Digest of rulings of the Court of Justice of the European Union with relevance to OLAF

15 June 2015

EUROPEAN ANTI-FRAUD OFFICE

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Unit C4

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This digest is intended as a mean of information on current judicial trends. It does not constitute guidance for staff nor should it be treated as a substitute for legal advice. Requests for legal advice should be referred to Unit C4 through the CMS (LJAM), where a legal advice request, together with supporting documents, should be uploaded.

TABLE OF CONTENTS

Court rulings of the Court of Justice of the European Union with relevance to OLAF

INTRODUCTION

This digest focusses on court rulings with a relevance to OLAF. Court rulings are relevant either because they mention OLAF, because they have an impact on the protection of the financial interests of the European Union or because they may apply by analogy. Cases where OLAF is specifically mentioned are indicated with an asterisk (*****).

It is divided into eleven sections and contains references to over 150 cases. The relevant extract or summary from the case law can be accessed by clicking on the table of contents on the chosen title. Referencing in the text shows the number of the case, part of the title and the numbering of the relevant paragraph(s) in italics, for example *T-29/03 Andalucia 31-32.* This reference is placed above the relevant text and a hyperlink to the full judgment in the Court of Justice website is also included.

Issues covered include (1) OLAF's independence and competence; (2) Cooperation, which deals with various aspects of OLAF's cooperation with others; (3) Procedure, which focusses on procedural rights and guarantees; (4) Access to documents; (5) Confidentiality; (6)Whistleblowing; (7) Impartiality and conflicts of interest; (8) Sanctions; (9) Recovery; (10) Damages and (11) Prevention.

There may occasionally be some overlap between topics - for example, as there is a corollation between confidentiality and the presumption of innocence, it may help to read both these sections when researching one or the other topic.

Data protection jurisprudence is not included. This is because a compendium of relevant cases is available on the OLAF internet site, on the DPO's site.

Relevant cases up to 15 June 2015 have been included. Any case to be included in the next review should be brought to the attention of Frederique Delmeiren, who is acting as coordinator.

1. OLAF'S INDEPENDENCE AND COMPETENCE

C-11/00 ECB 138-159; C-15/00 EIB* 106-107*

The OLAF regulations express the Community legislator's determination to subject the powers conferred on OLAF, first, to guarantees intended to ensure OLAF's complete independence, in particular from the Commission, and, second, to strict observance of the rules of Community law.

Neither the fact that OLAF was established by the Commission and is integrated in its administrative and budgetary structures, nor the fact that the Community legislation has conferred investigative powers on this body, external to the other EC institutions and bodies (ECB), can, as such, undermine the independence of the EC institutions and bodies.

OLAF's investigative function differs in its nature and its objectives from general control tasks such as those of the Court of Auditors and the ECB external auditors.

T-334/02 VSTKSAP 39*

In view of OLAF's functions and its independence from the Commission, OLAF is not competent to determine what stage the work of the Commission has reached with regard to a third party and even less to commit the Commission in that respect.

1.1. OLAF's competence

C-15/00 EIB 166*

Notwithstanding the existence of control mechanisms specific to the various institutions, bodies, offices and agencies established by or on the basis of the Treaties, it was necessary for the purposes of strengthening the prevention of, the fight against fraud, corruption and other irregularities detrimental to the financial interests of the European Community, to set up a control mechanism which is simultaneously centralised within one particular organ, specialised and operated independently and uniformly with respect to those institutions, bodies, offices and agencies.

C-209/97 Commission v Council 29

The protection of the financial interests of the Community does not follow from the establishment of the customs union, but constitutes an independent objective which, under the scheme of the Treaty, is placed in Title II (financial provisions) of Part V relating to the Community institutions and not in Part III on Community policies, which includes the customs union and agriculture.

1.2. OLAF's acts and their legal value

T-29/03 Andalucía 31-32*

The letter from OLAF informing an economic operator that no action could be taken on his complaint about the final report cannot be deemed a decision against which an action for annulment may be brought. The final report drawn up by OLAF at the end of the external investigation and sent to the competent authorities of the Member States is only a set of recommendations and opinions which have no mandatory legal effects that could impinge on the economic operator's economic interests by altering his legal situation.

C-60/81 IBM 9

Only measures producing binding legal effects of such a kind as to affect the applicant' interests by bringing about a distinct change in his position constitute acts against which an action for annulment may be brought.

T-193/04 Tillack 47 67-70; F-5/05 and 7/05 Violetti* 90-91*

The decision to forward information to the national authorities does not constitute an act adversely affecting an official, as it does not bring a distinct change in the legal position of the person concerned by the information in question.

Article 10(2) of Regulation No 1073/1999 merely provides for the forwarding of information to national judicial authorities, which remain free, in the context of their own powers, to assess the content and significance of that information. They make their own decision whether to take the action or not.

T-444/07 CPEM 135*

The fact that the enquiry by OLAF uncovered irregularities which had not been detected during an audit carried out by the Commission's Directorate-General for Employment, Social Affairs and Equal Opportunities does not in any way constitute inconsistency and cannot affect the lawfulness of a decision based on the results of that enquiry.

1.3. Duty of care/diligent and impartial examination (sound administration)

T-309/03 Camós Grau 104-105*

Institutions are subject to the principle of impartiality when carrying out investigative tasks such those entrusted to OLAF, to ensure that the public interest is respected. This protects persons concerned and confers on them a right as individuals to see that the corresponding guarantees are complied with.

By virtue of the rules which apply to it, OLAF must conduct investigations falling within its competence in compliance with the Treaty and the general principles of Community law, in particular the requirement of impartiality and with the Staff Regulations, Article 14 of which in particular seeks to avoid a situation where there is a conflict of interest on the part of officials.

1.4. Duty to give reasons

T-34/93 Société Générale 40

To respect the right of defence of undertakings concerned, the Commission has to specify the subject-matter and purpose of the investigation. That obligation is a fundamental requirement not merely in order to show that the investigation to be carried out on the premises of the undertakings concerned is justified, but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding the rights of the defence.

1.5. OLAF's access to EU staff's computers

T-74/96 Tzoanos 320

The Commission has a right of access to an official's computer held in his office for the purpose of fulfilling his function, even in the absence of the same official. This access does not violate the rights of the defence.

1.6. OLAF's access to European Parliament premises

T-345/05 Mote 18-36

Acts of the Parliament which produce or are intended to produce legal effects in regard to third parties or, in other words, acts whose legal effects go beyond the internal organisation of the work of the institution are open to challenge before the Community judicature.

Members, elected as representatives of the peoples of the States brought together in the Community, must, with respect to an act emanating from the Parliament and producing legal effects as regards the conditions under which the electoral mandate is exercised, be regarded as third parties within the meaning of the first paragraph of Article 230 EC.

Although the privileges and immunities have been granted solely in the interests of the Community, the fact remains that they have been expressly accorded to the officials and other staff of institutions of the Community and to the Members. The fact that the privileges and immunities have been provided in the public interest of the Community justifies the power given to the institutions to waive the immunity where appropriate but does not mean that these privileges and immunities are granted to the Community and not directly to its officials, other staff and Members. Therefore the Protocol confers an individual right on the persons concerned, compliance with which is ensured by the right of recourse provided for in Article 230 EC.

A decision by which the Parliament waives the immunity of one of its Members has legal effects going beyond the internal organisation of the Parliament since the decision makes it possible for proceedings to be brought against that Member in respect of the matters identified.

It follows that it must be possible for the Community judicature to review its legality under the first paragraph of Article 230 EC.

The notion of direct concern requires the Community measure complained of to affect directly the legal situation of the individual and leave no discretion to the addressees of that measure, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules alone without the application of other intermediate rules.

C-163/10 Aldo Patriciello 32, 33, 35

It is to be considered that 'opinion' for the purpose of Article 8 of the Protocol must be understood in a wide sense to include remarks and statements that, by their content, correspond to assertions amounting to subjective appraisal.

It is clear too from the wording of Article 8 of the Protocol that, in order to enjoy immunity, an opinion must have been expressed by a Member of the European Parliament 'in the performance of [his] duties', thus entailing the requirement of a link between the opinion expressed and the parliamentary duties.

The connection between the opinion expressed and parliamentary duties must be direct and obvious.

2. COOPERATION

T-193/04 Tillack 72 (+ Application 20477/05 ECHR)*

The duty of the Member States to cooperate in good faith implies that when OLAF forwards them information pursuant to Article 10(2) of Regulation No 1073/1999, the national judicial authorities have to examine that information carefully and on that basis

take the appropriate action to comply with Community law, if necessary by initiating legal proceedings. Such a duty of careful examination does not, however, require an interpretation of that provision to the effect that the forwarded information has binding effect.

C-2/88 Zwartveld 10 and 18-22

The duty to cooperate in good faith imposed on Community institutions and the Commission in particular is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system. This duty of cooperation requires the Commission to give active assistance where a national court, which is hearing proceedings on the infringement of Community rules, seeks the production of information concerning the existence of the facts constituting those infringements by providing the documents to the national court and authorising its officials to give evidence in the national proceedings, unless the Commission can establish that there are imperative reasons, associated with avoiding interference with the functioning and independence of the Communities, for not doing so.

3. RIGHTS, GUARANTEES AND PROCEDURE

T-444/07 CPEM 53; T-210/01 General Electric 632

Rights of the defence can be infringed by reason of a procedural irregularity only in so far as the irregularity has a concrete effect on the ability of the undertakings to defend themselves. Consequently, non-compliance with rules in force whose purpose is to protect the rights of the defence can vitiate the administrative procedure only if it is shown that the latter could have had a different outcome if the rules had been observed.

T-215/02 Gómez-Reino 65*

OLAF is not obliged to allow a Community official allegedly implicated in an internal investigation access to the documents which are the subject of that investigation, or to those which it has drawn up itself in that connection, before a final decision is made by his appointing authority.

Failure to take account of the rights of defence of an official under investigation, as guaranteed by Article 4 of the inter-institutional agreement constitutes a violation of the substantial formal requirements applicable to the investigation procedure and thereby affects the legality of the final decision of the appointing authority.

T-48/05 Franchet and Byk 151,154 and 164*

The obligation to seek and obtain the agreement of the Secretary-General of the Commission is not a mere formality that might, in an appropriate case, be complied with at a later stage. The requirement to obtain such agreement would lose its rationale, which is to ensure that the rights of defence of the officials concerned are respected, that OLAF can defer informing them only in truly exceptional cases and that the assessment of that exceptional nature is not a matter solely for OLAF but also requires the assessment of the Secretary-General of the Commission.

Admittedly, Article 4 of Decision 1999/396 confers a margin of discretion on OLAF in cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigation procedures falling within the remit of a national judicial authority (see, by analogy, *Nikolaou* v *Commission*, paragraph 153 above, paragraph 264). However, as regards the procedures for the adoption of the

decision to defer informing the officials concerned, OLAF has no discretion. Nor does OLAF have any discretion.

F-124/05 and F-96/06 A and G 189

The argument that some officials were not the subject of administrative investigations is not such as to establish the deficiencies or the violations of the rights of the defence.

3.1. Right to be heard

C-432/04 Cresson 69-72, 94 and 104*

The third subparagraph of Article 245(2) TFUE specifies the way in which members of the Commission must honour their obligations as members. This should be understood in the broad sense: members must meet the strictest standards of behaviour. However, it does not follow that the slightest deviation from such standards can be censured. The Commission can only refer a case of alleged misconduct of a member to the Court, and it is the Court which decides whether to rule that there has been infringement, and, if so, to impose a penalty.

The right to a fair hearing means that the Commission member against whom the Commission has initiated an administrative procedure under Article 245(2) TFUE must be afforded the opportunity during that procedure to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law.

T-259/03 Nikolaou 227-234*

During an internal investigation OLAF must invite the persons concerned to express their views about the facts. This obligation may be deferred exceptionally in cases requiring absolute secrecy for the purposes of the investigation and requiring the use of means of investigation falling within the competence of a judicial authority.

F-124/05 and F-96/06 A and G 191

The right of an official to comment on facts concerning him does not mean that the investigators are obliged to amend the conclusions of a report on the basis of the requests made by the official who has been interviewed.

3.2. Presumption of innocence/Protection of reputation

T-259/03 Nikolaou 227-234*

In presence of serious allegations affecting the good reputation of an official, the administration must avoid the publication of any allegations which are not strictly necessary. On the one hand, the administration must avoid giving to the press information which could damage the official and, on the other hand, take all the necessary steps to prevent, within the institution, any form of divulgation of the information which could have a defamatory effect. OLAF violates the rights of defence, in particular the presumption of innocence, when confirming the veracity of certain facts which had already been exposed in the press.

F-23/05 Giraudy 161-164*

Article 8(2) of Regulation No 1073/1999 defines in a broad way a confidentiality rule applicable to OLAF investigations. This rule must be interpreted as not only aiming to protect the confidentiality of information for gathering the facts, but also to safeguard the presumption of innocence, and therefore the reputation, of the officials or servants

concerned with these investigations. The successful performance of an investigation may require keeping it secret towards those persons concerned by the investigation.

Within the Community institutions a culture has developed to react on the concerns of the public to be informed on and ensured of the fact that fraud and other irregularities are identified and, if necessary, eliminated and sanctioned. This challenge implies that the officials holding positions of responsibility within the Commission must take into account the existence of a justified need to communicate certain information to the public.

3.3. Access to the file

T-215/02 Gómez-Reino 65*

In the context of OLAF investigations, the right of persons concerned to express their views on all the facts which concern them, as provided for in Article 4 of Commission Decision 1999/396/EC, represents a sufficient guarantee of their right of defence and should not be interpreted extensively, such as to include the right of the person concerned to access to her or his file.

3.4. Right to silence

T-112/98 Mannessmannröhren 66-67 [Appeal case before the Court of Justice: C-190/01 P]

There is an infringement to the right to silence whenever the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which is incumbent upon the Commission to prove.

3.5. Privileged nature of correspondence between lawyer and client (criminal matters)

C-305/05 Barreaux 32 and 36

Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 ECHR, if lawyers were obliged, in the context of judicial proceedings by passing them information obtained in the course of related legal consultations.

On the other hand, it must be recognised that the right to a fair trial do not preclude the obligations laid down in Directive 91/308 from being imposed in order to combat money laundering effectively.

3.6. Duration (sound administration)

F-124/05 and F-96/06 A and G 147 and 390-393*

It must be noted that all disciplinary proceedings place the official concerned in a situation of uncertainty about his professional future, inevitably causing him some degree of stress and anxiety. If that uncertainty persists for an inordinate period, the intensity of the stress and anxiety caused to the official goes beyond the level of what may be considered justifiable. Hence, the excessive duration of disciplinary proceedings is to be taken as giving rise to a presumption that the person concerned has suffered non-material damage.

It follows from the principle of sound administration that disciplinary authorities are under an obligation to conduct disciplinary proceedings with due diligence and to ensure that each procedural step is taken within a reasonable time following the previous step.

Even in the absence of a limitation period, disciplinary authorities are under an obligation to ensure that proceedings liable to result in a disciplinary measure are instituted within a reasonable period. OLAF may also be liable of the unreasonable duration of disciplinary proceedings as it may be the result both of the conduct of prior administrative investigations and of the disciplinary proceedings themselves.

The reasonableness of the duration of the proceedings must be assessed in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities.

3.7. Right to be assisted

F-124/05 and F-96/06 A and G 380-381*

The duty to provide assistance is concerned with the defence of officials against acts of third parties and of colleagues or hierarchical superiors in their personal capacity and not against acts of the institutions themselves, the review of which falls under other provisions of the Staff Regulations. OLAF, on the other hand, cannot be held to be a third party in relation to the institution.

C-229/84 Sommerlatte 20

In principle, it is for the applicant to apply for assistance under Article 24 of Staff Regulations. Only exceptional circumstances may oblige the institution to provide specific assistance not in response to a request from the individual concerned but on its own initiative.

3.8. Right to a reply (sound administration)

F-5/05 and F-7/05 Violetti 82*

OLAF is obliged to reply to the complaints brought under Article 90a of the Staff Regulation as a situation, in which the author of a contested decision does not comment on the criticism made against that decision, is hardly compatible with the principle of sound administration and reveals the problems to which an absence of clearly affirmed and effective judicial supervision is liable to give rise.

T-267/03 Roccato 84

Failure to comply with the time-limits established in Article 90 of the Staff Regulation can cause the liability of the institution concerned, in case of damage. On the other hand, it does not affect the validity of the decision in question.

T-123/99 JT's Corporation 24

Not responding to a request within the prescribed period is considered as an implicit negative decision.

T-355/04 and T-446/04 Co-Frutta 59, 71-72; T-44/01, T-119/01 and T-126/01 Vieira 167-170 [Appeal case before the Court of Justice: C-254/03 P]

OLAF must reply to the confirmatory application within fifteen working days from its registration. This period, in the event of a complex application, can be extended. Factors to be taken into the account are "number of documents requested and diversity of their authors".

None the less, failure to comply with this time-limit does not lead automatically to the annulment of the decision adopted after the deadline. In any event, compensation for any loss resulting from the lateness of the Commission's response may be sought through an action for damages.

3.9. Procedure: interaction of criminal and disciplinary proceedings (Interpretation of Article 25 of Annex IX of EU Staff Regulations)

T-307/01 François 59, 74-75

Article 88(5) of the Staff Regulations establishes the principle that disciplinary proceedings have to await the conclusion of criminal proceedings. This means that the appointing authority is precluded from giving a final decision on the disciplinary aspect of the case involving the official concerned by adjudicating on facts which are at the same time at issue in criminal proceedings, so long as the decision given by the criminal court has not become final. This prohibition applies equally where the respective legal characterisations of the facts in question in the criminal proceedings and in the disciplinary proceedings are different.

T-74/96 Tzoanos 35

It is the responsibility of the official concerned to provide the authorising officer with all the facts needed to establish whether the facts concerned by the disciplinary proceedings are also the subject of criminal proceedings against the official.

F-54/11 BG, 56-79

In case F-54/11 the Civil Service Tribunal stated that Article 25 of Annex IX of the EU Staff Regulations had to be interpreted 'restrictively'. This is to ensure that disciplinary procedures can have their intended impact (effet utile). In particular, the principle in Article 25 should not prevent an EU administration from adopting a disciplinary sanction on the basis of facts that are not contested by the person concerned.

It is possible for a disciplinary procedure to run concurrently with a preliminary enquiry carried out by a national authority, based on the same facts. It is up to the person concerned to give information to the Appointing Authority to enable it to appreciate whether he is being prosecuted and going through a disciplinary procedure at the same time. The facts on which the criminal prosecution is based can then be compared with the facts which led to the disciplinary procedure, in order to determine whether they are identical. It is understood from the ruling that if the facts are found to be identical, the principle in Article 25 applies at this stage, and not before. If the disciplinary procedure ends before the preliminary investigation by a national prosecution authority, it will be up to the national authorities to decide whether to take into account the outcome of the disciplinary procedure. 'Criminal prosecution' is defined in national law and has no independent EU definition.

3.10. Devoir de sollicitude

F-156/12 McCoy 106

Il ressort d'une jurisprudence constante que la notion de devoir de sollicitude implique notamment que, lorsque l'administration statue à propos de la situation d'un fonctionnaire, elle prenne en considération l'ensemble des éléments susceptibles de déterminer sa décision et que, ce faisant, elle tienne compte non seulement de l'intérêt du service, mais aussi de celui du fonctionnaire concerné. En outre, il convient de souligner que les obligations découlant pour l'administration du devoir de sollicitude sont substantiellement renforcées lorsqu'est en cause la situation d'un fonctionnaire dont il est avéré que la santé, physique ou mentale, est affectée. En pareille hypothèse, l'administration doit examiner les demandes de celui-ci dans un esprit d'ouverture.

4. ACCESS TO DOCUMENTS

T-204/99 Olli Mattila 26; C-353/01 P Olli Mattila 15; C-41/00 P Interporc 28; T-111/07 Agrofert 40

A Court cannot order an institution to give access to the documents in its judgment, as it exercises only a judicial review of legality of the decisions refusing it.

However, the institution is required to take the measures necessary to comply with its judgment.

T-380/04 Terezakis 155; T-110/03, T-150/03 and T-405/03 Sison 29; T-355/04 and T-446/04 Co-Frutta 155

There is a presumption of legality attached to any statement made by the institutions relating to the non-existence of documents requested. That is, however, a simple presumption which the applicant may rebut in any way on the basis of relevant and consistent evidence.

That presumption must be applied by analogy where the institution declares that it is not in possession of the documents requested.

C-28/08 P Bavarian Lager 63; C-127/13 P Strack 101*

Where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation No 45/2001 become applicable in their entirety, including Articles 8 and 18 thereof.

4.1. Interest in having access to documents

T-48/05 Franchet and Byk 8, 255*

A person requesting access is not required to demonstrate any interest in having access to the documents requested. The beneficiaries of the right of access are '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State'. The purpose of the Regulation is to guarantee access for everyone to public documents and not merely access for the requesting party to documents concerning him. A particular interest cannot be taken into account.

OLAF is under no obligation to grant an EU official who is alleged to be concerned by an internal investigation – before his appointing authority adopts a final decision adversely affecting him – access to the documents forming the subject-matter of such an investigation or to those drawn up by OLAF itself on flat occasion; otherwise, the effectiveness and confidentiality of the mission entrusted to OLAF and OLAF's independence could be undermined.

C-28/08 P Bavarian Lager 77; C-127/13 P Strack 107, 108*

It is for the person applying for access to establish the necessity of transferring personal data.

The argument that in the light of Article 8(a) of Regulation No 45/2001, the Commission was required to transmit personal data to the applicant on the ground that access to documents held by the institutions under Regulation No 1049/2001 is always in the public interest must be dismissed. Such an argument runs counter to the obligation on the applicant for the access to establish the necessity of transferring personal data.

4.2. General presumption of inaccessibility

A general presumption of inaccessibility exists as regards State aid procedures, merger control procedures and environmental matters governed by the Aarhus Regulation.

C-139/07 P Ilmenau 61

- documents in an administrative file concerning procedures for reviewing State aid.

All the documents in the administrative file relating to such a procedure form a single category to which a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigations applies.

C-404/10 P Odile Jacob 123

- the documents exchanged between the Commission and notifying parties or third parties in the context of merger control procedures

There is a general presumption that disclosure of documents exchanged between the Commission and undertakings during merger control procedures undermines, in principle, both protection of the objectives of investigation activities and that of the commercial interests of the undertakings involved in such a procedure.

C-514/11 P - LPN and Finland 50, 54, 55

- the pleadings lodged by an institution in proceedings pending before the courts

It is necessary to bear in mind that that application was made when that infringement procedure was still at the pre-litigation stage and that the procedure had neither been closed by the Commission nor brought before the Court of Justice when the contested decision was adopted.

The first sentence of Article 6(1) of Regulation No 1367/2006, which lays down a rule intended to facilitate access to documents containing environmental information, provides that that rule does not apply to 'investigations, in particular those concerning possible infringements of Community law'.

It follows that infringement procedures are regarded, by that European Union legislation, as a type of procedure which, as such, has characteristics precluding full transparency being granted in that field and which therefore has a special position within the system of access to documents.

C-477/10 P Agrofert 68; C-139/07 P Ilmenau 62

The above-mentioned general presumption does not exclude the possibility of demonstrating that a given document, of which disclosure is sought, is not covered by that presumption or that there is a higher public interest justifying the disclosure of that document under Article 4(2) of Regulation No 1049/2001.

4.3. Exceptions: rules for interpretation

C-139/07 P Ilmenau 51; C-477/10 P Agrofert 53.

In accordance with the Court's case law, although Regulation No 1049/2001 is designed to confer on the public as wide a right of access to the documents of the institutions as possible, that right is, nevertheless, subject, in the light of the exceptions laid down in Article 4 of that Regulation, to certain limits based on reasons of public or private interest.

C-266/05 P Sison 62; C-280/11 P Access Info 28, 29

Article 4 of Regulation No 1049/2001, by introducing a set of exceptions to the right of public access to documents of the institutions which is conferred by Article 1 of the

Regulation, permits the institutions to refuse access to a document in order to prevent disclosure of the document from undermining one of the interests protected by Article 4.

C-39/05 P and C-52/05 P Sweden and Turco 36, 49; T-2/03 Konsumenteninformation 69, 75; T-391/03 and T-70/04 Franchet and Byk 115*

Exceptions are to be interpreted and applied strictly. They should be applied if the document could specifically and effectively undermine the protected interest. However, this risk must be reasonably foreseeable and not purely hypothetical.

T-20/99 Denkavit 45; T-355/04 and T-446/04 Co-Frutta 123-124; T-111/07 Agrofert 79

The mere fact that a document concerns an interest protected by an exception is insufficient to refuse access to documents. The institution has to complete a concrete and individual examination of each of the documents, in order to assess whether a partial access could be given. This examination should remain specific in nature. It may not be necessary only if it is obvious that access must be refused or, on the contrary, granted. Such could be the case if certain documents were either, first manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally had already been the subject of a concrete, individual assessment by the institution in similar circumstances.

C-353/99 P Council v Hautala, 27-28; T-331/11 Besselink 83

Examination of partial access to a document of the European Union institutions must be carried out in the light of the principle of proportionality.

T-123/99 JT's Corporation 46; T-2/03 Konsumenteninformation 73; T-391/03 and T-70/04 Franchet and Byk 117; T-355/04 and T-446/04 Co-Frutta 124, 130; C-39/05 P and C-52/05 P Sweden and Turco 50*

The assessment carried out by reference to categories, rather than on the basis of actual information contained in those documents, is insufficient. On the contrary, in some cases, the assessment can be done on the basis of general considerations concerning the documents of the same nature.

T-355/04 and T-446/04 Co-Frutta 84

Actions taken by the institution, like preparing a detailed list of the documents in question, grouping them regarding the type of an exception under each they fall or granting the access to some of the documents, cannot prejudge that a concrete and individual examination of each of the documents has been done.

T-123/99 JT's Corporation 50; T-111/07 Agrofert 85

OLAF's refusal of access to the documents can be based only and exclusively on the exceptions laid down in Article 4 of Regulation No 1049/2001, with the result that OLAF cannot justify its refusal to grant access to the documents referring to Regulation No 515/97, which lays down the principle that information obtained in customs investigations is confidential.

C-350/12 In't Velt 52; T-447/11 Catinis 42

If the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.

T-447/11 Catinis 43, 48

It is open to the institution concerned to base its decisions to refuse access to a document on general presumptions which apply to certain categories of documents, as

similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature. That general presumption does not exclude the possibility of demonstrating that a given document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest justifying the disclosure of the document concerned by virtue of the last phrase of Article 4(2) of Regulation No 1049/2001. Similarly, the institution concerned is not required to base its decision on that general presumption. It may always carry out a specific examination of the documents covered by a request for access and provide appropriate reasons.

It is for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine.

4.4. Exception relating to inspections and investigations

T-391/03 and T-70/04 Franchet and Byk 109-112*

This exception applies only if the documents in question may endanger the completion of inspections, investigations or audits. The risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical.

Various documents can remain protected by this exception as long as the investigations or inspections continue, even if a particular investigation or inspection which gave rise to the report to which access is sought is completed.

On the other hand, the objective of guaranteeing public access to documents, oblige OLAF not to cover those documents by the exception till the follow-up actions, as they are future, uncertain and possibly distant.

T-447/11 Catinis 53, 54*

The fact that a document concerns an inspection or investigation cannot in itself justify the application of the exception invoked. The institution concerned must also provide explanations as to how disclosure of such a document could specifically and actually harm the interest protected by one of the exceptions provided for in Article 4(2) of Regulation No 1049/2001.

In the present case, disclosure of the documents to which access was sought would in fact harm the interest protected for the following reasons. Some documents related to the ongoing investigation, a number of documents revealed evidence gathered from various sources and disclosure could have alerted the persons or entities under investigation before all the evidence had been gathered. Similarly, those documents might also be used as evidence in proceedings before the national courts and their disclosure might compromise any effective use of those documents by those courts. Furthermore, some other documents disclose OLAF's strategy and the manner in which it conducted the investigation. Disclosure of those documents could provide information on its working methods in the present case and thus undermine the effectiveness of OLAF in the performance of its tasks. In addition, some documents relate to information exchanged with the national authorities in the investigation under consideration and their disclosure could have an adverse effect on the climate of mutual trust essential to effective cooperation with the national authorities in the investigation. Disclosure of those documents would also reveal the investigation strategies, action taken and the interpretation of procedures. Finally, public disclosure of those documents, such as a letter from an economic operator providing information to OLAF, would expose the informant and his anonymity would therefore no longer be protected, which would have the effect of discouraging individuals from providing information concerning possible cases of fraud and thereby deprive OLAF and the Commission of information that is of

use for the purpose of undertaking investigations for the protection of the financial interests of the European Union.

Competition law: T-623/13 UAHE 64, 90

A general presumption does exist according to which the disclosure of documents submitted by a national competition authority in proceedings concerning an infringement of the competition rules may, in principle, undermine the protection of the commercial interests of the undertakings concerned as well as the protection, which is closely linked, of the purposes of the national competition authority's investigation activity. Such presumption applies independently of the question whether the request for access concerns an investigation procedure that is already closed or one that is pending.

4.5. Exception relating to legal advice

C-39/05 P and C-52/05 P Sweden and Turco 42-43

This exception intends to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.

T-237/05 Odile Jacob 160; T-111/07 Agrofert

Legal advice should not be released if it could put Legal Service in a delicate position, later on, before the Court of Justice, while supporting Commission's actions which were not taken in a compliance with this document.

Access to this legal advice could harm the principle of equality of parties in court proceedings.

4.6. Exception relating to the public interest

This exception concerns public security, defence and military matters, international relations and the financial monetary or economic policy of the community or a Member State.

T-331/11 Besselink 64

The Council has stated that Document 9689/10 is a preparatory document, disclosure of which would weaken the Union's negotiating position. Such disclosure would give an insight to internal discussions within the Council of the negotiating directives for the Union's accession to ECHR, which would enable the Union's negotiating partner to identify issues which had given rise to divergences of views during the Union's internal discussions.

4.7. Exception relating to court proceedings

T-391/03 and T-70/04 Franchet and Byk 90-101*

The exception concerning 'court proceedings' covers only documents drawn up solely for the purposes of specific court proceedings: the pleadings or other documents lodged, internal documents concerning the investigation of the case and correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office. It cannot enable the Commission to escape from its obligation to disclose documents which were drawn up in connection with a purely administrative matter.

Compliance with national procedural rules is sufficiently safeguarded if the institution ensures that disclosure of the documents does not constitute an infringement of national law. A procedure whereby the institution consults the national court in the event of doubt

avoids the applicant's having to make a request first to the competent national court and then to the Commission.

Before rejecting a request for access to investigation documents sent to a national judicial authority, OLAF must consult that authority and may refuse access only if the authority opposes disclosure of the documents.

T-188/12 Breyer 80, 83

Les mémoires produits, à l'instar des mémoires litigieux, par un État membre dans le cadre d'une procédure en manquement ne relèvent, pas plus que ceux de la Commission, de l'exclusion du droit d'accès aux documents instituée, s'agissant de l'activité juridictionnelle de la Cour de justice, par l'article 15, paragraphe 3, quatrième alinéa, TFUE. Partant, l'article 15, paragraphe 3, quatrième alinéa, TFUE ne s'oppose pas à l'inclusion des mémoires litigieux dans le champ d'application du règlement n° 1049/2001, pour autant, cependant, que les conditions d'application de ce dernier règlement soient remplies et sans préjudice de l'application, le cas échéant, d'une des exceptions visées à l'article 4 dudit règlement et de la possibilité, prévue au paragraphe 5 de cette disposition, pour l'État membre concerné de demander à l'institution concernée de ne pas divulguer ses mémoires.

4.8. Exception relating to the amount of work involved in carrying out a concrete and individual examination

T-2/03 Konsumenteninformation 102-103, 113-115; T-237/05 Odile Jacob 170-173

In order to safeguard the principle of good administration, in exceptional cases, where a concrete and individual examination of the documents in question would entail an unreasonable amount of administrative work, the institution may avoid carrying it out.

The burden of proof concerning the unreasonableness and the scale of the task in question relies on the institution.

If the institution wants to refer to this exception, it is obliged to consult first with the applicant in order, on one hand, to ask to specify his interest in obtaining those documents and, on the other hand, to consider whether and how it may adopt a measure less onerous than a concrete and individual examination of those documents.

Applying this exception is possible only after genuine investigation of all other conceivable options and a detailed explanation of its reasons included in the decision.

C-127/13 P Strack 113*

A systematic obligation to encode [names deleted on the basis of data protection] would constitute a particularly heavy burden which serves no purpose. The institutions may, in specific cases, rely on the interests of good administration after weighing the interests of the applicant for access to the documents and the workload which would result from processing his application.

4.9. Exception relating to privacy and the integrity of the individual

C-127/13 P Strack 111*

Seeking to obtain the names of the officials referred to in the documents related to case T-110/04 cannot be accepted. Their names are protected data under Article 4(1)(b) of Regulation No 1049/2001. The fact that certain names had been disclosed at the hearing in the case before the General Court does not invalidate that finding. That fact is not able to relieve the other institutions from their obligations.

4.10. Overriding public interest

T-237/05 Odile Jacob 190-191

The institutions must grant access to documents, even if one of the exceptions from Article 4 of Regulation No 1049/2001 applies, when there is an overriding public interest in their disclosure.

This interest should have an objective and common character and it cannot be mistaken with an individual or private interest. Most often this interest is resulting from the reasons prevailing when Regulation No 1049/2001 was adopted.

4.11. Motivation

T-380/04 Terezakis 70, 71; T-355/04 and T-446/04 Co-Frutta 99-101; C-41/00 P Interporc 55

The statement of reasons must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution responsible for authorship of the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review.

Those requirements should be met not only with regard to its wording but also to its context and to all the legal rules governing the matter in question.

When an institution refuses access to documents it must demonstrate in each individual case that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001.

T-110/03, T-150/03 and T-405/03 Sison 84; T-105/95 WWF UK 65; T-237/05 Odile Jacob 46

Brevity and formulaic character of the statement of reasons provided do not have to be indicative of failure to carry out a concrete examination. In some cases it must be taken into account that it may be impossible to give the reasons justifying the refusal of access to each document or in this instance to each piece of information in the documents, without disclosing the content of the document or an essential aspect of it and thereby depriving the exception of its very purpose.

T-237/05 Odile Jacob 47

The same statement of reasons can be used to a group of documents falling into the same category, which can happen especially if those documents contain information of the same type.

T-392/07 Strack 166-167*

The suppression of data relating to legal persons must be motivated showing that the disclosure of the name of the legal person could lead to the identification of a natural person.

4.12. Procedural time-limits

T-355/04 and T-446/04 Co-Frutta 34, 72

The institution must reply to the confirmatory application within fifteen working days from its registration. This period, in the event of a complex application, can be extended. Factors to be taken into the account are "number of documents requested and diversity of their authors".

T-123/99 JT's Corporation 24

Not responding to a request within the prescribed period is considered as an implicit negative decision.

T-355/04 and T-446/04 Co-Frutta 71; T-44/01, T-119/01 and T-126/01 Vieira 167 and 170 [Appeal case before the Court of Justice: C-254/03 P]

None the less, failure to comply with this time-limit does not lead automatically to the annulment of the decision adopted after the deadline. In any event, compensation for any loss resulting from the lateness of the Commission's response may be sought through an action for damages.

C-64/05 P IFAW 88; T-355/04 and T-446/04 Co-Frutta 80-82

Member State may request the institution not to disclose a document originating from that Member State without its prior agreement. However, this sole objection cannot be the only reason to refuse an access to those documents.

The institution cannot accept a Member State's objection to disclosure of a document originating from that State if the objection gives no reasons at all or if the reasons are not put forward in terms of the exceptions listed in Article 4 (1) to (3) of Regulation No 1049/2001. Despite an express objection of a Member State, the institution must, if it considers that none of those exceptions applies, give access to the document originating from the Member State.

Accordingly, where the opposition by one or more Member States to disclosure of a document does not fulfil requirement to state reasons, the institution may decide, independently, that one or more of the exceptions applies to the documents covered by an application for access.

T-392/07 Strack 249-250

The suppression of data relating to legal persons must be motivated.

4.13. Action for annulment

T-391/03 and T-70/04 Franchet and Byk 47-48; T-141/05 Internationaler Hilfsfonds 56 and 109; T-437/05 Brink's 69-71*

The response to the initial application constitutes simply an initial statement of position. In consequence, only a measure adopted by the Director-General of OLAF, after the confirmatory stage of procedure, is capable to produce legal effects for the applicant and therefore capable of being a subject of an action for annulment.

T-437/05 Brink's 74-75

If the Commission omits to inform the applicant about its right to make a confirmatory application, the action for annulment brought against the response to the initial application can be, exceptionally, admissible.

5. CONFIDENTIALITY

T-261/09 P Violetti 63

Article 8(2) of Regulation No 1073/1999 constitutes a confidentiality rule in the field of internal investigations.

In case if, in the breach of this rule, information, forwarded or obtained in the course of internal investigation, are being communicated to persons other than those whose functions require them to know, it can constitute an illegality that can incur liability of the European Union.

T-259/03 Nikolaou 216 and 264*

Further, OLAF must take measures to ensure that no information concerning the OLAF investigations is leaked, given that such a leak constitutes a violation of the personal data protection obligations.

T-236/00 Stauner 60-62

The aim of the Framework Agreement between the Parliament and the Commission is not to limit the right of individual MEPs to put questions to the Commission, but merely to enable the Parliament to exercise wider powers of scrutiny over the Commission's activities by obtaining from that institution confidential information. In that respect, the Commission's discretion in deciding whether to communicate confidential information in its reply to a question put by an MEP acting individually, pursuant to the second paragraph of Article 230 TFUE and in accordance with the relevant provisions of the Parliament's Rules of Procedure, is not governed, even indirectly, by the Framework Agreement. The Framework Agreement provides for an additional mechanism, which permits, contrary to what would have been the case before the adoption of the Framework Agreement, the forwarding of confidential information to certain parliamentary bodies.

F-124/05 and F-96/06 A and G 212-215; T-48/05 Franchet and Byk* 182-183*

It is regrettable if during a popular television programme the document presented in the commentary accompanying the programme's images, as being the minutes of OLAF's interview with the applicant, was broadcast.

Although, Commission itself and OLAF are not the only bodies in possession of the minutes of OLAF's interviews with the applicants and this is why OLAF cannot be best placed to provide evidence enabling the cause of the leak to be established. Consequently, the exception settled in the case Franchet and Byk does not apply in this case and it remains for the applicant to establish that all the conditions of non-contractual liability of the EU, in the consequence of OLAF's actions, have been satisfied.

F-23/05 Giraudy 161*

Article 8(2) of Regulation No 1073/1999 defines in a broad way a confidentiality rule applicable to OLAF investigations. This rule must be interpreted as not only aiming to protect the confidentiality of information for gathering the facts, but also to safeguard the presumption of innocence, and therefore the reputation, of the officials or servants concerned with these investigations. The successful performance of an investigation may require keeping it secret towards those persons concerned by the investigation.

6. WHISTLEBLOWING

6.1. The good faith requirement

F-41/10 Bermejo 134-138 and 150*

In order to determine whether an official made honest use of the right of disclosure provided for in Article 22a of the Staff Regulations, the Tribunal must take a certain number of factors under consideration.

First of all, the Tribunal must ascertain whether the information communicated to superiors or, as the case may be, to OLAF direct, related to irregularities which, on the assumption that they were in fact committed, were obviously serious. That is borne out by the fact that Article 22a(1) of the Staff Regulations refers to fraud and corruption as being among the illegal activities communication of which is provided for and adds that such activities must be 'detrimental to the interests of the [Union]'. Likewise, still according to Article 22a(1) of the Staff Regulations, a failure to comply with the obligations of officials can be reported only if it is 'serious'.

The second factor to be taken into consideration is the authenticity or at least the likelihood of the reality of the information disclosed. An official who complains of irregularities which from his viewpoint fall within the scope of Articles 12a and 22a of the Staff Regulations is required to ensure that the accusations he makes are supported by accurate facts or, at least, that they are founded on a 'sufficient factual basis'. Article 22a of the Staff Regulations is aimed solely at the communication of actual facts which, on an initial assessment, led the official communicating them to form a reasonable presumption of the existence of an illegal activity or a serious breach of obligations. That provision must be reconciled with the obligations of objectivity and impartiality placed on officials, with the obligation to have regard to the dignity of their post and with their duty of loyalty, and also with the obligation to respect the honour and the presumption of innocence of the persons concerned.

The Tribunal must also take into consideration the means employed by the official in making a disclosure and, with particular respect to irregularities covered by Article 22a(1) of the Staff Regulations, it must ascertain whether the official approached the competent authority or body, namely 'his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or [OLAF] direct'.

Lastly, the motive of the official who reports illegalities is another factor in the assessment of whether he acted honestly. A denunciation motivated by a personal grievance or animosity or again by the prospect of a personal advantage, in particular a pecuniary advantage, cannot be regarded as being made honestly.

An official who gave wide publicity to accusation by circulating them to Presidents of a Group and other members of the Bureau [where he worked] failed to comply with the obligation to show the greatest prudence and discretion in the publicity given to allegations coming within the competence of OLAF.

F-77/09 Nijs 66, 70, 80 and 135*

The protection of Article 22b(1) may not apply to officials guilty of failures to comply with obligations, such as the breach of the obligation to show the greatest prudence and restraint when giving any publicity to allegations falling within the remit of OLAF.

The Institutions are entitled to expect officials of a certain grade to act with discernment and circumspection. Accordingly, an official who is the author of defamatory documents, which he has disclosed extensively, is responsible under Articles 17 and 17a of the Staff Regulations. The compulsory resignation of such an official is therefore not disproportionate.

T-493/09 Y 62*

Supposing that Article 22a is interpreted to mean that an official must take steps to demonstrate the authentic nature of his evidence, this does not however exonerate him from keeping his hierarchy informed of the steps he has taken to do so, in particular when these steps involve investigations likely to have a negative impact on the reputation of the Commission. The official cannot justify these steps on the grounds that he does not trust his hierarchy, since Article 22a(1) expressly provides that an official

should inform the Secretary General, or the persons in equivalent positions, or OLAF directly.

F-88/09 and F-48/10 Z 184

An official who divulged allegations to everyone in his Unit cannot benefit from the protection laid down in Article 22a of the Staff Regulations.

6.2. Protection against retaliation

F-77/09 Nijs 62; F-88/09 and F-48/10 Z 253; F-111/10 AN 86, 90; F-2/09 Menghi, 139.

The protection provided in Article 22a, third paragraph, of the Staff Regulations and in Article 2 of Decision 1999/396 is granted without any formalities to official disclosing information related to facts giving rise to the presumption of illegal activity. This protection is granted as a result of such a disclosure. However, this protection does not give the official a protection against all decisions likely to change his legal position, but only against decisions linked to his disclosure.

F-41/10 Bermejo 156

Although the Staff Regulations, in particular Article 7, do not expressly provide for the possibility of 'reassigning' an official, it is clear from settled case-law that the institutions have a wide discretion in the organisation of their departments according to the tasks conferred on them and in the assignment, in view of those tasks, of staff who are made available to them, on condition, however, first, that that assignment is carried out in the interests of the service and, second, that the principle of assignment to an equivalent post is respected.

6.3. Harassment

T-530/12 Bermejo 106

An official who believes he is being harassed is not obliged to disclose the facts relating to his alleged harassment. However, it cannot be excluded that he discloses facts relating to harassment on the basis of Article 22a of the Staff Regulations, as harassment can constitute professional misconduct within the meaning of the same Article.

6.4. Right to confidentiality

C-145/83 Adams 34

An institution has a duty to respect the anonymity of an informant if he requests that his identity not be revealed. In the case of information supplied on a purely voluntary basis but accompanied by a request for confidentiality in order to protect the informant's anonymity, an institution which accepts such information is bound to comply with such a condition.

6.5. Whistleblowers and OLAF investigations

T-4/05 Strack 39, 44, 46 and 48*

A whistleblower who alleges that irregularities have taken place can under no circumstances oblige OLAF to launch an investigation of the allegations.

The guarantees offered to the whistleblower by Articles 22a and 22b of the Staff Regulations are in no way undermined when OLAF decides to close the investigation opened on the basis of the information received as, under these circumstances, the whistleblower continues to be protected by the same guarantees if he meets the

conditions set out in those Articles. This is because the decision to close an investigation in itself does not make it possible to judge whether the whistleblower reasonably and honestly believed that the information he gave OLAF was true and had thus acted in good faith.

7. IMPARTIALITY AND CONFLICTS OF INTEREST

T-309/03 Camós Grau 113, 126 and 141*

The continuing presence and substantial involvement in the investigation of one of OLAF's investigative officers, who was found to have had a conflict of interests, constitutes a serious and manifest breach of the requirement of impartiality. This is a fault capable of giving rise to non-contractual liability on the part of the Community.

T-21/01 Zavvos 37-40

Les dispositions continues aux articles 11, premier alinéa, et 14 du Statut font peser sur le fonctionnaire une obligation générale d'indépendance et de probité à l'égard de son institution. Elles constituent à ce titre des piliers de la déontologie de la fonction publique communautaire.

Compte tenu de l'importance capitale de la garantie d'indépendance et d'intégrité des fonctionnaires en ce qui concerne tant le fonctionnement interne que l'image extérieure des institutions communautaires, et au vu de la généralité des termes de la disposition de l'article 11, premier alinéa, du statut, la norme de conduite prescrite par ladite disposition doit être comprise comme allant au-delà de l'interdiction pour le fonctionnaire de solliciter ou d'accepter des instructions d'un gouvernement, d'une autorité, d'une organisation ou d'une personne extérieure à son institution. Elle exige du fonctionnaire qu'il adopte, en toutes circonstances, une attitude guidée exclusivement par les intérêts des Communautés. Elle prohibe donc, d'une manière générale, tout comportement, lié ou non à une violation d'une réglementation particulière, qui, au vu des éléments de l'espèce, montre que le fonctionnaire concerné a entendu favoriser un intérêt particulier au détriment de l'intérêt général communautaire. Dans ce contexte, la constatation d'une violation de l'article 11, premier alinéa, du statut en présence d'un manquement à une réglementation donnée suppose qu'il soit démontré ou, du moins, qu'il puisse être raisonnablement considéré, à la lumière des circonstances factuelles de l'affaire, que ledit manquement a été inspiré par la poursuite d'un intérêt autre que les intérêts des Communautés.

L'article 14 du statut requiert du fonctionnaire qu'il informe l'autorité investie du pouvoir de nomination de l'existence d'un intérêt personnel de nature à compromettre son indépendance dans le traitement ou la solution d'une affaire sur laquelle il est appelé à se prononcer. Eu égard au caractère fondamental des objectifs d'indépendance et d'intégrité poursuivis par cette disposition, et compte tenu de ce que l'obligation prescrite consiste, pour le fonctionnaire concerné, à informer l'AIPN à titre préventif afin que celle-ci puisse prendre les mesures appropriées en fonction du contexte de l'affaire, et non à renoncer d'emblée au traitement ou à la solution de cette affaire ou à écarter, aux fins d'un tel traitement ou d'une telle solution, les éléments pouvant mettre en jeu son intérêt personnel, l'article 14 du statut a un champ d'application large, couvrant toute circonstance dont le fonctionnaire doit raisonnablement comprendre, au vu de la fonction qu'il exerce et des circonstances propres de l'affaire, qu'elle est de nature à apparaître, aux yeux de tiers, comme une source possible d'altération de son indépendance.

Les obligations prévues aux articles 11 et 14 du statut s'imposent de manière objective, en ce sens que la constatation d'un manquement à ces obligations n'est pas subordonnée à la condition que le fonctionnaire concerné ait tiré profit de ce manquement ou que ce dernier ait causé un préjudice à l'institution ou à l'existence d'une plainte d'une personne estimant avoir été lésée par l'attitude du fonctionnaire.

T-89/01 Willeme 47, 58; T-137/03 Mancini 29, 31 and 33

Aux termes de l'article 14 du statut, le fonctionnaire qui, dans l'exercice de ses fonctions, est amené à se prononcer sur une affaire au traitement ou à la solution de laquelle il a un intérêt personnel de nature à compromettre son indépendance doit en informer l'AIPN. Eu égard au caractère fondamental des objectifs d'indépendance et d'intégrité poursuivis par cette disposition, et compte tenu de ce que l'obligation prescrite consiste, pour le fonctionnaire concerné, à informer l'AIPN à titre préventif, l'article 14 du statut a un champ d'application large. Celui-ci couvre toute circonstance que le fonctionnaire qui est amené à se prononcer sur une affaire doit raisonnablement comprendre comme étant de nature à apparaître, aux yeux de tiers, comme une source possible d'affectation de son indépendance en la matière. Toutefois, l'existence de relations professionnelles entre un fonctionnaire et un tiers ne saurait, en principe, impliquer que l'indépendance du fonctionnaire est compromise ou apparaît comme telle lorsque ce fonctionnaire est appelé à se prononcer sur une affaire dans laquelle ce tiers intervient.

T-89/01 Willeme 71

L'article 11, premier alinéa, du statut, exige du fonctionnaire qu'il adopte, en toute circonstance, une attitude guidée exclusivement par les intérêts des Communautés et prohibe tout comportement qui, au vu des éléments de l'espèce, dénote la prise en compte, par le fonctionnaire concerné, d'un intérêt autre que l'intérêt communautaire.

T-157/04 De Bry 33, 34, 38, 39, 43, 44 and 46

Eu égard au caractère fondamental des objectifs d'indépendance et d'intégrité poursuivis par l'article 14 du statut, il est de jurisprudence bien établie que cette disposition a un champ d'application large. Celui-ci couvre toute circonstance dont le fonctionnaire qui est amené à se prononcer sur une affaire doit raisonnablement comprendre qu'elle est de nature à apparaître, aux yeux de tiers, comme étant susceptible d'affecter son impartialité en la matière. Une décision adoptée en violation de ladite exigence d'impartialité et d'intégrité peut être considérée comme étant entachée d'illégalité.

Toutefois, la situation impliquant un risque purement abstrait de conflit d'intérêts dans lequel serait placé, au regard d'une éventuelle promotion, l'évaluateur d'un fonctionnaire du seul fait que les deux fonctionnaires sont classés à un même grade ne suffit pas, en tant que telle, pour conclure qu'un rapport d'évolution de carrière de l'intéressé est établi en violation de l'exigence d'impartialité et d'intégrité prescrite par l'article 14 du statut.

Le pouvoir d'organiser leurs services reconnu aux institutions serait gravement affecté si, afin d'éviter un risque purement abstrait de conflit d'intérêts tel que celui allégué par le requérant, l'administration était obligée de subordonner l'organisation de ses services en matière d'encadrement intermédiaire à des exigences prétendument inhérentes à l'impartialité de la notation en ne formant que des unités dont les chefs occupent un grade plus élevé que celui de leurs subordonnés.

Cela étant, la prévention du risque de conflit d'intérêts en cause doit être conciliée avec le pouvoir d'organisation susmentionné. À cet effet, le système de notation mis en place par la Commission par les dispositions générales d'exécution de l'article 43 du statut prévoit que l'évaluateur réalise l'évaluation en étroite association avec le validateur et que l'évaluateur et le validateur établissent ensemble le rapport d'évolution de carrière, étant précisé que le validateur a la faculté, à la suite de l'entretien demandé par le fonctionnaire noté, soit de modifier, soit de confirmer le rapport. Le régime prévoyant l'intervention du validateur dans le processus d'évaluation doit être considéré comme une

garantie de nature à neutraliser un éventuel risque abstrait de conflit d'intérêts en la personne de l'évaluateur.

T-118/04 and T-134/04 Caló 246-248

Ne constitue pas une violation de l'article 14 du statut la conduite du chef de cabinet d'un membre de la Commission qui, candidat à un emploi dont la nomination appartient au collège des membres de cette institution, s'abstient de participer à la réunion du groupe de chefs de cabinet qui doit préparer l'adoption de cette décision, y étant remplacé par un autre membre du même cabinet. En effet, ni l'article 14 du statut ni aucune autre règle de droit n'impose que, lorsqu'un fonctionnaire s'abstient de se prononcer sur une affaire au traitement ou à la solution de laquelle il a un intérêt personnel, tous les fonctionnaires placés sous son autorité hiérarchique s'en abstiennent également. De plus, la seule circonstance que ce fonctionnaire faisait partie d'une instance impliquée dans la préparation de la décision de nomination est sans pertinence et ne permet pas de considérer qu'il aurait été "amené", au sens de l'article 14 du statut, à se prononcer au sujet de l'adoption de cette décision, alors qu'il n'a pas participé à sa préparation et que, en tout état de cause, elle a été adoptée définitivement par le collège de la Commission.

T-100/04 Giannini 223-224

Conformément à l'article 14 du statut, le conflit d'intérêts ne concerne que la situation où un fonctionnaire est amené, dans l'exercice de ses fonctions, à se prononcer sur une affaire au traitement ou à la solution de laquelle il a un intérêt personnel de nature à compromettre son indépendance. Lors de l'appréciation d'un risque de conflit d'intérêts, l'existence de relations professionnelles entre un fonctionnaire et un tiers ne saurait, en principe, impliquer que l'indépendance du fonctionnaire est compromise ou apparaît comme telle, lorsque ce fonctionnaire est appelé à se prononcer sur une affaire dans laquelle ce tiers intervient.

Par conséquent, la participation d'un membre d'un jury de concours à l'évaluation d'un candidat travaillant ou ayant travaillé au sein de la même unité ou de la même direction que lui n'amène pas, en soi, ce membre à se prononcer sur une affaire au traitement ou à la solution de laquelle il a un intérêt personnel de nature à compromettre son indépendance.

F-44/05 Strack 132

L'article 11 bis du statut poursuit les objectifs d'indépendance, d'intégrité et d'impartialité, lesquels ont un caractère fondamental. L'obligation prescrite à son paragraphe 2 consiste, pour le fonctionnaire concerné, à informer l'autorité investie du pouvoir de nomination à titre préventif afin que celle-ci puisse prendre les mesures appropriées en fonction du contexte de l'affaire, et non à renoncer d'emblée au traitement ou à la solution de cette affaire ou à écarter, aux fins d'un tel traitement ou d'une telle solution, les éléments pouvant mettre en jeu son intérêt personnel. Par conséquent, l'article 11 bis du statut a un champ d'application large, couvrant toute circonstance dont le fonctionnaire doit raisonnablement comprendre, au vu de la fonction qu'il exerce et des circonstances propres de l'affaire, qu'elle est de nature à apparaître, aux yeux des tiers, comme une source possible d'altération de son indépendance.

F-88/09 and F-48/10 Z 190, 281

En l'absence d'élément permettant de conclure à l'existence d'un conflit d'intérêts, l'existence de relations professionnelles entre le greffier de la Cour de justice et l'époux d'un tiers, voire avec le tiers lui-même, ne saurait suffire à impliquer que son indépendance a été compromise du seul fait qu'il a été appelé à se prononcer sur une affaire concernant indirectement ledit tiers. De même, le fait que ledit greffier a décidé, en sa qualité d'autorité investie du pouvoir de nomination, de l'octroi et de la prolongation des contrats d'emploi dudit tiers, ainsi que d'une sanction disciplinaire envers un fonctionnaire ayant envoyé un courrier électronique au personnel de

l'institution concernant ce prétendu conflit d'intérêts, ne permet pas d'établir que la relation professionnelle entre le tiers et lui ait excédé le cadre normal ou qu'il ait adopté une décision de réaffectation dudit fonctionnaire avec l'intention de punir celui-ci pour avoir révélé l'existence d'un prétendu traitement de faveur au bénéfice du tiers.

F-36/11 BD 68, 7O and 80

L'article 11 bis du statut, applicable aux agents contractuels au titre de l'article 3 bis du régime applicable aux autres agents en vertu des articles 11 et 81 du même régime, a pour but de garantir l'indépendance, l'intégrité et l'impartialité des fonctionnaires et agents, ainsi que, par voie de conséquence, celles des institutions qu'ils servent en imposant au fonctionnaire ou à l'agent concerné un devoir d'information préventif de l'autorité investie du pouvoir de nomination ou de l'autorité habilitée à conclure les contrats d'engagement destiné à lui permettre de prendre, le cas échéant, des mesures appropriées. Eu égard au caractère fondamental des objectifs d'indépendance et d'intégrité poursuivis par cette disposition et au caractère général de l'obligation prescrite aux fonctionnaires et agents, il convient de reconnaître à l'article 11 bis du statut un large champ d'application, couvrant toute situation au vu de laquelle l'intéressé doit raisonnablement comprendre, compte tenu des fonctions qu'il exerce et des circonstances, qu'elle est de nature à apparaître, aux yeux des tiers, comme une source possible d'altération de son indépendance. A cet égard, l'indépendance des fonctionnaires et agents vis-à-vis des tiers ne doit pas seulement être appréciée d'un point de vue subjectif. Elle suppose aussi d'éviter, particulièrement dans la gestion des deniers publics, tout comportement susceptible d'affecter objectivement l'image des institutions et de saper la confiance que celles-ci doivent inspirer au public.

Par ailleurs, il importe peu que l'institution concernée n'ait subi, par hypothèse, aucun préjudice financier à cause des manquements en cause, car les obligations qui pèsent sur les fonctionnaires et agents en vertu des articles 11 bis et 12 ter du statut tendent aussi à préserver l'indépendance et l'image des institutions.

F-155/12 Garcia Dominguez 34, 36 and 37

According to case-law, in the assessment of a conflict of interests, the existence of professional relations between an official and a third party cannot, in principle, mean that the official's independence is or appears to be impaired when that official is called upon to decide on a matter in which that third party is involved. In addition, the principle that the selection board must be impartial requires a member of the board to refrain from taking part in the assessment of a candidate where there is a direct link between the board member and the candidate.

In this connection, admittedly, one of the members of the selection board was the head of a service of a European Institution when the two candidates were employed there. However, it cannot be inferred from this fact that that member of the selection board had a direct link with those two candidates.

Moreover, although several candidates in the competition appear as 'friends' on the 'Facebook' account of two other members of the selection board, that status alone does not show that there are direct links between the members and those candidates. The fact that two persons are 'friends' on that network does not necessarily mean that there is a friendship, in the usual sense of the word, between those persons, but may merely be due to the wish of both those persons to exchange information on topics of general or professional interest. In addition, a person who is a 'friend' of another person does not necessarily have access to all the information published by that person, since each Facebook user may customise the settings for the access which he wishes to grant to his personal data.

C-538/13 eVigilo 43-47

The third subparagraph of Article 1(1) of Directive 89/665 and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18 must be interpreted as not precluding a finding that the evaluation of the tenders is unlawful on the sole ground that the tenderer has had significant connections with experts appointed by the contracting authority who evaluated the tenders.

The contracting authority is, at all events, required to determine the existence of possible conflicts of interests and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them. In the context of the examination of an action for annulment of an award decision on the ground that the experts were biased, the unsuccessful tenderer may not be required to provide tangible proof of the experts' bias. It is, in principle, a matter of national law to determine whether, and if so to what extent, the competent administrative and judicial control authorities must take account of the fact that possible bias on the part of experts had an effect on the decision to award the contract.

Evidence such as the connections between the experts appointed by the contracting authority and the specialists of the undertakings awarded the contract, in particular, the fact that those persons work together in the same university, belong to the same research group or have relationships of employer and employee within that university, if proved to be true, constitutes such objective evidence as must lead to a thorough examination by the contracting authority or, as the case may be, by the administrative or judicial control authorities.

8. SANCTIONS

8.1. Principle of assimilation

C-68/88 Greek Maize 23-25; C-352/92 Milchwerke 23; C-2/88 Zwartveld 17

Member States must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law and which, in any event, make the penalty effective, proportionate and dissuasive. *That obligation also extends to the initiation of any proceedings under administrative, penal, fiscal or civil law for the collection or recovery of duties or charges which have been fraudulently evaded.* In this context Member States and the Community institutions have mutual duties of sincere cooperation.

8.2. European Union competence

C-240/90 Germany v Commission 22 and 39; C-375/05 Geuting 39; C-496/04 Slob 39-41; C-176/03 Commission v Council 48; C-440/05 Commission v Council 70 and 71

Administrative sanctions: The Community has the power to provide for administrative *penalties* such as exclusions, surcharges etc., which are necessary in order to combat irregularities; those penalties come within the implementing powers which the Council may delegate to the Commission.

A measure, of which the consequences are the same whether there was unlawful conduct or not, does not seek to penalise an irregularity and thus cannot be classified as a penalty within the meaning of Regulation No 2988/95.

Notwithstanding the Community competence, there is nothing to prevent a Member State from adopting measures beyond those set out in a Community regulation where it may deem them necessary and if the measures set out in the Community regulation are merely minimum requirements. However, national authorities must exercise their discretion in compliance with the general principles of Community law, which include the principles of proportionality, legal certainty and the protection of legitimate expectations.

Criminal sanctions: When the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for enforcing a Community policy (or at least certain Community policies), the Community may take measures which relate to the criminal law of the Member States which it considers necessary.

By contrast, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence. It follows that the Community legislature may not adopt provisions, which relate to the type and level of the applicable criminal penalties.

8.3. Administrative sanctions

C-137/85 Maizena 12-14; C-210/00 Champignon 35 – 44 and 52; C-354/95 National Farmers' Union 57; C-236/02 Slob 37; C-274/04 Man Sugar 15*; C-94/05 Emsland-Stärke 43; C-367/09 BIR 43*

Penalties imposed irrespective of fault are not of a criminal nature. These administrative penalties, however, cannot be imposed unless they rest on a clear and unambiguous legal basis.

They cannot be imposed on the basis of the provisions of Articles 5 and 7 of Regulation No 2988/95 alone since, if, in connection with the protection of the European Union's financial interests, an administrative penalty is to be applied to a category of persons, a necessary precondition is that, prior to commission of the irregularity in question, either the European Union legislature has adopted sectoral rules laying down such a penalty and the conditions for its application to that category of persons or, where such rules have not yet been adopted at European Union level, the law of the Member State where the irregularity was committed has provided for the imposition of an administrative penalty on that category of persons.

C-304/00 Strawson 52

The application of deterrent and effective penalties in respect of irregularities in applications for aid concerning the years before that in which those irregularities came to light, subject to limitation periods, cannot be considered to be unjustified or disproportionate.

8.4. Non-retroactivity

C-295/02 Gerken 61; C-45/06 Campina 33; C-286/05 Haug 24

The withdrawal of granted funds constitutes an administrative penalty and leads to the retroactive application of a less stringent provision under Article 2(2) of Regulation No 2988/95. This principle does not apply insofar as a provision does not impose a penalty but provides for a basis of calculation for the amounts due.

C-420/06 Jager 60-70

Equally, there is no retroactive application of a less severe penalty in case of a CAP reform, which is not adopted with the aim of penalising less severely certain irregularities committed under the previous system, but is aimed at adapting those penalties to the

new regulatory context resulting from the CAP reform and maintaining the coherence of the system of penalties in the light of the principles underlying the reform.

8.5. Proportionality

C-354/95 National Farmers' Union 53; C-63/00 Schilling 40; C-210/00 Champignon 59-68; C-94/05 Emsland-Stärke 53; C-143/07 Reuter 17-19 and 35; C-230/06 Militzer 48-51

Given the difficulties involved in proving fraudulent intent, it cannot be considered unjustified or disproportionate to impose a dissuasive and effective penalty or hold someone liable even if the irregularity was committed by error, or in good faith and without fraudulent intent.

8.6. Criminal law sanctions: *Ne bis in idem*

C-467/04 Gasparini 28-29 and 37; C-436/04 Van Esbroeck 24

Relation of criminal penalties among the Member States: The *ne bis in idem* principle applies also between the Member States in respect of a penal offences even if the accused is acquitted finally because prosecution is time-barred; that principle does not apply to persons other than those whose trial has been finally disposed of. That principle is applicable between the Member States even for acts committed before the entry into force of international *ne bis in idem* rules.

T-199/99 Sgaravatti 138

Relation of Community and national penalties: The same facts may lead to a penalty imposed at Community and at national level provided one takes into account the other penalty.

C-489/10 Bonda 27, 28, 37 and 46

Article 138(1) of Regulation No 1973/2004 must be interpreted as meaning that the measures provided for in the second and third subparagraphs of that provision, consisting in excluding a farmer from receiving aid for the year in which he made a false declaration of the eligible area and reducing the aid he can claim within the following three calendar years by an amount corresponding to the difference between the area declared and the area determined, do not constitute criminal penalties. According to case-law (see, inter alia, ECHR, *Engel and Others v. the Netherlands*, 8 June 1976, §§ 80 to 82, Series A no. 22, and *Sergey Zolotukhin v. Russia*, no. 14939/03, §§ 52 and 53, 10 February 2009), three criteria are relevant in this respect, i.e. the legal classification of the offence under national law, the very nature of the offence, and the nature and degree of severity of the penalty that the person concerned is liable to incur.

If penalties laid down in rules of the common agricultural policy, such as the temporary exclusion of an economic operator from the benefit of an aid scheme, are not of a criminal nature, it follows that the *ne bis in idem* principle cannot be applied.

C-617/10 Åkelberg Fransson 34, 35 and 37

The *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine (in proceedings under Article 267 TFEU).

In order to ensure that all value added tax revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties. These penalties may therefore take the form of

administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.

8.7. Duty of EU Member States

C-186/98 Nunes and de Matos 14

Even where Community legislation provides for only civil or administrative penalties for conduct harmful to the financial interests of the Community, the Member States have to take all effective measures including criminal penalties.

9. RECOVERY

T-377/00, T-379/00, T 380/00, T-260/01 and T-272/01 Philip Morris Int. (upheld on this point by C-131/03 P Reynolds Tobacco) 79

On a series of actions for annulment of Commission decisions to commence, on behalf of the Community, a number of civil actions in a U.S. District Court (NY) against the cigarette manufacturers for their participation in a system of smuggling and distributing contraband cigarettes in the territory of the EC, the General Court decided to dismiss as inadmissible the manufacturers' applications for annulment of the Commission's decisions. A decision to commence legal proceedings, whether inside the EC or in a third State, does not in itself alter the legal position of the cigarette manufacturer defendants since the contested decisions to launch the action do not produce any binding legal effect.

9.1. Irregularities and abuse of law

C-110/99 Emsland-Stärke 52 and 53; C-515/03 Eichsfelder 39

Abuse of law is regulated by Article 4(3) of Regulation No 2988/95. *A finding that there is an abuse presupposes*: first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it; it is for the national court to verify the existence of an alleged abuse of law in accordance with the rules of evidence of national law. An abuse entails the obligation to reimbursement and is not in conflict with the principle of lawfulness.

9.2. Limitation period

C-278/02 Handlbauer 30-34; C-226/03 P Martí Peix 18

The limitation period of Article 3(1) of Regulation No 2988/95 is applicable to the irregularities leading to both administrative measures and penalties. It starts from the end of the irregularity.

C-278/02 Handlbauer 41-43; C-226/03 P José Martí Peix (T-125/01 José Martí Peix) 92 - 94; C-279/05 Vonk 44

A notification to the concerned economic operator interrupts the limitation period only if the suspected irregularities are sufficiently precisely defined. This is the case in a Commission (OLAF) letter seeking to investigate irregularities. An irregularity is continuous or repeated where it is committed by a Community operator who derives economic advantages from a body of similar transactions which infringe the same provision of Community law. The fact that the irregularity relates to a relatively small proportion of all the transactions carried out in a given period and that the transactions in which the irregularity has been detected always concern different consignments is immaterial in this respect.

C-52/14 Pfeifer & Lagen 56, 69, 74

In order to be regarded as a 'repeted irregularity' within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95, it is required only that the period between each irregularity be shorter than the limitation period of four years provided for in the first subparagraph of Article 3(1).

In the case of a continuos or repeted irregularity the limitation period begins to run from the day on which the irregularity ceased, irrispective of the date on which the national administration became aware of that irregularity. Acts relating to investigation or legal proceedings adopted by the competent authority and notified to the person in question do not have the effect of interrupting the limitation period laid down in the fourth subparagraph of Article 3(1).

C-62/06 Zefeser 26

The classification of an act as 'an act that could give rise to criminal court proceedings' which allows the post-clearance recovery of import duties even beyond the limitation period set out in the Customs legislation, falls within the competence of the customs authorities required to determine the exact amount of the import duties or export duties in question.

T-375/05 Le Canne 79 and 82

Par ailleurs, le principe général de droit communautaire du délai raisonnable doit être respecté dans le cadre des procédures administratives. Subordonner la prescription de l'instruction ou des poursuites, par la Commission, d'une irrégularité affectant l'exécution d'un projet à la clôture définitive, par cette même institution, du programme pluriannuel concerné, conduirait à la prorogation du délai de prescription en violation du principe général du délai raisonnable.

C-131/10 Corman 54-55; C-278/07 to C-280/07 Hauptzollamt Hamburg 45

Under the derogation provided for in Article 3(3) of Regulation No 2988/95, Member States retain wide discretion in fixing longer limitation periods which they intend to apply in cases involving an irregularity that is detrimental to the European Union's financial interests. Although, this Regulation does not provide for any information or notification process relating to the use made by Member States of their possibility of providing for longer limitation periods. Thus, no form of monitoring has been provided for at European Union level as regards either the limitation periods applied by way of exception by Member States under that provision or the sectors in which Member States have decided to apply those periods.

C-447/13 Nencini 49

Article 85b of the Implementing Regulation sets the starting point for the limitation period as the deadline notified to the debtor in the debit note, that is to say, in the act by which the determination of the debt by the authorising officer is brought to the notice of

the debtor and by which he is informed of the final date for payment, in accordance with Article 78 of the Implementing Regulation.

Having regard to Article 73a of the Financial Regulation, the period in which a debit note is communicated must be presumed to be unreasonable where that communication takes place outside a period of five years from the point at which the institution was, in normal circumstances, in a position to claim its debts. Such presumption cannot be overturned unless the institution in question establishes that, despite the efforts which it has made, the delay in acting was caused by the debtor's conduct, particularly time-wasting manoeuvres or bad faith. In the absence of such proof, it must therefore be held that the institution has failed to fulfil the obligations on it under the reasonable period principle.

9.3. Principle of legality

C-295/02 Gerken 56

In Regulation No 2988/95, the Community legislator set out some general principles that all the sectoral regulations must comply with. One of these is the principle of the retroactive application of less severe administrative penalties.

C-158/06 Stichting 34

Where the conditions for the grant of financial assistance by the Community to a Member State are set out in the grant decision but that Member State has neither published them nor made them known to the ultimate beneficiary of the assistance, it is not contrary to Community law to apply the principle of legal certainty so as to preclude repayment by that beneficiary of the amounts wrongly paid, provided that it is possible to establish the beneficiary's good faith. In such a case, the Member State concerned may be held financially liable for the amounts not recovered in order to give effect to the Community's right to obtain repayment of the amount of the assistance.

C-383/06 to C-385/06 VNOSW 38-40

In the area of Structural Funds Article 23(1) of Regulation No 4253/88 is the relevant legal basis for the obligation to recover and not Regulation No 2988/95 which merely lays down general rules. The exercise of any discretion to decide whether or not it would be expedient to demand repayment of Community funds unduly or irregularly granted would be inconsistent with the duty imposed on national administrations by Article 23(1) of Regulation No 4253/88.

9.4. Non-performance of contractual obligations

T-217/01 Forum des migrants 44 and 58

Applicants for and beneficiaries of Community financial aid have an obligation to provide information and to act in good faith, and are thus required to satisfy themselves that they are submitting reliable information to the Commission. The Commission can terminate a grant agreement if the beneficiary gives incomplete information in order to obtain payment of the grant.

T-29/02 GEF 73

The jurisdiction of the General Court to deal with an action based on an arbitration clause necessarily implies jurisdiction to deal with a counterclaim made by an institution in the context of the same action which derives from the contractual relationship or the situation on which the main application is based or has a direct link with the obligations deriving there from.

9.5. Customs

C-23/04 to C-25/04 Sfakianakis 21and 49

Customs authorities of an EC Member State need to accept and to comply with the decisions (e.g. on the validity of an EUR 1 certificate) taken by the authorities of a third country on the basis of a protocol on administrative cooperation between customs authorities; provided that the cooperation under the protocol is founded both on the division of responsibilities (between MS and third countries authorities) and on mutual trust between the authorities concerned.

C-12/92 Huygen 27-28

The EC Member States' authorities also have to accept the results of an inquiry by the third country's authority into the validity of a EUR 1 certificate undertaken on the request of the Member State's authorities. This means that the third country's decision can only be challenged if the customs authorities of the third state have not been in a position to carry out the subsequent verification properly and it has then been carried out by the importing Member State.

The obligation of acceptance of third countries' decisions is not limited to administrative acts but also includes judicial decisions on the legality of administrative decisions delivered by the third country authorities.

C-222/84 Johnston 18-19

The failure to accept judicial decisions would affect the exporter's right to an effective judicial remedy which is a general principle of EC law.

C-204/07 P C.A.S. 95 and 106-111

It is the task of the Commission to satisfy itself, in the supervising and monitoring the proper implementation of the Association Agreement, that the third country's authorities correctly classify the certificates (A.TR.1) as either irregular or inauthentic.

C-153/94 and C-204/94 Faroe Seafood 24-25

In the case of preferential treatment of goods originating in a third country on the basis of a unilateral Community measure such as a regulation, decisions taken by the authorities of the non-member State cannot bind the Community and its Member States in their interpretation of the Community legislation. Determinations made by the Commission as to the origin of goods in the light of a mission of enquiry must take precedence over the determinations of the customs authorities of the exporting non-member State.

9.6. VAT

C-354/03, C-355/03 and C-484/03 Optigen 55

In the case of business transactions that are part of a chain of supply, economic operators may only be held liable for tax fraud if they had knowledge or means of knowledge of their direct or indirect involvement in the fraud scheme. Member States' tax authorities may not refuse businesses reimbursement/deduction of input tax following transactions which are preceded by VAT fraud when the taxable person effected the relevant transactions without knowing or having any means of knowledge of the fraudulent nature of another transaction in the supply chain.

C-384/04 FTI 35

A taxable person to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of the value added tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid may be

made jointly and severally liable for the tax losses. However, national rules containing this liability rule have to comply with the principles of legal certainty and proportionality.

9.7. Structural funds

C-388/12 Comune di Ancona 29, 33 and 42

Article 30(4) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds must be interpreted as meaning that the modifications referred to in that provision include, not only those that take place during the performance of a project, but also those that take place afterwards, in particular in the course of the project's management, provided that those modifications take place within the five-year period specified in that provision.

Article 30(4) of Regulation No 1260/1999 must be interpreted as meaning that in order to undertake an assessment as to whether the grant of the concession generates substantial revenue for the contracting authority or undue advantage for the concessionaire, it is not first necessary to establish whether the works under concession have undergone a substantial modification.

Article 30(4) of Regulation No 1260/1999 must be interpreted as referring both to physical modifications – where the works carried out are not as specified in the project approved for funding – and to modifications affecting function, it being understood that, in the case of a modification consisting in the use of works for activities other than those originally envisaged in the project submitted for funding, such a modification must be capable of significantly reducing the capacity of the operation in question to attain its designated objective.

C-330/01 P Hortiplant 33; T-180/01 Euroagri 56-59; T-141/99, T-142/99, T 150/99 and T-151/99 Vela 113

Under Article 24 of Regulation No 4253/88, the Commission must request the Member State concerned to submit comments. The beneficiary must also be given the opportunity to submit comments, but the Commission has no obligation to inform the applicant of the fact that it had given the Member State the opportunity to submit comments. It is legitimate for the Commission to repeat its checks where fresh evidence becomes available. Regulations Nos 2988/95 and 2185/96 are designed to apply on a supplementary basis to sectoral legal bases.

C-110/13 HaTeFo GmbH 39

The fourth subparagraph of Article 3(3) of the Annex to the SME Recommendation must be interpreted as meaning that enterprises may be regarded as 'linked' for the purposes of that article where it is clear from the analysis of the legal and economic relations between them that, through a natural person or a group of natural persons acting jointly, they constitute a single economic unit, even though they do not formally have any of the relationships referred to in the first subparagraph of Article 3(3) of that annex. Natural persons who work together in order to exercise an influence over the commercial decisions of the enterprises concerned which precludes those enterprises from being regarded as economically independent of each other are to be regarded as acting jointly for the purposes of the fourth subparagraph of Article 3(3) of that annex. Whether that condition is satisfied depends on the circumstances of the case and is not necessarily conditional on the existence of contractual relations between those persons or a finding that they intended to circumvent the definition of a micro, small or medium-sized enterprise within the meaning of that recommendation.

10. DAMAGES

The European Union must make good any damage caused by OLAF or by its servants in the performance of their duties (Article 340 (2) TFUE).

10.1. Conditions for non-contractual liability

4/69 Lütticke 10

For the non-contractual liability of the EU to arise, three conditions must be met: OLAF's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the two.

T-387/94 Asia Motor 106-107; T-56/92 Koelman 21

An application seeking compensation for damage must state the evidence, from which the conduct alleged against it 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. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible the essential points of fact and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible.

T-228/02 OMPI 179

In the absence of any indication from the applicant, it is not for the Court to make assumptions and ascertain whether there is a causal link between the conduct complained of the injury alleged.

T-64/89 Automec 76; T-125/06 CSAM 100

The Court has accepted that, in special circumstances, it was not essential to specify the exact extent of the damage in the application and to state the amount of compensation sought. At the same time it has been held that the applicant had to establish, or at least indicate, the existence of any such circumstances in the application.

5/71 Schöppenstedt 11

In case if it is a legal measure that is relied on the basis for an action of the damages, it must constitute, in order to incur non-contractual liability, a sufficiently serious breach of a rule of law intended to confer rights on individuals.

C-282/05 P Holcim AG 47; C-352/98 P Bergaderm 43-44

The decisive criterion for establishing that a breach of EU law was sufficiently serious is whether the Commission manifestly and gravely disregarded the limits of its discretion. However, in all cases where the Commission 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.

T-198/95, T-171/96, T-230/97, T-174/98 and T-255/99 Comafrika 138 and 144; C-352/98 P Bergaderm 40

Finding of an error or irregularity on the part of the Commission is not sufficient in itself to attract the non-contractual liability of the EU unless that error or irregularity is characterised by a lack of diligence or care. Due diligence would be breached if the Commission or its servants committed a mistake which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence. However, the complexity of the situations to be regulated, difficulties in the

application or interpretation of the legislation and the margin of discretion available to the author of the act in question should always be taken into account.

T-178/98 Fresh Marine 118; C-146/91 KYDEP 81

It is for the party seeking to establish the EU liability to prove the existence and extent of the damage and a sufficiently direct causal link between that damage and the conduct of the Community's institution. All three main conditions have to be satisfied otherwise the action for damages will be rejected.

T-48/05 Franchet and Byk 182-183*

However, strict application of the rule, that it is for the applicant to establish that all the conditions are satisfied, may be mitigated, where a harmful event may have been the result of a number of different causes and where the Commission has adduced no evidence enabling it to be established to which of those causes the event was imputable, although it was best placed to provide evidence in that respect, so that the uncertainty which remains must be construed against it.

T-539/12 and T-150/13 Ziegler 65

The EU can be held liable for the damage suffered by the applicants due to its lack of action only if the allegedly unlawful actions and omissions of the Commission directly caused the alleged prejudice and, accordingly, on condition that, if the measure that the applicants criticise the Commission for having failed to take had in fact been taken, the alleged prejudice would probably not have taken place.

T-309/03 Camós Grau 157, 162*

The undue accusations made by OLAF against the official in its final report on the investigation, attributing to him wrongful acts that would have rendered him liable to criminal and disciplinary action, seriously impairing his honour and reputation, constitute non-pecuniary damage justifying pecuniary compensation.

10.2. Period of limitation for damages

C-282/05 P Holcim 29-33

The possibility to bring an action for damages is limited by a period of five years, which begins with the occurrence of the event that gives rise to the liability of the EU (Article 46 of the Statute of the Court of Justice). However, it cannot begin until all the requirements governing an obligation to provide compensation for damage are satisfied and, in particular, until the damage to be made good has materialised. Therefore, where the liability has its origin in a legislative measure, that period of limitation does not begin until the damaging effects of that measure have arisen.

This period will be interrupted if proceedings are instituted before the Court of Justice or if prior to them an application is made before OLAF (Article 46 of the Statute of the Court of Justice).

10.3. Principle of *res judicata*

T-539/12 and T-150/13 Ziegler 37, 40 and 42

The principle of *res judicata* presupposes that the action alleged to be inadmissible and the action culminating in the decision having the force of *res judicata* are between the same parties, have the same subject-matter and are based on the same cause of action.

Although actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such measure has not been taken, an action to establish liability seeks compensation for damage resulting from a measure or from

unlawful conduct, attributable to a Community institution or body. However, the claim for damages is inadmissible when it is actually aimed at securing withdrawal of an individual decision which has become definitive and would, if upheld, have the effect of nullifying the legal effect of the decision.

11. PREVENTION

11.1. Early Warning System

Order T-320/09 Planet 37, 38, 42, 44, 94 [judgment of the General Court: T-320/09; under Appeal before the Court of Justice]

Articles 15 to 17 and 19 to 22 of Decision 2008/969 do not only permit but also, and primarily require the authorizing officers concerned to adopt specific measures against the entity of the project concerned.

The impact of a warning about an entity in the EWS, even in the W1 category, cannot be confined within the institutions, organs and agencies of the European Union and such a warning necessarily affects relations between the authorising officers concerned and that entity.

The reinforced monitoring measures which the authorising officer is required to take against the entity concerned are not confined entirely to the institution internally, but are capable of having effects on the relations between that institution and the entity concerned.

A W1 warning necessarily affects the legal situation of the person concerned. Although the a warning necessarily has repercussions on relations between the authorising officer concerned and the entity affected, this does not imply that the external effects are automatically such as to bring about a distinct change in the legal situation of the entity affected. The Court must, rather, ascertain on a case by case basis whether there is such a change.

An action for annulment is available, according to settled case law, in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have binding legal effects capable of affecting the interests of the applicant by ringing about a distinct change in his legal position (see inter alia Case 50/81 IBM v Commission [1981] ECR 2639, paragraph 9; Case C-521/06 Athinnaiki Techniki v Commission [2008] ECR I-5829 and Case C-362/08 Internationaler Hilsfonds v Commission [2010] ECRI-669, paragraph 51).