



Reports of Cases

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 15 July 2021¹

Case C-351/20 P

Liviu Dragnea

v

European Commission

(Appeal – European Regional Development Fund – Romanian 2007-2013 Regional Operational Programme – Investigations conducted by the European Anti-Fraud Office (OLAF) – Investigation reports – Call for the national anti-corruption authority to open an investigation into embezzlement of EU funds – National investigation procedure – Request for an investigation to be opened into the conduct of previous OLAF investigations – Request to inspect files and access documents – Refusal – Action for annulment – Admissibility)

I. Introduction

1. In order to protect the financial interests of the Union, the European Anti-Fraud Office ('OLAF') has extensive powers of investigation. Regulation (EU, Euratom) No 883/2013 concerning investigations by OLAF² therefore provides for fundamental procedural guarantees for persons under such investigation. They are intended to ensure that their rights are safeguarded during investigative measures by OLAF, it being common ground that such investigations affect the rights of the persons concerned.

2. On the other hand, as far as I can see, the question of whether and, if so, to what extent the final reports prepared by OLAF on completion of its investigations can be challenged before the Courts of the European Union has not yet been clarified definitively. That question can ultimately be left to one side in these appeal proceedings, as it is irrelevant for the purpose of giving judgment in this case. Irrespective of whether the appellant could have challenged the two OLAF reports concerned by this case before the General Court, his action would have been out of time.

¹ Original language: German.

² Regulation 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). That regulation has been amended twice since the investigations at issue here were completed, most recently by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations (OJ 2020 L 437, p. 49). One amendment of interest in these proceedings is discussed below (see points 47 to 49 of this Opinion).

3. However, the question around which these appeal proceedings revolve concerns the associated problem of the grant of access to investigation files to a person who considers himself to be a person concerned by the investigations, but who was not classed as a person concerned within the meaning of Regulation No 883/2013 by OLAF. The main question that arises is how the right of inspection of the files, on the one hand, and the right of access to Commission documents in accordance with Regulation (EC) No 1049/2001,³ on the other hand, interact in this case.

II. Legal background

A. Regulation No 883/2013

4. It follows from Article 1(1) of Regulation No 883/2013 that the aim of the powers of investigation of OLAF is to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union.

5. According to Article 2, point 4, of Regulation No 883/2013, “‘administrative investigations’ (‘investigations’) shall mean any inspection, check or other measure undertaken by [OLAF] in accordance with Articles 3 and 4, with a view to achieving the objectives set out in Article 1 and to establishing, where necessary, the irregular nature of the activities under investigation ...’.

6. According to Article 2, point 5, of Regulation No 883/2013, a ‘person concerned’ by an OLAF investigation means ‘any person or economic operator suspected of having committed fraud, corruption or any other illegal activity affecting the financial interests of the Union and who is therefore subject to investigation by [OLAF]’.

7. Articles 3 and 4 of Regulation No 883/2013 provide for OLAF to conduct external investigations on the spot in the Member States, in third countries and on the premises of international organisations, and internal investigations within the institutions, bodies, offices and agencies of the European Union.

8. Article 5 of Regulation No 883/2013 is entitled ‘Opening of investigations’ and paragraphs 1, 2 and 4 of that article read as follows:

‘1. The Director-General may open an investigation when there is a sufficient suspicion, which may also be based on information provided by any third party or anonymous information, that there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union. The decision by the Director-General whether or not to open an investigation shall take into account the investigation policy priorities and the annual management plan of [OLAF] established in accordance with Article 17(5). That decision shall also take into account the need for efficient use of [OLAF’s] resources and for proportionality of the means employed. With regard to internal investigations, specific account shall be taken of the institution, body, office or agency best placed to conduct them, based, in particular, on the nature of the facts, the actual or potential financial impact of the case, and the likelihood of any judicial follow-up.

³ Regulation of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

2. The decision to open an external investigation shall be taken by the Director-General, acting on his own initiative or following a request from a Member State concerned or any institution, body, office or agency of the Union.

The decision to open an internal investigation shall be taken by the Director-General, acting on his own initiative or following a request from the institution, body, office or agency within which the investigation is to be conducted or from a Member State.

...

4. Within two months of receipt by [OLAF] of a request as referred to in paragraph 2, a decision whether or not to open an investigation shall be taken. It shall be communicated without delay to the Member State, institution, body, office or agency which made the request. Reasons shall be given for a decision not to open an investigation. If, on the expiry of that period of two months, [OLAF] has not taken any decision, [OLAF] shall be deemed to have decided not to open an investigation.

Where an official, other servant, member of an institution or body, head of office or agency, or staff member, acting in accordance with Article 22a of the Staff Regulations, provides information to [OLAF] relating to a suspected fraud or irregularity, [OLAF] shall inform that person of the decision whether or not to open an investigation in relation to the facts in question.'

9. Article 9 of Regulation No 883/2013 lists procedural guarantees for the benefit of persons under investigation by OLAF. Paragraph 4 provides in particular for a person to be given the opportunity to comment before conclusions referring to that person by name are drawn up.

10. Article 11 of Regulation No 883/2013 ('Investigation report and action to be taken following investigations') states that, on completion of an investigation by [OLAF], a report shall be drawn up that gives account in particular of the procedural steps followed, the facts established and their preliminary classification in law and includes any recommendations as to whether or not action should be taken by the EU institutions or the competent authorities of the Member States.

B. Regulation No 1049/2001

11. Article 6 of Regulation No 1049/2001 is entitled 'Applications' and paragraph 1 of that article reads as follows:

'1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.'

12. Article 7 of Regulation No 1049/2001 is entitled 'Processing of initial applications' and paragraphs 1, 2 and 4 of that article read as follows:

'An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for

the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

...

4. Failure by the institution to reply within the prescribed time limit shall entitle the applicant to make a confirmatory application.'

13. Article 8 of Regulation No 1049/2001 is entitled 'Processing of confirmatory applications' and paragraphs 1 and 3 of that article read as follows:

'1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

...

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.'

III. Background to the appeal

A. Procedure before OLAF and contested letter

14. On 10 February 2015, OLAF opened two investigations (OF/2015/0124/B5 and OF/2015/0125/B5) into suspected fraud in relation to two road construction projects awarded by Teleorman County Council, Romania, and financed by the European Regional Development Fund (ERDF) ('the previous investigations').⁴

15. In its final reports on those investigations of 30 May 2016 (OF/2015/0124/B5) and 16 September 2016 (OF/2015/0125/B5), OLAF concluded that two criminal groups had been established and that it was suspected that a large number of documents had been falsified in order to obtain EU funds unlawfully.

16. OLAF also made recommendations to the European Commission to recover the funds and to the Romanian anti-corruption authority to initiate criminal proceedings regarding offences against the financial interests of the Union.

⁴ See, in that regard and with regard to the following points, paragraph 1 et seq. of the disputed order (footnote 6 below of this Opinion).

17. OLAF listed Teleorman County Council as a ‘person concerned’ by the previous investigations within the meaning of Article 2, point 5, of Regulation No 883/2013. However, the appellant, Mr Liviu Dragnea, who was the president of that authority at the time of the acts under investigation, was not listed as a ‘person concerned’.

18. On 13 November 2017, the Romanian anti-corruption authority announced that a criminal investigation had been opened in respect of the appellant, who was accused of fraud relating to the EU budget, setting up a criminal organisation and misuse of his position.

19. On the same day, OLAF also circulated a press release in which it too announced that national criminal proceedings had been initiated against the appellant, who was mentioned by name, and noted the importance of OLAF’s contribution to the opening of the criminal proceedings by the national authorities:

‘The Romanian National Anticorruption Directorate (DNA) has accused Liviu Dragnea, the leader of the Romanian Social Democrat Party (PSD), of fraud with European Union (EU) funds, of creating an organised criminal group, and of misusing his position for personal gain. ...

The contribution of the European Anti-Fraud Office (OLAF) to this outcome has been emphasised by the DNA. The DNA has explained that their case comes as a result of two investigations conducted by OLAF into projects financed by the European Regional Development Fund for road construction in Romania, which were concluded in May and September 2016.

...’⁵

20. On 1 June 2018, the appellant wrote to OLAF criticising the procedure followed by OLAF in the previous investigations and the conclusions reached in the final reports and commenting in detail on certain paragraphs of the reports.

21. By letter of 10 July 2018, OLAF refused to address the matter or to comment on its final reports. It also referred to its general rules of procedure, the case-law of the General Court on the legal nature of final reports, the division of responsibilities between OLAF and the national authorities and the latter’s pending investigations.

22. On 22 August 2018, the appellant wrote to OLAF again challenging the statements made by OLAF in its letter of 10 July 2018 and again criticising the final reports and disputing the legality of the action, the accuracy of the conclusions and OLAF’s legal appraisal. He also complained that OLAF had failed to abide by the rules of procedure. Lastly, the appellant requested that OLAF open an investigation into the conduct of the previous investigations and grant him access to several documents contained in the procedural files relating to those investigations.

23. By letter of 1 October 2018 (‘the contested letter’), OLAF reiterated the views already expressed in its letter of 10 July 2018 and refused the appellant’s request, stating as its reasons, first, that the points raised by him did not justify the opening of an investigation into the conduct of the previous investigations and, second, that, as the appellant was not a person concerned by those investigations, the procedural rights under Article 9(4) of Regulation No 883/2013 did not apply to him. OLAF refused to grant access to the documents requested.

⁵ OLAF Press Release No 16/2017.

B. Proceedings before the General Court and disputed order

24. By pleadings dated 11 December 2018, the appellant lodged an application for annulment of the contested letter with the General Court. He also claimed that the General Court should order the Commission to produce the documents previously requested in the procedure before OLAF.

25. By pleadings dated 6 March 2019, the Commission raised a plea of inadmissibility under Article 130(1) of the Rules of Procedure of the General Court and contended that the action should be dismissed as inadmissible.

26. By pleadings dated 18 April 2019, the appellant claimed that the General Court should dismiss the plea of inadmissibility, examine the substance of the action and grant him access to the documents requested.

27. By order of 12 May 2020, *Dragnea v Commission* ('the disputed order'),⁶ the General Court admitted the Commission's plea of inadmissibility, dismissed the action as inadmissible and ordered the appellant to pay the costs.

28. Although, formally speaking, the forms of order sought by the appellant at first instance aimed at obtaining findings by the General Court, the General Court understood the action as a whole as an action for annulment of the contested letter by which OLAF refused the appellant's requests, first, that it open an investigation into the conduct of the previous investigations and, second, that it grant access to documents.⁷ Following the Commission's plea of inadmissibility, the General Court started by examining the admissibility of the action in so far as it was directed against OLAF's refusal to open an investigation into the conduct of the previous investigations.⁸ It then examined the admissibility of the action in so far as it was directed against the refusal to grant access to the documents requested.⁹ It concluded by finding that both forms of order sought were inadmissible.

IV. Appeal proceedings and forms of order sought by the parties

29. By pleadings dated 30 July 2020, the appellant lodged an appeal against the disputed order. He claims that the Court should set aside the disputed order, declare his action at first instance to be admissible, and find that the Commission had:

- breached Article 9(1), (2) and (4) of Regulation No 883/2013 and infringed his rights of defence, his right to be heard and the presumption of innocence;
- breached the general principle of EU law of sound administration;
- infringed his rights by refusing his request for access to documents.

30. The appellant further claims that the Court of Justice should order evidence to be taken and order the Commission to produce the documents listed in the notice of appeal in the course of the proceedings. Lastly, he claims that the Commission should be ordered to pay the costs.

⁶ T-738/18, not published, EU:T:2020:208.

⁷ Disputed order, paragraphs 14 to 21.

⁸ Disputed order, paragraphs 25 to 55.

⁹ Disputed order, paragraphs 56 to 70.

31. The Commission contends that the Court of Justice should dismiss the appeal as unfounded, dismiss the request that evidence be taken and order the appellant to pay the costs.

V. Appraisal

A. *The appeal*

32. By his appeal, the appellant contests both the findings of the General Court on the admissibility of his action in so far as it was directed against OLAF's refusal to open an investigation into the conduct of the previous investigations (1) and the findings of the General Court on the admissibility of his action in so far as it was directed against the refusal to grant access to the documents requested (2).

1. Admissibility of the action in so far as it was directed against OLAF's refusal to open an investigation into the previous investigations (first ground of appeal)

33. The General Court found that the form of order sought at first instance of annulment of OLAF's refusal to open an investigation into the conduct of the previous investigations was inadmissible for three reasons: first, because Regulation No 883/2013 does not confer on natural or legal persons the right to request that OLAF open an investigation, meaning that the refusal of such a request does not give rise to legal effects and is therefore not a challengeable act;¹⁰ second, because OLAF's final reports are only recommendations or opinions, not challengeable acts, meaning that the refusal of a request that such a report be amended is likewise not challengeable;¹¹ and, third, because, were the contested request to be declared admissible, that would be tantamount to circumvention of the time limit for challenging the final reports, as the application was lodged after the time limit for challenging those reports had expired.¹²

34. The appellant argues that the General Court's finding that his claim that it should annul OLAF's refusal to open an investigation into the conduct of the previous investigations was inadmissible was based, first, on the erroneous assumption that he was not a 'person concerned' by either of those investigations and, second, on the erroneous assumption that OLAF's investigation reports had no fundamental impact on the subsequent national criminal proceedings. He claims that the opposite is true and, therefore, that it would infringe the need for effective legal protection if unlawful investigative measures and procedural infringements on the part of OLAF could only be contested within the framework of an action for damages and not within the framework of an action for annulment.

35. It follows from that line of argument that the appellant's criticism focuses on the statement by which the General Court found, with reference to its settled case-law, that the reports drawn up by OLAF on completion of its investigations are not acts open to review under Article 263 TFEU, as they are only recommendations or opinions which have no binding legal effects.¹³

¹⁰ Disputed order, paragraphs 31 to 36.

¹¹ Disputed order, paragraphs 39 to 41.

¹² Disputed order, paragraphs 43 to 46.

¹³ See, in addition to paragraphs 40 and 41 of the disputed order, the orders of the General Court of 13 July 2004, *Comunidad Autónoma de Andalucía v Commission* (T-29/03, EU:T:2004:235, paragraphs 32 to 40); of 21 June 2017, *Inox Mare v Commission* (T-289/16, EU:T:2017:414, paragraph 14 et seq.); and of 12 July 2018, *TE v Commission* (T-392/17, not published, EU:T:2018:459, paragraphs 22 to 25). See also judgment of the General Court of 23 May 2019, *Remag Metallhandel and Jaschinsky v Commission* (T-631/16, not published, EU:T:2019:352, paragraphs 48 and 49).

36. As far as I can see, the Court of Justice has not yet addressed the question of whether such reports are challengeable acts; it has simply ruled that the transmission of information by OLAF to national authorities does not constitute a challengeable act.¹⁴

37. However, there is no need to discuss further whether OLAF's final reports constitute challengeable acts within the framework of these proceedings. On the contrary, the question of whether or not the case-law of the General Court on the matter is to be upheld can be left to one side for the purposes of these proceedings. That is because, even if OLAF's final reports were challengeable acts, the form of order sought in this case of annulment of OLAF's refusal to open an investigation into the conduct of the previous investigations would be inadmissible.

38. After all, as shown in the disputed order by the General Court, whose findings in that regard have not been called into question in these appeal proceedings, the appellant failed to challenge the final reports on the previous investigations in time. According to these findings, the time limit for lodging an action against those reports expired for the appellant on 12 August 2018, whereas the action at first instance was not lodged until 11 December 2018.¹⁵

39. Certainly, formally speaking, the application at first instance was directed against OLAF's letter of 1 October 2018, by which OLAF refused the appellant's request that it open an investigation into the conduct of the previous investigations, rather than against the final reports on the previous investigations themselves.

40. However, it is settled case-law that an action directed against an act which merely confirms a previous act not challenged within the prescribed period is inadmissible.¹⁶ An act must be assumed to be merely confirmatory if it contains no new factors as compared with the previous act and was not preceded by a review of the situation of the person concerned by the earlier act.¹⁷ An act that constitutes the reply to a request to the authority to reconsider the previous act must be assumed to be merely confirmatory if the request is not based on substantial new facts and the authority does not take a decision on the basis of those facts.¹⁸ Consequently, an applicant who lets the time limit for bringing an action against an act lapse cannot start time running again by asking the institution concerned to reverse the first act and bringing an action against the refusal confirming the previous act.¹⁹

41. That is precisely the situation in the present case, as the appellant's real intention, under the guise of requesting an investigation, was to induce OLAF to question the final reports on the previous investigations.

¹⁴ Order of the President of the Court of Justice of 19 April 2005, *Tillack v Commission* (C-521/04 P(R), EU:C:2005:240, paragraph 34).

¹⁵ Thus, the General Court found that, although the final reports of 30 May and 16 September 2016 (see point 15 of this Opinion) were neither published nor notified to the appellant, it is apparent from the file that he became aware of them not later than 1 June 2018, the date on which he sent OLAF an initial letter challenging their content (see point 20 of this Opinion). Therefore, the time limit for an action against those reports started to run on 2 June 2018 and expired on 12 August 2018 (see disputed order, paragraphs 43 to 46).

¹⁶ See judgments of 15 December 1988, *Irish Cement v Commission* (166/86 and 220/86, EU:C:1988:549, paragraph 16); of 9 December 2004, *Commission v Greencore* (C-123/03 P, EU:C:2004:783, paragraph 39); and of 31 May 2017, *DEI v Commission* (C-228/16 P, EU:C:2017:409, paragraph 35). See also judgment of the General Court of 15 March 1995, *COBRECAF and Others v Commission* (T-514/93, EU:T:1995:49, paragraph 44).

¹⁷ Judgments of 10 December 1980, *Grasselli v Commission* (23/80, EU:C:1980:284, paragraph 180); of 14 September 2006, *Commission v Fernández Gómez* (C-417/05 P, EU:C:2006:582, paragraph 46); and of 31 May 2017, *DEI v Commission* (C-228/16 P, EU:C:2017:409, paragraph 33).

¹⁸ See judgments of the General Court of 15 September 2011, *CMB and Christof v Commission* (T-407/07, not published, EU:T:2011:477, paragraph 91), and of 26 June 2019, *NRW Bank v SRB* (T-466/16, not published, EU:T:2019:445, paragraph 69).

¹⁹ See judgment of the General Court of 15 March 1995, *COBRECAF and Others v Commission* (T-514/93, EU:T:1995:49, paragraph 44).

42. The appellant's request to have an investigation opened was, after all, by no means a request to OLAF to open an investigation into misconduct in the European Union, the Member States or elsewhere in order to protect the financial interests of the Union within the meaning of Regulation No 883/2013. On the contrary, he requested that an investigation be opened into OLAF's own action in the two procedures completed with the final reports.²⁰

43. In terms of content, the appellant confined himself in his letter to OLAF to criticising the latter's conclusions in the final reports and the procedural acts that gave rise to those conclusions, without presenting any substantial new facts. Furthermore, OLAF's replies, especially the contested letter of 1 October 2018, likewise contained no new factors as compared with the final reports of the previous investigations, nor were they preceded by a review of the appellant's situation or a decision by OLAF based on substantial new facts.²¹

44. Aside from the refusal to grant the request to access documents, which is the focus of the second ground of appeal and requires separate examination,²² the contested letter therefore constitutes a purely confirmatory act with regard to the final reports of the previous investigations. Thus, the question as to whether those reports were challengeable can be left to one side. That is because, even if they were, that would be of no help in terms of the admissibility of the action in so far as it was directed against OLAF's refusal to open an investigation into the previous investigations.

45. It is true that the case-law on confirmatory acts primarily concerns cases in which the first act, confirmed by the second act, constituted a challengeable act,²³ what is also linked to considerations in terms of legal protection.²⁴ That is because, if it was perhaps not apparent to a person concerned that a decision gave rise to legal effects for him or her, the fact that it was not challenged in time should not be held against that person. However, that is not the situation in this case.

46. Although it is disputed in this case and no final ruling has been given as to whether OLAF's final reports are challengeable decisions, the appellant, who argues precisely that in this case, should have been aware that, if he wanted to cast doubt on OLAF's conclusions in those reports within the framework of an action for annulment, he could, at best, only do so within the framework of an action directed against those reports themselves or, at the very least, within the time limit for challenging the reports.

47. The fact that the appellant highlighted alleged unlawful procedural acts on the part of OLAF in his request that it open an investigation into the previous investigations does not alter the fact that that request was, at heart, simply a criticism of the final reports on those investigations. Certainly, the idea of opening an investigation into the conduct of OLAF's investigations is not entirely implausible. That is illustrated by the function of a Controller of procedural guarantees

²⁰ As the General Court ultimately found in paragraphs 31 to 36 of the disputed order. Moreover, the finding of the General Court, that natural and legal persons have no right under Regulation No 883/2013 to request that OLAF open an investigation, is not questioned in the appeal and there is no other reason to cast doubt upon it (see, in that regard, Article 5 of Regulation No 883/2013, point 8 of this Opinion).

²¹ See above, points 20 to 23 of this Opinion.

²² See below, point 54 et seq. of this Opinion.

²³ See, for example, judgments of 15 December 1988, *Irish Cement v Commission* (166/86 and 220/86, EU:C:1988:549, paragraphs 11 and 16); of 25 May 1993, *Foyer Culturel du Sart-Tilman v Commission* (C-199/91, EU:C:1993:205, paragraphs 19 to 24); of 9 December 2004, *Commission v Greencore*, C-123/03 P (EU:C:2004:783, paragraphs 40, 45 and 47); and of 31 May 2017, *DEI v Commission* (C-228/16 P, EU:C:2017:409, paragraphs 31 and 36).

²⁴ See, to that effect, judgment of 9 December 2004, *Commission v Greencore* (C-123/03 P, EU:C:2004:783, paragraphs 40, 45 and 47), and judgment of the General Court of 15 March 1995, *COBRECAF and Others v Commission* (T-514/93, EU:T:1995:49, paragraph 44).

independent of OLAF and the facility to lodge a complaint with this Controller regarding OLAF's compliance with those guarantees which was introduced just recently, and thus after the material period in this case, under Regulation 2020/2223 amending Regulation No 883/2013.²⁵

48. Even if that procedure were relevant in this case, complaints similar to those of the appellant would, however, be understood to be directed against the report concluding the procedure.

49. First, the monitoring of procedural guarantees by a Controller introduced recently is, after all, designed to guarantee compliance with procedural rights in an ongoing procedure or at a time when infringements can still be remedied, but no more than one month after the closure of the investigation.²⁶ Second, the complaint procedure before the Controller is explicitly without prejudice to the means of redress available under the Treaties.²⁷

50. In terms of the means of redress available under the Treaties, however, OLAF's procedural acts would most probably have to be classed, at least once a final report is available, as simply preparatory measures against which a complaint would have to be lodged within the framework of an action directed at the report.²⁸ If the final reports should not be classed as challengeable acts, a point that does not have to be examined in this case, those acts on the part of OLAF might be open to judicial review within the framework of an action for damages.²⁹

51. It follows from all the foregoing that the General Court rightly found that, were the action to be declared admissible in so far as it was directed against OLAF's refusal to open an investigation into the conduct of the previous investigations, that would be tantamount to circumvention of the time limit for challenging the final reports.³⁰ OLAF's contested letter did not establish a new time limit for bringing an action, as it was in any event an act that was of a merely confirmatory nature with regard to the final reports.

52. The fact that the General Court did not explicitly rely upon the case-law on confirmatory legal acts and did not examine the confirmatory nature of the contested letter with regard to the final reports does not by any means prevent the Court of Justice from making a finding to that effect. First, the aforesaid finding of the General Court is necessarily and implicitly based on the assumption that the contested letter was of a merely confirmatory nature with regard to the final reports. Second, the Court of Justice is required to examine the admissibility of the action before the General Court of its own motion.³¹ Thus, the Court of Justice may itself examine the

²⁵ See recitals 32 and 33 and Article 1, point 9, of Regulation 2020/2223 (footnote 2 of this Opinion) or Articles 9a and 9b of Regulation No 883/2013, as amended by Regulation 2020/2223. See also, in that regard, the Supervisory Committee established under Article 15 of the original version of Regulation No 883/2013 to regularly monitor the implementation by OLAF of its investigative function, including concerning the application of procedural guarantees. However, the latter acts simply on its own initiative, at the request of the Director-General or at the request of an institution, body, office or agency.

²⁶ Thus, complaints have to be lodged within one month of the complainant becoming aware of the relevant facts that might constitute infringement of procedural guarantees or fundamental rights. In any event, they have to be lodged no more than one month after the closure of the investigation. Complaints in connection with witness interviews or the opportunity to comment have to be submitted before expiry of the time limits available to the person concerned for that purpose (see Article 9b(2) of Regulation No 883/2013, as amended by Regulation 2020/2223).

²⁷ See Article 9b(8) of Regulation No 883/2013, as amended by Regulation 2020/2223.

²⁸ See, in that regard, judgments of 11 November 1981 (*IBM v Commission*, 60/81, EU:C:1981:264, paragraph 10); of 18 March 1997, *Guérin automobiles v Commission* (C-282/95 P, EU:C:1997:159, paragraph 34); and of 26 January 2010, *Internationaler Hilfsfonds v Commission* (C-362/08 P, EU:C:2010:40, paragraph 52).

²⁹ See, to that effect, judgment of the General Court of 8 July 2008, *Franchet and Byk v Commission* (T-48/05, EU:T:2008:257, paragraph 90).

³⁰ See paragraph 43 of the disputed order and point 33 of this Opinion.

³¹ Order of 15 February 2012, *Internationaler Hilfsfonds v Commission* (C-208/11 P, not published, EU:C:2012:76, paragraph 34 and the case-law cited).

confirmatory nature of the contested letter with regard to the final reports, especially as the parties had ample opportunity to comment on the content of those documents both before the General Court and in these proceedings.

53. Therefore, the first ground of appeal should be dismissed, without there being any need to examine the substance of the appellant's arguments alleging that OLAF's final reports are challengeable acts. That is because, if the finding of the General Court that OLAF's final reports do not constitute challengeable acts were vitiated by an error in law, any such error could not, in any event, give rise to annulment of the disputed order, the outcome of which is correct on other legal grounds.³²

2. Admissibility of the action in so far as it was directed against the refusal to grant access to the documents requested (second ground of appeal)

54. The General Court examined the admissibility of the form of order sought at first instance of annulment of OLAF's refusal to grant the appellant access to the documents listed in his letter of 22 August 2018³³ solely and exclusively in the light of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents (see (b) below). However, the question arises as to whether it should also have considered whether the request at issue was admissible in the light of the right of inspection of the files of a person concerned by the OLAF investigations (see (a) below).

(a) Right of inspection of the files

55. The reason given by the General Court for declaring inadmissible the form of order sought by the appellant of annulment of OLAF's refusal to grant him access to the documents requested is surprising.

56. The General Court found, in keeping with the Commission's line of argument, that the appellant's request to access the OLAF documents had been understood and dealt with by OLAF as a request to inspect the files by a person who considered himself to be concerned by the investigations, not as a request regarding public access to documents under Regulation No 1049/2001.

57. Subsequently, the General Court did not conduct any further examination whatsoever of the admissibility of the action in so far as it was directed against the refusal to grant access to the documents requested from the point of view of the right of inspection of the files of a person concerned by an investigation in accordance with Regulation No 883/2013. On the contrary, it focused solely on the question of admissibility from the point of view of Regulation No 1049/2001.

58. In doing so, it found that the action was inadmissible in so far as it was directed against the refusal to grant access to the documents requested, as the appellant failed to make a confirmatory application within the meaning of Article 7(2) of that regulation after OLAF refused his first request, and that OLAF's refusal is not to be regarded as a final negative reply within the meaning of Articles 7 and 8 of that regulation. The General Court dismissed the appellant's argument that OLAF did not inform him of his right to make such a confirmatory

³² See judgments of 2 April 1998, *Commission v Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraphs 47 to 49), and of 29 March 2011, *ThyssenKrupp Nirosta v Commission* (C-352/09 P, EU:C:2011:191, paragraph 136).

³³ See above, point 22 of this Opinion.

application. It found that OLAF cannot be criticised for having omitted to provide that information, as it understood the appellant's request as a request to inspect the files by a person who considered himself to be concerned by the investigations, not as a request regarding public access to documents under Regulation No 1049/2001.³⁴

59. The General Court did not explain, nor is it apparent, why it did not consider whether the action directed against OLAF's refusal to grant the appellant access to the documents requested was admissible as an action directed against the refusal of a request to inspect the files. That is all the more astonishing in that one of the Commission's main arguments in support of the inadmissibility of the application under Regulation No 1049/2001 was in fact that OLAF was entitled to regard the request to access those documents as a request to inspect the files by a person who considered himself to be concerned by an investigation. Having concurred with that line of argument, it would have been only logical for the General Court to have also examined the application in so far as it was directed against OLAF's refusal from the point of view of the right of inspection of the files.

60. Although, in terms of form, the appellant only relied in his application on infringement of the right of access to documents under Article 42 of the Charter of Fundamental Rights of the European Union and Regulation No 1049/2001,³⁵ in terms of content it clearly follows from his line of argument that he was also complaining that OLAF had refused to allow him to inspect the investigation files because it wrongly failed to consider him to be a person concerned. For example, the appellant stated in his application that a person must have access to the file of a procedure that directly concerns that person; that, within the framework of his rights of defence, he has a right of access to the documents in the investigation file that directly affected his rights; that, in particular, every decision concerning his role as president of Teleorman County Council must be made accessible to him; and that, moreover, all manner of correspondence between OLAF and the Romanian anti-corruption authority concerning him has a material impact on his rights.

61. That line of argument implies that the appellant was challenging the refusal by OLAF to grant him access to the documents requested not only in the light of Regulation No 1049/2001, but also in the light of his right of access to the file as a person concerned by an investigation within the framework of Regulation No 883/2013.³⁶ That is because, according to Article 6(1) of Regulation No 1049/2001, the applicant is not obliged to state reasons for the application, whereas the appellant based his request on his standing as a person concerned and his rights of defence. However, the right of inspection of the files is precisely the necessary corollary of the effective exercise of the rights of defence by a person concerned by a measure.³⁷ The fact that the appellant did not explicitly refer to his rights of defence or Article 41 of the Charter of Fundamental Rights is irrelevant. That is because it is for the General Court to apply the appropriate legal characterisation of the facts and arguments presented to it by the parties in accordance with the principle *iura novit curia*.³⁸

³⁴ See paragraphs 63 to 70 of the disputed order.

³⁵ See paragraph 20 of the disputed order.

³⁶ See, with regard to the possibility of implied pleas in law, judgment of 11 March 2020, *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* (C-56/18 P, EU:C:2020:192, paragraph 66 and the case-law cited).

³⁷ See, to that effect, judgment of 13 September 2018, *UBS Europe and Others* (C-358/16, EU:C:2018:715, paragraph 61 and the case-law cited).

³⁸ See, to that effect, judgment of 20 January 2021, *Commission v Printeos* (C-301/19 P, EU:C:2021:39, paragraph 54).

62. Furthermore, the General Court must examine the admissibility of an action of its own motion.³⁹ That being so, the General Court should, at the very least, have considered in this case whether the action, in so far as it was directed against OLAF's refusal to grant the appellant access to the documents requested, was admissible in the light of everyone's right of access to files concerning him or her. This is especially true as the reason given by the General Court for finding the action inadmissible in so far as it was directed against the refusal to grant access to the documents, namely the absence of a confirmatory application and a final negative decision within the meaning of Regulation No 1049/2001, is irrelevant in relation to the right of inspection of the files under Article 41 of the Charter of Fundamental Rights.

63. The disputed order is therefore vitiated by a defect in the statement of reasons.

64. The Court of Justice may raise the matter of a defect in the statement of reasons of its own motion in appeal proceedings,⁴⁰ especially where it concerns the admissibility of the action before the General Court, which is again a matter which the Court of Justice must, where necessary, raise of its own motion.⁴¹

65. Furthermore, it follows from the appellant's submissions in these proceedings that he is alleging, albeit implicitly, violation of his right of inspection of the files as a person concerned by an investigation within the framework of Regulation No 883/2013. Although, in terms of form, his second ground of appeal is based on infringement of Regulation No 1049/2001, which is certainly due in part to the fact that the General Court focused on that regulation, he claims, in terms of content, that access to the documents used during the course of the investigations is a question of rights of defence, as the investigations clearly concerned him and were even primarily directed towards him.

66. Thus, the disputed order should be annulled in that the General Court dismissed the action in so far as it was directed against the refusal to grant access to the documents requested without examining whether the action was admissible in the light of the right of inspection of the files of a person concerned.

(b) Regulation No 1049/2001

67. As far as Regulation No 1049/2001 is concerned, as stated previously, the General Court found the application to be inadmissible in so far as it was directed against OLAF's refusal to grant the appellant access to the documents requested. According to the General Court, OLAF's refusal at issue in the contested letter of 1 October 2018⁴² cannot be regarded as final refusal of an application to access documents in accordance with Articles 7 and 8 of that regulation.⁴³

68. First, the Court found that the appellant had relied solely and exclusively in his letter of 22 August 2018⁴⁴ on Regulation No 883/2013 and that his request referred to documents in connection with OLAF investigations that allegedly concerned him.

³⁹ See judgment of 29 April 2004, *Italy v Commission* (C-298/00 P, EU:C:2004:240, paragraph 35).

⁴⁰ See judgment of 20 December 2017, *EUIPO v European Dynamics Luxembourg and Others* (C-677/15 P, EU:C:2017:998, paragraph 36 and the case-law cited).

⁴¹ See order of 5 September 2013, *ClientEarth v Council* (C-573/11 P, not published, EU:C:2013:564, paragraph 20).

⁴² See above, point 23 of this Opinion.

⁴³ See above, points 57 and 58 of this Opinion and paragraphs 63 to 70 of the disputed order.

⁴⁴ See above, point 22 of this Opinion.

69. Second, it found that he had not made a confirmatory application to OLAF for access to documents in accordance with Article 7(2) of Regulation No 1049/2001; that, contrary to the appellant's contentions, OLAF cannot be criticised for not having informed him, in accordance with paragraph 1 of that article, of his right to make a confirmatory application; and that OLAF was, after all, entitled to regard his request as a request to access procedural files and not as an initial application within the meaning of Articles 6 and 7 of Regulation No 1049/2001.

70. The appellant takes the view that the legal interpretation by the General Court is not in keeping with Regulation No 1049/2001; that Article 6 of that regulation does not impose any additional requirements for an application to access documents other than the need for the application to be made in one of the EU languages and in a sufficiently precise manner to enable the institution to identify the document; that his request in his letter of 22 August 2018 fulfilled those requirements, meaning that OLAF was obliged under Article 7(1) of Regulation No 1049/2001 to inform him of his right to make a confirmatory application in accordance with paragraph 2 of that article, which it failed to do; and that, therefore, the refusal of his request in the contested letter must be regarded as a final negative decision, against which the action for annulment is admissible.

71. That argument must be accepted.

72. It is correct that the procedure for access to Commission documents is carried out in two stages. The response to an initial application within the meaning of Article 7(1) of Regulation No 1049/2001 is therefore, in principle, only a first opinion which, in principle, cannot be subject to an appeal.⁴⁵ However, exceptionally, where the Commission adopts a definitive position in such a response, the response may be directly subject to an action for annulment.⁴⁶

73. Contrary to the view expressed by the General Court in paragraph 69 of the disputed order, it follows from the circumstances of this case that OLAF's response in the contested letter to the request for access to the documents was to be regarded as definitive. By contrast to the Commission's contention, this question does not, moreover, concern the appraisal of the facts by the General Court; it concerns their classification for legal purposes, which may be raised in appeal proceedings.⁴⁷

74. According to the case-law, the two-stage procedure introduced under Regulation No 1049/2001 is designed to enable the Commission to take swift decisions on access to documents and, where appropriate, to review negative decisions. The main purpose of this is to prevent subsequent disputes.⁴⁸ However, that two-stage procedure only makes sense if the Commission truly wishes to keep open its option to amend the initial negative decision. It expresses that intention by advising the applicant of his or her right to make a confirmatory application in accordance with Article 7(2) of Regulation No 1049/2001. Consequently, the

⁴⁵ Order of 15 February 2012, *Internationaler Hilfsfonds v Commission* (C-208/11 P, not published, EU:C:2012:76, paragraph 30), and judgment of 2 October 2014, *Strack v Commission* (C-127/13 P, EU:C:2014:2250, paragraph 36).

⁴⁶ See, to that effect, judgments of 26 January 2010, *Internationaler Hilfsfonds v Commission* (C-362/08 P, EU:C:2010:40, paragraphs 58 to 62), and of 2 October 2014, *Strack v Commission* (C-127/13 P, EU:C:2014:2250, paragraph 36).

⁴⁷ Judgment of 23 November 2017, *Bionorica and Diapharm v Commission* (C-596/15 P and C-597/15 P, EU:C:2017:886, paragraph 55).

⁴⁸ Judgment of 26 January 2010, *Internationaler Hilfsfonds v Commission* (C-362/08 P, EU:C:2010:40, paragraphs 53 and 54).

General Court has already ruled in previous judgments that an action directed against refusal of the initial application for access to documents is admissible where no such advice was given,⁴⁹ as that expresses the fact that the refusal was definitive.

75. The fact that, according to the analysis of the General Court, the appellant was not advised that he could make a confirmatory application because OLAF understood the request as a request to inspect the files is irrelevant.

76. That is because, as the appellant has correctly shown, Regulation No 1049/2001 does not impose any additional requirements for an application to access documents other than the need for the application to be made in one of the EU languages and in a sufficiently precise manner to enable the institution to identify the document. Therefore, there is no need for the applicant to base his or her application explicitly on Regulation No 1049/2001. On the contrary, the institutions concerned by that regulation must be aware that EU law has established a general right of access to documents based on the rules of precisely that regulation. That means that every application to access documents potentially falls within its scope and any refusal is to be measured against the exemptions provided for. The fact that a request to access documents is made in connection with a procedure subject to a different set of rules (in this case Regulation No 883/2013) does not prevent that request from falling within the scope of Regulation No 1049/2001.⁵⁰

77. Therefore, an EU institution subject to that regulation must advise the applicant of his or her right to make a confirmatory application, pursuant to Article 7(2), if it wishes to keep its option open to reconsider its refusal of a request to access documents. Otherwise, it must accept that its refusal is definitive and directly open to judicial review.

78. Were an action directed against a negative decision to be inadmissible because of the lack of a confirmatory application even without any such advice, that might for the rest create an incentive for abusively omitting to advise of legal remedies. That incentive would be particularly marked in politically sensitive cases such as this.

79. Thus, it should have been assumed in this case that OLAF had adopted a definitive negative position in the contested letter on the appellant's request to access documents, which could therefore be directly subject to an action for annulment. The General Court therefore committed an error in law in declaring inadmissible the form of order sought by the appellant of annulment of OLAF's refusal to grant him access to certain documents.

⁴⁹ Judgments of the General Court of 9 September 2009, *Brink's Security Luxembourg v Commission* (T-437/05, EU:T:2009:318, paragraphs 74 and 75); of 23 January 2017, *Justice & Environment v Commission* (T-727/15, not published, EU:T:2017:18, paragraph 14); of 11 December 2018, *Arca Capital Bohemia v Commission* (T-440/17, EU:T:2018:898, paragraph 20); and of 11 December 2018, *Arca Capital Bohemia v Commission* (T-441/17, not published, EU:T:2018:899, paragraph 19).

⁵⁰ See, for example, judgments of 28 June 2012, *Commission v Éditions Odile Jacob* (C-404/10 P, EU:C:2012:393), and *Commission v Agrofert Holding* (C-477/10 P, EU:C:2012:394), and of 27 February 2014, *Commission v EnBW Energie Baden-Württemberg* (C-365/12 P, EU:C:2014:112).

3. *Interim conclusion*

80. It follows from all the foregoing that the disputed order should be annulled in that it declared inadmissible the appellant's action in so far as it was directed against OLAF's refusal to grant him access to certain documents. *Per contra*, the General Court rightly dismissed the action as inadmissible in so far as it was directed against OLAF's refusal to open an investigation into the conduct of the previous investigations.⁵¹

B. Referral of the case back to the General Court

81. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, after quashing the decision of the General Court, 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.

82. The question of referral of the case back to the General Court only arises in this case with regard to the form of order sought of annulment of OLAF's refusal to grant the appellant access to certain documents.

83. In that regard, the state of the proceedings is such that the Court can itself give final judgment on the admissibility of the form of order sought. That is because it follows from examination of the second ground of appeal that that form of order sought is admissible.

84. First, that examination has shown that OLAF's refusal of the request to access documents is a definitive negative decision in accordance with Articles 7 and 8 of Regulation No 1049/2001, by which OLAF adopted its definitive position and which can therefore be directly subject to an action for annulment.⁵²

85. Second, although it follows from that examination that the General Court did not, for its part, consider whether the action in so far as it was directed against OLAF's refusal to grant the appellant access to certain documents was admissible in the light of the right of a person concerned by an OLAF investigation to inspect the files,⁵³ there does not, nonetheless, appear to be any reason why the action should be inadmissible in that regard.

86. Thus, the appellant relied in his application at first instance, albeit implicitly, on his right of inspection of the files⁵⁴

87. It is true that not only the answer to the question of whether the appellant can obtain access to the files of the previous investigations within the framework of the right of inspection of the files, but also the answer to the question of whether the refusal to grant access to those files gives rise to any legal effects for him and is therefore a challengeable act depend upon whether he is to be regarded as a person concerned by those files, which OLAF denied. However, the examination of the parties' arguments on those points goes to the merits of the action in so far as it was directed against the refusal of the request to inspect the files or is, at the very least, so closely bound up with it that it cannot be answered within the framework of the examination of its admissibility.

⁵¹ See above, points 51 to 53 of this Opinion.

⁵² See above, points 73 to 79 of this Opinion.

⁵³ See above, points 57 and 59 of this Opinion.

⁵⁴ See above, points 60 and 61 of this Opinion.

88. The admissibility of the action in so far as it was directed against the refusal to allow inspection of the files cannot, in any event, be denied for the reason that it is tantamount to circumvention of the time limit for initiating an action challenging the final reports,⁵⁵ as it is necessary to examine in that context whether the appellant was wrongly not classed as a ‘person concerned’ by the reports within the meaning of Article 2, point 5, of Regulation No 883/2013.

89. Aside from the fact that the question of whether those reports can be challenged by an action for annulment is disputed and has not been clarified definitively,⁵⁶ it must, after all, be possible for the right of inspection of the files of a person (allegedly) concerned by an OLAF investigation to be exercised in any event, irrespective of whether that person has (possibly successfully) challenged the final report of an investigation. That is because it is perfectly possible that the need for the request to access the files of an OLAF investigation arises only after that person became aware of the investigation report, rather than at that time, especially as a result of the conclusions drawn by the national authorities from the results of the OLAF investigation and the measures taken by them on that basis, or within the framework of an action for damages.

90. Consequently, it cannot be argued to the appellant’s detriment, when examining his right of inspection of the files, that his argument according to which OLAF wrongly failed to class him as a ‘person concerned’ is precluded.

91. Lastly, nor can it be assumed that it is immaterial whether the application for annulment of the refusal by OLAF to grant the applicant access to the documents requested is examined in the light of Regulation No 1049/2001 or in the light of everyone’s right of access to the file of a procedure concerning him or her. That is because each of those two regulations has a different thrust. Thus, the right of every EU citizen to access documents is intended to create as wide a right of access as possible to EU documents for the general public,⁵⁷ whereas the right of access to files forms part of the rights of defence of a person concerned by a decision, both during and on completion of the procedure.⁵⁸

92. Thus, it may very well be that the outcome of the examination of the question of whether an applicant is granted access to a particular document differs depending on the legal basis on which it is examined. For example, it is perfectly conceivable that the exception to protect the purpose of inspections, investigations and audits in Article 4(2) of Regulation No 1049/2001, that would otherwise justify refusal of an application to access documents within the meaning of that regulation, cannot be held against an applicant who has made an application to access the files concerning him or her and has successfully argued that he or she is a person concerned. Conversely, it is conceivable that a person who fails to show that he or she is a person concerned by an investigation can nonetheless obtain access to certain documents in the investigation file via the general right of access to documents.

⁵⁵ The application at first instance was lodged after expiry of that time limit in this case, see above, point 38 of this Opinion.

⁵⁶ See above, points 35 and 36 of this Opinion.

⁵⁷ See judgment of 27 February 2014, *Commission v EnBW Energie Baden-Württemberg* (C-365/12 P, EU:C:2014:112, paragraph 61 and the case-law cited).

⁵⁸ See, to that effect, judgment of 13 September 2018, *UBS Europe and Others* (C-358/16, EU:C:2018:715, paragraph 61 and the case-law cited), and my Opinion in *UBS Europe and Others* (C-358/16, EU:C:2017:606, point 80 and the case-law cited).

93. It follows from all the foregoing that the Court of Justice can dismiss the Commission's plea of inadmissibility of the form of order sought of annulment of OLAF's refusal to grant the appellant access to certain documents. The case should be referred back to the General Court for judgment as to whether that request is well founded both in the light of the right of inspection of the file and in the light of Regulation No 1049/2001.

94. Thus, there is no need to rule on the appellant's claim that the Court should order evidence to be taken.⁵⁹

VI. Costs

95. According to Article 184(2) of the Rules of Procedure of the Court of Justice, where an appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Article 138(3) of the Rules of Procedure, applicable to proceedings on appeal under Article 184(1) of those rules, provides that, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may also order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

96. In the present case, the appeal is indeed dismissed on the one hand, in so far as it concerns the action against OLAF's refusal to open an investigation into the conduct of the previous investigations, and the disputed order is upheld in so far as it dismissed as inadmissible the form of order sought on that head.

97. On the other hand, the appeal is admitted in so far as the action was directed against OLAF's refusal to grant the appellant access to certain documents, the plea of inadmissibility raised by the Commission with regard to that form of order sought is dismissed and the case is referred back to the General Court for judgment on precisely that form of order sought. Furthermore, it followed from the examination of the second ground of appeal that the Commission's approach was not constructive, as its plea of inadmissibility was vitiated by the same contradiction as the line of argument followed by the General Court.⁶⁰

98. In the light of these circumstances, it would appear to be appropriate to order the Commission to pay both the costs incurred by it in these proceedings and in the proceedings at first instance relating to the plea of inadmissibility and half the costs incurred by the appellant in these proceedings and in the proceedings at first instance relating to the plea of inadmissibility.

99. In return, the appellant should be ordered to pay half the costs incurred by him in these proceedings and in the proceedings at first instance relating to the plea of inadmissibility.

100. Costs should be reserved as to the remainder.⁶¹

⁵⁹ See above, point 30 of this Opinion.

⁶⁰ See points 56 and 59 of this Opinion.

⁶¹ See, to that effect, judgment of 26 January 2010, *Internationaler Hilfsfonds v Commission* (C-362/08 P, EU:C:2010:40, paragraph 69).

VII. Conclusion

101. On the basis of the above considerations, I propose that the Court:

- (1) annul the order of the General Court of the European Union of 12 May 2020, *Dragnea v Commission* (T-738/18, not published, EU:T:2020:208), in so far as it dismissed as inadmissible the form of order sought of annulment of the refusal of the European Anti-Fraud Office (OLAF) to grant Mr Liviu Dragnea access to certain documents and ordered Mr Dragnea to pay the costs;
- (2) dismiss the plea of inadmissibility raised by the European Commission before the General Court of the European Union, in so far as it was directed against the form of order sought of annulment of OLAF's refusal to grant Mr Dragnea access to certain documents;
- (3) refer the case back to the General Court of the European Union for judgment on that form of order sought of annulment of OLAF's refusal to grant Mr Dragnea access to certain documents;
- (4) dismiss the appeal as to the remainder;
- (5) order the Commission to pay the costs incurred by it in these proceedings and in the proceedings at first instance relating to the plea of inadmissibility and half the costs incurred by Mr Dragnea in these proceedings and in the proceedings at first instance relating to the plea of inadmissibility;
- (6) order Mr Dragnea to pay half the costs incurred by him in the present proceedings and in the proceedings at first instance relating to the plea of admissibility;
- (7) reserve the costs as to the remainder.