Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 22 September 2020[1]

**Case C-615/19 P**

**John Dalli**
**v**

**European Commission**

(Appeal – Action for damages – Non-contractual liability – Compensation for damage purportedly suffered by the appellant as a result of allegedly illegal conduct of the Commission and the European Anti-Fraud Office (OLAF) connected with the termination of his office as a Member of the Commission on 16 October 2012)

## I. Introduction

1. By his appeal, Mr John Dalli seeks the setting aside of the judgment of 6 June 2019, *Dalli* v *Commission* (T-399/17, not published, EU:T:2019:384, 'the judgment under appeal'), by which the General Court of the European Union dismissed his action for compensation for the harm purportedly suffered by him as a result of allegedly illegal conduct of the European Commission and the European Anti-Fraud Office (OLAF), connected with the termination of his office as a Member of the Commission.

2. This appeal provides the Court with the opportunity of ruling on several novel issues relating to the investigative tasks of OLAF and the conduct of those investigations. Furthermore, the Court will be called upon to clarify certain aspects of the case-law on the force of *res judicata* and on the demonstration of the existence of non-material damage.

3. As requested by the Court, I will restrict my analysis in this Opinion to the argument raised by the Commission regarding the inadmissibility of the action before the General Court and to the first ground of appeal, the first part of the third ground of appeal and the fifth and seventh grounds of appeal.

1 Original language: French.

## II. Legal context

### *A. Regulation (EC) No 1073/1999*

4. Article 1(3) of Regulation (EC) No 1073/1999,[2] which is applicable to the facts at issue,[3] provides:

'Within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties (hereinafter "the institutions, bodies, offices and agencies"), the Office shall conduct administrative investigations for the purpose of:

– fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community,

– investigating to that end serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or members of the staff of institutions, bodies, offices or agencies not subject to the Staff Regulations of officials and the Conditions of employment of other servants of the European Communities ("the Staff Regulations").'

5. Articles 3 and 4 of that regulation set out the rules applicable, respectively, to external and internal investigations by OLAF.

6. Article 5 of the regulation provides:

'External investigations shall be opened by a decision of the Director of the Office, acting on his own initiative or following a request from a Member State concerned.

Internal investigations shall be opened by a decision of the Director of the Office, acting on his own initiative or following a request from the institution, body, office or agency within which the investigation is to be conducted.'

7. Article 6(1) of the same regulation states that the Director of the Office is to direct the conduct of investigations.

8. Article 8(3) of Regulation No 1073/1999 reads as follows:

'The Director shall ensure that the Office's employees and the other persons acting under his authority observe the Community and national provisions on the protection of personal data, in particular those provided for in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [4].'

2 Regulation of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1).

3 This regulation was replaced by Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1), which entered into force on 1 October 2013.

4 OJ 1995 L 281, p. 31.

9. Article 11(1) and (7) of that regulation reads thus:

‘1. The Supervisory Committee shall reinforce the Office’s independence by regular monitoring of the implementation of the investigative function.

At the request of the Director or on its own initiative, the committee shall deliver opinions to the Director concerning the activities of the Office, without however interfering with the conduct of investigations in progress.

…

7. The Director shall forward to the Supervisory Committee each year the Office’s programme of activities … The Director shall keep the committee regularly informed of the Office’s activities, its investigations, the results thereof and the action taken on them. Where an investigation has been in progress for more than nine months, the Director shall inform the Supervisory Committee of the reasons for which it has not yet been possible to wind up the investigation, and of the expected time for completion. The Director shall inform the committee of cases where the institution, body, agency or office concerned has failed to act on the recommendations made by it. The Director shall inform the committee of cases requiring information to be forwarded to the judicial authorities of a Member State.’

10. Article 14 of the regulation provides:

‘Pending amendment of the Staff Regulations, any official or other servant of the European Communities may submit to the Director of the Office a complaint by virtue of this Article against an act adversely affecting him committed by the Office as part of an internal investigation …

The above provisions shall apply by analogy to the staff of the institutions, bodies, offices and agencies which are not subject to the Staff Regulations.’

### *B. Rules of Procedure of the OLAF Supervisory Committee*

11. Article 13(5) of the Rules of Procedure of the OLAF Supervisory Committee[5] (‘the Rules of Procedure’) states:

‘Cases requiring information to be forwarded to the judicial authorities of a Member State shall be examined on the basis of the information provided by the Director-General of OLAF and in accordance with [Regulation No 1073/1999]. Follow-up shall also be carried out on this basis.

In particular, before the information is sent, the Supervisory Committee shall request access to the investigations in question in order to ascertain whether fundamental rights and procedural guarantees are being complied with. Once the Secretariat has obtained access to the documents within a time period guaranteeing compliance with this function, the rapporteurs appointed to examine the cases shall prepare their presentation at the Committee’s plenary session. The responsible staff of OLAF may be invited to this session in order to obtain full information.

The Committee shall appoint rapporteurs to examine these investigations and, if necessary, issue an opinion.’

5 OJ 2011 L 308, p. 114.

## III. The background to the dispute

12. The background to the dispute, as set out in paragraphs 1 to 16 of the judgment under appeal, can be summarised as follows.

13. By Decision 2010/80/EU,[6] Mr Dalli was appointed as a Member of the Commission for the period from 10 February 2010 to 31 October 2014. He was allocated the health and consumer protection portfolio by the President of the Commission.

14. On 25 May 2012, following the receipt by the Commission on 21 May 2012 of a complaint from the company Swedish Match containing allegations concerning Mr Dalli's behaviour, OLAF initiated an investigation.

15. Mr Dalli was interviewed by OLAF on 16 July and 15 October 2012.

16. On 15 October 2012, the OLAF report was sent to the Secretary-General of the Commission, for the attention of the President of that institution. That report was accompanied by a letter signed by the Director-General of OLAF, summarising the main findings of the investigation and informing the President of the Commission that those findings were being brought to his knowledge with a view to the possible adoption of measures on the basis of the Code of Conduct for Commissioners (C(2011) 2904).

17. On 16 October 2012, Mr Dalli met with the President of the Commission. Later that same day, the latter informed the Prime Minister of the Republic of Malta and the Presidents of the European Parliament and of the Council of the European Union of Mr Dalli's resignation. The Commission also issued a press release announcing that resignation.

18. By application lodged at the General Court Registry on 24 December 2012, Mr Dalli brought an action for annulment of the 'oral decision of 16 October 2012 of termination of [his] office … with immediate effect, taken by the President of the Commission' and for compensation for damage suffered of a symbolic EUR 1 for non-material damage and, on a provisional basis, of EUR 1 913 396 for material damage.

19. That action was dismissed by the judgment of the General Court of 12 May 2015, *Dalli* v *Commission* (T-562/12, EU:T:2015:270) ('the judgment in *Dalli* v *Commission*').

20. As regards, first, the claim for annulment, the General Court found that the appellant had resigned voluntarily, as no request for his resignation within the meaning of Article 17(6) TEU had been made by the President of the Commission. Since the existence of that request, which was the act challenged by the appellant, had not been established, the General Court considered that the claim for annulment had to rejected as inadmissible. The Court also found that, in any event, even assuming that the appellant were entitled to call into question, in the context of the action, the legality of his resignation on the ground that the appellant's consent to the resignation was vitiated, this had not been established.

21. As regards, second, the claim for compensation, the General Court considered that, since it had found that the existence of the Commission's acts challenged in the claim for annulment had not been established, no illegality in that respect and, a fortiori, no serious breach of a rule of law could be found against that institution. As regards the allegation that the appellant's consent was vitiated, put

6 Decision of the European Council of 9 February 2010 appointing the European Commission (OJ 2010 L 38, p. 7).

forward as a subsidiary plea in the context of the claim for annulment, the General Court observed that that had not been established. It concluded that the allegations of wrongful conduct on the part of the Commission or its President had not been established to the requisite legal standard. It therefore rejected the claim for damages as unfounded.

22. On 21 June 2015, Mr Dalli lodged an appeal against that judgment of the General Court, which was dismissed by the order of 14 April 2016, *Dalli* v *Commission*.[7]

## IV. The procedure before the General Court and the judgment under appeal

23. By application lodged at the General Court Registry on 28 June 2017, Mr Dalli brought an action for an order that the Commission pay him damages of an amount estimated, on a provisional basis, at EUR 1 000 000 as compensation for damage, in particular non-material damage, which he suffered as a result of allegedly illegal conduct of the Commission and OLAF, connected with the termination of his office as a Member of the Commission on 16 October 2012.

24. In support of that application, Mr Dalli put forward seven complaints relating to the unlawfulness of OLAF's conduct alleging, first, the unlawfulness of the decision to open the investigation, secondly, flaws in the characterisation of the investigation and the extension of that investigation, thirdly, breach of the principles governing the gathering of evidence and distortion and falsification of the evidence, fourthly, breach of the rights of the defence, of Article 4 of Decision 1999/396/EC[8] and of Article 18 of the OLAF Instructions to Staff on Investigative Procedures ('the OLAF Instructions'), fifthly, infringement of Article 11(7) of Regulation No 1073/1999 and of Article 13(5) of the Rules of Procedure, sixthly, breach of the principle of the presumption of innocence, infringement of Article 8 of Regulation No 1073/1999 and of Article 339 TFEU and breach of the right to the protection of personal data and, seventhly, infringement of Article 4 of Regulation No 1073/1999, of Article 4 of Decision 1999/396 and of the Memorandum of Understanding concerning a code of conduct to ensure timely exchange of information between OLAF and the Commission with respect to OLAF internal investigations in the Commission. In addition, Mr Dalli put forward two complaints relating to the unlawfulness of the Commission's behaviour.

25. By separate document lodged at the General Court Registry on 13 September 2017, la Commission raised a plea of inadmissibility.

26. By the judgment under appeal, the General Court rejected that plea of inadmissibility before dismissing the action brought by Mr Dalli as unfounded.

27. Firstly, the General Court took the view that the points of law and of fact relating to the allegedly wrongful conduct of OLAF and the Commission had not been examined in the judgment in *Dalli* v *Commission* and that that judgment did not therefore have, in that regard, the force of *res judicata*.

28. It went on to reject all the complaints raised by Mr Dalli against OLAF and the Commission.

29. Lastly, for the sake of completeness, it held that Mr Dalli had established neither the existence of a sufficiently direct causal link between the conduct complained of and the damage alleged nor the existence of that damage.

7 C-394/15 P, not published, EU:C:2016:262.

8 Commission Decision, ECSC, Euratom of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests (OJ 1999 L 149, p. 57).

## V. Forms of order sought by the parties and procedure before the Court

30. By his appeal, Mr Dalli claims that the Court should:

– set aside the judgment under appeal;

– order compensation for the damage, in particular the non-material damage, suffered by him and which can be estimated, on a provisional basis, at EUR 1 000 000; and

– order the Commission to pay the costs of both sets of proceedings.

31. The Commission contends that the Court should dismiss the appeal and order Mr Dalli to pay the costs incurred before the Court of Justice and the General Court.

32. A hearing was not held.

## VI. Analysis

### *A. Inadmissibility of the action before the General Court*

33. The Commission submits, in its response, that it has doubts as to the accuracy of the reasoning adopted by the General Court which led it to reject the plea of inadmissibility raised before it by the Commission regarding the force of *res judicata* attached to the judgment in *Dalli* v *Commission*.

34. From the outset, I must clarify that, although the Commission has not brought a cross-appeal to challenge the admissibility of the action before the General Court, the pleas of inadmissibility based on the force of *res judicata* are a matter of public policy which must be raised by the Courts of the European Union of their own motion.[9] In those circumstances, it is necessary to determine whether the General Court was right to find that the action before it was admissible on the basis that the judgment in *Dalli* v *Commission* did not have the force of *res judicata* attached to it.

35. Having noted the importance, both for the EU legal order and for the national legal systems, of the principle of *res judicata*,[10] the General Court pointed out that the force of *res judicata* is such as to bar the admissibility of an action if the proceedings disposed of by the judgment in question were between the same parties, had the same subject matter and were founded on the same grounds.[11] It recalled that the subject matter of an action corresponds to the claims of the person concerned, whereas the cause of action corresponds to the legal and factual basis of the claims relied on.[12] The General Court found that the conditions relating to the identity of the parties and of the subject matter between the action that gave rise to the judgment in *Dalli* v *Commission* and the action brought before it are met.[13]

9 See order 1 April 1987, *Ainsworth and Others* v *Commission* (159/84, 12/85 and 264/85, EU:C:1987:172); judgment of 1 June 2006, *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* (C-442/03 P and C-471/03 P, EU:C:2006:356, paragraph 45); and Opinion of Advocate General Bot in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:298, point 63). On this issue, see Wathelet, M., and Wildemeersch, J., *Contentieux européen*, Larcier, Brussels, 2014 (2nd ed.), p. 484.

10 Paragraph 27 of the judgment under appeal. See also judgment of 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraphs 35 and 36).

11 Paragraph 28 of the judgment under appeal. See also judgment of 25 June 2010, *Imperial Chemical Industries* v *Commission* (T-66/01, EU:T:2010:255, paragraph 197).

12 Paragraphs 33 and 34 of the judgment under appeal.

13 Paragraphs 32 and 33 of the judgment under appeal. I would point out, in this regard, that I have some doubts as to whether the subject matter of the actions is identical. Whereas the first action concerned, inter alia, compensation for the damage allegedly suffered on account of the Commission's requirement that the appellant resign, the second action concerns compensation for the damage suffered on account of unlawful investigative acts carried out by OLAF. In those circumstances, the reasons why the General Court held that the two actions had the same subject matter are not clear to me, since the purposes of the two actions differ.

36. However, as regards the condition relating to the identity of cause of the two actions, the General Court observed that, by its first action, the appellant had claimed that the unlawful acts alleged in the context of the claim for annulment constituted a serious breach of a rule of law intended to confer rights on individuals. Nevertheless, the General Court also noted that it had been held in the judgment in *Dalli* v *Commission* that the existence of the acts challenged in the application for annulment was not established, with the result that there was no unlawfulness which could give rise to liability on the part of the European Union.[14] In those circumstances, the General Court stated that, in the judgment in *Dalli* v *Commission*, it had not ruled on the wrongful conduct of the Commission or of OLAF and had found merely that the contested decision did not exist.[15]

37. In addition, the General Court explained that *res judicata* attaches only to matters of fact and law actually or necessarily settled by a judicial decision.[16] Since it had not examined the allegations relating to the wrongful conduct of the Commission and of OLAF in the first action, the General Court considered that those matters of fact and law had not actually and necessarily been settled by the judgment in *Dalli* v *Commission*, such that that judgment did not have the force of *res judicata* in that regard.

38. The General Court found that there was therefore no need to examine whether the cause of the two actions was identical.

39. In its response, the Commission argued that the fact that the General Court had not examined the claims for damages relating to the conduct of the Commission and of OLAF was not relevant. It considered that those claims had already actually and necessarily been settled by the judgment in *Dalli* v *Commission*, since they had been rejected in that judgment as 'unfounded' because they '[were] not … established to the requisite legal standard'.[17] The second action brought before the General Court sought merely to revive an issue that had been settled by the Courts of the European Union, which is not allowed by the principle of *res judicata*.

40. I do, however, take the view that the reasoning adopted by the General Court in the judgment under appeal withstands any challenge. The General Court rightly stated that the rejection of the claim for damages made in the context of the first action was based exclusively on the non-existence of the acts challenged. This necessarily means that an examination of the appellant's allegations about the wrongful conduct of the Commission was necessary and was therefore not conducted. The matters of fact and law underlying those allegations cannot therefore be regarded as having actually and necessarily been settled by the judgment and cannot, in those circumstances, have the force of *res judicata*.

41. That conclusion is not called into question by the Commission's argument that the fact that General Court found, in its judgment in *Dalli* v *Commission*, that the appellant's allegations '[have] not been established to the requisite legal standard' means that those allegations have necessarily been settled by that judgment. In other words, the General Court implicitly ruled on matters of fact and law relating to those allegations.

14 Paragraph 36 of the judgment under appeal.

15 Paragraph 37 of the judgment under appeal.

16 Paragraph 30 of the judgment under appeal.

17 *Dalli* v *Commission*, paragraphs 163 and 164.

42. That solution would open the door, in EU law, to an unreasonable extension of the force of *res judicata* to matters on which an implicit decision has been made, which appears undesirable to me.[18] In addition, such an extension does not seem to me to be applicable in the present case, since it cannot be claimed that a point of fact or law has been implicitly settled by a judgment when it is clear from that judgment that that matter has not even been examined.

43. In those circumstances, the judgment in *Dalli* v *Commission* cannot have the force of *res judicata* in relation to allegations that were not examined by the General Court in that judgment.

44. I am therefore of the view that the General Court did not err in finding the action admissible.

### *B. The first ground of appeal*

#### *1. The first part of the first ground of appeal*

45. By the first part of the first ground of appeal, the appellant contests the General Court's finding that neither Article 1(3) of Regulation No 1073/1999 nor Article 5 of the OLAF Instructions constitutes a rule conferring rights on individuals.[19]

46. In that regard, I note that the European Union is non-contractually liable for the unlawful conduct of its institutions subject to the satisfaction of a set of conditions, which include the condition relating to the unlawfulness of the conduct of which the institution is accused.[20] That condition requires a sufficiently serious breach of a rule of law intended to confer rights on individuals.[21] It is therefore necessary to determine whether the General Court was correct in finding that the rules relied on do not confer rights on individuals, such that the action for damages based on those provisions was unfounded.

47. With regard to Article 1(3) of Regulation No 1073/1999, the General Court found that that provision merely stated the objectives and tasks of OLAF in the context of administrative investigations and did not therefore confer rights on individuals. The appellant submits that the provision restricts OLAF's powers and allows it to open an investigation only where two conditions are met, namely the existence of both 'serious matters' and 'sufficiently serious suspicions'. As those two conditions guarantee the person concerned that an initial assessment of the case has been conducted, the provision concerned confers rights on individuals.

18 On the risks of the force of implicitly decided matters, see Turmo, A., *L'autorité de la chose jugée en droit de l'Union européenne*, Bruylant, Brussels, 2017, p. 177; on the treatment of the force of *res judicata* as a tool for the concentration of litigation, see Deshayes, O., 'L'autorité de la chose jugée', *Procédures*, 2012, No 3, pp. 33 to 36.

19 Article 5 of the OLAF Instructions, which is entitled 'Selection Process', provides, inter alia, in paragraphs 3 to 5 thereof:
'3. The opinion on the opening of an investigation or coordination case must be based on whether the information falls within OLAF's competency to act, whether the information is sufficient to open an investigation or coordination case and whether the information falls within the Investigative Policy Priorities (IPP) established by the Director-General.
4. In assessing whether OLAF is competent to act, consideration must be given to relevant EU Regulations, Decisions, Interinstitutional Agreement and other legal instruments relating to the protection of the financial and other interests of the EU. In evaluating whether the information is sufficient to open an investigation or coordination case, consideration must be given to the reliability of the source and the credibility of the allegations. In addition, all information collected during the selection process must be taken into account in justifying the opening of an investigation or coordination case. The IPP set out the criteria to be applied in determining whether an information falls within an established investigative priority.
5. The Investigation Selection and Review Unit should provide an opinion on the opening or dismissal of a case to the Director-General within 2 months of the registration of the incoming information.'

20 Judgments of 29 September 1982, *Oleifici Mediterranei* v *EEC* (26/81, EU:C:1982:318), and of 10 July 2014, *Nikolaou* v *Court of Auditors* (C-220/13 P, EU:C:2014:2057, paragraph 53).

21 Case-law in this regard has been settled since the judgment of 4 July 2000, *Bergaderm and Goupil* v *Commission* (C-352/98 P, EU:C:2000:361, paragraph 42 et seq.), which brought the conditions under which the European Union incurs liability into line with those governing the liability of the State for damage caused to individuals by a breach of EU law. See, more recently, judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 30). With regard to this issue, see also Kawczyńska, M., *Pozaumowna odpowiedzialność odszkodowawcza Unii Europejskiej*, Wolters Kluwer, Warsaw, 2015, pp. 313 to 316.

48. Such an argument appears to me to be incapable of succeeding. First, it is clear both from the content and from the title of Article 1 of Regulation No 1073/1999 that that provision is intended merely to set out, in general terms, the objectives pursued by OLAF in conducting its investigations and the tasks assigned to it to that end. The structure of Regulation No 1073/1999 also indicates that Article 1(3) of that regulation does not seek to lay down detailed rules governing OLAF's investigations or the legal situation of the persons subject to those investigations, since requirements of that kind essentially form the content of the subsequent provisions of that regulation, which define, in practical terms, the manner in which OLAF's investigations must be conducted. The primary objective of Article 1(3) of the regulation is not to establish, in itself, a form of protection for the interests of individuals but to define OLAF's role in the conduct of its investigations.

49. Second, contrary to the appellant's claims, nothing in the wording of Article 1(3) of Regulation No 1073/1999 requires that two cumulative conditions are satisfied, namely the existence of both 'serious matters' and 'sufficiently serious suspicions', in order for OLAF to open an investigation, since those conditions are not even mentioned in that provision.

50. In addition, although that requirement that sufficiently serious suspicions exist as a pre-requisite for the opening of an administrative investigation by OLAF is indeed apparent from the case-law of the Court, in accordance with which 'a decision by OLAF's Director to open an investigation … cannot be taken unless there are sufficiently serious suspicions',[22] the fact remains that such a condition is not connected with the general provision laid down in Article 1(3) of Regulation No 1073/1999 on OLAF's objectives and tasks. The requirement that there are sufficiently serious suspicions must be related to the specific provision on the opening of investigations by OLAF, namely Article 5 of Regulation No 1073/1999.[23]

51. I am therefore of the view that the General Court did not err in law in finding that Article 1(3) of Regulation No 1073/1999 is not a rule of law intended to confer rights on individuals.

52. As regards Article 5 of the OLAF Instructions, the General Court found that they are OLAF internal rules that are intended to ensure that OLAF investigations are conducted logically and consistently. According to the General Court, that provision describes the process for selecting cases and does not in itself confer any rights on individuals. The appellant submits that the internal nature of a rule does not mean that it cannot be a rule conferring rights on individuals. In his view, Article 5 of the OLAF Instructions requires OLAF to observe a number of conditions when it assesses information with a view to the possible opening of an investigation. Those conditions, which create obligations on OLAF, confer rights on the person who is the subject of the investigation.

53. I find the appellant's argument regarding Article 5 of the OLAF Instructions unconvincing. Contrary to the appellant's claims, the General Court did not take as a basis the internal, institution-specific nature of the OLAF Instructions only in order to exclude the possibility that those instructions confer rights on individuals, rather it also examined the content of the rule relied on by the appellant. Such a line of reasoning appears to me to be legally sound.

54. The internal, institution-specific nature of a rule points, in my view, to the fact that that rule does not confer rights on individuals. An internal, institution-specific rule is primarily addressed to the staff of that institution with a view to ensuring the optimal functioning of that institution; it does not therefore, in principle, have any effect beyond the institution.

22 Judgments of 10 July 2003, *Commission* v *ECB* (C-11/00, EU:C:2003:395, paragraph 141), and of 10 July 2003, *Commission* v *EIB* (C-15/00, EU:C:2003:396, paragraph 164).

23 Moreover, Regulation No 883/2013, which repeals and replaces Regulation No 1073/1999, confirms that interpretation, since Article 5 on the opening of investigations now clarifies that investigations are to be opened where there is sufficient suspicion.

55. I am nevetherless of the view that such an indication must be corroborated by a more specific consideration of the content of the provision at issue, which was rightly undertaken by the General Court in the judgment under appeal.[24] Thus, the General Court observed that Article 5 of the OLAF Instructions concerned the process for selecting investigations and, more specifically, the contents of the opinion on whether or not an investigation should be opened. That provision therefore sets out the criteria taken into account by the body in question to that effect as well as the time period within which the opinion must be issued. In other words, the provision primarily intends to offer guidance to OLAF staff with a view to prioritising certain cases so that, as the Commission notes, OLAF's resources can be used effectively. The same provision does not therefore seek to afford procedural guarantees to the individuals concerned and, consequently, does not, in my view, confer on them subjective rights upon which an action for damages may be based.

56. In those circumstances, I take the view that the General Court did not err in law in finding that neither Article 1(1) of Regulation No 1073/1999 nor Article 5 of the OLAF Instructions is a rule intended to confer rights on individuals.

57. The first part of the first ground of appeal must therefore be rejected.

*2. The second part of the first ground of appeal*

58. By the second part of the first ground of appeal, the appellant submits, on the basis of various arguments, that the General Court distorted the facts, infringed the duty to state reasons and erred in law in rejecting the allegation relating to OLAF's breach of the duty to act diligently.

*(a) Distortion of the facts*

59. The appellant claims that, by categorising the period of time between the submission of the complaint to the Director of OLAF and the decision to open the investigation as 'very short', whereas only a few hours had passed, the General Court distorted the facts.

60. Such an argument appears to me unfounded since a period of a few hours can rightly be categorised as 'very short'. The General Court cannot therefore be accused of having distorted the facts in this regard.

*(b) Infringement of the duty to state reasons*

61. The appellant submits that, contrary to the General Court's finding, the 'Investigation – Selection and Review' unit did not examine the complaint and did not gather additional information in that regard.

62. It must, however, be stated that that allegation relates to factual assessments made by the General Court. The appraisal of facts and the assessment of evidence does not, save where they have been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.[25] Since the appellant does not allege in that regard that the General Court distorted facts, it is my view that that argument must be rejected as inadmissible.

24 The internal nature of a rule alone cannot guarantee that that rule is not intended to confer rights on individuals. I am thinking inter alia of the situation in which an internal rule is in fact intended to give concrete expression, within the institution concerned, to a more general provision that confers rights on individuals.

25 Judgments of 28 November 2019, *LS Cable & System* v *Commission* (C-596/18 P, not published, EU:C:2019:1025, paragraph 24), and of 13 February 2020, *Greece* v *Commission (Permanent pasture)* (C-252/18 P, EU:C:2020:95, paragraph 59).

63. In support of that second argument, the appellant also states that, by rejecting the argument that OLAF did not carry out the necessary evaluation of the information received, without explaining why account was not taken of the Supervisory Committee's assessment, the General Court infringed its obligation to state reasons.

64. However, according to settled case-law, the General Court is not required to reply exhaustively to each of the arguments put forward before it by the parties.[26] More specifically, the General Court is not required to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case, provided that the reasoning enables the persons concerned to know why it has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review.[27]

65. That is the case here. The General Court rejected the argument raised before it, namely that OLAF did not carry out the necessary evaluation of the information received, by pointing out, first, that such an evaluation must not be confused with the examination to be conducted as part of the investigation once opened and, second, that, on the basis of the facts presented to it, that evaluation had indeed been carried out by OLAF.

66. In those circumstances, the General Court cannot be accused of having failed to state the reasons for its decision, and therefore that argument must be rejected.

*(c) Error of law*

67. The appellant submits that the General Court erred in law in finding that OLAF had not failed to comply with its duty of diligence because it had carried out a proper and sufficient examination of the elements contained in the complaint before opening the investigation concerning the appellant. He puts forward various arguments in that regard.

68. In the first place, the General Court found that, in the context of the process of selecting investigations, OLAF must ascertain whether the information at its disposal is sufficient, without this requiring an in-depth evaluation of that information however, since those facts must be analysed or established following the investigation.[28] According to the appellant, the General Court erred in law by failing to identify specifically the facts at issue and by not explaining why they could not be assessed at the selection process stage.

69. That argument cannot succeed in my view. The appellant was completely able to identify the points of fact at issue, since he bases that argument of the appeal in part on the General Court's incorrect assessment of those facts. In addition, as the Commission points out, I take the view that the argument that the General Court does not explain why those facts had to form the subject of an in-depth analysis not at the selection process stage but as part of the investigation is in fact intended to call into question the factual assessments made by the General Court. Since such an allegation does not, save where facts have been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal, that argument should be rejected as inadmissible.

26 Order of 19 June 2014, *Donaldson Filtration Deutschland* v *ultra air* (C-450/13 P, EU:C:2014:2016, paragraph 49), and judgment of 14 April 2016, *Netherlands Maritime Technology Association* v *Commission* (C-100/15 P, not published, EU:C:2016:254, paragraph 50).

27 Judgments of 2 April 2009, *Bouygues and Bouygues Télécom* v *Commission* (C-431/07 P, EU:C:2009:223, paragraph 42); of 22 May 2014, *Armando Álvarez* v *Commission* (C-36/12 P, EU:C:2014:349, paragraph 31); and of 26 January 2017, *Villeroy & Boch* v *Commission* (C-625/13 P, EU:C:2017:52, paragraph 72).

28 Judgment under appeal, paragraph 70.

70. In the second place, the appellant claims that the General Court erred in law in finding that OLAF could open an investigation on the basis of information contained in a complaint without conducting checks to establish the credibility of that information, where that information is precise and detailed. In the appellant's view, OLAF must, under the principle of due diligence, examine carefully and impartially the reliability and credibility of the allegations, and the fact that that information was precise and detailed cannot be sufficient to demonstrate that it is reliable and credible.

71. In that regard, although it is true that Regulation No 1073/1999 does not lay down specific conditions for the opening of an investigation, I note that, according to the case-law of the Court, an investigation cannot be opened by OLAF unless there are sufficiently serious suspicions.[29] OLAF does not, therefore, have a discretionary power to decide to open an investigation, but rather enjoys some discretion limited by the condition relating to the existence of sufficiently serious suspicions. In other words, a complaint submitted to OLAF cannot automatically trigger the opening of an investigation, since OLAF must still ensure that the allegations made to it are of a sufficiently serious nature.

72. It then remains to be determined whether such a requirement means that OLAF must systematically conduct checks on the information contained in a complaint or whether, as the General Court observed, in certain circumstances, the information contained in the complaint may be sufficient to establish the sufficiently serious nature of the suspicions and, therefore, to justify the opening of an investigation.

73. That second option should, in my view, be the approach adopted. I am of the opinion that a complaint based on precise and detailed information, as identified by the General Court, is sufficient to bring to light sufficiently serious suspicions and thus to allow an investigation to be opened. In other words, where such information is available, and unless its credibility is clearly in doubt, OLAF should be able to open an investigation.

74. The selection process, which precedes the investigation, should not be confused with the investigation process itself. Whereas the investigation seeks to establish the veracity of the allegations contained in a complaint, the selection process must involve merely a more succinct examination of that information. The checks carried out at that stage cannot therefore prompt OLAF to have to provide a thorough analysis of the information contained in the complaint. In those circumstances, save in cases where the information manifestly appears to be non-credible or insufficient, I am of the view that the sufficiently serious nature of the suspicions which the information brings to light may be established on the basis of precise and detailed information.[30] This argument should therefore be rejected.

75. Lastly, in the third place, the appellant alleges that the General Court erred in law in finding that OLAF was required to examine the possibility of a conflict of interests between the complainant and the appellant only where that conflict is clearly established solely on the basis of the examination of the information communicated to OLAF. Although verifying the existence of sufficiently serious suspicions prior to the opening of an OLAF investigation also involves ensuring that the person initiating the complaint is not in a conflict-of-interest situation, this does not however require OLAF to conduct an in-depth examination of that situation where it is not obvious. Such an examination must be conducted at the investigation stage whereas, at the selection process stage, OLAF merely has

29 Judgments of 10 July 2003, *Commission* v *ECB* (C-11/00, EU:C:2003:395, paragraph 141), and of 10 July 2003, *Commission* v *EIB* (C-15/00, EU:C:2003:396, paragraph 105).

30 Such an interpretation seems to me to be borne out by Article 5 of Regulation No 883/2013 which now specifies the conditions for the opening of an investigation by OLAF. Thus, that provision codifies the case-law on the existence of sufficient suspicions, and states that those suspicions may be based on information provided by any third party *that there has* been fraud, corruption or any other illegal activity affecting the financial interests of the Union. In other words, OLAF is not required, in order to open an investigation procedure, to establish that the information received demonstrates the proven existence of fraud, corruption or any other illegal activity; the existence of such activities has only to be presumed.

to make brief checks, otherwise the investigation and selection stages would be confused. OLAF cannot therefore be criticised for having failed to consider the possibility of a conflict of interests if the existence of such a conflict was not clearly apparent, and therefore the General Court did not err in law in that regard.

76. It follows from all the foregoing that the first ground of appeal should be dismissed.

### *C. The first part of the third ground of appeal*

77. By the first part of the third ground of appeal, the appellant puts forward various arguments by which he seeks to show errors of law in the General Court's reasoning with regard to the gathering of evidence by OLAF.

78. By his first two arguments, the appellant claims that the General Court erred in law in finding that OLAF's objective impartiality had not been compromised by the participation in the investigation of its Director and of a member of a national authority and of the OLAF Supervisory Committee.

79. With regard to the first argument relating to the participation of the Director of OLAF in the investigation, the Commission states that that argument is ineffective as it does not call into question all the grounds put forward by the General Court for ruling out an infringement of the obligation of impartiality by virtue of the participation of the Director of OLAF.

80. That argument appears to me to be incapable of succeeding. The other elements of the General Court's reasoning, to which reference is not made in the appeal and which are set out in paragraph 103 of the judgment under appeal, are not elements which, on their own, allowed the appellant's argument to be rejected, but are rather findings of fact made by the General Court. The General Court's rejection of the argument is based solely on the fact that the role of directing an investigation does not preclude the participation of the Director of OLAF in that investigation.

81. In addition, it should be noted that the General Court's reasoning in that connection must be endorsed. Contrary to the appellant's claim, the fact that Article 6(1) of Regulation No 1073/1999 provides that the Director of OLAF is to direct the conduct of investigations cannot be interpreted as preventing any direct participation on his part in the investigation in the absence of an express provision to that effect. I observe in that regard that the other tasks assigned to the Director of OLAF by the provisions of Regulation No 1073/1999 are likewise incapable of preventing him from participating in an investigation. On the contrary, the fact that the investigation report is drawn up under his authority already indicates some form of participation in the investigation. The same is true of his duty to monitor that the persons acting under his authority are complying with the provisions on the protection of personal data, which suggests some involvement in the conduct of OLAF's investigations. In addition, it is unclear to me how the Director of OLAF could direct an investigation effectively if he were at the same time prevented from participating in all stages of that investigation.

82. In those circumstances, I take the view that the objective impartiality of OLAF could not be called into question by the participation of its Director in an investigation, and therefore the General Court did not err in law in that regard.

83. As regards the second argument relating to the participation in the investigation of a member of the Maltese Anti-Fraud Coordinating Structures (AFCOS), such participation also does not appear to me to call into question OLAF's impartiality. Nothing in Regulation No 1073/1999 requires a strict separation between OLAF and the national authorities in the conduct of investigations. On the contrary, those authorities and OLAF are called upon to conduct cooperative investigations,[31] such

31 Article 6(6), Article 7(2) and Article 9(2) and (3) of Regulation No 1073/1999.

that the participation in the investigation of a member of a national authority cannot call into question OLAF's impartiality, especially where, as the General Court observes, that member did not intervene in the conduct of the interview in which he or she participated. The General Court cannot have erred in law in that regard.

84. The fact that that member of AFCOS is at the same time a member of the OLAF Supervisory Committee appears, prima facie, more problematic. The General Court stated, in this regard, that the presence of a member of the OLAF Supervisory Committee at the hearing of a witness is 'regrettable in view of the role conferred on that committee by Article 11(1) of Regulation No 1073/1999',[32] which provides that the Supervisory Committee is not to interfere with the conduct of investigations in progress. According to the appellant, such participation is proof of OLAF's lack of objective impartiality.

85. I am, however, of the view that the General Court did not err in law in finding that the obligation of impartiality had not been infringed by OLAF despite the presence of a member of the Supervisory Committee at the hearing of a witness. Article 11(1) of Regulation No 1073/1999 does indeed provide that the Supervisory Committee is not to interfere with investigations in progress. Such a requirement means that OLAF can perform its tasks independently. However, it remains the case that the mere presence of a member of the Supervisory Committee at the interview of a witness cannot be regarded as interference by that member in the conduct of the investigation where the member did not in fact participate in the investigation. In addition, the General Court found that the member of the Supervisory Committee in question was present at the interview for the purposes of interpretation and translation. In those circumstances, the view cannot be taken that that member had actually taken part in investigative activities, and therefore the General Court's reasoning must be upheld.

86. By his third argument, the appellant claims that the General Court erred in law in rejecting the argument that the use, collection and storage of the information obtained further to the requests for telephone logs made by OLAF to the Maltese authorities constituted unlawful interference by a public authority in the exercise of the right to private life. In particular, he states that the legal basis relied on by OLAF to request those logs from the Maltese authorities was incorrect and could therefore not justify such interference.

87. However, firstly, although the requests for telephone logs do contain an incorrect reference concerning the provision of Regulation No 1073/1999 on which they are based, the fact remains that it is clear from Article 6(6) of Regulation No 1073/1999 that the national authorities are bound by a more general obligation of sincere cooperation vis-à-vis OLAF's agents in the fulfilment of their task. Thus, the General Court correctly inferred from this that OLAF did indeed have a legal basis to request those logs from the Maltese authorities.

88. Second, even though those logs could not be produced in compliance with Maltese law, it cannot however be inferred from that fact that OLAF must be held responsible for the collection of that information and for the incompatibility of that collection with the law of the Member State concerned, since the collection was carried out by the Maltese authorities.

89. In those circumstances, the General Court was correct to hold that that request by OLAF did not constitute unlawful interference in the appellant's private life, since OLAF could legitimately ask the Maltese authorities for the telephone logs and the incompatibility of those requests with Maltese law cannot be attributed to OLAF.

32 Judgment under appeal, paragraph 105.

90. Finally, by his fourth argument, the appellant submits that the General Court erred in law in finding that, since he was not one of the persons whose conversation was intercepted and recorded, his right to respect for private life and to the confidentiality of communications was not infringed.

91. In that connection, I would point out that the European Union is non-contractually liable for the unlawful conduct of its institutions subject to the satisfaction of a set of conditions, which include the condition relating to the unlawfulness of the conduct of which the institution is accused. That condition requires a sufficiently serious breach of a rule of law intended to confer rights on individuals. [33]

92. Such a condition requires that the protection offered by the rule invoked must be effective vis-à-vis the person who invokes it and that that person must be among those on whom the rule in question confers rights. A rule which does not protect the individual against the unlawfulness invoked by him, but protects another individual, cannot be accepted as a basis for compensation. [34] It follows that the appellant cannot validly rely on unlawfulness arising from the alleged breach of the right to private life of a third party, and therefore the General Court did not err in law in that regard.

93. I am therefore of the view that the first part of the third ground of appeal must be dismissed.

### *D. The fifth ground of appeal*

94. By his fifth ground of appeal, the appellant submits that the General Court committed errors of law and distorted the facts in finding that, by informing the Supervisory Committee the day before the transmission of its report to the Maltese authorities, OLAF had not infringed the obligations under Article 11(7) of Regulation No 1073/1999, which requires the Director of OLAF to inform the Supervisory Committee of the forwarding of information to the judicial authorities of a Member State, and under Article 13(5) of the Rules of Procedure, pursuant to which the Supervisory Committee is to request access to the investigations in question in order to ascertain that fundamental rights and procedural guarantees are being complied with.

95. First, the appellant claims that, after informing the Supervisory Committee of the forwarding of information to the judicial authorities of a Member State, OLAF had to observe a period of five working days before forwarding that information. Although a shorter period of time may be allowed in exceptional circumstances, the agreement of the Supervisory Committee to that effect would, however, be necessary. The General Court therefore erred in law in finding that OLAF enjoyed some discretion as regards the period of time to be observed before information is forwarded to national judicial authorities once the Supervisory Committee has been informed.

96. I note that, although Article 11(7) of Regulation No 1073/1999 provides that the Director of OLAF is to inform the Supervisory Committee of cases requiring information to be forwarded to the judicial authorities, that provision does not however lay down any minimum period of time to be observed before actually forwarding the information concerned. The five-day period to which the appellant refers is stipulated in the transitional working arrangement concluded in September 2012 between OLAF and the Supervisory Committee. That working arrangement states that documents that will be forwarded to national judicial authorities must be communicated to it ‘as a general rule’ five days before being forwarded.

33 See point 46 of this Opinion.

34 Judgment of 3 December 2015, *CN* v *Parliament* (T-343/13, EU:T:2015:926, paragraph 86).

97. It is therefore clear from the wording both of Article 11(7) of Regulation No 1073/1999 and of the transitional working arrangement concluded between OLAF and the Supervisory Committee that OLAF is not required to observe a mandatory period of time in connection with the forwarding of information to the judicial authorities of a Member State. The General Court cannot therefore be criticised for having erred in law in the light of its finding that OLAF enjoyed some discretion with respect to the period of time.

98. It also follows from that fact that, contrary to the appellant's claim, the agreement of the Supervisory Committee to reduce that period of time was not required, since – as the General Court found – such a time period is indicative.

99. Next, the appellant claims that the General Court distorted the facts by taking into account the fact, relied on by the Commission, that the Chair of the Supervisory Committee had been informed of the need for the information to be forwarded to the national judicial authorities rapidly and had given his agreement to its rapid forwarding, even though there is no proof capable of substantiating the Commission's claim.

100. In my view, an argument of this nature must be rejected as ineffective. Since OLAF enjoys some discretion with respect to the period of time to be observed before forwarding information to the judicial authorities, the fact that the Chair of the Security Committee did or did not give his agreement to that information being forwarded rapidly is irrelevant.

101. Lastly, the appellant claims that the General Court erred in law in finding that the information could be forwarded to the judicial authorities before the Supervisory Committee has fulfilled its functions, as defined in its Rules of Procedure.

102. Article 13(5) of the Rules of Procedure does indeed provide that, 'before the information is sent, the Supervisory Committee shall request access to the investigations in question in order to ascertain whether fundamental rights and procedural guarantees are being complied with'. However, as the General Court rightly observes, the Rules of Procedure cannot impose on OLAF obligations not provided for by the legislature, in particular in Regulation No 1073/1999.

103. In addition, it is clear from Article 11 of Regulation No 1073/1999 that the Supervisory Committee regularly monitors OLAF's activities, with a view to reinforcing OLAF's independence,[35] without however interfering with the investigations in progress. The monitoring by the Supervisory Committee must therefore be understood to be systemic monitoring of OLAF's activities.

104. In those circumstances, although Article 11(7) of Regulation No 1073/1999 provides that the Supervisory Committee is to be informed of cases requiring information to be forwarded to judicial authorities, there is however no indication that the information forwarded is subject to review by the Supervisory Committee. Furthermore, such a suspensory nature is contrary to the role of the Supervisory Committee, which conducts systemic monitoring of OLAF's activities.

105. In addition, I note that there is no provision in Regulation No 1073/1999 which allows the Supervisory Committee to object to the forwarding of information to the judicial authorities of a Member State. In those circumstances, the obligation set out in Article 11(7) of Regulation No 1073/1999 must be understood as imposing on the Director merely a duty to provide information, which was fulfilled in the present case.

35 Recital 17 of Regulation No 1073/1999.

106. That interpretation is borne out by analysis of the provisions of Regulation No 883/2013, which now governs matters relating to investigations conducted by OLAF. Point (b) of the third subparagraph of Article 17(5) of that regulation thus provides that the Director is to inform the Supervisory Committee *periodically*, inter alia, of cases in which information *has been transmitted* to judicial authorities of the Member States. It is therefore clear from that provision that the monitoring conducted by the Supervisory Committee is not systematic but systemic and that, in addition, that committee has to be informed only a posteriori of the information which has been transmitted.

107. I thus find it difficult to see how it could be envisaged that, under Regulation No 1073/1999 and pursuant to the provisions of the Rules of Procedure, the obligation to inform the Supervisory Committee may be extended to the point that the forwarding of the information would be subject to a thorough review of that information by the Supervisory Committee.

108. In those circumstances, I take the view that the General Court did not err in law in finding that Article 11(7) of Regulation No 1073/1999 and the provisions of the Rules of Procedure were not breached.

109. The fifth ground of appeal should therefore be dismissed.

### *E. The seventh ground of appeal*

110. I would point out from the outset that this ground of appeal, which relates to the existence of damage suffered by the appellant, should be rejected as ineffective if the Court were to find that all the appellant's claims regarding errors in the General Court's reasoning on unlawfulness in OLAF's conduct were to be rejected.

111. The seventh ground of appeal alleges an error of law and a distortion of the parties' arguments because the General Court found that the appellant had failed to establish that the conduct complained of was, by reason of its gravity, such as to cause him damage.

112. In the first place, the argument relating to the distortion of the application appears to me to be incapable of succeeding. Contrary to the appellant's claim, the General Court did not disregard the evidence adduced by the appellant before it, but rather took the view that that evidence was insufficient to establish that the conduct complained of was such as to cause him damage.

113. In the second place, the appellant relies on an error of law stemming, in his view, from an incorrect definition of non-material damage.

114. In the judgment under appeal, the General Court found that, in order to satisfy the condition relating to the existence of non-material damage, the appellant had, 'at the very least, to prove that the conduct of which [he] complains was, by reason of its gravity, such as to cause [him] damage of that kind',[36] which the appellant failed to demonstrate.

115. It is my view that such an argument is the result of an error of law stemming from a misreading of the case-law relied on by the General Court.

36 Judgment under appeal, paragraph 225.

116. In that regard, I observe that the Court has held that, 'while the submission of evidence is not necessarily regarded as a requirement for the recognition of such harm, it is for the applicant to at least establish that the conduct alleged against the institution concerned was capable of causing him damage'.[37]

117. In the case of non-material damage, the condition relating to the existence of damage can therefore be satisfied in two ways. On the one hand, the appellant may put forward evidence to demonstrate the existence and the extent of non-material damage.

118. On the other hand, even in the absence of such evidence, the condition relating to the existence of damage may be satisfied if the appellant establishes that non-material damage necessarily resulted from the conduct of which he complains. In other words, case-law allows non-material damage to be recognised more easily in the case of certain types of conduct.

119. This is the case, inter alia, as regards unfounded negative assessments relating to the conduct and the professional competences of an official contained in an appraisal report.[38] Similarly, it is recognised in the case-law that, where a person is publicly associated with behaviour regarded as reprehensible on account of an entity's unlawful inclusion in a list of entities subject to restrictive measures, with the result that opprobrium and suspicion are provoked, an association of that kind is such as to cause him or her non-material damage.[39]

120. Whilst seemingly taking that case-law as a basis, the General Court has however departed from it. Rather than finding that certain types of conduct result, by definition, in non-material damage for the individual concerned, the General Court took the view that the conduct complained of had to be, *by reason of its gravity*, such as to cause damage of that kind.

121. However, it is by no means evident from the case-law upon which the General Court relies that the application of that case-law is subject to demonstration by the appellant of the gravity of the conduct at issue. By adding such a condition, the General Court reduced the opportunity of a person who has suffered non-material damage necessarily resulting from the conduct of which he complains from obtaining compensation for that damage. If it were to be followed, the General Court's reasoning would render redundant that case-law, which specifically seeks to facilitate the recognition of non-material damage in the case of certain types of conduct.

122. In addition, such reasoning cannot be easily reconciled with the more general case-law on the conditions governing the non-contractual liability of the European Union, in particular as regards the condition relating to the existence of a breach of a rule of law conferring rights on individuals, a breach which, according to case-law, must be 'sufficiently serious'. The decisive criterion for finding that a breach of EU law is sufficiently serious is that the institution concerned manifestly *and gravely* disregarded the limits set on its discretion.[40]

123. In those circumstances, it is clear that the gravity of the conduct of the institution is already to be evaluated when the existence of a sufficiently serious breach of a rule conferring rights on individuals is examined. Reintroducing the criterion of the gravity of the conduct when the existence of the non-material damage is being examined does not appear to me to be relevant, short of taking the view that certain serious breaches of a rule of law are, in actual fact, of relative gravity.

37 Judgments of 16 July 2009, *SELEX Sistemi Integrati* v *Commission* (C-481/07 P, not published, EU:C:2009:461, paragraph 38); of 16 October 2014, *Evropaïki Dynamiki* v *Commission* (T-297/12, not published, EU:T:2014:888, paragraph 31); and of 29 April 2020, *Tilly-Sabco* v *Council and Commission* (T-707/18, not published, EU:T:2020:160, paragraph 125).

38 Judgment of 13 December 2005, *Cwik* v *Commission* (T-155/03, T-157/03 and T-331/03, EU:T:2005:447, paragraph 206).

39 Judgment of 25 November 2014, *Safa Nicu Sepahan* v *Council* (T-384/11, EU:T:2014:986, paragraphs 82 to 85).

40 Judgments of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 30) and of 10 September 2019, *HTTS* v *Council* (C-123/18 P, EU:C:2019:694, paragraph 33).

124. Accordingly, I take the view that the General Court's reasoning concerning the definition of non-material damage is vitiated by an error of law, such that the seventh ground of appeal should be upheld, provided that it is effective.

125. It follows from the first paragraph of Article 61 of the Statute of the Court of Justice that, if an appeal is well founded, the Court 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.

126. In the present case, the General Court found that that appellant had not suffered non-material damage because he did not establish that the conduct of which he complains was, by reason of its gravity, such as to cause him damage.

127. However, as I have stated in point 124 of this Opinion, such a finding is based on an incorrect criterion in the definition of non-material damage.

128. In order to assess the plea alleging the existence of non-material damage, it is therefore necessary to conduct a fresh assessment of the facts in the light of the case-law identified in this Opinion, in order to determine whether the conduct complained of in the present case is such as to cause non-material damage to the appellant, without it being possible to require that the appellant demonstrate the gravity of that conduct.

129. It follows from the foregoing that the state of the proceedings does not permit judgment to be given by the Court of Justice, and therefore the examination of the action brought by the appellant should be referred back to the General Court for judgment on the plea relating to the existence of non-material damage.

## VII. Conclusion

130. In the light of the foregoing considerations, it is my view that the first ground of appeal, the first part of the third ground of appeal and the fifth ground of appeal should be dismissed.

Subject to the dismissal by the Court of the grounds of appeal relating to the unlawfulness of the conduct of the European Anti-Fraud Office (OLAF), I am of the opinion that the seventh ground of appeal should be dismissed as ineffective.

In the event that the Court were to uphold one of the grounds of appeal relating to the unlawfulness of OLAF's conduct, I take the view that the seventh ground of appeal should likewise be upheld and that, therefore, the action should be referred back to the General Court of the European Union.