Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 17 June 2021 [1]

Case C-894/19 P

European Parliament
v

UZ

(Appeal – Civil service – Official – Disciplinary proceedings – Psychological harassment – Disciplinary sanction – Downgrading by one grade – Rejection of the applicant's request for assistance – Action for annulment – Article 41 of the Charter of Fundamental Rights of the European Union – Requirement of objective impartiality – Right to be heard)

I. Introduction

1. By its appeal, the European Parliament seeks to have set aside the judgment of the General Court of the European Union of 20 September 2019, *UZ* v *Parliament* (T-47/18, EU:T:2019:650; 'the judgment under appeal'), by which the General Court, on the one hand, annulled the decision of the Secretary-General of the Parliament of 27 February 2017 imposing on UZ the disciplinary sanction of downgrading from grade AD 13, step 3, to grade AD 12, step 3, and resetting the merit points acquired in grade AD 13 to zero and, on the other hand, dismissed the action as to the remainder.

2. By her cross-appeal, UZ requests that the Court of Justice set aside the judgment under appeal in so far as the General Court dismissed the application for annulment of the decision rejecting her request for assistance.

3. In accordance with the Court's request, this Opinion will focus on the first part of the first ground of the main appeal, concerning the alleged lack of impartiality of the Parliament in the conduct of the disciplinary investigation against UZ. The Parliament submits that the General Court wrongly found that the appointed investigators did not offer guarantees sufficient to exclude any legitimate doubt as to their impartiality. According to the Parliament, that conclusion of the General Court was based, first, on a distortion of the facts and, secondly, on an erroneous legal characterisation of the concept of 'objective impartiality'.

[1] Original language: French.

4. The present case provides the Court with the opportunity to rule on whether the principles governing that concept of 'objective impartiality', already recognised in several areas of the EU legal order, are applicable to the civil service and, more specifically, to an administrative investigation carried out in the context of disciplinary proceedings.

II. Legal framework

5. Article 24 of the Staff Regulations of Officials of the European Union, in the version applicable to the dispute ('the Staff Regulations'), provides:

'The Union shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.

It shall jointly and severally compensate the official for damage suffered in such cases, in so far as the official did not either intentionally or through grave negligence cause damage and has been unable to obtain compensation from the person who did cause it.'

6. Article 86 of the Staff Regulations provides:

'1. Any failure by an official or former official to comply with his obligations under these Staff Regulations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action.

2. Where the Appointing Authority or OLAF becomes aware of evidence of failure within the meaning of paragraph 1, they may launch administrative investigations to verify whether such failure has occurred.

3. Disciplinary rules, procedures and measures and the rules and procedures covering administrative investigations are laid down in Annex IX.'

7. Under Article 3 of Annex IX to the Staff Regulations:

'On the basis of the investigation report, after having notified the official concerned of all evidence in the files and after hearing the official concerned, the Appointing Authority may:

(a) decide that no case can be made against the official, in which case the official shall be informed accordingly in writing; or

(b) decide, even if there is or appears to have been a failure to comply with obligations, that no disciplinary measure shall be taken and, if appropriate, address a warning to the official; or

(c) in the case of failure to comply with obligations within the meaning of Article 86 of the Staff Regulations,

    (i) decide to initiate the disciplinary proceedings provided for in Section 4 of this Annex, or

    (ii) decide to initiate disciplinary proceedings before the Disciplinary Board.'

8. Article 16 of that annex states, in paragraphs 1 and 2 thereof:

‘1. The official concerned shall be heard by the Board; at the hearing, he may submit observations in writing or orally, whether in person or through a representative. He may call witnesses.

2. The institution shall be represented before the Board by an official mandated by the Appointing Authority to this effect and having rights equivalent to those of the official concerned.’

9. Article 22 of that annex reads as follows:

‘1. After hearing the official, the Appointing Authority shall take its decision as provided for in Articles 9 and 10 of this Annex within two months of receipt of the opinion of the Board. Reasons must be given for the decision.

2. If the Appointing Authority decides to close the case without imposing any disciplinary penalty, it shall so inform the official concerned in writing without delay. The official concerned may request that this decision be inserted in his personal file.’

III. The background to the dispute and the contested decision

10. The background to the dispute is set out in paragraphs 1 to 27 of the judgment under appeal and may, for the purposes of this appeal, be summarised as follows.

11. UZ held the position of head of unit at the Parliament from 1 January 2009 onwards. She was latterly classified as grade AD 13, step 3.

12. On 24 January 2014, 14 of the 15 members of her unit (‘the complainants’) sent to the Secretary-General of the Parliament a request for assistance, pursuant to Article 24 of the Staff Regulations, alleging that they had suffered psychological harassment on the part of UZ.

13. Following that request, the Director-General of the Directorate-General for Personnel (‘DG PERS’) informed the complainants that interim measures had been taken. These included transferring the management of the staff of the unit concerned to another person and the opening of an administrative investigation.

14. Following the opening of an administrative investigation, UZ was heard on 20 November 2014 by the Director-General of DG PERS.

15. Following two reports, dated 3 March and 17 November 2015, UZ was heard, respectively, on 17 June and 2 December 2015 by the Director-General of DG PERS.

16. By letter of 6 January 2016, UZ was informed by the Secretary-General of the Parliament that her failure to comply with obligations under the Staff Regulations had been referred to the Disciplinary Board. She was heard by the Disciplinary Board on 17 February, 9 March, 8 April and 26 May 2016.

17. On 25 July 2016, the Disciplinary Board unanimously adopted an opinion in which it, first, proposed that the Appointing Authority penalise all of the wrongful acts committed by UZ with an overall penalty consisting of a downgrading and, secondly, concluded that the Appointing Authority should seriously consider reassigning her to another type of post within the Secretariat-General.

18. By decision of 20 September 2016, the Secretary-General of the Parliament authorised the Director-General of DG PERS to represent him at the hearing of UZ provided for in Article 22 of Annex IX to the Staff Regulations and instructed the Director-General to forward to him any observations which UZ might have on the opinion issued by the Disciplinary Board and forwarded on 7 September 2016.

19. By email of 4 October 2016, the Director-General of DG PERS invited UZ to attend a hearing on 20 October 2016, in accordance with Article 22(1) of the Staff Regulations, to enable her to make known her observations on the opinion of the Disciplinary Board.

20. On 14 November 2016, UZ was heard by the Director-General of DG PERS. At that hearing, she handed over a note and requested the assistance of the Parliament on account of alleged threats made against her by members of her unit.

21. On a proposal from the Director-General of DG PERS, UZ was then temporarily assigned to another unit.

22. By decision of 27 February 2017, the Secretary-General of the Parliament took the decision to impose on UZ the disciplinary sanction of downgrading, in the same function group, from grade AD 13, step 3, to grade AD 12, step 3, and resetting the merit points acquired in the former grade AD 13 to zero ('the contested decision').

23. By letter of 6 June 2017, UZ submitted a complaint against the contested decision to the Appointing Authority of the Parliament.

24. By letter of 14 June 2017, UZ submitted to the Secretary-General of the Parliament a complaint against the implied rejection of her request for assistance. By letter of 20 July 2017, the Director-General of DG PERS rejected that request for assistance.

25. By letter of 6 October 2017, the President of the Parliament rejected the complaints made by UZ in correspondence of 6 and 14 June 2017.

IV. The procedure before the General Court and the judgment under appeal

26. By application lodged at the Registry of the General Court on 29 January 2018, UZ brought an action seeking, first, annulment of the contested decision and, secondly, annulment of the decision rejecting her request for assistance.

27. The Parliament contended that the action should be dismissed.

A. The application for annulment of the contested decision

28. In support of her claim for annulment of the contested decision, UZ relied on two pleas in law, the first alleging that there were irregularities in the administrative investigation and the second alleging that there were irregularities in the proceedings of the Disciplinary Board and a failure by the competent authority to hold a hearing at the conclusion of those proceedings.

1. The first plea, alleging that there were irregularities in the administrative investigation

29. In the context of this first plea, UZ argued, in particular, that two of the investigators entrusted with the administrative investigation, namely the one entrusted with the 'disciplinary' component and the one entrusted with the 'harassment' component, did not have the independence and impartiality necessary to take part in that investigation.

30. In the first place, as regards the alleged lack of impartiality of the investigator of the 'disciplinary' component, the General Court found, in paragraph 51 of the judgment under appeal, that it was clear from the evidence of one of the complainants that a member of DG PERS had met with that complainant prior to the opening of the investigation and that the complainant had at that meeting reported to the abovementioned member, who was subsequently appointed investigator, that a complaint about him had been made to the European Anti-Fraud Agency ('OLAF') by UZ and, more specifically, through her husband, 'as revenge', in connection with alleged irregularities.

31. According to the General Court, such testimony could have given rise to a legitimate doubt on the part of UZ, as to the impartiality of the investigator, who could have been influenced by the particularly malicious nature of her alleged conduct as reported to him.

32. The General Court, in paragraphs 53 to 55 of the judgment under appeal, considered that, since UZ had informed the Parliament, at her hearing on 14 November 2016, of that lack of impartiality, the Parliament was in a position to choose a person with no prior knowledge of the facts of the case as investigator.

33. In the second place, as regards the alleged lack of impartiality of the investigator of the 'harassment' component, the General Court noted, in paragraph 57 of that judgment, that it was clear from the explanations given by the Parliament at the hearing that, before being appointed investigator of the 'harassment' component of the administrative investigation, he had chaired the Advisory Committee on Harassment and its Prevention at the Workplace. That committee had concluded that the management of the unit of which UZ was the head should be passed to another person.

34. According to the General Court, in the light of the conclusion reached by that committee, when he was appointed as the investigator of the 'harassment' component, he could already have had a negative opinion of UZ. That circumstance calls into question his objective impartiality.

35. Accordingly, the General Court held, in paragraph 59 of the judgment under appeal, that, by appointing as investigators two persons who could have had prior knowledge of the case, the Parliament did not offer guarantees sufficient to exclude any legitimate doubt, within the meaning of the case-law of the Court.

36. In the third place, the General Court, in paragraph 60 of the judgment under appeal, recalled the settled case-law according to which, in order that a procedural irregularity may justify the annulment of an act, it is necessary that had it not been for that irregularity, the outcome would have been different.

37. According to the General Court, it could not be ruled out that, had the administrative investigation in this case been conducted with care and impartiality, it might have resulted in a different initial assessment of the facts which would not necessarily have led to the imposition of the disciplinary penalty.

38. Accordingly, the General Court, in paragraph 65 of the judgment under appeal, ruled that UZ's claim for annulment of the contested decision must be upheld.

39. However, for reasons relating to the sound administration of justice, the General Court considered it useful to examine the second plea.

2. The second plea, alleging that that there were irregularities in the proceedings of the Disciplinary Board and a failure by the competent authority to hold a hearing at the conclusion of those proceedings

40. In support of her second plea, UZ argued, first, that the Parliament could not be legitimately represented by two officials at one of the six meetings and that the Parliament's representatives wrongly remained in the meeting room to deliberate with the members of the Disciplinary Board. Secondly, UZ maintained that only the Secretary-General of the Parliament was entitled to hear an official before deciding to impose a disciplinary penalty on him or her. According to UZ, no such hearing took place.

41. In paragraph 102 of the judgment under appeal, the General Court upheld the second plea. Since a review of the General Court's reasoning as regards the issues raised in that plea is of only limited interest for the analysis of the appeal in this Opinion, it is sufficient to refer in that regard to paragraphs 68 to 101 of the judgment under appeal.

B. The application for annulment of the decision rejecting the request for assistance

42. Before the General Court, UZ argued, in essence, that the Parliament had wrongly rejected the request for assistance which she had herself made to that institution.

43. Since that plea is not relevant for the purposes of the analysis carried out in this Opinion, it is sufficient to note that the application for annulment of the decision rejecting the request for assistance was dismissed by the General Court on the grounds set out, inter alia, in paragraphs 107 to 110 of the judgment under appeal.

44. In the light of the foregoing considerations, the General Court, by the judgment under appeal, annulled the contested decision and dismissed the remainder of the action.

V. Forms of order sought

A. Forms of order sought in the main appeal

45. By its appeal, the Parliament claims that the Court should:

– set aside the judgment under appeal and, consequently;

– dismiss the action at first instance;

– order each party to pay its own costs relating to the appeal, and

– order UZ to pay the costs of the proceedings at first instance.

46. In her response, UZ contends that the Court should:

– dismiss the appeal and,

– order the Parliament to pay the costs of the proceedings at first instance and on appeal.

B. Forms of order sought in the cross-appeal

47. By her cross-appeal, UZ claims that the Court should:

– set aside the judgment under appeal in so far as it dismisses the application for annulment of the decision rejecting her request for assistance; and

– giving judgment itself, annul the decision of the Parliament dismissing that application for annulment, and

– order the Parliament to pay the costs of the proceedings at first instance and on appeal.

48. By its response, the Parliament contends that the Court should:

– declare the cross-appeal partially inadmissible as regards the second ground of appeal and unfounded in its entirety, and

– order UZ to pay the costs.

VI. Legal analysis

A. The grounds of appeal raised by the Parliament and the scope of the assessment to be carried out

49. In support of its appeal, the Parliament puts forward three grounds of appeal. The *first ground of appeal*, which is directed against paragraphs 54, 58 and 59 of the judgment under appeal, alleges an error of law, distortion of the facts and a failure to state reasons, which undermined the General

Court's finding that the investigations carried out by the Parliament were vitiated by a lack of objective impartiality. The *second ground of appeal*, directed against paragraph 72 of that judgment, alleges an error of law, distortion of the facts and a failure to state reasons in respect of the General Court's finding of infringement of the principle of equality of arms during the Disciplinary Board's proceedings. The *third ground of appeal*, directed against paragraphs 90, 99 and 102 of that judgment, alleges an error of law, distortion of the facts and a failure to state reasons on the part of the General Court in its finding that UZ's right to be heard had been infringed.

50. The *first ground of appeal* is divided into four parts. As already stated in the introduction, this Opinion will deal only with the *first part* of that ground of appeal. I shall therefore confine myself below to presenting the arguments put forward by the Parliament in that regard.

51. The Parliament submits, in essence, that, in holding, in paragraphs 52, 58 and 59 of the judgment under appeal, that two investigators, namely the one entrusted with the 'disciplinary' component of the administrative investigation and the other entrusted with the 'harassment' component of that investigation, did not offer guarantees sufficient to exclude any legitimate doubt as to their objective impartiality, the General Court based its decision on a distortion of the facts and on erroneous legal criteria in the context of its assessment of the concept of 'objective impartiality', and thus infringed Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter').

52. According to the Parliament, mere prior knowledge of the facts by the investigator entrusted with the 'disciplinary' component, in particular when that knowledge is limited and isolated or even incomplete, as in the present case, cannot, in itself, automatically give rise to a legitimate doubt which justifies the selection of another person who has no prior knowledge of the facts of the case. Moreover, the General Court barely considered whether UZ's apprehensions were actually capable of justifying a legitimate doubt as to the objective impartiality of the investigators. In the present case, according to the Parliament, those apprehensions did not justify a need to appoint other investigators, in particular in the light of the absence of any conflict of interest between the investigators concerned and UZ.

53. It can be inferred from that summary of the arguments that the legal questions which arise in the present dispute concern, in essence, two main issues: first, the concept of 'impartiality' and, secondly, its applicability to a case such as this. In order to analyse those legal questions in a structured and logical manner, it is necessary to clarify, first, the areas of the EU legal order to which that concept generally applies and, secondly, whether the civil service is one of them. Only after examining those legal questions will it be possible to establish whether the General Court has committed errors of law and whether the complaint raised by the Parliament can be considered as being well founded. This is the structure of the analysis which is set out below.

B. The concept of 'impartiality' in EU law

1. Preliminary considerations

54. In common usage, the concept of 'impartiality' means 'neutrality'. It refers to the quality or character of someone who does not favour one party at the expense of another person or of what is objective, fair and equitable.[2] That said, regard should be had to the fact that EU law places particular importance on the impartiality of persons who are called upon to perform a specific function – usually related to decision-making or dispute resolution – within its institutional structure, whether they be Judges and Advocates General[3] at the Court or officials and other servants at the various institutions, bodies, offices and agencies. This is, in particular, due to the fact that the EU legal order has adopted many principles which have their origin in the constitutional traditions of its Member States.

55. Although the European Union, as a supranational organisation, does not itself have the status of 'State' as understood in political science, it is clear that the Treaties have endowed it with powers which evoke a set of characteristics inherent in Member States. The principle of institutional balance deriving from Article 13(2) TEU, under which 'each [EU] institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them';[4] is specifically intended to ensure mutual respect within the European Union for the powers conferred on the institutions. The same applies to recognition of the universal values of 'the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law', as referred to in the preamble of the TEU. Several provisions in the Treaties, and in particular in the Charter, ensure that the European Union will respect those principles when exercising its powers. At the present stage of its development, the EU legal order shows remarkable parallels with the legal orders of its Member States.

56. Viewed from a different angle, it could be argued that guaranteeing those principles and values is a necessary condition for the transfer of powers to the European Union. In so far as the European Union has increasingly assumed powers which were previously held by Member States, thereby taking on their role, its legal order has had to evolve to reflect the values and principles of the Member States. Moreover, since EU law often requires implementation at national level, for example, through the transposition of a directive by national legislative bodies or the adoption of administrative acts by national authorities, uniformity of values and principles has had to be

2 The concept of 'impartiality' is intrinsically linked to the concept of 'justice'. Impartiality is regarded in the philosophy of law as an ethical requirement necessary to ensure the uniform, and thus equal or fair, application of the law to individuals, thereby avoiding arbitrary decisions (see, to that effect, Petersen, J., *Nietzsches Genialität der Gerechtigkeit*, Berlin 2008, p. 102, and Drews, A., *Kants Naturphilosophie als Grundlage seines Systems*, Berlin 1894, p. 250). That concept implies a detachment on the part of the decision-maker from his or her personal interests and the taking of decisions without regard to the status of the person concerned (see, in that regard, Guinchard, S., 'La gestion des conflits d'intérêts du juge: entre statut et vertu', *Pouvoirs*, 2013/4, No 147, p. 39). According to a tradition dating back to the Middle Ages, the impartiality underpinning the judicial systems of the Member States is symbolised by the image of a blindfolded woman, an allegorical personification inspired by the goddesses Iustitia and Themis, from Roman and Greek mythology respectively.

3 Pursuant to the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, *acting with complete impartiality* and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement (see, in that regard, judgments of 3 December 2015, *Banif Plus Bank*, C-312/14, EU:C:2015:794, paragraph 33, and of 9 June 2016, *Pesce and Others*, C-78/16 and C-79/16, EU:C:2016:428, paragraph 25).

4 Judgments of 14 April 2015, *Council* v *Commission* (C-409/13, EU:C:2015:217, paragraph 64); of 16 July 2015, *Commission* v *Council* (C-425/13, EU:C:2015:483, paragraph 69); of 6 October 2015, *Council* v *Commission* (C-73/14, EU:C:2015:663, paragraph 61); and of 28 July 2016, *Council* v *Commission* (C-660/13, EU:C:2016:616, paragraph 32).

ensured.[5] This is essential for the proper functioning of any multi-tier system of governance, whether a country with a federal structure or a regional integration system such as the European Union.

57. With specific reference to the concept of 'impartiality', it should be noted that, since that concept is recognised in all Member States in various ways, it is logical that it should also form an integral part of the EU legal order. The issue which arises in that context is that of the areas to which that concept applies, having regard to the valuable guidance provided by the case-law of the Court. In this Opinion, I shall present an overview of that case-law with the aim of confirming that the concept of 'impartiality' is recognised as a central principle of EU law.

2. Application to the judicial system

58. Independence and impartiality are the two fundamental principles of any judicial system.[6] Those principles guarantee to individuals that the adjudication process will be determined solely by the arguments before the court or tribunal, free from any pressure or prejudice. Impartiality, which is a key element of the right to a fair trial, enshrined in prominent provisions such as Article 10 of the Universal Declaration of Human Rights, Article 14(1) of the International Covenant on Civil and Political Rights and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, refers to the absence of prejudice which must characterise a court. In that connection, independence is concerned rather with the relationships of a court with the other powers and is a necessary, though by no means sufficient, condition of a court's impartiality in the context of its relationships with individuals.

59. The Treaties and the Statute of the Court of Justice of the European Union provide the basis for independent judicial activity at the supranational level,[7] allowing the fully impartial handling of cases brought before it. Where those measures do not make specific provision for dealing with certain procedural issues in an appropriate manner, the Court often draws inspiration from the case-law of the European Court of Human Rights as the international judicial body responsible for interpreting the ECHR, which reflects the constitutional traditions common to the Member States. In so far as those rights and constitutional traditions constitute general principles of EU law, under Article 6(3) TEU, it is well known that the case-law of the European Court of Human Rights is an authoritative source for the interpretation of those general principles within the European Union.

60. The judgment of 19 February 2009, *Gorostiaga Atxalandabaso* v *Parliament* (C-308/07 P, EU:C:2009:103; 'the judgment in *Gorostiaga Atxalandabaso* v *Parliament*'), is particularly relevant in the present context, since in that judgment the Court recalled the importance of the right to a fair trial, enshrined in the aforementioned Article 6(1) ECHR, which implies access for

5 In administrative law, the effort to ensure that uniformity of values and principles which characterise good administration can be seen in the application, first, of Article 41 of the Charter to the EU institutions and bodies, to which that provision is addressed, and, secondly, of the general principle of EU law, reflected in that provision, to the Member States when they implement that law. See in that regard, judgments of 8 May 2019, *PI* (C-230/18, EU:C:2019:383, paragraph 57), and of 24 November 2020, *Minister van Buitenlandse Zaken* (C-225/19 and C-226/19, EU:C:2020:951, paragraph 34).

6 For an overview of the implementation of those two principles at the international level, see Olbourne, B., 'Independence and impartiality: International standards for national judges and courts', *Law and practice of international courts and tribunals*, vol. 2, No 1, April 2003, p. 97.

7 See, in that regard, Voßkuhle, A., 'The cooperation between European courts: the Verbund of European courts and its legal toolbox', *The Court of Justice and the Constitution of Europe: analyses and perspectives on sixty years of case-law*, The Hague 2013, p. 82, which explains that the German Constitutional Court has expressly acknowledged that the Court has the power to contribute to the development of EU law.

every person to an independent and impartial tribunal. The Court held, with regard to its status in the EU legal order, that the right to a fair trial constituted a fundamental right which the European Union respected as a general principle under Article 6(2) EU.[8] In that regard, it should be noted that the judgment in question dates from before the entry into force of the Treaty of Lisbon, that right now being enshrined in Article 47 of the Charter, which provides, inter alia, for access for every person to an independent and *impartial* tribunal. It should be noted that EU law aims to provide a similar or at least equivalent level of protection to that guaranteed by the ECHR.

61. One of the legal questions put to the Court of Justice at that time, in an appeal against an order of the General Court, was whether the fact that one or more of the judges were present in two successive formations and exercised the same functions, such as President or Judge-Rapporteur, was capable of raising any doubt as to the impartiality of the General Court. It should be recalled that the appellant in the case which gave rise to the judgment in question had argued that, in his view, respect for the principle of impartiality required that the same judge cannot, including where the same level of jurisdiction is concerned, hear and determine a case based on facts identical or sufficiently connected to those of a case that he has previously decided.[9] In his view, an infringement of the right to an impartial tribunal had arisen from the allocation of the case giving rise to the order under appeal to a formation consisting of judges, including those carrying out the functions of President and Judge-Rapporteur, who had already sat on the bench which had delivered the judgment in a previous case, relating in part to the same facts.

62. The Court rejected that line of argument, answering in the negative the legal question which had been put to it. According to the Court, even though the existence of guarantees concerning the composition of the tribunal are the cornerstone of the right to a fair trial, the fact that the judges who heard and determined a case initially may sit in another formation hearing and determining the same case again is not in itself incompatible with the requirements of a fair trial.[10] The Court stated that, in particular, the fact that one or more of the judges were present in two successive formations and exercised the same functions is in itself irrelevant to the assessment of compliance with the requirement of impartiality, since those duties are performed in a collegiate formation of the court.[11] According to the Court, such considerations are even more relevant where the two successive formations did not have to hear and determine the same case, but two separate cases which are related to some extent.[12]

63. It should be noted in particular that the Court relied on the concept of 'impartiality' developed in the case-law of the European Court of Human Rights[13] in order to apply it to the EU judicial system. More specifically, the Court pointed out that there are two aspects to the requirement of impartiality. In the first place, the tribunal must be subjectively impartial, that is, none of its members must show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary. In the second place, the tribunal must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect.[14]

8 Judgment in *Gorostiaga Atxalandabaso* v *Parliament*, paragraph 41.

9 Judgment in *Gorostiaga Atxalandabaso* v *Parliament*, paragraph 39.

10 Judgment in *Gorostiaga Atxalandabaso* v *Parliament*, paragraph 43.

11 Judgment in *Gorostiaga Atxalandabaso* v *Parliament*, paragraph 44.

12 Judgment in *Gorostiaga Atxalandabaso* v *Parliament*, paragraph 45.

13 Judgments of the European Court of Human Rights of 24 February 1993 in *Fey v. Austria* (CE:ECHR:1993:0224JUD001439688, § 28); of 25 February 1997 in *Findlay v. The United Kingdom*, (CE:ECHR:1997:0225JUD002210793, § 73); and of 4 October 2007 in *Forum Maritime SA v. Romania* (CE:ECHR:2007:1004JUD006361000, § 116).

14 Judgment in *Gorostiaga Atxalandabaso* v *Parliament*, paragraph 46.

64. Returning to the facts of the case submitted to it for decision, the Court of Justice noted, first, that the appellant had not advanced any argument liable to call into question the personal impartiality of members of the General Court and, secondly, that he had not put forward any objective evidence capable of raising any doubt as to the impartiality of the General Court.[15] The Court of Justice found that the appellant had instead merely pointed to the presence of the same judges in the two formations in question, which is a fact which was not in itself incompatible with the legal requirements for a fair trial. The Court of Justice thus rejected as unfounded the appellant's ground of appeal alleging an infringement of the right to an impartial tribunal.[16]

3. Application to administrative law in the broad sense

65. Although the requirement of impartiality is particularly relevant to any judicial system, given the central role which the judiciary has traditionally played in the interpretation and application of the law, it is not restricted to that field. In so far as the legal order confers sovereign powers on administrative bodies, enabling them to influence the legal status of natural and legal persons, it is necessary to make the exercise of those powers subject to conditions and even to set certain limits in order to safeguard the legitimate interests of those persons.[17] This must also be reflected in the way in which administrative bodies adopt their decisions, that is to say at the procedural level. Indeed, procedural law is at least as important as the substantive rules of administrative law, since it enables individuals to assert their rights. The aim of determining the conditions and limits for the exercise of sovereign powers by administrative bodies, generally at the level of constitutional law, is to establish a legal framework: an essential characteristic of the rule of law.[18]

66. The foregoing considerations are even more relevant to a 'union based on the rule of law' such as the European Union, its institutions being subject to review of the conformity of their acts, inter alia, with the Treaties and the general principles of law.[19] Among the principles in the light of which that review of legality is carried out is the *right to good administration*, enshrined in Article 41 of the Charter, which guarantees, inter alia, the right of every person 'to have his or her affairs handled *impartially*, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union' (emphasis added).

67. A distinctive feature of Article 41 of the Charter is that it transforms some elements of the objective principle of legality into a subjective right to good administration. As such, it enables the holder of that right to require the administration to act in a certain way or to refrain from acting.[20] That provision lays down for administrative procedures guarantees equivalent to those

15 Judgment in *Gorostiaga Atxalandabaso* v *Parliament*, paragraph 47.

16 Judgment in *Gorostiaga Atxalandabaso* v *Parliament*, paragraphs 48 and 49.

17 See Kanska, K., 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', *European Law Journal*, vol. 10, No 3, May 2004, p. 303. The author is of the view that conferring administrative rights on citizens at European level helps to strengthen the status of citizenship beyond the strictly national framework. According to that author, this is a necessity in view of the increasing power of the EU institutions.

18 Batalli, M. and Fejzullahu, A., 'Principles of Good Administration under the European Code of Good Administrative Behaviour', *Pécs Journal of International and European Law*, 2018, No 1, p. 31. The authors state that the principle of legality is considered to be the basis of any legal order, which, in essence, defines the rule of law. According to that principle, all administrative activities must be based on legal rules.

19 Judgments of 26 June 2012, *Poland* v *Commission* (C-336/09 P, EU:C:2012:386, paragraph 36), and of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 54).

20 See, to that effect, Kanska, K., 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights', *European Law Journal*, vol. 10, No 3, May 2004, p. 300. See also Bousta, R., 'Who said there is a "right to good administration"? A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union', *European Public Law*, 2013, No 3, p. 488, where the author, by contrast, takes the view that the right to good administration provides procedural guarantees for the fulfilment of fundamental rights.

laid down in Articles 47 and 48 of the Charter for judicial proceedings. Consequently, certain rights, such as the right to be heard, may pertain both to the right to good administration, laid down in Article 41 of the Charter, and to observance of the rights of defence and the right to a fair trial enshrined in Articles 47 and 48 of the Charter.[21] Their applicability therefore depends on the procedure in question. The history of Article 41 of the Charter reveals that that provision is based on national and European legal traditions,[22] and in particular on the case-law of the Court, which has occasionally relied on the concept of 'good administration' in order to strengthen the status of the persons concerned.[23]

68. Since EU administrative law has been codified not in a single legislative instrument, but rather in a variety of legal acts each governing its respective field,[24] administrative procedures may also vary considerably.[25] Nevertheless, certain principles governing administrative procedure are of mandatory application, including the rights referred to in Article 41 of the Charter, which, as a whole, establish the right to good administration. By virtue of its constitutional status in the EU legal order, Article 41 of the Charter has the effect of establishing a *horizontal right* to good administration which applies to every administrative procedure, even where this is not expressly provided for by the legislative measure establishing the administrative procedure in question.[26]

69. In order to better illustrate the scope of that right, and more specifically the requirement of impartiality in EU administrative law, I shall present below some examples drawn from the case-law of the Court in the fields of competition law,[27] the authorisation of medicinal products[28] and the economic and budgetary surveillance of the euro area,[29] as well as civil service law.[30] The analysis of that case-law will be the starting point for a subsequent examination of whether the requirement of impartiality can be applied to investigations in the context of disciplinary proceedings.

21 See Opinion of Advocate General Bot in *M.* (C-277/11, EU:C:2012:253, point 31).

22 The Treaties of the European Union already contain some provisions which have served as a source of inspiration for the codification in Article 41 of the Charter. For example, Article 41(2)(c) of the Charter is based on Article 296 TFEU; Article 41(3) of the Charter is based on Article 340 TFEU, and Article 41(4) of the Charter is based on Article 20(2)(d) TFEU. However, the requirement of 'impartiality' is not expressly referred to in the Treaties. Article 298 TFEU alone refers to an 'independent' European administration.

23 See, in that regard, the explanations relating to Article 41 of the Charter (OJ 2007 C 303, p. 17), as well as the judgments of 13 July 1966, *Consten and Grundig* v *Commission* (56/64 and 58/64, EU:C:1966:41, p. 501); of 9 July 1970, *Tortora* v *Commission* (32/69, EU:C:1970:68, paragraph 11); and of 31 March 1992, *Burban* v *Parliament* (C-255/90 P, EU:C:1992:153, paragraph 7).

24 See, in that regard, Mendes, J., 'The EU Administrative Institutions, Their Law, and Legal Scholarship', *The Oxford Handbook of Comparative Administrative Law*, Oxford 2020, p. 544; Stelkens, U. and Andrijauskaite, A., 'How to Assess the Effectiveness of the Pan-European General Principles of Good Administration', *Good Administration and the Council of Europe*, Oxford 2020, p. 68. Those authors speak of the current 'fragmentation' of EU administrative law, including administrative procedure, between several legislative acts.

25 In the past, there have nevertheless been initiatives to create a single code of administrative procedure, namely the European Parliament resolution of 15 January 2013, adopted under Article 225 TFEU, with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL); A7-0369/2012), as well as the 'Proposal for a Regulation for an open, efficient and independent European Union administration' (2016/2610(RSP); P8_TA(2016)0279), approved by the Parliament by resolution of 9 June 2016, in which the Parliament called on the Commission to examine that proposal for a regulation and asked the Commission to submit a legislative proposal. However, it appears that the Commission has not acted on that request.

26 See, to that effect, Ladenburger, C., 'Evolution oder Kodifikation eines allgemeinen Verwaltungsrechts in der EU', *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts*, Tübingen 2008, S. 116. That author takes the view that Article 41 of the Charter constitutes a 'compressed and general codification' which sets out the main procedural rights as individual rights.

27 See point 70 et seq. of this Opinion.

28 See point 76 et seq. of this Opinion.

29 See point 84 et seq. of this Opinion.

30 See point 91 et seq. of this Opinion.

(a) *Competition law*

70. The judgment of 11 July 2013, *Ziegler* v *Commission* (C-439/11 P, EU:C:2013:513; 'the judgment in *Ziegler* v *Commission*') provides useful lessons for the application of the right to good administration to competition law proceedings. In that case, which concerned the participation of several undertakings in a cartel in the international removal services sector, the Court was called upon to establish, inter alia, whether the rights of the undertakings involved had been observed by the Commission, as the authority responsible for imposing penalties on cartel members. According to one of the undertakings involved, the Commission's decision to impose a fine on it was vitiated by a lack of objective impartiality on the ground that the Commission was concerned by the alleged infringement due to both the fact that it was one of its victims and the fact that Commission officials had been involved in the illegal activities. That line of argument was based on the premiss that the victims of an infringement cannot act as judges of the infringement. [31]

71. The Court examined that line of argument, establishing, first of all, that while the Commission may not be classified as a 'tribunal' within the meaning of Article 6 ECHR, it is nevertheless required during the administrative procedure to respect the fundamental rights of the European Union, which include the right to good administration enshrined in Article 41 of the Charter. The Court explained that it is that provision, not Article 47 of the Charter, which governs the administrative procedure relating to restrictive practices before the Commission. [32] That finding provides important clarification concerning the respective scopes of the two provisions and the relationship between them, matters to which I have already drawn attention in this Opinion. [33]

72. Referring to its case-law, in particular the judgment in *Gorostiaga Atxalandabaso* v *Parliament* cited above, [34] the Court recalled that, under Article 41 of the Charter, every person has the right, inter alia, to have his or her affairs handled impartially by the institutions of the European Union. That requirement of impartiality encompasses, on the one hand, subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned. [35]

73. Observing that only the concept of 'objective impartiality' was at issue in that case, the Court considered, in the light of the arguments put forward by the undertaking involved, that the simple fact that the Commission investigates a cartel which is detrimental to the European Union's financial interests and imposes penalties on its members does not mean that the Commission lacks objective impartiality. Otherwise, according to the Court, the mere possibility that the Commission, or indeed any other EU institution, might be the victim of anti-competitive conduct would have the effect of depriving it of its competence to investigate such conduct, which cannot be accepted. In that regard, the Court held that it should be noted in particular

31 Judgment in *Ziegler* v *Commission*, paragraph 146.

32 Judgment in *Ziegler* v *Commission*, paragraph 154.

33 See point 67 of this Opinion.

34 See point 63 of this Opinion.

35 Judgment in *Ziegler* v *Commission*, paragraph 155.

that, under Article 105 TFEU, the tasks entrusted to the Commission by the Treaties include precisely that of ensuring the application of the principles laid down in Articles 101 TFEU and 102 TFEU. [36]

74. The Court then found that the fact that the Commission's departments responsible for bringing proceedings for infringements of EU competition law and those responsible for the administration of removals of officials and agents of that institution belong to the same organisational structure cannot, of itself, call into question that institution's objective impartiality, since those departments necessarily form part of the structure, to which they belong. [37] Finally, the Court recalled that Commission decisions may be subject to review by the European Union judicature and that European Union law lays down a system enabling the courts to review Commission decisions, including decisions relating to procedures under Article 101 TFEU, which provides all the guarantees required by Article 47 of the Charter. [38]

75. In the light of all the foregoing considerations, the Court of Justice concluded that there was no evidence to suggest that the Commission had failed in its duty of impartiality. The Court of Justice therefore held that the General Court did not err in law in rejecting the plea raised by the undertaking involved, alleging infringement of the right to fair legal process and the general principle of good administration. [39]

(b) *The authorisation of medicinal products*

76. While competition law might, in view of the broad powers of supervision conferred on the Commission, appear to be a special area of administrative law capable of justifying recognition of certain guarantees for legal persons subject to that legal regime, [40] the judgment of 27 March 2019 in *August Wolff and Remedia* v *Commission* (C-680/16 P, EU:C:2019:257; 'the judgment in *Wolff* v *Commission*') clearly shows that the requirement of impartiality enshrined in Article 41 of the Charter is fully applicable to administrative procedures before the various institutions, bodies, offices and agencies of the Union. Moreover, that judgment contains valuable clarification as to the scope of the obligations of the officials and other servants working in them.

77. The dispute which gave rise to that judgment stemmed from a decision adopted by the Commission concerning national marketing authorisations for medicinal products, which was based on the opinion issued by a Committee for Medicinal Products for Human Use ('the Committee'), responsible for drawing up the opinion of the European Medicines Agency (EMA) on any question relating to the evaluation of medicinal products for human use. The applicants requesting that the General Court annul that decision had relied on the fact that the chief rapporteur, appointed by the Committee to prepare the opinion of that committee, had acted in a dual capacity, since she was also an employee of the national authority which had initiated the procedure for reviewing marketing authorisation before the Committee. That fact demonstrates an overlap in function and a conflict of interest giving rise to a legitimate doubt as to the impartiality of that procedure. [41]

36 Judgment in *Ziegler* v *Commission*, paragraphs 155 and 156.

37 Judgment in *Ziegler* v *Commission*, paragraph 158.

38 Judgment in *Ziegler* v *Commission*, paragraph 159.

39 Judgment in *Ziegler* v *Commission*, paragraph 160.

40 See, to that effect, Craig, P., *The EU Charter of Fundamental Rights* (edited by Peers, Hervey, Kenner and Ward), Oxford 2014, Article 41, 41.25, p. 1077.

41 Judgment in *Wolff* v *Commission*, paragraph 21.

78. The Court of Justice examined the arguments put forward by the applicants, recalling at the outset that EU institutions and bodies are required to respect the fundamental rights of the European Union, which include the right to good administration enshrined in Article 41 of the Charter. The Court drew attention to the fact that paragraph 1 of that provision states, inter alia, that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. [42]

79. In that regard, the Court of Justice made clear that the need for impartiality, required of institutions and bodies in carrying out their missions, is intended to guarantee equality of treatment, on which the European Union is founded. That requirement is intended, inter alia, to avoid a situation where there could be a conflict of interest on the part of officials or agents acting on behalf of those institutions and bodies. Having regard to the fundamental importance of ensuring the independence and probity of EU institutions and bodies as regards both their internal functioning and external reputation, the requirement of impartiality covers all circumstances in which an official or agent who is called upon to decide on an issue must reasonably consider that issue as being of such a nature as to be viewed by third parties as a possible source of impairment of his or her independence in that matter. [43]

80. According to the Court of Justice, it is also incumbent upon those institutions and bodies to comply with both components of the requirement of impartiality, which are, on the one hand, subjective impartiality, by virtue of which no member of the institution concerned may show bias or personal prejudice and, on the other, objective impartiality, under which there must be sufficient guarantees to exclude any legitimate doubt as to possible bias on the part of the institution concerned. [44] As regards, more particularly, the second component of the principle of impartiality, the Court made clear that, where a number of EU institutions or bodies are given separate responsibilities of their own in the context of a procedure that is liable to result in a decision adversely affecting a party, each of those institutions and bodies is required, in respect of its own activities, to comply with the requirement of objective impartiality. Consequently, even where only one of them has breached that requirement, such a breach is liable to render the decision adopted by the other at the end of the procedure at issue unlawful. [45]

81. The Court shared the view of the applicants, and considered that the particular circumstances of the case in question were likely to give rise to doubts as to compliance with the requirement of impartiality. More specifically, the Court considered that the objective impartiality of the committee in question could be jeopardised because of the conflict of interest arising from the overlap in function of one of its members, irrespective of that member's actual conduct. [46] The Court considered as decisive factors the role assigned to the rapporteur in that committee and the lack of sufficient safeguards to avoid any undue influence on the Committee's opinion. Indeed, the Court stated that it is for the Committee, in view of the rapporteur's own responsibilities, to be particularly vigilant in attributing that role in order to avoid giving rise to any legitimate doubt as to possible bias. [47]

42 Judgment in *Wolff* v *Commission*, paragraphs 24 and 25.

43 Judgment in *Wolff* v *Commission*, paragraph 26.

44 Judgment in *Wolff* v *Commission*, paragraph 27.

45 Judgment in *Wolff* v *Commission*, paragraph 28.

46 Judgment in *Wolff* v *Commission*, paragraph 30.

47 Judgment in *Wolff* v *Commission*, paragraph 38.

82. The Court recalled that, in order to show that the organisation of an administrative procedure did not ensure sufficient guarantees to exclude any legitimate doubt as to possible bias, it was not necessary to prove lack of impartiality due to the specific characteristics of the role of rapporteur in the procedures conducted before the Committee. It was sufficient for a legitimate doubt to arise which cannot be dispelled.[48] In that case, the Court rule, in essence, that third party observers could legitimately consider that the national authority which initiated the procedure before the Committee was in a position to influence the decisions taken by that committee.[49] The value of that judgment lies in the fact that it established a certain standard of proof for determining whether objective impartiality has been compromised in a particular case. I shall return to this matter when I examine the present case in the light of the criteria developed in the case-law.

83. Having regard to the foregoing considerations, the Court of Justice concluded that the General Court had erred in law by holding that the Committee had ensured the existence of sufficient guarantees to exclude any legitimate doubt as to compliance with the obligation of impartiality enshrined in Article 41 of the Charter.

(c) *Economic and budgetary surveillance of the euro area*

84. The judgment of 20 December 2017, *Spain* v *Council* (C-521/15, EU:C:2017:982; 'the judgment in *Spain* v *Council*'), should also be cited in an overview of the case-law relating to the requirement of impartiality in the context of an administrative procedure. The relevance of that judgment stems from the fact that the administrative procedure in question provides for an investigation stage directed against Member States, which raises the question whether they can rely upon the right to good administration guaranteed by Article 41(1) of the Charter in order to claim that an administrative act is unlawful.[50] The Court expressly refrained from ruling on whether a Member State may be regarded or treated as a 'person' within the meaning of that provision and may, on that basis, rely on the right set out therein. However, the Court stated that that right reflects a general principle of EU law, which may, for its part, be relied on by Member States and in the light of which the legality of any administrative act adopted by the EU institutions must therefore be assessed.

85. The case which gave rise to the judgment in *Spain* v *Council* falls within the field of economic and budgetary surveillance of the euro area and concerned, more specifically, the investigative powers of the Statistical Office of the European Union (Eurostat) vis-à-vis the Member States. That dispute stemmed from a decision adopted by the Council, which concluded that the Kingdom of Spain had, through gross negligence, made misrepresentations to Eurostat and, accordingly, imposed a fine on that Member State. The contested decision was based on data obtained in the course of investigations into the manipulation of statistics in Spain.

86. Challenging the contested decision, that Member State brought an action for annulment, arguing, inter alia, that there had been an infringement of the right to good administration on the basis that the investigation procedure had been conducted under conditions that did not guarantee the Commission's objective impartiality.[51] More specifically, the Kingdom of Spain had argued that several of the members of staff who had taken part in the visits carried out by Eurostat

48 Judgment in *Wolff* v *Commission*, paragraph 37.

49 Judgment in *Wolff* v *Commission*, paragraph 39.

50 Judgment in *Spain* v *Council*, paragraph 89.

51 Judgment in *Spain* v *Council*, paragraph 86.

in Spain, before the decision to launch the investigation was adopted, formed part of the team which was subsequently set to work by the Commission in the context of the investigation procedure.

87. As stated above, the Court examined the alleged illegality of the contested Council decision from the point of view of the general principle reflected in the right to good administration enshrined in Article 41 of the Charter, recalling its case-law to the effect that the EU institutions are required to observe that general principle of law in the context of administrative procedures that are initiated against Member States and are liable to result in decisions adversely affecting them.[52] Referring to the judgment in *Ziegler* v *Commission*, the Court recalled that it is incumbent upon the EU institutions to comply with both components of the requirement of impartiality, which are, first, subjective impartiality, by virtue of which no member of the institution concerned may show bias or personal prejudice, and secondly, objective impartiality, under which there must be sufficient guarantees to exclude any legitimate doubt as to possible bias on the part of the institution concerned.[53]

88. The Court rejected the Kingdom of Spain's allegation of partiality, pointing out in essence that the visits, on the one hand, and the procedure, on the other, fell within separate legal frameworks and had different purposes.[54] According to the Court, even though the data which were the subject of, first, those visits and, secondly, that investigation procedure may have partially coincided, the assessments which Eurostat and the Commission were respectively called upon to make in respect of those data were, on the other hand, necessarily different. Consequently, the assessments made by Eurostat as to the quality of some of those data, following the visits made in a Member State, did not, in themselves, prejudge the view that might be taken by the Commission regarding the existence of misrepresentations relating to the same data should it subsequently decide to initiate an investigation procedure in that regard.[55]

89. The Court concluded from this that the fact that the conduct of an investigation procedure founded on a particular legal basis is entrusted to a team largely composed of members of Eurostat's staff who have already taken part in visits organised by Eurostat in the Member State concerned on a separate legal basis, before the institution of that procedure, did not, as such, permit the Court to conclude that the decision adopted at the end of that procedure was unlawful on account of a breach of the requirement of objective impartiality to which the Commission is subject.[56]

90. Furthermore, the Court clarified that it was not for Eurostat, but rather for the Commission, and therefore for the Commissioners acting as a collegiate body, to decide to initiate the investigation procedure, to take responsibility for conducting the investigation and, finally, to submit to the Council the recommendations and proposals that are necessary at the conclusion of the investigation. The Court stated that, since the relevant legal framework did not entrust Eurostat's staff with any responsibility of their own in the conduct of the investigation procedure, the role assigned to Eurostat's staff in that investigation procedure could not be regarded as decisive for either the conduct or the outcome of that procedure. Accordingly, the Court held that the fact that the conduct of the investigation procedure was entrusted to a team largely composed of members of Eurostat's staff who had already taken part in visits organised by

52 Judgment in *Spain* v *Council*, paragraph 90.

53 Judgment in *Spain* v *Council*, paragraph 91.

54 Judgment in *Spain* v *Council*, paragraph 96.

55 Judgment in *Spain* v *Council*, paragraphs 99 and 100.

56 Judgment in *Spain* v *Council*, paragraph 101.

Eurostat in Spain, before that procedure was initiated, could not be regarded as vitiating the contested decision on account of an alleged breach by the Commission of the requirement of objective impartiality. Consequently, the Court dismissed the plea put forward by the Kingdom of Spain alleging an infringement of the right to good administration.

4. Application to civil service law

91. The judgments presented above illustrate how the requirement of impartiality applies in the context of administrative procedures pending before the institutions, bodies, offices and agencies of the Union. A common feature of those cases is the fact that the procedures in question involved legal persons as well as Member States, that is to say parties which could be regarded as 'external' to the EU administration. That said, I am still of the view that there is no legitimate reason to justify the exclusion of officials and servants of the administration from the category of beneficiaries of the protection guaranteed by Article 41 of the Charter.[57] On the contrary, I would like to point out in that context that, first, under that provision 'every person' has the right to have his or her affairs handled impartially and, secondly, that provision does not distinguish between EU administrative law in the narrow sense and the European civil service, the latter also being subject to administrative law in the broad sense of the term. Accordingly, the requirement of impartiality must be regarded as a principle of general application, applicable to all administrative procedures. As will be explained below by way of examples, that interpretation has been confirmed by the case-law of the Court.

(a) *The procedure for waiving the immunity of an official*

92. In that regard, it should be recalled from the outset that, as is clear from Article 41(2) of the Charter, the right to good administration actually comprises a set of rights, which includes in particular the right to be heard. In the judgment of 18 June 2020, *Commission* v *RQ* (C-831/18 P, EU:C:2020:481; 'the judgment in *Commission* v *RQ*'), which I shall present next, the Court ruled on the scope of the *right to be heard*[58] in the context of a procedure for waiving the immunity of an EU official. The judgment in question therefore concerned an essential aspect of the European civil service, guaranteed by Protocol (No 7) on the Privileges and Immunities of the European Union[59] with the aim of ensuring the proper functioning of the institutions, bodies, offices and agencies of the Union. The relevance of that judgment to the present case lies in the fact that it contains general considerations on the interpretation of Article 41 of the Charter, which, for reasons I shall discuss below, can in my view be applied to the requirement of impartiality.

93. In the relevant part of the analysis, the Court recalled at the outset that, according to settled case-law, observance of the rights of the defence is a fundamental principle of EU law.[60] The Court noted that, with regard more particularly to the right to be heard in all proceedings, that right is inherent in that fundamental principle and is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect of both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 thereof, which guarantees the right to good administration.[61] Article 41(2) of the Charter provides that the right to good administration

57 See, to that effect, Jarass, H., *Charta der Grundrechte der Europäischen Union*, 4th edition, Berlin, 2021, Article 41, point 10.

58 See also judgment of 4 June 2020, *EEAS* v *De Loecker* (C-187/19 P, EU:C:2020:444, paragraph 70), concerning also the right to be heard in the context of the civil service.

59 OJ 2010 C 83, p. 266.

60 Judgment in *Commission* v *RQ*, paragraph 64.

61 Judgment in *Commission* v *RQ*, paragraph 65.

includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.[62] It should be noted in that context that, as already indicated in this Opinion in relation to the requirement of impartiality, the Court emphasises the parallelism between the rights guaranteed by Articles 41 and 47 of the Charter, applicable respectively to a specific type of procedure.

94. The Court then observed that, as follows from its very wording, that provision is of general application. The Court inferred from this that the right to be heard must be observed in all proceedings which are liable to culminate in a measure adversely affecting the person concerned, even where the applicable legislation does not expressly provide for such a procedural requirement. Moreover, that right guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely.[63] In so far as those considerations are consistent with the observations I have made above in support of the view that the requirement of impartiality must be understood as a principle of general application governing any administrative procedure, it seems clear to me that Article 41 of the Charter is also intended to apply to the European civil service so far as concerns that requirement.

95. Another reason why the judgment in *Commission* v *RQ* is of particular importance is that it provides guidance on certain aspects of EU general administrative law which may play a decisive role in the examination of the present case and to which I shall return later in this Opinion,[64] namely the legal inferences to be drawn when the administration adopts a decision in breach of the procedural rights of the person concerned.

96. In that regard, the Court recalled that, according to its settled case-law, an infringement of the rights of the defence, in particular the right to be heard, will lead to the annulment of the decision taken at the conclusion of the administrative procedure in question only if, in the absence of that irregularity, that procedure might have led to a different outcome.[65] In that regard, the Court has explained that an applicant who alleges an infringement of his or her rights of defence cannot be required to show that the decision of the EU institution concerned would have been different in content but simply that such a possibility cannot be totally ruled out. The assessment of that question must be made in the light of the factual and legal circumstances of each case.[66]

(b) *The procedure for the removal of a member of the Commission*

97. To conclude this overview of the case-law, it is appropriate to cite the judgment of 25 February 2021, *Dalli* v *Commission* (C-615/19 P, EU:C:2021:133; 'the judgment in *Dalli* v *Commission*'), as an example of the application of the requirement of impartiality in the context of the civil service. The case which gave rise to that judgment involved an action brought before the General Court by a former member of the European Commission seeking an order that the Commission pay compensation for the damage, in particular non-material damage, he allegedly suffered as a result of allegedly unlawful conduct on the part of the Commission and OLAF in

62 Judgment in *Commission* v *RQ*, paragraph 66.

63 Judgment in *Commission* v *RQ*, paragraph 67.

64 See points 111 to 118 of this Opinion.

65 Judgment in *Commission* v *RQ*, paragraph 105.

66 Judgment in *Commission* v *RQ*, paragraphs 106 and 107.

connection with the termination of his office. In support of his action, the then applicant had put forward a number of complaints relating to the unlawfulness of the conduct of the Commission and OLAF, which were all nevertheless rejected by the General Court.

98. By his appeal, the appellant argued that the General Court had erred in law by failing to find any infringement of the requirement of impartiality under Article 41 of the Charter in the investigation against him. According to the appellant, there were elements which could give rise to legitimate doubts as to the impartiality of the investigation. In the first place, the appellant had complained of direct participation by the Director of OLAF, whereas, according to the appellant, the rules in force conferred on the Director of OLAF competence only to direct investigations. In the second place, the appellant criticised the General Court for wrongly concluding that the participation of representatives of a national authority in the investigation did not undermine OLAF's objective impartiality, even though one of those representatives was also a member of the Supervisory Committee. [67]

99. The Court did not share the view of the appellant and subsequently rejected the ground of appeal based, in essence, on an alleged infringement of the requirement of impartiality. More specifically, the Court concluded that none of the facts relied on by the appellant were such as to call into question compliance with the requirement of impartiality.

100. In the first place, as regards the error of law allegedly committed by the General Court when ruling on the participation of the Director of OLAF in the investigation, the Court recalled that Article 41(1) of the Charter states, inter alia, that every person has the right to have his or her affairs handled impartially by the institutions, bodies, offices and agencies of the Union. [68] The Court explained that it is incumbent on those institutions, bodies and agencies to comply with the requirement of impartiality, in its two components, which are, on the one hand, subjective impartiality and, on the other hand, objective impartiality. The Court then clarified the powers of the Director of OLAF, recalling to that end the relevant provisions of the regulation concerning the investigations conducted by that service [69] and concluding that he was required to play an active role in the conduct of investigations. The Court noted that the appellant had not demonstrated that the direct participation of the Director of OLAF in certain investigative activities is such as to undermine his objective impartiality. Furthermore, the Court noted that the appellant had not contested the validity of those provisions. Consequently, the Court found that the General Court's assessment, according to which such direct participation did not undermine the impartiality of the investigation, was not vitiated by an error of law.

101. In the second place, as regards the participation at a hearing of a representative of a national authority who was also a member of the Supervisory Committee, the Court held that the fact that one of its members had been directly involved in carrying out an OLAF investigative activity was of such a nature as to give rise to legitimate doubt as to the existence of any prejudice, positive or negative, on his part, in the exercise of his supervisory functions within that committee, as to the conditions under which the investigative activity in question was carried out. [70] According to the Court, although the objective impartiality of a member of the Supervisory Committee could thus be called into question in the exercise of the supervisory functions that he or she exercised in that capacity, the fact that that person may subsequently be called upon to exercise such supervision

67 Judgment in *Dalli* v *Commission*, paragraphs 106 and 107.

68 Judgment in *Dalli* v *Commission*, paragraphs 111 to 118.

69 Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1).

70 Judgment in *Dalli* v *Commission*, paragraphs 119 to 124.

could not, however, give rise to a legitimate doubt as to his or her impartiality when participating in an investigative activity. The Court concluded from this that, although the lack of objective impartiality raised by the applicant could, where appropriate, be invoked with regard to the Supervisory Committee's opinion on the OLAF investigation, it was not capable of calling into question compliance with the principle of impartiality in the context of that investigation and, in particular, during the hearing in which a member of that committee had taken part. In that regard, the Court noted that the applicant's argument was intended to challenge the legality of the collection of evidence by OLAF and not the legality of the Supervisory Committee's opinion. The Court thus concluded that the argument alleging an error of law in that regard had to be rejected as unfounded.

C. Lessons to be learned from the case-law

102. The above overview of the case-law requires me, first, to determine the lessons to be learned from the concept of 'impartiality' in EU law, before I, secondly, examine the appeal brought by the Parliament [71] in the present case.

103. First, the examples which I have presented in this overview of the case-law support applying the requirement of impartiality in the context of the civil service. That conclusion follows in particular from the fact that the judgments in *Commission* v *RQ* [72] and *Dalli* v *Commission* [73] clearly show that Article 41(1) of the Charter *applies to administrative procedures providing for an investigation stage and concerning the legal status of officials* and members of the Commission, whether those procedures are concerned with their immunity or the continuation of their duties.

104. Secondly, it is clear from the judgment in *Wolff* v *Commission* [74] that the requirement of impartiality is intended to guarantee equality of treatment. Similarly, it can be inferred from that judgment that, since both the internal functioning and external reputation of the institutions and bodies depend on compliance with that requirement, it must necessarily extend to all areas of activity of the EU administration, including *matters relating to the management of the civil service*, such as the appointment, promotion and disciplining of staff.

105. Thirdly, it should be noted that the Court relies in its case-law [75] on a concept of 'impartiality' which has two components: on the one hand, subjective impartiality, by virtue of which no member of the institution concerned may show bias or personal prejudice, and, on the other hand, objective impartiality, under which there must be sufficient guarantees to exclude any legitimate doubt as to possible bias on the part of the institution concerned.

106. Fourthly, as regards that second component, it is clear from the judgment in *Gorostiaga Atxalandabaso* v *Parliament* [76] that prior knowledge of the facts by those called upon to participate in the adoption of a judicial or administrative decision is not, in itself, capable of vitiating that decision with a procedural defect of lack of impartiality. As the judgments in *Wolff*

71 See point 119 et seq. of this Opinion.

72 Judgment in *Commission* v *RQ*, paragraph 65.

73 Judgment in *Dalli* v *Commission*, paragraph 111.

74 Judgment in *Wolff* v *Commission*, paragraph 26.

75 See points 80, 87, 98 and 100 of this Opinion.

76 Judgment in *Gorostiaga Atxalandabaso* v *Parliament*, paragraphs 43 to 45.

v *Commission*[77] and *Spain* v *Council*[78] show, such prior knowledge is often inevitable in the light of a professional activity carried out previously or in parallel by the persons concerned. Rather, it is necessary to establish whether, in a particular case, there is a *conflict of interest*, on the part of officials or agents acting on behalf of those institutions and bodies, giving rise to a *legitimate doubt as to the impartiality of that procedure*.

107. Fifthly, it is clear from the judgments in *Gorostiaga Atxalandabaso* v *Parliament*,[79] *Dalli* v *Commission*[80] and *Wolff* v *Commission*[81] that the case-law of the Court requires the person concerned, from a procedural point of view, to *advance arguments liable to call into question the personal impartiality of the officials or servants involved in the administrative procedure*. It is only on the basis of the arguments presented by the persons concerned that the Court can carry out a detailed examination of the alleged infringement of objective impartiality. It therefore follows that general and abstract claims which are clearly unfounded hardly satisfy that requirement.

108. However, it should be noted that the Court stated in the judgment in *Wolff* v *Commission*[82] that, in order to show that the organisation of an administrative procedure does not ensure sufficient guarantees to exclude any legitimate doubt as to possible bias, it is not necessary to prove lack of impartiality due to the specific characteristics of the role of rapporteur in the procedures conducted before the Committee. *It is sufficient for a legitimate doubt to arise which cannot be dispelled*. Accordingly, the burden of proof does not appear to be excessively onerous.

109. Sixthly, it can be inferred from the judgments in *Ziegler* v *Commission*[83] and *Wolff* v *Commission*[84] that an examination of compliance with the requirement of subjective impartiality is not necessary in cases in which an infringement of objective impartiality has already been found. *An examination of the facts in the light of the second component of the concept of 'impartiality' is sufficient* if there is no evidence to establish with certainty the existence of prejudice on the part of the officials or agents involved in the administrative procedure.

110. Seventhly, it follows from the judgments in *Spain* v *Council*[85] and *Wolff* v *Commission*[86] that where a number of EU institutions, bodies, offices or agencies are given separate responsibilities of their own in the context of a procedure that is liable to result in a decision adversely affecting an individual, *each of those entities is required, in respect of its own activities, to comply with the requirement of objective impartiality*. Consequently, even where only one of them has breached that requirement, such a breach is liable to render the decision adopted by the other at the end of the procedure at issue unlawful.

111. Eighthly, it follows from a comparison between, on the one hand, the judgment in *Wolff* v *Commission*,[87] in which the Court found that the requirement of impartiality had not been fulfilled, and, on the other hand, the judgment in *Commission* v *RQ*,[88] which concerned

77 Judgment in *Wolff* v *Commission*, paragraph 39.

78 Judgment in *Spain* v *Council*, paragraph 99.

79 Judgment in *Gorostiaga Atxalandabaso* v *Parliament*, paragraph 47.

80 Judgment in *Dalli* v *Commission*, paragraph 117.

81 Judgment in *Wolff* v *Commission*, paragraph 30.

82 Judgment in *Wolff* v *Commission*, paragraph 37.

83 Judgment in *Ziegler* v *Commission*, paragraph 156.

84 Judgment in *Wolff* v *Commission*, paragraph 41.

85 Judgment in *Spain* v *Council*, paragraph 94.

86 Judgment in *Wolff* v *Commission*, paragraph 28.

87 Judgment in *Wolff* v *Commission*, paragraph 39.

88 Judgment in *Commission* v *RQ*, paragraph 112.

infringement of the right to be heard, that an infringement of the rights referred to in Article 41 of the Charter, which, as a whole, establish the right to good administration, is *clearly capable of having different consequences depending on the right infringed in the particular case*.

112. In the judgment in *Commission* v *RQ*,[89] the Court recalled that, according to its settled case-law, 'an infringement of the rights of the defence, in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different'. However, it should be noted that such a reference to the case-law concerning the legal consequences of a procedural defect resulting from an infringement of the rights of the defence is nowhere to be found in the judgment in *Wolff* v *Commission*. By contrast, the Court set out in detail in that judgment the reasons why it considered that the participation of a particular expert in the decision-making procedure was such as to give rise to legitimate doubts as to the impartiality of the Committee within the EMA among third party observers, and accordingly held that there had been an infringement of the requirement of impartiality enshrined in Article 41 of the Charter.

113. The question therefore arises as to whether such a distinction between the rights in question appears to be legally justified. In my view, that question deserves a *nuanced response*, as I shall explain below.

114. Although an infringement of the rights guaranteed by Article 41(2) of the Charter certainly constitutes a procedural defect which may render an administrative decision 'unlawful', it is nonetheless necessary to recall that the law of administrative procedure of the European Union and of its Member States provides for mechanisms to remedy such defects.[90] For example, the person concerned may be granted the right to be heard at a later stage of the procedure, before it has been completed and a final decision has been taken. Similarly, the Court recently ruled in the judgment in *Commission* v *Di Bernardo*[91] that it is possible, under certain strict conditions, to supplement the inadequate statement of reasons for an administrative act, thereby avoiding any infringement of the rights of the person to whom that act is addressed.[92]

115. Moreover, it should be remembered that not all procedural errors are of such a nature as to affect the substance of an administrative decision. In other words, an error on the part of the administration in the management of the procedure may prove harmless in the light of the various interests at stake. Indeed, for reasons, inter alia, of *administrative efficiency*, *legal certainty* and *procedural economy*, the administration may be exempted from the penalty of 'nullity' generally laid down by any legal order for the most serious cases of illegality of an administrative decision. Under that model, the 'formal illegality' of the legal act by which the decision is taken is accepted, provided that it does not adversely affect the 'substantive right' of the person concerned. That said, it seems to me that the Court is aware of all those matters and applies the model which I have just illustrated to the EU legal order, in so far as it requires, in accordance with the above-cited case-law, an examination, in each particular case, of the consequences of an infringement of the rights of the defence, in particular of the right to be heard, before deciding on how the administrative decision at issue is to be treated.

89 Judgment in *Commission* v *RQ*, paragraph 105.

90 See judgments of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 91), on remedying procedural errors in an environmental decision-making procedure; of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686, paragraph 56), on remedying procedural errors in Commission antitrust proceedings; and of 16 January 1992, *Marichal-Margrève* (C-334/90, EU:C:1992:15, paragraph 25), on customs procedural law.

91 Judgment of 11 June 2020 (C-114/19 P, EU:C:2020:457).

92 Judgment of 11 June 2020, *Commission* v *Di Bernardo* (C-114/19 P, EU:C:2020:457, paragraphs 51 to 60).

116. So far as specifically concerns infringement of the requirement of impartiality, which is the subject matter of the present case, I consider that the approach to be adopted depends on *the seriousness of each particular case*. In that regard, I would like to draw attention to the fact that the concept of 'impartiality', as established in the case-law of the Court and in the various codes of conduct used by the institutions, bodies, offices and agencies of the Union, is not defined in the same way. The Court seems to rely on a *rather general concept, which is open to interpretation*, whereas the Code of Good Administrative Behaviour of the European Ombudsman covers *specific and particularly serious cases*, such as conflicts of interest for personal, family, political or financial reasons.[93] Because the concept encompasses a variety of situations, it is necessary to determine in each case the specific circumstances which give rise to doubts as to the administration's impartiality.

117. On the one hand, it is true that a lack of objective impartiality is likely to undermine the confidence of the person concerned in the neutrality of the administration. The suspicion of being subject to arbitrary and, consequently, unfair treatment may negatively affect the perception of the persons concerned[94] and, in the case of the civil service, the attitudes of the officials and servants concerned towards the entity for which they work. Since the implications are considerable, both for the internal functioning and for the external reputation of the institutions, bodies, offices and agencies of the Union, it is clear that an infringement of the requirement of objective impartiality[95] cannot be easily remedied. On the contrary, it seems to me that such a situation is likely to undermine the legality of the administrative procedure as a whole. Seen in that light, it is easier to understand why the Court, in the judgment in *Wolff* v *Commission*,[96] refrained from examining whether or not the participation of a certain expert had influenced the decision adopted and confined itself to finding that there was a legitimate doubt as to objective impartiality which could not be dispelled.

118. On the other hand, it is no less true that, in so far as the requirement of 'impartiality' is intended to prohibit different types of conduct, ranging from *minor offences* to *criminal acts*, the legal consequences of an infringement of that requirement must be proportionate and take due account of the interests inherent in any legal order. The interests of the addressee of an administrative act which is unlawful on account of a procedural defect conflict with principles such as administrative efficiency, legal certainty and procedural economy. For that reason, I do not consider that any legitimate doubt as to compliance with the requirement of objective impartiality is such as automatically to render an administrative act null and void. As already explained in this Opinion,[97] such a legal consequence should be reserved for the *most serious cases of illegality*, in particular those involving a *conflict of interests for personal, family, political*

93 According to Article 8 ('impartiality and independence') of the European Code of Good Administrative Behaviour, drawn up by the European Ombudsman and approved by resolution of the Parliament during its plenary session of 6 September 2001, the requirement of impartiality requires the official to abstain 'from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds whatsoever'. That code requires that the conduct of the official is never to be guided by 'personal, family or national interest or by political pressure'. The official must also not 'take part in a decision in which he or she, or any close member of his or her family, has a financial interest'.

94 Batalli, M. and Fejzullahu, A., 'Principles of Good Administration under the European Code of Good Administrative Behaviour', *Pécs Journal of International and European Law*, 2018, No 1, p. 35. The authors point out that failure to comply with the principles of 'good administration' can lead to 'maladministration', that is to say a situation characterised by weak State institutions which are unable to promote the well-being of citizens. All this may lead to general discontent among citizens.

95 See, in that regard, Mouly, J., 'Du caractère substantiel des dispositions garantissant le principe d'impartialité dans la procédure disciplinaire', *Droit Social*, Dalloz, 2016, No 10, p. 869, where the author emphasises the importance of the requirement of impartiality. The author considers that certain particularly important rules of disciplinary proceedings constitute substantive guarantees, the infringement of which must automatically lead to the nullity of the penalty imposed, without the employee having to show that he or she had not been able to assert his or her rights of defence.

96 Judgment in *Wolff* v *Commission*, paragraphs 37 to 41.

97 See point 115 of this Opinion.

or financial reasons, as well as *criminal acts*, such as those relating to *corruption in the civil service*. In other situations, however, the possibility of seeking annulment of an administrative act which is vitiated by a procedural defect related to infringement of that requirement should, as the Court held in the judgment in *Commission* v *RQ*,[98] cited above, be made conditional on whether, had it not been for such an irregularity, the outcome of the procedure might have been different. If not, that possibility should be excluded.

D. Examination of the appeal in the light of the case-law

1. Preliminary considerations

119. Having established the lessons to be drawn from the case-law of the Court on the requirement of impartiality, it is necessary next to apply them to the present case in the context of the examination of the appeal.

120. In so far as the Parliament relies on a distortion of the facts, it must be borne in mind that it follows from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that an appeal is limited to points of law. The General Court therefore has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The assessment of those facts and that evidence does not therefore, save where it distorts those facts and evidence, constitute a point of law which is, as such, subject upon appeal to review by the Court. Such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence.[99]

121. In that regard, I would like to point out that the Parliament has not shown how the General Court distorted the facts on the basis of which it held, in paragraph 59 of the judgment under appeal, that the Parliament had not offered guarantees sufficient to exclude any legitimate doubt as to the objective impartiality of the investigators concerned. Rather, the Parliament merely alleged that the appointed investigators had only 'superficial and incomplete knowledge of the case', which is not sufficient to conclude that there was a lack of objective impartiality. A reading of the judgment under appeal shows that the General Court examined in detail several aspects of the relationship between the investigators and UZ which serve to indicate the existence of an interpersonal conflict or, in any event, the possibility that the investigators had a negative opinion of UZ at a stage prior to the opening of the administrative investigation.

122. Those situations clearly differ from the one evoked by the Parliament, in which there is simply 'prior knowledge' of the subject matter at issue in the administrative procedure. Those situations concern, rather, the risk of preconceived opinions which might distort how the facts are perceived. It therefore seems to me that, contrary to what the Parliament argues, the General Court was right to consider that there were facts which could call into question the objective impartiality of the investigators.

98 See point 112 of this Opinion.

99 See judgments of 12 January 2017, *Timab Industries and CFPR* v *Commission* (C-411/15 P, EU:C:2017:11, paragraph 89), and of 1 October 2020, *CC* v *Parliament* (C-612/19 P, not published, EU:C:2020:776, paragraph 51 and the case-law cited).

2. Application of the concept of 'impartiality' to the investigation procedure

123. For the sake of completeness, it is necessary to examine below whether the General Court was justified in taking the view that the Parliament had failed in its duty of objective impartiality on the ground that two investigators had prior knowledge of the facts of the case before the administrative investigation was opened, with the result that those investigators could have had a negative opinion of UZ.

124. At the outset, I note that the General Court correctly recognised, in paragraph 38 of the judgment under appeal, that Article 41 of the Charter was applicable at the administrative investigation stage in the context of civil service disciplinary proceedings. Similarly, I would observe that the General Court correctly made reference to the concept of 'impartiality', as recognised in the case-law of the Court of Justice, in holding, in paragraph 39 of the judgment under appeal, that it was in the light of that concept that it was necessary to examine, inter alia, the argument based on the lack of impartiality of the investigators appointed by the Parliament. Consequently, it must be held that the General Court applied to the case in question a number of the conclusions which must be drawn from the case-law of the Court of Justice. [100]

125. The General Court next carried out an assessment of the facts, reaching the conclusion that the appointment of the investigators in question was likely to give rise to legitimate doubts as to their objective impartiality.

(a) *The appointment of the investigator of the 'disciplinary' component*

126. More specifically, the General Court took into account the fact that one of the investigators entrusted with the 'disciplinary' component had met one of the complainants before the administrative investigation was launched against UZ. According to the testimony of that complainant, he had gone to Luxembourg (Luxembourg) to enquire into a possible OLAF investigation against him, since colleagues had explained to him that UZ's husband had, on her initiative, reported him to OLAF, in connection with alleged irregularities relating to parental leave, 'as a form of revenge', 'because the colleague in question [had] sabotaged her work'. As the General Court noted in paragraph 48 of the judgment under appeal, the Parliament did not deny the existence of that meeting between one of the complainants and the future investigator before the administrative investigation was launched. The Parliament nevertheless maintained, first, that no information relating to the case in question had been communicated by the latter and, secondly, that no one could have known that the future investigator would be called upon to carry out that function.

127. I consider that, on the basis of the information available, it is possible to conclude that the General Court was right to choose not to follow the Parliament's line of argument. It is necessary to examine the General Court's reasoning in greater detail, the better to understand the reasons for that conclusion.

128. In the first place, the General Court found, in paragraph 49 of the judgment under appeal, that there was no record of the content of the conversation between one of the complainants and the future investigator. Consequently, there was no satisfactory way of establishing the subject matter of the conversation between the persons involved at that meeting. The Parliament's claim that no information relating to the case had been communicated could therefore not be proven. In

[100] See points 103 and 104 of this Opinion.

the absence of reliable evidence, the testimony in question could be no more than an indication which could be confirmed only by the persons involved. It seems to me that such testimony is capable of raising questions as to the attitude of those persons towards UZ, especially if it is properly documented at a hearing, as in this case. This brings us to a central aspect of the case, which the General Court considered next.

129. In the second place, the General Court recalled that objective impartiality presupposes that the institution offers guarantees sufficient to exclude any legitimate doubt. As indicated in this Opinion, [101] this is precisely what the Court has always required in its case-law so as to avoid any compromising situation. Mindful of that requirement, the General Court found that such testimony could give rise to a legitimate doubt on the part of UZ as to the impartiality of the investigator, who could have been influenced by the particularly malicious nature of her alleged conduct as reported to him. Indeed, it seems to me that, irrespective of the veracity of that information, the official in question was likely to have a rather unfavourable impression of UZ, even before he was called upon to perform the function of investigator. Accordingly, UZ cannot be criticised for having called into question the impartiality of the procedure as regards the Parliament, as the General Court observed in paragraph 52 of the judgment under appeal. In accordance with the case-law of the Court, the General Court was not required to ascertain whether the investigator was *in fact* prejudiced against UZ. It was sufficient for a *legitimate doubt* to arise which could not be dispelled. [102] As the General Court correctly found, those conditions were satisfied in the present case.

130. In that connection, it seems to me that, in view of the situation described above, the General Court did not err in law in holding, in paragraph 55 of the judgment under appeal, that the Parliament should not have appointed an investigator who had met one of the complainants before the investigation was launched. In so far as the Parliament was required to offer guarantees sufficient to exclude any legitimate doubt, according to the case-law of the Court of Justice, it seems to me that the General Court was right to establish, in paragraph 54 of the judgment under appeal, that there was no indication that it would have been difficult for the Parliament to select, from among its officials, a person who had no prior knowledge of the facts of the case and who thus did not give rise to any legitimate doubt on the part of UZ. In the light of the foregoing considerations, I am of the view that the General Court correctly applied the concept of 'impartiality' in the present case, so far as concerns the appointment of the investigator entrusted with the 'disciplinary' component.

(b) *The appointment of the investigator of the 'harassment' component*

131. As regards the alleged lack of impartiality of the investigator of the 'harassment' component, the General Court found, in paragraph 57 of the judgment under appeal, that, before being appointed investigator, he had chaired the Advisory Committee on Harassment and its Prevention at the Workplace, which, following the complainants' request for assistance, had concluded that the management of the unit of which UZ was the head should be passed to another person. The General Court concluded from this that, in the light of the conclusion of that advisory committee, when he was appointed as the investigator of the 'harassment' component, he may have already had a negative opinion of UZ. According to the General Court, that fact too was such as to call into question the objective impartiality of the investigators.

101 See point 105 of this Opinion.

102 See point 108 of this Opinion.

132. On the one hand, it could be argued, as the Parliament suggests, that the situation described in the preceding point has some similarity with the situation of 'prior knowledge' of the facts by those called upon to participate in the adoption of a judicial or administrative decision, a circumstance which, according to the case-law of the Court of Justice,[103] is not, in itself, capable of vitiating that decision with a procedural defect of lack of impartiality. On the other hand, a closer examination reveals that the situation at issue is in fact very different, given that the official called upon to perform the function of investigator had previously participated in the adoption of a decision to replace UZ as head of unit, precisely on the grounds of harassment. Such a situation seems to me to be particularly delicate, since it presupposes active involvement at several stages in an administrative procedure which could lead to the imposition of a disciplinary penalty.[104] In those circumstances, it seems to me almost impossible to expect completely unprejudiced treatment on the part of the officials involved.[105]

133. Therefore, contrary to what the Parliament argues, the present case does not simply involve 'prior knowledge' of the facts but rather 'prior participation' in the administrative procedure, raising legitimate doubts as to the official's attitude towards UZ. Accordingly, I am of the view that the General Court was right not even to consider the possibility of applying the above case-law by analogy in its reasoning, and to conclude instead, in paragraph 58 of the judgment under appeal, that the appointment of the official concerned was such as to call into question the objective impartiality of the investigator on the ground that it could not be ruled out that he might already have had a negative opinion of UZ. That conclusion seems to me to be consistent and therefore unassailable from a legal point of view.

134. I consider that, in the circumstances of the present case, the General Court cannot reasonably be criticised for having applied the criteria relating to the concept of 'impartiality' in an excessively strict manner. In so far as, on the one hand, the institutions are required to offer guarantees sufficient to *exclude any legitimate doubt* as to possible prejudice in the context of administrative investigations and, on the other hand, the present case involves an administrative procedure which may give rise to a *disciplinary penalty with serious* professional *consequences* for the official concerned, it seems to me that a prudent approach is required. It should be borne in mind that putting in place appropriate measures to take account of the requirement of objective impartiality is not an end in itself but a way of ensuring that the administrative procedure is conducted in full compliance with *the rights of the person concerned*. Moreover, given that, as has already been recalled in this Opinion, the requirement of objective impartiality serves to *protect both the internal functioning and the external reputation of the institutions, bodies, offices and agencies of the Union*,[106] I consider that it would be wrong to presume that the obligations arising therefrom can be taken lightly.

103 See point 106 of this Opinion.

104 See, in that regard, Van Reenen, P., 'Impartiality in the EU Asylum Procedure', *European Journal of Migration and Law*, 2018, No 20, p. 345. The author considers that a situation in which a judge has participated on several occasions in the adoption of decisions unfavourable to an individual is likely to give rise to legitimate doubts as to his or her impartiality.

105 In that context, reference should be made to the judgment of the European Court of Human Rights of 28 October 1998 in *Castillo Algar v. Spain* (CE:ECHR:1998:1028JUD002819495), which concerned the impartiality of a military court, two members of which had previously heard an appeal in another chamber against an order charging the person concerned with an offence. According to that court, there was evidence to suggest that the judges had endorsed the previous court's view that there was 'sufficient evidence to allow of the conclusion that a military offence has been committed'. Accordingly, the European Court of Human Rights found an infringement of Article 6(1) ECHR.

106 See point 104 of this Opinion.

(c) *Preliminary conclusion concerning the appointment of the investigators*

135. The reasoning set out in the judgment under appeal shows that the General Court was aware of the implications and drew the appropriate conclusions, when it found that the Parliament had not complied with the obligations arising from the requirement of 'impartiality', as interpreted by the Court of Justice in its case-law. Contrary to what is asserted by the Parliament, there is no basis for inferring that the General Court misrepresented or incorrectly assessed the facts. For the reasons set out above, I consider that the General Court did not err in law in holding, in paragraph 59 of the judgment under appeal, that, when appointing the abovementioned investigators, the Parliament had not offered guarantees sufficient to exclude any legitimate doubt.

3. The legal consequences of an infringement of the requirement of 'impartiality'

136. That said, I would point out that the General Court went on to examine, in paragraphs 60 to 64 of the judgment under appeal, whether that infringement of the requirement of impartiality was such as to affect the decision to impose a disciplinary penalty on UZ. Referring to its own case-law,[107] the General Court stated that, in order that a procedural irregularity may justify the annulment of an act, it is necessary that had it not been for that irregularity, the outcome would have been different. In other words, the General Court suggests, in the first place, that not all procedural errors are such as to render an administrative act null and void and, in the second place, that an infringement of the requirement of impartiality is not an exception to that rule.

137. As already explained, the requirement of impartiality is intended to prohibit various types of conduct, ranging from minor offences to criminal acts. Accordingly, the legal consequences of an infringement of that requirement must be proportionate and take due account of the interests inherent in any legal order, such as those of administrative efficiency, legal certainty and procedural economy, which may require the maintenance of an administrative act in force despite its illegality. In accordance with the proposed approach,[108] it is necessary to examine first whether the requirement of impartiality has been infringed by the commission of acts of such seriousness that the administrative decision in question justifies a penalty of invalidity. In that regard, I note that, in the absence of more precise information, the facts of the case reveal the existence of neither a criminal act on the part of the investigators nor a conflict of interests for personal, family, political or financial reasons. Accordingly, it seems to me that the option of declaring the contested decision null and void *ab initio* must be rejected.

138. The next step in the analysis is, in accordance with the proposed approach, to ascertain whether that infringement of the requirement of impartiality is such as to affect the decision to impose a disciplinary penalty on UZ. As regards that question, it should be noted that, in paragraph 64 of the judgment under appeal, the General Court concluded that 'it cannot be ruled out that, if the administrative investigation had been conducted with care and impartiality, that investigation might have resulted in *a different initial assessment of the facts* and, thus, led to *different consequences*'. That conclusion is based on the idea that the administrative investigation affects the exercise by the Appointing Authority of its discretion as to the action to be taken further to that investigation and that that action may result, *in fine*, in the imposition of a disciplinary measure.

[107] Judgment of 14 February 2017, *Kerstens* v *Commission* (T-270/16 P, not published, EU:T:2017:74).

[108] See point 118 of this Opinion.

139. As the General Court correctly explained in paragraph 63 of the judgment under appeal, it is on the basis of that investigation and of the hearing of the staff member concerned that the Appointing Authority assesses, first, whether or not it is necessary to initiate disciplinary proceedings, secondly, whether or not those proceedings must, as the case may be, consist in the matter being referred to the Disciplinary Board and, thirdly, where it initiates proceedings before the Disciplinary Board, the facts referred to that board. In other words, an incorrect factual basis, established in the context of an administrative investigation marked by several procedural irregularities, may have serious consequences for the official concerned. More specifically, such a situation may give rise to erroneous and therefore unlawful decisions by the Appointing Authority and by entities involved in the disciplinary proceedings. Such reasoning seems to me logical and unassailable from a legal point of view.

140. That said, it should be observed in that context that the conclusion of the General Court in paragraph 64 of the judgment under appeal reflects, in essence, the case-law of the Court of Justice as set out in the judgment in *Commission* v *RQ* cited above. [109] Indeed, the General Court applied similar criteria when it found that it could not be ruled out that the infringement of the requirement of impartiality had an influence on the initial assessment of the facts. In so doing, the General Court indirectly recognised the possibility that the contested decision could have been different in content if the requirement of impartiality had been fulfilled.

141. For the reasons set out above, I consider that the General Court did not err in law in so far as concerns the outcome of its analysis. The General Court correctly interpreted and applied to the present case the concept of 'impartiality', as recognised in the case-law of the Court. It follows that the General Court was right to conclude that the contested decision was vitiated by a *significant* procedural defect and that it had to be annulled. I therefore consider that the first part of the first ground of the main appeal should be rejected as unfounded.

VII. Conclusion

142. In the light of the foregoing considerations, I propose that the Court declare the first part of the first ground of the main appeal unfounded.

[109] See point 118 of this Opinion.