ORDER OF THE PRESIDENT OF THE COURT
8 April 2003 *

In Case C-471/02 P(R),

Santiago Gómez-Reino, official of the Commission of the European Communities, residing in Brussels (Belgium), represented by M.-A. Lucas, avocat,

appellant,

APPEAL against the order of the President of the Court of First Instance of the European Communities of 17 October 2002 in Case T-215/02 R *Gómez-Reino* v *Commission* [2002] ECR-SC I-A-199 and II-1019, seeking to have that order set aside,

* Language of the case: French.

the other party to the proceedings being:

Commission of the European Communities, represented by H.P. Hartvig and J. Currall, acting as Agents, with an address for service in Luxembourg,

defendant at first instance

THE PRESIDENT OF THE SIXTH CHAMBER OF THE COURT,

replacing the President of the Court pursuant to the second paragraph of Article 85 of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 118 of those rules,

after hearing Advocate General Jacobs,

makes the following

Order

1 By application lodged at the Court Registry on 26 December 2002, Santiago Gómez-Reino brought an appeal, under Article 225 EC and the second paragraph of Article 50 of the EC Statute of the Court of Justice, against the order of the

President of the Court of First Instance of 17 October 2002 in Case T-215/02 R *Gómez-Reino* v *Commission* [2002] ECR-SC I-A-199 and II-1019 ('the order under appeal') rejecting his application for interim measures made pursuant to Article 104(1) of the Rules of Procedure of the Court of First Instance seeking, first, an order for the production of certain documents, secondly, an order suspending a series of decisions taken or prohibiting the adoption of future decisions relating to internal investigations carried out by the European Anti-Fraud Office ('OLAF') and, thirdly, an order adopting measures pursuant to Article 24 of the Staff Regulations of officials of the European Communities ('the Regulations').

2 By document lodged at the Court Registry on 10 February 2003, the Commission submitted its written observations to the Court.

3 Since the written observations submitted by the parties contain all the information required to give a ruling in this appeal, it is not necessary for the parties to present oral arguments.

Legal framework

4 Article 9 of 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) provides:

'1. On completion of an investigation carried out by the Office, the latter shall draw up a report, under the authority of the Director, specifying the facts

established, the financial loss, if any, and the findings of the investigation, including the recommendations of the Director of the Office on the action that should be taken.

...

4. Reports drawn up following an internal investigation and any useful related documents shall be sent to the institution... concerned. The institution... shall take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant, and shall report thereon to the Director of the Office, within a deadline laid down by him in the findings of his report.'

5 The first paragraph of Article 4 of Decision 1999/396/EC, ECSC, Euratom: Commission Decision of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests (OJ 1999 L 149, p. 57) provides:

'Where the possible implication of a[n]... official... of the Commission emerges, the interested party shall be informed rapidly as long as this would not be harmful to the investigation. In any event, conclusions referring by name to a[n]... official... of the Commission may not be drawn once the investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him.'

6 Under Article 5 of Decision 1999/396:

'If, following an internal investigation, no case can be made out against a[n]... official... of the Commission against whom allegations have been made, the internal investigation concerning him shall be closed, with no further action

taken, by decision of the Director of the Office, who shall inform the interested party in writing.'

7 Article 11 of Annex IX to the Regulations, which concerns disciplinary proceedings, provides:

'Where there are new facts which are supported by relevant evidence, disciplinary proceedings may be reopened by the appointing authority on its own initiative or on application by the official concerned.'

8 Finally, the first paragraph of Article 24 of the Regulations is worded as follows:

'The Communities 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.'

The facts and the proceedings before the Court of First Instance

9 The facts in the case and the proceedings before the Court of First Instance are set out as follows in paragraphs 5 to 24 of the order under appeal:

'5 The applicant, an official of the Commission, was Director of the European Community Humanitarian Office (ECHO) from 1 October 1992 to 31 December 1996.

6 On the basis of a report by the Anti-Fraud Coordination Unit (UCLAF), disciplinary proceedings were opened against the applicant. The aim of those proceedings was *inter alia* to determine whether the applicant should be held responsible, as director of ECHO, for irregularities committed in the performance of certain contracts concluded by ECHO.

7 On 14 July 1999, the Commission, in its capacity as appointing authority ("the appointing authority") adopted the opinion of the Disciplinary Council, that the complaints made against the applicant were not proved, and decided to take no action on the disciplinary proceedings brought against him.

8 After several press articles had called into question the applicant's honesty and integrity or expressed doubts as to the regularity and objectivity of the disciplinary proceedings brought against him, the applicant, by application lodged at the Court Registry on 27 April 2000, sought, first, the annulment of several express or implied Commission decisions relating to the requests for assistance which he submitted under Article 24 of the Regulations in respect of those press articles and in respect of the statements, considered defamatory of him, made by certain officials and members of the European Parliament, and, second, damages (Case T-108/00).

9 On the same day, by a separate document, the applicant applied for interim relief in order to avoid serious and irreparable damage as a result of the decision of which he seeks annulment (Case T-108/00 R).

10 After the parties had informed the Court that an amicable agreement had been reached in the proceedings for interim relief, Case T-108/00 R was removed from the Court register by order of the President of the Court of 3 July 2000. In accordance with the amicable agreement, the Commission sent letters clarifying the situation to the press bodies concerned and sent copies of those letters to the President of the Committee on Budgetary Control of the European Parliament ("Cocobu"). It was stated *inter alia* in each of those letters that "the decision taken in [the disciplinary proceedings against the applicant] is final, in the absence of fresh evidence, of which there is none in this case".

11 By order of 12 September 2001, Case T-108/00 was removed from the Court register.

12 On 13 November 2000, a Danish television channel broadcast a programme entitled "The Aid Jackals" which called in question the applicant's honesty and integrity and expressed doubts as to the regularity and objectivity of the disciplinary proceedings brought against him. Having been requested to do so, the Commission assisted the applicant, pursuant to Article 24 of the Regulations, in the action brought against the programme's producers by sending a letter to the television channel similar in content to the letters sent under the amicable agreement reached in Case T-108/00 R.

13 On 13 February 2001, Mr van Buitenen, an official of the Commission, sent a note to several members of the Commission, amongst them Mr Kinnock, expressing his reaction to the programme broadcast by the Danish television channel and asking the addressees questions regarding the regularity of the disciplinary proceedings brought against the applicant and the possible consequences of irregularities in those proceedings.

14 In August 2001, Mr van Buitenen sent OLAF and the Commission a report containing numerous claims concerning alleged irregularities ("Mr van Buitenen's report"). In June 1999, OLAF also received documents from a lawyer which also referred to irregularities within the Commission.

15 According to a Commission press release dated 26 February 2002, both OLAF and the Directorate-General (DG) for Personnel and Administration "have begun work to determine whether that document [Mr van Buitenen's report] contains evidence on which to open a formal investigation". It also emerges that "OLAF sent a summary of its report to the DG [for Personnel and Administration] on 15 February 2000" and that "it [the report] was forwarded on the same day to the President of the Committee on Budgetary Control of the European Parliament (Cocobu)". The press release also states that "decisions will be adopted as to the appropriate action to be taken on Mr van Buitenen's document".

16 By press release dated 28 February 2002, the Commission announced *inter alia* that an internal investigation was under way in respect of UCLAF and that additional checks were considered necessary in four cases.

17 Articles in the German, English and French press disseminated information concerning the existence and progress of inquiries carried out by OLAF in response to Mr van Buitenen's report.

18 By memo dated 7 March 2002 sent to Mr N. Kinnock, Member of the Commission, Mr R. Kendall, President of the OLAF Supervisory Committee, and Mr F.-H. Brüner, Director of OLAF, the applicant stated that he had learned of press articles referring to OLAF's preparation of a "report/memo...

apparently sent... to the Commission and the European Parliament (Cocobu)" and calling into question the conduct of the disciplinary proceedings brought against him. He stated that, since he was not informed of Mr van Buitenen's report nor of OLAF's "report/memo", his rights of defence were infringed and he requested access to those documents. Furthermore, he requested, first, the Commission's assistance pursuant to Article 24 of the Regulations in the light of a statement made by Mrs Stauner, in the magazine *Stern*, and, secondly, disclosure of the new facts supported by relevant evidence which could justify the reopening of the disciplinary proceedings against him or, in the alternative, the Commission's assistance pursuant to Article 24 of the Regulations with respect to a statement contained in the newspaper *Le Monde*.

19 On 11 March 2002, during a meeting of Cocobu held *in camera*, Mr Kinnock presented a Commission document containing, under the heading "Proposals and Recommendations", the following: "In relation to the allegations against a former Director-General of ECHO, the documents handed over to OLAF by van Buitenen and in 1999 by a lawyer and which have now surfaced should carefully be examined by OLAF in the active file, in order to evaluate whether the new facts could justify new measures against the person mentioned".

20 Mr Kinnock, in his reply dated 8 April 2002 to the applicant's memo of 7 March 2002, informed him that the Commission, in accordance with Article 24 of the Regulations, had sent a statement to the magazine *Stern*. He also stated as follows: "With regard to the copy documents which you request, namely, the section of Mr van Buitenen's report and the section of OLAF's assessment of the report, I should point out that, if OLAF were to

open an investigation concerning ECHO, you would enjoy the rights associated with the opening of such an investigation", in accordance with the provisions of Article 4 of Decision 1999/396. He also stated that the applicant's implicit reference to Article 11 of Annex IX to the Regulations was irrelevant if disciplinary proceedings were not reopened.

...

21 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 15 July 2002, the applicant brought an action in which he claimed that the Court should:

"1. declare unlawful OLAF's failure to take, in regard to him, the measures laid down by the relevant rules, namely, to notify him of the decision to open inquiries or an investigation concerning him individually, to inform him of inquiries or investigations liable to implicate him personally, and to enable him to express his views on all the facts concerning him before conclusions relating to him individually are drawn from those inquiries or investigations;

2. annul the decisions taken by the Director of OLAF and by the Commission, and disclosed by the Commission's press release of 26 February 2002, to open or reopen, in September 2001, on the basis of [Mr] van Buitenen's report of 31 August 2001, investigations or inquiries on the ECHO case or the proceedings to which it gave rise, or as to the existence of fresh evidence in that case;

3. annul any investigative procedures carried out in those investigations or inquiries;

4. annul any conclusions drawn from those investigations or inquiries, in particular, the report of 31 January 2002 by OLAF's 'judges' unit and the Office's report of 15 February;

5. annul the decision of OLAF's Director, disclosed in the Commission's press release of 28 February 2002, to open a formal investigation against former officials of UCLAF, in particular the investigation coordinator in the ECHO case, because of obstacles they put in the way of the inquiries made by the UCLAF investigator in charge of that case;

6. annul the unnotified or unpublished decision of OLAF's Director, which is revealed in the document submitted by the Vice-President of the Commission to Cocobu at its meeting of 11 March and his letters of 12 and 15 April to the President of that [c]ommittee, to open an inquiry into the alleged manipulation of the proceedings in the ECHO case by a 'cartel of high-ranking officials', of which [the applicant] was a member;

7. annul the unpublished or unnotified decision of OLAF's Director, disclosed in the same documents, to reopen an investigation against [the applicant] in the ECHO case on the basis of so-called fresh evidence in that case, which could justify reopening or resuming disciplinary proceedings against him;

8. annul any investigative procedures carried out in those investigations;

9. annul any conclusions drawn from those investigations;

10. annul the Commission's decision, of which he was notified in a letter of 8 April 2002 from its Vice-President, in so far as it rejects his requests for assistance of 8 March 2002 and previous requests or does not fulfil its obligation automatically to provide that assistance by appropriate means;

11. declare unlawful the repeated failure to assist the applicant after that date, either at his request or of its own motion;

12. annul the implied decision taken by OLAF's Director on 7 July 2002 rejecting the applicant's complaints of 8 March against the decisions and related failure to take measures laid down by the rules applicable to the Office, which he requests should be annulled or declared unlawful, or rejecting his claims that OLAF should adopt in regard to him measures laid down by the rules applicable to the Office;

13. annul the express decision of 8 April 2002 in which the Commission rejected the applicant's complaints against the decisions and incidences of failure to take measures laid down by the Regulations, which he requests should be annulled or declared unlawful, or rejecting his claims that OLAF should adopt in regard to him measures laid down by the Regulations;

14. order the Commission to pay him EUR 1 000 000 as compensation for non-material damage and damage to his career, assessed provisionally, together with interest at the rate of 8% per annum from 1 March 2002 until full payment;

15. order the Commission to pay the costs."

22 By a separate document, lodged at the Court Registry on the same day, the applicant brought an action for interim measures, claiming that the Court should:

"1. order OLAF and the Commission to disclose [to him]:

(a) the passages and annexes of [Mr] van Buitenen's report of 31 August 2001 which concern him directly or indirectly, individually or with others, on account of the ECHO case or the proceedings to which it gave rise, or which are regarded as fresh evidence in that case;

(b) the document by which, in June 1999, a lawyer sent OLAF 63 pages of internal documents relating to the matter, and those documents;

(c) any decisions to open inquiries or investigations on the basis of those documents;

(d) any investigative procedures carried out in those investigations or inquiries;

(e) any conclusions drawn from those inquiries or investigations, in particular the confidential report of 31 January 2002 of the members of OLAF's 'judges' unit and OLAF's report of 15 February 2002 to the Commission and to Cocobu;

(f) any follow-up decisions or action by the Commission on those reports, particularly the document submitted on 11 March 2002 by the Vice-President of the Commission to Cocobu at its meeting held *in camera* on 11 March 2002;

(g) any decisions, taken on the basis of those documents, conclusions, reports or follow-up decisions, to open formal investigations or to carry out inquiry procedures adopted on the basis of those documents, conclusions, reports or follow-up decisions;

(h) any investigative procedures carried out in those investigations or inquiries;

(i) any conclusions drawn from those inquiries or investigations;

2. suspend the decisions taken by the Director of OLAF and by the Commission, and disclosed by the Commission's press release of 26 February 2002, to open or reopen, in September 2001, on the basis of [Mr] van Buitenen's report of 31 August 2001, investigations or inquiries on the ECHO case or the proceedings to which it gave rise, or as to the existence of fresh evidence in that case;

3. suspend any investigative procedures carried out in those investigations or inquiries;

4. suspend any conclusions drawn from those investigations or inquiries, in particular, the report of 31 January 2002 by OLAF's 'judges' unit and the Office's report of 15 February, and also the document presented by the Vice-President of the Commission at a meeting of Cocobu held *in camera* on 11 March 2002;

5. suspend OLAF's decision, disclosed in the press release of 28 February 2002, to open a formal investigation against former officials of UCLAF, in particular the investigation coordinator in the ECHO case, because of obstacles they put in the way of the inquiries made by the UCLAF investigator in charge of that case;

6. suspend or prohibit the decision of OLAF's Director, the adoption or risk of adoption of which is revealed in the document submitted by the Vice-President of the Commission to Cocobu at its meeting held *in camera* on 11 March, in his letters of 12 and 15 April to the President of that [c]ommittee and from the report of 18 June 2002 of the Supervisory Committee, to open an investigation into the alleged manipulation of the proceedings in the ECHO case by a 'cartel of high-ranking officials', of which [the applicant] was a member;

7. suspend or prohibit the decision of OLAF's Director, the adoption or risk of adoption of which is revealed in the same documents and in the letter of 8 April 2002 from the Vice-President of the Commission to the applicant, to reopen an investigation against [the applicant] in the ECHO case on the basis of so-called fresh evidence in that case, which could justify reopening or resuming disciplinary proceedings against him;

8. suspend or prohibit any investigative procedures which have been or might be carried out in those investigations;

9. suspend or prohibit any conclusions which have been or might be drawn from those investigations;

10. order the Commission to send to the former members or officials of the Commission, to the press bodies and to the members of the European Parliament that approved or supported the allegations made by Mr Rivando and Mr van Buitenen against [the applicant] and the actions taken upon them by OLAF, and in particular to the Danish and Swedish television networks, to [Ms] [A.] Gradin and [Ms] [R.] Bjerregard, to *Stern*, to [Ms] Stauner and to

11. [Mr] Rhule, with a copy for maximum circulation to the main press bodies, including those of the European institutions, and to the President of Cocobu, a letter telling them that neither [Mr] van Buitenen's report of 31 August 2001 nor any other information sent to OLAF or to the Commission revealed fresh evidence on which to open, reopen or resume disciplinary proceedings against [the applicant] in the ECHO case or cases connected with it, reaffirming his complete innocence of the disciplinary complaints which had been made against him and denouncing those of their comments by which they had called into question or had appeared to call into question his acquittal and the validity of the proceedings against him, without prejudice to any legal action which might be taken in response to them;

12. order the Commission to pay the costs."

23 The Commission submitted its written observations on the application for interim relief on 7 August 2002.

24 The parties presented oral argument at the hearing held on 27 September 2002.'

The order under appeal

10 By the order under appeal, the President of the Court of First Instance dismissed the application for interim relief in its entirety as inadmissible.

11 The President of the Court held, first of all, that the submissions contained in points 2 to 9 of the application, which he considered he should analyse first, sought either to obtain suspension of operation of several 'decisions' taken, or to prevent, by means of the interim measures, the adoption of future 'decisions' relating to internal investigations conducted by OLAF.

12 He held that, to date, there was no OLAF conclusion or Commission measure referring to the applicant by name which could adversely affect him. In those circumstances, he held that the head of claim in the main action seeking the annulment of the decisions taken or future decisions relating to internal investigations conducted by OLAF was manifestly inadmissible and that that inadmissibility entailed the inadmissibility of the submissions contained in points 2 to 9 of the application for interim relief.

13 He based that conclusion on the following grounds, stated in paragraphs 43 to 47 of the order under appeal:

'43 In the present case, the applicant, who brought his application under Article 91 of the Regulations, maintains that he is adversely affected by three series of measures (see paragraphs 32 to 37 above), namely OLAF's decisions to open administrative investigations, OLAF's conclusions of 31 January and 15 February 2002 and, in the alternative, investigative procedures carried out by OLAF.

44 However, it is not possible to uphold that assessment, because the applicant has still failed to adduce evidence of the existence of any measure adversely affecting him. The explanations furnished by the parties at the hearing, far from supporting the applicant's argument, confirmed the absence of any measure having an adverse effect.

45 In that regard, it should be pointed out that Article 4 of Decision 1999/396 lays down the requirement that an official of the Commission should be heard before OLAF formulates conclusions implicating him individually. As for the moment at which the official concerned must be heard, that provision distinguishes between two situations. Although the official concerned must "be informed rapidly as long as this would not be harmful to the investigation", OLAF must, in any event, give the official concerned the opportunity to express his views before conclusions referring to him by name are drawn at the end of the investigation.

46 Furthermore, the conclusions drawn by OLAF at the end of the investigation, referred to in the second situation in Article 4, are bound to be those contained in the report drawn up under the authority of the Director of that office, as provided in Article 9 of Regulation No 1073/1999. According to

that regulation, that report and any useful related documents shall be sent to the institution concerned, which shall take such action, in particular disciplinary or legal, on the internal investigation as its results warrant.

47 Yet, when questioned by the President of the Court, the Commission stated at the hearing that there was no report, within the meaning of Article 9 of Regulation No 1073/1999, sent to it by OLAF and implicating the applicant individually. It should also be pointed out that the applicant is not subject to any action, disciplinary or legal, taken on the basis of an OLAF report implicating him. In that connection, it should also be pointed out that Mr Kinnock, a member of the Commission, expressly stated, in his letter of 8 April 2002, that the applicant would enjoy all the benefits conferred by Article 4 of Decision 1999/396 if OLAF's conclusions were to refer to him by name, which must mean that, as far as Mr Kinnock knew, no measure of that kind had been taken.'

14 In paragraph 50 of the order under appeal, the President of the Court added, in essence, as regards the same claims in the application for interim measures, that the possible infringement of the rights of the defence, of the legitimate expectations to which the acquittal pronounced at the end of the disciplinary proceedings gave rise, and also of the right to secrecy of the work of the Disciplinary Council does not fall within the scope of the examination of the admissibility of the main action but of its merits.

15 The President of the Court held, in any event, in paragraph 51 of the order under appeal, that the applicant had not proved that OLAF had drawn conclusions referring to him by name or that there was a prior complaint justifying the exercise of his rights of defence, so that those rights could not be invoked or infringed.

16 In paragraph 52 of the order under appeal, the President of the Court also ruled out the applicant's premiss that his acquittal at the end of the disciplinary proceedings gave him a 'fundamental right to peace of mind' deriving from the principle of protection of legitimate expectations. In that regard, the President of the Court stated that Article 11 of Annex IX to the Regulations provides that new facts which are supported by relevant evidence may always justify reopening disciplinary proceedings and that the Commission had often expressed reservations with regard to the definitive nature of disciplinary proceedings.

17 As for the claim that the evidence submitted by Mr van Buitenen and the lawyer in question was unlawfully disclosed to OLAF, the President of the Court rejected it stating, in paragraph 53 of the order under appeal, that it could not be used to challenge, before any outcome of the OLAF investigation, the use which OLAF makes of those documents.

18 Next, as regards the claims, contained in point 1 of the application for interim relief, seeking the disclosure of certain documents, the President of the Court held, in paragraph 57 of the order under appeal, that they should be rejected on the ground that the applicant was not referred to in an allegation and that the relevant rules did not provide for disclosure of documents in such a case.

19 Finally, as regards the claims made in points 10 and 11 of the application for interim relief, that the Commission should assist the applicant pursuant to Article 24 of the Regulations, the President of the Court held, in paragraph 58 of the order under appeal, that they could not be upheld either, on the ground that it was not for him to express a view on unproven facts which, furthermore, it was not certain had occurred, or to order the authority to waive in advance its right to exercise its disciplinary powers.

The appeal

20 Mr Gómez-Reino claims that the Court should:

— set aside the order under appeal;

— give a ruling itself on the application for interim relief of 15 July 2002, upholding the claims set out therein;

— in the alternative, refer the case to the Court of First Instance for a new ruling on that application;

— order the Commission to pay the costs of the proceedings at first instance and of the appeal.

21 The Commission contends that the appeal should be dismissed as partly inadmissible and partly unfounded. In the alternative, in the event that the Court accepts that the appeal is well founded, it submits that, in the order under appeal, the President of the Court did not give a ruling either on the prima facie case or on the condition of urgency, and that therefore the application for interim relief has not been subject to any examination on the merits, so that the case is

not at a stage where judgment can be delivered and the Court cannot itself give a ruling on that application. The Commission requests that, in any event, costs be reserved.

The first plea, alleging failure to state sufficient reasons

Arguments of the parties

22 The appellant maintains that the order under appeal did not address his arguments concerning the existence of measures adversely affecting him and that it therefore contains an insufficient statement of reasons. He claimed before the President of the Court that, even if no definitive conclusion, within the meaning of Article 9 of Regulation No 1073/1999, had been drawn from OLAF's preliminary investigations, those investigations had been opened, pursuant to that regulation, had given rise to reports dated 31 January and 15 February 2002 and were in themselves capable of adversely affecting him, because they infringed his rights of defence, the principles of legal certainty and of the protection of legitimate expectations, and were prepared on the basis of evidence disclosed to OLAF in breach of the secrecy of disciplinary proceedings. He also raised the fact that there was a chance that final conclusions referring to him by name would be adopted in a report calling for disciplinary or legal action. To address those arguments properly it was therefore necessary, in his view, to establish either that the measures in question, including OLAF's preliminary inquiries, did not exist or that they were not measures causing an adverse effect within the meaning of the case-law of the Court of Justice.

23 In order to reply to those arguments, the President of the Court merely stated, in paragraph 48 of the order under appeal, that there were no OLAF conclusions or Commission measures referring to the applicant by name and capable of adversely affecting him.

24 Furthermore, in paragraph 49 of the order under appeal, the President of the Court incorrectly cited the comments made by the applicant at the hearing, although they did not vary from the wording of his written pleadings.

25 Moreover, by holding, in paragraph 50 of the order under appeal, that the possible infringement of the rights of the defence did not fall within the scope of the examination of the admissibility of the action but of its merits, the President of the Court rejected, without giving reasons, the applicant's argument that, as a matter of fact, the infringement of the rights of the defence indicated the existence of measures having an adverse effect, which made the issues of inadmissibility and substance inseparable.

26 Moreover, in the reply which he gave, 'in any event', to the complaints alleging infringement of the rights of the defence, in paragraph 51 of the order under appeal, the President of the Court failed to state the reasons why the applicant had not been told that he might be implicated nor been informed of the content of the claims made against him, although the interests of the investigation in no way justified it and written and oral replies given by Mr Kinnock to the members of Cocobu, which were produced to the Court in the proceedings for interim relief by the applicant on 11 and 23 September 2002, showed that the Commission itself considered that the rights of the defence were applicable at the preliminary stage of OLAF's investigations.

27 Finally, as regards the complaints alleging failure to observe the principles of protection of legitimate expectations and legal certainty, and also the unlawful use of evidence, the order under appeal, in paragraphs 52 and 53, also states insufficient reasons, because it does not give an appropriate reply to the arguments put forward by the applicant, who maintained *inter alia* that the Commission's letters of 28 June 2000 and 10 May 2001 had given rise to legitimate expectations on his part.

28 The Commission states that the applicant has not challenged paragraphs 40 to 43 of the order under appeal or the assessment made by the President of the Court of the claims in his application, and that he is therefore not entitled to maintain that the latter misrepresented his basic arguments. By stating that the President of the Court did not reply to his arguments that there was a chance that OLAF would draw conclusions referring to him directly, the applicant is distorting the content of his application for interim relief, particularly points 37 and 45 thereof, and also confirming that he knew that no such conclusions existed. As for paragraph 49 of the order under appeal, its content is as correct a summary as possible of the arguments put forward by the applicant at the hearing. Paragraph 50 sets out a clear legal rule, for which, moreover, no reasons had to be stated. The other contested paragraphs in the order under appeal do not state insufficient reasons either.

Findings of the Court

29 The judge of the Court of First Instance hearing the application cannot be required to reply explicitly to all the points of fact and law raised in the course of the interlocutory proceedings. It is sufficient that the reasons given validly justify that order in the light of the circumstances of the case and enable the Court of Justice to exercise its powers of review (orders in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 58, and Case C-148/96 P(R) *Goldstein* v *Commission* [1996] ECR I-3883, paragraph 25).

30 In the present case, the reason why the application for interim relief was dismissed as inadmissible is that the President of the Court found that it was not proved that, at the date on which the order under appeal was pronounced, there were OLAF conclusions or Commission measures referring to the applicant by name which would have been capable of adversely affecting him.

31 In order to arrive at that finding, which appears on paragraph 48 of the order under appeal, the President of the Court stated, in paragraphs 45 and 46 of the order, that an official affected by an OLAF investigation must always be heard before that office draws its conclusions, if those conclusions appear in a report, within the meaning of Article 9 of Regulation No 1073/1999, implicating him individually. In paragraph 47 of the order under appeal, the President of the Court held that, in the present case, no report of that nature was sent to the Commission by OLAF, the applicant was not subject to any action, disciplinary or legal, which would give rise to such a report, and it is apparent from the wording of the letter dated 8 April 2002 sent to the applicant by Mr Kinnock, Member of the Commission, that no measure of that kind had been taken.

32 The President of the Court thus properly justified the assessment which he made in paragraph 48 of the order under appeal and, by stating sufficiently precisely the factual and legal reasons on which the assessment was based, enabled the Court of Justice to carry out its review.

33 Next, in order to reply to the applicant's arguments that internal investigations concerning him had been carried out by OLAF without his being heard and that the consequent infringements of the rights of the defence themselves adversely affected him, the President of the Court held, in paragraph 51 of the order under appeal, that the applicant, because he had not established that OLAF had drawn conclusions referring to him by name before having heard him, could not rely on an act adversely affecting him which would entitle him to exercise his rights of defence and had not proved that those rights had been infringed. The President of the Court thus replied to the applicant's arguments and showed that he had not altered their scope, even though he presented some of their points inaccurately in paragraph 49 of the order under appeal.

34 Therefore, and in the light of the findings in paragraphs 43 to 47 of the order under appeal, the fact that the President of the Court, in paragraph 50 of the order under appeal, merely stated that the possible infringement of the rights of

the defence did not fall within the scope of the examination of the admissibility of the main action but of its merits, and that he did not therefore reply specifically in that paragraph to the arguments alleging that the applicant had not been informed of the opening of an internal investigation which might involve him personally and that the conducting of an investigation in those circumstances adversely affected him, does not in itself constitute an inadequate statement of reasons justifying criticism of the order under appeal.

35 Similarly, in order to hold that the applicant could not reasonably invoke the principle of the protection of legitimate expectations, the President of the Court pointed out, in paragraph 52 of the order under appeal, that Article 11 of Annex IX to the Regulations provides for the possibility of reopening disciplinary proceedings on the basis of new facts and that the Commission's letters sent to the press bodies in 2000, pursuant to the amicable agreement concluded in Case T-108/00 R *Gómez-Reino* v *Commission* (not published in the ECR), contained reservations as to the final nature of disciplinary proceedings. The President of the Court thus stated with sufficient accuracy the grounds for rejecting the plea concerning the principle of legitimate expectations, even though he did not expressly reply to the argument that OLAF's investigations could not relate to the same evidence as that whose probative value had been ruled out by the Commission in its letters of 28 June 2000 and 10 May 2001.

36 Finally, contrary to the appellant's claim, the President of the Court did not fail, in paragraph 53 of the order under appeal, to give a ruling on the argument that disclosure to OLAF of documents or information covered by the secrecy of disciplinary proceedings renders the investigations of that office unlawful. He expressly stated, once again enabling the Court to carry out its review, that that fact could be used to challenge OLAF's use of that evidence, but only where it had drawn final conclusions from its investigations.

37 It is apparent from the foregoing considerations that the order under appeal does not fail to state sufficient reasons. The first plea must therefore be rejected.

The second plea, alleging infringement of the rules concerning the burden of proof and the right to a fair hearing

Arguments of the parties

38 The appellant maintains that the President of the Court infringed the rules relating to the burden of proof by holding that 'the applicant [had] still failed to adduce evidence of the existence of a measure adversely affecting him' although there was objectively a serious presumption in favour of that argument, and the right to a fair hearing by refusing to uphold the applicant's claim for disclosure of documents, although those documents were essential to establish the existence of measures having an adverse effect.

39 So far as concerns the rules relating to the burden of proof, the appellant points out that the President of the Court himself noted, in paragraph 26 of the order under appeal, that the admissibility of the main action could be examined in interlocutory proceedings only if it was not prima facie totally excluded. However, in the present case, the appellant has proved satisfactorily, on the basis of a whole range of proof or evidence which is unquestionably objective, that the admissibility of the main action could not be manifestly excluded a priori. It is therefore for the Commission to show the absence of measures having an adverse effect.

40 As regards the right to a fair hearing, the appellant maintains, referring *inter alia* to the judgment in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, that that right meant that the President of the Court should order the Commission to produce the documents which had been duly identified and were likely to have a bearing on the case, particularly the passages from Mr van Buitenen's report and the conclusions drawn from them by OLAF on 31 January and 15 February 2002. The fact that conclusions had already been drawn from

those documents reinforced the duty to disclose them. Furthermore, the questions put to the Commission at the hearing of the parties showed that the President of the Court had doubts as to the scope of those documents. By being satisfied by the Commission's oral explanations alone and by refusing to order disclosure of the documents in question, as measures of inquiry or measures of organisation of procedure, the President of the Court had given a ruling lacking an objective basis.

41 The Commission considers that the first limb of this plea, alleging an error of law in respect of the burden of proof, amounts, in essence, to a criticism of the unappealable assessment of the adequate nature of evidence made by the President of the Court and that it cannot therefore be upheld in the appeal. The President of the Court, by holding that there was no measure having an adverse effect, had, moreover, made a finding of fact identical to that presented by the Commission at the hearing. Furthermore, by holding that the burden of proof lay with the applicant and that he had not adduced evidence of the existence of such a measure, the President of the Court did not improperly reverse the burden of proof. Indeed, in interlocutory proceedings, the Commission could not prove a negative fact, namely the absence of a measure having an adverse effect.

42 The Commission maintains that the second limb of this plea, relating to the infringement of the 'principle of the objectivity of judgments' and the principle of equality of arms, likewise cannot be upheld. The President of the Court was not required, in the present case, to order measures of inquiry because the applicant had not adduced sufficient evidence in support of the facts alleged or made a request to that effect. The interlocutory proceedings, which are characterised by a more rapid examination of the arguments of the parties, do not lend themselves to such measures of inquiry. It is not open to the applicant, at the appeal stage, to criticise a refusal to respond to a request which he himself did not formulate before the judge hearing the application for interim measures, as point 210 of his application for interim relief would suggest.

Findings of the Court

43 By this second plea, the two limbs of which are not separable, the appellant maintains that the President of the Court could not dismiss the application for interim relief as inadmissible without first having ordered disclosure of the documents which were held only by the Commission and which were necessary for adducing evidence of the existence of measures having an adverse effect. By requiring the applicant himself to adduce evidence of the existence of those measures and by acting on the basis only of the Commission's observations, the President of the Court had infringed both the rules relating to the burden of proof and the right to a fair hearing.

44 The appellant therefore does not merely call into question the findings of fact made by the President of the Court but seeks to establish that the order under appeal is vitiated by an error of law in the legal assessment by that judge of the facts presented to him, in particular the application of the rules relating to the burden of proof (see, to that effect, the order in Case C-89/97 P(R) *Moccia Irme* v *Commission* [1997] ECR I-2327, paragraphs 39 and 40, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 64 and 65).

45 In interlocutory proceedings, the applicant must prove the existence of certain facts to support the prima facie conclusion that the main action to which his application for interim measures is an adjunct is admissible, in order to prevent him, by means of interim measures, obtaining *inter alia* suspension of operation of measures which the Court might subsequently, if the main action were declared inadmissible, refuse to annul (see, to that effect, the order in Case C-329/99 P(R) *Pfizer Animal Health* v *Council* [1999] ECR I-8343, paragraph 89).

46 Such examination of the admissibility of the action is, in that context, necessarily summary because the proceedings for interim relief are by nature urgent, and the question of admissibility can be considered only on the basis of the facts adduced by the applicant, since the decision of the judge hearing an application for interim relief does not prejudge the decision to be made by the Court of First Instance on hearing the main action (order in Case C-300/00 P(R) *Cofradías de Pescadores de Guipúzcoa and Others* v *Council* [2000] ECR I-8797, paragraph 35).

47 Moreover, the finding of the Court of First Instance that the applicant has not provided the necessary evidence to support his allegations is a finding of fact which comes within the exclusive jurisdiction of the Court of First Instance and cannot be called into question in the context of an appeal (see, to that effect, Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 12, and Case C-191/98 P *Tzoanos* v *Commission* [1999] ECR I-8223, paragraph 23), unless the Court distorts the evidence presented to it (see, to that effect, Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraphs 35 and 36).

48 Admittedly, it is conceivable that, in certain circumstances, the rule that the applicant must prove the existence of facts to support the prima facie conclusion that the main action to which his application for interim measures is an adjunct is admissible, may be qualified. That may be the case if the evidence required depends on facts which are in the sole possession of the other party or if that other party has made it impossible to adduce the evidence (see, to that effect, Case 49/65 *Napoletane* v *High Authority* [1966] ECR 73, 82).

49 Similarly, where there is a strong presumption in support of the applicant's argument, it is for the other side to adduce evidence in rebuttal (see, to that effect, Case 10/55 *Mirossevich* v *High Authority* [1956] ECR 333, 343).

50 However, the President of the Court did not infringe those various rules relating to the burden of proof in the present case, by finding, in paragraph 44 of the order under appeal, that the applicant had not adduced evidence of the existence of a measure adversely affecting him.

51 Indeed, after having duly mentioned, in the presentation of the facts in the case, the documents which, according to the applicant, proved with sufficient accuracy and probability that the investigations referred to him individually and adversely affected him, the President of the Court took into consideration, in paragraph 47 of the order under appeal, the Commission's observations which stated *inter alia* that the applicant was not subject to any action, disciplinary or legal, taken on the basis of an OLAF report implicating him. On those grounds, the President of the Court therefore held, implicitly but necessarily, that, in any event, the Commission had adduced evidence to rebut the presumption that the applicant was seeking to establish and that it was not necessary to allow his application seeking an order for the disclosure of various documents.

52 By consequently deciding, in the light of all those facts and by an assessment which cannot be called into question in an appeal, that the applicant had failed to adduce evidence of the existence of a measure adversely affecting him, the President of the Court did not incorrectly apply the rules governing the burden of proof. Accordingly, the appellant's claim that the rules relating to the right to a fair hearing have been infringed is unfounded.

53 It is apparent from the foregoing that the second plea must be rejected.

The third plea, alleging that the judge hearing the application for interim relief erred in law by holding that the principle of observance of the rights of the defence did not apply before OLAF drew conclusions referring to the appellant by name

Arguments of the parties

54 The appellant maintains that the President of the Court erred in law by holding that neither Article 4 of Decision 1999/396 and Articles 2 and 9 of Regulation No 1073/1999 nor the general principles of observance of the rights of the defence and of legality of administrative proceedings could be invoked until OLAF had drawn final conclusions referring to him by name from its formal investigations.

55 First of all, Article 4 of Decision 1999/396 required, in the present case, that the appellant should be informed quickly of the possibility that he might be individually implicated in the cases to which OLAF's new investigations related and that he should be enabled to express his views on all the facts concerning him, in any event before the conclusions referring to him individually were drawn from the investigations.

56 Further, the President of the Court misinterpreted the scope of Article 9 of Regulation No 1073/1999 by holding, in paragraphs 46 and 47 of the order under appeal, that the conclusions of an OLAF investigation which refer to an official by name are necessarily those which call for disciplinary or legal action. When it states that the actions which may be taken following an OLAF investigation may be 'in particular disciplinary and legal', the article does not preclude other action, for example requests for additional information addressed to OLAF by the institution concerned, as provided in Article 5(7) of the

Commission decision of 19 February 2002 concerning the conduct of administrative investigations and disciplinary proceedings, or even a decision to open a formal investigation.

57 Finally, the President of the Court infringed the principle of observance of the rights of the defence, which is applicable, even in the absence of any written provision to that effect, in any proceedings opened against a person which could end in a measure adversely affecting him, even if they are preliminary proceedings. As the appellant has already maintained in his first plea (see paragraph 26 of this order), Mr Kinnock's written and oral replies to the members of Cocobu show that the Commission itself considered that the rights of the defence were applicable at the preliminary stage of OLAF's investigations. OLAF is also very concerned that the information it possesses should be forwarded to it in compliance with the legitimate rights of the person concerned, as stated in point (d) of the 'guidelines for [its] action', as published on OLAF's Internet site.

58 The Commission states, in the introductory comments of its defence and before replying directly to the final plea of the appeal, that the observations it submitted at first instance on 7 August 2002, according to which the applicant was seeking the suspension of purely preparatory measures which, furthermore, might not even lead to any proceedings against him, are still wholly valid. It reaffirms that the documents cited by the applicant did not refer to him in particular and that, if his position were to be examined more closely by OLAF one day, he would be informed before conclusions were drawn. It points out that that assessment of the facts, which the applicant himself accepted *inter alia* in points 36, 45 and 46 of his application, was not contradicted before the President of the Court and that it cannot now be challenged at the appeal stage.

59 The Commission argues that the rights of the defence cannot be invoked if there is no measure having an adverse effect and that the plea is therefore irrelevant. Such

a plea may be put forward only in support of a challenge brought against a final decision having an adverse effect. The applicant's argument that the existence of a measure having an adverse effect is shown by the infringement of the rights of the defence is contrary to that principle and makes the admissibility of actions depend on the applicant's subjective assessment. Paragraph 50 of the order under appeal only draws attention to those rules. The mere conducting of investigations by OLAF cannot, in those circumstances, in itself justify taking into account the rights of the defence at such a preliminary stage.

60 Similarly, the fact that OLAF draws conclusions referring to an agent — which is not, in any event, the position in this case — does not automatically constitute a reviewable measure. The existence of safeguards for observance of the rights of the defence stated in Article 4 of Decision 1999/396 does not alter that assessment. Finally, the expression 'in any event', which appears at the beginning of paragraph 51 of the order under appeal, indicates that that paragraph is included for the sake of completeness and that a possible error of law affecting it would have no effect on the validity of the order.

Findings of the Court

61 The measures which adversely affect an official are measures capable of directly affecting his legal position (Case 32/68 *Grasselli* v *Commission* [1969] ECR 505, paragraph 4). Only a measure the legal effects of which are binding on and capable of affecting the interests of an applicant by bringing about a distinct change in his legal position is an act or decision against which an action for annulment may be brought (Case 346/87 *Bossi* v *Commission* [1989] ECR 303, paragraph 23).

62 As regards staff cases, acts preparatory to a decision do not adversely affect the applicant within the meaning of Article 90(2) of the Regulations and therefore

can only be contested incidentally in an appeal against measures capable of being annulled (Case 11/64 *Weighardt* v *Commission* [1965] ECR 365, 383, and *Bossi* v *Commission*, cited above, paragraph 23). Although some purely preparatory measures may adversely affect an official inasmuch as they may influence the content of a subsequent challengeable act, those measures cannot be the subject of a separate action and must be challenged in support of an action brought against that act (see, to that effect, Case 35/67 *van Eick* v *Commission* [1968] ECR 329, 341).

63 In the present case, it is clear from the provisions of Article 4 of Decision 1999/396 that the official concerned must be informed rapidly that he may be personally implicated, as long as this would not be harmful to the investigation, and that, in any event, conclusions referring by name to an official of the Commission may not be drawn once the investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him.

64 Failure to apply those provisions, which lay down the conditions under which observance of the rights of the defence of the official concerned may be reconciled with the requirements of confidentiality inherent in any investigation of that kind, constitutes an infringement of the essential procedural requirements applicable to the investigation procedure.

65 However, the consequence is not that the preparatory measures which, for that official, are constituted by the opening and conducting of an internal investigation, may be the subject of a separate action, different from that which the party concerned is entitled to bring against the authority's final decision. Indeed, contrary to what the applicant maintains, neither the existence, even if established, of infringements of the rights of the defence nor the fact that internal investigations are conducted show in themselves that a measure having an adverse effect, that is to say a measure open to appeal, has been adopted.

66 Accordingly, by holding, on the grounds stated in paragraphs 43 to 48 of the order under appeal, that the applicant was not entitled to seek the annulment of OLAF's investigative procedures, the President of the Court did not err in law.

67 Furthermore, by pointing out, in paragraph 47 of the order under appeal, by an assessment which cannot be challenged in appeal proceedings, that OLAF had not drawn conclusions referring to the applicant by name and, by holding, in paragraphs 50 and 51 of the order, that, in those circumstances, the grounds of appeal alleging infringement of the rights of the defence could not, in any event, be invoked by the applicant, the President of the Court correctly interpreted the rules of admissibility for actions brought against measures which are only preparatory in nature, so that the order under appeal does not contain an error of law.

68 Moreover, by holding, in paragraph 46 of the order under appeal, that the conclusions of an OLAF investigation which refer to an official by name, within the meaning of Article 4 of Decision 1999/396, are bound to be those contained in a report drawn up under the authority of the Director of the Office, as laid down in Article 9 of Regulation No 1073/1999, and that the actions which may be taken following an internal investigation by the institution concerned may be 'in particular' disciplinary and legal, the President of the Court did not fail to take account of the scope of the provisions which he thus interpreted.

69 It is true that, in paragraph 47 of the order under appeal, the judge stated that 'no action, disciplinary or legal', involved the applicant, thus omitting to say that those actions were those which the institution concerned could 'in particular' but not exclusively draw from an internal investigation by OLAF. However, that inaccuracy, in the light of the grounds stated in paragraph 46 of the order under appeal, does not on its own establish that the President of the Court, in order to hold that no conclusion referring by name to the applicant had been drawn in the present case by that office, based his argument on an incorrect assessment of the provisions applicable to the case.

70 In those circumstances, the appellant's claim that the President of the Court erred in law by holding that, if there was no measure having an adverse effect, observance of the rights of the defence could not be pleaded before him is unfounded.

71 Consequently, the third plea cannot be upheld.

72 It is apparent from all of the foregoing considerations that the appeal must be dismissed.

Costs

73 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the successful party's costs if they are applied for in the successful party's pleadings.

74 The Commission has not expressly applied for costs against the appellant but for the costs of these proceedings to be reserved. Therefore, although the appellant has been unsuccessful, it is not appropriate to order him to pay the costs of the appeal.

On those grounds,

THE PRESIDENT OF THE SIXTH CHAMBER OF THE COURT,

replacing the President of the Court pursuant to the second paragraph of Article 85 of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 118,

hereby orders:

1. The appeal is dismissed.

2. Costs are reserved.

Luxembourg, 8 April 2003.

R. Grass
Registrar

J.-P. Puissochet
President of the Sixth Chamber acting for the President