JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

8 July 2008 *

In Case T-48/05,

Yves Franchet, a former official of the Commission of the European Communities, residing in Nice (France),

Daniel Byk, an official of the Commission of the European Communities, residing in Luxembourg (Luxembourg),

represented by G. Vandersanden and L. Levi, lawyers,

applicants,

v

* Language of the case: French.

Commission of the European Communities, represented by J.-F. Pasquier, acting as Agent,

defendant,

APPLICATION for compensation for the material and non-material damage alleged to have been sustained as a consequence of the errors alleged to have been committed by the Commission and OLAF in the investigations into the 'Eurostat' case,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, V. Tiili (Rapporteur) and T. Tchipev, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 3 October 2007,

gives the following

Judgment

Legal framework

1 The European Anti-Fraud Office (OLAF), established by Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 (OJ 1999 L 136, p. 20), is responsible, in particular, for carrying out internal administrative investigations within the institutions intended to investigate serious facts linked to the performance of professional activities which may constitute a breach of obligations by officials and servants of the Communities likely to lead to disciplinary and, in appropriate cases, criminal proceedings.

2 Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by OLAF (OJ 1999 L 136, p. 1) governs the inspections, checks and actions undertaken by OLAF's agents in the exercise of their duties. The investigations conducted by OLAF consist of 'external' investigations, that is to say, those carried out outside the Community institutions, and 'internal' investigations, that is to say, those carried out within those institutions.

3 Recital 10 in the preamble to Regulation No 1073/1999 provides:

'… these investigations must be conducted in accordance with the Treaty and in particular with the Protocol on the [P]rivileges and [I]mmunities of the European

Communities, while respecting the Staff Regulations of officials and the conditions of employment of other servants of the European Communities … and with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value; … to that end the institutions, bodies, offices and agencies must lay down the terms and conditions under which such internal investigations are conducted; … consequently the Staff Regulations should be amended in order to lay down the rights and obligations of officials and other servants as regards internal investigations'.

4 Recital 13 in the preamble to Regulation No 1073/1999 provides:

'… it is for the competent national authorities or the institutions, bodies, offices or agencies, as the case may be, to decide what action should be taken on completed investigations on the basis of the report drawn up by [OLAF]; … it should nevertheless be incumbent upon the Director of [OLAF] to forward directly to the judicial authorities of the Member State concerned information acquired by [OLAF] in the course of internal investigations concerning situations liable to result in criminal proceedings'.

5 Article 4 of Regulation No 1073/1999 is worded as follows:

'Internal investigations

1. In the areas referred to in Article 1, [OLAF] shall carry out administrative investigations within the institutions, bodies, offices and agencies …

These internal investigations shall be carried out subject to the rules of the Treaties, in particular the Protocol on [the P]rivileges and [I]mmunities of the European Communities, and with due regard for the Staff Regulations under the conditions and in accordance with the procedures provided for in this Regulation and in decisions adopted by each institution, body, office and agency. The institutions shall consult each other on the rules to be laid down by such decisions.

…

5. Where investigations reveal that a member, manager, official or other servant may be personally involved, the institution, body, office or agency to which he belongs shall be informed.

In cases requiring absolute secrecy for the purposes of the investigation or requiring recourse to means of investigation falling within the competence of a national judicial authority, the provision of such information may be deferred.

…'

6 Under Article 6(5) of Regulation No 1073/1999:

'Investigations shall be conducted continuously over a period which must be proportionate to the circumstances and complexity of the case.'

7 Article 8 of Regulation No 1073/1999, entitled 'Confidentiality and data protection', is worded as follows:

'1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.

2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities.

Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.

3. The Director shall ensure that [OLAF]'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. [OJ 1995 L 281, p. 31].

4. The Director of [OLAF] and the members of the Supervisory Committee referred to in Article 11 shall ensure that this Article and Articles 286 [EC] and 287 [EC] are applied.'

8 Article 9 of Regulation No 1073/1999, entitled 'Investigation report and action taken following investigations', provides:

'1. On completion of an investigation carried out by [OLAF], the latter shall draw up a report, under the authority of the Director, specifying the facts established, the financial loss, if any, and the findings of the investigation, including the recommendations of the Director of [OLAF] on the action that should be taken.

2. In drawing up such reports, account shall be taken of the procedural requirements laid down in the national law of the Member State concerned. Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports.

3. Reports drawn up following an external investigation and any useful related documents shall be sent to the competent authorities of the Member States in question in accordance with the rules relating to external investigations.

4. Reports drawn up following an internal investigation and any useful related documents shall be sent to the institution, body, office or agency concerned. The institution, body, office or agency shall take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant, and shall report thereon to the Director of [OLAF], within a deadline laid down by him in the findings of his report.'

9 Article 10 of Regulation No 1073/1999, entitled 'Forwarding of information by [OLAF]', provides:

'1. Without prejudice to Articles 8, 9 and 11 of this Regulation and to the provisions of Regulation (Euratom, EC) No 2185/96, [OLAF] may at any time forward to the competent authorities of the Member States concerned information obtained in the course of external investigations.

2. Without prejudice to Articles 8, 9 and 11 of this Regulation, the Director of [OLAF] shall forward to the judicial authorities of the Member State concerned the information obtained by [OLAF] during internal investigations into matters liable to result in criminal proceedings. Subject to the requirements of the investigation, he shall simultaneously inform the Member State concerned.

3. Without prejudice to Articles 8 and 9 of this Regulation, [OLAF] may at any time forward to the institution, body, office or agency concerned the information obtained in the course of internal investigations.'

10 Article 11 of Regulation No 1073/1999, entitled 'Supervisory Committee', provides:

'1. The Supervisory Committee shall reinforce [OLAF]'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 [OLAF], without however interfering with the conduct of investigations in progress.

...

7. The Director shall forward to the Supervisory Committee each year [OLAF]'s programme of activities referred to in Article 1 of this Regulation. The Director shall keep the committee regularly informed of [OLAF]'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.

...'

11 The second and third subparagraphs of Article 12(3) of Regulation No 1073/1999 provide:

'The Director shall report regularly to the European Parliament, the Council, the Commission and the Court of Auditors on the findings of investigations carried out by [OLAF], whilst respecting the confidentiality of those investigations, the legitimate rights of the persons concerned and, where appropriate, national provisions applicable to judicial proceedings.

The above institutions shall ensure that the confidentiality of the investigations conducted by [OLAF] is respected, together with the legitimate rights of the persons concerned, and, where judicial proceedings have been instituted, that all national provisions applicable to such proceedings have been adhered to.'

12 Commission Decision 1999/396/EC, 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) prescribes in Article 4 the procedure for informing the interested party, in the following terms:

'Where the possible implication of a Member, official or servant of the Commission emerges, the interested party shall be informed rapidly as long as this would not be harmful to the investigation. In any event, conclusions referring by name to a Member, official or servant of the Commission may not be drawn once the investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him.

In cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority, compliance with the obligation to invite the Member, official or servant of the Commission to give his views may be deferred in agreement with the President of the Commission or its Secretary-General respectively.'

13 Under Article 2 of the Rules of Procedure of OLAF's Supervisory Committee (OJ 2000 L 41, p. 12), entitled 'Compliance with the law':

'The Committee shall ensure that OLAF activities are conducted in full compliance with human rights and fundamental freedoms and in accordance with the Treaties and with secondary legislation, including the Protocol on the Privileges and Immunities of the European Communities and the Staff Regulations of officials.'

14 Under Article 14(1) to (3) of the Rules of Procedure of OLAF's Supervisory Committee:

'1. Meetings of the Supervisory Committee shall not be held in public. Its proceedings, and documents of any description giving rise to those proceedings, shall be confidential, unless the Supervisory Committee decides otherwise.

2. Documents and information submitted by the Director of OLAF shall be subject to the provisions of Article 287 [EC] on the protection of confidentiality.

3. The Supervisory Committee shall act on the basis of documents and draft opinions, reports, or decisions.'

15 Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, concerning the right to a fair trial, provides:

'…

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

…'

16 The Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1; 'the Charter), provides:

'*Article 41*

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

— the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

— the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

— the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

…

Article 48

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.'

Facts

17 The applicants, Mr Yves Franchet and Mr Daniel Byk, are, respectively, the former Director-General and the former Director of Eurostat (Statistical Office of the European Communities).

18 A number of Eurostat internal audits revealed possible irregularities in its financial management. Consequently, OLAF initiated a number of investigations concerning, in particular, the contracts concluded by Eurostat with Eurocost, Eurogramme, Datashop, Planistat and CESD Communautaire and the subsidies granted to those companies.

19 On 4 July 2002, OLAF forwarded to the Luxembourg judicial authorities a file relating to the investigation concerning Eurocost and another file relating to the investigation concerning Eurogramme.

20 On 13 November 2002, Mr Franchet wrote to the Director-General of OLAF, in the following terms:

'…

I learn from Cocobu that you have provided them with information concerning the files which you had sent to the Luxembourg judicial authorities and which I do not have; I read in the magazine *Stern* that you have identified "a whole series of cases" in Eurostat, in respect of which your services have communicated nothing to me.

…'

21 On 13 March 2003, the Parliament adopted a resolution concerning the Eurostat case.

22 On 19 March 2003, the Director-General of OLAF sent the French judicial authorities a letter concerning the 'Forwarding of information relating to matters liable to be characterised as criminal CMS No IO/2002/0510 — Eurostat/Datashop/Planistat' ('the letter of 19 March 2003'), together with a note by two OLAF investigators, addressed on the same date to the Director-General of OLAF, concerning 'Denouncement of matters liable to be characterised as criminal CMS No IO/2002/0510 — Eurostat/Datashop/Planistat' ('the note of 19 March 2003').

23 On 3 April 2003, the Director-General of OLAF sent a summary note for the attention of the Secretary-General of the Commission concerning the ongoing investigations relating to Eurostat.

24 On 19 May 2003, the applicants requested the Commission to provide 'assistance pursuant to Article 24 of the Staff Regulations to preserve [their] reputation and [their] rights of defence vis-à-vis those at the origin of, and those responsible for spreading, that inaccurate information' and asked to be relieved of their duties in order to be able to ensure their defence.

25 On 21 May 2003, the applicants were transferred at their own request.

26 On 26 May 2003, the applicants sent two letters to the Director-General of OLAF and requested, in particular, to be informed 'as soon as possible of the complaints and charges drawn up by OLAF' concerning them in order to ensure respect for the rights

of the defence in the context of the hearings set for the end of June 2003. They thus sought access to the entire file. They emphasised that they had not been informed, or been heard, before the files were forwarded to the national judicial authorities. They further stated that 'it also appear[ed] obvious that confidential matters ha[d] been leaked to the press by OLAF, those leaks having been, where appropriate, intentionally organised in the context of a campaign of denigration and accusation by Eurostat, or indeed by other highly placed persons within the Commission'.

27 On the same date, the applicants also sent two letters to OLAF's Supervisory Committee informing it that they had learned from the press that OLAF had handed over to the national judicial authorities a file containing charges referring to 'offences of misappropriation, receiving misappropriated funds and forming a criminal association', that they had never been heard by OLAF and that leaks had taken place. They requested the Supervisory Committee to 'rule on the unacceptable conduct of OLAF, which ha[d] either organised those leaks or ha[d] failed to take all necessary measures to avoid them, thus incurring full liability towards [the applicants] … and, furthermore, to ensure that their fundamental rights would henceforth be fully respected'.

28 On 26 May 2003, the applicants again sent two letters, to the Secretary-General of the Commission and to a Director-General of the Commission respectively, requesting the Commission to specify the terms of the assistance which it had undertaken to afford them. They also requested that they be able to consult any material relating to the OLAF file that might be at the Commission's disposal.

29 On 5 June 2003, the applicants approached the Director-General of OLAF and requested access to the file before the hearings set for the end of June 2003.

30 On 11 June 2003, the Commission instructed its Internal Audit Service ('the IAS') to examine contracts concluded and subsidies granted by Eurostat in the context of the monitoring of the budget discharge procedure. The IAS prepared three reports, the first dated 7 July, the second dated 24 September and the third dated 22 October 2003.

31 In June and July 2003, the Committee on Budgetary Control of the Parliament (Cocobu) met and exchanged views on the Eurostat case with, among others, certain Members of the Commission.

32 On 18 June 2003, the applicants again approached the Director-General of OLAF, emphasising that the 'right to be heard presume[d] that the person concerned be informed of the complaints against him and that he would have access to the file' and pointing out that the hearings set for the end of June would therefore be unable to take place properly. They stated that '[w]hen access to the file [could] be achieved and when counsel and their clients [could] have sufficient time to examine the evidence, the hearings [could] continue'.

33 On 23 June 2003, at a first hearing by OLAF, Mr Franchet lodged a preliminary statement with a legal memorandum relating to the rights of the defence. On 25 and 26 June 2003, he was heard by OLAF concerning the Eurocost case. On 26 and 27 June 2003, he was heard concerning the Datashop and Planistat cases and, on 2 July 2003, concerning the CESD Communautaire case.

34 On 1 July 2003, Mr P., a Head of Unit in the Secretariat-General of the Commission, sent a note for the attention of the Members of the Commission concerning the Cocobu meeting and also the exchange of views with the Secretary-General of the Commission and the Director-General of OLAF on 30 June 2003.

35 On 3 and 4 July 2003, Mr Byk was heard by OLAF concerning the Datashop and Planistat files. He also lodged a preliminary statement with a legal memorandum relating to the rights of the defence.

36 On 9 July 2003, the Commission decided to initiate disciplinary proceedings against the applicants. Those proceedings were immediately suspended owing to the fact that the OLAF investigation was still in progress. The Commission also set up a multidisciplinary operational team known as a 'task force' ('the task force').

37 On the same date, the Commission issued a press release, entitled 'The Commission takes action on financial mismanagement in Eurostat' (IP/03/979).

38 On 17 July 2003, the applicants sent letters to the President of the Commission, informing him of their situation.

39 On 22 July 2003, the applicants sent a letter to the Commission describing the faults which they alleged it to have committed and claiming that it was liable. They also requested the Commission to forward to them the documents cited in the decisions initiating the disciplinary proceedings.

40 The minutes of the hearings of the applicants at the end of June and the beginning of July were drawn up on 11 August 2003.

41 On 24 September 2003, the Director-General of OLAF sent the President of the Commission a 'summary of the Eurostat cases now closed'. According to the covering memorandum, 'this summary memorandum c[ould] not in any way be regarded as constituting a final investigation report within the meaning of Regulation No 1073/1999' and that its 'sole purpose [was] to highlight the main findings of the investigations carried out'.

42 That summary, accompanied by a report entitled 'Report of the Eurostat task force (TFES) — Summary and conclusions' and by an information note concerning Eurostat, based on the second intermediary report drawn up by the IAS, were sent to the Parliament on the same date.

43 On 25 September 2003, OLAF drew up the final investigation reports, within the meaning of Article 9 of Regulation No 1073/1999, in the Eurocost, Datashop, Planistat and CESD Communautaire cases.

44 On the same date, the President of the Commission was heard by Cocobu and also addressed the Conference of Presidents of Parliamentary Groups of the Parliament.

45 On 25 September 2003, the applicants sent a letter to the Commission, referring to the documents forwarded to the Parliament on 24 September 2003. In that letter, the applicants maintained that 'it [was] unacceptable that [they] should be publicly implicated without having access to the documents which charge[d] them' and raised the question whether 'it [was] normal that, once again, [they] should learn from the press that they [were] accused of misconduct'. By that letter, the applicants

further requested the Commission to forward those reports to them, together with the documents requested by the letter of 22 July 2003, namely:

'— the note of 3 April 2003 (004201) and the notes of 19 March 2003 (003441 and 003440) drawn up by OLAF;

— the report of [the Budget] DG of 4 July 2003 ("DGBUDG Report — Analysis of audit reports on Eurostat systems for grants and procurement");

— the Commission's [IAS] report of 7 July 2003 ('First Interim Report — IAS examination of Eurostat contracts and grants: reportable events');

— the three reports drawn up by [the IAS], the task force and OLAF for the hearing by the [President of the Commission] on 25 September 2003'.

46 On 1 October 2003, the Commission adopted a decision on the reorganisation of Eurostat, with effect from 1 November 2003. It was decided to abolish one directorate and one post as director.

47 On 10 October 2003, the applicants received a copy of the final reports of 25 September 2003 in the Eurocost, Datashop and CESD Communautaire cases and

a copy of the three documents communicated to the Parliament on 24 September 2003 referred to at paragraph 42 above. On the same date, the applicants received the documents referred to in the decisions initiating the disciplinary proceedings and requested in the letters of 22 July and 25 September 2003, with the exception of the letter and note of 19 March 2003, on the ground that 'this [concerned] the letter sent by OLAF to the French judicial authorities in Paris and that letter therefore form[ed] an integral part of a domestic investigation'.

48 On 23 October 2003, the applicants lodged a request pursuant to Article 90(1) of the Staff Regulations of Officials of the European Communities, in the version applicable to the present case ('the Staff Regulations'), seeking compensation for the damage sustained as a consequence of the faults committed by the Commission, including those attributable to OLAF.

49 By decision of 10 May 2004, received by the applicants on 17 May 2004, the appointing authority rejected that request.

50 On 19 May 2004, the applicants lodged a complaint on the basis of Article 90(2) of the Staff Regulations against the decision of 10 May 2004. On 5 August 2004, the applicants supplemented their complaint.

51 By decision of 27 October 2004, notified to the applicants by letter of 3 November 2004, the appointing authority expressly rejected that complaint.

Procedure and forms of order sought by the parties

52 By application lodged at the Registry of the Court of First Instance on 28 January 2005, the applicants brought the present action.

53 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, within the framework of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the Court of First Instance, requested the parties to produce certain documents and to answer certain written questions. The parties complied in part with those requests within the prescribed periods.

54 By order of 6 June 2007, in accordance with Article 65(b), Article 66(1) and the second subparagraph of Article 67(3) of the Rules of Procedure, the Court ordered the Commission to produce all the documents transmitted to the French judicial authorities in connection with the Eurostat case and stated that those documents would not be communicated to the applicants at that stage. The Commission complied with that request.

55 On 11 June 2007, the Commission lodged its observations on the applicants' answers to the questions and requests to produce documents to the Court. On the same date, the applicants lodged their observations on the Commission's answers to those questions and requests.

56 The parties submitted oral argument and their answers to the oral questions put by the Court at the hearing on 3 October 2007.

57 At the hearing, the parties confirmed that, among the documents produced by the Commission following the measure of inquiry ordered by the Court, the only documents which the applicants did not have at their disposal were the annexes to the note of 19 March 2003, the complaint of 10 July 2003 and the final Planistat report. The applicants agreed that the Court could, if necessary, use the information in those documents, which had not been communicated to them, and a note to that effect was recorded in the minutes. The Court considered it necessary to use only the documents which the applicants had at their disposal.

58 At the hearing, following the Court's request, the Commission lodged an OLAF memo dated 16 May 2003. The applicants did not object to the lodging of that memo and a note to that effect was recorded in the minutes.

59 The applicants claim that the Court should:

— order the Commission to pay them a sum provisionally evaluated at EUR 1 million to compensate them for their material and non-material damage;

— order the Commission to pay the costs.

60 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

61 In support of their action for compensation, the applicants rely on errors made by both OLAF and the Commission, serious material and non-material damage and a direct causal link between the alleged errors and the damage flowing therefrom.

62 As a preliminary point, the Commission disputes the production by the applicants of certain documents of OLAF's Supervisory Committee which are annexed to the application.

63 The Commission also contends that the action for damages is premature in part.

I — *The claim that certain annexes to the application should be removed from the file*

A — *Arguments of the parties*

64 The Commission claims that certain documents of OLAF's Supervisory Committee which are produced by the applicants in support of their action should be removed from the file, namely six annexes to the application.

65 The Commission contends that the documents in question are internal documents and are not intended to be made public. Furthermore, they were obtained by the applicants by unlawful means and should therefore be removed from the file, together with the references to and the quotations from the annexes in the application (Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle Erling and Others* v *Council and Commission* [1981] ECR 3211, paragraphs 13 to 16).

66 The Commission stresses that internal confidential documents can be produced by applicants in support of their actions only where the applicants are able to show that they obtained the documents by lawful means.

67 In the present case, the documents in question are indeed internal documents of OLAF's Supervisory Committee and, pursuant to Article 14 of its Rules of Procedure, are confidential. The Supervisory Committee never decided to waive the confidentiality attaching to those documents and make them public, nor, likewise, to communicate them to the applicants in the context of their defence. Since the documents are intended to remain purely internal, the fact that they are not marked 'confidential' does not deprive them of their confidential nature.

68 In any event, in the Commission's submission, the applicants must state by what lawful means they were able to obtain those documents, for example by submitting a request for access and receiving a favourable response from OLAF's Supervisory Committee. The fact that the applicants produce an affidavit stating that they did not remove, or steal, or intercept any internal document produced by the secretariat of OLAF's Supervisory Committee, which the Commission has never accused them of having done, does not show that they obtained the documents lawfully.

69 Last, the Commission maintains that none of those documents is capable of proving in any way whatsoever the alleged errors of OLAF or the Commission.

70 The applicants deny that the documents are confidential or that they obtained them by unlawful means.

71 The applicants submit that if, in a file such as that in the present case, in which compensation for damage is sought, it were not possible to comment on or to have access to documents which actually prove the errors committed by OLAF and by the Commission, which are essential elements for the purpose of establishing liability, it is clear that there would be a serious and actual breach of full respect for the rights of the defence and effective judicial protection.

72 The applicants maintain that the documents in question support their position with respect to their criticisms of the functioning of OLAF, which is the real reason why the Commission objects to the production of the documents.

B — *Findings of the Court*

73 The Commission claims that certain annexes to the application are confidential internal documents of OLAF's Supervisory Committee which were not obtained lawfully by the applicants. Those annexes consist of the following documents:

— the minute of the appearance of the Secretary-General of the Commission before OLAF's Supervisory Committee on 3 September 2003; the Secretary-General was

not advised that his intervention was being recorded and later obtained an assurance from the Chairman of the Supervisory Committee that the document would remain purely internal to the Supervisory Committee and its secretariat;

— the note from the secretariat of the Supervisory Committee to the Chairman of that committee and one of its members, dated 5 March 2003;

— the note from the secretariat of the Supervisory Committee to the Chairman of that committee, dated 27 May 2003;

— the minutes of the meeting of 2 and 3 September 2003 of the Supervisory Committee;

— the report of the Supervisory Committee, of 15 January 2004, delivered at the request of the Parliament concerning questions of procedure raised by the investigations carried out in the Eurostat case;

— the information note of the secretariat of the Supervisory Committee, of 10 October 2003, on the progress of OLAF's investigations in the Eurostat case and their repercussions on the situation of OLAF.

74 It must be observed that neither the fact that the documents in question may be confidential nor the fact that they may have been obtained unlawfully precludes their remaining in the file.

75 There is no provision that expressly prohibits evidence obtained unlawfully, for example in breach of fundamental rights, from being taken into account.

76 Admittedly, in *Ludwigshafener Walzmühle Erling and Others* v *Council and Commission*, paragraph 65 above, on which the Commission relies, the Court of Justice found that, as there was doubt both as to the nature of the contested document and as to whether the interveners had obtained it by proper means, the document must be removed from the file (paragraph 16).

77 Thus, as a general rule, an institution is entitled to request the removal of an internal document where it was not obtained by proper means by the person who relies on it. An internal document is confidential by nature, unless the institution in which it originates agrees to disclose it.

78 However, in its subsequent case-law, the Court of Justice did not preclude that even internal documents may, in certain cases, be lawfully placed in a case-file (orders of 19 March 1985 in Case 232/84 *Tordeur and Others* (not published in the ECR), paragraph 8, and of 15 October 1986 in Case 31/86 *LAISA* v *Council* (not published in the ECR), paragraph 5). Furthermore, the Court of First Instance has on occasion agreed to take account of documents which had not been shown to have been obtained by proper means.

79 Thus, in certain situations, it was not necessary for the applicant to show that it had obtained by lawful means the confidential document relied on in support of its argument. The Court considered, on the balance of the interests to be protected, that it was necessary to consider whether particular circumstances, such as the decisive nature of the production of the document for the purposes of reviewing the

lawfulness of the procedure leading to the adoption of the contested measure (see, to that effect, Case T-192/99 *Dunnett and Others* v *EIB* [2001] ECR II-813, paragraphs 33 and 34) or of establishing the existence of a misuse of powers (see, to that effect, Case T-280/94 *Lopes* v *Court of Justice* [1996] ECR-SC I-A-77 and II-239, paragraph 59), constituted grounds for not withdrawing a document.

80 It must be held that, in the present case, the specific nature of the present action permits the conclusion that the documents in question must remain in the file. Those documents are necessary for the purpose of appraising OLAF's conduct in the investigations relating to Eurostat. Accordingly, the particular nature of the present action, in which the applicants seek to establish the illegality of OLAF's conduct, justifies the non-removal of those documents (see, to that effect, *Dunnett and Others* v *EIB*, paragraph 79 above, paragraphs 33 and 34).

81 In that regard, it must be borne in mind that the documents in question consist of preparatory documents of OLAF's Supervisory Committee, whose task, pursuant to Article 2 of its Rules of Procedure, is to ensure 'that OLAF activities are conducted in full compliance with human rights and fundamental freedoms and in accordance with the Treaties and with secondary legislation, including the Protocol on the Privileges and Immunities of the European Communities and the Staff Regulations of officials', and a minute of the appearance of the Secretary-General of the Commission before that committee. It must further be noted that the applicants are in a difficult situation with respect to showing that OLAF's conduct was unlawful. Last, it must be observed that those documents are capable of demonstrating the facts of which the applicants accuse OLAF and may thus be important for the resolution of the present dispute.

82 Consequently, in the light of the nature of the documents in question and of the particular circumstances of the dispute, the claim that they should be removed from the file must be rejected.

II — *The premature nature of the action*

A — *Arguments of the parties*

83 The Commission asserts that most of the applicants' claims concerning alleged irregularities during the investigation procedure are premature.

84 The Commission explains that it did not allege that the action is inadmissible but that it claims that the action is premature because, it maintains, certain of the applicants' pleas, concerning procedural errors committed by the Commission or by OLAF, can be assessed only in the light of the consequences which those errors might have on any final decision that might be taken in the criminal or disciplinary proceedings (Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 48) and, moreover, because, even on the assumption that errors might be attributed to the Commission or to OLAF, the assessment of the damage sustained would vary according to the terms of the criminal and/or disciplinary decisions concerning them. Thus, the assessment of the alleged non-material damage is correlated to the applicants' degree of 'guilt' and the consequences of the errors made by OLAF or by the Commission, on the assumption that they are established, could not be appraised without taking account of any errors made by the applicants.

85 The Commission refers to Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1081, paragraph 6, and submits that the Court may give a decision at an early stage of the proceedings on the question whether the conduct of OLAF or of the Commission has been such as to entail the liability of the Community, while possibly, depending on the nature of the errors established, reserving consideration of the question of the extent of the non-material damage for a later stage.

86 The applicants deny that the action is premature and state that the Commission's pleadings are unclear in that regard.

87 The applicants contend that the action satisfies all the conditions as to admissibility and substance necessary to engage the liability of the Commission and to enable the Court to exercise its power of review.

88 There is no reason to consider that an action for compensation is incidental to the initiation of a disciplinary procedure and/or to investigations conducted by the judicial authorities of a Member State. It would be contrary to the principle of the right to proper judicial protection and to the proper administration of justice if a future and uncertain event could in itself influence and paralyse an action for compensation, with the consequence that the damage would increase and the persons concerned would be deprived of the right to seek compensation for the damage.

89 The applicants contend that the damage which they have sustained has been real and current since the errors were made by the Commission and that it increases as time passes.

B — *Findings of the Court*

90 It is common ground that the national judicial proceedings are still pending. However, the outcome of those proceedings cannot affect the present proceedings. Indeed, in the present case the question is not whether or not the facts of which the applicants are accused are established, as that question does not fall within the

jurisdiction of the Court. Thus, in the present case the issue is not whether or not the applicants made errors in the course of their employment, but an examination is required of the way in which OLAF conducted and completed an investigation which refers to the applicants by name and attributes to them liability for the irregularities established publicly well before a final decision, and also of the way in which the Commission conducted itself in the context of that investigation. Nor, if the applicants are found not guilty by the national judicial authorities, would such a finding necessarily make good any damage that they would then also have sustained.

91 Accordingly, since the alleged damage relied on in the present action is distinct from the damage that might be confirmed by a finding of not guilty by the national judicial authority, the claims for compensation cannot be rejected as premature with the consequence that the applicants would be able to submit such a claim only after any definitive decisions had been taken by the national judicial authorities.

92 Consequently, as the action is not premature, there is no need to reserve examination of the questions relating to the nature and extent of the damage for a later stage.

III — *The incurring of the non-contractual liability of the Community*

93 It has consistently been held that in order for the Commission to incur non-contractual liability for the unlawful conduct of its organs, within the meaning of the second paragraph of Article 288 EC, a number of conditions must be satisfied, namely: the unlawfulness of the conduct alleged against the institutions, the fact of damage and

the existence of a causal link between the alleged conduct and the damage complained of (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20).

94 If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions (Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37; see, to that effect, Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 81).

95 As regards the first of those conditions, the case-law requires that there has been a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). As regards the requirement that the breach be sufficiently serious, the decisive test for determining that that requirement is satisfied is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54, and Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134).

96 The applicants assert that errors were made both by OLAF and by the Commission and that the Commission alone can be held liable for all of those errors. OLAF made errors vis-à-vis both the applicants and the Commission.

97 Thus, the Court considers that it must examine first of all the question whether OLAF and/or the Commission committed sufficiently serious breaches of a rule of law intended to confer rights on individuals.

A — *The illegality of OLAF's conduct*

1. The errors made when OLAF forwarded the files relating to the Eurostat case to the French and Luxembourg judicial authorities

(a) Arguments of the parties

98 First of all, the applicants emphasise the clear distinction that exists, as regards the forwarding of the information by OLAF, between external investigations and internal investigations. They refer to the confusion between the nature of the investigation and the nature of the forwarding of the information to the French judicial authorities on 19 March 2003. According to the statement of the Director-General of OLAF before the Cocobu on 30 June 2003, the file in question was an 'external file' which none the less mentioned the applicants' names. However, the investigation was purely internal, which required that the institution concerned be informed before any external transmission.

99 The applicants contend that OLAF therefore characterised its internal investigations as external investigations in order to cover procedural errors relating to the fact that neither the Commission nor OLAF's Supervisory Committee had been informed in advance that the Eurostat file had been forwarded to the French and Luxembourg judicial authorities by OLAF.

100 Nor, next, were the applicants informed in advance that the Datashop and Planistat files were being forwarded to the French judicial authorities by OLAF, and Mr Franchet was not informed that the Eurocost file, in which Mr Byk was not implicated, was being forwarded to the Luxembourg judicial authorities.

101 Accordingly, OLAF deliberately disregarded the principle of sound administration, the *inter partes* principle, the rights of the defence and the requirement of an investigation that considers the evidence for and against the parties concerned, enshrined, inter alia, in the ECHR and the Charter.

102 The applicants also rely on Article 4 of Decision 1999/396 and refer in that regard to the decision of the European Ombudsman of 26 April 2002 on complaint 781/2001/IJH as it relates to OLAF, according to which 'this provision requires OLAF, before reaching a conclusion unfavourable to a person who is being investigated, to inform the person concerned of the allegation against him and the facts on which it is based and to give him the opportunity to express his views'; the Ombudsman also considered that '[t]his [was] a normal part of a fair and effective investigation procedure' and that, '[m]oreover, testimony that ha[d] not been subject to challenge in this way [would] normally lack evidential value'.

103 In the applicants' submission, the Commission interprets Articles 4 and 10 of Regulation No 1073/1999 and Article 4 of Decision 1999/396 too restrictively and thus fails to respect fundamental rights. According to such an interpretation, OLAF's decision to defer informing the institution is not in principle amenable to review and OLAF could thus take such a decision to exempt itself, without any real limit in time, from any obligation to inform.

104 Indeed, neither OLAF nor the Commission has ever explained why absolute secrecy was required or what justification there was for the alleged need to defer informing the Commission, with the exception of the summary note on the ongoing investigations relating to Eurostat, sent by the Director-General of OLAF to the Secretary-General of the Commission on 3 April 2003 (see paragraph 23 above). As regards the need to defer informing the official concerned, so far as the applicants are aware, the Secretary-General never expressed the agreement required by the second paragraph of Article 4 of Decision 1999/396.

105 The applicants also rely on a proposal for a regulation of the European Parliament and of the Council of 10 February 2004 amending Regulation No 1073/1999 (COM(2004) 103 final) and on a draft interinstitutional agreement of 14 August 2003 aimed at establishing a code of conduct in order to ensure a timely exchange of information between OLAF and the Commission with respect to internal investigations (SEC(2003) 871 consolidated), which establish, in particular, the obligation to give substance to information by OLAF. Likewise, according to the proposal for a regulation amending Regulation No 1073/1999, the official involved should be heard at the time when information is forwarded to the national judicial authorities, which does not constitute an amendment of the existing regulation, as it merely enshrines the fundamental principles contained, notably, in the Charter, as the Commission observed. The applicants note that they were heard by OLAF because they requested a hearing and not because OLAF invited them to be heard.

106 Last, in the applicants' submission, OLAF 'steered' the French judicial authorities by already characterising as criminal offences certain facts which it had thought it could

identify in the Eurostat case, which is contrary to its role of conducting administrative investigations. The note of 19 March 2003 to the French judicial authorities contains a veritable legal analysis in French law of the facts reported and characterises them as criminal offences under French law, and thus goes further than merely forwarding information as provided for in Regulation No 1073/1999.

107 In the first place, the Commission contends that the applicants cannot rely on OLAF's obligation to inform it, to hear them or to inform them before transmitting information to national judicial authorities, whatever the type of the investigation (internal or external).

108 The Commission maintains that, under Article 10 of Regulation No 1073/1999, OLAF must forward to the judicial authorities of the Member State concerned the information obtained during internal investigations into matters liable to result in criminal proceedings, whereas it merely has the option to forward the information obtained in the course of external investigations. That article contains no requirement to inform the institution concerned or any officials that may be implicated at the same time as, or before, the information is forwarded to the national judicial authorities.

109 The Commission refers to Article 4(5) of Regulation No 1073/1999 and observes that the failure to inform the institution to which officials who may be personally involved belong may be justified by the need to defer that information. Even on the assumption that such deferral may not be justified in the present case, any failure to inform the Commission has no effect on the lawfulness of the proceedings concerning the applicants provided that the applicants were not in any way harmed by that failure to inform.

110 As regards the applicants' right to be heard or informed, the Commission maintains that, pursuant to Article 4 of Decision 1999/396, the information of an official who may be personally implicated is subject to the condition that it would not be harmful to the investigation, which is a matter for OLAF's discretion. The obligation to enable the person concerned to express his views on all the facts which concern him is decisive at the time when OLAF draws conclusions at the close of the investigation and may be deferred, in certain specific cases, only in agreement with the President of the Commission or its Secretary-General, but not at the time when, on the basis of Article 10 of Regulation No 1073/1999, OLAF forwards information to the judicial authorities of a Member State in the course of the investigation.

111 Furthermore, in accordance with Article 4 of Decision 1999/396, the applicants were enabled to express their views on all the facts which concerned them before OLAF drew the conclusions from the investigations concerning them.

112 Contrary to the applicants' contention, it is incorrect to assert that an OLAF decision to defer the information due to the institution is not as a matter of principle amenable to review, but that such review can be carried out only at the close of the investigation if no further action is taken, or at the close of the criminal and/or disciplinary procedures. Accordingly, in the Commission's submission, the failure to inform is justified by the need for absolute secrecy for the purposes of the investigation or by the need to resort to methods of investigation falling within the jurisdiction of a national judicial authority, and to purport to review that justification at an earlier stage would amount to 'demolishing it'.

113 The Commission further emphasises that an error can arise only from a breach of the legal framework existing at the material time and not from a breach of a provision contained in a proposal for a new legal framework that is submitted after the material time.

114 In the second place, the Commission contends that any criminal characterisation which OLAF gives to the facts which it forwards to a national judicial authority is merely an indication which is not binding on that authority. Such a characterisation is merely the expression of the views of the OLAF agents responsible for such a file, as the matter can be forwarded to a judicial authority only where OLAF considers that the facts in issue are capable of being characterised as criminal. The Commission emphasises that the national judicial authorities to which OLAF refers the case are entirely free to accept and/or limit the scope of the matter referred to them and that it is not for OLAF to give any directions whatsoever to those authorities.

115 Furthermore, the applicants have misread paragraph 3.4.3 of the Commission report of 2 April 2003 on the evaluation of the activities of OLAF (COM(2003) 154 final). The Commission never intended to say that a reference to a national judicial authority had the effect of binding that authority with respect to the results of OLAF's fieldwork, quite the contrary.

(b) Findings of the Court

The characterisation of the investigations

116 It must be borne in mind that, under Regulation No 1073/1999, the investigations carried out by OLAF consist of external investigations, that is to say, investigations outside the Community institutions, and internal investigations, that is to say, investigations carried out within those institutions. The procedural rules to be followed by OLAF differ according to the nature of the investigation.

117 The applicants maintain that OLAF characterised its internal investigations as external investigations in order to cover procedural errors. They claim that the

investigation was purely internal, which required that the institution concerned, OLAF's Supervisory Committee and the officials implicated be informed before any information was forwarded to any external authority.

118 The Court finds that in effect there was confusion as to the nature of the different investigations in question while they were in progress.

119 In that regard, it follows from the summary note of 3 April 2003 (see paragraph 23 above) that OLAF had characterised as internal investigations the investigations relating to the Eurocost case (forwarded to the Luxembourg judicial authorities) and the Datashop case (forwarded to the French judicial authorities). In the 'summary of the Eurostat cases now closed', the investigation pursued in the Eurocost case had been characterised as an internal investigation, that relating to the Eurogramme case as an external investigation, that relating to the CESD Communautaire as an internal investigation and that relating to the Datashop case as an internal investigation. That summary note also states that the internal investigation relating to the Datashop network revealed the central role of Planistat, and for that reason OLAF opened an external investigation with respect to that company on 18 March 2003.

120 However, it is apparent from the note of 1 July 2003 (see paragraph 34 above) concerning the Cocobu meeting and the exchange of views with the Secretary-General of the Commission and the Director-General of OLAF of 30 June 2003 that that characterisation was not clear. According to that note, the Director-General of OLAF had observed that the internal and external parts overlapped in the Eurostat case and, more specifically, that in the Eurocost and Eurogramme cases the external part was almost closed, that it had been forwarded to the Luxembourg judicial authorities and that the Datashop and Planistat cases displayed the same overlap between the external and internal parts.

121 Furthermore, in OLAF's Supervisory Committee's report of 15 January 2004, drafted at the request of the Parliament concerning questions of procedure raised in the investigations relating to Eurostat, the Supervisory Committee stated that:

'OLAF also experienced difficulties in implementing the provisions of the rules on internal investigations, on the one hand, and external investigations, on the other. Initially, OLAF opened external investigations and it was only when it became apparent that officials might be involved that internal investigations were opened. This purely administrative division of the same files gave rise to confusion.'

122 It is apparent from the file that, at least at the end of the investigations, the Eurocost, Datashop and CESD Communautaire cases were internal cases, while the Eurogramme and Planistat cases were external cases. However, it is also apparent from the file that the Datashop and Planistat cases were closely linked.

123 It is important to determine the nature of the forwarding of the file to the French judicial authorities on 19 March 2003. In that regard, it should be observed that the fact that, in the letter and note of 19 March 2003, the reference mentions the Planistat external case (opened the previous day), and not the Datashop internal case, is irrelevant. Such a fact cannot breach procedural obligations linked with the internal investigations when officials are involved. Furthermore, in spite of the reference to an external case in the note of 19 March 2003, the investigators refer to the relevant provision of Regulation No 1073/1999 concerning the forwarding of the information obtained by OLAF in internal investigations. In the letter of 19 March 2003, it is not expressly stated whether the investigation is an internal or an external investigation. According to its subject, however, it concerned the '[f]orwarding of information relating to matters liable to be characterised as criminal', which corresponds to the terms of Article 10(2) of Regulation No 1073/1999 on the forwarding of information obtained during internal investigations into matters liable to result in criminal proceedings. Thus, the fact that there is no mention of the internal case being referred to the national judicial authorities does not have the consequence that the rights of

defence of the persons mentioned in that note can be ignored. In any event, after the case reference, there is a reference to 'Eurostat/Datashop/Planistat'. Furthermore, the Director-General of OLAF himself stated in his note of 3 April 2003 (see paragraph 23 above) that the Datashop internal case, in which officials were involved, had been forwarded to the prosecution authorities in Paris (France).

124 Consequently, it must be considered that, for the purposes of these proceedings, the forwarding of the Eurocost case to the Luxembourg judicial authorities on 4 July 2002 concerned an internal investigation, as did the forwarding of the Datashop — Planistat file to the French judicial authorities on 19 March 2003.

125 Thus, the Court must examine whether OLAF infringed a rule of law conferring rights on individuals when it forwarded the internal investigation files to the national judicial authorities.

Informing the applicants, the Commission and OLAF's Supervisory Committee

— Informing the applicants

126 The applicants claim that they were not informed in advance that the Datashop — Planistat file was being forwarded to the French judicial authorities, nor was Mr Franchet informed that the Eurocost file, in which Mr Byk was not implicated, was being forwarded to the Luxembourg judicial authorities. Accordingly, OLAF

deliberately disregarded the principle of sound administration, the *inter partes* principle, the rights of the defence and the requirement of an investigation of the incriminating and exonerating evidence enshrined, in particular, in the ECHR and the Charter. They also refer to Article 4 of Decision 1999/396.

127 The Court observes that provision is made for informing the officials concerned only in the context of internal investigations, in Article 4 of Decision 1999/396, whereby the Commission defined the implementation of the terms and conditions for internal investigations.

128 It is clear from the provisions of the first paragraph of Article 4 of Decision 1999/369 that the official concerned must be informed rapidly that he may be personally implicated, as long as this would not be harmful to the investigation, and that, in any event, conclusions referring by name to an official of the Commission may not be drawn once the investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him (order of the President of the Court of Justice in Case C-471/02 P(R) *Gómez-Reino* v *Commission* [2003] ECR I-3207, paragraph 63).

129 Failure to apply those provisions, which lay down the conditions under which observance of the rights of defence of the official concerned may be reconciled with the requirements of confidentiality inherent in any investigation of that kind, constitutes an infringement of the essential procedural requirements applicable to the investigation procedure (order in *Gómez-Reino* v *Commission*, paragraph 128 above, paragraph 64).

130 However, Article 4 of Decision 1999/396 does not expressly concern the forwarding of information to the national judicial authorities and therefore does not impose any obligation to inform the official concerned before such information is forwarded. Under Article 10 of Regulation No 1073/1999, OLAF may (in the case of external

investigations) or must (in the case of internal investigations) forward information to the national judicial authorities. The forwarding of that information may therefore precede the 'conclusions drawn at the close of the investigation', which are normally included in the investigation report.

131 Furthermore, according to the order in *Gómez-Reino* v *Commission*, paragraph 128 above, paragraph 68, the conclusions drawn by OLAF once the investigation has been completed, which refer to an official by name, within the meaning of Article 4 of Decision 1999/396, are bound to be those contained in a report drawn up under the authority of the Director of OLAF, as laid down in Article 9 of Regulation No 1073/1999, and the actions which may be taken following the internal investigation by the institution concerned may be inter alia disciplinary and legal.

132 Thus, it is quite possible to take the view that, at the time when the information was forwarded to the national judicial authorities, there was no report within the meaning of Article 9 of Regulation No 1073/1999 that was submitted to the Commission by OLAF and that personally implicated the applicants.

133 However, it is still appropriate to examine whether the 'information' forwarded to the Luxembourg and French judicial authorities must be understood as meaning that it contains 'conclusions referring by name' to the applicants.

134 As regards, first, the forwarding of the Eurocost file to the Luxembourg judicial authorities on 4 July 2002, it is stated in the covering note that neither Mr Franchet nor the representatives of Eurocost have been heard by OLAF, and that that is a deliberate decision, in order not to compromise the outcome of the judicial investi-

gation. Thus, there is no doubt that Mr Franchet was not heard concerning that file before it was forwarded to the Luxembourg judicial authorities.

135 In that note, it is stated that Mr Franchet is one of the founders, and has also been president, vice-president and a member of Eurocost, that he was regularly present at general meetings of Eurocost and that he signed the contract of employment of the Director of Eurocost at the time when he was president. The Director-General of OLAF emphasises that there is a potential conflict of interests and that the findings of an internal audit reveal numerous irregularities and cases of fraud against Eurostat by the management of Eurocost. Concerning 'accounting manipulations designed to conceal fraud against Eurostat', it is stated that the existence of tacit agreements with Eurostat on that matter was mentioned. The 'double and even triple financing of certain costs' are also mentioned.

136 It must be observed that that covering note, which expressly mentions Mr Franchet concerning a potential conflict of interests, must be interpreted as containing 'conclusions referring by name' to Mr Franchet. In that regard, it is also appropriate to emphasise that, in the note of 3 April 2003 (see paragraph 23 above), the Director-General of OLAF stated that, '[b]y letter of 10 July 2002, the Luxembourg public prosecutor did not object to the officials charged being heard by the OLAF investigators' and that 'the Director-General [of Eurostat] might be involved'.

137 As regards, second, the forwarding of the Datashop — Planistat file to the French judicial authorities on 19 March 2003, it is common ground that the applicants were neither informed nor able to express their views on the file before it was forwarded to those authorities. Next, it must be borne in mind that the letter of 19 March 2003 had as its subject the '[f]orwarding of information relating to matters liable to be characterised as criminal' and the accompanying note '[d]enouncement of matters liable to be characterised as criminal'.

138 In the letter of 19 March 2003, the Director-General of OLAF states that, subject to the assessment of the French judicial authorities, 'it would appear that OLAF has unearthed fraudulent activities which have harmed the Community budget and which are liable to be characterised as criminal', explaining that '[t]he investigation has revealed that these matters were the work of the operators of the company Planistat Europe SA, whose registered office is in Paris, with the active complicity of European officials'.

139 In the note of 19 March 2003, it is stated, in the context of a '[h]istory of the matters covered by the investigation', at paragraph 2.3, entitled 'Findings made during the investigation', that a report of the Eurostat internal audit dated September 1999 concerning the Datashops in Brussels (Belgium), Luxembourg (Luxembourg) and Madrid (Spain), on the basis of which the OLAF investigation had begun, 'ha[d] revealed numerous irregularities committed in the context of the management of those three Datashops in the years 1996 to the end of 1999' and that, '[i]n this case, a significant part of the turnover "declared" by those three Datashops — between 50 and 55% — was placed in a slush fund the use of which was subject to the authorisation of an official of [Eurostat]'.

140 That note also states that '[t]he only persons with an overall view of that whole case are the management of Groupe Planistat and probably Mr Byk, Head of Unit at Eurostat, of French nationality'; that false invoices 'were paid from the slush fund … after being approved by Mr Daniel Byk, Director at Eurostat, of French nationality'; that '[a]pproximately [EUR] 922 500 ha[d] thus been invoiced and paid'; and that, 'by using slush funds, Eurostat ha[d] thus settled a significant deficit of Planistat Europe SA which ought normally have remained the responsibility of the Commission's contracting partner'; the note further stated that 'the slush fund ha[d] also been used to pay restaurant, hotel and travel expenses … incurred by certain Eurostat officials, including Mr Byk'.

141 In the description of the criminal offences in question, at paragraph 3.1, entitled 'Breach of trust', the note states:

'The setting-up by certain Community officials of a network of economic operators, one of the objectives of which is to conceal from the Commission part of the revenues from the sale of products or of Community statistical services, may constitute the misappropriation "of funds, securities or any property whatsoever" as provided for in Article 314-1 of the Criminal Code, defining breach of trust. All of the constituent elements of the offence were carried out jointly by the Community officials, the management of the Planistat group and the management of the Datashops concerned. The Community officials could not fail to be aware of the financial regulation in force, which obliged them to hand over the revenues in full.

Furthermore, the same Community officials used the sums in question for purposes incompatible with the Community interest in so far as that money was clearly used to pay expenses not provided for in the contract between Planistat Europe SA and the Commission, or even those officials' personal expenses. The fraudulent intent follows from that use for purposes other than Community purposes.'

142 After dealing with the issue of the offence of breach of trust, concerning Planistat, the note states at paragraph 3.3, entitled 'Criminal association':

'According to Article 450-1 of the Criminal Code, "[a] criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more serious offences or one or more less serious offences punishable by at least five years' imprisonment …"

It remains to be determined whether that characterisation may also be applied in the context of the present case, in so far as the looting of Community funds could not have taken place without the association of the officials, the management of Planistat and the management of Datashops who committed offences of breach of trust.

…'

143 Last, at paragraph 3.5, entitled 'Application of French law to offences committed abroad by French nationals', the note states:

'…

In the context of the present case, Mr Yves Franchet, Director of Eurostat, and Mr Daniel Byk, Head of Unit at Eurostat, both officials of the European Commission, based in Luxembourg, who may have set up the system in whole or in part, are of French nationality.

All the elements developed above permit the assertion that OLAF is faced with a vast enterprise of looting of Community funds having as its basis a series of facts capable, subject to the assessment of the competent judicial authority, of being characterised as criminal.

It is therefore appropriate to forward the present note and the documents annexed thereto to the [p]ublic [p]rosecutor in Paris.'

144 It is clear from the note of 19 March 2003 that it contains 'conclusions referring by name' to the applicants.

145 Consequently, before the Eurocost file was forwarded to the Luxembourg judicial authorities, as regards Mr Franchet, and before the Datashop — Planistat file was forwarded to the French judicial authorities, as regards Mr Franchet and Mr Byk, the latter were entitled, in principle, to be informed and heard with respect to the facts concerning them, on the basis of Article 4 of Decision 1999/396.

146 However, that article provides for an exception in cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority. In such cases, the obligation to invite the official concerned to give his views may be deferred in agreement with the Secretary-General of the Commission. Thus, in order to defer informing the official concerned, the twofold condition consisting of the need to maintain absolute secrecy for the purpose of the investigation and the requirement to use investigative procedures falling within the remit of a national judicial authority must be satisfied. In addition, it is necessary to obtain the prior agreement of the Secretary-General of the Commission.

147 In that regard, as concerns the forwarding of the Eurocost file to the Luxembourg judicial authorities, it follows from a letter of 2 August 2002 from the Secretary-General of the Commission to the Director-General of OLAF that the former agreed that the persons concerned should not be informed. The Secretary-General gave the following reasons: '[p]ending the outcome of the discussions between [their] services about the way to improve existing procedures, [he could] mark [his] agreement

with [the] proposal [of the Director-General of OLAF] not to inform the parties concerned in the case cited above'. Thus, the Secretary-General of the Commission did not mention either of the conditions referred to above. In any event, his consent was given after the file in question had been forwarded.

148 As regards the forwarding of the Datashop — Planistat file to the French judicial authorities, it follows from the note of 3 April 2003, which therefore post-dated the forwarding of the file on 19 March 2003, that the Director-General of OLAF stated in that note that officials of Eurostat and of the Office for Official Publications of the European Communities were involved, that that part had been transmitted to the French judicial authorities and that it was appropriate to defer informing the officials in accordance with Article 4 of Decision 1999/396 owing to the necessity to maintain absolute secrecy for the purposes of the investigation. However, there is no reference to the second condition referred to above.

149 Furthermore, in answer to a written question put by the Court, the Commission confirmed that its Secretary-General 'ha[d] not had the opportunity to give his agreement to defer the obligation to invite the applicants to express their views'.

150 Consequently, the conditions for the application of the exception provided for in Article 4 of Decision 1999/396, which allows OLAF to defer informing the person concerned, were not satisfied in this case.

151 It must be observed that the obligation to seek and obtain the agreement of the Secretary-General of the Commission is not a mere formality that might, in an appropriate case, be complied with at a later stage. The requirement to obtain such agreement would lose its rationale, which is to ensure that the rights of defence of the officials concerned are respected, that OLAF can defer informing them only in

truly exceptional cases and that the assessment of that exceptional nature is not a matter solely for OLAF but also requires the assessment of the Secretary-General of the Commission.

152 In those circumstances, OLAF infringed Article 4 of Decision 1999/396 and the applicants' rights of defence when it forwarded the Datashop — Planistat file to the French judicial authorities and it also infringed that article and Mr Franchet's rights of defence when it forwarded the Eurocost file to the Luxembourg judicial authorities.

153 It is incontestable that the rule of law infringed in this case, which provides that persons being investigated must be informed and enabled to express their views on all the facts which concern them, confers rights on individuals (see, to that effect and by analogy, the judgment of 12 September 2007 in Case T-259/03 *Nikolaou* v *Commission* (not published in the ECR), paragraph 263).

154 Admittedly, Article 4 of Decision 1999/396 confers a margin of discretion on OLAF in cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigation procedures falling within the remit of a national judicial authority (see, by analogy, *Nikolaou* v *Commission*, paragraph 153 above, paragraph 264). However, as regards the procedures for the adoption of the decision to defer informing the officials concerned, OLAF has no discretion. Nor does OLAF have any discretion as regards the verification of the conditions for the application of Article 4 of Decision 1999/396.

155 As stated above, the terms and conditions for the application of that exception were not observed in the present case, as OLAF did not refer to the implementation of

such investigation procedures and did not seek, let alone obtain, the agreement of the Secretary-General of the Commission in a timely manner to defer the mandatory invitation to the official concerned by the investigation to express his views.

156 In those circumstances, by failing to fulfil its obligation to inform the official concerned, OLAF committed a sufficiently serious breach of a rule of law conferring rights on individuals.

— Informing the Commission

157 The applicants claim that the Commission was not informed in advance that the Eurostat files were being forwarded to the Luxembourg and French judicial authorities by OLAF. The Court considers that that argument must be taken to mean that it is necessary to determine whether the Commission had to be informed other than as provided for in Article 4 of Decision 1999/396, so that its Secretary-General could give his agreement, which was examined above.

158 In that regard, it must be borne in mind that, pursuant to Article 10 of Regulation No 1073/1999, OLAF is to forward to the judicial authorities of the Member State concerned the information obtained during internal investigations into matters liable to result in criminal proceedings, while, in the context of external investigations, the forwarding of such information is purely optional. In the present case, it should be noted that the investigation reports had not yet been drawn up and that, accordingly, the forwarding of the files consisted initially in the forwarding of information, even though the files contained conclusions referring by name to the applicants, and not in the forwarding of investigation reports, governed by Article 9 of Regulation No 1073/1999. Under Article 10(3), the forwarding to the institution concerned of

the information obtained during internal investigations is also optional. That article contains no requirement to inform the institution concerned at the same time as, or before, the information is forwarded to the national judicial authorities.

159 The requirement to inform the institution concerned in the context of internal investigations is provided for in Article 4(5) of Regulation No 1073/1999. However, that provision prescribes no time-limit for providing that information. It does not provide, for example, that the institution concerned must be informed before the information is forwarded to the national judicial authorities. Furthermore, it contains an exception in cases requiring absolute secrecy for the purposes of the investigation. In such a case, OLAF may defer informing the institution. It is apparent from the file that OLAF considered that, at least as regards the Datashop — Planistat file, it was necessary to maintain absolute secrecy for the purposes of the investigation (see the note of 3 April 2003, cited at paragraph 23 above). It should be observed that it is within OLAF's discretion to decide whether that exception must be applied.

160 In the present case, OLAF was not required to inform the Commission before forwarding the information to the national judicial authorities on the basis of Article 4(5) of Regulation No 1073/1999.

161 Accordingly, OLAF did not infringe Articles 4 and 10 of Regulation No 1073/1999 by not informing the Commission before forwarding the information to the national judicial authorities.

162 In any event, the applicants have not demonstrated how the fact that the Commission was not informed before the information was forwarded to the national judicial authorities adversely affected their rights, subject to the considerations developed

in the context of the application of Article 4 of Decision 1999/396. The provisions referred to in the preceding paragraph do not contain rules of law conferring rights on individuals which are enforced by the Community Courts.

— Informing OLAF's Supervisory Committee

163 The applicants claim that OLAF's Supervisory Committee, too, was not informed before information was forwarded to the Luxembourg and French judicial authorities.

164 In that regard, the Court observes that, pursuant to Article 11(7) of Regulation No 1073/1999, in the context of the regular monitoring of the implementation of the investigative function carried out by the Supervisory Committee, '[t]he Director [of OLAF] shall inform the committee of cases requiring information to be forwarded to the judicial authorities of a Member State'. It should be observed that the wording of that provision indicates that the committee must be informed before the information is forwarded to the national judicial authorities. Otherwise, it would not refer to 'cases requiring information to be forwarded', an expression which refers to a future event. That interpretation is also supported by the declaration of the Chairman of OLAF's Supervisory Committee before the House of Lords Select Committee on the European Union of 19 May 2004, where the Chairman stated that 'OLAF ha[d] an obligation to tell the [Supervisory Committee] before it refer[red] anything to a judicial authority'.

165 It follows from the Commission's answer to the written question put by the Court that on 25 October 2002 the Director-General of OLAF informed the Supervisory Committee that the Eurocost and Eurogramme files had been forwarded to

the Luxembourg judicial authorities, that is to say, he informed the Supervisory Committee after the information had been forwarded on 4 July 2002. Likewise, on 24 March 2003 the Supervisory Committee was informed that the Datashop — Planistat file had been forwarded to the French judicial authorities, and was thus also informed after the information had been forwarded on 19 March 2003.

166 Accordingly, OLAF infringed Article 11(7) of Regulation No 1073/1999. However, it is still necessary to examine whether that provision contained a rule of law conferring rights on individuals which are enforced by the Community Courts.

167 In that regard, it must be borne in mind that, even though, under Article 11(1) of Regulation No 1073/1999, OLAF's Supervisory Committee does not interfere with the conduct of investigations in progress, pursuant to Article 2 of its Rules of Procedure, it is to ensure 'that OLAF activities are conducted in full compliance with human rights and fundamental freedoms and in accordance with the Treaties and with secondary legislation, including the Protocol on the Privileges and Immunities of the European Communities and the Staff Regulations of officials'.

168 Thus, the Supervisory Committee's task is to protect the rights of persons who are the subject of OLAF investigations. Therefore, it cannot be disputed that the requirement to consult that committee before forwarding information to the national judicial authorities is intended to confer rights on the persons concerned.

169 Accordingly, it must be held that, by infringing Article 11(7) of Regulation No 1073/1999, OLAF infringed a rule of law conferring rights on individuals.

170 Furthermore, since Article 11(7) of Regulation No 1073/1999 provides that the obligation to inform the Supervisory Committee is unconditional and leaves no margin of discretion, the infringement is sufficiently serious.

Influence brought to bear on the national judicial authorities

171 The applicants claim that OLAF 'steered' the French judicial authorities by already characterising as criminal facts which it had believed it could identify in the Eurostat case, which is contrary to its role of carrying out administrative investigations.

172 The Court observes that the action taken by the national authorities in response to the information forwarded to them by OLAF is within their sole and entire responsibility. It is thus for those authorities themselves to ascertain whether such information justifies or requires the bringing of criminal proceedings. Consequently, judicial protection against such proceedings must be ensured at national level with all the guarantees provided by domestic law, including those which follow from the fundamental rights that, as an integral part of the general principles of Community law, must also be observed by the Member States when they implement Community rules (judgments in Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19, and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 88, and order of the President of the Court of Justice in Case C-521/04 P(R) *Tillack* v *Commission* [2005] ECR I-3103, paragraph 38).

173 The applicants' argument relating to the influence brought to bear on the national judicial authorities is therefore inoperative.

2. The disclosure of information by OLAF

(a) Arguments of the parties

174 The applicants take issue with OLAF for having breached the obligation to maintain confidentiality, laid down, in particular, in Articles 8 and 12 of Regulation No 1073/1999, the principle of sound administration, and the principle of the presumption of innocence. First, there were leaks with respect to the forwarding of the Datashop — Planistat file to the French judicial authorities. The applicants learned from the press in May 2003 of the accusations against them and of the fact that the matter had been referred to the French judicial authorities.

175 Second, those leaks continued. In the applicants' submission, the leaks are based on matters deriving either from the report and the information communicated to the national judicial authorities, or directly from the applicants' interviews with OLAF's investigators between 23 June and 4 July 2003. The origin of the leaks is therefore well established. The explanations provided to OLAF's investigators were to be found the following day or a few days later, transcribed, almost word for word, in the press.

176 The communication by OLAF, on 24 September 2003, to the President of the Commission of the 'summary of the Eurostat cases now closed' also constitutes a breach of the obligation of confidentiality. That document was not communicated to the applicants and the Director-General of OLAF must have been aware that it would be used publicly by the President of the Commission the following day and had been circulated publicly in the Parliament on the previous day.

177 Furthermore, OLAF publicly — including by leaks to the press — designated the applicants as being guilty of a number of criminal offences, which encouraged belief in their guilt and prejudged the assessment of the facts by the French court, thus breaching the principle of the presumption of innocence. The Director-General of OLAF made statements to the press and before Cocobu, characterising the case as grave and serious; his statements thus contained a judgment on the case, although the investigations were still in progress. Accordingly, OLAF also failed to respect the obligation to maintain confidentiality.

178 The Commission disputes the applicants' arguments and asserts that it is for them to demonstrate the truth of their accusation or their charge, which is seriously detrimental to OLAF's honour.

179 As regards the communication of the 'summary of the Eurostat cases now closed' of 24 September 2003, the Commission refers to Article 10 of Regulation No 1073/1999 and states that, even if the investigation concerned was an external investigation, OLAF was also entitled to forward the information to the Commission, since the Commission was concerned from the aspect of the protection of the Community's financial interests.

180 Last, the Commission contends that the complaint concerning breach of the presumption of innocence is wholly unfounded. OLAF could not take any judicial or disciplinary decision against the applicants, as it is not a judicial or disciplinary organ. Even if a breach of the presumption of innocence might also emanate from other public authorities, the applicants have not demonstrated in what circumstances OLAF designated the applicants publicly as being guilty of a number of criminal offences.

(b) Findings of the Court

The leaks

181 The applicants maintain, first, that there were leaks with respect to the communication of the Datashop — Planistat file to the French judicial authorities and, second, that those leaks continued.

182 The Court observes that, according to the case-law, it is for the applicant, in an action for damages, to establish that the conditions on which the Community incurs non-contractual liability within the meaning of the second paragraph of Article 288 EC are satisfied (Case T-273/01 *Innova Privat-Akademie* v *Commission* [2003] ECR II-1093, paragraph 23, and Case T-146/01 *DLD Trading* v *Council* [2003] ECR II-6005, paragraph 71). Thus, in so far as the applicants have not established in the present case that the publication of information concerning the investigation of which they had been the subject resulted from the disclosure of information attributable to OLAF, such publication could not in principle be construed against OLAF (see, to that effect, *Nikolaou* v *Commission*, paragraph 153 above, paragraph 141).

183 The strict application of that rule may be mitigated, however, where a harmful event may have been the result of a number of different causes and where the Community institution has adduced no evidence enabling it to be established to which of those causes the event was imputable, although it was best placed to provide evidence in that respect, so that the uncertainty which remains must be construed against it (see, to that effect, Joined Cases 169/83 and 136/84 *Leussink-Brummelhuis* v *Commission* [1986] ECR 2801, paragraphs 16 and 17). It is appropriate to adopt that approach when examining whether the applicants have established that certain information

had been disclosed by OLAF or one of its servants, without prejudice, at this stage of the Court's assessment, to whether any such disclosures constitute unlawful conduct on the part of OLAF (see, to that effect, *Nikolaou* v *Commission*, paragraph 153 above, paragraph 142).

— The existence and the content of the leaks

184 It should be observed that the existence of leaks must be considered an acknowledged fact in the present case. The Commission itself admitted at the hearing that 'there [had been] a communication to the national judicial authorities, [that] there [had] certainly been leaks at one time or another which [had] meant that, some weeks later, it [had] appeared in the press'. In spite of that general admission of the existence of leaks, the Commission insists that it is for the applicants to demonstrate that leaks originating in OLAF took place. The applicants, for their part, accept that they have no documentary evidence that a particular person was at the origin of the leaks, but assert that a body of indicia and presumptions indicate that there had been leaks from OLAF.

185 In that regard, it should be noted that the minute of the appearance of the Secretary-General of the Commission before OLAF's Supervisory Committee on 3 September 2003 mentions the existence of leaks. It is appropriate to cite a passage from that minute, which the Commission had sought to have removed from the file and which demonstrates the existence of difficulties:

'As regards the problems of hearing the persons, I fully agree, it is a real problem. It can all work if confidentiality is maintained. If there is really confidentiality, a file drawn up by OLAF is sent to the prosecution and it is for the prosecution to

determine whether or [not] the persons must be heard. That is all very well if there are no leaks. Unfortunately, at the moment, [in] OLAF, everything [gets out]. Thus, the so-called confidentiality — [let's say] I am [Mr Franchet or Mr Byk], I [read] in the *Financial Times* that I am accused of having plundered Community funds. I'm sorry, but your reputation is destroyed. There is no way, even if [they are completely cleared] later, those people, they are destroyed, professionally and even personally. Therefore, it is serious, all that. One is playing with [people's] careers, the[ir] personal life, the[ir] integrity. Therefore, in my opinion, so long as leaks have not been avoided, it is necessary to pay great attention to what one writes and to what one says; one must be somewhat prudent.'

186 Furthermore, according to the note from the secretariat of OLAF's Supervisory Committee for the attention of the Chairman of the Supervisory Committee, dated 27 May 2003:

'Various articles which have appeared, in particular, in the German press, and then in the French press, have referred to the forwarding of the information from OLAF to the prosecution authorities in Paris.

The leaks in the German press appear to have been well synchronised, with, on the one hand, the visits to Germany of certain OLAF officials and, on the other, the ceremonies marking Eurostat's [50th] anniversary.

The attached article from the newspaper *Libération*, published on 22 May 2003, was, it appears, drawn up on the sole basis of the communication by OLAF to the prosecution authorities in Paris. The article is signed by two journalists based in Brussels, giving the impression that the leak originated in Brussels and not in Paris.'

187 Likewise, according to the report of OLAF's Supervisory Committee of 15 January 2004, drafted at the request of the Parliament concerning procedural questions raised by the investigations relating to Eurostat:

'The conduct of this case was marked by the communication to the press and to the institutions by OLAF, intentionally or unintentionally, of information and statements which, as they adversely affected the individual rights of the persons under investigation, and also the proper conduct of the investigation, ought to have been treated confidentially.'

188 It also follows from the note of 1 July 2003 (see paragraph 34 above) that the leaks were an accepted fact for the Director-General of OLAF, since he had stated: 'As regards the leaks, the Commission's security service is investigating.'

189 In those circumstances, it must be observed that the existence of leaks is already sufficiently established on the basis of the documents cited above.

190 In their answer to a written question put by the Court, the applicants state that the information and the terms used in OLAF's letter and note of 19 March 2003 form the basis of a first series of articles or public comments in the media or by Members of the European Parliament who clearly had access to those documents. They cite a number of press articles in that regard.

191 In its observations on the applicants' answer, the Commission disputes the fact that the press articles produced prove the existence of leaks, in particular from OLAF, and states that the applicants are making an assertion without proof. The Commission claims that there is nothing in those articles to confirm that OLAF was the source of the leaks relating to the communication made to the French judicial authorities on 19 March 2003 or to any other event.

192 In that regard, the Court observes that the press articles produced by the applicants support the existence of the leaks. They contain references, in particular, to a 'well-informed source' and also direct quotations from the letter and note of 19 March 2003 sent to the French judicial authorities.

193 It is still appropriate to cite certain of those articles in order to examine the content of the leaks in greater detail.

194 According to an article which appeared in the *Süddeutsche Zeitung* on 26 April 2003:

'It ought to be a holiday. On 16 May the Statistical Office of the European Communities will be 50 years old …

It may be, however, that the holiday will be less grand than expected. Just before that great jubilee, the management of Eurostat is under fire from the critics. According to information received by the *Süddeutsche Zeitung*, internal audits have led to serious accusations. These relate to "slush funds" that drained funds from bodies financed by

the European Union. For some months OLAF … has been actively investigating the matter.

… From 1999 at the latest, at least EUR 900 000 — corresponding to the income from those "Data Shops" were diverted from official accounts. Senior officials are suspected of having diverted funds for themselves from those slush funds.

Too little is still known about the details. All the participants must be presumed innocent until the contrary has been proved. If the accusations were to persist, one would then be dealing with a particularly audacious fraud. …

Suspicion has also fallen on the management, headed by the Frenchman Yves Franchet. Franchet is one of the founders of the company Eurocost, which has long received financial assistance from the [s]tatistical [o]ffice. As the European Parliament stated in March, Eurocost is accused, in particular, of having fiddled its accounts. …

With this new accusation of slush funds, the Eurostat case could be revived. According to a Member of the European Parliament, Ms S.: "If this serious charge is confirmed, the case will then assume a new dimension" …'

195 On 16 May 2003, another article in the *Financial Times* reported that:

'French prosecutors have opened a criminal investigation into allegations of a "vast enterprise of looting" of European Union funds, involving the two most senior officials of Eurostat …

…

… news of the French inquiry broke in the midst of this week's five-day celebrations marking Eurostat's 50th anniversary …

The investigation by the Tribunal de Grande Instance in Paris is so far not directed against any individuals. However, it was launched in response to a probe by OLAF … against two high-ranking French officials — Yves Franchet, Eurostat's long-serving [D]irector-[G]eneral, and Daniel Byk, a director heading one of Eurostat's six departments.

According to the files OLAF passed on to the French authorities on [19] March …, the two men are suspected of setting up … a bank account at a Luxembourg savings bank, which was then used to park up to [EUR] 900 000 that should have gone to Eurostat instead.

…'

196 Another article by the same Brussels reporter refers to 'a criminal investigation by French prosecutors into claims against Yves Franchet, the [D]irector-[G]eneral, and Daniel Byk, one of the institution's directors', who are 'suspected of being involved in setting up a bank account at a Luxembourg savings bank that was outside the scrutiny of financial controllers'. The article also refers to the Eurocost, Eurogramme and CESD Communautaire cases.

197 Furthermore, according to an article which appeared in *La Voix du Luxembourg* on 16 May 2003, 'after a thorough investigation and according to a well-informed source, it turns out that this case is much more advanced than that' and that 'it has been proved that, in a letter dated 19 March and addressed to the [p]ublic [p]rosecutor at the Tribunal de Grande Instance in Paris, the Director-General of [OLAF] reports the discovery of "fraudulent activities which have caused loss to the Community budget and which are liable to be characterised as criminal"'. It should be noted that that article contains direct quotations from the letter and note of 19 March 2003 sent to the French judicial authorities.

198 Consequently, it follows from those articles that, in all probability, the press were in possession of certain information relating to the forwarding of information to the French judicial authorities. Those articles made reference to the 'slush funds' and the applicants are referred to by name as being likely to have set up the system in whole or in part.

199 In addition, on 14 May 2003, Mr Franchet sent the Secretary-General of the Commission an anonymous letter which he had received and which, according to him, had been sent to a Luxembourg newspaper. It should be noted that that anonymous letter, the subject of which is 'Eurostat's 50th birthday', contains extracts from the letter and note of 19 March 2003 sent to the French judicial authorities and expressly mentions the applicants' names. It should also be noted that the extracts are the same as those found in the article which appeared in *La Voix du Luxembourg*, cited at paragraph 197 above.

200 Furthermore, it follows from a statement of 16 May 2003 concerning Eurostat, which was published by the press release of 19 May 2003 (IP/03/709) and which the applicants produced in answer to a written question put by the Court, that the Commission had 'regret[ted] the breach of the confidentiality of that OLAF investigation, which [had] create[d] a difficult situation, above all for the officials referred to in the media, but also for the Commission, which [was] unable to decide what action to take while it [was] not in possession of the appropriate information from the OLAF investigation'. The Commission had said in that statement that 'information [was] circulating … in the media concerning supposedly unlawful activities connected with Eurostat's "Datashops" and the possible implication of [certain of its] officials' and that '[t]hose allegations … [were] … the subject of an investigation by OLAF, with respect to certain aspects of which OLAF ha[d] forwarded a file to the French prosecuting authorities'.

201 Thus, on the basis of all of those documents, it should be observed that, generally, there were leaks and the applicants learned from the press that the Datashop — Planistat file had been forwarded to the French judicial authorities, which the Commission does not dispute.

202 On the question whether those leaks could be imputed to OLAF, the Commission stated, in answer to a question put by the Court at the hearing, that, since the information forwarded to the French judicial authorities had been communicated to OLAF's Supervisory Committee and to the Commission's Legal Service before it appeared in the press, it could not be established beyond doubt that the leaks could only have come from OLAF. In that regard, the Court considers it sufficient to state that any leak from OLAF's Supervisory Committee would be imputable to OLAF and that, in any event, even if the leaks came from the Commission's Legal Service, the Community would also be liable.

203 In those circumstances, and since the Commission has not referred to the possibility that the source of the leaks might have been non-Community in nature, such as the

French judicial authorities, the fact that the information might be known by that non-Community authority does not preclude the presumption that the source of the information was OLAF or another source for which the Community is answerable.

204 Accordingly, it must be considered that the existence of leaks is established as concerns the forwarding of the Datashop — Planistat file to the French judicial authorities. In addition, as all the material in the file, like the context of the file (see the analysis of the various documents made above), permits the view that the source of the leaks is OLAF and in the absence of any indication that the source is, rather, the Commission's Legal Service, it must be presumed that the source of the leaks is, specifically, OLAF.

205 As regards the alleged leaks relating to the interviews of the applicants by OLAF's investigators between 23 June and 4 July 2003, or the leaks relating to the reports, it must be observed that the documents examined above do not show expressly that leaks took place as regards the interviews or reports. Nor have the applicants succeeded in establishing that by means of the press articles which they produced. Accordingly, the existence of any such leaks is not sufficiently established.

206 It must be concluded, in the light of the foregoing, that, in the absence of any evidence adduced by the Commission with a view to showing that the leaks may have had a different origin, OLAF is liable for the leaks relating to the information contained in the letter and note of 19 March 2003 concerning the forwarding of the Datashop — Planistat file to the French judicial authorities and that that information was found in the press following that leak.

207 It is therefore necessary to examine whether OLAF infringed a rule of law that confers rights on individuals.

— Analysis of the alleged breaches of rules of law conferring rights on individuals that may have resulted from the disclosure of information by OLAF

208 The applicants claim, in particular, that there has been a breach of the obligation to maintain the confidentiality of OLAF investigations, a breach of the principle of sound administration and a breach of the principle of the presumption of innocence.

209 As regards the principle of the presumption of innocence, the Court recalls that that principle, which constitutes a fundamental right set forth in Article 6(2) of the ECHR and Article 48(1) of the Charter, confers rights on individuals which are enforced by the Community Courts (Case T-193/04 *Tillack* v *Commission* [2006] ECR II-3995, paragraph 121).

210 According to the case-law of the European Court of Human Rights, Article 6(2) of the ECHR governs criminal proceedings in their entirety, irrespective of the outcome of the prosecution, and not solely the examination of the merits of the charge. That provision guarantees that no one will be described or treated as guilty of an offence before his guilt has been established by a court. Accordingly, it requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged. The presumption of innocence is breached by statements or decisions which reflect the sentiment that the person is guilty, which encourage the public to believe in his guilt or which prejudge the assessment of the facts by the competent court (see European Court of Human Rights, *Pandy v. Belgium*, no. 13583/02, judgment of 21 September 2006, §§ 41 and 42).

211 The European Court of Human Rights has also held that, while the principle of the presumption of innocence enshrined in Article 6(2) of the ECHR is one of the elements of a fair criminal trial that is required by Article 6(1) of the ECHR, it is not limited to a procedural guarantee in criminal matters: its scope is wider and requires that no representative of the State declares that a person is guilty of an offence before his guilt has been established by a court (see European Court of Human Rights, *Y.B. and Others v. Turkey*, nos. 48173/99 and 48319/99, judgment of 28 October 2004, § 43). The European Court of Human Rights had already held in its *Allenet de Ribemont v. France* judgment of 10 February 1995 (Series A no. 308, §§ 35 and 36), on which the applicants rely, observing that the ECHR must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory, that the presumption of innocence may be breached not only by a judge or a court but also by other public authorities. In that regard, the European Court of Human Rights has emphasised the importance of the choice of words by agents of the State in the statements which they make before a person has been tried and found guilty of an offence. What matters for the purposes of the application of Article 6(2) of the ECHR is the real meaning of the statements in question and not their literal form. However, whether the statement of a public agent constitutes a breach of the presumption of innocence must be resolved in the context of the particular circumstances in which the statement in issue was made (*Y.B. and Others v. Turkey*, § 44).

212 Furthermore, the European Court of Human Rights recognises that Article 6(2) of the ECHR cannot, in the light of Article 10 of the ECHR, which guarantees freedom of expression, prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (*Allenet de Ribemont v. France*, paragraph 211 above, § 38, and *Y.B. and Others v. Turkey*, paragraph 211 above, § 47).

213 That principle has its corollary in the obligation to maintain confidentiality placed on OLAF pursuant to Article 8(2) of Regulation No 1073/1999.

214 Similarly, it has been held that, by virtue of its obligation to have due regard to the interests of officials and of the principle of sound administration, the administration must avoid giving the press information concerning disciplinary proceedings which might damage the official concerned and take all necessary measures to prevent any form of dissemination of information which might be defamatory of that official (see the order of the President of the Court of First Instance in Case T-203/95 R *Connolly* v *Commission* [1995] ECR II-2919, paragraph 35).

215 In the present case, the applicants claim that OLAF named them publicly — including by the leaks in the press — as guilty of a number of criminal offences, which encouraged the belief in their guilt and prejudged the assessment of the facts by the French court, thus breaching the principle of the presumption of innocence.

216 It must be borne in mind that, for example, in the press article of 16 May 2003 which appeared in the *Financial Times* and is cited at paragraph 195 above, it is clearly stated, on the basis of information that in all probability was leaked by OLAF, that the applicants are likely to have committed a 'vast enterprise of looting' of European Union funds. It is clear that that statement breaches the principle of the presumption of innocence in that it reflects the view that the applicants are guilty and encourages the public to believe in their guilt.

217 Thus, by leaking information already containing in itself such a statement, OLAF breached the principle of the presumption of innocence. By those leaks, OLAF also breached the obligation to maintain the confidentiality of investigations and, by provoking the disclosure in the press of sensitive elements of the investigations, it acted against the interests of sound administration in so far as it enabled the public at large to have access, during the investigation procedure, to confidential information of the administration.

218 As already stated above, the principle of the presumption of innocence confers rights on individuals. It should be observed that the obligation to maintain confidentiality also confers rights on individuals who are affected by an OLAF investigation in so far as they are entitled to expect that the investigations concerning them will be conducted in a manner that respects their fundamental rights. In the same way, the applicants are entitled to rely in the present case on the principle of sound administration in that it entails the right to have their cases dealt with in such a way that confidentiality is maintained.

219 It must be held that these are sufficiently serious breaches of those rules of law, in so far as it is for OLAF to ensure that such leaks, which breach the fundamental rights of the persons concerned, such as the presumption of innocence, do not take place, as the administration has no margin of discretion with respect to compliance with that obligation.

The communication of 24 September 2003

220 The applicants claim that OLAF breached the obligation to maintain confidentiality by communicating to the President of the Commission, on 24 September 2003, the 'summary of the Eurostat cases now closed'.

221 That summary was sent to the President of the Commission by the Director-General of OLAF. According to the covering note, the Director-General sent the President of the Commission 'a brief summary of the Eurostat cases now closed which might be circulated'. The Director-General further stated that 'this summary note c[ould] not in any way be considered to constitute a final investigation report within the meaning of Regulation No 1073/1999'. Last, he noted that 'this working document, of general scope, [was] solely intended to highlight the main conclusions drawn from

the investigations'. The summary itself sets out, for each file (Eurocost, Eurogramme, Datashop, Planistat and CESD Communautaire), the purpose of the investigation, the findings and the conclusions.

222 In that regard, it is sufficient to observe that, under Article 10(3) of Regulation No 1073/1999, OLAF may at any time forward to the institution concerned the information obtained in the course of internal investigations. In addition, the applicants are somewhat contradictory in their arguments, since on the one hand they criticise OLAF for not having communicated certain information to the Commission and on the other they criticise it for having communicated other information. It should further be observed that the applicants had already expressed their views concerning those files at their hearings in June and July 2003 and, accordingly, they cannot claim that they were not heard before that communication was made.

223 In any event, since OLAF was entitled to submit that document to the Commission, it cannot be held responsible for the fact that the President of the Commission used that document publicly and that the document was publicly disseminated to the Parliament. That aspect will be examined again below in the context of the assessment of unlawful conduct on the part of the Commission.

The views expressed by the Director-General of OLAF

224 The applicants claim that the Director-General of OLAF expressed views on the file, by characterising it as grave and serious, both in the press and on the occasion of his statements before Cocobu.

225 As regards the alleged statements of the Director-General of OLAF in the press, the Court notes that the applicants have adduced no evidence. Nor have they established how the fact that the Director-General of OLAF stated in a television interview on 30 June 2003 that the Eurostat case was a 'serious matter' had adversely affected the confidentiality of the case. In any event, the applicants have produced no evidence against which the content of those televised statements might be verified.

226 As regards the statements of the Director-General of OLAF before Cocobu on 30 June and 16 July 2003, the applicants have also failed to establish how the fact that he characterised the Eurostat file as 'not normal' and 'not classic' had adversely affected the confidentiality of the case.

227 However, the applicants also claim, in that regard, that there has been a breach of the principle of the presumption of innocence.

228 In that regard, it is necessary to examine what the Director-General of OLAF said in his statements before Cocobu. According to the note of 1 July 2003, the Director-General of OLAF stated when he appeared before Cocobu on 30 June 2003 that 'OLAF [was] continuing the internal investigation and that Mr Franchet and Mr Byk [would] be heard, although the investigation could not be finalised for the end of June'. He further asserted that, '[a]s to why disciplinary measures such as suspension had not been taken, [he had] shared OLAF's hesitations but [had] emphasised that OLAF had not wished to compromise the internal investigation by sounding the alarm immediately'. The Director-General also observed that 'Mr Franchet and Mr Byk had not at any time attempted to alter the course of the investigation'. When he appeared before Cocobu on 16 July 2003, the Director-General of OLAF emphasised that 'it [was] quite exceptional for a Director-General to be involved' and that 'initially that aspect had not been apparent'. He further noted that 'an internal audit

did not necessarily mean that there was proof'. He also stated that Mr Franchet had been informed that the investigation had been launched and that the results would be forwarded to the Luxembourg judicial authorities.

229 It should be observed that, in spite of the fact that the Director-General of OLAF expressly referred to the applicants when he appeared before Cocobu, he cannot be considered to have breached the principle of the presumption of innocence. His statements were more in the nature of information, notably in answer to the questions put by the members of Cocobu, than likely to encourage belief in the applicants' guilt.

230 In those circumstances, OLAF did not breach the principle of the presumption of innocence in that regard.

3. The alleged errors concerning the drafting and the communication of the notes and final reports

(a) Arguments of the parties

231 The applicants refer to the decision of the Ombudsman of 3 July 2003, concerning the complaint against OLAF registered as No 1625/2002/IJH, which states that the principle of good administration requires that administrative investigations by OLAF be carried out 'carefully, impartially and objectively'. The applicants contend that that was not so in the present case.

232 In fact, OLAF already drew conclusions in a note of 1 July 2002 relating to the Eurocost file, although it had by no means investigated that file or heard Mr Franchet, who was none the less referred to in the communication of 4 July 2002 to the Luxembourg judicial authorities.

233 Furthermore, neither the 'summary of the Eurostat cases now closed' of 24 September 2003 nor OLAF's final reports take into consideration the elements communicated by the applicants when they were heard in June and July 2003 concerning the Eurocost, Datashop — Planistat and CESD Communautaire files. Similarly, OLAF did not state its reasons for not taking them into consideration. The mere fact of stating that the persons concerned deny their liability does not mean that they were given a proper hearing by the OLAF investigators.

234 In addition, OLAF did not present its conclusions to the applicants before drawing up its final reports, and thus again breached their right to be heard.

235 The applicants emphasise that, according to recital 10 in the preamble to Regulation No 1073/1999, the conclusions of an investigation may be based solely on elements which have evidential value. Accordingly, OLAF should take account of all the elements obtained when drawing its conclusions and cannot interpret them to serve the cause or objective which it has set itself in advance.

236 Furthermore, OLAF brought great pressure to bear on the national judicial authorities to prosecute the applicants. The communication by OLAF to the French judicial authorities of the final reports relating to the CESD Communautaire and Datashop — Planistat files is contrary to Article 9(4) of Regulation No 1073/1999,

since the action, whether disciplinary or legal, to be taken on the final reports is a matter for the institution concerned and not for OLAF.

237 The Commission submits, with respect to the obligation to conduct investigations carefully and impartially, that OLAF may itself decide when it is appropriate to forward information obtained in the course of an investigation. The Commission denies that the investigators stated that they had forwarded the information without being in possession of complete and accurate knowledge of the relevant facts. It submits that the applicants themselves acknowledge that they were heard by the OLAF investigators. However, the investigators were able to hear the applicants only from the time when the state of progress of the investigation allowed, which puts the applicants' assertion that they were heard only when they requested a hearing into perspective.

238 As regards the failure to take into account the elements communicated to OLAF by the applicants when they were heard in June and July 2003, the Commission asserts that the files in question are now with the French and Luxembourg judicial authorities and that, consequently, it does not consider that it is required to comment on the substance of those files in the present case. In any event, OLAF is not bound to share the applicants' point of view. In addition, the 'summary of the Eurostat cases now closed' states that the officials concerned have been heard and that they deny their liability.

239 As for the pressure that OLAF is alleged to have brought to bear on the French judicial authorities, relating to the fact that it was for the Commission and not for OLAF to communicate the investigation reports, pursuant to Article 9(4) of Regulation No 1073/1999, the Commission emphasises that that provision does not in any way prevent OLAF from sending the final report of an internal investigation to a national judicial authority for its information, especially if that authority has already been sent information during the investigation. That provision reserves to the institution concerned responsibility for taking such disciplinary and legal action as it may deem appropriate on the results of an internal investigation.

(b) Findings of the Court

240 In the first place, as regards the note of 1 July 2002, it is sufficient to observe that that note makes no reference, not even an implicit reference, to Mr Franchet. In any event, since the Court has already held above that Mr Franchet ought to have been heard concerning the forwarding of the Eurocost file to the Luxembourg judicial authorities, there is no further need to consider whether he ought to have been heard with respect to that note, which formed part of the file sent to those authorities.

241 In the second place, as regards the alleged failure to take the elements communicated by the applicants into account in the drafting of the final reports, it is sufficient to note that the applicants confine themselves to long factual arguments but fail to adduce any evidence to support those arguments. In addition, it is not the Court's place to re-examine those files. Furthermore, as the Commission states, OLAF and its investigators are not bound to share the applicants' point of view. Moreover, in the 'summary of the Eurostat cases now closed' of 24 September 2003, it was emphasised that when they were heard by OLAF's services the officials concerned had denied liability with respect to the facts alleged against them and considered, in particular, that they had always acted in the interest of the Commission.

242 Furthermore, as regards the applicants' argument that the conclusions of an investigation may be based solely on elements which have evidential value and that, accordingly, OLAF should take into consideration all the elements obtained, without interpreting them to serve the cause or the objective which it has set itself in advance, it is sufficient to observe that the applicants have wholly failed to substantiate their assertion that OLAF based its conclusions on material having no evidential value or that it set itself a particular objective in advance.

243 Furthermore, as regards the alleged breach of the obligation to state reasons, in that OLAF failed to explain its reasons for not taking the applicants' observations into account, it is sufficient to observe that, according to consistent case-law, a breach of the obligation to state reasons laid down in Article 253 EC is not sufficient for the Community to incur liability (Case 106/81 *Kind* v *EEC* [1982] ECR 2885, paragraph 14; Case C-119/88 *AERPO and Others* v *Commission* [1990] ECR I-2189, paragraph 20; Case C-76/01 P *Eurocoton and Others* v *Council* [2003] ECR I-10091, paragraph 98; Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 57; Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 104; Case T-18/99 *Cordis* v *Commission* [2001] ECR II-913, paragraph 79; and Case T-43/98 *Emesa Sugar* v *Council* [2001] ECR II-3519, paragraph 63). That argument must therefore be rejected.

244 In any event, the obligation to state reasons does not mean that all the matters of fact and of law which have been raised by the persons concerned during the proceedings must be discussed (see, to that effect, Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22; Case T-277/01 *Stevens* v *Commission* [2002] ECR-SC I-A-253 and II-1273, paragraph 71; and Case T-198/02 *N* v *Commission* [2004] ECR-SC I-A-115 and II-507, paragraph 109).

245 Accordingly, the applicants cannot claim that OLAF failed to take account of all the elements and observations communicated by them.

246 In the third place, as regards the applicants' argument that OLAF did not present its conclusions to them before drawing up its final reports, and thus breached their right to be heard, it is sufficient to observe that the applicants were heard at the end of June and the beginning of July 2003 concerning the files in question, that is to say,

well before OLAF drew up its reports in September 2003. The right to be heard does not require OLAF to have presented its conclusions to the applicants.

247 In the fourth place, as regards the communication of the final reports to the national judicial authorities and the pressure alleged to have been brought to bear on those authorities, it must be borne in mind that, under Article 9(4) of Regulation No 1073/1999, reports drawn up following an internal investigation and any useful related documents are to be sent to the institution, body, office or agency concerned, which is to take such action, in particular disciplinary or legal, as the results of those investigations warrant, and is to report thereon to the Director of OLAF.

248 It should also be borne in mind that, under Article 10(2) of Regulation No 1073/1999, the Director of OLAF is to forward to the judicial authorities of the Member State concerned the information obtained by OLAF during internal investigations into matters liable to result in criminal proceedings.

249 In the present case, OLAF had already forwarded information, pursuant to Article 10(2) of Regulation No 1073/1999, to the French judicial authorities. It should be noted that Article 9(4) of Regulation No 1073/1999 does not prevent OLAF from sending the final report of an internal investigation to a national judicial authority for its information, especially if that authority has already been sent information during the investigation. Article 9(4) of that regulation reserves to the institution concerned responsibility for taking disciplinary and legal action on the results of an internal investigation and for reporting thereon to the Director of OLAF.

250 In any event, the applicants have not succeeded in demonstrating that OLAF did in fact bring great pressure to bear on the French judicial authorities.

251 It follows from the foregoing that the applicants have not succeeded in demonstrating that OLAF's conduct was unlawful with respect to the drafting and communication of the notes and final reports, apart from the unlawful conduct already found when the Court examined the forwarding of the information to the Luxembourg and French judicial authorities.

4. The refusal of access to certain documents

(a) Arguments of the parties

252 The applicants maintain that by refusing to communicate the entire file to them OLAF was guilty of maladministration, in addition to the breach of their fundamental rights. There is nothing in the relevant rules to justify the refusal to communicate the investigation file and, a fortiori, the (external or internal) investigation report to a person under investigation by OLAF, notwithstanding the question whether the investigation has been successful in whole or in part.

253 It cannot be accepted that OLAF is entitled to refuse access to its documents on the general ground of the guarantee of the effectiveness and confidentiality of the mission entrusted to it and of its independence. Access to documents is a fundamental right and any limit placed on such access must be assessed restrictively.

254 The Commission observes that OLAF did not act unlawfully by refusing access to the documents in question, since it is under no obligation to allow access at the preliminary stage represented by its investigation. It is only at a subsequent stage, if action

is taken on OLAF's reports, in disciplinary and/or legal proceedings, that access to the file is open. Furthermore, the relevant documents were presented to the applicants when they were heard, according to the questions put to them.

(b) Findings of the Court

255 It must be borne in mind that OLAF is under no obligation to grant a Community official who is alleged to be concerned by an internal investigation — before his appointing authority adopts a final decision adversely affecting him — access to the documents forming the subject-matter of such an investigation or to those drawn up by OLAF itself on that occasion; otherwise, the effectiveness and confidentiality of the mission entrusted to OLAF and OLAF's independence could be undermined. In particular, the mere fact that part of a confidential investigation file appears to have been unlawfully communicated to the press does not in itself justify any derogation, in favour of the official alleged to be referred to, from the confidentiality of that file and of the investigation conducted by OLAF. Respect for the rights of defence of the official in question is sufficiently ensured by Article 4 of Decision 1999/396 (order in Case T-215/02 *Gómez-Reino* v *Commission* [2003] ECR-SC I-A-345 and II-1685, paragraph 65, and judgment in *Nikolaou* v *Commission*, paragraph 153 above, paragraph 241).

256 Thus, Article 4 of Decision 1999/396 does not require OLAF to give access to the documents forming the subject-matter of an internal investigation or to those drawn up by OLAF itself, in particular because an interpretation of that provision which required OLAF to do so would undermine its work (*Nikolaou* v *Commission*, paragraph 153 above, paragraph 242).

257 That approach is not inconsistent with respect for the right to good administration, provided for in Article 41 of the Charter, which states that that right includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy. Thus, access to the file may be refused, according to that principle, where respect for confidentiality so requires.

258 Since that interpretation precludes any obligation for OLAF to give access to its file before it has adopted its final report, the applicants' argument relating to access to the investigation file must be rejected.

259 As regards access to the final report, it should be noted that none of the obligations resulting from Article 4 of Decision 1999/396 is material to that question. As regards the *inter partes* principle, the existence of an illegality with regard to OLAF can be established only where the final report is published or in so far as it is followed by the adoption of an act adversely affecting the person concerned (see, to that effect and by analogy, *Nikolaou* v *Commission*, paragraph 153 above, paragraphs 267 and 268).

260 In the present case, it is not claimed that the reports were published without having first been communicated to the applicants. In so far as the persons to whom the final reports were addressed, namely the Commission and the French or Luxembourg judicial authorities, intended to adopt such an act vis-à-vis the applicants on the basis of the final reports, it is for those other authorities, where appropriate, and not for OLAF, to give the applicants access to those final reports in accordance with their own procedural rules (see, to that effect, *Nikolaou* v *Commission*, paragraph 153 above, paragraph 269).

261 It must therefore be held that OLAF committed no illegality in the present case with respect to access to the final reports.

262 In any event, as is apparent from paragraph 47 above, the applicants had access to the final reports in response to their requests, with the exception of the final report of the investigation relating to the Planistat file, which concerns the external part of the Datashop — Planistat file.

5. The unreasonableness of the time taken to deal with the Eurostat case and infringement of Articles 6 and 11 of Regulation No 1073/1999

(a) Arguments of the parties

263 The applicants take issue with OLAF on account of the fact that the investigations culminated in final reports only on 25 September 2003, or almost three years from the time when they were opened, or three and a half years after the Eurocost and Datashop — Planistat files were referred to OLAF, and 18 months after the investigation was opened, or almost two years after the CESD Communautaire file was referred to OLAF. Those periods are therefore unreasonable and unjustified by reference to the nine-month period prescribed in Article 11(7) of Regulation No 1073/1999 and the obligation laid down in Article 6(5) of that regulation to conduct the investigations continuously over a period which must be proportionate to the circumstances and complexity of the case.

264 Mr Franchet communicated the audit reports forming the basis of the investigations to OLAF in March 2000 (the Eurocost case) and November 2001 (the CESD Communautaire case). The Financial Controller had had the audit report relating to the Datashop — Planistat file since February 2000 and forwarded it to OLAF in March 2000. OLAF did not open its investigations until 6 October 2000 as regards

the Eurocost and Datashop — Planistat files and until 18 March 2002 as concerns the CESD Communautaire file, thus taking eight months (in the Eurocost and Datashop — Planistat cases) and four months (in the CESD Communautaire case) to decide to undertake an investigation, although it had not had time to hear the applicants.

265 In the applicants' submission, OLAF never informed its Supervisory Committee of the reasons why the investigation could not be wound up within the nine-month period, or of a foreseeable time-limit for completing the investigation.

266 Therefore, by first of all taking a long time to open the investigations, to pursue them and to close them, and by referring the cases to the national judicial authorities in inconsistent circumstances and on the basis of incomplete investigations which had been unsuccessful, OLAF adopted conduct which disregarded the concept of a reasonable time and the principles of good administration and sound management.

267 Furthermore, the applicants sustained damage on account of that period and are entitled to complain of the excessive duration of an investigation even before they were actively subject to such an investigation or before their involvement in that investigation was known.

268 The Commission acknowledges that a long period elapsed between the time when the various files were communicated to OLAF, the time when it opened the investigations and the time when those investigations were closed. That period may be explained in part by the actual establishment of OLAF, which commenced its activities on 1 June 1999 with the staff of the former Task Force for Coordination of Fraud Prevention which it replaced. The arrival of new staff was phased over mid-2001 to mid-2002 and that change of personnel entailed a complete reorganisation of the service and changes to the management and the reassignment of cases.

269 However, the length of the period is not in itself unreasonable if the degree of complexity of the case is taken into account. The various files relating to this case were referred to OLAF on an ad hoc basis and it was only when those various files were compared, which could only be done after a certain time, that the whole significance of the problem became apparent.

(b) Findings of the Court

270 It must be borne in mind that, pursuant to Article 6(5) of Regulation No 1073/1999, investigations are to be conducted continuously over a period which must be proportionate to the circumstances and complexity of the case.

271 In addition, Article 11(7) of Regulation No 1073/1999 provides that where an investigation has been in progress for more than nine months, the Director of OLAF is to inform OLAF's 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.

272 Thus, it must be held that Regulation No 1073/1999 does not prescribe any specific and binding period for the completion of investigations by OLAF.

273 In that regard, it must be borne in mind that the obligation to conduct administrative procedures within a reasonable time is a general principle of Community law which is enforced by the Community Courts and which, moreover, is set forth, as an element of the right to good administration, in Article 41(1) of the Charter (judg-

ment of 11 April 2006 in Case T-394/03 *Angeletti* v *Commission* (ECR-SC I-A-2-95 and II-A-2-441), paragraph 162).

274 Therefore the procedure before OLAF cannot be extended beyond a reasonable time, which must be assessed by reference to the circumstances of the case.

275 In the present case, it is apparent from the file that OLAF had, since 17 March 2000, 12 April 2000 and 15 November 2001 respectively, been in possession of audit reports relating to the Datashop, Eurocost and CESD Communautaire files.

276 It is also apparent from the file that OLAF opened its internal investigations into the Datashop and Eurocost files on 6 October 2000, and on 18 March 2002 into the CESD Communautaire file. Thus, it took almost seven months and six months respectively to open the investigations in the Datashop and Eurocost cases, and four months in the CESD Communautaire case.

277 Those investigations were closed by the final investigation reports on 25 September 2003. Accordingly, the investigations in the Datashop and Eurocost cases were closed approximately three and a half years after the cases were referred to OLAF and almost three years after the investigations were opened; the investigation in the CESD Communautaire case was closed approximately one year and ten months after the case was referred to OLAF and one and a half years after the investigation was opened.

278 It should be observed that those periods may be regarded as relatively long.

279 As the Commission itself acknowledges, a long period elapsed between the time when the various files were communicated to OLAF, the time when OLAF opened the investigations and the time when those investigations were closed. That period may be explained in part by the actual establishment of OLAF, which commenced its activities on 1 June 1999 with the staff of the former Task Force for Coordination of Fraud Prevention which it replaced. The arrival of new staff was phased over mid-2001 to mid-2002 and that change of personnel entailed a complete reorganisation of the service and changes to the management and the reassignment of cases.

280 The Court considers that such explanations cannot in themselves justify those long periods. As the applicants correctly maintain, the officials concerned must not suffer on account of the deficiencies in the administrative organisation of the Commission's services. The fact that OLAF experienced teething problems cannot constitute a ground for exempting the Commission from liability.

281 However, as the Commission contends, the degree of complexity of the case must also be taken into account. The complexity of the Eurostat case, inherent in the various investigations to which it gave rise and the possible interaction between those investigations, is not disputed and is apparent from the file.

282 The periods in question cannot therefore be regarded as unreasonable in the circumstances of the present case.

283 As regards the applicants' argument that OLAF never informed its Supervisory Committee of the reasons for which it had not been possible to wind up the investigation within the nine-month period or of the expected time for completion, it is

sufficient to note that, even if that were the case, the applicants would still have failed to show that this constituted a sufficiently serious breach of a rule of law conferring rights on individuals.

284 In those circumstances, the applicants' assertion that the time taken by the investigations was unreasonable must be rejected.

285 It follows from all of the foregoing that OLAF made a number of errors of such a kind as to entail the liability of the Community. Those errors consist in forwarding the information to the Luxembourg and French judicial authorities without having first heard the applicants and its Supervisory Committee and in the leaks relating to the forwarding of the Datashop — Planistat file to the French judicial authorities.

B — *The unlawfulness of the Commission's conduct*

1. The disclosure of information by the Commission

(a) Arguments of the parties

286 The applicants claim that the institutions are required to ensure respect for the confidentiality of OLAF investigations and the legitimate rights of the persons concerned

pursuant to Article 12(3) of Regulation No 1073/1999, and also respect for fundamental rights, and that the Commission failed to do so.

287 In the present case, the forwarding of information or reports by OLAF to the national judicial authorities led to 'more or less orchestrated, and probably intentional, leaks on the part of OLAF', which led to a media campaign to denigrate the applicants which seriously undermined their legitimate rights, their honour and their dignity. Similarly, since the applicants were heard by OLAF's investigators, the press have been aware of particular specific details of the Eurostat case. Thus, the Commission did not ensure respect for confidentiality. The applicants further submit that the Commission does not dispute those facts.

288 In addition, the applicants maintain that the Commission itself disseminated information, in breach of its obligation to maintain confidentiality and also of the *inter partes* principle and the principle of the presumption of innocence. The applicants refer to a press release of 9 July 2003, in which the Commission announced that it was opening disciplinary proceedings against three of its officials. Although that press release stated that the decision to open disciplinary proceedings had been taken without prejudice to the principle of the presumption of innocence, it must be seen against a background that necessarily undermines the applicants' legitimate rights. In addition, in that press release, the Commission made public certain confidential information relating to the Eurostat case by relying on investigations during which the applicants were never heard in advance.

289 Moreover, on 24 September 2003, the Commission circulated within the Parliament three documents accusing or criticising the applicants (see paragraph 42 above) which were not communicated to the applicants in advance and on which the applicants never had the opportunity to comment, and which were communicated

to the applicants only at their request, on 10 October 2003, in spite of having been distributed widely within the institutions and in the press since 25 September 2003.

290 The applicants claim that, even if the documents in question, which originated in the task force and the IAS, do not specifically and individually implicate them, since the mission of those bodies was not to pronounce formally on the existence of fraud or to implicate anyone individually, the mere fact that they question the lawfulness of certain elements which had been found adversely affects the applicants.

291 In the reply, the applicants claim that the distribution of that information was contrary to the Framework Agreement on relations between the European Parliament and the Commission (Annex XIII to the Rules of Procedure of the Parliament), which provides that those two institutions, in the context of any confidential information, are to respect, inter alia, 'fundamental human rights, including the right to a fair trial and the right to protection of privacy'. Furthermore, confidential information can be communicated only to the President of the Parliament, the chairpersons of the parliamentary committees concerned and the Bureau and the Conference of Presidents. In the present case, the distribution was wider, since the documents distributed were accessible in practice to any Member of the Parliament and, beyond, to the press. In addition, the President of the Commission appeared before the Presidents of the Parliamentary Groups, a category not mentioned in Article 1(4) of the Framework Agreement.

292 In addition, in his speech of 25 September 2003 before the Conference of Presidents of Parliamentary Groups, the President of the Commission made extremely serious charges against the applicants and, in particular, Mr Franchet. Even though the President of the Commission did not accuse Mr Franchet by name of being responsible for the irregularities, he criticised him for having allowed such irregularities to take place. Mr Franchet was also accused of having misled the responsible Member

of the Commission, as the Commission acknowledges, and of having an interest in 'concealing the truth about facts which dated back to the past'.

293 Accordingly, by making that accusation, which was not preceded by any interview with the accused, who was thus 'thrown to the lions' before the members of Cocobu and the press, on the sole basis of reports drawn up in a climate of suspicion towards the Commission, which ought therefore to have adopted a firm approach, the President of the Commission did not conduct himself with the dignity and honesty that every citizen is entitled to expect of him. He did not respect the applicants' fundamental rights and, in particular, their rights of defence and based his assessments on inaccurate facts. In the applicants' submission, it is unacceptable that he decided, for purely political reasons, to identify a culprit rather than face any criticism. That 'umbrella strategy', as the press described it, was intended solely to gain time.

294 The Commission contends that, since OLAF, in the context of its investigative mission, acts in complete independence, it is not the Commission's place to interfere in OLAF's investigations. Article 12(3) of Regulation No 1073/1999 requires the Commission to respect the confidentiality of OLAF's investigations to the extent to which it is aware of them The Commission assumes any liability that may be attributed to OLAF, but that does not empower it to interfere in OLAF's investigative acts to ensure their confidentiality.

295 As regards the press release of 9 July 2003 and the decisions adopted on that date, the Commission contends that they appear to be particularly prudent, measured and concerned with protecting the individuals, if account is taken of the context, 'marked by the emergence of an undeniable climate of interinstitutional tension [following] the discharge for the 2001 budget'.

296 As for the three documents communicated to the Parliament on 24 September 2003 (see paragraph 42 above), the Commission states that the summary and the conclusions of the work of the task force contain no implication of the applicants. The information note, based on the second intermediary report drawn up by the IAS, contains preliminary findings which are not guaranteed to be exhaustive and do not address the direct and individual liability of the applicants, who cannot therefore complain that those documents were not communicated to them in advance and that they did not have the opportunity to formulate their observations. Those documents are confined to establishing systemic dysfunctions. If it were accepted that reports from bodies such as the task force or the IAS could adversely affect officials merely because they question the regularity of certain acts or conduct, that would quite simply amount to denying any possibility of an audit activity.

297 As regards the address which he gave on 25 September 2003, the President of the Commission undertook an uncompromising analysis of a serious situation, but did not seek to portray the applicants as 'scapegoats'. Even if he had criticised Mr Franchet for not having withdrawn sufficiently quickly from certain entities, contrary to the instructions given by the previous Commission, and for having maintained contractual relations with certain companies in spite of the results of certain audits which were available to him, which is contrary to the precautionary principle at its most basic, he did not accuse the applicants of those irregularities.

298 According to the Commission, the main criticism of Mr Franchet is not that he may have been personally involved in fraud or irregularities, but that he supplied insufficient information to the responsible Member of the Commission, since, on taking up office, the responsible Member of the Commission was not informed about the Eurostat case. The Commission observes that the President of the Commission also clearly identified the communication problems between OLAF and the Commission and acknowledged the need to improve financial governance at the level of central control. He never claimed that the applicants had incurred criminal or disciplinary liability, but clearly referred to Mr Franchet's 'administrative and political liability'.

(b) Findings of the Court

299 As a preliminary point, as regards the applicants' complaint that the Commission did not ensure the confidentiality of the investigations when information was forwarded to the national judicial authorities, it is sufficient to observe that, admittedly, pursuant to the third subparagraph of Article 12(3) of Regulation No 1073/1999, the institutions are to ensure that the confidentiality of the investigations conducted by OLAF is respected, together with the legitimate rights of the persons concerned. However, that provision cannot be interpreted as placing the Commission under a general obligation to ensure that OLAF, which carries out its investigations in complete independence, respects confidentiality. That provision must be read together with the preceding subparagraph, which provides that the Director-General of OLAF is to report regularly to the institutions on the findings of those investigations, whilst respecting the same principles. Thus, it follows from Article 12 of Regulation No 1073/1999 that, where the Director-General of OLAF has communicated to the institutions, including the Commission, information concerning the investigations, those institutions must ensure the confidentiality of that information and the legitimate rights of the persons concerned when dealing with that information.

300 Consequently, the Court must examine whether the Commission acted unlawfully when it itself disclosed various items of information in the context of the investigations in question.

The Commission's press release of 9 July 2003

301 The applicants claim that the Commission itself disseminated information in breach of its obligation to maintain confidentiality and also of the *inter partes* principle and the principle of the presumption of innocence; the applicants refer to the press release of 9 July 2003 (IP/03/979).

302 It is appropriate to quote that press release:

‘The Commission takes action on financial mismanagement in Eurostat

Over the past few weeks the European Commission has conducted its own internal investigations into [Eurostat]. The preliminary results of these analyses clearly point towards the existence of systemic management weaknesses and irregularities within Eurostat. With all due respect to the independent and ongoing proceedings of [OLAF], the Commission believes these concerns have to be dealt with immediately. Therefore the Commission has today agreed on a series of measures which are designed to address the most pressing problems.

The President of the Commission … said: “We have been patiently waiting for the outcome of different ongoing investigations. However, our own analyses now provide us with the basis to act and the Commission is very anxious that the process be accelerated. We are taking drastic measures today and they will hurt but they’re indispensable. Whatever has happened in the past will be dealt with and the functioning of Eurostat brought in line with the rules and principles this Commission has sworn to apply.”

Actions

The Commission has opened disciplinary proceedings against three Commission officials. As a precautionary measure, a number of Eurostat managers will be moved to advisory functions.

If any other current or former member of Eurostat staff is found to have acted in breach of the Financial Regulation and of the Staff Regulations, disciplinary proceedings will be opened against them. The Commission wishes to stress that the decisions to open disciplinary procedures or to move officials are without prejudice to the principle of the presumption of innocence.

…

[The analysis by the Budget DG of the audit reports drawn up following the Eurostat internal audit] demonstrates that a number of serious breaches of the Financial Regulation have taken place and that the follow-up to several significant aspects of internal audit reports has not shown the necessary breadth and thoroughness or led to essential action.

…

The IAS findings are preliminary and need further corroboration. However, the preliminary findings and indications suggest that serious wrongdoing may have taken place.

The OLAF report expected for [the] end of June is still awaited.'

303 The applicants contend that this press release undermines their legitimate rights and breaches the principle of the presumption of innocence.

304 The Court observes that the applicants are not expressly named in that press release. However, since their names were widely disseminated to the public, notably in May 2003, with respect to the existence of systemic management weaknesses and irregularities within Eurostat, there was no doubt that the press release was referring to the applicants.

305 The Commission had already made the applicants' names public in a statement concerning Eurostat which it issued in a press release of 19 May 2003 (IP/03/709), which the applicants produced in answer to a written question of the Court. According to that statement:

'On Friday, the Commission received a short intermediary note from OLAF on its investigations into alleged past mismanagement within Eurostat, which confirms that there are issues under investigation which could have implications regarding the personal responsibility of certain senior officials. However, this note does not yet provide proof concerning any specific official. Moreover, the officials concerned have not yet been heard by OLAF.

The Commission will review the situation at its forthcoming meeting on Wednesday, with a view to taking any appropriate steps to ensure a speedy conclusion to the investigations in hand and to defend the financial interests of the Communities and the reputation of both the Institution and its officials. In this context, it will study the request from Mr Franchet, Director-General of Eurostat, and Mr Byk, Director in Eurostat, to be moved from their current posts, so as [to] safeguard the interests of the Institution and to be in a position to defend themselves.

The Commission urges OLAF to speed up its ongoing investigation and in particular to provide the officials it considers to be potentially involved with an opportunity to be heard as soon as possible.'

306 Thus, the Commission clearly associated the applicants' names with the alleged irregularities in the Eurostat case. The same happened again on 21 May 2003, when the Commission issued another press release, entitled 'Commission acts to safeguard the interests of the Institution and its staff in view of the allegations surrounding Eurostat' (IP/03/723), which the applicants produced in answer to a written question of the Court, and which states:

'The Commission today reviewed the situation created by the allegations surrounding the EU's statistical office, Eurostat. In this context, it has adopted four measures to safeguard the interests of the Institution and its staff.

First, the Commission accepts the requests of Eurostat Director-General Yves Franchet and Director Daniel Byk to be transferred to new posts for the duration of ongoing investigations. These transfers are in no way a disciplinary measure. They are done to protect the interests of the Institution and to give the persons in question proper facility for defending themselves against the allegations. Both persons are temporarily appointed to Advisor functions in the Directorate-General for Administration as of this day. The Commission has also decided to appoint [M.V.A.], presently Director-General for Translation, as Director-General of Eurostat on a temporary basis, to ensure proper continuity in the management of Eurostat.

The Commission notes that [OLAF] intends to report back on the potential involvement of Commission officials in the context of its ongoing investigations by the end of June this year.

Second, in recognition of the situation created for Mr Franchet and Mr Byk, particularly by the nature of public coverage, the Commission has decided to assist them in preserving their reputation and their rights of defence.

Third, it has requested the Directorate-General [for the] Budget to analyse the audit reports drafted by Eurostat with respect to compliance by Eurostat with the provisions of the Financial Regulation in the cases under investigation by OLAF.

Finally, the Commission has decided on the principle of introducing its own complaint in the investigation opened by the Paris public prosecutor, in order to protect the Communities' civil and financial interests ("*plainte contre X avec constitution de partie civile*").

The Commission wishes to underline that OLAF investigations are still ongoing, and notes that OLAF will both provide the officials it considers to be potentially involved with an opportunity to be heard, and seek to conclude these investigations as soon as possible.

The Commission also stresses the right of all individuals to the presumption of innocence and reiterates that the information at its disposal at this stage does not permit

any conclusions to be drawn regarding the personal responsibility of any specific official.

OLAF was created precisely to defend the financial interests of the Communities, and its investigatory and operational independence was guaranteed. The Commission respects OLAF's prerogatives by not taking action which could undermine the outcome of the investigations nor anticipating their results. This, however, means that [it] is not in a position to act conclusively until OLAF has finalised its work and submitted a report.'

307 Thus, that press release once again clearly linked the applicants' names with the allegations concerning the Eurostat case.

308 Consequently, regard being had to the context and to the publicity which the Commission had itself already given to the applicants and to their potential involvement in the mismanagement within Eurostat, it must be held that the communication to the public of the Commission's decision of 9 July 2003 to initiate disciplinary proceedings against three of its officials might have given credence to the idea that the applicants might be guilty of or at least suspected of the mismanagement forming the subject-matter of the investigations relating to the management of the programmes coming within the remit of Eurostat. That impression is not dispelled by the statement that '[t]he Commission wishes to stress that the decisions to open disciplinary procedures or to move officials are without prejudice to the principle of the presumption of innocence' (see, to that effect, the judgments of 7 February 2007 in Case T-339/03 *Clotuche* v *Commission* (not published in the ECR), paragraph 145, and in Joined Cases T-118/04 and T-134/04 *Caló* v *Commission* (not published in the ECR), paragraph 120).

309 It should be noted that the form of the communication to the public of the decision of 9 July 2003 to open disciplinary procedures gave the public, or at least a part of the public, the impression that the applicants were involved in the irregularities committed within Eurostat (see, to that effect, *Clotuche* v *Commission*, paragraph 308 above, paragraph 219, and *Caló* v *Commission*, paragraph 308 above, paragraph 155).

310 In that regard, it must be borne in mind that, as stated at paragraphs 210 and 211 above, the principle of the presumption of innocence requires that a person charged with an offence be presumed innocent so long as his guilt has not been proved beyond all reasonable doubt in legal proceedings. However, at the time of publication of that press release, and even today, the applicants' guilt had not, and still has not, been proved.

311 However, it must also be borne in mind that the institutions cannot be prevented from informing the public about investigations in progress (see paragraph 212 above). In the present case, however, the Commission cannot be regarded as having done so with all the necessary discretion and reserve, while striking a proper balance between the applicants' interests and those of the institution. In fact, by the publicity which it decided to give to the Eurostat case, while taking care to link the applicants with the mismanagement, it did not remain within the bounds of what was justified by the interest of the service.

312 In those circumstances, the Commission's argument that the press release of 9 July 2003 appears to be particularly prudent, measured and concerned with protecting the individuals, cannot be upheld if account is taken of the context, 'marked by the emergence of an undeniable climate of interinstitutional tension [following] the discharge for the 2001 budget'.

313 Consequently, the Commission breached the principle of the presumption of innocence by issuing that press release.

314 As stated at paragraph 209 above, that principle confers rights on individuals. It should be further observed that in the circumstances of the present case that breach must be considered to be sufficiently serious, since the Commission has no discretion with respect to its obligation to respect the principle of the presumption of innocence.

The documents communicated to the Parliament on 24 September 2003

315 The applicants claim that on 24 September 2003 the Commission circulated within the Parliament three documents implicating or criticising them which were not communicated to them in advance and on which they therefore did not have the opportunity to comment.

316 The documents in question are the 'summary of the Eurostat cases now closed', drawn up by the Director-General of OLAF, the report entitled 'Report of the Eurostat task force (TFES) — Summary and conclusions' and an information note concerning Eurostat, based on the second intermediary report drawn up by the IAS.

317 As regards the 'summary of the Eurostat cases now closed', it was sent to the President of the Commission by the Director-General of OLAF. It must be emphasised that the applicants criticise the Commission solely for not having communicated that

document to them and for not having heard them before forwarding it. However, it is sufficient to observe that, since this was not a document drawn up by the Commission, the Commission was not required to hear the applicants before forwarding it to the Parliament. Furthermore, as is apparent from paragraphs 33 and 35 above, OLAF had heard the applicants in June and July 2003, and therefore well before it drew up that summary.

318 Next, as regards the task force and IAS documents in question, the applicants claim that, even though they do not specifically and individually implicate the applicants, since the mission of those bodies was not to pronounce formally on the existence of fraud or to criticise anyone individually, the mere fact that they question the regularity of certain elements established is prejudicial to them.

319 In that regard, the Court observes that the document containing the summary and the conclusions of the report of the task force does not directly implicate the applicants. It is not an act adversely affecting the applicants, so that they cannot properly rely on the principle of respect for the rights of the defence to criticise the fact that they were not heard before that report was drawn up. Nor can the applicants rely on any damage resulting from the fact that the document was sent to the Parliament.

320 As regards the information note concerning Eurostat, based on the second intermediary report drawn up by the IAS, it, too, does not directly implicate the applicants. According to the applicants, that document contains elements which are damaging to, in particular, Mr Franchet in that it mentions the lack of transparency and communication between the former Director-General of Eurostat and the responsible Member of the Commission. Furthermore, they emphasise that that note states that 'the lack of controls in the management of those funds entails the risk, to an unacceptable degree, of exposure to fraud and irregularities'. However, the Court notes that the applicants omit to cite the following sentence, according to which, 'in light of the nature of the IAS's terms of reference, [it is not possible to] comment

on the possibility of fraud entailing personal enrichment'. It must be observed that those elements do not suffice to demonstrate that the applicants ought to have been heard in that regard before that report was drawn up, or that the communication of the report to the Parliament caused them any damage. In any event, the IAS report on which that note was based was not yet the final report. Nor can it be considered to constitute an act adversely affecting the applicants.

321 Last, in the reply, the applicants claim that the dissemination of the three documents in question was contrary to the Framework Agreement on relations between the Parliament and the Commission (Annex XIII to the Rules of Procedure of the Parliament), which provides that, in the context of any confidential information, those two institutions must respect, inter alia, 'fundamental human rights, including the right to a fair trial and the right to protection of privacy'.

322 In that regard, the Court considers it sufficient to note that this is a new plea in law introduced in the course of proceedings which is not based on matters of law or of fact which have come to light in the course of the procedure. Consequently, it must be rejected as inadmissible, in accordance with Article 48(2) of the Rules of Procedure.

323 For the sake of completeness, it must be noted that the applicants have wholly failed to demonstrate that the Commission communicated confidential information to any persons other than those mentioned in the Framework Agreement and that the documents circulated were accessible in practice to every Member of the Parliament and, beyond, to the press.

324 Consequently, since the Commission was not required to hear the applicants before forwarding the three documents in question to the Parliament or to communicate the documents to them before doing so, the applicants' complaint to that effect must be rejected.

The address of the President of the Commission of 25 September 2003

325 The applicants claim that, in his address of 25 September 2003 before the Conference of Presidents of Parliamentary Groups of the Parliament, the President of the Commission made extremely serious charges against the applicants and, in particular, Mr Franchet and that, accordingly, he did not respect their fundamental rights.

326 The Commission contends that its President did not accuse the applicants of irregularities in the course of that address. However, the Court observes that the interpretation which the Commission puts on that address (see paragraphs 297 and 298 above) does not reflect reality. Admittedly, in his address, the President of the Commission emphasises the lack of transparency and communication between the Director-General of Eurostat and the responsible Member of the Commission. However, he gives the impression that there is no doubt about the involvement of the Director-General of Eurostat, and that of another senior official.

327 For example, the President of the Commission states that, '[d]espite instructions from the previous Commission to withdraw from these bodies, … the Director-General continued cooperation with these bodies in other ways and forms', that 'things went

off the rails' and that '[a] number of audit reports … highlighted irregularities sometimes serious, sometimes very serious in terms of the texts applying which damaged the EU's financial interests'. He went on to emphasise that 'the full magnitude and gravity' of the facts became apparent to the Commission 'in May 2003, in the first note of substance OLAF sent to the Secretary-General', that, '[q]uite aside from the seriousness of these facts, the most appalling and hitherto unknown aspect was the implication of Eurostat's Director-General himself and of another senior official in the Datashops case' and that '[a] vital link in the chain was broken', namely 'a Director-General had betrayed the legitimate trust his political masters had placed in him and this cast a totally different light on the whole Eurostat file and called for a reassessment of the whole sequence of events'.

328 The President of the Commission inferred, in particular, that the facts in question 'constitute — quite apart from their possible criminal implications, a catalogue of poor practice, laxity, sloppy management and control, clear irregularities and risks of fraud, if not fraud itself' and that '[a]ll of that is the responsibility of the highest level of the hierarchy of Eurostat'.

329 In addition, as regards the lack of communication between the Director-General of Eurostat and the responsible Member of the Commission, the President of the Commission states that, from the time when his Cabinet received, at his request, a 'briefing note' in July 2002, following the publication of OLAF's communication announcing that it had forwarded the files concerning Eurostat to the Luxembourg judicial authorities, 'some pieces of the jigsaw puzzle were in the Cabinet's possession, but not enough of them to trigger a reaction since the most critical piece of all', namely the 'implication of the Director-General himself, was missing'. The President went on to acknowledge that '[t]he way you view this clear lack of communication — and consequently of any reaction — will depend on your own administrative culture', indeed that 'there are those who will consider that it was up to the Cabinet to show more vigilance and there are those who will demand information

where the Director-General did not supply it of his own accord'. However, the President considers, for his part, that it was necessary to determine '[w]ho had reason to conceal the truth about things that went back a long way' and that it was 'certainly not [the Member of the Commission]'.

330 It must be observed that it is clear from those passages that, even though the President of the Commission did not accuse Mr Franchet by name of being responsible for the irregularities, he criticised him for having allowed such irregularities to take place and that, in his view, there was no doubt whatsoever as to Mr Franchet's liability. Furthermore, the President accuses Mr Franchet quite directly of having concealed the truth about the facts in question. Likewise, he mentions 'another senior official' in connection with the Datashop case, which leaves no doubt as to the identity of Mr Byk, whose name had already been disseminated in public by the Commission itself.

331 In those circumstances, it must be considered that, by his address, the President of the Commission did not fully respect the applicants' fundamental rights and, in particular, the principle of the presumption of innocence, in so far as statements, such as '[a]ll of that [is] the responsibility of the highest level of the hierarchy of Eurostat' and the 'implication of the Director-General of Eurostat himself and of another senior official' in that address reflect the view that the applicants are guilty of the misappropriation of funds indicated in the address. Such conduct constitutes a sufficiently serious breach of that principle, which confers rights on individuals.

332 It follows from the foregoing that by its press release of 9 July 2003 and by the address of its President of 25 September 2003 the Commission committed sufficiently serious breaches of the principle of the presumption of innocence for Community liability to be incurred.

2. The disciplinary proceedings

(a) Arguments of the parties

333 The applicants claim that the Commission's conduct was inconsistent. It decided to initiate disciplinary proceedings and immediately suspended them pending the outcome of the administrative investigations which it had launched, an approach which is even less comprehensible because those proceedings were initiated on the basis of facts which were no different from the context in which the Commission decided to afford its assistance to the applicants. The applicants observe that the fact that a criminal complaint has been lodged does not prevent the institution from pursuing the disciplinary proceedings, since any disciplinary measure can be imposed only after the closure of the criminal proceedings before the national judicial authorities.

334 In the applicants' submission, the opening of a disciplinary procedure before the internal investigations had been completed is pointless and is contrary to the principle of good management and sound administration. Under the general implementing provisions on the conduct of administrative inquiries and disciplinary procedures, published in *Administrative notices* No 86-2004, of 30 June 2004, the Director-General for Administration and Personnel is to open the disciplinary procedure after receiving the report of the Commission's Investigation and Disciplinary Office (IDOC) or, where appropriate, directly after receiving OLAF's report.

335 In the present case, however, by setting up, on 9 July 2003, multiple parallel investigations and by initiating disciplinary proceedings, the Commission acted in panic in order to 'calm everyone down', which is apparent from what the Chairman of OLAF's Supervisory Committee said in response to the intervention of the Secretary-General

of the Commission at the meeting of the Supervisory Committee on 3 September 2003. The Commission thus ought to have awaited the outcome of the internal investigations which it had ordered and the outcome of OLAF's work and the commencement of the work of IDOC, which had not yet begun, and the results of that work before determining whether to initiate disciplinary proceedings against the applicants.

336 The applicants assert that, even if the decision to initiate disciplinary proceedings is not an act adversely affecting them, it is liable to give rise to prejudice owing to the ignominy that necessarily attaches to such a decision.

337 The Commission contends that the decision to initiate disciplinary proceedings is merely a preparatory procedural step and does not prejudge the final position of the administration and that it cannot therefore be regarded as an act adversely affecting the applicants. Furthermore, the applicants have failed to show that the measures taken by the appointing authority were wholly unlawful, whereas the complaints formulated by the appointing authority in support of the initiation of the disciplinary proceedings were supported by a number of reports and by the information communicated by OLAF in its notes of 3 and 19 April 2003.

338 The Commission maintains that it was desirable to suspend the disciplinary proceedings initiated against the applicants in order to avoid any interference between those proceedings and the criminal proceedings already initiated on the basis of similar facts, particularly since the national judicial authorities have at their disposal investigative measures that are not available to the administrative authorities.

(b) Findings of the Court

339 The applicants take issue with the Commission, on the one hand, for having decided to initiate disciplinary proceedings and then suspend them immediately pending the results of investigations and, on the other hand, for having initiated the disciplinary proceedings before the internal investigations had been completed.

340 The Court recalls, by way of preliminary observation, that the appointing authority's decision to initiate disciplinary proceedings is merely a preparatory procedural step. It does not prejudge the final position to be adopted by the administration and thus cannot be regarded as an act adversely affecting an official within the meaning of Article 91 of the Staff Regulations. It may therefore be challenged only incidentally in an action brought against a final disciplinary decision adversely affecting an official (Case T-166/02 *Pessoa e Costa* v *Commission* [2003] ECR-SC I-A-89 and II-471, paragraph 37).

341 As regards, first of all, the fact that the disciplinary proceedings were suspended, it must be borne in mind that the fifth paragraph of Article 88 of the Staff Regulations provides that, '[w]here, however, the official is prosecuted for those same acts, a final decision shall be taken only after a final verdict has been reached by the court hearing the case'. It follows from that provision that the appointing authority is precluded from taking a final decision on the administrative situation of the official concerned by ruling on acts forming the subject-matter of simultaneous criminal proceedings so long as the decision of the criminal court concerned has not become final (*Pessoa e Costa* v *Commission*, paragraph 340 above, paragraph 45). Accordingly, the fifth paragraph of Article 88 of the Staff Regulations does not confer any discretion on the appointing authority responsible for taking the final decision in the case of an official in relation to whom disciplinary proceedings have been initiated, unlike the second paragraph of Article 7 of Annex IX to the Staff Regulations, which provides that, in the event of criminal proceedings, the Disciplinary Board may decide not to deliver its opinion until after the court has given its decision (Case T-74/96 *Tzoanos*

v *Commission* [1998] ECR-SC I-A-129 and II-343, paragraphs 32 and 33, and Case T-307/01 *François* v *Commission* [2004] ECR II-1669, paragraph 59).

342 It should be pointed out that the fifth paragraph of Article 88 of the Staff Regulations has a twofold rationale. First, that article is intended to ensure that the position of the official in question is not affected in any criminal proceedings instituted against him on the basis of facts which are also the subject-matter of disciplinary proceedings within his institution (*Tzoanos* v *Commission*, paragraph 341 above, paragraph 34). Second, suspension of the disciplinary proceedings pending the conclusion of the criminal proceedings makes it possible to take into consideration, in those disciplinary proceedings, the findings of fact made by the criminal court when its decision has become final. It must be borne in mind, for that purpose, that the fifth paragraph of Article 88 of the Staff Regulations enshrines the principle that disciplinary proceedings arising out of a criminal offence must await the outcome of the criminal trial, a rule which is justified, in particular, by the fact that the national criminal courts have greater investigative powers than the appointing authority (Case T-23/00 *A* v *Commission* [2000] ECR-SC I-A-263 and II-1211, paragraph 37). Consequently, where the same facts may constitute both a criminal offence and a breach of the official's obligations under the Staff Regulations, the administration is bound by the findings of fact made by the criminal court in the criminal proceedings. Once that court has established the existence of the facts of the case, the administration can then undertake the legal characterisation of those facts in the light of the concept of a disciplinary offence, ascertaining, in particular, whether they constitute breaches of obligations under the Staff Regulations (*François* v *Commission*, paragraph 341 above, paragraph 75).

343 Thus, in the present case, since it is common ground that the disciplinary proceedings brought against the applicants related, at least in part, to the same facts as those forming the subject-matter of the criminal proceedings, the Commission was precluded from taking a final decision in the disciplinary proceedings so long as no final decision had been reached by the criminal courts (see, to that effect, *François* v *Commission*, paragraph 341 above, paragraph 73).

344 In those circumstances, the Commission cannot be criticised for having suspended the disciplinary proceedings against the applicants; on the contrary, it was required to suspend them.

345 As regards, next, the fact that the Commission initiated the disciplinary proceedings before the internal investigations had been completed, it is true that, under Article 4(2) of the general implementing provisions, on the opening and conduct of administrative inquiries, to which the applicants refer:

'Before opening the inquiry, the Director-General for Personnel and Administration shall consult [OLAF] to ascertain that that office is not undertaking an investigation for its own purposes and does not intend to do so. As long as OLAF is conducting an investigation within the meaning of Regulation No 1073/1999, no administrative inquiry under the preceding paragraph shall be opened regarding the same facts.'

346 Thus, under that provision, a disciplinary procedure cannot be opened so long as the OLAF investigation concerning the same facts is still in progress. However, that decision was not yet applicable at the time when the decisions to initiate disciplinary procedures were adopted, on 9 July 2003. At that time, the relevant provision was Article 5(2) of Commission Decision C(2002) 540 of 19 February 2002 on the conduct of administrative inquiries and disciplinary procedures, which provided:

'Before opening such an inquiry, the Director-General of Personnel and Administration shall first consult [OLAF] to check that OLAF is not itself undertaking an inquiry or does not intend to do so.'

347 Even though that provision did not contain an express prohibition on the institution of disciplinary proceedings before the OLAF investigation concerning the same facts was closed, it is questionable whether that provision served any purpose if it was not to be interpreted in that sense. In effect, if it was envisaged that the Director-General for Personnel and Administration was to check that OLAF was not undertaking an inquiry or did not intend to do so, that would have amounted to saying that, if that were so, then a disciplinary investigation could not yet be opened.

348 Furthermore, Article 5(7) of Decision C(2002) 540 provided that, '[w]here the appointing authority receives an inquiry report from OLAF, the appointing authority shall, where appropriate, examine it for a minimum period of two weeks and, if it thinks fit, shall request OLAF to amplify the report, or undertake an additional administrative inquiry'. It was therefore on the basis of that inquiry report from OLAF that the appointing authority took any decision to undertake an administrative inquiry and, if appropriate, to initiate disciplinary proceedings.

349 It should also be borne in mind that, under Article 9(4) of Regulation No 1073/1999, the institutions are to take such action, in particular disciplinary or legal, on OLAF's internal investigations, as the results of those investigations warrant.

350 In those circumstances, it must be held that the Commission ought not to have decided to initiate the disciplinary proceedings on 9 July 2003, when OLAF's investigations, concerning the same facts, were not yet closed. It would only have been able to take such a decision after 25 September 2003, after receiving the final inquiry reports.

351 Accordingly, the Commission breached the rules governing disciplinary proceedings and prohibiting the initiation of disciplinary proceedings before OLAF's investigations have been closed.

352 It should be observed that the objective pursued by those rules is, in particular, to protect the official concerned by ensuring that, before initiating disciplinary proceedings, the appointing authority has the precise and relevant evidence, in particular exonerating evidence, established in the investigation conducted by OLAF, which has extensive investigative means. It follows that the rules governing the disciplinary proceedings referred to above constitute rules of law conferring rights on individuals.

353 In addition, it should be observed that the breach in question was a sufficiently serious breach of those rules, since the Commission had no discretion with respect to the obligation placed on it to comply with the rules on disciplinary proceedings. Furthermore, it is apparent from the file that it cannot be wholly precluded that the Commission initiated those disciplinary proceedings in order to 'calm everyone down', as the applicants claim. Thus, the Commission did not take the applicants' interests sufficiently into account when initiating the disciplinary proceedings against them before the investigations were complete.

3. The different investigations conducted by the Commission and their conduct

(a) Arguments of the parties

354 The applicants claim that their fundamental rights were breached by the setting-up of the task force, since that task force was composed of officials not belonging to OLAF and therefore not subject to the strict rules imposed on OLAF officials in terms of authorisation, authority and confidentiality, in accordance with Article 6 of Regulation No 1073/1999, even if the task force was placed under the direct authority

of the Director-General of OLAF on 23 July 2003. Furthermore, as the Commission decided to increase OLAF's staff by 20 units for the Eurostat file, the relationship between those two working groups is not known.

355 In the applicants' submission, the confusion arising from the proceedings is the consequence of the multiplicity of the administrative investigations. At least eight investigations were carried out, in parallel, in the Eurostat case: at least five investigations by OLAF, one investigation by the IAS, one investigation by the task force and one investigation by the Commission's Directorate-General (DG) for the Budget. In addition, the case was referred to two national judicial authorities. The existence of those different investigations, the rules governing them and the overlap between them raise a number of questions, such as the proportionality of the investigations by reference to the costs.

356 The letter from the Secretary-General of the Commission of 10 October 2003 does not answer the applicants' questions in that regard. The applicants note that the purpose of the task force until 23 July 2003 was to assume responsibility for the internal and external aspects of the investigations carried out by OLAF and to undertake an administrative investigation with the aim of evaluating the responsibilities of the staff as regards the financial irregularities. In its report of 24 September 2003, entitled 'Report of the Eurostat task force (TFES) — Summary and conclusions', the task force emphasised a numbers of problems and questions actually concerning the applicants and, in any event, Mr Franchet.

357 The applicants assert that the fact that IDOC personnel were made available to the task force is not innocent and is not without consequences for the administrative investigation that IDOC might be called upon to carry out in the Eurostat case. Since the task force necessarily examined the questions concerning the applicants and liable to be directed at their personal involvement, IDOC appears to have carried out an investigation outside its organic framework.

358 The applicants further submit that the Commission breached the principle of sound administration. The applicants were never heard in the context of the numerous investigations opened by the Commission. All they were given was the opportunity to submit comments on the report of the Budget DG of 20 June 2003.

359 That conduct demonstrates a chronic failure to communicate and a lack of transparency with respect to Eurostat. The applicants question why the Financial Controller never questioned Eurostat in order to seek its explanations or an exchange of views following the communication of the Datashop audit and why he approached OLAF directly in particularly alarming terms. The Financial Controller did not keep a copy for Eurostat of his note of 2 March 2000 to OLAF, contrary to the recommendations contained in that note. Nor did he ever question Eurostat about any deficiencies concerning its management or control mechanisms although the Financial Controller, the IAS and the Budget DG made such criticisms in 2003. If such criticisms had been well founded, and if there had been any substance for the serious charges formulated and made public by the President of the Commission, those services ought to have referred the matter to the Member of the Commission concerned. However, they took no action for several years. In the applicants' submission, there is no justification for the Commission's repeated inaction.

360 The applicants also refer to two parliamentary questions put to the Commission in July and October 2003, which reveal the confusion to which the conduct of the Commission and OLAF in the Eurostat case gives rise, and also the legality of the decisions taken. They also claim that the press was able to measure the 'damage' caused by the Commission and by OLAF.

361 The Commission claims, as regards the setting-up of the task force, that its Secretary-General explained that point at length to the applicants in his letter of 10 October 2003. Furthermore, it is clear from the report of the task force of 24 September 2003 that the task force was focusing on the systemic dysfunctions and did not formulate any conclusions with respect to individuals. The appointment of members of IDOC

to form part of the task force was done on an ad hoc basis, in order to extend the range of competences of the task force. According to the Commission, it was able to make those appointments because the task force's activities did not fall within the scope of Decision C(2002) 540, but pursued a different objective from that of administrative investigations and disciplinary procedures, namely to uncover systemic dysfunctions.

362 In any event, the applicants cannot judge whether the way in which the Commission decided to carry out the internal investigations designed to cast light on all of Eurostat's activities was appropriate, since those different investigations did not affect the applicants' individual rights.

363 As regards the right to be heard, the applicants themselves recognise that they were given the opportunity to comment on the report of the Budget DG of June 2003.

364 Last, the Commission observes that it is not for it, at this stage, to respond to allegations which relate in particular to the content of the charges which led it to initiate disciplinary procedures against the applicants. It is only within the framework of those procedures that the arguments whereby the applicants seek to demonstrate that the complaints formulated against them are unfounded will be examined, with proper regard for the rights of the defence.

(b) Findings of the Court

365 In the first place, as regards the setting-up of the task force, it is sufficient to state that the applicants have failed to demonstrate specifically how the mere setting-up

of the task force infringed their fundamental rights and how the fact that it may have been inappropriate to set it up directly affected their rights. That argument must therefore be rejected.

366 In the second place, as regards the multiplicity of the investigations, it is also sufficient to state that the applicants have failed to demonstrate specifically how the mere initiation and existence of those different investigations constituted a sufficiently serious breach of a rule of law conferring rights on them. Even if such confusion corresponded to reality, it would not be for the applicants to judge whether the way in which the Commission had decided to carry out the internal investigations designed to cast light on all of Eurostat's activities was appropriate, as the Commission states. Furthermore, the question relating to the proportionality of the investigations by reference to the costs does not come under a rule of law conferring rights on individuals. The arguments relating to the multiplicity of the investigations must therefore be rejected.

367 In the third place, as regards the alleged breach of the principle of sound administration in that the Commission never heard the applicants within the framework of the numerous investigations which it had opened, it is sufficient to state that the applicants' right to be heard has already been examined above in the context of the examination of the specific arguments put forward in that regard. It need merely be recalled that, since there were not, on the Commission's part, any acts adversely affecting the applicants, the principle of respect for the rights of the defence cannot not be effectively relied on by the applicants to criticise the fact that they had not been heard before the reports or notes were drawn up in the context of the various investigations.

368 Last, as regards the other general criticisms formulated with respect to the Commission's conduct, it is sufficient to state that, once again, the applicants have failed to demonstrate the existence of a sufficiently serious breach of a rule of law conferring rights on them.

4. The refusal of access to documents

(a) Arguments of the parties

369 The applicants claim that the Commission refuses to communicate to them the documents in its possession and originating in OLAF, thus breaching the fundamental right of access to documents enshrined in Article 255 EC, Article 41 of the Charter and Regulation (EC) No 1049/2001 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).

370 The applicants refer to their action on the basis of Regulation No 1049/2001 in Joined Cases T-391/03 and T-70/04. However, they emphasise that their complaint in the present action is independent of Regulation No 1049/2001, as it concerns their own interest independently of the right of access of any citizen to the documents of the Commission. The applicants have a quite specific interest in obtaining communication of the documents which are in the Commission's possession and originating in OLAF in the light of their personal situation in the Eurostat case.

371 In particular, the Commission refused to communicate the letter and the note of 19 March 2003 sent to the French judicial authorities and, by way of justification for its refusal, stated in the letter of 10 October 2003 that those documents formed an integral part of an investigation procedure at national level. However, those documents are essential documents in the context of this case which are of such a kind as to enable the applicants to assess and comment on the regularity of the conduct of the Commission and of its administrative service, OLAF, and also to defend their rights.

372 The Commission merely refers to the fact that the applicants brought actions in Joined Cases T-391/03 and T-70/04 on the basis of Regulation No 1049/2001 and emphasises that their request for access, and its rejection, came within the framework of that regulation.

(b) Findings of the Court

373 In so far as they seek access to the documents on the basis of Regulation No 1049/2001, the applicants' request does not belong to the present proceedings, since that request has already been dealt with in the Court's judgment of 6 July 2006 in Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023.

374 Furthermore, in so far as the applicants rely on their special interest, it is sufficient to state that they have obtained, during these proceedings, access to the letter and the note of 19 March 2003, communicated to the French judicial authorities, and, accordingly, that they were properly able to defend their rights. Likewise, they obtained, at the hearing, access to OLAF's note of 16 May 2003, to which reference is made in the press release of 19 May 2003, and they were properly able to defend their rights.

375 Thus, it is no longer necessary to adjudicate on the request for access to the OLAF documents in the Commission's possession.

376 It follows from all of the foregoing that the Commission made a number of errors capable of incurring the liability of the Community. Those errors consist in the publication of the press release of 9 July 2003, in the speech of the President of the Commission of 25 September 2003 and in the initiation of the disciplinary proceedings before the investigations were complete.

377 The Court must therefore examine the reality of the alleged damage and the existence of a causal link between the errors found by the Court and the damage sustained.

C — *The damage and the causal link*

378 In the light of the particularly close link, in the circumstances of the present case, between the question whether the applicants sustained damage for which compensation might be awarded and the question of the causal link between the illegalities found and the alleged damage, those two questions must be dealt with together.

1. Arguments of the parties

(a) Non-material damage

379 The applicants claim, first of all, that their professional reputation, which was universally acknowledged and appreciated, both within Eurostat and the Commission and

outside that institution, 'has been publicly and seriously tarnished'. Without advance warning, without being heard, the applicants 'were vilified, in a precipitate defensive reaction' unworthy of the entire hierarchy. Furthermore, the savage attacks mounted against the applicants by a certain German publication, reporting words totally divorced from the reality of the facts expressed within the Parliament and by certain officials, obliged the applicants to bring actions for defamation on 21 May 2003.

380 The applicants thus claim that they have been rejected by their professional circle and that they have sustained an irremediable slur on their reputation. They suffered a veritable 'professional "lynching"'. In that regard, the applicants refer to the appearance of the Secretary-General of the Commission before OLAF's Supervisory Committee on 3 September 2003.

381 Mr Franchet, who retired in March 2004, suffered a complete and brutal severance of all links with his colleagues, his partners and his professional circle. 'Malicious words' were uttered about him, in an aggressive and unfair manner.

382 As for Mr Byk, even though he had been considered by the Selection Board to be the best person to occupy the post of Director at Eurostat, for which he applied following the reorganisation of that body, he was not appointed on account of the proceeding initiated against him. He was transferred to the Personnel and Administration DG and forced to abandon any prospect and all hope of ever again finding work corresponding to his specialisation and experience. The unfounded accusations disseminated in the press are the cause of immense suffering and definite distress.

383 The applicants further point to the serious consequences for their private and social life. Their close relatives were interviewed about the matter. In addition, the

applicants' health has suffered and Mr Byk was the victim of a stroke which may have been linked to the anguish and upset attributable to the Eurostat case. The applicants maintain that they were the expiatory victims of a political game which developed around them and which they largely suffered while complying with their duty to act with discretion.

384 As regards the evaluation of the non-material damage, the applicants quantify it provisionally at EUR 800 000, which is commensurate with the gravity of the errors made by the Commission and OLAF and with the consequences which those errors had for the applicants' physical and mental health. That sum should be shared equally between the applicants, since they suffered the same errors, in the same conditions, and the consequences for their health, although slightly different, should be assessed in an equivalent manner.

385 The applicants submit that if the Commission and OLAF had reacted immediately Mr Franchet forwarded the internal audit reports, in 2000, for the files in question, and if a dialogue had been opened at that time, there never would have been a Eurostat case and no one would have been unfairly distressed. The failure to react on the part of the Commission and OLAF is to a large extent the cause of the turn subsequently taken by the events and the unwarranted charges against the applicants.

386 The applicants emphasise that, in the eyes of all, they are guilty, even though the criminal investigation concerning Mr Byk is still in progress in Paris and even though the disciplinary procedures remain open. The applicants' public condemnation without a trial and without a real preliminary investigation is a serious error and the source of significant non-material damage which increases in so far as the suffering persists. That public condemnation could also influence the outcome of the investigation before the French judicial authorities.

387 The Commission does not deny that the situation experienced by the applicants might constitute non-material damage. However, it is unable to understand how any damage was quantified at EUR 800 000 or what part of that sum should be awarded to each of them, and on what basis.

(b) Material damage

388 The applicants claim that their material damage consists essentially of the significant costs which they have had to incur in order to defend their rights since the date (May 2003) when they first became aware of the charges against them.

389 They quantify the material damage at EUR 200 000, provisionally and subject to increase. That damage might be reduced in the event that the Court should decide to order the Commission to pay all the costs.

390 In the reply, the applicants make clear that the material damage does not consist solely in the reimbursement of lawyers' fees and costs by way of expenditure. The applicants remain liable for the significant outlay not covered by costs, such as travelling expenses resulting from the numerous journeys which they have had to undertake between Nice and Luxembourg, indeed as far as Brussels, since these proceedings were initiated in May 2003. The applicants have also had to defend themselves since that date and to call upon the assistance of their lawyers, before OLAF and throughout the pre-litigation request and complaint procedure, and those fees are not covered by costs. Furthermore, additional costs and expenses were occasioned by the investigations pursued in France, covering travel and French lawyers' fees. The applicants also refer to their action under Regulation No 1049/2001.

391 At the Court's request, the applicants are prepared to provide details of the constituent elements of their material damage, not including the costs of these proceedings.

392 The Commission claims that the applicants have failed to demonstrate any material damage. The fees which they incurred for their defence do not constitute material damage but costs. They cannot secure reimbursement of the part of their costs which is not recoverable, because it results from fees incurred during the pre-contentious procedure, by describing it as material damage.

(c) The causal link

393 The applicants claim that the direct cause of all of the damage sustained by them lies in the incorrect conduct of the Commission and of OLAF and the other services. The applicants were profoundly affected, for example, by the unexpected nature of the attacks to which they were subject, by being charged, without a prior investigation and without respect for the rights of the defence, by the French judicial authorities, by the absence of a prior hearing, by the deliberately orchestrated leaks designed to harm them, and also by the opening of the disciplinary proceedings, which were immediately suspended, to enable the Commission to 'save face' vis-à-vis the Parliament.

394 The applicants emphasise that if the Commission had acted correctly they would not have been implicated and their reputation would not have been publicly destroyed. They would not have been 'abandoned' by their colleagues and declared responsible for the basest conduct by the President of the Commission. In effect, there would have been no Eurostat case. The 'institutional mess' which ought to have led to the condemnation of the Commission could be avoided only by such a manoeuvre,

consisting in making culprits of the applicants. Furthermore, the public accusations are liable to prejudge the investigations carried out with respect to Mr Byk by the French judicial authorities.

395 Last, the applicants wonder what the origin of the damage was, if it was not the way in which they were treated by the Commission and by OLAF. They wonder how the Commission can acknowledge the existence of their actual non-material damage and, on the other hand, deny that there is a causal link between the origin of that damage and the errors which it made.

396 The Commission claims that the applicants have not adduced evidence of the causal link. The direct cause of the damage sustained by the applicants lies in the leaks in the press, but the applicants produce nothing capable of demonstrating that those leaks are the responsibility of the Commission or of OLAF.

2. Findings of the Court

397 It must be borne in mind, as a preliminary point, that, according to the consistent case-law, in order to found a claim for compensation, damage must be a sufficiently direct consequence of the conduct complained of (Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091, paragraph 21; *International Procurement Services* v *Commission*, paragraph 93 above, paragraph 55; Case T-7/96 *Perillo* v *Commission* [1997] ECR II-1061, paragraph 41; and Case T-72/99 *Meyer* v *Commission* [2000] ECR II-2521, paragraph 49). It also follows from settled case-law that it is for the person claiming damages to adduce evidence of the causal link, within the meaning of the second paragraph of Article 288 EC (see, to that effect, Joined Cases C-363/88 and C-364/88

Finsider and Others v *Commission* [1992] ECR I-359, paragraph 25; Case T-168/94 *Blackspur and Others* v *Council and Commission* [1995] ECR II-2627, paragraph 40; and Case T-149/96 *Coldiretti and Others* v *Council and Commission* [1998] ECR II-3841, paragraph 101).

398 In that regard, it must be borne in mind that the errors of OLAF capable of incurring Community liability consist in the forwarding of information to the Luxembourg and French judicial authorities without having heard the applicants and its Supervisory Committee and in the leaks relating to the forwarding of the Datashop — Planistat file to the French judicial authorities (see paragraph 285 above); the errors of the Commission capable of incurring Community liability consist in the publication of the press release of 9 July 2003, in the speech of its President of 25 September 2003 and in the initiation of the disciplinary proceedings before the investigations were complete (see paragraph 376 above).

399 The applicants have relied on two separate heads of damage in this case, namely non-material damage and material damage. The Court considers that it should examine each of those types of damage in turn in order to ascertain to what extent their existence and the causal link between each of them and one of the unlawful acts committed by OLAF or the Commission are established.

(a) Non-material damage

400 It must be observed that the fact that OLAF forwarded the Eurocost and Datashop — Planistat files to the national judicial authorities without having heard the applicants caused them damage. The fact that they were unable to express their views on the facts directly concerning them and to defend themselves necessarily produced feelings of injustice and frustration in the applicants. It should be noted that that damage

was the direct result of the unlawful conduct of OLAF and that there is thus a causal link between that conduct and the damage.

401 As regards the fact that OLAF did not inform its Supervisory Committee before forwarding those files, it is sufficient to state that such a fact caused no additional damage to the applicants. The consequences of that illegality are the same as those resulting from the fact that the applicants were not heard and cannot therefore constitute separate damage.

402 As regards the leaks relating to the forwarding of the Datashop — Planistat file to the French judicial authorities, it is accepted, even by the Commission, that there was a slur on the applicants' honour and professional reputation, in the light of the information which was published in the press. It should also be noted that the direct nature of the causal link between the illegality committed by OLAF and the non-material damage sustained by the applicants is not open to question. Indeed, when confidential information is leaked, the publication of that information is the foreseeable and natural consequence of that illegality, so that the causal link remains sufficiently direct.

403 As regards the issuing of the press release of 9 July 2003 (see paragraph 302 above), it must be noted that, by giving the impression, through that press release, which was freely accessible to the public, that the applicants were involved in the mismanagement in question, the Commission cast a slur on the applicants' reputation and honour (see paragraphs 308 to 310 above). Since that press release was issued by the Commission itself, the existence of the direct causal link between that illegality committed by the Commission and such non-material damage is not open to question.

404 Likewise, as regards the address given by the President of the Commission, it cannot be denied that, by his statements before the Parliament, he cast a slur on the applicants' reputation and honour (see paragraphs 326 to 331 above) and that, accordingly, there is a direct causal link between those statements and that damage.

405 As regards the fact that the Commission opened the disciplinary procedures against the applicants before the OLAF investigation had been closed, it must be observed that that circumstance caused the applicants a slur on their reputation and disruption of their private life and placed them in a state of uncertainty, constituting non-material damage that must be made good (see, to that effect, *François* v *Commission*, paragraph 341 above, paragraph 110). Furthermore, although the Commission immediately suspended the disciplinary procedures, that suspension had no effect vis-à-vis the public, since the press release of 9 July 2003 mentioned only the decisions to open the disciplinary procedures and not the fact that they had been suspended. However, since OLAF's investigations were closed two months after the disciplinary procedures were opened, at which point the Commission could properly open those procedures, that state of uncertainty did not last for long.

406 The applicants further claim that although Mr Byk was deemed by the Selection Board to be the best person to occupy the post of Director at Eurostat, for which he had applied following its restructuring in autumn 2003, he was not appointed owing to the procedure opened against him. In that regard, the Court finds that the applicants have not established their claim. On the contrary, it follows from a note of 5 March 2004 which the applicants produced to the Court in answer to a written question that three candidates, including Mr Byk, possessed the necessary qualifications for the post in question. It even follows from that note that the Consultative Committee had noted the good qualifications of the other two candidates. That argument must therefore be rejected.

407 In any event, it was possible for Mr Byk to seek annulment of that alleged rejection of his candidature if he considered that it had been wrongly based on the existence

of a pending disciplinary procedure against him (see, to that effect, *Pessoa e Costa* v *Commission*, paragraph 340 above, paragraph 69).

408 Furthermore, the applicants rely on damage linked with their health. The Court observes, first of all, that the applicants have wholly failed to substantiate their arguments with documentary evidence, such as medical certificates, and that, accordingly, that damage is not established.

409 In any event, it should be noted that the applicants have not succeeded in establishing that the illegalities identified above were the direct cause, within the meaning of the case-law cited at paragraph 397 above, of any effect on their physical or mental health. In addition, the applicants themselves have referred to the 'savage attacks mounted [against them] by a certain German publication, which may also be a cause of that damage.

410 Last, as concerns the element based on the non-material damage linked with the serious consequences for their close relatives, it must be emphasised that the applicants' allegations are not supported by any firm evidence that would establish the existence of the element of damage relied on or that of a causal link between that alleged damage and the investigative and disciplinary procedures of which they were the subject (see, to that effect, Case T-21/01 *Zavvos* v *Commission* [2002] ECR-SC I-A-101 and II-483, paragraph 334).

411 It follows from all of the foregoing that the applicants experienced feelings of injustice and frustration and that they sustained a slur on their honour and their professional reputation on account of the unlawful conduct of OLAF and of the Commission. Taking account of the particular circumstances of the present case and of the

fact that the applicants' reputation was very seriously affected, the Court evaluates the damage, on an equitable basis, at EUR 56 000.

(b) Material damage

412 The applicants claim that their material damage consists essentially in the significant fees which they have been required to meet in order to defend their rights since the date (May 2003) when they first became aware of the charges against them.

413 The Court finds that the claim for compensation for material damage cannot be considered admissible. Although the applicants have put an overall value on that damage of EUR 200 000, they have not quantified the various components of that alleged damage and have not established, or even alleged, the existence of special circumstances that would justify the omission to quantify that damage in the application. In that regard, it is not sufficient to state that, '[a]t the Court's request', they are 'prepared to provide details of the constituent elements of their [alleged] material damage, not including the costs of these proceedings'. It must therefore be held that the claim for compensation for the material damage in question does not satisfy the requirements of Article 44(1) of the Rules of Procedure and must therefore be rejected as inadmissible (see, to that effect, Case C-150/03 P *Hectors* v *Parliament* [2004] ECR I-8691, paragraph 62; Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463, paragraph 82; and Case T-309/03 *Camós Grau* v *Commission* [2006] ECR II-1173, paragraph 166).

414 For the sake of completeness, it should be observed that, as the Commission correctly states, any fees which the applicants incurred for their defence are not material damage but costs. In that regard, it must be borne in mind that the costs incurred by the parties for the purpose of the judicial proceedings cannot as such be regarded as

constituting damage distinct from burden of costs (see, to that effect, Case C-334/97 *Commission* v *Montorio* [1999] ECR I-3387, paragraph 54).

415 As regards the lawyers' fees incurred before the judicial proceedings were initiated, the damage relied on is in reality the consequence of a choice exercised by the applicants and cannot therefore be regarded as damage caused directly by the Commission (see, to that effect, Case C-331/05 P *Internationaler Hilfsfonds* v *Commission* [2007] ECR I-5475, paragraph 27).

416 It follows that the applicants cannot claim, in an action for compensation, reparation for the damage resulting from the costs which they allege to have incurred during the administrative stage of the procedure before the Commission. The same solution applies with respect to the lawyers' fees linked with the procedure before OLAF.

417 As regards any costs corresponding to the conduct of the proceedings before the national courts, it must be held that they cannot be recovered in the context of the present case, in the absence of a causal link between that alleged damage and the errors committed by OLAF and the Commission (see, to that effect, *François* v *Commission*, paragraph 341 above, paragraph 109). In any event, the question of recovery of the costs incurred at national level falls within the exclusive jurisdiction of the national court, which, in the absence of Community harmonisation measures in that area, must settle such a question in application of the provisions of the applicable national law (see, to that effect, *Nölle* v *Council and Commission*, paragraph 243 above, paragraph 37).

418 In those circumstances, it must be held that the applicants' claim for damages for material damage is inadmissible and, in any event, unfounded.

Costs

419 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared, it being understood that, under Article 88 of the Rules of Procedure, in proceedings between the Communities and their servants the institutions are to bear their own costs.

420 In the present case, as the action has been upheld in part, the Court decides, on an equitable assessment of the matter, and regard being had to the particular context of the case, that the Commission, in addition to bearing its own costs, is to pay all the costs incurred by the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Orders the Commission to pay Mr Yves Franchet and Mr Daniel Byk the sum of EUR 56 000;

2. Dismisses the remainder of the action;

3. Orders the Commission to pay the costs.

Jaeger Tiili Tchipev

Delivered in open court in Luxembourg on 8 July 2008.

E. Coulon M. Jaeger

Registrar President

Table of contents