JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

6 June 2019 (*)

(Non-contractual liability — Investigation by OLAF — Sufficiently serious breach of a rule of law conferring rights on individuals — Non-material damage — Causal link)

In Case T−399/17,

**John Dalli,** residing in St. Julians (Malta), represented by L. Levi and S. Rodrigues, lawyers,

applicant,

v

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

defendant,

ACTION under Article 268 TFEU seeking compensation for damage allegedly suffered by the applicant as a result of the illegal conduct of the Commission and the European Anti-Fraud Office (OLAF), connected with the termination of his office as a Member of the Commission on 16 October 2012,

THE GENERAL COURT (Sixth Chamber),

composed of G. Berardis, President, S. Papasavvas (Rapporteur) and O. Spineanu-Matei, Judges,

Registrar: F. Oller, Administrator,

having regard to the written part of the procedure and further to the hearing on 13 December 2018,

gives the following

## Judgment

### Background to the dispute

1 By Decision 2010/80/EU of the European Council of 9 February 2010 appointing the European Commission (OJ 2010 L 38, p. 7), the applicant, Mr John Dalli, was appointed as a Member of the European Commission for the period from 10 February 2010 to 31 October 2014. He was allocated the health and consumer protection portfolio by the President of the Commission.

2 On 25 May 2012, following the receipt by the Commission on 21 May 2012 of a complaint ('the complaint') from the company Swedish Match ('the complainant'), containing allegations concerning the applicant's behaviour, the European Anti-Fraud Office (OLAF) initiated an investigation (No OF/2012/0617), in accordance with Articles 3 and 4 of 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).

3 On 11 July 2012, OLAF informed the applicant that he was to be considered a person concerned by an investigation opened following the complaint. The applicant was refused access to the complaint.

4 On 16 July 2012, the applicant was interviewed by OLAF for the first time.

5 The President of the Commission met the applicant on 25 July 2012. During that meeting the applicant denied the allegations made against him in the complaint.

6 On 17 September 2012, the applicant was interviewed by OLAF for the second time.

7 On 5 October 2012, the Director-General of OLAF informed the Secretary-General of the Commission that the final investigation report relating to the complaint ('the OLAF report') was about to be sent to her.

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

9 On 16 October 2012, the applicant met the President of the Commission. Later on the same day, the latter telephoned the Prime Minister of the Republic of Malta to inform him that the applicant had resigned from his office as a Member of the Commission and to ask him to consider how to fill the vacancy. The President of the Commission also wrote to the Presidents of the European Parliament and of the Council of the European Union to notify them that the applicant had tendered his resignation with immediate effect. Still later on that day, the Commission issued a press release announcing that resignation.

10 On 21 October 2012, the applicant wrote to the President of the Commission to inform him that he did not consider that there had been a valid resignation on his part, that he considered that he had been denied his right to defend himself properly and that his right to the presumption of innocence had been breached by the Director-General of OLAF.

11 On 28 November 2012, the Council, by common accord with the President of the Commission, adopted Decision 2012/744/EU appointing a new Member of the European Commission (OJ 2012 L 332, p. 21), Mr Tonio Borg, for the remainder of Commission's term of office, which ran until 31 October 2014.

12 By application lodged at the Court Registry on 24 December 2012, the applicant brought an action for annulment of the 'oral decision of 16 October 2012 of termination of [his] office … with immediate effect, taken by the President of the Commission' and for compensation for damage of EUR 1 symbolic for non-material damage and, on a provisional basis, of EUR 1 913 396 for material damage (Case T−562/12, *Dalli* v *Commission*) ('the first action').

13 By judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270), the Court dismissed the first action.

14 As regards, first, the claim for annulment, the Court found that the applicant had resigned voluntarily, as no request for his resignation within the meaning of Article 17(6) TEU had been made by the President of the Commission. Since the existence of that request, which was the act challenged by the applicant, had not been established, the Court considered that the claim for annulment must be rejected as inadmissible.

15 As regards, second, the claim for compensation, the Court considered that, since it had found that the existence of the Commission acts challenged in the claim for annulment had not been established, no illegality in that respect and, a fortiori, no serious breach of a rule of law could be found against that institution. As regards the allegation that the applicant's consent was vitiated, put forward as a subsidiary plea in the context of the claim for annulment, the Court observed that it had not been established. It concluded that the allegations of wrongful conduct on the part of the Commission or its President had not been established to the requisite legal standard. It therefore rejected the claim for damages as unfounded.

16 By order of 14 April 2016, *Dalli* v *Commission* (C−394/15 P, not published, EU:C:2016:262), the Court of Justice dismissed the appeal brought by the applicant against the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270).

**Procedure and forms of order sought**

17 The applicant brought the present action by application lodged at the Registry of the General Court on 28 June 2017.

18 By separate document lodged at the Registry of the General Court on 13 September 2017, the Commission raised an objection of inadmissibility under Article 130 of the Rules of Procedure of the General Court. The applicant lodged his observations on that plea on 24 October 2017.

19 By order of 21 February 2018, *Dalli* v *Commission* (T−399/17, not published), the Court (Sixth Chamber) joined the plea of inadmissibility to the substance of the case, on the basis of Article 130(7) of the Rules of Procedure.

20 Acting on a proposal from the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, in the context of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put some written questions to the Commission, which answered them within the period prescribed.

21 At the hearing on 13 December 2018, the parties presented oral argument and replied to oral questions put by the Court.

22 In the application and the reply, the applicant claims that the Court should:

– order compensation for the damage, in particular the non-material damage, estimated, on a provisional basis, at EUR 1 000 000;

– order the Commission to pay the costs.

23 In the plea of inadmissibility, the Commission contends that the Court should:

– reject the claim for compensation as inadmissible;

– order the applicant to pay the costs.

24 In the observations on the plea of inadmissibility, the applicant claims that the Court should:

– reject the plea of inadmissibility and ask the Commission to lodge a statement of defence;

– order compensation for the damage, in particular the non-material damage, estimated, on a provisional basis, at EUR 1 000 000;

– order the Commission to pay the costs.

25 In the statement of defence and the rejoinder, the Commission contends that the Court should:

– dismiss the action as inadmissible and, in any event, as manifestly unfounded;

– order the applicant to pay the costs.

**Admissibility**

26 The Commission submits that the present action is inadmissible as the matter is *res judicata* following the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270). First, the present action is between the same parties as the first action. Second, the purpose of the first action encompasses the purpose of the present action. Third, the legal bases of the two actions overlap. The Commission points out that, in the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270), the Court dismissed the first action in its entirety, namely the application for annulment as inadmissible and the claim for compensation as unfounded, and that, in the context of his appeal against that judgment, the applicant did not contest the rejection of that latter application. In any event, the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270), was confirmed by the Court of Justice. Therefore, in the light of the definitive nature of the findings of the Court in the abovementioned judgment concerning the claim for compensation, the Commission maintains that the present action is manifestly inadmissible. The Commission also emphasises that, although the case-law requires only the identity of the legal bases and not the identity of each of the pleas put forward, the submissions and pleas put forward in the present action are similar to those put forward in the first action. According to the Commission, the only pleas of the present action which were not expressly stated in the first action are the plea alleging breach of the Memorandum of Understanding concerning a code of conduct to ensure a timely exchange of information between OLAF and the Commission with respect to OLAF internal investigations in the Commission ('the Memorandum of Understanding') and those alleging breach of the principle of sound administration and breach of OLAF's independence. However, the latter two pleas are based on facts discussed in the reply in the first action. Furthermore, apart from the fact that these three pleas are largely inoperative, they could have been raised in the first action. In that regard, the Commission observes that if the present action were admissible, the applicant would, first, circumvent the prohibition on submitting new pleas in the reply in a procedure by presenting them in a new procedure and, secondly, would be able to request a de facto revision of a final judgment without putting forward any decisive new fact.

27 In that regard, attention should be drawn to the importance, both for the EU legal order and for the national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question (see judgment of 6 October 2009, *Asturcom Telecomunicaciones*, C−40/08, EU:C:2009:615, paragraphs 35 and 36 and the case-law cited).

28 According to settled case-law, a judgment's status as *res judicata* is such as to bar the admissibility of an action if the proceedings disposed of by the judgment in question were between the same parties, had the same subject matter and were founded on the same grounds, those conditions necessarily being cumulative (see judgment of 25 June 2010, *Imperial Chemical Industries* v *Commission*, T−66/01, EU:T:2010:255, paragraph 197 and the case-law cited).

29 In particular, as regards the claim for damages, the force of *res judicata* attaching to a judgment dismissing such a claim, on the ground that neither the fact and extent of the damage alleged, nor the existence of a causal link between such damage and the substantive illegalities invoked in support of that claim were established to the requisite legal standard, precludes the applicant from claiming again compensation for damage corresponding to the damage in respect of which a claim for compensation on the same grounds has already been rejected (see, to that effect, judgment of 23 November 2011, *Sison* v *Council*, T−341/07, EU:T:2011:687, paragraphs 21 to 25 and the case-law cited).

30 It should also be noted that *res judicata* attaches only to matters of fact and law actually or necessarily settled by a judicial decision (see judgment of 25 June 2010, *Imperial Chemical Industries* v *Commission*, T−66/01, EU:T:2010:255, paragraph 198 and the case-law cited).

31 In the present case, in accordance with the case-law cited in paragraph 28 above, it is necessary to examine whether the first action and the present action are between the same parties, concern the same subject matter and are based on the same cause of action.

32 As regards, in the first place, the condition that the parties in both actions must be the same, it must be concluded that it is satisfied in the present case.

33 As regards, in the second place, the condition relating to the subject matter of actions, it must be noted that the subject matter of an action corresponds to the claims of the person concerned (see, to that effect, judgment of 25 October 2013, *Commission* v *Moschonaki*, T−476/11 P, EU:T:2013:557, paragraph 84). In that regard, firstly, it should be noted that, in the first action, the applicant requested the annulment of the verbal decision allegedly taken by the President of the Commission, on 16 October 2012, to terminate his office as a Member of the Commission and compensation for the damage allegedly suffered by him as a result of that decision. As regards the latter request, the applicant claimed that, by terminating his office, the Commission caused him non-material and material damage and he requested compensation in the symbolic amount of EUR 1 in relation to the non-material damage and, provisionally, EUR 1 913 396 in relation to the material damage. Secondly, it must be noted that, in the context of the present action, the applicant requests compensation for the damage, in particular non-material damage, caused to him mainly by the unlawful behaviour of the Commission, including OLAF, connected with the termination of his office on 16 October 2012. He thus requests compensation for damage, in particular non-material damage, estimated, provisionally, at EUR 1 000 000. It follows that, by those two actions, the applicant requests compensation for the damage allegedly suffered in the context of the termination of his duties at the Commission and that the subject matter of the present action is, in essence, included in that of the first action. It must therefore be considered that the subject matter of the present action is the same as that of one of the requests submitted in the first action and that, as a result, the condition relating to the subject matter of actions is satisfied. That conclusion is not called into question by the fact that the amount of the compensation sought differs between the two actions, since that amount is incidental to the subject matter itself of the actions.

34 As regards, in the third place, the condition relating to the cause of actions, it is to be emphasised that the cause of action corresponds to the legal and factual basis of the claims relied on (see, to that effect, judgment of 25 October 2013, *Commission* v *Moschonaki*, T−476/11 P, EU:T:2013:557, paragraph 84).

35 In that regard, it must at the outset be pointed out that, in the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270), in order to reject the claim for damages submitted in the first action, the Court stated that, since it had held that the existence of the Commission acts challenged in the application for annulment was not established, no illegality in that respect and, a fortiori, no serious breach of a rule of law can be found against the Commission. It added, as regards the allegation that the applicant's consent was vitiated, put forward as a subsidiary plea in the context of the application for annulment, that it had not been established. The Court therefore concluded that the allegations of wrongful conduct on the part of the Commission or its President had not been established to the requisite legal standard.

36 It follows that the rejection of the claim for damages submitted in the first action is based on the fact that the decision of the President of the Commission terminating the office of the applicant did not exist and that, therefore, that decision was not vitiated by unlawfulness capable of incurring liability on the part of the EU. In other words, the Court did not rule, in the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270), on the wrongful conduct invoked in order to substantiate the application for annulment of the alleged decision of the President of the Commission, but merely concluded that there was no such decision.

37 It therefore does not follow from the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270), that the points of law and fact relating to the wrongful conduct of OLAF alleged in the first action were actually or necessarily settled by that judgment. The latter therefore does not have, in that regard, the force of *res judicata*, in accordance with the case-law cited in paragraph 30 above.

38 Admittedly, the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270), concludes that 'the allegations of wrongful conduct on the part of the Commission or its President have not been

established to the requisite legal standard'. However, is clearly apparent from that judgment that those claims were not examined, since the Court merely based the dismissal of the application for annulment on the non-existence of the decision in question, and, for the same reason, that of the claim for damages.

39 In those circumstances, it must be concluded that the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270), does not rule on the illegalities invoked in support of the claim for damages, and thus on the legal and factual basis for that claim.

40 Therefore, since the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270) does not have the force of *res judicata* with respect to that question, it is not necessary to examine whether the grounds for the two actions are identical.

41 It is, finally, necessary to reject the Commission's arguments according to which, if the present action were admissible, the applicant could circumvent the prohibition on submitting new pleas and de facto seek a revision of the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270). Firstly, the prohibition on submitting new pleas applies within a single procedure. Also, to the extent that *res judicata* does not oppose the admissibility of the present action, it remains open to the applicant to submit the pleas of his choice in support of that action. Secondly, to the same extent, the present action has neither the aim nor the effect of obtaining a review of the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270). In any event, since the Court failed to examine, in that judgment, the unlawful conduct which was invoked in order to substantiate the application for annulment of the alleged decision of the President of the Commission, it cannot be considered that the applicant 'tries to resuscitate an old controversy which has already been decided', as is suggested by the Commission.

42 It follows from the foregoing that the present action is admissible in its entirety and that the Commission's plea of inadmissibility must be rejected.

**Substance**

43 The applicant claims compensation for the damage, notably the non-material damage, caused to him mainly by the alleged unlawful conduct of the Commission, including OLAF, connected with the termination of his office as a Member of the Commission, with immediate effect, on 16 October 2012.

44 In that regard, it should be noted that, pursuant to the second paragraph of Article 340 TFEU, in the case of non-contractual liability, the Union, in accordance with the general principles common to the laws of the Member States, is to make good any damage caused by its institutions or by its servants in the performance of their duties.

45 According to settled case-law, the second paragraph of Article 340 TFEU is to be interpreted as meaning that the non-contractual liability of the European Union and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions, namely the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of (see judgment of 9 September 2008, *FIAMM and Others* v *Council and Commission*, C−120/06 P and C−121/06 P, EU:C:2008:476, paragraph 106 and the case-law cited).

46 Since one of those conditions is not satisfied, the action must be dismissed in its entirety without it being necessary to consider the other conditions for non-contractual liability on the part of the European Union (see judgment of 14 October 1999, *Atlanta* v *European Community*, C−104/97 P, EU:C:1999:498, paragraph 65 and the case-law cited).

***The unlawfulness of the conduct complained of***

47 It must be noted that, in order to satisfy the condition relating to the unlawfulness of the conduct of the institutions, the case-law requires a sufficiently serious breach of a rule of law intended to confer rights on individuals to be established (see judgment of 19 April 2007, *Holcim (Germany)* v *Commission*, C−282/05 P, EU:C:2007:226, paragraph 47 and the case-law cited).

48 In that regard, it is necessary to reject at the outset the applicant's argument according to which, in the context of the administrative or non-normative activities of an institution, the criterion that determines the liability of the institution is the unlawfulness of its conduct, independently of the existence of a rule of law intended to confer rights on individuals. Admittedly, where it is put in issue under the provisions of Article 270 TFEU, the non-contractual liability of the institutions may be incurred on the ground solely of the illegality of an act adversely affecting an official or of non-decision-making conduct, without there being any need to consider whether it is a sufficiently serious breach of a rule of law intended to confer rights on individuals (see judgment of 14 June 2018, *Spagnolli and Others* v *Commission*, T−568/16 and T−599/16, EU:T:2018:347, paragraph 196 and the case-law cited). The case-law invoked by the applicant in support of his argument concerns moreover actions pursuant to Article 270 TFEU. However, except in such cases concerning actions in civil service matters, the EU Courts have not established a non-contractual liability regime based on administrative activity distinct from the system of non-contractual liability based on legislative activity. It does not follow from the case-law that, except in actions in civil service matters, it is not necessary to establish the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals in order to engage the EU's non-contractual liability, where the alleged unlawful acts are connected with the administrative activity of the institution concerned. On the contrary, it follows from the case-law that the requirement that such a breach be established is applicable both in the legislative activity and in the administrative activity of the institutions. It has already been held that that requirement sought, whatever the nature of the unlawful act at issue, to avoid the risk of having to bear the losses claimed by the persons concerned obstructing the ability of the institution concerned to exercise to the full its powers in the general interest, whether that be in its legislative activity or in that involving choices of economic policy or in the sphere of its administrative competence, without however thereby leaving individuals to bear the consequences of flagrant and inexcusable misconduct (see judgment of 23 November 2011, *Sison* v *Council*, T−341/07, EU:T:2011:687, paragraph 34 and the case-law cited). That requirement was moreover implicitly confirmed by the case-law concerning the alleged illegality of the conduct of both OLAF and the Commission in the context of their non-normative activities (see, to that effect, judgments of 7 April 2016, *Holcim (Romania)* v *Commission*, C−556/14 P, not published, EU:C:2016:207, paragraph 55; of 8 July 2008, *Franchet and Byk* v *Commission*, T−48/05, EU:T:2008:257, paragraph 95, and of 20 July 2016, *Oikonomopoulos* v *Commission*, T−483/13, EU:T:2016:421, paragraph 41, not published).

49 It must, finally, be borne in mind that a sufficiently serious breach of a rule of law that is intended to confer rights on individuals is established where the breach is one that implies that the institution concerned manifestly and gravely disregarded the limits set on its discretion, the factors to be taken into consideration in that connection being, inter alia, the degree of clarity and precision of the rule breached and the measure of discretion left by that rule to the EU authorities (judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C−45/15 P, EU:C:2017:402, paragraph 30). Where that institution has only considerably reduced, or even no, discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach (judgment of 10 December 2002, *Commission* v *Camar and Tico*, C−312/00 P, EU:C:2002:736, paragraph 54).

50 It is in the light of those considerations that it is necessary to examine the complaints made by the applicant concerning the unlawfulness of OLAF's and the Commission's conduct.

*The unlawfulness of OLAF's conduct*

51 As regards the unlawfulness of OLAF's conduct, the applicant puts forward, in essence, seven complaints.

– *First complaint: the unlawfulness of the decision to open the investigation*

52 The applicant maintains that OLAF's decision to open the investigation was unlawful. In that regard, he observes, in particular, that OLAF did not identify the legal basis of its investigation, that it did not evaluate the information in the complaint and that it did not ascertain whether there were sufficiently serious suspicions. Furthermore, it did not evaluate the possibility of a conflict of interests on the part of the complainant. It thus breached its duty to act diligently. The applicant also maintains, in the reply, that OLAF breached its duty to act impartially.

53 The Commission disputes the applicants' arguments.

54 In that regard, it is necessary to check, in the first place, whether, in the context of the present complaint, the applicant invokes the infringement of rules of law intended to confer rights upon individuals.

55 For that purpose, it must be noted that the applicant refers, in the application, to Article 1(3) of Regulation No 1073/1999 and to Article 5 of the OLAF Instructions to Staff on Investigative Procedures ('the OLAF instructions').

56 Firstly, Article 1(3) of Regulation No 1073/1999 states that, within the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties, OLAF is to conduct administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union and to investigate to that end serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the EU liable to result in disciplinary and, as the case may be, criminal proceedings, or an analogous breach of obligations by Members of the institutions and bodies, heads of the bodies or members of staff of the institutions and bodies not subject to the Staff Regulations of Officials of the European Union. Therefore, far from conferring rights on individuals, in particular procedural rights, that provision merely states the objectives and tasks of OLAF in the context of administrative investigations.

57 Secondly, as regards the OLAF instructions, it should be noted that they are OLAF internal rules that must be applied by the latter's staff in the context of its investigations. Those instructions seek to ensure that OLAF investigations are conducted logically and consistently. Concerning more specifically Article 5 of those instructions, which is invoked by the applicant, it describes the procedure for selecting cases and, more particularly, the contents of the opinion on the opening or dismissal of a case which must be prepared by the Investigation Selection and Review Unit of OLAF, the criteria taken into account in that regard and the deadline within which it must be issued. It must therefore be considered, in the light of its content, that Article 5 of the OLAF instructions does not in itself confer any rights on individuals.

58 It follows that Article 1(3) of Regulation No 1073/1999 and Article 5 of the OLAF instructions have neither the purpose nor the effect of conferring an individual right on the applicant.

59 However, the applicant also refers, in the context of the present complaint, to a breach of the duty to act diligently. The latter, which is inherent in the principle of sound administration and which requires that the administration of the EU act with care and caution (see, to that effect, judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraphs 92 and 93), constitutes a rule of law conferring rights on individuals (see, to that effect, judgment of 16 September 2013, *ATC and Others* v *Commission*, T-333/10, EU:T:2013:451, paragraph 93).

60 It is therefore necessary to examine, in the second place, whether the applicant has established that, by opening the investigation, OLAF failed to comply with its duty of diligence.

61 Firstly, it is necessary to assess the applicant's allegations relating to the legal basis for opening the investigation.

62 As regards, first of all, the claim that OLAF decided to open the investigation although it had recognised that the financial interests of the EU were not at stake, it must be noted that that claim is ineffective. It follows from the first subparagraph of Article 2(1) of ECSC, Euratom: Commission Decision

1999/352/EC, of 28 April 1999 establishing OLAF (OJ 1999 L 136, p. 20), that OLAF exercises the Commission's powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Union's financial interests, as well as any other act or activity by operators in breach of EU provisions. It also follows from the second subparagraph of Article 2(1) of Decision 1999/352, that OLAF is responsible for conducting administrative investigations for the purpose of, firstly, fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union and, secondly, to investigate serious facts linked to the performance of professional activities which may constitute a breach of obligations by officials and servants of the Union likely to lead to disciplinary and, in appropriate cases, criminal proceedings or an analogous breach of obligations by Members of the institutions and bodies, heads of the bodies or members of staff of the institutions and bodies not subject to the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union. It should also be noted that, according to recital 5 of Regulation No 1073/1999, OLAF's responsibility extends beyond the protection of financial interests to include all activities relating to safeguarding the Union's interests against irregular conduct liable to result in administrative or criminal proceedings. It must also be pointed out that the wording of the second subparagraph of Article 2(1) of Decision 1999/352 is in essence reproduced in Article 1(3) of Regulation No 1073/1999, with a slight difference in terminology. That is however not capable, read in the light of Decision 1999/352 and of recital 5 of Regulation No 1073/1999, to call into question the nature of OLAF's competence. It follows that OLAF is not solely responsible for protecting the financial interests of the Union, but also, in particular, for fighting fraud and corruption and investigating serious facts linked to the performance of professional activities which may constitute a breach of obligations by officials and servants of the Union likely to lead to disciplinary and, in appropriate cases, criminal proceedings. As regards the fact, referred to by the applicant, that the investigative policy priorities established by the Director-General of OLAF for 2012 mention the financial impact as one of the five priorities, it suffices to note that it is provided that no single policy priority can operate as a condition *sine qua non*. In any event, those priorities cannot call into question the definition of OLAF's competence resulting from Decision 1999/352 and from Regulation No 1073/1999. It follows from the foregoing that the absence of an impact on the financial interests of the Union does not affect the possibility for OLAF to open an investigation. The applicant's argument must consequently be rejected.

63 As regards, next, the argument that the allegations at issue do not concern 'serious matters', it must, first of all, be noted that the applicant is wrong to claim, by referring to Article 1(3) of Regulation No 1073/1999, that only 'serious matters' can justify the opening of an investigation. It does not follow from that provision that the proven existence of such facts is a condition for the opening of an investigation. It follows from the wording thereof that OLAF investigations are, inter alia, intended to investigate such facts. In that regard, it should moreover be pointed out that the regime introduced by Regulation No 1073/1999 is specifically intended to permit the investigation of suspicions relating to matters within the scope of OLAF's competence to conduct investigations (see, to that effect, judgments of 10 July 2003, *Commission* v *ECB*, C−11/00, EU:C:2003:395, paragraph 141, and of 10 July 2003, *Commission* v *EIB*, C−15/00, EU:C:2003:396, paragraph 105). In any event, the complaint contained serious allegations concerning the conduct of the applicant, and in particular his involvement in attempted bribery. According to the complainant, a Maltese businessman, Mr Z, used his relationship with the applicant to attempt to obtain a financial benefit from the complainant and from the association European Smokeless Tobacco Council (ESTOC) in exchange for his intervention seeking to influence a potential legislative proposal on tobacco products, to the advantage of the tobacco industry. The allegations at issue concerned therefore 'serious matters' capable of justifying the opening of an investigation seeking to verify whether they were proven. The applicant's argument must therefore be rejected.

64 As regards, finally, the argument that OLAF makes no reference to the existence of sufficiently serious suspicions relating to his competencies, it should be noted that the decision of the Director-General of OLAF to open an investigation cannot be taken unless there are sufficiently serious suspicions relating to acts of fraud, corruption or other illegal activities detrimental to the financial interests of the Union (see, to that effect, judgments of 10 July 2003, *Commission* v *ECB*, C−11/00, EU:C:2003:395, paragraph 141, and of 10 July 2003, *Commission* v *EIB*, C−15/00, EU:C:2003:396, paragraph 164). It must be considered that

that is also the case regarding an investigation concerning allegations relating to serious matters which may constitute a dereliction of the obligations of Members of the institutions. In the present case, the opinion on the opening of the investigation provided by the Investigation Selection and Review Unit, on which the Director-General of OLAF relied to adopt the decision to open the investigation, states that the information provided was sufficient to open an investigation. Admittedly, that opinion does not expressly refer to the existence of suspicions capable of justifying the opening of the investigation, However, in the light of the precise information and detailed allegations contained in the complaint, such as referred to in paragraph 63 above, it must be considered that OLAF could legitimately harbour sufficiently serious suspicions relating to a possible dereliction of his obligations on the part of the applicant, for the purposes of Article 1(3) of Regulation No 1073/1999. The applicant's argument must therefore be rejected.

65 It follows that the applicant is wrong to claim that OLAF was illegally considered to be competent in infringement of Regulation 1073/1999.

66 Secondly, it is necessary to examine the applicant's arguments according to which OLAF did not carry out a necessary evaluation of the information received and that, in fact, that information was revealed to be false.

67 In that regard, it must at the outset be noted that the applicant relies on a mere statement and does not adduce any evidence allowing it to be established that OLAF failed to carry out the evaluation of the information received.

68 Admittedly, as the applicant in essence states, on 24 May 2012, the Secretary-General of the Commission transmitted to the Director-General of OLAF the information contained in the complaint and the decision to open the investigation was adopted the next day, so that the investigation was opened within a very short period of time after the receipt of the information by the Commission. However, it cannot be inferred from that fact that OLAF did not examine that information. It follows by contrast from the opinion on the opening of the investigation that, within the short time available, the Investigation Selection and Review Unit of OLAF carried out investigations concerning the complainant and two of the persons subject to investigation.

69 In any event, as is apparent from Article 5.3 of the OLAF instructions, the opinion of the Investigation Selection and Review Unit, which is given in the context of the selection process and which is examined by the Director-General of OLAF before deciding to open an investigation or to dismiss the case, must be based on questions whether the information falls within the remit of OLAF, whether that information is sufficient in order to open an investigation and whether it corresponds to the priorities defined by the Director-General of OLAF. As regards the examination of the question whether the information is sufficient in order to open an investigation, it is necessary to pay attention to the reliability of the source and to the credibility of the allegations, as is apparent from Article 5.4 of those instructions.

70 It follows that, although the OLAF instructions require it to be verified, in the context of the selection procedure, whether the information is sufficient in order to open an investigation, they do not require an in-depth evaluation of that information, which could only take place in the context of the investigation.

71 OLAF must by contrast carefully and impartially examine all of the evidence at issue, and in particular the reliability of the source and the credibility of the allegations, in order to determine whether the information at issue is sufficient to open the investigation.

72 It follows that the applicant is wrong to complain that OLAF allegedly ignored the facts referred to by him in the reply, since those facts could be established or analysed only following the investigation and not at the stage of the evaluation of information gathered. Likewise, the claim that the complaint was allegedly based on false information is not relevant, since the accuracy of that information could not be confirmed or refuted at that stage. It is necessary, for those same reasons, to reject the complaint, raised at the stage of the reply, that OLAF infringed the principle of objective impartiality by failing to check the seriousness of the facts evoked in the complaint, without it even being necessary to examine its admissibility.

73 In any event, in view of the accuracy of the information contained in the complaint and the detailed nature of the allegations made therein, it cannot be considered that OLAF should, a priori, have doubted the credibility of those allegations.

74 It is necessary, for the same reasons, to reject the applicant's complaint according to which OLAF did not examine the possibility of a conflict of interests with the complainant or the existence of a manipulation of the tobacco industry. Although OLAF needs, as is apparent from paragraph 71 above, to examine the reliability of the source during the selection process, it is not for it, before the adoption of a decision to open an investigation, to examine such eventualities, except where such are clearly established solely on the basis of the examination of the information communicated to it. In the present case, in the light of the elements included in the complaint, the fact that tobacco was a sensitive issue involving lobbying or the fact that the complainant was affected by several issues addressed by the applicant did not have to result in OLAF concluding, before the opening of the investigation, that there was a conflict of interests or a manipulation. In any event, nothing in the case file allows the existence of such a manipulation or conflict of interests to be established, nor for it to be concluded that OLAF should have doubted the reliability of the source.

75 It is also necessary to reject the applicant's argument that the information at issue was wrongly presented as coming from the Commission, and not from the complainant. It is not disputed that the Secretary-General of the Commission received the complaint of 21 May 2012 and that, as is required by the second subparagraph of Article 2 of ECSC, Euratom: Commission Decision 1999/396/EC 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), the latter transmitted to the Director-General of OLAF the information which was communicated to her on 24 May 2012. Therefore, as is indicated in the opinion on the opening of the investigation, the source of the OLAF's information is the Commission, regardless of the fact that the latter was notified by way of complaint. In any event, it is clearly apparent from that opinion that the complaint was sent to the Commission and that the latter transmitted it to the Director-General of OLAF.

76 It follows from all of the foregoing that, in the circumstances of the present case, OLAF has not failed in its duty of diligence.

77 The first complaint must therefore be rejected.

– *Second complaint: flaws in the characterisation of the investigation and the unlawful extension of the investigation*

78 The applicant criticises the extensions of the scope of the investigation, which in his submission are not permitted and which, on the assumption that they were permitted, were not decided on in proper conditions.

79 The Commission contests the applicants' arguments.

80 In that regard, it must be pointed out, first of all, that, in the application, the applicant claims, in general, that the procedural rules are rules which confer rights on individuals. He does not however precisely identify any rule conferring rights on individuals which was infringed in the present case. When questioned in that regard by the Court during the hearing, the applicant failed to expressly and specifically mention any rule of law conferring rights on individuals infringement of which was alleged, and he merely claimed that the Investigation Selection and Review Unit had not carried out a review.

81 Next, and in any event, none of the arguments put forward by the applicant in support of the present complaint is founded.

82 Therefore, as regards, firstly, the possibility of extending the scope of the investigation, it is to be noted that, in accordance with Regulation No 1073/1999, the investigations carried out by OLAF consist of

external investigations, that it is to say, investigations outside the EU Institutions, and of internal investigations, that is to say, investigations carried within those institutions. The procedural rules to be followed by OLAF differ according to the nature of the investigation.

83 It is, moreover, to be noted that Article 5 of Regulation No 1073/1999 provides that external investigations are to be opened by a decision of the Director of OLAF, acting on his own initiative or following a request from a Member State concerned and that internal investigations are to be opened by a decision of that director acting on his own initiative or following a request from the institution, body, office or agency within which the investigation is to be conducted.

84 It must however be noted that Regulation No 1073/1999 does not contain any provisions relating to the extension of the scope of an investigation, that is to say concerning the possibility of extending the scope of an internal investigation to that of an external investigation and vice-versa.

85 However, there is nothing expressly prohibiting the Director-General of OLAF from carrying out such an extension.

86 It would also be contrary to the objectives assigned to OLAF and to the independence of the latter to limit the powers conferred on its director-general concerning the opening of investigations, including when it comes to extending the scope of an investigation. That would be the case where, in the event of sufficiently serious suspicions concerning the facts, which came to light during an internal investigation, but which require the opening of an external investigation, the Director-General of OLAF was prevented from opening the latter or from extending the scope of the former.

87 It must also be noted that the OLAF instructions envisage the possibility of extending the scope of an investigation. Accordingly, Article 12.3 of those instructions provides that, where the investigation unit envisages conducting an investigative activity outside the existing scope of the investigation or coordination case, it is to submit a request for a decision to extend the scope to the Investigation Selection and Review Unit. The latter is to review the lawfulness of and need for the proposed extension of the scope and submit an opinion to the Director-General of OLAF, on the basis of which the latter is to take a decision.

88 In that regard, it should be noted that, since Regulation No 1073/1999 does not preclude the possibility of extending the scope of an investigation, the applicant's argument that the OLAF instructions cannot add a rule to that regulation must be rejected.

89 It results from the foregoing that, contrary to what is claimed by the applicant, extensions to the scope of an investigation are not, in themselves, unlawful.

90 Concerning, secondly, the extensions of the scope of the investigation at issue in the present case, it is to be noted that there is nothing allowing it to be established, as the applicant suggests, that they were decided improperly.

91 Therefore, as regards the first extension, it was decided by the Director-General of OLAF on 22 June 2012 in response to a request by the special investigation team of 19 June 2012 and after an opinion of the Investigation Selection and Review Unit of OLAF of 22 June 2012. That extension was intended to extend the scope of the investigation to cover aspects external to it. It should be noted that the applicant does not adduce any evidence allowing it to be considered that the extension decision does not respect the procedure established by the OLAF instructions concerning the extension of the scope of an investigation. In that context, it is necessary to reject the argument, invoked during the hearing, that the Investigation Selection and Review Unit of OLAF did not conduct a review of the request at issue. That unit delivered a positive opinion in that regard and nothing allows it to be considered that it did not adequately examine the request of the special investigation team. It is also necessary to reject, for the reasons set out in paragraph 62 above, the applicant's argument that that decision fails to mention any fraud or irregularity concerning the financial interests of the Union. As regards the fact that the request for an extension of the scope of the

investigation referred to the fact that the investigation had been opened in relation to serious matters concerning the discharge of professional duties although that investigation had been opened due to a possible dereliction of obligations on the part of a Member of the Commission, it does not affect the lawfulness of the decision to extend the scope of the investigation. Moreover, despite that fact, the extension request submitted by the special investigation team sets out precisely and unambiguously the grounds justifying that request.

92 As regards the second extension, it was decided by the Director-General of OLAF in response to a request by the special investigation team to implement it, to undertake on-the-spot inspections and to interview a person concerned, and after an opinion of the Investigation Selection and Review Unit of OLAF of 27 June 2012. In so far as it relates to the extension, that request refers, in essence, to possible fraud in connection with the European Union budget in relation to an undertaking wishing to obtain EU funds. In that regard, it is necessary at the outset to reject the applicant's allegation that the suspicions of misappropriation of funds were invented in bad faith by OLAF, since it is not based on any evidence, and the applicant is relying on a mere statement. In any event, the request for authorisation of that second extension refers to specific evidence, including a telephone conversation of 29 March 2012 during which the issue of an undertaking of Mr Z which he uses in order to obtain additional EU funds was raised, which allows the existence of those suspicions to be demonstrated. As regards the argument that the extension decision was taken on the same day as the request for authorisation and required an in-depth analysis, it should be noted that there is nothing to suggest that such an analysis did not take place. It should also be noted that the Investigation Selection and Review Unit, in its opinion, expressed a doubt concerning the need to extend the scope of the investigation, given that it already covered Articles 3 and 4 of Regulation No 1073/1999. It nevertheless considered that that extension was acceptable so as to better protect the fundamental rights of Mr Z. That demonstrates that that unit carried out an in-depth examination of the request. As regards the allegation that the third party identified in that request was interviewed in relation to allegations made in the framework of the internal investigation, it has no impact on the lawfulness of the extension decision. The same applies to the applicant's allegations relating to the involvement of the Anti-Fraud Coordination Services ('the AFCOS').

93 It follows that it has not been demonstrated that the extensions to the scope of the investigation are unlawful.

94 The second complaint must therefore be rejected.

– *Third complaint: breach of the principles governing the gathering of evidence and distortion and falsification of the evidence*

95 The applicant takes issue with OLAF for having breached the principles governing the gathering of evidence and for having distorted or falsified the evidence. In that context, he criticises, first of all, the Director-General of OLAF for having assigned the case to a special investigation team without involving a director; for having decided that the special investigation team would act under his direct supervision; and for having participated directly in investigative tasks, including the interviews of the applicant and of other persons concerned. In response to the Commission's assertion that he had not lodged a complaint alleging a procedural irregularity, the applicant states that he lodged a complaint against OLAF before a Belgian court in 2014. Next, the applicant claims that OLAF advised the complainant's staff to maintain a false statement on which the complaint was based. He maintains, moreover, that an email and a transcript of a telephone call were truncated. He complains, furthermore, of OLAF's attitude to a witness, Mrs K. The investigation also breached his right to respect for his private life and the confidentiality of communications. He also criticises the fact that Mrs S., a member of the OLAF Supervisory Committee ('the Supervisory Committee'), attended certain interviews. Last, he claims that the Commission does not explain why that Committee referred, in Opinion 2/2012, to different breaches of the principles governing the gathering of evidence, in particular the principles of impartiality and respect for private life and communications.

96 The Commission denies that there was any breach by OLAF of the principles to which the applicant refers.

97 In that regard, it should, first of all, be noted that the applicant considers that the OLAF investigations must be conducted in compliance with the principles of legality, proportionality, impartiality, objectivity and fairness, in compliance with the presumption of innocence, subsidiarity and confidentiality, which are included in recitals 10 and 21 of Regulation No 1073/1999, in Articles 41 and 48 of the Charter of Fundamental Rights of the European Union and in the introduction to the OLAF instructions. According to the applicant, those procedural rules constitute rules of law conferring rights on individuals.

98 It must however be pointed out that, in so claiming, the applicant merely sets out, in general, principles which confer rights on individuals and which were breached in the present case, without however precisely indicating which of them was breached in this case.

99 It can however be deduced from a comprehensive analysis of the application, in particular of the six claims put forward in support of the present complaint, that the applicant invokes, in essence, an infringement of the obligation of impartiality, the existence of conflicts of interest, falsification or distortion of evidence and a breach of the right to respect for private life and the confidentiality of communications.

100 In that regard, it must be pointed out that the right to respect for private life and the confidentiality of communications confers rights on individuals (see judgment of 24 September 2008, *M* v *Ombudsman*, T-412/05, not published, EU:T:2008:397, paragraph 125 and the case-law cited). Moreover, the requirement of impartiality, to which the institutions are subject in carrying out investigative tasks of the kind which are entrusted to OLAF, is intended, as well as ensuring that the public interest is respected, to protect the persons concerned and confers on them a right as individuals to see that the corresponding guarantees are complied with (judgment of 6 April 2006, *Camós Grau* v *Commission*, T-309/03, EU:T:2006:110, paragraph 102). Finally, the rules on the administration of evidence, in particular the principle of loyalty, seek to guarantee the rights of persons concerned to have their affairs handled impartially and fairly, which is guaranteed by Article 41 of the Charter of Fundamental Rights.

101 As regards, in the first place, the alleged breach of the obligation of impartiality and the existence of a conflict of interests, the applicant puts forward, in essence, two allegations.

102 Firstly, the applicant criticises the Director-General of OLAF for having assigned the case to a special investigation team without the involvement of a director, for having decided that the special investigation team would act under his direct supervision and for having participated directly in investigative tasks, including the interviews of the applicant and of other persons concerned, so that he breached his duty of impartiality and was in a situation of a conflict of interests.

103 In that regard, it should be noted that, in the present case, the Director-General of OLAF assigned the investigation to a special investigation team, acting under his direct supervision. It should be pointed out, firstly, that Article 6.3 of the OLAF instructions expressly provides that the Director-General of OLAF may, in exceptional circumstances, assign a case to an investigation unit other than the responsible one or to a special investigation team established for that purpose. In that regard, concerning the applicant's reference to the fact that the Director of Directorate A of OLAF was not involved, it should be noted that the OLAF instructions do not provide that, in order to assign a case to a special investigation team, the Director-General of OLAF must involve that director. It should be noted, secondly, that, in accordance with Article 6(1) of Regulation No 1073/1999, it is incumbent on the Director-General of OLAF to direct the conduct of investigations. He thus cannot be prevented, where the circumstances so require, from supervising himself a special investigation team or to participate in investigation activities. The direction of an investigation may involve both his supervision and the direct participation thereof. It must in addition be noted that no provisions of Regulation No 1073/1999 or of the OLAF instructions prohibit such a possibility. Contrary to what is claimed by the applicant, that does not undermine the impartiality of the investigation, nor is it a source of a conflict of interests. Likewise, the applicant's right of recourse in order

to protest against deficiencies in the investigation is in no way called into question, as the applicant alleges in essence, by the fact that the Director-General of OLAF supervised the special investigation team. The Commission asserts moreover, without being validly contradicted by the applicant, that at no time during the investigation did the latter submit a complaint concerning the participation of the Director-General of OLAF in the investigation. In that context, it should also be pointed out that, although the Director-General of OLAF was present during two interviews of the applicant, it is not apparent from the minutes of those interviews that the applicant criticised the participation of that director-general in the investigation. The applicant's reference to the fact that, on 5 February 2014, he submitted a complaint, with the tribunal de première instance de Bruxelles (Court of First Instance of Brussels, Belgium), against OLAF for defamation and violation of professional secrecy is not relevant. Apart from the fact that that complaint was not added to the case file by the applicant, it was only submitted 2 years after the investigation and it does not follow from the applicant's argument that it refers specifically to the participation of the Director-General of OLAF in the investigation, nor, more generally, to a violation of the obligation of impartiality and to the existence of a conflict of interests.

104 Secondly, the applicant claims that the AFCOS representatives, and in particular its director, Mrs S, who was also a member of the Supervisory Committee, participated in certain interviews conducted by OLAF. He refers to the interview of Mr Z, on 4 and 5 July 2012. That demonstrates a confusion and a conflict of interests between the role of OLAF and that of the national authorities.

105 In that regard, it suffices to point out that, as the applicant states, the presence of AFCOS representatives was accepted by Mr Z for the purposes of interpretation and translation. It is also apparent from the case file that those representatives informed Mr Z, in Maltese, of his rights in the context of the applicable Maltese law. Furthermore, there is no provision precluding the presence of AFCOS representatives during the interview of a person concerned carried out by OLAF in Malta. In any event, there is nothing to indicate that those representatives intervened in the context of the interview. In particular, although the presence, amongst those representatives, of a person who is, in addition, a member of the Supervisory Committee is admittedly regrettable in view of the role conferred on that committee by Article 11(1) of Regulation No 1073/1999, there is no evidence proving that that person interfered in any way in the conduct of that interview or, in general, in the investigation. As regards the fact that Mrs S received the OLAF report, it is not relevant, since that communication took place as a result of her capacity as Head of AFCOS, in accordance with the working arrangements between OLAF and that service, and not as a member of the Supervisory Committee.

106 It follows that the arguments relating to the alleged breach of the obligation of impartiality and the existence of a conflict of interests must be rejected.

107 As regards, in the second place, the alleged falsification or distortion of evidence, the applicant puts forward, in essence, four allegations.

108 Firstly, as regards the claim relating to the alleged advice that OLAF sent to the complainant's staff, that they maintain to a false statement, one the one hand, it must be pointed out that that declaration concerns the circumstances of a meeting between Mrs K and Mr Z. In that regard, it should be noted that, although the complaint states that Mrs K met Mr Z and the applicant on 10 February 2012, the OLAF report does not maintain such a claim and is not based on an alleged meeting between Mrs K, Mr Z and the applicant on 10 February 2012. That report states that, on that date, the applicant met Mr Z and that, subsequently, Mr Z met Mrs K, who, during that meeting, telephoned Mr G, letting him know that she had been present at the meeting with the applicant. Moreover, as the applicant acknowledges, OLAF indicated to him, at his interview of 16 July 2012, that there was no proof of the existence of a meeting between him and Mrs K. Furthermore, it is apparent both from the OLAF report and from the annexes thereto that Mr G merely indicated to OLAF what Mrs K had declared to him concerning participants at that meeting, without himself attesting to the applicant's participation. On the other hand, it cannot be deduced from what was said by Mr G and another employee of the complainant during an interview with members of the Parliament that OLAF asked them to maintain their statements. It follows in essence from that interview that Mr G indicated that OLAF had advised him to be careful with respect to the way he provided

information, by trying not to disturb the ongoing investigation in Malta. Mr G in particular denied, in response to a question, that OLAF had requested him to 'keep his views'. The Commission states moreover in that regard, without being validly contradicted by the applicant, that, in the light of the confidentiality of the ongoing Maltese investigations, OLAF only advised the persons interviewed to provide their account of the facts without disclosing the facts it had established, which were covered by professional secrecy. That statement corresponds to the substance of the transcript of the meeting at issue. In the light of all those elements, the applicant's argument concerning the alleged request to maintain a false statement must therefore be rejected.

109 Secondly, as regards the claim that the OLAF report did not reproduce certain passages of an email that Mrs K had sent to the complainant on 6 January 2012 in which she stated that she had not represented the latter during her meeting with the applicant the same day, it must be noted that it cannot be a requirement of OLAF investigation reports that they reproduce in full the evidence on which they are based, since that evidence is to be included, where appropriate, only in an annex to those reports. In the present case, although, admittedly, the body of the OLAF report does not reproduce verbatim the email at issue, the fact remains that it is annexed to that report in full. That annex reproduces in particular the information that Mrs K indicated to the complainant that that meeting was confidential, that she did not represent the complainant in any event and that she was merely expressing the objective position of snus producers and users. She also reproduced the passages mentioning the applicant's attitude during that meeting. It follows that the applicant's argument must be rejected. As for the claim, included in the reply, that the fact that the applicant met Mrs K, in a capacity as lobbyist, led the Commission to terminate his office, it suffices, in order to reject it, to note that the applicant resigned on his own initiative, as was stated in the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270).

110 Thirdly, concerning the claim relating to the fact that the transcript of a telephone conversation of 29 March 2012 between Mr Z and Mrs D was truncated, it must be noted that there is a slight difference between the two transcripts of the same part of a conversation referred to by the applicant. The transcript relied upon by the applicant states 'tell them this is the price he is asking', whereas the transcript reproduced by OLAF states 'this is the price he's asking'. However, no falsification or distortion of evidence can be deduced from such a minor difference, since that difference has no impact on the findings made by OLAF. Moreover, as is indicated by the Commission, it can be implicitly deduced from the two versions that reference is made to a third party, in this case the applicant. The applicant's argument must therefore be rejected.

111 Fourthly, as regards the claim concerning the conditions in which the interview of Mrs K was conducted on 14 June 2012, it is to be noted that the applicant refers, in that regard, only to elements reported by Maltese press articles. There is however no direct evidence adduced allowing them to be substantiated or to verify the substance thereof. In any event, it is not apparent from the minutes of that interview that Mrs K contested the conditions in which that interview was conducted. Furthermore, although, during her second interview, which took place on 7 September 2012 and was continued on 15 September 2012, Mrs K made additional statements, changes and clarifications with respect to her first interview of 14 June 2012, she nevertheless did not call into question the conditions of the latter.

112 It follows that the arguments relating to the alleged falsification or distortion of evidence must be rejected.

113 As regards, in the third place, the alleged breach of the right to respect for private life and the confidentiality of communications, the applicant puts forward, in essence, two allegations, the first relating to requests for telephone logs addressed by OLAF to the Maltese authorities, and the second to the recording by OLAF of a telephone conversation of 3 July 2012 between Mr Z and Mrs D.

114 Before examining those claims, it should be noted that, in accordance with the wording of Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') and of Article 7 of the Charter of Fundamental Rights, everyone has the right to respect for his private and family life, his home and his correspondence. In that regard, it is to be noted that, according to the case-law of the European Court of Human Rights ('the ECtHR'), telephone

communications are covered by the notions of private life and correspondence, for the purposes of Article 8 of the ECHR (ECtHR, 4 December 2015, *Roman Zakharov v. Russia*, EC:ECHR:2015:1204JUD 004714306, paragraph 173).

115 Firstly, concerning the requests for telephone logs, it should be noted, first of all, that those requests were communicated by the Commission following a request by the Court in the context of a measure of organisation of procedure, since the applicant did not produce them in support of his action.

116 It is necessary, next, to examine the five allegations put forward, in essence, by the applicant concerning the requests for telephone logs.

117 First of all, it should be pointed out that, admittedly, as the applicant claims, the legal basis indicated in the requests for telephone logs, namely Article 4(2) of Regulation No 1073/1999, was not appropriate, since that provision did not cover information held by national authorities. However, the fact that those requests include a mistaken indication concerning their legal basis cannot, in itself, call into question their lawfulness, for which there is moreover no evidence allowing it to be considered that that lawfulness was contested by the Maltese authorities. It is in addition to be noted that, in his pleadings, the applicant does not expressly claim that there is no legal basis to allow OLAF to make such requests. In any event, those requests took place in the context of the duty of sincere cooperation expected of the Member States where OLAF exercises its powers of investigation. That duty, set out in particular in the first sentence of Article 6(6) of Regulation No 1073/1999, implies that the competent national authorities support actions brought by OLAF in the name of the Union (see, to that effect, judgment of 4 October 2006, *Tillack* v *Commission*, T−193/04, EU:T:2006:292, paragraph 73).

118 Next, it is necessary to reject the claim that those requests were not preceded by a legal check by the Investigation Selection and Review Unit. Firstly, the applicant does not invoke any specific provision requiring such a check in support of his claim. Secondly, Article 12.1 of the OLAF instructions, read in conjunction with Article 11 thereof, makes provision for the submission of a request to the Investigation Selection and Review Unit only where it is planned to interview persons concerned and witnesses, to make inspections of premises, to carry out on-the-spot inspections, to conduct digital forensic operations and to carry out investigative missions in third countries. It is by contrast not provided for by those instructions that a request for telephone logs, addressed to a national authority, such as that at issue in the present case, requires the consultation of that unit.

119 Moreover, concerning the applicant's claim that the use, collection and storage of the information obtained constitutes an unlawful interference by a public authority in the exercise of the right to private life and correspondence, it is not supported by any arguments, since the applicant relies on a mere statement, by reproducing the remarks of the Supervisory Committee. In particular, the applicant does not indicate why, assuming that interference is established, it could not be justified, on the basis of Article 52(1) of the Charter of Fundamental Rights, in the light, inter alia, of the tasks entrusted to OLAF. Furthermore, he does not state how OLAF could be held responsible for the collection at issue, which was carried out by the Maltese authorities. In that regard, it must be noted that the Maltese authorities responded to OLAF's request and that they did not state that Maltese law did not allow those records to be made or opposed them, in particular in light of respect for private life and the confidentiality of communications. In that context, it should be noted that although, under the first sentence of Article 6(6) of Regulation No 1073/1999, the competent national authorities are to provide the OLAF agents with the assistance necessary for carrying out their duties, that is subject to conformity with their national provisions.

120 In addition, as regards the applicant's claim that no verification was made in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1), it is to be noted that the provisions of that regulation are rules of law that are intended to confer rights on the persons concerned by the personal data held by the institutions and bodies of the European Union (judgment of 12 September 2007, *Nikolaou* v *Commission*, T−259/03, not published, EU:T:2007:254, paragraphs 210 and 232). However, in the present case, the

applicant has not adduced any evidence in support of his allegation concerning the lack of 'verification', in particular concerning the right of the person concerned to receive certain information. Assuming that, by that allegation, he is claiming that he was not informed about the forwarding of his personal data, as is provided for by Articles 11 and 12 of Regulation No 45/2001, it should be noted that the applicant received information concerning his personal data, in accordance with those articles, on several occasions, in this case when invited to the interview, during the interview itself and when the investigation was closed. As regards the information about other persons, it suffices to note that the applicant cannot rely on an alleged infringement of the obligation to provide information of a third party in support of the present action.

121 Finally, as regards the allegation concerning the selective analysis of the calls at issue made by OLAF, it suffices to note that the applicant is relying on pure assertion and does not adduce any evidence allowing it to be demonstrated that OLAF manifestly and gravely disregarded the limits on its broad appreciation, during the analysis of telephone logs, by focussing on the calls made by Mr Z to the applicant and to Mrs K. The argument according to which the telephone logs sent to other persons by Mr Z could have shown that the latter was interested in a Maltese lottery tender and in the national political upheavals must be rejected, since such logs do not allow the contents of the telephone calls at issue to be proved.

122 Secondly, concerning the recording of a telephone conversation of 3 July 2012 between Mr Z and Mrs D, it should be pointed out, first of all, that the complaint mentioned, in particular, a telephone conversation which took place on 29 March 2012 between the Secretary-General of ESTOC and Mr Z, during which the latter made a request for payment of a very large sum in return for a meeting with a high-ranking personality. Following the opening of the investigation, OLAF considered that it might be suitable to ask the Secretary-General of ESTOC to have a new telephone conversation with Mr Z, capable of providing additional evidence, which would enable the next stages of the investigation to be better planned and allow the facts concerning the reported attempted bribery to be confirmed or disproved and to define the scope of the attempted bribery. The Secretary-General of ESTOC confirmed her willingness to cooperate with OLAF to that effect. That second telephone conversation between Mr Z and the Secretary-General of ESTOC took place on 3 July 2012 and was recorded by OLAF.

123 In the present case, it must at the outset be noted that, according to the case-law of the ECtHR, a telephone interception such as that carried out on 3 July 2012 constitutes interference with the right to respect for private life and correspondence (see, to that effect, ECtHR, 7 June 2016, *Cevat Özel v. Turkey*, EC:ECHR:2016:0607JUD 001960206, paragraph 29). In accordance with Article 52(1) of the Charter of Fundamental Rights, such a limitation can be justified only if it is provided for by law, if it respects the essence of that right and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C−439/14 and C−488/14, EU:C:2016:688, paragraph 49).

124 Without its even being necessary to rule on the question whether the limitation at issue could be regarded as being provided for by law, it suffices to point out that, since the applicant was not one of the persons whose conversation was intercepted and recorded, his right to respect for private life and the confidentiality of communications was, in this case, not breached.

125 That conclusion is not called into question by the applicant's argument, according to which the conversation at issue concerned him and was an attempt to incriminate him. Firstly, the right to respect for private life and the confidentiality of communications protects everyone against the unlawful interception of a telephone conversation, the recording thereof and the possible further use thereof, and not against the fact of being concerned by that conversation. In addition, the fact that the conversation concerned him, assuming that is established, does not permit an infringement by OLAF of the right at issue to be established. For that reason, it is necessary to reject the argument put forward by the applicant during the interview according to which he invokes an 'indirect' infringement of that right. Secondly, there is nothing to permit the conclusion that that conversation sought specifically to call the applicant into question.

126 In the fourth place, the allegation that the Commission does not explain why the Supervisory Committee referred, in Opinion 2/2012, to different breaches of principles governing the gathering of evidence, in particular the principles of impartiality and respect for private life and communications, must be rejected. It is for the applicant to establish that the conditions giving rise to the EU's non-contractual liability are satisfied. It is, by contrast, not for the Commission to take a position on the allegations contained in Opinion 2/2012 concerning the procedure, which has no binding force. It is for the applicant to establish that those allegations are proved. It is also necessary, in that context, to reject the allegation that not all of the remarks and recommendations included in that opinion have been addressed, since it is not relevant for the purposes of establishing the alleged unlawfulness.

127 The third complaint must therefore be rejected.

– *Fourth complaint: breach of the rights of the defence, of Article 4 of Decision 1999/396 and of Article 18 of the OLAF Instructions*

128 The applicant invokes a breach of his rights of the defence, of Article 4 of Decision 1999/396 and of Article 18 of the OLAF instructions. In that regard, he claims, in essence, that allegations were made against him which are distinct from those of which he was informed by OLAF on 11 July 2012. In the applicant's submission, OLAF was not entitled to draw conclusions on the basis of allegations other than those in respect of which the applicant had been identified as a person concerned. The applicant claims, in addition, that he was not given the opportunity to present his comments on those allegations. In particular, he was not aware of the elements in a statement by Mr G. of 19 September 2012, reproduced in a note of the same date. He was also unable to rebut one of the three conclusions drawn by OLAF.

129 The Commission contests the applicant's arguments.

130 In that regard, it must be noted, firstly, that, under the first subparagraph of Article 4 of Decision 1999/396, where the possible implication of a Member, official or servant of the Commission emerges, the interested party is to 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 having been enabled to express his views on all the facts which concern him.

131 The second subparagraph of Article 4 of Decision 1999/396 provides however that, 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.

132 Secondly, Article 18.1 of the OLAF instructions provides that, prior to drawing conclusions referring by name to a person concerned, the investigation unit must inform him of facts concerning him and invite him to comment on those facts. Those comments may be provided within the framework of an interview or in writing.

133 However, Article 18.3 of the OLAF instructions provides that, where it is necessary to maintain the confidentiality of the investigation or of a national judicial procedure, the right of the person concerned to present his comments on the facts concerning him may be deferred. If the person concerned is a Member, an official or other servant of an institution, body, office or agency of the Union, the right to present his comments may be deferred in agreement with the Secretary-General or other equivalent authority.

134 It must therefore be concluded that Article 4 of Decision 1999/396 confers rights on individuals (see judgment of 8 July 2008, *Franchet and Byk* v *Commission*, T−48/05, EU:T:2008:257, paragraph 153 and the case-law cited). The same applies to Article 18 of the OLAF instructions. Those provisions provide the possibility for a Member of the Commission to be informed rapidly about a potential personal

involvement, to be informed of the facts concerning him and to present his comments before conclusions are drawn.

135 Admittedly, Article 4 of Decision 1999/396 confers a margin of appreciation on OLAF 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 (see judgment of 8 July 2008, *Franchet and Byk* v *Commission*, T−48/05, EU:T:2008:257, paragraph 154 and the case-law cited). The same also applies to Article 18 of the OLAF instructions, where it is necessary to maintain the confidentiality of the investigation or of a national judicial procedure.

136 However, as regards the right of the interested party to comment on all of the facts concerning him, OLAF has no margin of appreciation.

137 In the present case, the applicant criticises OLAF for having drawn consequences on the basis of allegations other than those in respect of which he had been identified as a person concerned and for not having had the opportunity to present comments on those allegations.

138 In that regard, it should be noted that, on 11 July 2012, the applicant was informed by OLAF that he was considered to be a person concerned in an investigation relating to attempts to involve the complainant and ESTOC through an intermediary in the payment of bribes with a view to obtaining a lifting of the ban on snus and to have met with interested parties, lobbyists and economic operators to discuss subjects related to the snus case, which could constitute an infraction of the rules relating to the impartiality of the Members of the Commission.

139 In that context, the applicant puts forward, in essence, six arguments.

140 Firstly, the applicant claims that OLAF ultimately had repeated unofficial contacts concerning him with interested parties, lobbyists and economic operators to discuss matters related to snus. It must be noted that that allegation included in the OLAF report concerns the part thereof dealing with the subject matter of the investigation relating to the applicant (paragraph 1.2 of the OLAF report). It does not however concern conclusions made by OLAF in relation to him (paragraph 5.1 of the OLAF report). In any event, that indication is completely in line with the parameters of the reason for the investigation which was stated to the applicant on 11 July 2012. The applicant's argument concerning that indication must be rejected.

141 Secondly, the applicant claims that facts advanced in relation to him were 'hidden' from him. He refers in particular to the contention, included in the OLAF report, that he had 'repeated unofficial contacts with interested parties, lobbyists and economic operators to discuss matters related to snus issue'. It is apparent from the case file that, during the interview of 16 July 2012, OLAF informed the applicant that there was evidence that Mr Z had offered to manufacturers of smokeless tobacco to pay considerable sums in order to meet him in secret and to subsequently obtain a lifting of the ban on snus. OLAF also questioned the applicant on the issue of whether he had discussed with Mr Z questions related to snus, informed him that a meeting he had on 6 January 2012 also concerned that question and asked him whether he had mentioned the possibility of lifting the ban on that product. The applicant's argument concerning the existence of facts which were hidden from him must therefore be rejected.

142 Thirdly, the applicant alleges that the contention in the OLAF report that he was aware of machinations of Mr Z and that he was using his name and position in order to gain financial advantages contradicts other findings made in the OLAF report. In that regard, it should at the outset be noted that that argument is not relevant in the context of the present complaint concerning, in essence, the rights of the defence, so that it must, for that reason, be rejected. In any case, it is unfounded. During his interview of 16 July 2012, OLAF informed the applicant that it had evidence in that regard, as has already been stated in paragraph 141 above. Moreover, that affirmation is in no way in contradiction, as the applicant claims, with the findings that there is no evidence of the applicant's direct participation whether as instigator or as mastermind of the operation consisting in requesting money in exchange for political services, according to which the applicant attempted to minimise the frequency and the contents of the contacts he had had with Mr Z and

according to which he did not take action to dissociate himself from the facts or to report the circumstances of which he was aware. There is no incompatibility between that affirmation and those findings.

143 Fourthly, the applicant claims that the OLAF report contains a note transcribing the contents of an interview with Mr G of 19 September 2012, which was not brought to his attention. In that regard, first of all, it must admittedly be pointed out that both that interview and that note are subsequent to the date of the applicant's last interview and that the latter did not submit his observations in that regard. However, it must be noted that Article 4 of Decision 1999/396 and Article 18 of the OLAF instructions grant the person concerned right to submit his observations only with respect to facts concerning him. Those provisions by contrast do not oblige OLAF to request a person concerned to take a position on each statement of evidence. It moreover does not follow from the case file that the applicant took a specific position on all the other statements of evidence collected by OLAF, which he does not contest in the present case. Next, it follows from the OLAF report that that note in the case file was evoked, in essence, only in order to present the interviews of witnesses which were conducted (footnote 8), in order to record a fact not concerning the applicant and confirming what the witness had already stated during a first interview (footnote 63) and in order to record the subjective understanding, by a witness, of offers made by Mr Z inter alia to the complainant (footnote 120). It therefore does not follow from that report that OLAF drew any conclusions relating to the applicant on the basis solely of that note. Finally, it is to be noted that, during the interview, although the applicant wrongly stated, as is apparent from the above, that the note at issue was not expressly mentioned in the body of the OLAF report, he also claimed that it was included in the list of annexes. However, contrary to what he alleges, it cannot be inferred from the mere fact that the note at issue is cited in the list of annexes to the OLAF report that it was used as evidence of allegations made against him. That is moreover not substantiated by the body of the OLAF report. The applicant's argument concerning the note at issue must therefore be rejected.

144 Fifthly, in the reply, the applicant claims that, as was found by the Supervisory Committee, he was unable to rebut one of OLAF's findings, by denying or explaining the facts. In that regard, it must be noted at the outset that, as was confirmed during the interview by the applicant, the conclusion at issue is that according to which the applicant did not report to the Commission or to the Directorate-General (DG) for Health and Consumer Protection concerning his unofficial meetings relating to snus with the interested parties. Next, it should be noted that, although Article 4 of Decision 1999/396 confers on the person concerned the right to express his views on all the facts concerning him, there is no provision which gives the right to express his views on the conclusions which can be drawn by OLAF, in the context of its final investigation report. Furthermore, the applicant does not indicate which facts supporting that conclusion he intended to deny or explain. In particular, he does not adduce any evidence to show that he made a report to the Commission or to the DG for Health and Consumer Protection about his meetings. Therefore, the applicant's argument concerning the conclusion at issue must be rejected, without it being necessary to rule on its admissibility.

145 Sixthly, as regards the fact, invoked by the applicant also in the reply, that the Supervisory Committee indicated, in Opinion 2/2012, that it was not certain that the applicant had been clearly informed by OLAF, it cannot suffice, in itself, to demonstrate a breach of the rights of the defence. It is apparent, in any event, from the case file that the applicant was able to express his opinion on the facts concerning him.

146 It follows from all of the foregoing that it has not been established that OLAF violated the applicant's rights of defence.

147 The fourth complaint must therefore be rejected.

– *Fifth complaint: infringement of Article 11(7) of Regulation No 1073/1999 and of Article 13(5) of the Supervisory Committee's Rules*

148 The applicant invokes an infringement of Article 11(7) of Regulation No 1073/1999 and of Article 13(5) of the Supervisory Committee's Rules. He claims, in essence, that the powers of the Supervisory Committee were breached in that, in particular, it did not have sufficient time to perform its task before information was transmitted to the Maltese judicial authorities.

149 The Commission contests any infringement of the provisions invoked by the applicant.

150 In that regard, it should be noted that, under the last sentence of Article 11(7) of Regulation No 1073/1999, the Director-General of OLAF is to inform the Supervisory Committee of cases requiring information to be forwarded to the judicial authorities of a Member State. As is apparent from the wording of that provision, that committee must be informed before the information is forwarded (judgment of 8 July 2008, *Franchet and Byk* v *Commission*, T−48/05, EU:T:2008:257, paragraph 164). That is moreover confirmed by Article 2(4) of the Supervisory Committee's Rules which provides that the information forwarded by OLAF to the national judicial authorities is to be 'previously notified' to it.

151 It must also be pointed out that, according to the first subparagraph of Article 13(5) of the Supervisory Committee's Rules, the cases in which it is necessary to forward information to the judicial authorities of a Member State are examined on the basis of the information provided by the Director-General of OLAF and in accordance with Regulation No 1073/1999. The second subparagraph of Article 13(5) of the Supervisory Committee's Rules provides in particular that, before the information is sent, the Supervisory Committee is to request access to the investigations in question in order to ascertain whether fundamental rights and procedural guarantees are being complied with. Once the Secretariat has obtained access to the documents within a time period guaranteeing compliance with this function, the rapporteurs appointed to examine the cases are to prepare their presentation at the Supervisory Committee's plenary session.

152 It must, finally, be noted that, as is apparent from Article 2(4) of its rules, with regard to the information sent by OLAF to the national judicial authorities and previously notified to the Supervisory Committee, the Committee is to examine compliance with fundamental rights and procedural guarantees during the investigation. Its task is therefore to protect the rights of persons who are the subject of OLAF investigations. Therefore, the requirement to consult that Committee before forwarding information to the national authorities, derived from the last sentence of Article 11(7) of Regulation No 1073/1999, is intended to confer rights on the persons concerned (judgment of 8 July 2008, *Franchet and Byk* v *Commission*, T−48/05, EU:T:2008:257, paragraph 168). It must be concluded that the same applies to the first subparagraph of Article 13(5) of the Supervisory Committee's Rules.

153 In that regard, it must be pointed out that although OLAF enjoys no margin of appreciation with respect to the requirement to inform the Supervisory Committee before transmitting information to the judicial authorities of a Member State, the last sentence of Article 11(7) of Regulation No 1073/1999 gives no indication of the deadline within which the documents which can be requested by the Supervisory Committee within that context must be communicated. However, according to the transitional working arrangement concluded, in September 2012, between OLAF and its Supervisory Committee, the documents to be forwarded to the Supervisory Committee must be communicated to it as a general rule 5 working days before the transmission to the national authorities. That deadline is however indicative and adaptable to the circumstances, as is apparent in particular from the use of the words 'as a general rule'. OLAF thus enjoys a margin of appreciation with respect to that deadline.

154 In the present case, it follows from the case file that on 16 October 2012, the Director-General of OLAF informed, by telephone, the Chair of the Supervisory Committee about the possibility for information to be transmitted to the Maltese judicial authorities in less than 5 days.

155 On 17 October 2012, OLAF informed the Supervisory Committee in writing, in accordance with the last sentence of Article 11(7) of Regulation No 1073/1999, that it intended to transmit its report to the Maltese authorities. It transmitted the first 11 anonymised pages of that report, as well as the opinion on that report and the recommendations of the Investigation Selection and Review Unit. That same day, the Chair of the Supervisory Committee requested from the Director-General of OLAF access to the case file given that the documents sent to that committee did not provide it with sufficient information in order to fulfil its remits.

156 On 18 October 2012, OLAF granted the Supervisory Committee access to the case file until the end of November 2012.

157 On 19 October 2012, at the end of the morning, the Supervisory Committee informed OLAF that its members considered that they had not been given a deadline allowing their function to be fulfilled. The same day, the OLAF report and its annexes were forwarded to the Maltese authorities. In that regard, it should be specified that, although the letter of transmission is dated 17 October 2012, it is confirmed by the report of the communication of the report to the Maltese authorities and by the corresponding receipts that that forwarding actually took place on 19 October 2012 at midday. Also on that day, at around 7 p.m., the Supervisory Committee was informed that the Director-General of OLAF had decided to grant access to the case file on the terms requested by the Chair of that committee on 17 October 2012.

158 On 22 October 2012, the Supervisory Committee accessed the case file.

159 It must therefore be concluded that OLAF informed the Supervisory Committee before the transmission of its report to the Maltese authorities. It thus complied with the obligation derived from the last sentence of Article 11(7) of Regulation No 1073/1999.

160 Admittedly, OLAF did not respect the indicative time period of 5 days, fixed by the transitional working arrangement concluded with the Supervisory Committee, between the communication of evidence to the Supervisory Committee and the forwarding to the national authorities. However, in light of the specific circumstances of the present case, including in particular the importance and sensitivity of the ongoing investigation and the fact that the applicant had resigned on 16 October 2012, it cannot be considered that OLAF clearly overstepped its margin of appreciation by forwarding its report to the Maltese authorities on 19 October 2012, although full access to the case file had been granted only the day before. In that context, it is also necessary to take into account the fact, invoked by the Commission and not validly contested by the applicant, that the Chair of the Supervisory Committee had been informed on 16 October 2012 of the need for a rapid transmission of the report to the Maltese authorities and that he had endorsed that need.

161 As regards the question whether the Supervisory Committee was able to adequately fulfil its functions, as it defined them in its rules of procedure, it must be noted that there is no provision requiring that those functions be necessarily fulfilled before information is forwarded to the judicial authorities of a Member State. The last sentence of Article 11(7) of Regulation No 1073/1999 imposes only an obligation to inform the Supervisory Committee. Although the case-law has interpreted that provision as requiring that that committee be informed before the information is forwarded (judgment of 8 July 2008, *Franchet and Byk* v *Commission*, T−48/05, EU:T:2008:257, paragraph 164), it does not follow either from that provision or from the case-law that that committee should have completed the fulfilment of its functions before the forwarding of information to the national authorities. Admittedly, Article 13(5) of the rules of procedure of the Supervisory Committee provides that, ‘before the information is sent, the Supervisory Committee shall request access to the investigations in question in order to ascertain whether fundamental rights and procedural guarantees are being complied with’ and that ‘once the Secretariat has obtained access to the documents within a time period guaranteeing compliance with this function, the rapporteurs appointed to examine the cases shall prepare their presentation at the Committee’s plenary session’. However, apart from the fact that the rules of procedure of the Supervisory Committee cannot impose on OLAF obligations which are not provided for, inter alia, by Regulation No 1073/1999, Article 13(5) of the rules of procedure of the Supervisory Committee does not mean that, for it to fulfil its functions, the Supervisory Committee’s investigation must be completed before the forwarding of information to the national authorities. Moreover, as the Commission pointed out without being validly contested by the applicant, the Supervisory Committee had requested access to the case file until 15 November 2012, a date that was considerably later than that which would have resulted in compliance with the period of 5 days provided for by the transitional working arrangement for the forwarding of information.

162 It must also be pointed out that, although the Supervisory Committee may, inter alia on its own initiative, provide opinions to the Director concerning OLAF’s activities, it is, as follows from the second subparagraph of Article 11(1) of Regulation No 1073/1999, without however interfering with the conduct of investigations in progress. Moreover, as the applicant acknowledged during the hearing, that committee could not, in any case, oppose that transmission.

163 Finally, and in any event, notwithstanding the circumstances of the case, the Supervisory Committee was able to adequately fulfil its functions. It adopted Opinion 2/2012, which was designed in particular to ensure compliance with procedural guarantees and fundamental rights in the context of the investigation at issue.

164 It follows from the foregoing that it has not been established that Article 11(7) Regulation No 1073/1999 and Article 13(5) of the Supervisory Committee's Rules had been infringed.

165 The fifth complaint must therefore be rejected.

– *Sixth complaint: breach of the principle of the presumption of innocence, infringement of Article 8 of Regulation No 1073/1999 and of Article 339 TFEU and breach of the right to the protection of personal data*

166 The applicant invokes a breach of the principle of the presumption of innocence, an infringement of Article 8 of Regulation No 1073/1999 and of Article 339 TFEU and a breach of the right to the protection of personal data. He claims in that regard that OLAF named him as guilty of criminal offences, which constitutes a breach of the principle of the presumption of innocence, of the duty of confidentiality and professional secrecy and of the protection of personal data. He relies on a number of factual elements in support of that complaint, including, in particular, the statements made by the Director-General of OLAF at a conference on 17 October 2012, the disclosure of the content of and the allegations contained in the OLAF report, the fact that the complainant had access to that report and that OLAF had informed the complainant that the press conference was to be held and had invited the latter to prepare for it, and that the OLAF report had been leaked, leading, in particular, to its being published in the press.

167 The Commission denies that the applicant's right to be presumed innocent was breached in the present case.

168 In that regard, it should be borne in mind that the principle of the presumption of innocence, which constitutes a fundamental right set out in Article 6(2) of the ECHR and in Article 48(1) of the Charter of Fundamental Rights, confers rights on individuals which are enforced by the Union judicature (see judgment of 8 July 2008, *Franchet and Byk* v *Commission*, T−48/05, EU:T:2008:257, paragraph 209 and the case-law cited).

169 That principle has its corollary in the obligation to maintain confidentiality placed on OLAF pursuant to Article 8(2) of Regulation No 1073/1999, and which 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 (judgment of 8 July 2008, *Franchet and Byk* v *Commission*, T−48/05, EU:T:2008:257, paragraphs 213 and 218).

170 The same applies to the obligation of confidentiality following from Article 339 TFEU, which is invoked by the applicant and which provides, in particular, that the officials and other servants of the Union are to be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

171 Moreover, as has been noted (see paragraph 120 above), the provisions relating to the protection of personal data, and in particular Regulation No 45/2001 which is invoked by the applicant, are rules of law which are intended to confer rights on the persons concerned by the personal data held by the institutions and bodies of the Union.

172 In the present case, the applicant claims that OLAF named him as guilty of criminal offences. In that regard, he puts forward four arguments.

173 As regards, in the first place, the argument relating to the press conference held by the Director-General of OLAF on 17 October 2012, it should be noted, first, that Article 6(2) of the ECHR is not restricted to a procedural guarantee in criminal matters, its scope is wider and requires that no representative of the State declare that a person is guilty of an offence before his guilt has been established by a court (ECtHR, 28 October 2004, *Y. B. and Others v. Turkey*, EC:ECHR:2004:1028JUD 004817399, paragraph 43). Secondly, 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 requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (ECtHR, *Allenet de Ribemont v. France*, 10 February 1995, EC:ECHR:1995:0210JUD 001517589, paragraph 38, and 28 October 2004, *Y. B. and Others v. Turkey*, EC:ECHR:2004:1028JUD 004817399, paragraph 47).

174 The applicant more particularly criticises the Director-General of OLAF for having selected and disclosed extracts from the OLAF report whilst maintaining its confidentiality in order to accentuate the impression of his guilt.

175 It must however be noted that the information which was given to the press by the Director-General of OLAF during the press conference at issue respects a fair balance between the applicant's interests, in particular his right to respect for the presumption of innocence, and those of OLAF, consisting in informing, as precisely as possible, the public of actions implemented in the context of possible failures or fraud. It should be noted, as is apparent from the transcript of the press conference at issue supplied by the applicant, that during that conference, the Director-General of OLAF drew attention, in particular, to elements of the findings of the OLAF report. In that regard, it is to be noted that certain of them were already included in a Commission press release of 16 October 2012. Moreover, the remarks of the Director-General of OLAF, made in response to questions posed by journalists, appear to be balanced and measured, and observe the necessary restraint.

176 The Director-General of OLAF in particular merely made a general reference to the conduct of the investigation and, on an essentially factual basis, the main findings of the OLAF report and refrained from revealing the majority of the details of that report, including the names of the persons involved. He also took care to note that OLAF did not publicly disclose the contents of its reports and that that was also so in the present case. Admittedly, the factual findings at issue concern the applicant, and more particularly his awareness of the conduct at issue and his failure to respond in that regard. However, it cannot be considered that those findings are referred to in order to reflect guilt on the part of the applicant or to encourage the public to believe in his guilt. It must moreover be noted that it is emphasised that there is no conclusive evidence of his direct participation in the facts at issue. The Director-General of OLAF in addition refrained from stating that the applicant is guilty of criminal offences and did not prejudge the assessment of the facts by the Maltese judicial authorities. Finally, he refused to comment on the applicant's statements.

177 It is also to be noted that, on 16 October 2012, the applicant published a press release in which he referred himself to the findings of the OLAF report. He stated in particular, as the Commission had done in the press release announcing his resignation, that that report indicated that there was no evidence of his direct participation and that the decision-making process of the Commission had not been influenced, but that OLAF considered, on the basis of circumstantial evidence, that he was aware of the facts at issue. In his press release, the applicant denied having knowledge thereof. It must therefore be stated that, before the press conference of the Director-General of OLAF, the applicant had himself set out, in order to contest them, the findings of the OLAF report and had, therefore, associated his name with the case at issue.

178 In those circumstances, it cannot be considered that, during that press conference, OLAF infringed the principle of the presumption of innocence, as the applicant claims. The same applies to the obligation of confidentiality, of professional secrecy and the protection of personal data, in respect of which the applicant fails to develop any independent arguments.

179 As regards, in the second place, the argument relating to the OLAF press release of 19 October 2012, it follows, first of all, from that press release that it was published in order to clarify comments made in the media. It notes in addition, essentially factually, the main findings of the OLAF report. That press release refers moreover to the mention in the press of certain evidence and, while regretting that that partial evidence was supplied to the press by interested parties, it refuses to make any comments in that regard. It also states that the rights of the persons concerned were respected, emphasising in particular that the applicant was interviewed twice during the investigation. It notes, finally, that the principle of the presumption of innocence and the rights of the defence of the person concerned were respected throughout the whole process of investigation.

180 In the light of the contents of that press release, it must be concluded that OLAF legitimately informed the public with all the necessary discretion and reserve, while striking a proper balance between the applicants' interests and its own. It does not exceed the limits imposed on OLAF in the context of legitimately informing the public.

181 As regards, in the third place, the argument that an employee of the complainant stated that the latter had access to the OLAF report and that, on 14 October 2012, OLAF had telephoned the complainant to inform him about the press conference of 17 October 2012 and to advise him to prepare for it, it follows in essence from the statements made by the employee at issue before the members of the Parliament that OLAF contacted the complainant before the press conference, on 16 October 2012. OLAF requested the complainant to be 'prepared', given that he was going to be 'mentioned'. However, according to those statements, the complainant 'did not know anything before the press conference'. It must however be noted that the applicant's arguments are based on a mistaken interpretation of the statements of the employee at issue. In addition, there is nothing to indicate a disclosure of confidential information and documents, or an infringement of Regulation No 1073/1999, as the applicant claims. As regards the allegation that OLAF's main concern was the opinion that the tobacco industry has of the Commission, it is based on a mistaken reading of a letter sent by OLAF to the President of the Commission on 15 October 2012 and in no way allows it to be demonstrated that the complainant had access to the OLAF report before the press conference of 17 October 2012. Finally, concerning the fact that OLAF contacted the complainant before the termination of the applicant's office, it cannot be deduced therefrom, as the applicant claims in the reply, that it supports the argument that that termination was planned. Apart from the fact that no evidence allows it to be demonstrated that, at that meeting, that question was raised, it must be noted that the applicant resigned on his own initiative, as was found by the Court in the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270). For that reason, it is necessary to reject also the applicant's argument, raised in the reply, referring to a meeting between OLAF and the Secretary-General of the Commission on 5 October 2012 and from which he deduces in essence that the termination of his office was orchestrated.

182 As regards, in the fourth place, the argument that the Maltese press published the OLAF report, it is, first of all, to be noted that that disclosure took place on 28 April 2013, that is more than 6 months after that report was sent by OLAF to the Maltese judicial authorities and to AFCOS. It follows, moreover, from the information provided by the Commission that a court also ordered the forwarding of that report by the Maltese judicial authorities to Mr Z's lawyers. Therefore, on the date of the disclosure, numerous persons were able to have access to that report. It is, moreover, to be noted that, as the Commission points out, the version of the OLAF report which was disclosed is that which was sent to the Maltese judicial authorities, which included the letter of transmission to the Attorney General of Malta. Furthermore, there is no basis for considering that OLAF is responsible for the leak at issue or that it was negligent in that regard. In those circumstances, it must be considered that the responsibility for the disclosure at issue cannot, in the absence of evidence to that effect, be imputed to OLAF. Finally, concerning the allegation that the Maltese press reported that the police had found an original copy of the OLAF report at the home of a former member of the Supervisory Committee, it is to be noted that, as was stated in paragraph 105 above, that person received that copy as a result of her functions as a director of AFCOS, in accordance with the working arrangements between OLAF and that service. That is clearly stated by the forwarding report.

183 It follows from the foregoing that it has not been established that OLAF had infringed the principle of the presumption of innocence, Article 8 of Regulation No 1073/1999, Article 339 TFEU or the right to protection of personal data.

184 The sixth complaint must be rejected.

– *Seventh complaint: infringement of Article 4 of Regulation No 1073/1999, of Article 4 of Decision 1999/396 and of the Memorandum of Understanding*

185 The applicant invokes an infringement of Article 4 of Regulation No 1073/1999, of Article 4 of Decision 1999/396 and of the Memorandum of Understanding. In that regard, he claims, first of all, that when informing the Secretary-General of the Commission, on 25 May 2012, of his decision not to inform the applicant and asking her not to inform the President of the Commission, the Director-General of OLAF cited the second subparagraph of Article 4(5) of Regulation No 1073/1999, whereas he ought to have cited Article 4 of Decision 1999/396. Next, OLAF breached the Memorandum of Understanding by not informing the President of the Commission although the case concerned a Member of that institution. Finally, the information provided by the Director-General of OLAF on 25 May 2012 is incorrect, in breach of Article 4(5) of Regulation No 1073/1999 and of the Memorandum of Understanding. OLAF therefore breached those provisions, which confer rights on the applicant, and in particular the right for the President of the Commission to check that when opening an investigation on the basis of allegations and facts correctly shared OLAF will not compromise the activities of the Member of the Commission concerned.

186 The Commission considers that the provisions breach of which is alleged in the present complaint do not confer rights on individuals and in any event contests that they have been breached.

187 In that regard, in the first place, concerning the infringement of Article 4 of Regulation No 1073/1999 and of Article 4 of Decision 1999/396, it should be noted, at the outset, that although the latter article confers rights on individuals (see paragraph 134 above), that is not the case of Article 4 of Regulation No 1073/1999 (see judgment of 8 July 2008, *Franchet and Byk* v *Commission*, T−48/05, EU:T:2008:257, paragraphs 161 and 162).

188 Next, and in any event, it is to be noted, first, that, according to the first subparagraph of Article 4(5) of Regulation No 1073/1999, 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 is to be informed. The second subparagraph of Article 4(5) of Regulation No 1073/1999 provides however that, 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. Secondly, the first sentence of the first subparagraph of Article 4 of Decision 1999/396 provides that, where the possible implication of a Member, official or servant of the Commission emerges, the interested party is to be informed rapidly as long as this would not be harmful to the investigation. Nevertheless, according to the second subparagraph of Article 4 of Decision 1999/396, 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.

189 It must therefore be concluded that Article 4(5) of Regulation No 1073/1999 permits OLAF to defer the provision of information to the institution where investigations have revealed that one of its Members may be personally involved, whereas Article 4 of Decision 1999/396 confers on OLAF the right not to rapidly inform a Member who may be so involved, so as not to harm the investigation.

190 The note sent on 25 May 2012 by the Director-General of OLAF to the Secretary-General of the Commission requests that the applicant not be informed and mentions, as the basis for that request, the second subparagraph of Article 4(5) of Regulation No 1073/1999.

191 Although that error is regrettable, it is however not relevant in the present case. The applicant moreover does not indicate the consequence which should be drawn from that error. It cannot therefore be considered that Article 4 of Decision 1999/396 or the second subparagraph of Article 4(5) of Regulation No 1073/1999 have been infringed.

192 In the second place, as regards the breach of the Memorandum of Understanding, it must, at the outset, be noted that that memorandum was not concluded, since OLAF did not sign it. Nevertheless, it must be considered, in the light of the evidence provided by the Commission in response to the written questions put by the Court, that it constituted the 'practical reference' whereby the timely exchange of information between OLAF and the Commission concerning internal investigations was ensured. Next, it follows from that memorandum that OLAF must inform the President of the Commission in writing about any case involving a Member of the Commission or an inspection of his premises. It must be stated that those provisions, regardless of the legal scope of the Memorandum of Understanding, do not confer rights on individuals, since they are designed to regulate relations between OLAF and the Commission in the context of internal investigations. In any event, in his note of 25 May 2012, the Director-General of OLAF did not request the Secretary-General of the Commission not to inform the President of the Commission about the opening of the investigation, as is claimed by the applicant. He stated that the prohibition on informing the applicant about that opening applied to the President of the Commission, to the other Members of the Commission and to officials. The applicant therefore clearly mistakes the scope of the note of 25 May 2012. The applicant's arguments relating to the Memorandum of Understanding must therefore be rejected.

193 In the third place, it should be noted that the argument alleging that the note of 25 May 2012 evokes corruption or improper behaviour on the part of a Member of the college although the decision to open the investigation mentions a possible failure to discharge obligations on the part of a Member of the Commission must be rejected. The complaints mentioned in that note are covered by the offences invoked in the decision to open the investigation. In addition, the opinion of the Investigation Selection and Review Unit refers to a suspicion of corruption. Furthermore, the fact that there is no allegation of any kind of activity affecting the financial interests of the Union is not relevant, as is apparent from paragraph 62 above. Finally, although the Memorandum of Understanding confirms that the information to be provided by OLAF includes a 'a summary of the facts giving rise to the suspicion that the person under investigation may be personally involved', it suffices to note, apart from the fact that it is doubtful that the provision at issue of the Memorandum of Understanding confers rights on individuals, that the facts at issue were indicated by the Commission itself to OLAF, so that it appears superfluous that the latter provide it with such a summary. Moreover, the decision to open the investigation refers to information received and the note of 25 May 2012 sent by the Director-General of OLAF to the Secretary-General of the Commission cites that decision as being the source of information.

194 It follows that no evidence allows it to be concluded that OLAF infringed Article 4 of Regulation No 1073/1999, Article 4 of Decision 1999/396 or the Memorandum of Understanding.

195 For those reasons, it is necessary to reject the breach of the right to sound administration invoked by the applicant in the reply, in the context of the present complaint.

196 The seventh complaint must therefore be rejected.

*The unlawfulness of the Commission's behaviour*

197 As regards the Commission's behaviour, the applicant puts forward, in essence, two complaints.

– *First complaint: breach of the principle of sound administration, of the duty to behave in a loyal, impartial and objective manner and to respect the principle of independence*

198 The applicant invokes a breach of the principle of sound administration and of the duty to behave in a loyal, impartial and objective manner and to respect the principle of independence. In that regard, he

claims in particular, in essence, that the elements communicated by the complainant were allegedly received only 1 week after they were sent and that it is apparent from the OLAF report that, according to a witness, a former Member of the Commission's staff, who was then a consultant to the complainant, discussed with the Secretary-General of that institution evidence gathered by the complainant before it submitted its report and its allegations to the Commission. That, in the applicant's contention, constitutes evidence of the breach of the principle of sound administration, a serious conflict of interests, a breach of the independence of the Commission's staff and unethical behaviour, and also evidence that the tobacco lobby developed a strategy vis-à-vis the Commission in order to frustrate the decision-making process of the Tobacco Directive, which was spearheaded by the applicant. He also invokes Articles 11 and 11a of the Staff Regulations of Officials of the European Union.

199 The Commission disputes the applicants' arguments.

200 In that regard, it must be noted that the principle of sound administration, where it constitutes the expression of a specific right such as the right to have one's affairs handled impartially, fairly and within a reasonable time, as provided for in Article 41 of the Charter of Fundamental Rights, must be regarded as a rule of EU law whose purpose is to confer rights on individuals (see, to that effect, with regard to the duty to act with all necessary diligence, which is inherent in the principle of sound administration and obliges the relevant institution to examine carefully and impartially all the relevant facts of the case, judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C−47/07 P, EU:C:2008:726, paragraph 91 and the case-law cited; see also, to that effect, judgments of 4 October 2006, *Tillack* v *Commission*, T−193/04, EU:T:2006:292, paragraph 127, and of 13 November 2008, *SPM* v *Council and Commission*, T−128/05, not published, EU:T:2008:494, paragraph 127). That is so in the present case, since the applicant invokes the principle of sound administration in combination with the right to have the administration behave in an objective, impartial and loyal manner and in the respect of the principle of independence. Contrary to what is contended by the Commission, the same applies to Articles 11 and 11a of the Staff Regulations of Officials of the European Union, since they set out, in essence, obligations seeking to ensure that officials of the Union act independently and to avoid situations of conflicts of interest.

201 In the present case, the applicant puts forward two allegations in support of his complaint.

202 Firstly, the applicant refers, in essence, to the fact that the Secretary-General of the Commission received the complaint dated 14 May 2012 on 21 May. It must at the outset be noted that that fact is, in itself, not capable of leading to the finding of an infringement of the principle of sound administration by the Commission to the detriment of the applicant. The applicant, moreover, does not, in that context, present either evidence or arguments to show unlawful conduct on the part of the Commission. He thus merely poses the question whether it is plausible that the complaint 'was lost in transit for a week' or whether it is not more plausible to consider that it was being assessed 'to develop a strategy of action' before being officially registered. In any event, there is nothing in the case file to support a finding that the Secretary-General of the Commission received the complaint before 21 May 2012. It is apparent moreover from several elements in the case file that, in the context of exchanges between the Commission and the complainant, the Commission refers to the letter of 14 May 2012 by specifying that it was received on 21 May 2012. In any event, a time for delivery of the complaint, including with delivery by hand, of 1 week does not appear to be unreasonable. As regards the allegation, put forward in the reply, that a time for delivery of the complaint to OLAF of 3 or 4 days cannot be considered to be an immediate transmission as the Commission contends in the statement of defence, it suffices to note that such a period does not in itself appear to be unreasonable and that nothing can be inferred therefrom concerning an alleged infringement of the principle of sound administration.

203 Secondly, the applicant points out that a former Director-General of the Commission's Legal Service, who is now a consultant for the complainant and a lobbyist for the tobacco industry, and the Secretary-General of the Commission discussed evidence collected by the complainant before the latter sent the complaint to the Commission. It is apparent solely from the interview, carried out by OLAF, of an advisor to the complainant that the former Director-General of the Commission's Legal Service contacted the Secretary-

General of the Commission at the request of the complainant, and that the complainant subsequently submitted the complaint. There is nothing in the case file to support a finding that there was an exchange, whether direct or indirect, relating to the substance of the evidence communicated by the complainant, between the latter and the Commission, before the forwarding of the complaint. The applicant is therefore wrong to claim that it concerns serious evidence of the infringement of the principle of sound administration, a serious conflict of interest, a breach of the independence of the Commission's staff and unethical conduct as well as unambiguous circumstantial evidence that the tobacco lobby developed a strategy with a view to frustrating the decision making process linked to the Tobacco Products Directive.

204 It follows from the foregoing that there is no evidence allowing it to be established that there is an infringement of the principle of sound administration, of the duty to behave in an objective, impartial and loyal manner and in compliance with the principle of independence or of Articles 11 and 11a of the Staff Regulations of Officials of the European Union.

205 The first complaint must be rejected.

– *Second complaint: breach of OLAF's independence*

206 The applicant invokes a breach, by the Commission, of OLAF's independence. In that regard, he refers, in particular, to the fact that the President of the Commission asked the Director-General of OLAF to deal with the case as a matter of priority and then enquired about the state of the investigation, to the fact that the legislative process of the draft Tobacco Directive was subordinated to the chronology of the OLAF investigation and to the fact that the Director-General of OLAF stated on several occasions that he was under pressure.

207 The Commission contests the applicant's arguments.

208 In that regard, it should be noted that, according to Article 3 of Decision 1999/352, OLAF is to exercise its powers of investigation in complete independence. In exercising these powers, the Director of OLAF is to neither seek nor take instructions from the Commission, any government or any other institution or body.

209 In so far as it guarantees the impartiality, the fairness and objectivity of its investigations, it must be concluded that OLAF's independence provided for by Article 3 of Decision 1999/352 confers rights on individuals.

210 In the present case, the applicant puts forward several elements seeking to show that the Commission undermined OLAF's independence.

211 Concerning, firstly, the application to have the case given priority, it should be noted that, according to the note of 25 May 2012 sent to the Director-General of OLAF by the Secretary-General of the Commission, the president of that institution asked the latter to request that the case be given priority by OLAF. Such a request cannot be regarded as an instruction for the purposes of Article 3 of Decision 1999/352, since the request to give the case priority does not relate to its substance, in so far as it is not an order seeking the opening of the investigation and prescribing the meaning to be given to the results of that investigation.

212 As regards, secondly, the fact that the President of the Commission asked the Director-General of OLAF about the stage which had been reached by the investigation, it should be noted that such a question cannot be considered to be an instruction for the purposes of Article 3 of Decision 1999/352, or even to be pressure on OLAF. That could however be the case if such a question had been posed repeatedly and insistently, which is neither demonstrated nor even alleged in the present case. In that context, it should be pointed out that the fact that, approximately 10 days before the closure of the investigation, the Director-General of OLAF informed the Commission that his report was on the point of being sent to it is not relevant in that regard, since the provision of such information to the Commission by OLAF appears to be neither unlawful nor to call into question OLAF's independence. Likewise, the arguments put forward by the applicant, in particular in the reply, concerning the exchanges between the President of the Commission

and the Prime Minister of the Republic of Malta are based on pure conjecture, which is in no way substantiated.

213 As regards, thirdly, the argument relating to the legislative process of the draft Tobacco Directive, it suffices to note that the evidence put forward by the applicant is not capable of establishing any undermining of OLAF's independence. It follows in any event from the evidence provided by the Commission that the first report in the implementation of the inter-service consultation concerning the draft directive is connected with remaining problems, in particular concerning the legal basis of the draft directive, and that the second report was connected in particular with the holding of a European Council. By contrast, there is nothing to indicate that there is any connection with the investigation.

214 Concerning, fourthly, the fact that the Director-General of OLAF confirmed on several occasions that he was under pressure, the applicant submits, in that regard, that that director-general stated, in order to justify the failure to comply with the time granted to the Supervisory Committee to carry out its review, that that time was shorter given the pressures to which he was subject everywhere. It must be noted that such a vague and generic declaration is not capable of demonstrating specific pressure exerted by the Commission over OLAF, or, a fortiori, a wish on the part of the Commission to undermine OLAF's independence, for example, by influencing the findings of the investigation.

215 It follows that no evidence adduced by the applicant allows it to be demonstrated that the Commission undermined OLAF's independence.

216 The second complaint must therefore be rejected.

*Conclusion on the unlawfulness of the conduct complained of*

217 It follows from all of the foregoing that the applicant has not shown the existence of unlawful conduct on the part of OLAF or of the Commission.

218 The Court considers nevertheless that it is appropriate to examine, for the sake of completeness, the existence of the damage alleged and of the causal link.

***The alleged damage and the causal link***

219 The applicant claims that he sustained damage, notably non-material damage, principally as a result of the unlawful behaviour of the Commission, including OLAF, connected with the termination of his office on 16 October 2012. In the applicant's submission, the existence of the non-material damage is the result of the errors on the part of the Commission and OLAF. That damage was caused by the attack on his reputation and professional integrity in the Commission, in the EU institutions, in his private circles, in Malta, in the European Union and also outside the European Union, the vilification of which he was a victim, the psychological aggravation and stress to which he and his family were subject, his marginalisation from public life, the fact that he is practically unemployable and that he has had no further employment or income since mid-October 2012, the detrimental impact on his health and the state of uncertainty and anxiety in which he finds himself. In the applicant's submission, there is a direct causal link between the alleged breaches and the damage which he has sustained.

220 The Commission contests the applicants' arguments.

221 In that regard, it must be borne in mind that, under Article 76(d) of the Rules of Procedure, any application must indicate the subject matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law. An application seeking compensation for damage caused by a EU institution must set out the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered and the nature and extent of that damage (judgment of 13 December 2006, *Abad Pérez and Others* v *Council and Commission*, T-304/01,

EU:T:2006:389, paragraph 44). As regards the damage, the application must contain the information which makes it possible to identify the damage alleged and to assess the extent and the nature of that damage (judgment of 30 September 1998, *Coldiretti and Others* v *Council and Commission*, T−149/96, EU:T:1998:228, paragraph 47). That requirement is also applicable to non-material damage (see, to that effect, judgment of 28 February 2013, *Inalca and Cremonini* v *Commission*, C−460/09 P, EU:C:2013:111, paragraph 103).

222 It follows, moreover, from the case-law that the damage for which compensation is sought in an action to establish non-contractual liability on the part of the European Union must be actual and certain, which is for the applicant to prove (see judgment of 9 November 2006, *Agraz and Others* v *Commission*, C−243/05 P, EU:C:2006:708, paragraph 27 and the case-law cited). It is for the applicant to adduce conclusive proof as to the existence and extent of the damage it alleges (see judgment of 16 September 1997, *Blackspur DIY and Others* v *Council and Commission*, C−362/95 P, EU:C:1997:401, paragraph 31 and the case-law cited).

223 The condition relating to the causal link contained in the second paragraph of Article 340 TFEU concerns a sufficiently direct causal nexus between the conduct of the institutions and the damage (judgments of 18 March 2010, *Trubowest Handel and Makarov* v *Council and Commission*, C−419/08 P, EU:C:2010:147, paragraph 53, and of 14 December 2005, *Beamglow* v *Parliament and Others*, T−383/00, EU:T:2005:453, paragraph 193; see also, to that effect, judgment of 4 October 1979, *Dumortier and Others* v *Council*, 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79, EU:C:1979:223, paragraph 21). It is for the applicant to adduce evidence of a causal link between the conduct complained of and the damage pleaded (see judgment of 30 September 1998, *Coldiretti and Others* v *Council and Commission*, T−149/96, EU:T:1998:228, paragraph 101 and the case-law cited).

224 In the present case, it must be noted that the applicant does not present any evidence establishing the existence of the alleged non-material damage, or the link with the conduct of the Commission or of OLAF. He thus puts forward no evidence to demonstrate the substance of the allegations summarised in paragraph 219 above. The applicant produced only three medical certificates. However, as is stated by the Commission, those certificates cover only January and February 2013 and do not refer to the facts at issue in the present case. In addition, it is apparent from the documents submitted by the Commission that, as of the summer 2013, the applicant was invited by a bank to participate in a day of reflection relating, in essence, to the reform of the health system and the Maltese Government asked him to advise the Maltese minister for health concerning the reorganisation of a hospital. It is thus not established that, as he alleges, the applicant suffered a marginalisation from public life and is practically unemployable, or that his reputation and professional integrity were undermined. Furthermore, in so far as the damage invoked by the applicant results from the Commission's unlawful conduct in relation to the end of his office, as stated in the application, it is to be noted that it follows from the judgment of 12 May 2015, *Dalli* v *Commission* (T−562/12, EU:T:2015:270), that the applicant resigned voluntarily from his office, so that no damage resulting from the end of that office can be imputed to the Union. Finally, it is necessary to reject the applicant's claim that the press release of 16 October 2012 establishes a causal link between the resignation and the OLAF report. Apart from the fact that that claim is based on a misreading of that press release, it suffices to note that it is a link between the damage and the alleged misconduct that the applicant must prove and not between the OLAF report and his resignation.

225 Admittedly, it follows from the case-law that, where the applicant has put forward nothing to show the existence of its non-material damage or to establish its extent, it falls to it, at the very least, to prove that the conduct of which it complains was, by reason of its gravity, such as to cause it damage of that kind (see, to that effect, judgments of 16 July 2009, *SELEX Sistemi Integrati* v *Commission*, C−481/07 P, not published, EU:C:2009:461, paragraph 38; of 28 January 1999, *BAI* v *Commission*, T−230/95, EU:T:1999:11, paragraph 39; and of 16 October 2014, *Evropaïki Dynamiki* v *Commission*, T−297/12, not published, EU:T:2014:888, paragraphs 31, 46 and 63). However, in the present case, the applicant has failed to establish those elements.

226 It follows from the foregoing that the applicant has not established the existence of a sufficiently direct causal link between the conduct complained of and the damage alleged, or even the existence of the latter.

**The requests for measures of organisation of procedure**

227 The applicant suggests that the Court might consider it necessary to request, by way of a measure of organisation of procedure, the production of various documents.

228 The Commission considers that those documents are manifestly irrelevant to the outcome of the dispute and that the applicant's request must be rejected.

229 In that regard, it should be noted that it is for the Court to appraise the usefulness of measures of organisation of procedure (see judgment of 9 March 2015, *Deutsche Börse* v *Commission*, T−175/12, not published, EU:T:2015:148, paragraph 417 and the case-law cited).

230 In the present case, it must be noted that the elements in the case file and the explanations provided during the hearing are sufficient to allow the Court to give a ruling, since it has been able to give a proper ruling on the basis of the forms of order sought, the pleas in law and the arguments put forward during the proceedings and in the light of the documents lodged by the parties.

231 It follows that the requests for measures of organisation of procedure must be rejected and the action dismissed in its entirety.

**Costs**

232 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, he must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

**1. Dismisses the action;**

**2. Orders Mr John Dalli to bear his own costs as well as those incurred by the European Commission.**

Berardis Papasavvas Spineanu-Matei

Delivered in open court in Luxembourg on 6 June 2019.

E. Coulon G. Berardis

Registrar President

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* Language of the case: English.