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ECLI:EU:C:2022:8

JUDGMENT OF THE COURT (Third Chamber)

13 January 2022 (\*)

(Appeal – Investigations conducted by the European Anti-Fraud Office (OLAF) – Investigation reports – Request for an investigation to be opened into the conduct of previous OLAF investigations – Request to access documents – Letter of refusal – Article 263 TFEU – Decision against which an action for annulment may be brought – Time limit for bringing proceedings – Action against a letter confirming OLAF’s investigation reports – Regulation (EC) No 1049/2001 – Article 6 and Article 7(2) – Obligation to inform the applicant of his or her right to make a confirmatory application)

In Case C-351/20 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 30 July 2020,

**Liviu Dragnea**, residing in Bucarest (Romania), represented by C. Toby, O. Riffaud and B. Entringer, avocats,

appellant,

the other party to the proceedings being:

**European Commission**, represented by J.-P. Keppenne and J. Baquero Cruz, acting as Agents,

defendant at first instance,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Second Chamber, acting as President of the Third Chamber, J. Passer (Rapporteur), F. Biltgen, L.S. Rossi and N. Wahl, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2021,

gives the following

## **Judgment**

1 By his appeal, Mr Liviu Dragnea asks the Court of Justice to set aside the order of the General Court of the European Union of 12 May 2020, *Dragnea v Commission* (T-738/18, not published, ‘the order under appeal’, EU:T:2020:208), by which the General Court dismissed his action for annulment of the letter of the European Anti-Fraud Office (OLAF) of 1 October 2018 concerning (i) a refusal to open an investigation into the conduct of two previous investigations and (ii) a refusal to access the documents related to those investigations (‘the letter at issue’).

## **Legal context**

### ***Regulation (EU, Euratom) No 883/2013***

2 In accordance with Article 2(5) of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1), ‘person concerned’ means ‘any person or economic operator suspected of having committed fraud, corruption or any other illegal activity affecting the financial interests of the Union and who is therefore subject to investigation by [OLAF]’.

3 Article 5 of that regulation, under the heading ‘Opening of investigations’, provides:

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

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

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

...

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

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

...'

4 Article 9 of that regulation, under the heading 'Procedural guarantees', lists the procedural safeguards which the persons concerned by OLAF's investigations must be entitled to. Paragraph 4 of that article provides, in particular: 'before conclusions referring by name to a person concerned are drawn up, that person shall be given the opportunity to comment on facts concerning him'.

5 Article 11 of that regulation, under the heading 'Investigation report and action to be taken following investigations', provides in paragraph 1 that, on completion of an investigation by OLAF, a report is to be drawn up, which is to give an account, inter alia, of the procedural steps followed, the facts established and their preliminary classification in law, and is to be accompanied, where appropriate, by recommendations on whether or not action by the EU institutions or the competent authorities of the Member State concerned should be taken.

### ***Regulation (EC) No 1049/2001***

6 Article 6 of 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), under the heading 'Applications', provides in paragraph 1:

'Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article [55 TEU] and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.'

7 Article 7 of that regulation, under the heading 'Processing of initial applications', provides:

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

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

...

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

8 Article 8 of that regulation, under the heading ‘Processing of confirmatory applications’, is worded as follows:

‘1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles [263] and [228 TFEU], respectively.

...

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

### **Background to the dispute**

9 On 10 February 2015, OLAF opened two investigations into suspected fraud in relation to two road construction projects in Romania (‘the previous investigations’). Those projects had been awarded by Teleorman County Council (Romania) and financed by the European Regional Development Fund (ERDF).

10 On 30 May and 16 September 2016, OLAF closed those investigations. In its final reports, it concluded that two criminal groups had been established and that it was suspected that a large number of documents had been falsified in order to obtain EU funds unlawfully.

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

12 OLAF listed Teleorman County Council as a ‘person concerned’ by the previous investigations within the meaning of Article 2(5) of Regulation No 883/2013. However, the appellant, Mr Dragnea, who was the president of that council at the time of the events, was not listed as a ‘person concerned’.

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

14 On the same day, OLAF circulated a press release in which it announced the opening of those criminal proceedings. OLAF mentioned the appellant by name in that press release and noted the importance of those previous investigations to the opening of the criminal proceedings by the national authorities.

15 On 1 June 2018, the appellant wrote to OLAF requesting it to submit observations on the conclusions of its analysis relating to the final reports, which dealt with questions of both substance and procedure.

16 By letter of 10 July 2018, OLAF informed the appellant that, since the matter was the subject of an investigation by the competent national authorities, it would refrain from commenting on the substance. In addition, it provided clarification on the procedural issues raised by the appellant.

17 On 22 August 2018, the appellant wrote to OLAF requesting it to open an investigation into the conduct of the previous investigations and, second, to grant him access to several documents contained in the files relating to those investigations ('the letter of 22 August 2018').

18 By the letter at issue, OLAF *inter alia* informed the appellant that the previous investigations had been carried out in accordance with the legal framework in force and that it did not consider that the points raised by the appellant constituted information capable of justifying the opening of an investigation into previous investigations. Furthermore, OLAF stated that, since the appellant was not a 'person concerned' by the previous investigations, he could not rely on the procedural rights referred to in Article 9 of Regulation No 883/2013 and that he could not have access to the documents which he had requested.

### **The proceedings before the General Court and the order under appeal**

19 By application lodged at the Court Registry on 11 December 2018, the appellant brought an action seeking annulment of the letter at issue.

20 As regards the refusal to open an investigation into the conduct of the previous investigations, the appellant relied on infringement of the rights of the defence, as enshrined in particular in Article 9 of Regulation No 883/2013, and infringement of the principle of sound administration and various errors of assessment allegedly made during the previous investigations or affecting the reports which concluded those investigations.

21 As regards the refusal to grant access to the documents, the appellant alleged infringement of Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Article 4(2) and Article 7 of Regulation No 1049/2001.

22 By separate document lodged at the Court Registry on 6 March 2019, the Commission raised an objection of inadmissibility in respect of that action under Article 130(1) of the Rules of Procedure of the General Court.

23 On 18 April 2019, the appellant submitted his observations on that objection of inadmissibility.

24 By the order under appeal, the General Court, taking the view that it had sufficient information from the documents in the file, ruled, on the basis of Article 130(1) and (7) of its Rules of Procedure, on the Commission's application without taking further steps in the proceedings and, granting that request, dismissed the action as inadmissible.

25 By its objection of inadmissibility, the Commission raised two pleas of inadmissibility. As regards, in the first place, the plea of inadmissibility based on the fact that a refusal by OLAF to open an investigation into the conduct of previous investigations is not capable of forming the subject matter of an action for annulment, the General Court noted, first, that no provision of

Regulation No 883/2013 conferred on natural and legal persons, whether or not they were ‘persons concerned’ within the meaning of that regulation, the right to request OLAF to open an investigation into its own previous investigations in order to examine whether the procedural guarantees provided for in Article 9 of Regulation No 883/2013 have been complied with and, second, that it is apparent from that regulation that natural or legal persons may provide OLAF with information relating to misconduct, but cannot oblige OLAF to open an administrative investigation.

26 In those circumstances, the General Court found that OLAF’s refusal to open an investigation into the conduct of the previous investigations could not be regarded as a measure producing binding legal effects capable of affecting the interests of the appellant by bringing about a distinct change in his legal position.

27 The General Court further stated, first, that, even if OLAF’s refusal to open an investigation into the conduct of the previous investigations contained in the letter at issue may be interpreted as a refusal to amend or to call into question the final reports, that refusal could not be considered to be a decision which may be the subject of an action for annulment. Since OLAF’s reports and recommendations drawn up following an external or internal investigation and sent to the competent authorities of the Member States are only recommendations or opinions which have no binding legal effects, allowing an action against such a refusal would amount to circumvention of the non-actionable nature of such reports and recommendations.

28 Secondly, the General Court held that a different conclusion from that referred to in the previous paragraph would moreover, in the present case, also entail a circumvention of the time limit for bringing an action for annulment, since, even if those reports and recommendations constituted acts open to challenge, the appellant would have allowed, in the present case, that period to expire.

29 Thirdly, the General Court considered that a finding that the action for annulment was inadmissible did not create a lacuna in the EU system for the protection of rights, in view, in particular, first, of the possibility for the national court hearing the action, in the context criminal proceedings, if any, brought on the basis of information forwarded by OLAF to the national authorities, of seeking a preliminary ruling from the Court of Justice under Article 267 TFEU and, second, of the fact that any unlawful act committed by OLAF which is not an act which adversely affects an individual may, where appropriate, be open to sanction in an action for damages.

30 In the second place, as regards the plea of inadmissibility alleging that a refusal of access to documents is not a challengeable act for the purposes of Regulation No 1049/2001, the General Court held, first, that the appellant could not base his request for access directly on a provision of primary law such as Article 42 of the Charter.

31 Second, the General Court found that, in the specific circumstances of the case, the refusal of access to the documents could not be regarded as a definitive act adopted in accordance with Articles 7 and 8 of Regulation No 1049/2001, nor, therefore, as an act against which an action for annulment may be brought under that regulation.

32 In that regard, the General Court found, first, that it was only in the pleadings lodged with it that the appellant stated, for the first time, that the request for access to documents made in the letter of 22 August 2018 was submitted in accordance with Article 6 of Regulation No 1049/2001.

33 Secondly, the General Court found that it was clear from the wording of the letter at issue that OLAF treated the request for access to documents as a request for access to the previous investigations file and not as an initial application for the purposes of Articles 6 and 7 of Regulation No 1049/2001 and that OLAF was entitled to deal in that way with that request, since, in the letter of 22 August 2018, the appellant referred throughout to Regulation No 883/2013.

34 Thirdly, having noted that the appellant had not submitted a confirmatory application within the meaning of Article 7(2) of Regulation No 1049/2001, the Court found that, since OLAF had rightly treated the appellant's request as a request for access to the investigation file and not as an initial application for the purposes of Articles 6 and 7 of that regulation, the Commission had not infringed Article 7(1) of that regulation by failing to inform the appellant of his right to make such a confirmatory application.

### **Forms of order sought by the parties**

35 By his appeal, the appellant claims that the Court of Justice should:

- set aside the order under appeal;
- declare that the action for annulment is admissible;
- find that the Commission infringed Article 9(1), (2) and (4) of Regulation No 883/2013, the appellant's rights of defence, including the right to be heard and the principle of respect for the presumption of innocence, the general principle of EU law of sound administration and the appellant's rights by rejecting the request for access to documents; and
- order the Commission to pay the costs of the present appeal.

36 In addition, the appellant requests, in essence, that the Court of Justice order a measure of inquiry and order the Commission to produce all the documents relating to the previous investigations.

37 The Commission contends that the Court of Justice should:

- dismiss the appeal as unfounded;
- dismiss the application for a measure of inquiry; and
- order the appellant to pay the costs.

### **The appeal**

38 In support of his appeal, the appellant puts forward two grounds of appeal. By the first ground of appeal, alleging infringement of Regulation No 883/2013 and Article 47 of the Charter, he challenges the order under appeal in so far as, by that order, the General Court dismissed his action for annulment as inadmissible in so far as it related to OLAF's refusal to open an investigation into the conduct of the previous investigations. By his second ground of appeal, alleging infringement of Articles 6 and 7 of Regulation No 1049/2001, he challenges the order under appeal in so far as, by that order, the General Court dismissed his action for annulment as inadmissible in so far as it concerned OLAF's refusal to grant access to the documents used in the context of its previous investigations.

## ***The first ground of appeal, alleging infringement of Regulation No 883/2013 and Article 47 of the Charter***

### *Arguments of the parties*

39 By the first part of his first ground of appeal, the appellant criticises the conclusion reached by the General Court, in paragraph 36 of the order under appeal, that OLAF's refusal to open an investigation into the conduct of the previous investigations does not constitute a decision against which an action for annulment may be brought and the considerations set out by that court in paragraphs 33 and 34 of that order supporting that conclusion. According to the appellant, that conclusion is the result of an error of assessment committed by the General Court in finding that he could not be classified as a 'person concerned' within the meaning of Article 2(5) of Regulation No 883/2013, that he could not assert any right to a fair trial in the context of the investigation and that OLAF's reports had no significant impact on subsequent national criminal proceedings. According to the appellant, by deciding not to regard him as a 'person concerned', even though he was, in fact, at the centre of the investigations as the president of Teleorman County Council, and even though that national entity was regarded as a 'person concerned' within the meaning of Article 2(5) of Regulation No 883/2013, OLAF deprived the appellant of the procedural guarantees referred to in Article 9 of that regulation. OLAF's reports had a major impact on the decision of the Romanian anti-corruption authority to prosecute the appellant, as is shown by the press releases of OLAF and the Romanian anti-corruption authority of 13 November 2017. Those reports were regarded as decisive evidence during the national criminal proceedings. According to the appellant, the appropriate legal basis on which the admissibility of his action should be examined is the judgment of 8 July 2008, *Franchet and Byk v Commission* (T-48/05, EU:T:2008:257).

40 By the second part of the first ground of appeal, the appellant submits that the dismissal of his action as inadmissible signifies a failure in the EU system of judicial protection contrary to the requirements of Article 47 of the Charter in so far as, contrary to the General Court's findings in paragraphs 40 and 41 of the order under appeal, OLAF's reports and recommendations had a significant impact on the decisions of the national authorities in relation to prosecution. Furthermore, given that the courts of the Member States have no jurisdiction either to examine OLAF's initial investigations in the light of EU law or to rule on their lawfulness and that OLAF's unlawful investigative acts cannot be the subject of an action for annulment, but only an action for damages and interest, such an action cannot be regarded as an effective remedy within the meaning of that provision.

41 The Commission contends that the first ground of appeal is ineffective and, in any event, unfounded.

### *Findings of the Court*

42 As the General Court correctly pointed out in paragraph 30 of the order under appeal, where, as in the present case, a decision of the Commission amounts to a rejection, that decision must be appraised in the light of the nature of the request to which it constitutes a reply (order of 6 April 2006, *GISTI v Commission*, C-408/05 P, not published, EU:C:2006:247, paragraph 10 and the case-law cited), namely, in the present case and as found by the General Court in paragraph 31 of that order, the application to OLAF to initiate an investigation into the conduct of the previous investigations.

43 In the first place, contrary to what is claimed by the appellant in the first part of his ground of appeal directed against paragraphs 33, 34 and 36 of the order under appeal, the General Court was

fully entitled to find, in that regard, in paragraph 36 of that order, on the basis of the considerations set out in paragraphs 33 to 35 of that order, that OLAF's refusal to open an investigation into the conduct of previous investigations could not be regarded as a measure producing binding legal effects capable of affecting the interests of the appellant by bringing about a distinct change in his legal position and that that refusal therefore did not constitute a decision against which an action for annulment may be brought under Article 263 TFEU.

44 Moreover, it must be stated that, by his arguments, the appellant does not criticise the substance of the reasoning followed by the General Court in paragraphs 33 to 35 of the order under appeal in order to reach the conclusion set out in paragraph 36 of that order, but that he frames that argument around the question whether OLAF was correct not to treat him in the previous investigations as a 'person concerned' within the meaning of Article 2(5) of Regulation No 883/2013.

45 However, the answer to such a question is irrelevant in the light of the General Court's reasoning and finding, since the General Court correctly stated, *inter alia*, in paragraph 33 of the order under appeal, that no provision of Regulation No 883/2013 confers on natural or legal persons, whether or not they are 'persons concerned' within the meaning of Article 2(5) of that regulation, the right to request OLAF to open an investigation into its own previous investigations.

46 Even a 'person concerned' within the meaning of that provision, defined by that provision as 'any person or economic operator suspected of having committed fraud, corruption or any other illegal activity affecting the financial interests of the Union and who is therefore subject to investigation by [OLAF]', is not entitled to request that office to open an investigation into its own investigations and that office is not obliged to open such an investigation on the basis of that information which has been provided to it.

47 Furthermore, as submitted by the Commission, the General Court also found, in essence, in paragraph 43 of the order under appeal and by reference to paragraphs 37 and 38 thereof, that, if it were to assess the action in the light of OLAF's final reports on which it is based, as suggested by the appellant, with the result that that action would relate to OLAF's refusal to alter or call into question those reports, such an action would entail a circumvention of the time limit for bringing an action for annulment against such reports.

48 By his first ground of appeal, the appellant does not dispute the General Court's finding.

49 In that regard, since the action at first instance was formally directed not against the final reports of the previous investigations themselves, but against the letter at issue by which OLAF rejected the appellant's request to open an investigation into the conduct of the previous investigations, it should be noted that, in accordance with the settled case-law of the Court of Justice, a measure which contains no new factor as compared with a previous measure constitutes a purely confirmatory measure and cannot therefore have the effect of setting a fresh time limit (order of 23 October 2009, *Commission v Potamianos* and *Potamianos v Commission*, C-561/08 P and C-4/09 P, EU:C:2009:656, paragraph 43 and the case-law cited).

50 In the present case, as observed by the Advocate General in point 43 of her Opinion and as is apparent from the findings made by the General Court in the order under appeal, the appellant confined himself, in his letter to OLAF, to criticising the latter's conclusions set out in the final reports relating to the previous investigations and the procedural acts that gave rise to those conclusions, without presenting any substantial new facts. It is apparent from those same findings

that OLAF's replies, and in particular the letter at issue, similarly did not refer to such facts or to a review of the appellant's situation in the light of those reports.

51 It follows that, as regards OLAF's refusal to open an investigation into the conduct of the previous investigations, the letter at issue constitutes, in any event, a measure which merely confirms the final reports drawn up following those investigations, with the result that, without it even being necessary to examine, in the present case, the question whether those reports constitute acts open to challenge for the purposes of Article 263 TFEU, it must be held that the General Court correctly found, in paragraph 43 of the order under appeal, that the appellant's action cannot, in the present case, in any event, be declared admissible without circumventing the time limit within which the final reports of previous OLAF investigations could, where appropriate, have been challenged by the person concerned.

52 In the light of the foregoing, the first part of the first ground of appeal must be rejected as unfounded.

53 In the second place, as regards the second part of that ground of appeal, alleging that the finding of inadmissibility of the action made by the General Court in the order under appeal reflects a lacuna in the EU system of judicial protection, it should be borne in mind, at the outset, that it follows from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, Article 168(1)(d) and Article 169 of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and the legal arguments specifically advanced in support of the appeal, failing which the appeal or ground of appeal concerned will be inadmissible (order of 29 June 2016, *Ombudsman v Staelen*, C-337/15 P, ECLI:EU:C:2016:670, paragraph 21 and the case-law cited).

54 In expressing the second part of his first ground of appeal in the terms set out in paragraph 40 above, the appellant did not satisfy those requirements. Although the General Court examined the appellant's argument, made at first instance, alleging such a lacuna in the EU system of judicial protection, in paragraphs 47 to 55 of the order under appeal, by devoting to that question a series of legal arguments, the appellant confines himself, in that second part, first, to expressing his disagreement with the assessments made by the General Court in paragraphs 40 and 41 of that order, and, second, to setting out, in very succinct terms, a number of considerations of a general nature, without taking steps to explain how the various legal arguments thus contained in paragraphs 47 to 55 of that order may be vitiated by errors of law.

55 In that regard, it should be borne in mind that a ground of appeal which is limited to general statements and does not contain precise indications as to which points of the decision at issue may be vitiated by an error of law must be rejected as manifestly inadmissible (see, to that effect, order of 29 June 2016, *Ombudsman v Staelen*, C-337/15 P, ECLI:EU:C:2016:670, paragraph 22 and the case-law cited). In accordance with the Court of Justice's settled case-law, the requirement referred to in paragraph 53 above is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, merely reproduces the pleas in law and arguments previously submitted to the General Court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake (see, to that effect, judgment of 16 December 2020, *Council and Others v K. Chrysostomides & Co. and Others*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 127 and the case-law cited).

56 It follows that the second part of the first ground of appeal is inadmissible.

57 In the light of all the foregoing, the first ground of appeal must be rejected in its entirety as partly unfounded and partly inadmissible.

***The second ground of appeal, alleging infringement of Article 6 of Regulation No 1049/2001***

*Arguments of the parties*

58 According to the appellant, the General Court erred in law by upholding the Commission's plea of inadmissibility alleging that OLAF's refusal of access, in the letter at issue, to the documents requested from it was not a challengeable act for the purposes of Regulation No 1049/2001. In particular, the General Court incorrectly held, in paragraph 69 of the order under appeal, that the refusal of access to the documents requested in the letter of 22 August 2018 could not be regarded as a definitive act adopted in accordance with Articles 7 and 8 of that regulation. It reached that conclusion, after noting, in particular in paragraphs 64 and 65 of that order, first, that it was only in the pleadings lodged with the General Court that the appellant had stated, for the first time, that his request for access was based on Article 6 of that regulation and, second, that it was clear from the letter at issue that OLAF had treated that request, not as a request for access under Article 6, but only as a request for access to the investigation file.

59 In so doing, the General Court allegedly failed to take account of the fact that, as regards the request for access to documents, Article 6 of Regulation No 1049/2001 does not lay down any specific formal requirement other than the drafting of that request in one of the languages of the European Union or a sufficient degree of precision to enable the institution to identify the documents in question. Accordingly, according to the appellant, since the Commission did not inform him of his right to make a confirmatory application under Article 7(2) of that regulation, the refusal of access to documents made by OLAF should have been regarded as a definitive act against which an action for annulment may be brought.

60 The Commission submits, first, that, by his second ground of appeal, the appellant requests the Court of Justice to call into question the assessment of the facts by the General Court, which falls outside the jurisdiction of the Court of Justice in the context of an appeal.

61 Secondly, according to the Commission, for the purposes of access to the documents requested from OLAF, the appellant could rely either on the right of access to the file, referred to in Article 41(2)(b) of the Charter, or on the right of public access to documents established and governed by Regulation No 1049/2001. In the present case, the legal basis on which the appellant based his request for access set out in the letter of 22 August 2018 was not clear and that letter gave the impression that it was based on Article 41(2)(b) of the Charter. It was therefore normal that, in the letter at issue, OLAF did not examine that request for access in the light of Regulation No 1049/2001 and did not draw the appellant's attention to the possibility of submitting a confirmatory application under Article 7 of Regulation No 1049/2001. In that regard, according to the Commission, it is apparent from the case-law of the Court of Justice that a request for access to documents must be sufficiently precise to enable the institution concerned to reply to it. In that context, applicants are under an obligation to provide relevant information and a duty of loyalty is imposed on them when submitting such a request.

62 Thirdly, according to the Commission, if the appellant nevertheless considered that his request for access was based on that regulation, he should have made a confirmatory application on the basis of Article 7 of Regulation No 1049/2001. If OLAF's initial reply were to be understood as

a refusal within the meaning of that regulation, it could not, in any event, constitute a challengeable act, in view of the two-stage procedure established by that regulation.

### *Findings of the Court*

63 As a preliminary point, it should be borne in mind that the procedure for access to documents held by the institutions is carried out in two stages and that the response to an initial application, within the meaning of Article 7(1) of Regulation No 1049/2001, is only the first position adopted which, in principle, cannot be subject to an appeal. However, exceptionally, where an institution adopts a definitive position with such a response, it may be subject to an action for annulment (see judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 36 and the case-law cited).

64 As the Advocate General observed, in essence, in point 74 of her Opinion, the fact that, in its reply, the institution concerned fails to inform the applicant, in accordance with Article 7(1) of Regulation No 1049/2001, that they are entitled to make a confirmatory application under Article 7(2) of that regulation, expresses the fact that that reply is definitive.

65 In addition, to the extent that the Commission contends that the arguments put forward in support of the appellant's second ground of appeal concern the assessment of the facts made by the General Court and, as such, are not subject to review by the Court of Justice hearing an appeal, it should be borne in mind that the classification for legal purposes of an act or a measure, such as a letter, by the General Court is a question of law which may be raised in an appeal (judgment of 23 November 2017, *Bionorica and Diapharm v Commission*, C-596/15 P and C-597/15 P, EU:C:2017:886, paragraph 55 and the case-law cited).

66 In the present case, it is apparent from the order under appeal that OLAF did not inform the appellant of his right to make a confirmatory application under Article 7(2) of Regulation No 1049/2001.

67 Admittedly, it also follows from that order that, in the letter of 22 August 2018, the appellant did not mention Regulation No 1049/2001 and that it was only in the written pleadings lodged with the General Court that he stated, for the first time, that his request for access to documents made in that letter had been made under Article 6 of that regulation.

68 However, it should be noted in that regard that, under Article 6(1) of Regulation No 1049/2001, requests for access to documents must be made in written form, including electronic form, in one of the languages listed in Article 55 TEU and in a sufficiently precise manner to enable the institution concerned to identify the document.

69 On the other hand, no provision of Regulation No 1049/2001 requires the applicant to specify the legal basis of his or her application.

70 Nor can such an obligation be inferred from the case-law referred to by the Commission, given that, despite some shades of wording, it was the requirement, referred to in paragraph 68 above, to make the request for access in a sufficiently precise manner to enable the institution to identify the document, which was discussed in the judgment of 20 January 2011, *Strack v Commission* (F-121/07, EU:F:2011:3, paragraphs 84 to 91), and not an obligation to specify the legal basis of the request.

71 The absence of any obligation to make express reference to Regulation No 1049/2001 in a request for access to documents is, moreover, consistent with the objective pursued by that regulation. It follows from Article 1(a) of that regulation that its purpose is to ensure ‘the widest possible access to documents’.

72 Thus, it is apparent from the Court of Justice’s case-law that Regulation No 1049/2001 confers a very extensive right of access to the documents of the institutions concerned, there being, in accordance with Article 6(1) of the regulation, no requirement to state reasons for the application in order to enjoy that right (judgment of 26 January 2010, *Internationaler Hilfsfonds v Commission*, C-362/08 P, EU:C:2010:40, paragraph 56).

73 In those circumstances, it must be held, contrary to what the General Court held in paragraphs 65, 66 and 68 of the order under appeal, that OLAF should, inter alia, have examined the appellant’s request for access in the light of Regulation No 1049/2001 and was therefore required to inform the appellant of his right to make a confirmatory application under Article 7(2) of that regulation.

74 The fact, in particular, that, in paragraph 66 of the order under appeal, the General Court noted that, in the letter of 22 August 2018, the appellant ‘referred throughout to Regulation No 883/2013’ is irrelevant in that context.

75 The fact that the letter of 22 August 2018 concerned a request for access to documents relating to OLAF investigations, that is to say a field governed by Regulation No 883/2013, does not preclude that request from being based, at the outset, on Regulation No 1049/2001, since it is common ground that that regulation may serve as the legal basis for a request for access to documents relating to an administrative procedure governed by another EU act.

76 Since, in the present case, OLAF failed to inform the appellant of his right to make a confirmatory application under Article 7(2) of Regulation No 1049/2001, he was therefore entitled, as is apparent from paragraphs 63 and 64 above, to consider that OLAF had thus definitively established, in the letter at issue, its position of refusing his request for access to documents made in the letter of 22 August 2018 and that, therefore, the letter at issue could be the subject of an action for annulment in that regard.

77 It follows that the second ground of appeal must be declared well founded, since the General Court erred in law in holding, in paragraph 69 of the order under appeal, that the refusal of access to the documents requested in the letter of 22 August 2018 could not be regarded as a definitive act against which an action for annulment may be brought.

78 In the light of all the foregoing, the order under appeal must therefore be set aside to the extent that, by that order, the General Court dismissed as inadmissible the appellant’s action in so far as it sought annulment of OLAF’s refusal, contained in the letter at issue, to grant him access to the documents requested in his letter of 22 August 2018 and to dismiss the appeal as to the remainder.

### **Referral of the case back to the General Court**

79 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

80 In the present case, since the General Court dismissed the appellant's action as inadmissible in so far as it sought annulment of OLAF's refusal, contained in the letter at issue, to grant him access to the documents requested in his letter of 22 August 2018 and, consequently, since the pleas relied on in support of that part of his action had not been the subject of an exchange of arguments before the General Court and had not been examined by that court, the state of the proceedings is not such that it may give final judgment in the matter, within the meaning of that provision (see, to that effect, judgment of 8 September 2020, *Commission and Council v Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 130). The case must therefore be referred back to the General Court for a ruling on that part of the action for annulment.

81 Accordingly, there is no longer any need to rule on the application for measures of inquiry referred to in paragraph 36 above.

### **Costs**

82 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded or where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court is to make a decision as to the costs.

83 Article 138(3) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

84 In the present case, it is appropriate to apply that provision, since the appeal is dismissed to the extent that, by the order under appeal, the General Court dismissed the application for annulment of the letter at issue, in so far as, by that letter, OLAF refused to open an investigation into the conduct of the previous investigations, but it was upheld to the extent that, by that order, the General Court rejected the application for annulment of the letter at issue, in so far as, by that letter, OLAF refused to grant the appellant access to the documents requested in the letter of 22 August 2018.

85 It is therefore appropriate to order the parties to bear their own costs relating to the present appeal proceedings and to reserve the costs relating to the proceedings at first instance, the case being referred back to the General Court.

On those grounds, the Court (Third Chamber) hereby:

- 1. Sets aside the order of the General Court of the European Union of 12 May 2020, *Dragneav Commission*, (T-738/18, not published, EU:T:2020:208), to the extent that, by that order, the General Court dismissed as inadmissible the action brought by Mr Liviu Dragnea for annulment of the letter from the European Anti-Fraud Office (OLAF) of 1 October 2018, in so far as, by that letter, OLAF refused to grant him access to the documents requested in his letter of 22 August 2018;**
- 2. Refers the case back to the General Court of the European Union for judgment on this head of the application for annulment;**
- 3. Dismisses the appeal as to the remainder;**
- 4. Orders Mr Liviu Dragnea and the European Commission to bear their own costs incurred in the context of the present appeal;**

5. **Reserves the costs as to the remainder.**

Prechal

Passer

Biltgen

Rossi

Wahl

Delivered in open court in Luxembourg on 13 January 2022.

A. Calot Escobar

K. Lenaerts

Registrar

President

\* Language of the case: English.

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