



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 19 December 2019¹

Case C-831/18 P

European Commission

v

RQ

(Appeal — Articles 11(a) and 17 of Protocol (No 7) on the Privileges and Immunities of the European Union — EU Civil Service — Officials — Article 90(2) of Regulation No 31 (EEC), 11 (EAEC) — Director-General of OLAF — Commission Decision waiving official's immunity — Article 41(2)(a) of the Charter — Right to be heard)

1. This appeal, by which the European Commission challenges the General Court's decision in *RQ v Commission*,² raises a number of important questions concerning the fundamental right of an official of the EU institutions to be heard in his own defence. First, is a decision to waive an EU official's immunity from prosecution in national criminal proceedings an 'act affecting him adversely', for the purposes of the Staff Regulations?³ Second, what factors should be taken into account in assessing whether an official's immunity should be waived in accordance with Protocol (No 7) on the Privileges and Immunities of the European Union ('Protocol No 7')? Third, how should the right to be heard be interpreted in relation to the right to good administration enshrined in Article 41(2) of the Charter of Fundamental Rights of the European Union ('the Charter')?

Legislation

The Charter

2. Article 41(1) of the Charter guarantees every person the right to have their affairs handled impartially, fairly and within a reasonable time by the EU institutions. Article 41(2)(a) states that the right to good administration includes 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'.

3. Article 51(1) states that the provisions of the Charter are addressed, inter alia, to the EU institutions with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law. They are to respect the rights, observe the principles and promote the application of the Charter in accordance with their respective powers.

¹ Original language: English.

² Judgment of 24 October 2018, T-29/17, EU:T:2018:717 ('the judgment under appeal').

³ Regulation No 31 (EEC), 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ, English Special Edition 1962 (I), p. 135) as last amended by Regulation (EU) No 423/2014 of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 129, p. 12) ('the Staff Regulations').

4. Pursuant to Article 52(1), limitations on the exercise of rights, such as the right to good administration, must be provided for by law and respect the essence of those rights. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

Protocol (No 7) on the privileges and immunities of the European Union

5. Provisions governing officials (and other servants) of the European Union are set out in Chapter V of Protocol No 7. Within that Chapter, Article 11(a) states that EU officials are immune from legal proceedings in respect of acts performed by them in their official capacity.

6. Article 17 (part of Chapter VII, entitled ‘General Provisions’) provides that privileges, immunities and facilities are accorded to, inter alia, EU officials solely in the interests of the European Union. Pursuant to the second subparagraph of Article 17, each EU institution is required to waive that immunity wherever the institution concerned considers that such a waiver is not contrary to the interests of the European Union.

7. Article 18 requires the EU institutions to cooperate with the responsible authorities of the Member States for the purposes of applying Protocol No 7.

The Staff Regulations

8. Article 23 of the Staff Regulations provides that the privileges and immunities enjoyed by officials are accorded solely in the interests of the European Union. Subject to Protocol No 7, officials are not exempt from fulfilling their private obligations or from complying with the laws and police regulations in force. When privileges and immunities are in dispute the official concerned must immediately inform the appointing authority.

9. Article 24 states that the European Union is to provide assistance to officials, in particular in proceedings against any person to which that person is subjected by reason of his position or duties.

10. Article 90(2) forms part of Title VII (‘Appeals’) and states that an official may submit a complaint against an act affecting him adversely.

11. In accordance with Article 91(1), the Court has jurisdiction in any dispute between an official and the European Union regarding the legality of an act affecting that official adversely within the meaning of Article 90(2).

Regulation (EU, EURATOM) No 883/2013

12. Regulation (EU, EURATOM) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)⁴ lays down rules for the conduct of investigations to protect the financial interests of the European Union.⁵ In pursuit of the fight against fraud, corruption and any other illegal activity affecting the EU’s financial interests, OLAF has full independence from the Commission in order to exercise its investigative functions.⁶ Under Article 17(1), the Commission appoints the

⁴ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1).

⁵ Recitals 1 to 4.

⁶ Article 1; see also recital 3.

Director-General of OLAF. In accordance with Article 17(3), the Director-General is to perform his investigative and reporting duties fully independently of, inter alia, any government or institution. If the Director-General considers that the Commission has taken a measure which calls his independence into question, he is to inform immediately the Supervisory Committee and decide whether to bring an action against the Commission before the Court.⁷

Factual background

13. The factual background is summarised in paragraphs one to six of the judgment under appeal.

14. The facts arise from the same circumstances that led to the scandal known colloquially as ‘Dalligate’.⁸ In May 2012, Swedish Match (a manufacturer of a tobacco product known as ‘snus’) lodged a complaint with the European Commission. Swedish Match made serious allegations of attempted bribery involving a Maltese businessman, Mr Zammit, who it alleged had had a telephone conversation with the Secretary-General of the European Smokeless Tobacco Council (‘ESTOC’). Swedish Match claimed that during that telephone conversation Mr Zammit had requested payment of a ‘very large sum of money’ in exchange for organising a meeting with Mr John Dalli, the Member of the Commission responsible for health and consumer protection (whom he knew personally), thereby using his influence with the Commissioner in order potentially to influence proposed legislation to the advantage of the tobacco industry.

15. On 25 May 2012, OLAF opened administrative investigation OF/2012/0617 regarding that complaint. OLAF decided to pursue its investigations by asking the Secretary-General of ESTOC to have a further telephone conversation with Mr Zammit with a view to gathering additional evidence into the report of attempted bribery. The Secretary-General of ESTOC confirmed that she was willing to cooperate with OLAF in that stratagem.

16. On 3 July 2012, the Secretary-General of ESTOC telephoned Mr Zammit from OLAF premises and a second conversation took place between them. That telephone call was made with the consent of and in the presence of RQ, the Director-General of OLAF. OLAF also recorded the conversation.

17. On 15 October 2012, OLAF adopted its final report on the investigation. In that report it made reference to the telephone conversation of 3 July 2012 between the Secretary-General of ESTOC and Mr Zammit.

18. On 13 December 2012, Mr Dalli lodged a criminal complaint, together with an application to join any ensuing proceedings as a party claiming civil damages, before the Belgian courts. Mr Dalli raised the issue of OLAF’s alleged unlawful recording of Mr Zammit’s telephone conversation of 3 July 2012 in his complaint.

19. On 19 March 2013, the Belgian authorities asked the Commission to provide access to the records related to the acts under investigation and to release the officials who participated in that OLAF investigation from their duty of confidentiality. On 21 November 2013, RQ, as Director-General of OLAF, agreed to release the members of the investigation team and its Head of Unit from that duty.

⁷ The Supervisory Committee’s task is to monitor regularly the implementation of OLAF’s investigative responsibilities in order to reinforce its independence in the proper exercise of its functions under Regulation No 883/2013 (Article 15).

⁸ Mr John Dalli was appointed as the Maltese Member of the Commission for the period from 10 February 2010 until 31 October 2014. He served in the Commission of which Mr José Manuel Durão Barroso was the President (‘President Barroso’). On 24 December 2012 Mr Dalli lodged proceedings in the General Court (seeking annulment of the oral decision allegedly taken by President Barroso on 16 October 2012 to terminate Mr Dalli’s office as a Member of the Commission). Those proceedings resulted in the judgment of 12 May 2015, *Dalli v Commission*, T-562/12, EU:T:2015:270). The background circumstances of alleged bribery in relation to a Commission proposal to regulate the tobacco industry arose from the same sources that led to the investigation which in turn prompted the present proceedings.

20. By letters of 21 November 2014 and 6 February 2015, respectively, the Belgian authorities asked the Commission to waive the immunity of the OLAF staff members involved (including RQ), as they were seeking to establish whether there had indeed been an unlawful recording of Mr Zammit's telephone conversation of 3 July 2012. The Belgian authorities wanted to question the OLAF staff as defendants in that respect.

21. By letters of 19 December 2014 and 3 March 2015, the Commission requested further details in relation to that request, so as to enable it to reach a decision in full knowledge of the facts.

22. By the time that the Belgian Public Prosecutor's Office took the case over, the request to waive immunity was restricted to RQ. By letter of 23 June 2015 ('the letter of 23 June 2015'), the Public Prosecutor's Office set out certain facts which in its view indicated that an unlawful recording of a telephone conversation had taken place.

23. On 2 March 2016, the Commission adopted Decision C(2016) 1449 final concerning a request to waive RQ's immunity from legal proceedings ('the contested decision'). By that Decision, the Commission waived in part RQ's immunity from legal proceedings, in accordance with the second subparagraph of Article 17 of Protocol No 7.⁹ The waiver was limited to allegations of fact relating to the monitoring of a telephone conversation referred to in the letter of 23 June 2015. The Commission rejected the Belgian authorities' request to waive RQ's immunity in respect of other allegations.

24. In March and April 2016, the Commission issued public statements in which it repeated that RQ continued to enjoy its trust and that he continued to benefit from the presumption of innocence. The Commission also asserted that the contested decision did not affect the running of OLAF nor RQ's authority as its Director-General. On 1 April 2016, the Commission granted RQ's request for payment of his legal fees under Article 24 of the Staff Regulations.

25. By letter of 12 April 2016, the Belgian Public Prosecutor's Office asked the Commission to release RQ from his duty of confidentiality so as to enable the relevant national authorities to question him and to allow him to be heard as a defendant in the context of the national proceedings. The Commission granted that request by letter of 28 April 2016.

26. On 10 June 2016, RQ lodged a complaint against the contested decision in accordance with Article 90(2) of the Staff Regulations. On 5 October 2016, that complaint was rejected by the Commission's appointing authority by Decision Ares(2016) 5814495.

The contested decision

27. Recitals 1 to 8 of the contested decision record the factual background of the Belgian authorities' request to waive RQ's immunity.¹⁰

28. I summarise below the grounds relied on by the Commission in adopting the contested decision:

- It was necessary to ensure under Article 17 of Protocol No 7 that a waiver of immunity would not harm the interests of the European Union and, more specifically, the independence and proper functioning of the EU institutions, offices, bodies and agencies. It follows from the Court's case-law that that is the only substantive criterion that permits a waiver of immunity to be

⁹ See point 6 above.

¹⁰ See points 13 to 24 above.

refused. Otherwise, immunity should be waived systematically, as Protocol No 7 does not permit the EU institutions to verify whether the national legal proceedings underlying the request are well founded or fair.¹¹

- In reaching a decision, it was appropriate to take into consideration the highly specific legal framework governing OLAF investigations under Regulation No 883/2013. The EU legislature conferred powers of investigation on OLAF that the latter (although it is connected to the Commission) exercises in full independence from the Commission itself. That specific regulatory framework requires the Commission to satisfy itself that, by granting a request to waive immunity, it does not hinder the independence and proper functioning of OLAF as the EU's anti-fraud investigation office.¹²
- The immunity of the Director-General of OLAF could be waived only if the Commission were informed, with sufficient clarity and precision, of the reasons why the Belgian authorities took the view that the allegations against him could, if appropriate, warrant his being heard as a defendant in criminal proceedings. If that were not the case, any person concerned by an OLAF investigation could, by making manifestly unfounded allegations against its Director-General, succeed in bringing the functioning of that office to a standstill, which would be contrary to the interests of the European Union.¹³
- In the present case, regarding the allegations of unlawful recording of telephone conversations, further to the letter of 23 June 2015 the Commission now had very clear and specific indications showing that the Belgian authorities could reasonably — and, in any event, without acting in an arbitrary or abusive manner — consider that the allegations against RQ warranted his being investigated. In those circumstances, it would be contrary to the principle of sincere cooperation with the national authorities to refuse to waive RQ's immunity. The Commission was therefore, in its opinion, required to grant the request to waive immunity in respect of those allegations.¹⁴
- Nonetheless, RQ continued to benefit from a presumption of innocence and the decision to waive his immunity was in no way a judgment of whether the allegations against him were well founded or whether the national proceedings were fair.¹⁵
- Finally, RQ was entitled to claim legal assistance from the Commission on the basis of the first paragraph of Article 24 of the Staff Regulations, covering legal and lawyers' fees, in the event that the investigation against him by the Belgian authorities should result in proceedings being instituted that led him to incur costs.¹⁶

¹¹ Recital 9.

¹² Recital 10.

¹³ Recital 11.

¹⁴ Recital 13.

¹⁵ Recital 14.

¹⁶ Recital 15.

Procedure before the General Court and the judgment under appeal

29. On 17 January 2017, RQ brought proceedings before the General Court seeking annulment of the contested decision.¹⁷ RQ advanced five pleas in law in support of his action. He claimed infringement of: (i) Article 23 of the Staff Regulations and the second subparagraph of Article 17 of Protocol No 7, together with manifest errors of assessment concerning the waiver of immunity from legal proceedings; (ii) Article 24 of the Staff Regulations and breach of the duty to have regard to the welfare of officials; (iii) the obligation to state reasons; (iv) the principle of the protection of legitimate expectations; and (v) the rights of the defence.

30. Initially the Commission raised two objections to the admissibility of RQ's action. First, it argued that the new action was precluded by the fact that proceedings on the same issue were already pending before the General Court in Case T-251/16.¹⁸ Second, the Commission argued that the contested decision did not constitute an act adversely affecting RQ. At the hearing before the General Court the Commission withdrew its first objection of inadmissibility to RQ's action.

31. As set out in the judgment under appeal, the General Court annulled the contested decision and ordered the Commission to pay the costs of the proceedings. The Commission now challenges that judgment in its appeal before this Court.

The appeal and the procedure before the Court of Justice

32. The Commission asks the Court to:

- set aside the judgment under appeal;
- dismiss RQ's application to annul the contested decision introduced before the General Court and to give final judgment in the matter, or if this Court considers that the state of the proceedings does not allow it to give a definitive ruling, to refer the case back to the General Court for judgment;
- order RQ to pay the Commission's costs at first instance and on appeal before this Court.

33. The Commission submits that the judgment under appeal is vitiated by the following errors of law. First, the General Court was wrong in deciding that the contested decision gave rise to an act that adversely affected RQ. Second, the General Court erred in placing a very broad construction on the right to be heard enshrined in Article 41(2)(a) of the Charter. Third, the General Court erred in law with regard to its characterisation of the Commission's conduct in the case at issue.

First plea: error of law concerning the interpretation of Article 90(2) of the Staff Regulations and the meaning of the phrase 'an act affecting a person adversely' and of Article 17 of Protocol No 7

34. By its first plea the Commission challenges the General Court's ruling (in paragraphs 36 to 45 of the judgment under appeal) that the contested decision constitutes an act adversely affecting RQ.

¹⁷ By an application lodged in the General Court's registry on 20 May 2016, RQ instituted parallel proceedings challenging the contested decision under the specific procedure laid down in Article 17(3) of Regulation No 883/2013 in his capacity as Director-General of OLAF. The grounds of that application are that the contested decision is vitiated by error of law, since it calls his independence into question. That case (T-251/16) is suspended pending the outcome of the current proceedings. RQ also brought proceedings for interim measures (in Case T-251/16 R), seeking suspension of the contested decision in so far as it waived his immunity. The General Court rejected that application by order of 20 July 2016.

¹⁸ See footnote 16 above.

The judgment under appeal

35. The General Court began by recalling that ‘only measures the legal effects of which are binding on and are capable of affecting directly and immediately the interests of an official by bringing about a distinct change in his legal position constitute measures that adversely affect the official’.¹⁹ Protocol No 7 confers an individual right on the persons concerned, compliance with which is ensured by the system of remedies established by the Treaty. The immunity from legal proceedings provided by Article 11 of Protocol No 7 protects officials and members of staff of the EU institutions from prosecution by Member States’ authorities for acts performed in their official capacity. Hence, a decision to waive an official’s immunity changes his legal position. By removing that protection, it re-establishes his status as a person who is subject to the general law of the Member States and thus lays him open, without the necessity for any intermediary rule, to measures such as those ordering detention and the bringing of legal proceedings against him.²⁰

36. The discretion left to the national authorities, following the waiver of immunity, as regards the resumption or discontinuance of proceedings brought against an official or member of staff has no bearing on the fact that his legal position is directly affected. Thus, the Commission’s decision to waive RQ’s immunity constituted an act affecting him adversely.²¹

37. The General Court then proceeded to reject all the Commission’s arguments that sought to challenge that conclusion. First, it rejected the Commission’s submission that the Court’s judgment in *Humblet v Belgian State*,²² concerning the exemption of EU officials from all national taxes on salaries, wages and emoluments (paid by what was at that time the High Authority of the European Coal and Steel Community (‘the ECSC’)), did not confirm that an official can bring proceedings against an institution’s decision to waive his immunity. Second, the General Court held that there was no basis in law for the Commission’s argument that that Court’s earlier ruling in *Mote v Parliament*²³ could not be applied by analogy, because that case concerned the privileges and immunities of a Member of the European Parliament (‘MEP’) rather than an official. Third, the General Court rejected the Commission’s submission that the decision of the former Civil Service Tribunal in *A and G v Commission*,²⁴ should be disregarded because that ruling had not been confirmed by the General Court or this Court.²⁵

38. The General Court accordingly rejected the Commission’s plea of inadmissibility on those grounds.²⁶

The parties’ submissions

39. The Commission submits that the General Court erred in law in the following respects. There is no line of established case-law as to whether a decision to waive an official’s immunity under Protocol No 7 constitutes an act which affects him adversely. It cannot be assumed that the Court would apply the reasoning in an old case, such as *Humblet v Belgian State*,²⁷ which is distinguishable from RQ’s case, when interpreting Articles 90 and 91 of the Staff Regulations. The rules in Article 9 of Protocol No 7 which apply to MEPs in substance provide protection which is stronger and more personal in

19 Paragraph 36 of the judgment under appeal.

20 Paragraphs 36 to 38 of the judgment under appeal.

21 Paragraphs 39 and 40 of the judgment under appeal.

22 Judgment of 16 December 1960, 6/60-IMM, EU:C:1960:48.

23 Judgment of 15 October 2008, T-345/05, EU:T:2008:440.

24 Judgment of 13 January 2010, F-124/05 and F-96/06, EU:F:2010:2.

25 Paragraphs 42 to 44 of the judgment under appeal.

26 Paragraph 45 of the judgment under appeal.

27 Judgment of 16 December 1960, 6/60-IMM, EU:C:1960:48.

nature than that afforded to officials such as RQ. Thus, the judgments cited in the judgment under appeal concerning MEPs are not relevant. Also, the General Court wrongly relied on a judgment of the Civil Service Tribunal which is not decisive as it was not confirmed by a decision of the General Court or this Court.

40. The Commission submits that the General Court's ruling is based on misunderstanding the right to immunity as being subjective and a misinterpretation of the text of Article 11 of Protocol No 7. The wording of that provision indicates that immunity is not a subjective right of the official concerned. The official's position is affected only indirectly where immunity is waived under Article 17 of Protocol No 7: only a conviction has a real impact on the official's legal position. The purpose of immunity is to prevent hindrances to the proper functioning and independence of the European Union. An act that 'adversely affects' an official's position is one that produces binding legal effects which directly and immediately affect the interests of the person concerned by changing his legal situation. The Commission's normal practice is systematically to waive immunity in order not to impede national procedures. In so doing, the Commission seeks to comply with the principle of sincere cooperation. The normal safeguards, such as the presumption of innocence, the rights of the defence and the usual procedural guarantees apply to protect the official concerned. In so far as that official needs access to a remedy, the appropriate course is for him to challenge the validity of the decision at issue within the domestic proceedings and for the national court to make a preliminary reference to the Court under Article 267 TFEU.

41. RQ argues that the Commission's first plea should be rejected as inadmissible or unfounded.

42. The purpose of an appeal is not to reproduce the same grounds and identical arguments to those that were heard at first instance. Yet, in its appeal the Commission simply repeats the arguments that it made at first instance. Accordingly, its first plea should be rejected as inadmissible.

43. In the alternative, the Commission is wrong to assert that waiving immunity does not change the official's legal position. Before the waiver, he is protected legally and factually from any national proceedings. After immunity is waived, that protection is suppressed. The fact that *Humblet v Belgian State*²⁸ arose in the context of the protocol to the ECSC Treaty does not mean that it cannot apply to the present case. Likewise, it does not follow that *Mote v Parliament*²⁹ cannot apply by analogy. The judgment in *A and G v Commission*³⁰ is good authority. The Commission did not appeal that decision, which accordingly became definitive.

Assessment

44. By its first plea, the Commission criticises the General Court's interpretation of both Articles 90(2) and 91(1) of the Staff Regulations. Did the General Court err in law in its interpretation of Article 90(2) of the Staff Regulations, in particular the meaning of the expression '... an act affecting him adversely', and therefore in concluding that RQ's application was admissible?

45. Both Articles 90(2) and 91(1) of the Staff Regulations use that expression. I shall not examine the latter provision separately: my conclusion in respect of Article 90(2) should be read as applying also to Article 91(1) of the Staff Regulations.

46. I shall start by examining RQ's plea of inadmissibility.

²⁸ Judgment of 16 December 1960, 6/60-IMM, EU:C:1960:48.

²⁹ Judgment of 15 October 2008, T-345/05, EU:T:2008:440.

³⁰ Judgment of 13 January 2010, F-124/05 and F-96/06, EU:F:2010:2.

47. RQ rightly states that the object of an appeal against a decision of the General Court is not simply to reproduce and re-rehearse the same grounds that were advanced at first instance.³¹ However, provided that an appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in an appeal.

48. In its appeal the Commission disputes the General Court's reading and application of principles which that Court derived from its own case-law and that of the former Civil Service Tribunal. The Commission also takes issue with the General Court's interpretation of Articles 11(a) and 17 of Protocol No 7. The Commission is therefore clearly challenging the reasoning in the judgment under appeal, which it is for this Court to examine.

49. I therefore reject RQ's plea of inadmissibility.

50. As to the substance, it seems to me that it is common ground that the contested decision constitutes an 'act' for the purposes of Article 90(2) of the Staff Regulations. The legal effects of that decision were to partially waive RQ's immunity from prosecution for alleged criminal offences by national authorities in the Belgian courts that would otherwise have been afforded to him by Article 11(a) of Protocol No 7. The contested decision was therefore an act which had legal effects on third parties (namely the Belgian authorities), as it enabled them to proceed against RQ. Its effects thus extended beyond the internal workings of the Commission.

51. The essence of the dispute between the parties is whether the contested decision affected RQ adversely within the meaning of Article 90(2) of the Staff Regulations.

52. The starting point of the analysis is dictated by consistent case-law in so far as it is necessary to examine the wording, objectives, context and scheme of Article 90(2) of the Staff Regulations.³² The ordinary everyday meaning of the words 'affecting him adversely' is that it must be possible to demonstrate that the contested act changed the legal position of the official concerned in an injurious manner.

53. I therefore reject the Commission's submission that regard should be had solely to whether the contested decision was adverse to the functioning of the European Union itself. The aim of Article 90 is to enable officials to appeal against reasoned decisions which affect them. Article 90(1) states that an official may request the relevant appointing authority to take a decision relating to *him*. The word 'him' indicates that it is the official himself that is the subject of the decision at issue. Article 90(2) then allows an official to lodge a complaint against such a decision, precisely because the person concerned (the official) is affected by the legal consequences of the act. I also note that under Article 90(1) and (2) of the Staff Regulations a failure of the appointing authority to reply to a complaint within the time limit laid down is deemed to constitute an implied decision which opens the route for the official concerned to challenge the *failure* of the appointing authority to take a challengeable decision. Either way, the focus is on enabling the *official concerned* by the appointing authority's action (or inaction) to bring a challenge. The interpretation advanced by the Commission cannot therefore be correct.

54. It seems to me that there is a necessary link between the immunity conferred by Article 11(a) of Protocol No 7 and the official's functions as an EU civil servant. That provision refers expressly to acts performed by EU civil servants acting in their official capacity. That is because the scope of immunity is not so broad that it covers officials when acting in a purely personal capacity.

31 Judgment of 12 September 2006, *Reynolds Tobacco and Others v Commission*, C-131/03 P, EU:C:2006:541, paragraphs 49 and 50 and the case-law cited.

32 Judgment of 22 November 2012, *Probst*, C-119/12, EU:C:2012:748, paragraph 20.

55. National authorities which seek to pursue a criminal investigation implicating an EU official or take further measures following such an investigation have to request that the immunity of that official be waived and obtain a decision agreeing to that request. Absent such a decision, those authorities cannot proceed against the official concerned. The consequences of a decision waiving immunity thus changes the official's position radically. Prior to the waiver no action could be taken against the official concerned in relation to an alleged criminal offence. However, after immunity is waived the official can be subject to criminal proceedings under national laws.

56. It would be artificial in the extreme to treat the waiver as producing no legal change to the official's position. On the contrary, there has been a significant change which has serious adverse consequences for that official. He will in any event now be subject to a criminal investigation which he would otherwise have been spared. Potentially, he may find that he faces charges in criminal proceedings and the prospect of detention.

57. The Commission seeks to rely upon the wording of Article 17 of Protocol No 7 to submit that immunity from prosecution in national proceedings is not granted to officials as a subjective right and recalls that the second subparagraph of Article 17 sets out the conditions for waiving the protection of immunity conferred by Article 11(a) of Protocol No 7. In so doing, the Commission confuses two distinct issues. Whether immunity should be waived is a separate and different question from whether the contested decision adversely affects the official concerned within the meaning of Article 90(2) of the Staff Regulations. Article 90(2) is concerned with the nature of the act which the official seeks to challenge, not with the assessment as to whether the decision itself was correct.

58. The key point here is that Article 11(a) of Protocol No 7 provides the direct benefit of immunity to EU officials when acting in an official capacity. A decision to remove or suppress that benefit has serious adverse consequences for the official concerned and can therefore be challenged under Article 90(2) of the Staff Regulations.

59. In order to determine whether the contested decision produces binding legal effects, it is necessary to examine its substance and to assess its effects on the basis of objective criteria, such as the content, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act.³³

60. The contested decision here at issue produces legally binding effects for both RQ and the national authorities. The effects for RQ are clear. The immunity he enjoyed under Article 11(a) of Protocol No 7 is suppressed. The legal effects in relation to Belgian authorities are equally obvious. In the absence of the contested decision, they were unable to take criminal proceedings against RQ. After that decision was adopted, the national proceedings were no longer blocked by RQ's immunity.³⁴

61. Thus, I reject the Commission's submission that an act such as the contested decision is a mere preparatory act which does not change the legal position of the official concerned. As RQ no longer had the benefit of (full) immunity under Protocol No 7, the consequences which flowed from that decision also had direct and immediate effects on him.

62. That conclusion is not called into question by the General Court's analysis of the case-law in paragraphs 42 to 44 of the judgment under appeal.

³³ Judgment of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, paragraph 32 and the case-law cited.

³⁴ See point 56 above.

63. The General Court there first examined the Court's decision in *Humblet v Belgian State*.³⁵ Mr Humblet was a Belgian national employed in Luxembourg as an official of the ECSC. He was treated as having his domicile for tax purposes in Belgium (where he also maintained a residence) and where his wife received an income. Mrs Humblet's income was declared in Belgium where it was subject to tax in the name of her husband as head of the household, in accordance with national law. The Belgian authorities then changed their previous practice and required Mr Humblet also to declare the amount of his salary as an ECSC official which was exempt from taxation under the Protocol on Privileges and Immunities to the ECSC Treaty ('the ECSC Protocol'). The national authorities issued estimated assessments against Mr Humblet for the tax years in question which he then challenged. In the light of Article 16 of the ECSC Protocol Mr Humblet considered himself to be entitled to bring the matter before the Court of Justice.

64. The Commission argued before the General Court that the judgment in *Humblet v Belgian State*³⁶ does not confirm that an EU official can bring proceedings against an institution's decision to waive his immunity. The General Court rejected that argument and drew on that judgment for guidance.

65. It seems to me that the Court's reasoning on the questions of jurisdiction and procedure in that judgment do indeed provide useful guidance in relation to RQ's case. The Court there ruled that whilst it had no jurisdiction to annul legislative or administrative measures of one of the Member States, the issue raised nevertheless fell within its jurisdiction as that issue concerned the interpretation and application of the ECSC Protocol, in particular Article 11(b) thereof. The Court made the following statements in its judgment which are particularly pertinent:

'By giving a right of recourse based on Article 16 of the [ECSC] Protocol, the authors of the [ECSC] Protocol clearly sought to ensure compliance with the privileges and immunities therein prescribed, in the interests not only of the Community and its institutions *but also of the individuals to whom these privileges and immunities were granted* and, on the other hand, in the interests of the Member States and of their administrative authorities which need to be protected against too wide an interpretation of those privileges and immunities.

...

Although the privileges and immunities were granted "solely in the interests of the Community" it must not be forgotten that they were expressly accorded "to the officials of institutions of the Community".

The fact that the privileges, immunities and facilities were provided in the public interest of the Community certainly justifies the power given to the High Authority to determine the categories of officials to which they are applicable (Article 12) or where appropriate to waive the immunity (second paragraph of Article 13) but *does not mean that these privileges are granted to the Community and not directly to its officials*. This interpretation is, furthermore, clearly supported by the wording of the abovementioned provisions.³⁷

66. It is perfectly true that the wording of Article 16 of the ECSC Protocol is not reflected in Article 90(2) of the Staff Regulations. That said, was the General Court correct in deciding to apply the reasoning in *Humblet v Belgian State*³⁸ by analogy to RQ's case?

67. In my view it was.

³⁵ Judgment of 16 December 1960, 6/60-IMM, EU:C:1960:48.

³⁶ Judgment of 16 December 1960, 6/60-IMM, EU:C:1960:48.

³⁷ Judgment of 16 December 1960, *Humblet v Belgian State*, 6/60-IMM, EU:C:1960:48, p. 570; emphasis added.

³⁸ Judgment of 16 December 1960, 6/60-IMM, EU:C:1960:48.

68. The General Court derived from the judgment in *Humblet v Belgian State*³⁹ that although officials enjoy the benefit of immunity when acting in the course of their duties (which is considered to be synonymous with acting within the public interest of the European Union itself) it does not necessarily follow that privileges and immunities are granted to the entity, that is, the Union, and not directly to the official himself. On that basis, it then becomes necessary to determine whether the act in question adversely affects the official concerned.

69. The Commission's argument that by not using the wording in Article 16 of the ECSC Protocol in the Staff Regulations the legislature intended to exclude the possibility of officials making such claims is unconvincing.

70. Title VII of the Staff Regulations is under the heading 'Appeals'. Under that Title, the legislature established a full and complete procedure for an official to challenge decisions relating to him. Given that a specific appeals procedure was thereby established, it seems to me that the counter-argument has greater force, namely that the legislature did not need to borrow the wording of Article 16 of the ECSC Protocol in order to create the necessary right of appeal. I therefore conclude that the Commission's argument in that respect cannot prosper.

71. Next, the Commission objects to the General Court's reference to the decisions in *Mote v Parliament*⁴⁰ and *Gollnisch v Parliament*.⁴¹ The General Court cited the latter to support the proposition that the privileges and immunities under Protocol No 7 confers an individual right on the person concerned. It relied on the former in support of the reasoning (based on *Humblet v Belgian State*⁴²) that privileges and immunities are granted directly to officials.

72. Both cases concerned the privileges and immunities of MEPs, which are governed by Articles 7 to 9 in Chapter III of Protocol No 7. The wording of those provisions is not the same as Article 11(a), which lays down the rules for EU officials. That is unsurprising, as the roles are very different. However, the *nature* of the immunity of the person concerned is not at issue here. Thus, there is no need to compare the respective positions of MEPs and officials. The question is, rather, whether the Staff Regulations provide an EU official with *recourse* to a *remedy* where his immunity is waived. In that context, in the light of my conclusion that the contested decision does indeed create direct and immediate legal consequences for RQ, it seems to me that the General Court was correct to apply the reasoning in *Mote v Parliament*⁴³ and *Gollnisch v Parliament*⁴⁴ by analogy.

73. Last, the Commission challenges the General Court's reliance on what the Commission describes as an 'isolated' decision of the former Civil Service Tribunal in *A and G v Commission*.⁴⁵

74. That judgment concerned one of the various disputes that arose from the scandal surrounding Edith Cresson, a former Member of the Commission, namely two actions taken against the Commission by Mrs Cresson's former 'Chef de cabinet'. In view of the significance of the case, the Civil Service Tribunal sat as a Full Court. The Commission's attempt to dismiss the ensuing ruling in that case as insignificant and wholly irrelevant thus seems inappropriate. In paragraph 230 of the

39 Judgment of 16 December 1960, 6/60-IMM, EU:C:1960:48.

40 Judgment of 15 October 2008, T-345/05, EU:T:2008:440.

41 Judgment of 17 January 2013, T-346/11 and T-347/11, EU:T:2013:23.

42 Judgment of 16 December 1960, 6/60 IMM, EU:C:1960:48.

43 Judgment of 15 October 2008, T-345/05, EU:T:2008:440.

44 Judgment of 17 January 2013, T-346/11 and T-347/11, EU:T:2013:23.

45 Judgment of 13 January 2010, F-124/05 and F-96/06, EU:F:2010:2.

judgment in *A and G v Commission*⁴⁶ the Civil Service Tribunal reiterated the statements made in *Humblet v Belgian State*⁴⁷ and *Mote v Parliament*⁴⁸ to the effect that officials are directly concerned by decisions that waive the immunity provided by Article 11(a) of Protocol No 7. Thus, *A and G v Commission*⁴⁹ sets out reasoning which is clearly relevant to the present case.

75. This Court cannot be bound by that judgment, since it is not required to adopt a particular interpretation of the Staff Regulations. Equally, however, there is no good reason why the General Court or this Court cannot apply the same reasoning as the Civil Service Tribunal applied in *A and G v Commission* in the present case.⁵⁰

76. Finally, the Commission seeks to argue that the route in Article 90(2) of the Staff Regulation is closed. The Commission suggests that the appropriate remedy for the official is to challenge the decision waiving his immunity in the national criminal proceedings and for the national court then to refer questions regarding the validity of the measure at issue to the Court under the procedure in Article 267 TFEU.

77. It seems to me that the Commission's submissions here are both implausible and misconceived.

78. First, it is settled case-law that preliminary references on validity can only concern legally binding EU acts.⁵¹ The Commission puts forward two arguments which are mutually incompatible. On the one hand, it maintains that the contested act does *not* create binding legal effects which directly and immediately affect the official concerned, so that he is unable to use Article 90(2) of the Staff Regulations. On the other hand, it argues that the same act could be the subject of invalidity proceedings under Article 267 TFEU, which presupposes that the act does indeed have legally binding effects that the official concerned might wish to challenge.

79. Second, even if it were possible to ignore the inherent contradiction in the Commission's case, the preliminary reference procedure would not always provide a complete remedy, because whether a reference would or indeed could be made would vary according to the national procedure at issue.⁵² I also recall that whilst a party may request a national court to make a reference to this Court under Article 267 TFEU, it cannot oblige the national court to do so.

80. Third, the preliminary reference procedure is designed exclusively to assist national courts when an authoritative ruling on the interpretation or validity of EU law is necessary in order to determine the matter before them. However, at the point when a decision waiving immunity produces its effects (by enabling a criminal investigation involving the EU official in question to begin), there is — it seems to me — unlikely to be a procedure before a national court that would provide the context in which a reference could properly be made. It is only at a later stage, if or when a court or tribunal becomes involved in criminal proceedings brought against that official as a defendant, that the official concerned would have the opportunity to solicit a reference to this Court as to the validity of the decision waiving his immunity. It does not seem fanciful to me to think that, at that stage, the reaction of the national judge might well be that such a reference was *no longer necessary* for him to determine the criminal proceedings over which he was by then presiding.

81. For all the above reasons, I consider that the Commission's first plea is unfounded.

46 Judgment of 13 January 2010, F-124/05 and F-96/06, EU:F:2010:2.

47 Judgment of 16 December 1960, 6/60-IMM, EU:C:1960:48.

48 Judgment of 15 October 2008, T-345/05, EU:T:2008:440.

49 Judgment of 13 January 2010, F-124/05 and F-96/06, EU:F:2010:2.

50 Judgment of 13 January 2010, F-124/05 and F-96/06, EU:F:2010:2.

51 Judgment of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraphs 14 and 16.

52 See for example, Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores v Council*, C-50/00 P, EU:C:2002:197, points 61 to 65.

Second plea: misinterpretation of Article 41(2)(a) of the Charter and wrongful interpretation and application of Article 4(3) TEU

82. By its second plea, which is made in the alternative, the Commission claims that the General Court erred in ruling that, by not weighing up RQ's interests against the national authorities' desire to preserve the confidentiality of their investigations before deciding to partially waive that official's immunity, the Commission failed to respect RQ's right to be heard.

The judgment under appeal

83. The relevant passages in the General Court's judgment state as follows:

'... as a general rule, omitting to hear the person concerned before waiving his immunity preserves investigative confidentiality.

Nevertheless, it should be pointed out that if, in duly justified cases, a national authority opposes precise and full disclosure to the person concerned of the grounds which constitute the basis of a request to waive immunity, by invoking reasons of investigative confidentiality, the Commission must, together with the national authorities in accordance with the principle of sincere cooperation, implement measures that are intended to accommodate legitimate considerations of investigative confidentiality and the need to ensure sufficient compliance with the person's fundamental rights, such as the right to be heard ...

Since the Commission is required to respect the right to be heard when it adopts an act adversely affecting a person, it must pay the utmost attention to the way in which it can accommodate the respect of that right of the person concerned and the legitimate considerations of the national authorities. That weighing-up of interests ensures both that the rights conferred on EU officials and other staff, and, consequently, the interests of the European Union, in accordance with the second paragraph of Article 17 of Protocol No 7, are protected, and that national criminal proceedings are conducted efficiently and smoothly in keeping with the principle of sincere cooperation.'⁵³

The parties' submissions

84. The Commission claims that the General Court erred in law by stating that it is necessary to conduct a balancing exercise in order to ensure the proportionality of any decision to waive an official's immunity. The General Court was therefore wrong in finding that the Commission had failed to weigh up RQ's interests in the context of such an exercise. Requiring the Commission to carry out such an exercise would breach the principle of sincere cooperation enshrined in Article 4(3) TEU. The Commission's general practice is to respect national rules which impose a condition of strict confidentiality linked to investigative confidentiality and therefore to waive immunity without first hearing the official concerned.

85. RQ submits that the second plea is inadmissible because the Commission simply repeats the arguments that it made at first instance. In the alternative, RQ maintains that the second plea should be rejected as unfounded.

⁵³ See, respectively, paragraphs 65 to 67 of the judgment under appeal.

Assessment

86. The reasons for rejecting RQ's plea of inadmissibility in relation to the first plea apply equally to the second plea.⁵⁴ Accordingly, I conclude that the Commission's second plea is admissible.

87. By its second plea the Commission challenges the General Court's interpretation, in the judgment under appeal, of the relationship between the right to be heard enshrined in Article 41(2)(a) of the Charter and the principle of sincere cooperation in Article 4(3) TEU. I shall begin with Article 41(2)(a) of the Charter.

88. The Explanatory Note on Article 41⁵⁵ confirms that that provision is 'based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined, *inter alia*, good administration as a general principle of law'.⁵⁶ Thus, general principles, such as the right to be heard and the rights of the defence underpin Article 41(1) and (2).

89. The Court has ruled in relation to the right to be heard that observance of the rights of the defence is a fundamental principle of EU law. That right is now affirmed in Articles 47 and 48 of the Charter, which ensure respect both of the rights of the defence and the right to fair legal process in all judicial proceedings. The Court has always affirmed the importance of the right to be heard and its very broad scope within the EU legal order. Thus, the Court considers that that right must apply in *all* proceedings which are liable to culminate in a measure adversely affecting the person concerned.⁵⁷

90. Article 41(2) of the Charter identifies (non-exhaustively) three strands of the right to good administration: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; and (c) the obligation of the administration to give reasons for its decisions. The three strands thus identified are clearly interrelated. If a decision is going to affect a person adversely, he must be given an opportunity to put his arguments forward. To do so, he needs access to the whole file, save for those elements for which confidentiality or secrecy may *legitimately* be claimed. And the administration must make known the reasons for the decision that it then takes, so that the person adversely affected by the decision may assess the adequacy of the administration's reasoning and decide whether or not to seek judicial review of that decision by the competent court.

91. The right to be heard must be observed even where the applicable legislation does not expressly provide for such a procedural requirement. As the Court has explained in a different context, that right guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely. It also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision. The obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person to understand why his application is being rejected is thus a corollary of the principle of respect for the rights of the defence.⁵⁸

⁵⁴ See points 44 to 49 above.

⁵⁵ The Explanatory Notes to the Charter are set out in the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

⁵⁶ The Explanatory Note cites, *inter alia*, judgment of 18 October 1989, *Orkem v Commission*, 374/87, EU:C:1989:387 (see, in relation to the right to be heard, paragraph 25 and the case-law cited). As to the general scope of the duty to have regard for the interest of officials and the principle of good administration, see judgment of 31 March 1992, *Burban v Parliament*, C-255/90 P, EU:C:1992:153, paragraph 7 and the case-law cited.

⁵⁷ Judgment of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraphs 81 to 85 and the case-law cited.

⁵⁸ Judgment of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraphs 86 to 88 and the case-law cited.

92. The Commission has explained that its current practice is based on the premiss that a decision waiving an official's immunity does not constitute an act affecting him adversely. The procedure for adopting such a decision is apparently as follows. The decision is made by a Member of the Commission with the agreement of the President. The College of Commissioners is responsible for all such decisions. Within that procedure there is no systematic provision for allowing the official concerned to be heard before a decision waiving his immunity is adopted. If the relevant national authorities invoke investigative confidentiality and request the Commission to refrain from informing the official concerned that they are seeking a waiver of immunity, the Commission will systematically accede to that request. If no such request is made the Commission does inform the official that his immunity is being waived, but it does not hear him as to whether he should retain his immunity.

93. I have concluded in relation to the first plea that the contested decision *is* a measure that affects RQ adversely. It follows that I consider that the premiss behind the Commission's practice is wrong.

94. Article 41(1) of the Charter confers on 'every person' the right 'to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions ... of the Union'. Like everyone else, officials working within the EU institutions may thus rely on the right to good administration. In RQ's case that fundamental right necessarily entailed a right to be heard, in accordance with Article 41(2)(a) of the Charter, before the Commission adopted the contested decision. I therefore consider that the General Court was right in concluding that the Commission was obliged to respect RQ's rights of the defence.

95. Did the Commission weigh up the infringement of RQ's fundamental rights against the request for investigative confidentiality? In other words, did it carry out a proportionality assessment as required by Article 52(1) of the Charter?

96. Under Article 52(1), limitations may be imposed on the rights and freedoms recognised by the Charter if those limitations are provided for by law, they respect the essence of those rights and freedoms and, subject to the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.⁵⁹

97. The public or general interest objective here is in the criminal investigation being conducted by the Belgian authorities. The General Court found that those proceedings are provided for by national law.⁶⁰ As such they fall squarely within the domain of the national authorities and clearly outwith the scope of the Commission's remit.

98. The limitation in the present case is that the official was deprived of the right to be heard. In the judgment under appeal the General Court examined whether the Commission had conducted a proportionality assessment, in accordance with Article 52(1) of the Charter before waiving RQ's immunity. The General Court concluded that the Commission had not assessed the impact on RQ of the breach of his fundamental rights against any advantages that might arise from acceding to the national authorities request for investigative confidentiality.

99. In so concluding the General Court was plainly correct. The Commission's own description of its practice regarding requests to waive immunity makes it clear that that institution *systematically* omits to afford to the official concerned a hearing before adopting a decision in relation to such a request. Indeed where national authorities invoke investigative confidentiality the person concerned may not even be informed that a request has been made (as was the case here).

⁵⁹ See the Opinion of my late and esteemed friend and colleague, Advocate General Bot in ZZ, C-300/11, EU:C:2012:563, point 65.

⁶⁰ The General Court describes the relevant national legal framework in paragraphs 61 and 62 of the judgment under appeal.

100. In the Commission's view, it is solely obliged to consider whether the European Union's interests might be prejudiced. Accordingly, it does not have to take the official's interests into account. The logical consequence is that the Commission does not carry out a proportionality assessment in cases such as RQ's.

101. It seems to me that that approach is in plain breach of the requirements of Article 52(1) of the Charter. A proper proportionality assessment necessarily requires an evaluation of the competing interests. Here, the three protagonists are the official concerned, the national authorities, and the European Union whose interests (in particular its financial interests) must be safeguarded. The Commission's starting point for examining requests to waive immunity disregards the first of those protagonists entirely. However, the premiss of the balancing exercise to be conducted under Article 52(1) of the Charter is that the official has a right to be heard. The purpose of the exercise to be conducted under Article 52(1) is then to evaluate whether the requested *limitation* to that right (arising from the claim of investigative confidentiality invoked by the national authorities) is justifiable and proportionate.

102. That exercise involves the interpretation and application of EU law, namely Article 41(2)(a) of the Charter and the second paragraph of Article 17 of Protocol No 7, and is for the institution in question to conduct. It will not be able to demonstrate that its decision waiving immunity was proportionate where no such evaluation is carried out.

103. I therefore conclude that the Commission's current practice, as it was explained to the Court, disregards important procedural rights guaranteed by the Charter and is inconsistent with that institution's obligations under Article 51(1) of the Charter to respect the rights, observe the principles and promote the application of the rights enshrined therein.

104. The Commission argues that were the Court also to reach that conclusion and confirm the judgment under appeal, such a decision would have significant consequences for the EU administration. Specifically, the Commission would have to change its hitherto consistent practice, which has been to waive immunity and to comply with national rules that impose a condition of strict investigative confidentiality.

105. The principle of sincere cooperation laid down in Article 4(3) TEU requires the Union and the Member States 'in full mutual respect' to assist each other in carrying out tasks which flow from the Treaties. The Member States are to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. That principle thus generates reciprocal obligations between the EU institutions and the Member States as well as between the Member States themselves.

106. The Commission submits that, were it to be obliged to assess the interests of the Member State concerned in relation to those of the official, it would be required to substitute its own assessment of the domestic criminal proceedings for that of the national authorities, thereby contravening Article 4(3) TEU.

107. I reject that submission.

108. First, in paragraphs 66 and 67 of the judgment under appeal the General Court states that the Commission and the national authorities should *cooperate* in finding a solution which respects the official's rights guaranteed by Article 41(1) and (2)(a) of the Charter. Such cooperation does not require the Commission to encroach on the domain of national authorities. Second, the Commission is required to comply with its obligation to give effect to the official's right to be heard. Third, the

Commission is also required to assess the EU's interests under Article 17 of Protocol No 7. The national authorities are therefore under a reciprocal obligation under Article 4(3) TEU to assist the Commission in carrying out the task of assessing their requests to waive immunity in a way that complies with its obligations under EU law.

109. In accordance with the principle of sincere cooperation, where national authorities oppose precise and full disclosure to the official concerned, it will be for them to collaborate with the Commission to establish how legitimate concerns for investigative confidentiality can be adapted so as to accommodate the Commission's obligations to respect the official's procedural rights.⁶¹

110. The Commission submits that the procedure to waive immunity has its roots in an alleged breach of national law. Such cases are therefore different from cases where the Commission launches an administrative procedure against an official; the official's rights of defence are not triggered by such a procedure.

111. I cannot agree with that submission.

112. The issue before the Court is whether RQ's rights of defence were respected when the Commission adopted the contested decision which waived the immunity he enjoyed under Article 11(a) of Protocol No 7. The interpretation of the provisions of that Protocol, and of the Staff Regulations which provide a right of recourse against the Commission, are matters of EU law. The underlying criminal proceedings are a matter of domestic law. However, the latter national proceedings are not as such at issue here.

113. Finally, the Commission claims that carrying out the balancing exercise mentioned by the General Court in the judgment under appeal would entail a detailed dialogue with national authorities and that that would delay the criminal proceedings.

114. Since there is no evidence before the Court to that effect, this claim is a bare assertion. Even were it to be true that the requisite dialogue would necessarily take time to conduct administrative inconvenience is not a legitimate reason for placing limitations on the fundamental rights guaranteed by the Charter.

115. I therefore conclude that the second plea is unfounded.

Third plea: error of law in failing to describe the Commission's conduct correctly

116. By its third plea (which is also raised in the alternative), the Commission submits in essence that the General Court erred in concluding that the Commission had failed to take RQ's interests adequately into account in its assessment of his case. In so doing it challenges the General Court's findings in paragraphs 69 to 72 of the judgment under appeal.

The judgment under appeal

117. The General Court made four key statements in its judgment. First, it noted that the national court file contained *no* material indicating that the Commission had in fact weighed up the competing interests. Second, the General Court found as a fact that the Commission had not asked the national authorities what risks hearing RQ before adopting its decision might entail for the preservation of investigative confidentiality and, ultimately, the proper conduct of the criminal proceedings. Third, the General Court held that there was no evidence of a genuine risk that the preservation of investigative

⁶¹ See, by analogy, judgment of 4 June 2013, ZZ, C-300/11, EU:C:2013:363, paragraph 57 and the case-law cited.

confidentiality would or might actually be jeopardised by hearing RQ (for example, because he might abscond or destroy evidence, or because surprise was a necessary element to this particular investigation). It noted that certain information relating to the investigation was, moreover, already in the public domain. Fourth, the General Court ruled that the fact that the Commission had asked the Belgian authorities if it was possible to hear RQ on the subject of their requests to waive his immunity (which was confirmed by correspondence annexed to the defence) was not sufficient to conclude that the Commission had actually weighed up RQ's interest in being heard correctly against the preservation of investigative confidentiality.⁶²

The parties' submissions

118. In the first part of its third plea, the Commission claims that the General Court could not properly conclude on the basis of the evidence before it that the Commission had failed to assess RQ's interests before deciding to waive his immunity. In the second part of that plea, the Commission argues that RQ has failed to show that if he had been heard, the decision reached would have been different.⁶³

119. RQ submits that the third plea (or at least the first part of that plea) is manifestly inadmissible as the Commission is in reality seeking to obtain a re-examination of the facts. In the alternative, he claims that the Commission misread the judgment under appeal and that its third plea is unfounded.

Assessment

120. I consider that the third plea is admissible.

121. In essence, the Commission alleges that the General Court erred in law by categorising the Commission's conduct in adopting the contested decision as a failure to balance the Belgian authorities' request for investigative confidentiality against RQ's right to be heard. The Commission asserts that it sent several letters to the Belgian authorities requesting further details on the subject of investigative confidentiality and that immunity was waived in part only after the national authorities answered those requests. That, it claims, is sufficient as a matter of law to demonstrate that it did carry out the requisite balancing exercise.

122. The Commission is thus not attempting to challenge the General Court's findings of fact. Rather, it contests whether the General Court could properly in law conclude from those facts that the Commission had failed to carry out a balancing exercise. That issue is indeed a question of law that is subject to review by the Court.⁶⁴ I therefore turn to the substantive arguments made in relation to that plea.

123. In paragraph 5 of the judgment under appeal, the General Court records that the Commission requested more detailed information from the Belgian authorities before adopting the contested decision. In paragraph 10 thereof, the General Court refers to recital 11 of the contested decision, where the Commission stated that it could waive RQ's immunity only if it were informed with sufficient clarity and precision of the reasons why the Belgian authorities had made the request to waive immunity and pointed out that otherwise, any person concerned by an OLAF investigation could, by making manifestly unfounded allegations against its Director-General, succeed in bringing the functioning of that office to a standstill, which would be contrary to the interests of the European

⁶² Paragraphs 69 to 72 of the judgment under appeal.

⁶³ In points 135 to 147 below.

⁶⁴ Judgment of 16 June 2016, *SKW Stahl-Metallurgie and SKW Stahl-Metallurgie Holding v Commission*, C-154/14 P, EU:C:2016:445, paragraph 37 and the case-law cited.

Union. The General Court records that the Commission went on to state that, further to receiving the letter of 23 June 2015, it had obtained very clear and specific indications showing that the Belgian authorities could reasonably — and, in any event, without acting in an arbitrary or abusive manner — consider that the allegations against RQ warranted his being investigated.⁶⁵

124. The Commission has helpfully included in Annex A.1 to its appeal the documents that were annexed to the Commission's defence before the General Court. Those documents include the letter of 19 December 2014 sent by the Secretary-General of the Commission to the investigating magistrate seeking further details of the national investigation ('the letter of 19 December 2014'). In paragraph 2 (on page 2) of that letter, the Secretary-General stated that in the light of OLAF's special independent status, the Commission would like to hear the Director-General of OLAF (RQ) before deciding whether immunity should be waived, in order to allow the Commission to assess in full knowledge the implications that such a waiver of immunity could have on the independence and operation of OLAF and thereby on the interests of the European Union. The Commission then asked the Belgian authorities to specify whether it was necessary to maintain confidentiality surrounding their investigations in relation to all officials concerned by their enquiries and whether the Director-General of OLAF could be informed of the investigations.

125. The Belgian authorities replied by letter of 6 February 2015. In response to the Commission's query as to whether RQ might be informed of the request to waive his immunity, they stated that as the facts of the case showed that he might be the subject of criminal proceedings, the need to respect the principle of investigative confidentiality precluded that his opinion should be sought in relation to the request to waive his immunity. So far as I can judge, this appears to be framed as a standard response to the question 'can we tell the suspect that he is under investigation?' rather than a specific response to the (different) question 'is it imperative to respect the principle of investigative confidentiality in the circumstances of this particular case?'

126. By a further letter of 3 March 2015, the Secretary-General repeated the Commission's request for further information. She also confirmed that the Commission 'would respect' the Belgian authorities' request to maintain investigative confidentiality ('the letter of 3 March 2015').

127. The General Court's statements in paragraphs 69 to 72 of the judgment under appeal should be read in the context of that fuller account of the facts and of the documents in that Court's file.

128. On the basis of that material, I consider that the General Court could properly in law conclude that the Commission had indeed sought clarification from the Belgian authorities as to the nature of the allegations against RQ, not least because of his special position as Director-General of OLAF at the material time. However, and crucially, pursuing such enquiries is not the same as seeking to ensure that RQ's right to be heard was respected. Nor, by the enquiries that it did make, did the Commission seek to solicit the necessary information to enable it to decide how to *balance the competing interests at stake*. Thus, the General Court found — in my view, rightly — that by making those enquiries the Commission did not seek to ascertain whether there would be risks (an adverse impact on RQ's fundamental rights) attached to a decision not to inform RQ of the allegations against him and to allow him to make submissions before adopting a decision waiving his immunity or, conversely, a risk to the conduct of the Belgian authorities' enquiries were RQ to be so informed and

⁶⁵ The contested decision was put before the General Court as Annex A.1 to RQ's application. Recital 4 of that decision states that by letter of 3 March 2015 the Commission informed the investigating magistrate that it required further details of the allegations against RQ. The Commission stated in that letter that once it received the requested information it would adopt a decision aiming to achieve a balance between its obligation of sincere cooperation with the Belgian authorities and the need to protect the interests of the European Union. See further point 128 below.

to be permitted to make submissions.⁶⁶ Instead, the Commission simply confirmed, in the letter of 3 March 2015, that *it would respect* the Belgian authorities' standard request for investigative confidentiality. The rest of the checking process was concerned solely with whether the Belgian authorities could reasonably consider that the allegations against RQ warranted his being investigated.

129. It is the Commission's failure to make an assessment of those possible risks and to balance the interests of investigative confidentiality against RQ's competing fundamental right to be heard which lies at the heart of the General Court's ruling.

130. The General Court rightly accepted (in paragraph 71 of the judgment under appeal), that in some cases it will be perfectly proper not to communicate the request to waive immunity to the person concerned before deciding on such a request. That will include where there is a genuine risk that that person might impede the national proceedings by absconding or destroying evidence, or where surprise is a necessary element in the investigation. However, there was nothing in the file before the Court indicating that the Belgian authorities had put forward such arguments in the present case.

131. The General Court also noted that certain information relating to the ongoing investigation was already public domain. I can only agree. It is abundantly clear from the presentation of the background facts in paragraphs 1 to 6 of the judgment under appeal that the scandal around former Member of the Commission John Dalli (which was the starting point for the chain of events that led to RQ's case) was already the subject of avid press attention.

132. Finally, the General Court stated (in paragraph 72 of the judgment under appeal) that the fact that the Commission had asked the Belgian authorities whether they could hear the applicant on the subject of the requests to waive immunity (which was confirmed by the correspondence annexed to the Commission's defence), was not sufficient to find that the Commission had then proceeded to weigh up RQ's interest in exercising his right to be heard against the Belgian authorities request to preserve investigative confidentiality. Again, I agree with the General Court's assessment and with the logic underpinning it. An enquiry as to whether the Commission might receive submissions from RQ as part of the process of reaching a decision (in the letter of 19 December 2014) followed by confirmation that the Commission would respect the Belgian authorities' desire to maintain investigative confidentiality (in the letter of 3 March 2015) do *not*, when taken together, add up to an assessment of whether, in this particular case, investigative confidentiality should be balanced against and allowed to trump RQ's fundamental right to be heard. I shall return to this point later.⁶⁷

133. The General Court concluded (in paragraph 74 of the judgment under appeal) that the Commission's failure to conduct such a balancing exercise infringed the proportionality requirement in Article 52(1) of the Charter in so far as it went beyond what was necessary to attain the objective of preserving investigative confidentiality and did not respect the essence of the right to be heard in Article 41(2)(a) of the Charter. I agree.

134. I therefore conclude that the first part of the third plea is unfounded.

135. The second part of the third plea raises a more difficult point. Is the official seeking to rely on the right to be heard required to show that the decision waiving immunity would have been different if he had been able to exercise that right?

⁶⁶ Paragraphs 69 and 70 of the judgment under appeal.

⁶⁷ See point 145 below.

136. The Commission claims that the General Court erred in law when it held (in paragraph 76 of the judgment under appeal) that it cannot be excluded that the content of the contested decision would have been different ‘if the Commission had put [RQ] in a position to effectively make his point of view known on the waiver of his immunity from legal proceedings and, more specifically, as observed by [RQ] in his written submissions, his point of view on the interests of the European Union and the preservation of his necessary independence as an official serving as Director-General of OLAF’.

137. This Court has consistently stated that respect for the rights of the defence is of crucial importance in procedures which result in the adoption of an act that entail adverse consequences for the person concerned.⁶⁸ That person cannot be required to show that the Commission’s decision would have been different in content but simply that such a possibility cannot be totally ruled out, since he would have been better able to defend himself had there been no procedural error.⁶⁹

138. A more recent decision of the Court in a very different context states, however, that a breach of the rights of the defence, in particular the right to be heard, only leads to the annulment of the contested act if in the absence of that irregularity the procedure would lead to a different result.⁷⁰ Mr Makhoulf’s case concerned the adoption of restrictive measures imposed on him. On appeal the Court found that he had not indicated in the proceedings at first instance which arguments he would have presented to the Council to contest the relevance or probative value of the documents which the latter had communicated to him. Accordingly, it dismissed his objection that he had not been invited to present his observations on those documents.

139. First, that case is clearly distinguishable from the present matter, because there, Mr Makhoulf was informed of the case against him and allowed access to the documents which the Council had taken into account in deciding to adopt restrictive measures against him. However, there was no finding of fact at any level in those proceedings that Mr Makhoulf had exercised his rights of defence in challenging those documents. In contrast, RQ was not informed of the request to waive his immunity before the decision waiving his immunity was taken.⁷¹ He therefore had no opportunity to make representations in the context of the administrative procedure leading up to that decision, either in his capacity as an official or as Director-General of OLAF.⁷²

140. Second, in paragraph 52 of *Makhoulf v Council*⁷³ the Court cites the standard test established in its consistent case-law which I have set out in point 137 above.⁷⁴ The Court then went on to construe the right to be heard very restrictively in the particular circumstances of that case. I do not consider that, in the very different circumstances of the present case, that much stricter interpretation and application is appropriate.

141. What should an official such as RQ be required to demonstrate in order to obtain a ruling that the breach of his rights of defence entails the annulment of the act adversely affecting him?

68 Judgment of 27 June 1991, *Al-Jubail Fertilizer v Council*, C-49/88, EU:C:1991:276, paragraph 15. See also judgment of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware v Council*, C-141/08 P, EU:C:2009:598, paragraph 93 and the case-law cited.

69 Judgment of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware v Council*, C-141/08 P, EU:C:2009:598, paragraph 94 and the case-law cited.

70 Judgment of 14 June 2018, *Makhoulf v Council*, C-458/17 P, not published, EU:C:2018:441, paragraph 42 and the case-law cited; see also paragraph 43. That judgment was taken by a three-judge chamber, without the benefit of an Advocate General’s Opinion, and was not regarded by the chamber itself as being of sufficient importance to warrant full translation and publication.

71 See points 126 to 128 above.

72 I recall that in his capacity as Director-General of OLAF, RQ has brought an action against the Commission under Article 17(3) of Regulation No 883/2013: Case T-251/16 (see footnote 16 above).

73 Judgment of 14 June 2018, C-458/17 P, not published, EU:C:2018:441.

74 The authority cited is judgment of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, which refers to judgment of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware v Council*, C-141/08 P, EU:C:2009:598, paragraph 94 and the case-law cited.

142. It seems to me that it would be inappropriate for the Court to be overly prescriptive. The factors that are relevant will, it seems to me, necessarily differ according to the particular circumstances of the individual case.

143. Paragraph 76 of the judgment under appeal can, it seems to me, be construed in two ways. On the one hand, it can be read as suggesting that it was necessary to take account of RQ's point of view on the interests of the European Union and the preservation of his necessary independence as an official serving as Director-General of OLAF before adopting the contested decision. On the other hand, it is possible to read the General Court's statement as indicating that '[the] possibility cannot totally be ruled out' that if RQ had had been given the opportunity to be heard, the Commission might have had the opportunity to obtain his views on the consequences for the smooth functioning of OLAF of any decision to waive immunity. Such information might have formed part of RQ's spontaneous submissions or might have been forthcoming as a result of questions which the Commission itself might have put to RQ during the administrative procedure.

144. In his written submissions, RQ fairly makes the point that, as an official serving as Director-General of OLAF, he did have views that he wished to put forward as to the interests of the European Union and the preservation of the independence necessary for a person exercising those specific functions. I consider it to be close to self-evident that 'the possibility cannot be totally ruled out' that his submissions (informed as they necessarily would be by his experience of actual service in the role of Director-General of OLAF) *might* have had an effect on the decision that was ultimately adopted on waiver of immunity. The contrary position requires one to assume that those responsible for the decision in the Commission would simply have closed their ears to any and every argument that RQ put forward.

145. I am reluctant to make such a pejorative assumption about the Commission's decision-making process. Fortunately, in the present proceedings there is no need to do so. The letter of 19 December 2014 explained to the Belgian authorities that *the Commission wished to hear RQ*, not in order to respect his fundamental right to be heard, but because the Commission wished to be in a position 'to assess in full knowledge the implications that such a waiver of immunity could have on the independence and operation of OLAF and thereby on the interests of the European Union'.⁷⁵ Thus, there was clear evidence before the General Court that *the Commission itself considered* that RQ's views would be both pertinent and important to reaching an appropriate decision on waiving immunity. Against that background, it seems to me to be logically impossible to conclude otherwise than that respecting RQ's right to be heard might very plausibly have had some bearing on the outcome of the administrative procedure and hence on the decision that was finally adopted in respect of waiver of immunity. However, it does not follow that the person concerned should have to demonstrate that the decision at issue would have been different if his right to be heard had been respected.

146. More generally, the fundamental principle which underlies the rights of the defence and in particular the right to be heard is the need to ensure procedural fairness. Was the person concerned deprived of an opportunity to put forward relevant information before a decision that affected him adversely was adopted? It seems to me that the essential tests are (i) would the information that he wished to put forward have been relevant and (ii) will his legal situation change to his detriment if the act is adopted? I do not think that he should be required to demonstrate more than that. I also observe that the right to be heard is closely linked to the administration's obligations to give reasons for its decisions, enshrined in Article 41(2)(c) of the Charter. Unless the administration fully takes into account all material relevant to the decision that it is about to adopt, it is likely to fall foul of that obligation.

⁷⁵ That letter is mentioned in point 126 above.

147. I therefore consider that there is no merit in the second part of the third plea and that consequently the third plea is unfounded.

Costs

148. In accordance with Articles 138(1) and 140(1) of the Rules of Procedure, the Commission as the unsuccessful party in this appeal should pay the costs of these proceedings.

Conclusion

149. In the light of the foregoing considerations I propose that the Court should:

- dismiss the appeal; and
- order the Commission to pay the costs.