013, *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraph 40).

108 In that regard, it should be recalled that, as stated in Article 17 of Protocol No 7 and Article 23 of the Staff Regulations, the privileges and immunities enjoyed by officials and other servants of the European Union are accorded solely in the interests of the European Union.

109 However, the purpose of the immunity accorded to an EU official, as provided for in those provisions, must be taken into account when assessing the effect of a possible infringement of the right to be heard on the legality of a decision waiving that immunity.

110 It is to that effect that the European Court of Human Rights also pointed out, in a judgment concerning parliamentary immunity, that it is in relation to the need to preserve the institutional purpose of such immunity that the effect on the person's rights of the manner in which immunity was applied must be examined (ECtHR, 3 December 2009, *Kart v. Turkey*, CE:ECHR:2009:1203JUD000891705, § 95).

111 It follows that considerations relating to the personal circumstances of the official concerned by a request to waive immunity, considerations which that official would be best placed to rely on if he were to be heard in relation to that request, have no relevance to the action to be taken in response to that request. Only considerations relating to the interests of the service are relevant in that regard.

112 Accordingly, an official who has brought an appeal against a decision waiving his or her immunity cannot confine himself or herself to relying, in an abstract manner, on infringement of the right to be heard in support of his or her application for annulment of such a decision. He or she must

demonstrate that it cannot be totally ruled out that the decision of the EU institution concerned would have been different in content if he or she had been able to put forward arguments and evidence relating to the interests of the service.

113 However, it is not clear from the judgment under appeal that the Court checked that RQ put forward arguments seeking to demonstrate that the decision could have been different.

114 It is clear from a reading of the file in the case at first instance, forwarded to the Court in accordance with Article 167(2) of the Rules of Procedure of the Court of Justice, that the General Court merely reproduced, in paragraph 76 of the judgment under appeal, in almost identical terms, a vague assertion in RQ's application, relating to the arguments which he could have put forward if he had been heard before the decision at issue was adopted.

115 Apart from that assertion, RQ failed to provide, in his submissions before the Court, any information relating to interests of the service which might justify maintaining his immunity and which he could have put forward if he had been heard before the decision at issue was adopted.

116 In those circumstances, it must be found that the Court erred in law in holding that the infringement of RQ's right to be heard justified the annulment of the decision at issue, even though he had failed to demonstrate that it could not be totally ruled out that the Commission's decision would have been different in content if he had been put in a position to exercise his right to be heard.

117 Consequently, the second part of the third ground of appeal must be upheld and the judgment under appeal must be set aside.

The action before the General Court

118 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

119 In the present case, the state of the proceedings permits final judgment to be given on the first part of fifth plea in law of RQ's action, alleging infringement of the right to be heard.

120 It is apparent from the reasons set out in the analysis of the second and third grounds of the appeal that, although the Commission did not respect RQ's right to be heard before the decision at issue was adopted, such an infringement cannot justify the annulment of that decision, since RQ failed to demonstrate that it cannot be totally ruled out that, in the absence of that infringement, the decision would have been different in content.

121 Accordingly, the first part of the fifth plea in law of RQ's action, alleging infringement of the right to be heard, must be dismissed.

122 As to the remainder, the state of the proceedings does not permit final judgment to be given, since the other pleas and complaints put forward by RQ in support of his action have not been examined by the General Court.

123 Consequently, the case must be referred back to the General Court.

Costs

124 Since the case has been referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

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

1. **Sets aside the judgment of the General Court of the European Union of 24 October 2018, *RQ* v *Commission* (T-29/17, EU:T:2018:717);**

2. **Dismisses the first part of the fifth plea in law in the action before the General Court of the European Union;**

3. **Refers the case back to the General Court of the European Union for judgment on the first to fourth pleas in law and on the second and third parts of the fifth plea in law;**

4. **Reserves the costs.**

[Signatures]