Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

19 December 2019*

(Staff of a private company providing IT services within the institution – Refusal to grant access to the Commission's premises – Competence of the author of the act)

In Case T-504/18,

XG, represented by S. Kaisergruber and A. Burghelle-Vernet, lawyers,

applicant,

v

European Commission, represented by C. Ehrbar and T. Bohr, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for the annulment of the decision of the Commission of 3 July 2018 maintaining its refusal to allow the applicant access to its premises,

THE GENERAL COURT (First Chamber),

composed of P. Nihoul (Rapporteur), acting as President, J. Svenningsen and U. Öberg, Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written part of the procedure and further to the hearing on 8 October 2019,

gives the present

Judgment

Background to the dispute

1 Since [*confidential*],[1] the applicant, XG, had been employed by [*confidential*], owned by the [*confidential*] group ('the employer').

* Language of the case: French.

[1] Confidential information omitted.

2 Following a public procurement procedure, a consortium constituted by [*confidential*] ('the contractor') entered, on [*confidential*], into a framework contract with the European Union for the provision of [*confidential*] services to the European Commission ('the framework contract').

3 The applicant was posted by his employer as a [*confidential*] to the Commission's Directorate-General (DG) [*confidential*], which was located in the Commission's [*confidential*] building. In that regard, he received a badge giving him access to the Commission's buildings.

4 The framework contract was amended by the addendum of 14 September 2017 ('the addendum to the framework contract'), which inserted into the framework contract Article 1.14 of the special conditions, which provides, inter alia, as follows:

'2. Pursuant to Articles 3, 7 and 8 of Commission Decision (EU, Euratom) 2015/443 [of 13 March 2015] on Security in the Commission [(OJ 2015 L 72, p. 41)], it is possible to carry out background checks of on-site personnel in order to prevent and monitor risks to the security of the Commission's staff, assets and information. In addition, under the Belgian law of 11 December 1998 on classification and security clearances, security certificates and security advisory opinions …, access rights for on-site personnel to the premises of the contracting authority may be made conditional on a positive security advisory opinion to be issued by the Belgian authorities. Existing access rights remain valid until a negative security advisory opinion is issued.

3. In order to allow the Belgian authorities to issue a security advisory opinion, the contractor is required to submit the attached form (notification document) to the relevant on-site personnel. The notification documents, duly completed and signed (labelled "notification document"), are to be returned to the Commission's Security Directorate (European Commission, HR.DS – BERL 3/190) and an up-to-date electronic list of relevant personal data, as specified in the attached form, is to be sent to "EC-SECURITY-SCREENING@ec.europa.eu" no later than 30 days after the date of the signature of the present addendum.

4. Failure or refusal to complete the notification document may result in the personnel being refused rights of access to the Commission's buildings.

…

6. … The contractor undertakes to supply only on-site personnel who have received a positive security advisory opinion for the following Commission buildings: [*confidential*] …'

5 Subsequently, the Commission contacted the employer requesting it to ask its employees who worked in the Commission's buildings to give their consent to the procedure for obtaining a security advisory opinion.

6 On 26 October 2017, the applicant agreed that his file be subject to a security check by completing the notification document annexed to the addendum to the framework contract.

7 By letter dated 30 March 2018, the comité interministériel pour la politique de siège (CIPS) (Interministerial Committee for the policy of providing seats for international organisations) informed the applicant that the Autorité nationale de sécurité (National Security Authority (ANS)) had carried out a security check on him and had decided to issue him with a negative security advisory opinion ('the negative security advisory opinion'). The reason for that opinion,

annexed to the letter, was that the applicant had a police record relating, first, to intentional assault and battery and, second, to the rape of an adult, all of which had been committed [*confidential*] against his former partner.

8 On 12 April 2018, the applicant brought an appeal against the negative security advisory opinion before the competent Belgian appeals body for security clearances, certificates and advisory opinions ('the appeals body').

9 On 24 April 2018, the Commission was informed by the European Parliament that the applicant had been issued with a negative security advisory opinion.

10 On 25 April 2018, after receiving the confirmation of the negative security advisory opinion, the Commission arranged for the applicant to be heard in the presence of his employer. That hearing took place before A and B, officials from the 'Administrative Requisitioning' section of the Commission's Security Directorate. Invited to submit his comments on the absence of a positive security advisory opinion, the applicant claimed, in particular, that, as regards his conviction for assault and battery, he had appealed against the judgment delivered against him and, as regards the circumstances relating to rape, an order had been issued in his regard stating that there was no need to adjudicate.

11 At the end of that hearing, of which the applicant received a copy of the minutes, his right of access to the Commission's premises was withdrawn ('the decision of 25 April 2018'). The applicant makes reference to this in the minutes of his hearing, stating:

'You have informed me that you will withdraw my access badges due to that absence of a positive security advisory opinion. I accordingly return my two access badges to you … You have informed me that I have the right subsequently to make a written and reasoned request to be granted access to the Commission's buildings once again.'

12 By decision of 20 June 2018, the appeals body took the view that the negative security advisory opinion had no legal basis and that, consequently, it was not competent to decide on the merits of that opinion ('the decision of the appeals body').

13 By email dated 28 June 2018, the employer informed the Commission of the decision of the appeals body, stating that the latter had decided that the negative security advisory opinion issued by the ANS '[had] no legal basis and [should] therefore be considered non-existent'.

14 By letter dated 3 July 2018 ('the contested decision'), the Commission informed the employer that 'the refusal to allow access to the Commission's sites [was] being maintained for [the applicant] on the basis of Article 3 of Commission Decision (EU, Euratom) 2015/443 of 13 March 2015 on Security in the Commission' on the ground that 'the negative opinion issued by the ANS [had] not been annulled by the appeals body'. That letter was signed by C, Head of the 'Information Security' Unit in the Security Directorate of the Commission's DG for Human Resources and Security.

15 By letter dated 24 July 2018, the applicant's lawyers requested, inter alia, the communication of the act by which the DG for Human Resources and Security had delegated to C the competence to adopt decisions on access to buildings.

16 On 3 August 2018, the applicant brought an action for interim relief before the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-Speaking), Belgium) seeking to have the negative security advisory opinion annulled.

17 By letter dated 10 August 2018, the Commission informed the applicant that it took the view that 'the requests made in [his] letter [dated 24 July 2018] [were no] longer relevant', in particular in the light of the action brought before the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)).

18 On 6 September 2018, the employer informed the applicant that his employment contract was to be terminated and that, in accordance with the applicable Belgian legislation on employment contracts, his nine-week notice period would begin on 10 September 2018.

19 By order of 26 October 2018, the chambre des référés du tribunal de première instance francophone de Bruxelles (chamber hearing applications for interim relief of the Brussels Court of First Instance (French-Speaking)) suspended the effects of the opinions issued by the ANS concerning the applicant and ordered the Belgian State to request that the ANS issue a new security advisory opinion.

Procedure and forms of order sought

20 By application lodged at the Registry of the General Court on 24 August 2018, the applicant brought the present action.

21 By separate document lodged at the Registry of the Court on the same day, the applicant brought an application for interim relief seeking suspension of operation of the contested decision.

22 On 24 August 2018, the applicant requested anonymity pursuant to Article 66 of the Rules of Procedure of the General Court. That request was granted by decision of 2 October 2018.

23 By order of 11 September 2018, *XG* v *Commission* (T-504/18 R, not published, EU:T:2018:526), the President of the General Court rejected the application for suspension of operation of the contested decision.

24 Acting on a proposal from the Judge-Rapporteur, the Court decided to open the oral part of the procedure and, by way of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, requested the parties to lodge certain documents and put to them written questions. The parties complied with those requests within the prescribed period.

25 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

26 The Commission contends that the Court should:

– declare the action inadmissible or, in any event, declare that the action has become devoid of purpose;

– in the alternative, dismiss the action as unfounded;

– order the applicant to pay the costs.

Law

Admissibility of the action

27 The Commission contends that the action is inadmissible for two reasons: first, the applicant, who was dismissed by his employer, no longer has an interest in seeking the annulment of the contested decision and, second, the action has been brought against a measure confirming a decision that has become final.

28 Even though the Commission has not raised a plea of inadmissibility in that regard, it must also be examined whether the contested decision, although adopted in a contractual context, can be regarded as a challengeable act within the meaning of Article 263 TFEU.

The applicant's legal interest in bringing proceedings

29 The Commission takes the view that the applicant no longer has any legal interest in bringing proceedings on the ground that, having been dismissed by his employer, he could not procure any advantage from the annulment of the contested decision. It was, the Commission submits, only in his capacity as an employee of the Commission's contractor that he benefited from a badge giving him access to the premises of that institution.

30 In that regard, it is settled case-law that an action for annulment brought by a natural or legal person is admissible only in so far as the applicant has an interest in the annulment of the contested measure. Such an interest presupposes that the annulment of the measure must of itself be capable of having legal consequences and that the action must be likely, if successful, to procure an advantage for the party who brought it (see judgment of 18 March 2010, *Centre de Coordination Carrefour* v *Commission*, T-94/08, EU:T:2010:98, paragraph 48 and the case-law cited).

31 That interest must be vested and present and is evaluated as at the date on which the action is brought. However, it must continue until the final decision, failing which there will be no need to adjudicate (judgments of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 42, and of 18 March 2010, *Centre de Coordination Carrefour* v *Commission*, T-94/08, EU:T:2010:98, paragraph 49).

32 In the present case, on 6 September 2018, that is, after the present action had been brought, the employer informed the applicant that his employment contract was to be terminated and that, in accordance with the applicable Belgian legislation on employment contracts, his nine-week notice period would begin on 10 September 2018.

33 The contract therefore ended during November 2018.

34 However, the applicant cannot be regarded as no longer having a legal interest in bringing proceedings as, on 24 September 2018, the employer wrote to him, stating:

'Once you have received a positive notification from the Security Office and the DG [*confidential*] has a request concerning you, we will reinstate the employment contract between you and our company.'

35 It follows from that letter that, despite the contested decision, the relationship of trust between the applicant and his employer has continued to exist, with the result that, if the contested decision were to be annulled, the applicant would have a genuine prospect of being hired once again by that employer.

36 In that regard, the Commission cannot argue that the letter dated 24 September 2018 refers, not to the annulment of the contested decision, but to the issuance of a positive security advisory opinion. In the event of annulment of the contested decision, it would be for the Commission to draw the consequences of that annulment and, even in the absence of a positive security advisory opinion, the Commission may consider that access to its buildings should be granted to the applicant once again.

37 In addition, it must be borne in mind that it follows from Article 266 TFEU that an applicant retains an interest in seeking the annulment of a measure of an institution in order to prevent its alleged unlawfulness recurring in the future, provided that such a possibility can be envisaged, irrespective of the circumstances of the case which gave rise to the action brought by the applicant (see, to that effect, judgment of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraphs 50 to 52).

38 In the present case, if the applicant were to be hired again by the employer, it would be in the applicant's interest for the Commission not to adopt a new decision vitiated by the same illegalities as those alleged in the present action.

39 For those reasons, the Commission's plea of inadmissibility alleging that the applicant has no legal interest in bringing proceedings must be rejected.

The question of whether the contested decision is confirmatory in nature

40 According to the Commission, the contested decision is not a challengeable act within the meaning of Article 263 TFEU as it merely confirms the decision of 25 April 2018, by which the Commission withdrew the applicant's access badge. As an action was not brought against the latter decision within the two-month period provided for in the last paragraph of Article 263 TFEU, that decision has become final. The action brought against the contested decision, the sole purpose of which is to maintain that refusal to allow access, is therefore, the Commission submits, inadmissible.

41 In that regard, it should be borne in mind that, according to well-established case-law, an action for the annulment of a measure which merely confirms a previous decision that has become final is inadmissible. A measure is regarded as merely confirmatory of a previous decision if it contains no new factor as compared with the previous measure and was not preceded by a re-examination of the circumstances of the person to whom that measure was addressed (see judgment of 7 February 2001, *Inpesca* v *Commission*, T-186/98, EU:T:2001:42, paragraph 44 and the case-law cited).

42 However, the confirmatory or other nature of a measure cannot be determined solely with reference to its content as compared with that of the previous decision which it is said to confirm. The nature of the contested measure must also be appraised in the light of the nature of the request to which it constitutes a reply (see judgment of 7 February 2001, *Inpesca* v *Commission*, T-186/98, EU:T:2001:42, paragraph 45 and the case-law cited).

43 In particular, if the measure constitutes the reply to a request in which substantial new facts are relied on, and whereby the administration is requested to reconsider its previous decision, that measure cannot be regarded as merely confirmatory in nature, since it constitutes a decision taken on the basis of those facts and thus contains a new factor as compared with the previous decision (judgment of 7 February 2001, *Inpesca* v *Commission*, T-186/98, EU:T:2001:42, paragraph 46).

44 In order for a fact to be 'new', it is essential that neither the applicant nor the administration was aware of, or in a position to be aware of, the fact in question when the previous decision was adopted. That condition is fulfilled, *a fortiori*, if the fact in question has emerged since the previous decision was adopted (see judgment of 7 February 2001, *Inpesca* v *Commission*, T-186/98, EU:T:2001:42, paragraph 50 and the case-law cited).

45 In order to be 'substantial', the fact concerned must be capable of substantially altering the applicant's situation forming the basis of the initial request which gave rise to the previous decision which has become definitive (see judgment of 7 February 2001, *Inpesca* v *Commission*, T-186/98, EU:T:2001:42, paragraph 51 and the case-law cited).

46 In the present case, it must be noted that, in the decision of 25 April 2018, the Commission, in order to withdraw the applicant's right of access to its premises, took into account, in particular, the negative security advisory opinion issued in his regard by the ANS.

47 Subsequently, the applicant challenged the legality of that security advisory opinion before the appeals body, which, on 20 June 2018, decided that 'the opinion as formulated by the [ANS] [had] no legal basis' and that, consequently, '[it was] not competent to decide on the merits or otherwise of [that] opinion'.

48 By email dated 28 June 2018, the employer then submitted the decision of the appeals body to the Commission on the ground that, in its view, in the light of that decision, the negative security advisory opinion should be considered non-existent.

49 The request that the decision of 25 April 2018 be reviewed was therefore based on the decision of the appeals body.

50 The decision of the appeals body is new, within the meaning of the case-law referred to in paragraph 44 above, as it was given on 20 June 2018, and thus after the initial decision, which is dated 25 April 2018.

51 The decision of the appeals body is also substantial. As that decision states that the negative security advisory opinion has no legal basis, it is capable of casting doubt on an important factor taken into account by the Commission for the purpose of adopting the decision of 25 April 2018 and suggests that it could lead to a review of that decision.

52 Having been informed of that new factor by the applicant's employer, the Commission carried out a review of the applicant's situation as it considered that, because the appeals body had failed to annul the negative opinion, the refusal to allow access, to which the applicant had been made subject on 25 April 2018, should be maintained.

53 It must therefore be held that the contested decision is not confirmatory, with the result that the action cannot be declared inadmissible on that ground.

The question of whether the contested decision can be separated from the contractual context within which it was adopted

54 In this regard, it must be borne in mind that, under Article 263 TFEU, the Courts of the European Union review the legality of acts adopted by the institutions and intended to produce legal effects vis-à-vis third parties.

55 According to settled case-law, that jurisdiction concerns only the acts referred to by Article 288 TFEU, which the institutions must adopt under the conditions laid down by the FEU Treaty (see order of 10 May 2004, *Musée Grévin* v *Commission*, T-314/03 and T-378/03, EU:T:2004:139, paragraph 63 and the case-law cited).

56 By contrast, acts adopted by the institutions in a purely contractual context from which they are inseparable are, by their nature, not among the measures covered by Article 288 TFEU, annulment of which may be sought before the General Court pursuant to Article 263 TFEU (judgments of 17 June 2010, *CEVA* v *Commission*, T-428/07 and T-455/07, EU:T:2010:240, paragraph 52; of 24 October 2014, *Technische Universität Dresden* v *Commission*, T-29/11, EU:T:2014:912, paragraph 29; and order of 6 January 2015, *St'art and Others* v *Commission*, T-36/14, not published, EU:T:2015:13, paragraph 30).

57 In the present case, the action undoubtedly forms part of a contractual context.

58 The code of conduct annexed to the contract entered into on 8 February 2017 between the applicant and his employer provides that the external consultant working for the Commission undertakes to comply with the conditions set by the Commission's security services.

59 Moreover, as follows from paragraph 4 above, the addendum to the framework contract provides that, pursuant to Articles 3, 7 and 8 of Decision 2015/443, the Commission may carry out a background check of the on-site personnel in order to prevent and monitor risks to the security of its staff, assets and information, that access rights for on-site personnel to the premises of the contracting authority may be made conditional on a positive security advisory opinion to be issued by the Belgian authorities, that existing access rights remain valid until a negative security opinion is issued and that the contractor undertakes to supply only on-site personnel who have received a positive security advisory opinion for the Commission buildings listed therein.

60 However, according to the case-law, the measure adopted by an institution in a contractual context must be regarded as being severable from that context where, first, the measure was adopted by that institution in the exercise of its own powers, and, second, it produces, by itself, obligatory legal effects capable of affecting the interests of its recipient and against which, therefore, an action for annulment may be brought. Accordingly, an action for annulment

brought by the addressee of the measure must be considered to be admissible (see order of 21 October 2011, *Groupement Adriano, Jaime Ribeiro, Conduril* v *Commission*, T-335/09, EU:T:2011:614, paragraph 32 and the case-law cited).

61 In that context, the 'own powers of an institution' must be understood as being those deriving from the Treaties or secondary law which are part of its public-power prerogatives and accordingly allow it to create or amend, unilaterally, rights and obligations for a third party (order of 21 October 2011, *Groupement Adriano, Jaime Ribeiro, Conduril* v *Commission*, T-335/09, EU:T:2011:614, paragraph 33).

62 Those conditions are satisfied in the present case.

63 First, the contested decision was adopted by the Commission on the basis of Decision 2015/443, which confers on that institution powers of its own, including the powers to safeguard security on its premises.

64 Second, as stated by the Commission in response to a question from the Court, by maintaining the refusal to allow the applicant access to the Commission's premises, the contested decision produces, unilaterally and independently of the contracts referred to in paragraphs 58 and 59 above, binding legal effects on the situation of a third party, with the result that it constitutes an act of public authority.

65 Moreover, the effects of the contested decision go beyond the contractual sphere as it has the effect of depriving the applicant of any right of access to the premises, even as a visitor.

66 The contested decision therefore constitutes an act which is separable from the contract and is open to challenge pursuant to Article 263 TFEU.

Substance

67 The applicant puts forward four pleas in law in support of his action. The first alleges the lack of competence of the author of the contested decision. The second alleges infringement of Article 3 of Decision 2015/443 and the absence of a legal basis for the contested decision. The third alleges infringement of fundamental rights. The fourth, raised in the alternative, alleges infringement of Article 296 TFEU, of Article 41(2) of the Charter of Fundamental Rights of the European Union and of the principles that unilateral acts must contain a formal and material statement of reasons.

68 The Court considers it appropriate to begin by examining the second plea in law in so far as it alleges infringement of Article 3 of Decision 2015/443.

The second plea in law, in so far as it alleges infringement of Article 3 of Decision 2015/443

69 By the second plea, the applicant submits that the contested decision has no legal basis on the ground, in particular, that Article 3 of Decision 2015/443, to which the contested decision refers, does not provide for the possibility of withdrawing the right of access to the Commission's buildings, but constitutes a general provision referring to the Charter of Fundamental Rights, Protocol No 7 on the Privileges and Immunities of the European Union (OJ 2010 C 83, p. 266) and national law.

70 In that regard, it must be stated that the contested decision does indeed refer to Article 3 of Decision 2015/443.

71 As pointed out by the applicant, Article 3 of Decision 2015/443 lists the provisions and principles to be observed by the Commission in the implementation of that decision, but does not give it the power to adopt measures limiting third-party access to its premises.

72 In its statement of defence, the Commission has contended that the reference to Article 3 of Decision 2015/443 in the contested decision was a clerical mistake and that, in fact, it is Article 12 of that decision that should have been referred to in the contested decision.

73 In that regard, it must be held that, as the Commission observes, Article 12(1)(b) of Decision 2015/443 entrusts staff mandated in accordance with Article 5 of that decision with the power to refuse access to the Commission's premises.

74 The reference to Article 3 of Decision 2015/443 in the contested decision clearly constitutes a clerical mistake and cannot affect the basis or validity of that decision.

75 The second plea in law must therefore be rejected in so far as it concerns the reference to Decision 2015/443.

The first plea, alleging the lack of competence of the author of the contested decision

76 In the first plea, the applicant submits that C, Head of the 'Information Security' Unit in the Security Directorate of the DG for Human Resources and Security, was not competent to adopt the contested decision.

77 In that regard, it must be noted that Article 17 of Decision 2015/443 provides that the responsibilities of the Commission referred to in that decision are to be exercised by the DG for Human Resources and Security under the authority and responsibility of the Member of the Commission responsible for security.

78 In that regard, Article 5(1) of Decision 2015/443 provides:

'Only staff authorised on the basis of a nominative mandate conferred [on] them by the Director-General for Human Resources and Security, given their current duties, may be entrusted with the power to take one or several of the following measures:

(1) Carry side arms;

(2) Conduct security inquiries as referred to in Article 13;

(3) Take security measures as referred to in Article 12 as specified in the mandate.'

79 Article 12(1) of Decision 2015/443 states:

‘In order to ensure the security in the Commission and to prevent and control risks, staff mandated in accordance with Article 5 may, in compliance with the principles set out in Article 3, take inter alia one or more of the following security measures:

…

(b) limited measures concerning persons posing a threat to security, including … banning persons from the Commission’s premises for a period of time, the latter defined in accordance with criteria to be defined in implementing rules;

…’

80 It follows from those provisions that, in order to adopt a decision banning access such as the contested decision, the official of the Commission must have a nominative mandate conferred on him by the Director-General for Human Resources and Security.

81 The requirement of a nominative mandate implies that it must be in writing, as confirmed by the words ‘as specified in the mandate’ in Article 5(1)(3) of Decision 2015/443.

82 In the context of a measure of organisation of procedure, the Court asked the Commission whether C, who signed the contested decision, was a member of the staff on whom a nominative mandate had been conferred within the meaning of Article 5 of Decision 2015/443.

83 It is clear from the Commission’s answer that C had not received a nominative mandate to adopt the measures provided for in Article 12(1)(b) of Decision 2015/443.

84 It must therefore be held that the person who signed the contested decision was not entrusted with the power to adopt that decision in accordance with the requirements of Decision 2015/443.

85 In its statement of defence, the Commission contended that the contested decision could be taken by the head of unit in the Security Directorate as that official had been granted a delegation of signature by the director of that directorate to represent the Commission vis-à-vis third parties in regard to security policy.

86 In order to establish the existence of the alleged delegation of signature, the Commission submitted a document containing a description of the duties performed by C. That document sets out, in particular, that the head of the ‘Information Security’ Unit of the Security Directorate of the DG for Human Resources and Security represents the Commission vis-à-vis representatives of Member States and third States as well as public and private organisations in regard to security policy and the other matters within the remit of that unit.

87 In that regard, it must be borne in mind that a delegation of signature differs from a delegation of power in that the delegator does not transfer competence to the delegatee, who is simply entrusted with the power to draw up and sign, on behalf of and under the responsibility of the delegator, the formal document of a decision the substance of which has been defined by the latter. In addition, a delegation of signature must concern clearly defined management and administrative measures.

88 In the present case, in the first place, it is important to note that the powers set out in the document referred to in paragraph 86 above do not necessarily include the power to issue bans on access to the Commission's premises.

89 In the second place, it must be noted that, in addition to not being signed, the description of C's powers in that document does not, because of its general nature, satisfy the requirement that the measures subject to a delegation of signature be clearly defined.

90 In the third place, such a delegation of signature is incompatible with Decision 2015/443, which requires, for the adoption of a measure banning access, a nominative and explicit mandate issued by the director of the DG for Human Resources and Security.

91 In those circumstances, the view must be taken that C was not competent to adopt the contested decision.

92 According to the Commission, the illegality, which has been identified, should, if a finding of illegality were to be made, lead to the annulment of the contested decision only if the applicant adduces evidence that he has suffered an infringement of a guarantee which should have been given to him, evidence which he has failed to adduce in the present case.

93 In that regard, it must be pointed out that, in the case in which the dispute is between an institution and its staff and involves guarantees given to the latter by the Staff Regulations of Officials of the European Union or a rule of sound administration, a lack of competence of the author of the contested act does not necessarily lead to annulment of that act if the applicant has not shown that he has suffered an infringement of a guarantee (see, to that effect, judgments of 7 February 2007, *Caló* v *Commission*, T-118/04 and T-134/04, EU:T:2007:37, paragraphs 67 and 68, and of 13 December 2018, *Pipiliagkas* v *Commission*, T-689/16, not published, EU:T:2018:925, paragraph 62).

94 However, there is no need to extend that case-law to relations between the Commission and third parties, particularly since, being outside the administration, the latter do not benefit from the guarantees that are given to EU officials by their Staff Regulations.

95 Conversely, the case-law makes clear that the rules concerning the competence of the author of the act are a matter of public policy, meaning that, given their importance, the pleas in law alleging infringement of those rules not only can but must be raised by the EU judicature of its own motion where that competence is at issue in a case brought before it (see, to that effect, judgment of 17 November 2017, *Teeäär* v *ECB*, T-555/16, not published, EU:T:2017:817, paragraph 36 and the case-law cited).

96 In those circumstances, the argument put forward by the Commission on that point must be rejected, the first plea in law must be upheld and, consequently, the contested decision must be annulled, without it being necessary to examine the remainder of the second plea and the other pleas.

Costs

97 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.

98 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 (First Chamber)

hereby:

1. Annuls the decision of the European Commission of 3 July 2018 maintaining its refusal to allow XG access to its premises;

2. Orders the Commission to pay the costs.

Nihoul Svenningsen Öberg

Delivered in open court in Luxembourg on 19 December 2019.

[Signatures]