



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

28 June 2023*

(Non-contractual liability – OLAF investigations – Press leaks – Material and non-material damage – Causal link – Imputability of the leaks – Sufficiently serious breach of a rule of law intended to confer rights on individuals – Confidentiality of legal advice)

In Case T-752/20,

International Management Group (IMG), established in Brussels (Belgium), represented by L. Levi and J.-Y. de Cara, lawyers,

applicant,

v

European Commission, represented by J. Baquero Cruz, J.-F. Brakeland and S. Delaude, acting as Agents,

defendant,

THE GENERAL COURT (Seventh Chamber),

composed, at the time of the deliberations, of R. da Silva Passos, President, L. Truchot (Rapporteur) and M. Sampol Pucurull, Judges,

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure, in particular:

- the application lodged at the Registry of the General Court on 21 December 2020,
- the plea of inadmissibility raised by the Commission under Article 130 of the Rules of Procedure of the General Court by separate document lodged at the Court Registry on 12 March 2021,
- the order of 2 July 2021 reserving the decision on the plea of inadmissibility for the final judgment,

further to the hearing on 20 June 2022,

gives the following

* Language of the case: French.

Judgment¹

1 By its action under Article 268 TFEU, the applicant, International Management Group (IMG), seeks compensation for the material and non-material damage which it claims to have suffered as a result of the unlawfulness of the conduct of the European Commission and of the European Anti-Fraud Office (OLAF) following a report concerning the applicant drawn up by OLAF.

...

Forms of order sought

19 The applicant claims that the Court should:

- order the Commission to pay it the sum of EUR 10 000 per month for the period from mid-December 2015 until delivery of the judgment in the present case, by way of compensation for the non-material damage suffered;
- order the Commission to pay it the sum of EUR 2.1 million, together with default interest, by way of compensation for the material damage suffered;
- order the Commission to pay the costs.

20 The Commission contends that the Court should:

- dismiss the action as inadmissible;
- in the alternative, dismiss the action as manifestly unfounded or unfounded;
- remove the opinion of its Legal Service of 16 January 2015 ..., annexed to the application, from the file for the present case;
- order the applicant to pay the costs.

Law

The claim for compensation

...

The unlawfulness of the conduct of the Commission and OLAF

...

¹ Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

– Breach of the duty to act diligently and of the duty to have regard for the welfare of officials

- 70 The applicant claims that the Commission failed in its duty to act diligently and its duty to have regard for the welfare of officials inasmuch as it neither publicly condemned the leak of the OLAF report nor put an end to the dissemination of false information caused by that leak by means of the publication of a press release summarising the main information contained in the letter of 8 May 2015, by which it had decided not to follow in full the recommendations of the OLAF report.
- 71 As a preliminary point, it should be noted that the Court of Justice has defined the duty to have regard for the welfare of officials as a concept reflecting the balance of reciprocal rights and obligations established by the Staff Regulations of Officials of the European Union in the relationship between the administration and civil servants, bearing in mind that that balance implies, in particular, that when the administration takes a decision concerning the situation of an official, it should take into consideration all the factors which may affect its decision and that when doing so it should take into account not only the interests of the service but also those of the official concerned (see judgment of 12 November 2020, *Fleig v EEAS*, C-446/19 P, not published, EU:C:2020:918, paragraph 67 and the case-law cited).
- 72 Thus, the duty to have regard for the welfare of officials specifically concerns the obligations of the institutions of the Union towards their officials and other servants, in particular in so far as it involves taking account of their individual interests (see, to that effect, judgment of 10 December 2008, *Nardone v Commission*, T-57/99, EU:T:2008:555, paragraph 167).
- 73 Since the present action does not relate to the relationship between the EU administration and one of its officials or other servants, the duty to have regard for the welfare of officials is not applicable in the present case and therefore cannot be relied on by the applicant in support of its claims.
- 74 Thus, the applicant's plea of illegality must be rejected in so far as it is based on breach of the duty to have regard for the welfare of officials.
- 75 It is therefore necessary to examine that plea of illegality in so far as it is based on breach of the duty to act diligently.
- 76 It follows from the settled case-law of the Court of Justice that, in order for the non-contractual liability of the Union to be capable of being triggered in a given case, it is necessary that the person seeking compensation for the loss or harm which he or she claims to have suffered as a result of conduct or an act of the Union establish the existence of a breach of a rule of law intended to confer rights on individuals (judgments of 4 July 2000, *Bergaderm and Goupil v Commission*, C-352/98 P, EU:C:2000:361, paragraphs 41 and 42, and of 4 April 2017, *Ombudsman v Staelen*, C-337/15 P, EU:C:2017:256, paragraph 31).
- 77 Moreover, that breach must be sufficiently serious, a requirement which itself depends on the discretion enjoyed by the institution, body, office or agency of the Union which has allegedly acted in breach of that rule and on whether it has manifestly and gravely disregarded the limits placed on that discretion, in view of, inter alia, the degree of clarity and precision of the rule, the difficulties of interpretation or application which may ensue therefrom, and the complexity of the

situation to be resolved (see, to that effect, judgments of 4 July 2000, *Bergaderm and Goupil v Commission*, C-352/98 P, EU:C:2000:361, paragraphs 40, 43 and 44, and of 30 May 2017, *Safa Nicu Sepahan v Council*, C-45/15 P, EU:C:2017:402, paragraph 30).

- 78 It is apparent from paragraph 70 above that the applicant is accusing the Commission of having failed to adopt a position publicly condemning the leak of the OLAF report and putting an end to the dissemination of false information caused by that leak by means of the publication of a press release. In so doing, the applicant complains that the Commission failed to act.
- 79 According to the case-law, omissions by the institutions of the Union are capable of triggering liability on the part of the Union only when those institutions have failed to fulfil a legal obligation to act resulting from a provision of EU law (see order of 12 July 2018, *Acquafarm v Commission*, C-40/18 P, not published, EU:C:2018:566, paragraph 42 and the case-law cited).
- 80 It follows from paragraphs 77 and 79 above that the examination of the question whether an institution has committed a sufficiently serious breach of a rule of law intended to confer rights on individuals on account of an omission involves determining whether three conditions are satisfied, namely (i) the existence of a legal obligation to act, (ii) the existence of discretion on the part of the institution, body, office or agency of the Union in question, and (iii) a manifest and serious breach by that institution of the limits placed on that discretion.
- 81 It is necessary to examine whether those three conditions are satisfied in the present case.
- 82 The duty to act diligently, which is inherent in the right to good administration enshrined in Article 41 of the Charter of Fundamental Rights and which applies generally to the actions of the EU administration in its relations with the public, requires that that administration act with care and caution (see, to that effect, judgment of 16 June 2022, *SGL Carbon and Others v Commission*, C-65/21 P and C-73/21 P to C-75/21 P, EU:C:2022:470, paragraph 30 and the case-law cited).
- 83 In the first place, it is apparent from the case-law of the Court of Justice that the duty to act diligently constitutes a rule of law intended to confer rights on individuals, breach of which is liable to trigger the non-contractual liability of the Union in certain circumstances, namely where it is established, in a given case, that that breach is sufficiently serious, in accordance with the case-law referred to in paragraph 77 above (see, to that effect, judgments of 27 March 1990, *Grifoni v Commission*, C-308/87, EU:C:1990:134, paragraphs 6, 7 and 14; of 16 December 2008, *Masdar (UK) v Commission*, C-47/07 P, EU:C:2008:726, paragraph 91; and of 4 April 2017, *Ombudsman v Staelen*, C-337/15 P, EU:C:2017:256, paragraphs 38 and 41).
- 84 In the second place, it must be noted that, in the light of the nature of the duty to act diligently, which is intrinsically linked to the context in which the EU administration acts in a given case, the existence of a sufficiently serious breach of that duty can be identified only by examining all the relevant issues of fact and law on a case-by-case basis, taking into consideration the field, the circumstances and the context in which the duty to act diligently has been imposed on the institution, body, office or agency concerned, as well as the specific circumstances enabling it to be established that there has been a failure to perform that duty (see, to that effect, judgment of 4 April 2017, *Ombudsman v Staelen*, C-337/15 P, EU:C:2017:256, paragraphs 40 and 41).

- 85 As has been noted in paragraph 70 above, the applicant claims that the Commission failed in its duty to act diligently inasmuch as it neither publicly condemned the leak of the OLAF report nor put an end to the dissemination of false information caused by that leak by means of the publication of a press release summarising the main information contained in the letter of 8 May 2015.
- 86 It is therefore necessary to examine whether the duty to act diligently can be interpreted as meaning that the Commission was under a legal obligation to act, consisting of the obligation to publicly condemn a leak and to put an end to the dissemination of false information caused by that leak by means of the publication of a press release.
- 87 It should be noted that, in its written pleadings, the applicant does not rely on any specific rule of law which gives rise, on the part of the Commission, to a legal obligation to act consisting of the adoption of a position publicly condemning the leak of an OLAF investigation report and putting an end to the dissemination of false information caused by such a leak by following up on the transmission of an OLAF report. However, the breach of the duty of diligence relied on by the applicant is intrinsically linked to [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)], which constitutes the legal framework within which the Commission acted when it adopted the letter of 8 May 2015, so that it must be determined whether such an obligation follows from the provisions of that regulation.
- 88 First, under Article 11(3) of Regulation No 883/2013, ‘reports and recommendations drawn up following an external investigation and any relevant related documents shall be sent to the competent authorities of the Member States concerned in accordance with the rules relating to external investigations and, if necessary, to the competent Commission services’. It should be noted that that provision does not lay down a legal obligation to act which is incumbent on the Commission. It cannot therefore be held that the applicant has demonstrated that the duty of diligence gave rise to a legal obligation to act, on the basis of that provision, on the part of the Commission.
- 89 Secondly, according to Article 10(1) of Regulation No 883/2013, ‘information transmitted or obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions’. Under Article 3(2) of that regulation, which concerns, according to the title of that article, ‘external investigations’, in the version applicable at the material time, ‘[OLAF] may, in accordance with the provisions and procedures laid down by Regulation (Euratom, EC) No 2185/96, conduct on-the-spot checks and inspections on economic operators’. Article 8(1) of Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities’ financial interests against fraud and other irregularities (OJ 1996 L 292, p. 2) provides that ‘information communicated or acquired in any form under this Regulation shall be covered by professional secrecy’.
- 90 In addition, under Article 10(3) of Regulation No 883/2013, ‘the institutions, bodies, offices or agencies concerned shall ensure that the confidentiality of the investigations conducted by [OLAF] is respected’. In the present case, it is not disputed that the Commission is an institution concerned for the purposes of that provision.

- 91 It follows from those provisions that the Commission is bound by obligations of confidentiality and professional secrecy in the context of OLAF's external investigations.
- 92 However, despite the obligation to ensure that the confidentiality of OLAF investigations is respected which is thus incumbent on the Commission, the duty to act diligently to which the Commission is subject cannot impose on it, since it has not failed to fulfil that obligation of confidentiality and since responsibility for the leak of the OLAF report to the press cannot be attributed to it ..., an obligation to act such as that relied on by the applicant in the present case, consisting in condemning the leaking to the press of information relating to such an investigation and distancing itself from the information published.
- 93 The duty to act diligently does not have the scope which the applicant ascribes to it. It is the leak of that report to the press, and not the omission of which the Commission is accused by the applicant, which constitutes a failure to fulfil the obligation of confidentiality mentioned above. However, the imputability of that leak to the Commission has not been demonstrated (see, to that effect and by analogy, judgment of 15 January 2015, *Ziegler and Ziegler Relocation v Commission*, T-539/12 and T-150/13, not published, EU:T:2015:15, paragraph 102).
- 94 The applicant has therefore not established that the Commission was under an obligation to act in the present case.
- 95 Thus, in accordance with the case-law cited in paragraph 79 above, the alleged omission is not capable of triggering liability on the part of the Union.
- 96 In any event, assuming that, in the present case, it is held that a legal obligation to act which is incumbent on the Commission is the result of the duty to act diligently, it is necessary to examine whether the Commission manifestly and gravely infringed the limits placed on its discretion in that case.
- 97 It should be noted that such a situation would lead to the duty to act diligently being interpreted as meaning that, in the event of the leak of a confidential document in respect of which it has not been demonstrated that the institution concerned is the source for the purposes of Regulation No 883/2013, it would be for that institution not to aggravate the damage which might result from that breach of confidentiality.
- 98 As has been noted in paragraph 77 above, the question whether the institution of the Union in question has manifestly and gravely disregarded the limits placed on its discretion must be determined, inter alia, in the light of the degree of clarity and precision of the rule the sufficiently serious breach of which is being relied on and the difficulties of interpretation or application which may arise therefrom.
- 99 In that regard, it should be noted that no such obligation, on the part of the Commission, to act in order not to aggravate the damage caused by a breach of confidentiality which is not imputable to that institution arises from Article 10 of Regulation No 883/2013; nor can it be inferred from the content of that provision. By providing that the institutions concerned are to ensure that the confidentiality of OLAF investigations is respected, paragraph 3 of that article imposes an obligation on those institutions to ensure that the content of OLAF investigations remains confidential. However, it does not impose on them, where that confidentiality has not been

respected and the disclosure does not originate from within the institution concerned, obligations to condemn the leak, to put an end to the dissemination of the information at issue, or to correct the parts of that information which are incorrect.

- 100 Such obligations cannot be regarded as forming part of the obligation to ensure that the confidentiality of OLAF investigations is respected within the meaning of Article 10(3) of Regulation No 883/2013. First, since that confidentiality has been breached, the Commission's obligation to ensure respect therefor has become devoid of purpose. Secondly, it should be noted that (i) the possible need to condemn the leak exceeds the mere obligation to ensure that confidentiality is respected, (ii) in such a case, it is impossible for the Commission to put an end to the dissemination of the OLAF report resulting from that leak to the press, and (iii) assuming that some of the information disseminated is incorrect, the correction of that information is not such as to restore its confidential nature, which has permanently disappeared.
- 101 Thus, even assuming that the Commission was under a legal obligation to act in the present case, it cannot be held that the breach of the duty to act diligently alleged by the applicant constitutes a sufficiently serious breach of a rule of law intended to confer rights on individuals.
- 102 It must therefore be held that the fourth instance of illegality relied on is not serious as regards the alleged breach by the Commission of the duty to have regard for the welfare of officials and the duty to act diligently.
- 103 Therefore, it must be held that the first condition for liability to be triggered on the part of the Union is not satisfied.
- 104 Having regard to all the foregoing considerations, the action must be dismissed.

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On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

- 1. Orders that the document produced by International Management Group (IMG) as Annex A.21 to the application be removed from the case file;**
- 2. Dismisses the action;**
- 3. Orders IMG to pay the costs.**

da Silva Passos

Truchot

Sampol Pucurull

Delivered in open court in Luxembourg on 28 June 2023.

[Signatures]