

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

6 July 2006 \*

In Joined Cases T-391/03 and T-70/04,

**Yves Franchet** and **Daniel Byk**, officials of the Commission of the European Communities, residing in Luxembourg (Luxembourg), represented by G. Vandersanden and L. Levi, avocats,

applicants,

v

**Commission of the European Communities**, represented by D. Maidani, J.-F. Pasquier and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of decisions of the European Anti-Fraud Office (OLAF) and of the Commission refusing the applicants access to certain documents relating to an enquiry concerning Eurostat,

\* Language of the case: French.

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,  
Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 15 September 2005,

gives the following

### **Judgment**

#### **Legal context**

<sup>1</sup> Article 255 EC provides:

‘1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

...'

2 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) defines the principles, conditions and limits governing the right of access to documents of those institutions provided for in Article 255 EC. That regulation entered into force on 3 December 2001.

3 Article 2(1) and (3) of Regulation No 1049/2001 provides:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

...

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.'

4 Article 4 of Regulation No 1049/2001, relating to the exceptions to the abovementioned right of access, states:

‘ ...

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

...

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

...’

5 Article 6(1) of Regulation No 1049/2001 provides that ‘... [t]he applicant is not obliged to state reasons for the application’.

6 Article 8(1) of Regulation No 1049/2001 states:

‘A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.’

7 Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94) repealed Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58), which ensured that effect was given, as regards the Commission, to the code of conduct on public access to Council and Commission documents (OJ 1993 L 340, p. 41; ‘the code of conduct’), approved by the Council and the Commission on 6 December 1993.

8 Article 3 of the Annex to Decision 2001/937 provides:

“Treatment of initial applications

...

The applicant shall be informed of the response to his application either by the Director-General or the head of department concerned, or by a Director designated for this purpose in the Secretariat-General or by a Director designated in the OLAF [European Anti-Fraud Office] where the application concerns documents concerning OLAF activities referred to in Article 2(1) and (2) of Commission Decision 1999/352/EC, ECSC, Euratom establishing OLAF, or by a member of staff they have designated for this purpose.

Any answer which is even partly negative shall inform the applicant of his right to submit, within 15 working days from receipt of the answer, a confirmatory application to the Secretary-General of the Commission or to the Director of OLAF where the confirmatory application concerns documents concerning OLAF activities referred to in Article 2(1) and (2) of Decision 1999/352/EC, ECSC, Euratom.'

- 9 Moreover, as regards the treatment of confirmatory applications, Article 4 of the Annex to Decision 2001/937 provides:

'In accordance with Article 14 of the Commission's Rules of Procedure, the power to take decisions on confirmatory applications is delegated to the Secretary-General. However, where the confirmatory application concerns documents concerning OLAF activities referred to in Article 2(1) and (2) of Decision 1999/352/EC, ECSC, Euratom, the decision-making power is delegated to the Director of OLAF.

The Directorate-General or department shall assist the Secretariat-General in the preparation of the decision.

The decision shall be taken by the Secretary-General or by the Director of OLAF after agreement of the Legal Service.

The decision shall be notified to the applicant in writing, where appropriate by electronic means, and inform him of his right to bring an action before the Court of First Instance or to lodge a complaint with the European Ombudsman.’

- <sup>10</sup> Article 8(2) 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:

‘Confidentiality and data protection

...

2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities.

Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.’

11 Article 9 of Regulation No 1073/1999 provides:

‘Investigation report and action taken following investigations

1. On completion of an investigation carried out by [OLAF], 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.

2. In drawing up such reports, account shall be taken of the procedural requirements laid down in the national law of the Member State concerned. Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports.

3. Reports drawn up following an external investigation and any useful related documents shall be sent to the competent authorities of the Member States in question in accordance with the rules relating to external investigations.

4. Reports drawn up following an internal investigation and any useful related documents shall be sent to the institution, body, office or agency concerned. The institution, body, office or agency 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 [OLAF], within a deadline laid down by him in the findings of his report.’

<sup>12</sup> Article 10 of Regulation No 1073/1999 provides

‘Forwarding of information by [OLAF]

1. Without prejudice to Articles 8, 9 and 11 of this Regulation and to the provisions of Regulation (Euratom, EC) No 2185/96, [OLAF] may at any time forward to the competent authorities of the Member States concerned information obtained in the course of external investigations.

2. Without prejudice to Articles 8, 9 and 11 of this Regulation, the Director of [OLAF] shall forward to the judicial authorities of the Member State concerned the information obtained by OLAF during internal investigations into matters liable to result in criminal proceedings. Subject to the requirements of the investigation, he shall simultaneously inform the Member State concerned.

3. Without prejudice to Articles 8 and 9 of this Regulation, [OLAF] may at any time forward to the institution, body, office or agency concerned the information obtained in the course of internal investigations.’

## **Background**

<sup>13</sup> The applicants, Mr Yves Franchet and Mr Daniel Byk, are, respectively, the former Director-General and the former Director of Eurostat (Statistical Office of the European Communities).

- 14 Several internal audits of Eurostat revealed possible irregularities in its financial management. Consequently, OLAF initiated several investigations concerning, in particular, the contracts concluded by Eurostat with Eurocost, Eurogramme and Datashop — Planistat and the subsidies granted to those companies.
- 15 On 4 July 2002, OLAF sent the Luxembourg judicial authorities, in accordance with Article 10 of Regulation No 1073/1999, a dossier relating to the internal investigation concerning Eurocost in which Mr Franchet was implicated, and another dossier relating to the external investigation concerning Eurogramme. On 19 March 2003, OLAF also sent the French judicial authorities a dossier relating to Datashop — Planistat in which the two applicants were implicated.
- 16 On 21 May 2003, the applicants were transferred at their own request.
- 17 On 11 June 2003, the Commission asked the internal audit service (IAS) to examine certain contracts concluded and subsidies granted by Eurostat in the context of the follow-up of the discharge procedure. The IAS drew up three reports, the first dated 7 July, the second dated 24 September and the third ('the final IAS report') dated 22 October 2003.
- 18 On 9 July 2003, the Commission decided to initiate disciplinary proceedings against the applicants. These proceedings were immediately suspended due to the fact that OLAF's investigation was still in progress. The Commission also set up a multidisciplinary task force.

19 By application of 25 July 2003, the applicants requested, invoking the general principle of transparency and the fundamental right of access to documents laid down by Article 42 of the Charter of fundamental rights of the European Union proclaimed on 7 December 2000 at Nice (OJ 2000 C 364, p. 1) and the provisions of Regulation No 1049/2001 and Decision 2001/937, access to the following documents:

‘— the letter or letters sent by OLAF to the Luxembourg judicial authorities in connection with the Eurocost and Eurogramme dossiers with their annexes and the list of those annexes;

— the letters sent by OLAF to the French judicial authorities in connection with the Datashop-Planistat dossier with their annexes and the list of those annexes. In particular, a letter probably dated 19 March 2003 (No 003441) with ... reference CMS No IO/2002/510 — Eurostat/Datashop/Planistat;

— the communication from OLAF to the Commission mentioned in a press release dated 19 May 2003 (IP/03/[709]);

— all other communications from OLAF to the Commission.’

20 Access was refused in a letter from OLAF of 18 August 2003 (‘the decision of 18 August 2003’). This letter stated:

‘...’

The exceptions which apply to the documents which you have applied for in the first and second requests are those relating to the protection of court proceedings and the purpose of inspections, investigations and audits. The letters requested in the two applications are an essential part of the dossier sent by OLAF to the judicial authorities of the Member States for the purposes of national court proceedings, and concern matters which are still under investigation. Therefore, they are protected by the abovementioned exceptions.

As regards the third request, the communication to which access is applied for was made by OLAF to the Commission pursuant to Article 10(3) of Regulation [No] 1073/1999, of 25 May 1999, which allows OLAF, in the context of its investigative duties, to inform the institution. As it is a document sent by OLAF in the context of its investigation, it is covered by the exception for the protection of the purpose of inspections, investigations and audits.

As regards the fourth request, your application lacks precision. We have unfortunately not been able to identify the document(s) in question. I would therefore be grateful if you could provide us with further information to clarify your initial application.

...'

<sup>21</sup> On 8 September 2003, the applicants made a confirmatory application.

<sup>22</sup> The applicants' confirmatory application was rejected by letter of 1 October 2003 from OLAF ('the first contested decision'). It stated the following:

'...

After detailed examination of your application and of the initial response sent to you by OLAF, I hereby confirm that OLAF is not able at this time to provide you with the requested documents.

1. You allege that the documents referred to in the first and second requests have been, illegally, made public. In fact, those documents have never legally been made public.

You state that “Mr Franchet and Mr Byk are directly concerned by these matters and therefore have a particular interest in having access to the documents”. The right of public access to the documents on the basis of Regulation [No] 1049/2001 must be distinguished from the right of access to the dossier of a person concerned. The first is a right which is guaranteed to all natural and legal persons and applies to all documents held by an institution. The legislation does not require the applicant to show an interest in order to be authorised to have access to the documents. Access to the documents must be granted unless they are covered by one of the exceptions listed in [Article] 4 of the Regulation. In the present case, OLAF is of the opinion, for the reasons set out below, that none of the documents which are the subject of your request for access can be disclosed under Regulation [No] 1049/2001.

On the other hand, a person concerned by national judicial proceedings and/or Community disciplinary proceedings has the right of access to a dossier which concerns him in accordance with the appropriate legislation.

Since judicial investigations are in progress in France and Luxembourg, access to the dossier is governed by the procedural rules which apply in those two countries. You may approach the competent French and/or Luxembourg authorities, in order to request access to the dossier which was sent to them. This will then be for them to decide, and OLAF will not object to their decision.

You allege that there is an overriding public interest in making available to Mr Byk and Mr Franchet the documents covered by the first and second requests. However, we consider that the right to a fair hearing of Mr Franchet and Mr Byk is a private interest rather than an overriding public interest. As stated above, they will have the right of access to the entire dossier in sufficient time in the context of any disciplinary or judicial proceedings.

2. You state that it is incorrect to maintain that all documents sent by OLAF in the context of an investigation are ipso facto covered by the exception for the protection of the purpose of inquiries, investigations and audits laid down by [Article] 4 of the Regulation. However, this is not what OLAF has maintained.

On the contrary, we have invoked that exception in respect of the specific documents which you have requested, more precisely: the letters sent to the French and Luxembourg authorities and to the Commission. These letters to the national judicial authorities contain a summary of the results of OLAF investigations. If OLAF were to make these letters available, that would be prejudicial to the national judicial proceedings in so far as they are an integral part of the legal dossiers and cannot therefore be communicated until such time as provided for under national procedures.

The communication to the Commission also contains a summary of the results of the investigation which OLAF considered important for the Commission in order that it could take all measures necessary for the protection of its interests. Consequently, the reasons for which OLAF refused to disclose the documents are specific to the documents requested and do not constitute a general argument as you have suggested.

3. Concerning the fourth request, we have identified 35 communications from OLAF to the Secretary-General of the Commission relating to the investigations concerning Eurostat, sent between 23 September 1999 and 25 September 2003. All

of those communications contain results of the investigation the disclosure of which would prejudice the judicial proceedings in progress in France and Luxembourg. They are consequently covered by the exception relating to inspections, investigations and audits as well as by the exception relating to court proceedings.

...'

23 The final report concerning Eurogramme was drawn up in July 2002.

24 On 25 September 2003, OLAF drew up final investigation reports, in accordance with Article 9 of Regulation No 1073/1999, concerning Eurocost and Datashop — Planistat. On 10 October 2003, the applicants received copies of those reports. On the same date, they also received a copy of the intermediate IAS report of 7 July 2003, but without its annexes.

25 By letter of 21 October 2003, the applicants made a new application for access to various documents, in particular the final IAS report. On 29 October 2003, they made an additional request concerning the annexes to the IAS report of 7 July 2003, the report having been sent to them on 10 October 2003.

26 As there was no reply to these applications, the applicants made a confirmatory application on 2 December 2003.

27 That confirmatory application was dismissed by decision of the Commission of 19 December 2003 ('the second contested decision'). The refusal was worded as follows:

' ...

I regret to have to confirm that those documents cannot be sent to you. Their disclosure would undermine the purpose of that investigation in that it would disrupt the implementation of the appropriate follow-up action. Therefore, in accordance with Article 4(2) of Regulation ... No 1049/2001, access to those documents must be refused. Taking account of the sensitiveness of the matter concerned and the structure of the documents, partial access as referred to in Article 4(6) of the abovementioned Regulation is impossible. Furthermore, I see no evidence which would allow me to conclude that, in this particular case, public interest in the disclosure of the information contained in the requested documents should take precedence over the necessity of protecting the purpose of the investigation.

...'

## **Procedure**

28 By application lodged at the Registry of the Court of First Instance on 27 November 2003, the applicants brought an action, Case T-391/03, against the decision of 18 August 2003 and against the first contested decision.

29 By means of a separate document lodged on the same day, they requested that the action be decided under an expedited procedure in accordance with Article 76a of the Rules of Procedure of the Court of First Instance.

30 The Fourth Chamber of the Court of First Instance, to which the case was assigned, rejected the application for an expedited procedure by a decision of 17 December 2003, which was notified to the applicants on 22 December 2003.

31 By application lodged at the Registry of the Court of First Instance on 19 February 2004, the applicants brought an action, Case T-70/04, against the Commission's implicit decision to reject their applications for access to various documents made on 21 and 29 October 2003 and against the second contested decision.

32 As a result of the changes to the composition of the chambers of the Court of First Instance in the new judicial year, the Judge-Rapporteur was attached to the Third Chamber, to which this case has, in consequence, been assigned.

33 By order of the President of the Third Chamber of the Court of First Instance of 13 July 2005, Cases T-391/03 and T-70/04 were joined for the purposes of the oral procedure and the judgment in accordance with Article 50 of the Rules of Procedure.

34 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, as measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure, put questions in writing to the applicants and the Commission. The parties complied within the prescribed time-limits.

35 The parties presented oral argument and their replies to oral questions put by the Court of First Instance at the hearing on 15 September 2005.

36 By order of 26 September 2005, in accordance with Article 65(b), Article 66(1) and the third subparagraph of Article 67(3) of the Rules of Procedure, the Court called on the defendant to produce the documents at issue but ruled that those documents would not be communicated to the applicants in the course of these proceedings. That request was complied with.

37 The oral procedure was closed by decision of the President of the Third Chamber of the Court of First Instance on 8 November 2005.

### **Forms of order sought**

38 In the context of Case T-391/03, the applicants claim that the Court should:

— annul the decision of 18 August 2003 and the first contested decision;

— order the Commission to pay all the costs.

39 The Commission claims that the Court should:

- declare the action inadmissible in so far as it seeks the annulment of the decision of 18 August 2003;
- dismiss the claim for annulment of the first contested decision as unfounded;
- order the applicants to pay the costs.

40 In the context of Case T-70/04, the applicants claim that the Court should:

- annul the Commission's implicit decision to reject their applications for access to various documents made on 21 and 29 October 2003 as well as the second contested decision;
- order the Commission to pay all the costs.

41 The Commission claims that the Court should:

- declare the action inadmissible in so far as it seeks the annulment of the implicit decision of rejection;

- dismiss the claim for annulment of the second contested decision as unfounded;
  
- order the applicants to pay the costs.

## **Law**

### *Admissibility*

#### Arguments of the parties

- <sup>42</sup> In the context of Case T-391/03, the Commission considers that the decision of 18 August 2003 is not a definitive measure and cannot therefore be the subject of an action for annulment.
- <sup>43</sup> Regarding Case T-70/04, the Commission submits that the action against the implicit decision to reject the applications of 21 and 29 October 2003 is inadmissible, as it is not a definitive measure.
- <sup>44</sup> The applicants consider that, in the same way as in the pre-litigation procedure in staff cases, the reasoning of the first contested decision may be seen as supplementing the reasoning of the decision of 18 August 2003, and that the latter constitutes the contested act. The same argument applies to the implicit decision to reject the applications of 21 and 29 October 2003.

45 However, questioned on that point by the Court during the hearing, the applicants left the matter to the Court's discretion.

## Findings of the Court

46 It has consistently been held that 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 against which an action for annulment may be brought under Article 230 EC. In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is, in principle, open to review only if it is a measure definitively laying down the position of the institution at the end of that procedure, and not a provisional measure intended to pave the way for the final decision (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 10, and Case T-277/94 *AITEC v Commission* [1996] ECR II-351, paragraph 51).

47 It is clear from the combined effect of Articles 3 and 4 of the annex to Decision 2001/937 and Article 8 of Regulation No 1049/2001 that the response to the initial application was only an initial statement of position, conferring on the applicants the right to request the Secretary-General of the Commission or the Director of OLAF to reconsider the position in question.

48 Consequently, only the measure adopted by the Secretary-General of the Commission or by the Director of OLAF, which is a decision and which entirely replaces the previous statement of position, is capable of producing legal effects such as to affect the interests of the applicant and, therefore, of being the subject of an action for annulment under Article 230 EC (Case T-47/01 *Co-Frutta v Commission* [2003] ECR II-4441, paragraph 31).

49 Therefore, Case T-391/03 is inadmissible as regards the decision of 18 August 2003, and Case T-70/04 is inadmissible as regards the implicit decision to reject the applicants' applications of 21 and 29 October 2003.

### *Substance*

#### Arguments of the parties

50 In support of their actions, the applicants raise a single plea in law alleging infringement of Articles 2 and 4 of Regulation No 1049/2001, infringement of the 'fundamental right of access to documents', a manifest error of assessment, infringement of the principle of proportionality and the incorrect and contradictory nature of the contested decisions.

51 They submit that OLAF gave a wide scope to the exceptions to the right of access to documents, relating to the protection of court proceedings and the purpose of inspections, investigations and audits. They observe that the exceptions to the right of access to documents must be interpreted restrictively, so as not to frustrate application of the general principle of giving the public the widest possible access to documents.

52 The applicants consider that the Commission's interpretation leads to the result that documents concerning OLAF's activities are, by their very nature, excluded from the right of access. Such an approach fails to have regard to the fact that a restrictive interpretation must be given to exceptions, especially where exceptions to a fundamental right are involved.

- 53 In that respect, the applicants submit that the Commission was wrong to consider that OLAF was covered by an arrangement that was special and even derogated from the rules concerning access to documents. Such a derogation has no basis either in Regulation No 1049/2001 or in OLAF's own regulations. The applicants consider that neither the requirement of confidentiality of its investigations or OLAF's independence can result in all requests for access to documents being refused.
- 54 Concerning the exception based on the protection of court proceedings, the applicants consider, referring to Case T-92/98 *Interporc v Commission* [1999] ECR II-3521, (*Interporc II*), that that exception does not apply in the present case. In fact, it only concerns documents drawn up in the context of a legal case in progress. OLAF's communications were only intended to inform the judicial authorities or the institutions of facts liable to result in criminal or disciplinary proceedings. Therefore, they were not made in the context of court proceedings in progress. In that respect, the applicants point out that OLAF is an administrative service of the Commission which puts together administrative dossiers and draws up administrative reports. It is the institutions and the national authorities which take such action, in particular disciplinary or legal, as the results of investigations warrant.
- 55 The applicants submit that OLAF cannot avoid the obligations laid down by the legislation relating to public right of access to documents by arguing that access to its documents must be assessed in accordance with national rules or those concerning disciplinary proceedings.
- 56 Concerning the documents communicated by OLAF to the French and Luxembourg authorities, the applicants also consider that OLAF made, in two respects, a manifest error of assessment by failing to comply with its obligation to consult the national authorities on the question whether they had any objection to the disclosure of the documents in question. Relying on *Interporc II* and on Joined Cases

C-174/98 P and C-189/98 P *Netherlands and van der Wal v Commission* [2000] ECR I-1, '*van der Wal*'), they consider that the Commission should have questioned the national judicial authorities to which it referred the matter to assess not only whether such disclosure was prejudicial but also whether it constituted an infringement of national law.

- 57 Concerning the documents communicated by OLAF to the Commission, the applicants consider that the refusal of access to those documents was not justified either. They observe that it is not for OLAF to assess the Commission's interests and the level of protection the documents may benefit from, but only to question the Commission on that point, as indicated in *van der Wal*.
- 58 Concerning the exception based on the protection of the purpose of inspections, investigations and audits, the applicants dispute that this exception was applicable in the present case, the Commission having adduced no evidence in this respect to justify the refusal to disclose.
- 59 The applicants claim that OLAF should have indicated the specific reasons making the exceptions applicable in the present case and considered, for each document requested, whether its content prevented disclosure. The applicants submit that, according to case-law, the exception cannot apply, even if the document contains information relating to an investigation, if disclosure would not be prejudicial thereto. OLAF did not examine in relation to each document requested whether its content precluded its disclosure, but justified the refusal of access using general arguments. Moreover, it is not certain whether any investigations are still in progress.

- 60 The applicants submit that OLAF did not check, contrary to the principle of proportionality, whether partial disclosure of the documents was possible. They refer to Case C-353/01 P *Mattila v Council and Commission* [2004] ECR I-1073 and claim that the decision to refuse access to the documents must be annulled if the Commission omitted to examine the possibility of partial access to the documents.
- 61 The applicants also state that the reasoning of the decision of 18 August 2003 and of the first contested decision is contradictory. Regarding the documents communicated by OLAF to the French and Luxembourg judicial authorities, OLAF justified the refusal of access by indicating that the documents requested contained a summary of the results of OLAF investigations. On 3 April 2003, that is on a date subsequent to the communication of the documents to the national authorities, OLAF informed the Secretary-General that the investigations were still in progress. The applicants point out in that respect that it was only on 25 September 2003 that OLAF submitted its final investigation reports.
- 62 Moreover, the applicants consider that the Commission's reference to the order of the Court of First Instance in Case T-215/02 *Gómez-Reino v Commission* [2003] ECR-SC I-A-345 and II-1685 is not relevant to the present case. They claim that the approach adopted in that order makes the fundamental right to a fair hearing ineffective. According to the applicants, according to that order measures taken by OLAF in the context of its activities do not adversely affect officials but are simply measures of a preparatory nature, with only any final decision taken having the characteristics of an act adversely affecting an official. It would follow that none of OLAF's activity would be subject to judicial review.
- 63 Concerning the final IAS report and the annexes to the IAS report of 7 July 2003, the applicants add that the reasoning of the second contested decision, which contained no information specific to the present case and did not explain why disclosure of the requested documents to the applicants alone would have been prejudicial, is too general. The reasoning is also insufficient with regard to the question of whether

partial access was possible. Moreover, the reasoning is not plausible, given that the three IAS reports were widely distributed. The applicants submit that the Commission gave them access to the first two IAS reports without explaining the reasons why access to the final IAS report and to the annexes to the IAS report of 7 July 2003 had to be treated differently.

- 64 They believe, moreover, that the exception based on the protection of the purpose of inspections, investigations and audits should not have been applied to the final IAS report as, at the time of the adoption of the second contested decision, the IAS's audits were finished. Therefore, the Commission could indefinitely oppose a request for access by abstaining from deciding what action should be taken following an enquiry.
- 65 Finally, the applicants submit that the right to a fair hearing constitutes an overriding public interest as referred to in Article 4(2) of Regulation No 1049/2001 and claim that, even if the right to a fair hearing primarily protects a private interest, this is also an overriding right which constitutes the basis of the rule of law and democracy in a State. In particular, access to the courts and to effective judicial protection is at issue. They add that the Commission has failed to weigh up the interests in question.
- 66 The Commission observes that the action is for the annulment of a decision refusing access to documents which were requested exclusively on the basis of the legislation relating to public right of access to documents. Consequently, the applicants' request should be treated in the same way as a request for access from any member of the public.
- 67 It submits that the specific features of OLAF's duties must be taken into consideration in examining the request for access to documents in question and that OLAF is not covered, as such, by a special arrangement or one which derogates

from the rules concerning access to documents. It considers that it follows from all of the provisions of Regulation No 1073/1999 that OLAF's duties cannot be reduced to those of a purely administrative service, which draws up dossiers or administrative documents such as those referred to in *Interporc II* or those drawn up by any other Directorate-General in the context of the Commission's usual duties. It claims that the investigations carried out by OLAF are liable to have disciplinary or criminal implications. They therefore require a high level of confidentiality, as may be seen from Articles 8(2) and 12(3) of Regulation No 1073/1999, and by their nature fall within the exception on the protection of investigations. It also considers that in so far as investigations in progress, or even those that are finished, may have links with court proceedings that have been or will be brought, the exception relating to the protection of court proceedings is inevitably connected to that relating to investigations.

68 The Commission observes that, in the present case, the dossiers submitted to the Luxembourg authorities are currently the subject of preparatory inquiries and those submitted to the French authorities have given rise to proceedings before the courts.

69 It considers that the two exceptions in question necessarily cover not only the documents forming the OLAF dossiers or those sent to the judicial authorities, but also the communications on this subject between OLAF and the institutions.

70 It submits that the need for confidentiality makes it impossible to allow public access to any document relating to the essential part of an OLAF investigation, even when it is completed, at the very least as long as a final decision has not been taken by the judicial authorities seized or by the appointing authority. It relies on the interpretation by analogy of Case T-191/99 *Petrie and Others v Commission* [2001] ECR II-3677. It considers that the requirement of confidentiality is particularly

justified given that OLAF investigations can lead to criminal or disciplinary proceedings and that, if judicial or disciplinary proceedings are initiated, the persons involved are entitled to observance of the presumption of innocence.

71 It submits that, in the present case, the access to documents requested was refused on the ground, in particular, that they related to an essential part of the OLAF investigations and that the latter had not given rise to a final decision by the judicial authorities seized or the appointing authority. If such a decision had been taken, the Commission's analysis could have been different. The documents in question could have been communicated on the basis of Regulation No 1049/2001, where appropriate omitting the name of the natural or legal persons mentioned.

72 The Commission adds that, in *Gómez-Reino v Commission*, the Court of First Instance held that OLAF was not obliged to give a Community official allegedly concerned by an internal investigation, before a final decision of the appointing authority adversely affecting him, access to the documents which were the subject of the investigation or those drawn up by OLAF. According to the Commission, if such access can be refused in respect of an official concerned by that investigation, refusal must also be acceptable in respect of a request for access to documents concerning an investigation based on Regulation No 1049/2001.

73 The Commission considers that there is no incoherence or contradiction in the reasoning of its decisions and that the applicants confuse the external and internal investigations led by OLAF. The different terms in the contested decisions are due to the fact that in July 2002 and March 2003 the results of external investigations were brought to the attention of the national judicial authorities, such investigations being independent of the internal investigations led by OLAF. Moreover, OLAF's internal investigations were still in progress on 18 August 2003. On the other hand, those investigations were ended on 1 October 2003, which explains the different terms in the first contested decision.

- 74 Regarding the sufficiency of the reasoning, the Commission submits that it is necessary to take into account both the reasoning of the decision of 18 August 2003 and that of the first contested decision as well as the other information which was available to the applicants. It recalls that, according to Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, it is not always possible for the Commission to give reasons justifying the need for confidentiality of a document without disclosing the content of the document and, thereby, depriving the exception of its very purpose.
- 75 The Commission considers that the principle of proportionality has not been infringed either. It takes the view that to ensure the protection of investigations and enquiries as well as of court proceedings, even partial access to the various documents requested could not be granted to the public without depriving the exceptions in question of their effectiveness.
- 76 Regarding the documents which are the subject of Case T-70/04, the Commission claims that it correctly applied the exception based on the third indent of Article 4(2) of Regulation No 1049/2001 given that, even if the IAS's audits were finished, the investigation and the Commission's analysis thereof were still in progress and those reports could still be used by OLAF in the context of its own investigations.
- 77 The Commission recalls that the documents which were sent to the applicants by the Secretary-General of the Commission as an annex to his reply of 10 October 2003 were sent as general information concerning disciplinary proceedings initiated against them and immediately suspended, and not in response to a request for access under Regulation No 1049/2001, and that access to those documents, requested under Regulation No 1049/2001, was refused.
- 78 The Commission points out that it was following the two resolutions of the European Parliament that the Commission asked the IAS, by decision of 11 June

2003, to examine the legality and the regularity of the contracts concluded and the subsidies granted by Eurostat or by another Directorate-General at the request of Eurostat, with the aim of responding to the Parliament's request, but also of detecting any irregularities or problems and of drawing the appropriate conclusions therefrom. The reports drawn up by the IAS in this context are therefore of a sensitive nature, both as regards their subject and their content. The Commission disputes that they have been widely distributed. On the contrary, they were distributed in a particularly restricted manner. The public has never had access to those documents.

- 79 The Commission remarks that if the applicants were correct the documents would have to be made available to everyone.
- 80 Finally, the Commission considers that, having regard to the specific features of the present case, there is no overriding public interest which would justify disclosure to the public of the documents relating to the OLAF investigations. It underlines that Regulation No 1049/2001 is not intended to govern access to the dossiers of persons possibly concerned by an OLAF investigation in order to allow them to prepare their defence.

## Findings of the Court

### — Preliminary remarks

- 81 It must be observed, as a preliminary point, that the present cases must be examined in the light of Regulation No 1049/2001. It is common ground that the contested decisions were adopted on the basis of that regulation.

82 It is important to point out that, under Article 6(1) of Regulation No 1049/2001, a person requesting access is not required to justify his request and therefore he does not have to demonstrate any interest in having access to the documents requested (see, concerning the application of Decision 94/90, Case T-124/96 *Interporc v Commission* [1998] ECR II-231, paragraph 48, and *Interporc II*, paragraph 44). It follows that the applicants' application must be examined in the same way as an application from any other person.

83 The Court also recalls that access to documents is the rule and that a decision refusing access is valid only if it is founded on one of the exceptions provided for by Article 4 of Regulation No 1049/2001.

84 According to settled case-law, those exceptions must be construed and applied restrictively so as not to defeat the general principle enshrined in that regulation (see *van der Wal*, paragraph 27, and Case T-211/00 *Kuijjer v Council* [2002] ECR II-485, paragraph 55, and the case-law cited).

85 In the context of Case T-391/03, the Commission submits that the documents in question must not be disclosed for two reasons, namely, because they are linked to investigations, inspections and audits and because they were, in addition, drawn up for the purpose of court proceedings. Accordingly, the Commission invokes, in the first contested decision, the exceptions provided for in the second and third indents of Article 4(2) of Regulation No 1049/2001 in refusing the applicants access to the documents requested.

86 In the context of Case T-70/04, the applicants request access to the final IAS report and to the annexes to the interim IAS report of 7 July 2003. The Commission raises, in this respect, only the exception based on the protection of the purpose of investigations, inspections and audits, referred to in the third indent of Article 4(2) of Regulation No 1049/2001.

87 It is in the light of the case-law cited at paragraph 84 that the Commission's application of the exceptions referred to in the second and third indents of Article 4(2) of Regulation No 1049/2001 must be examined.

— The exception based on the protection of court proceedings

88 The expression 'court proceedings' has been interpreted by the Court of First Instance, in the context of the application of Decision 94/90, as meaning that the protection of the public interest precludes the disclosure of the content of documents drawn up solely for the purposes of specific court proceedings (*Interporc II*, paragraph 40).

89 Given that the term 'court proceedings' has thus already been interpreted in the context of the right of public access to the institutions' documents, the Court considers that that definition is also relevant for the purposes of Regulation No 1049/2001.

90 Similarly, the Court of First Instance has already held that the words 'documents drawn up solely for the purposes of specific court proceedings' must be understood to mean the pleadings or other documents lodged, internal documents concerning the investigation of the case, and correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office. The purpose of this definition of the scope of the exception is to ensure both the protection of work done within the Commission and confidentiality and the safeguarding of professional privilege for lawyers (*Interporc II*, paragraph 41).

91 However, the Court of First Instance has held that the exception based on the protection of public interest (court proceedings) contained in the code of conduct

cannot enable the Commission to escape from its obligation to disclose documents which were drawn up in connection with a purely administrative matter. That principle must be respected even if the disclosure of such documents in proceedings before the Community judicature might be prejudicial to the Commission. The fact that court proceedings for annulment were initiated against the decision taken following the administrative procedure is immaterial in that regard (*Interporc II*, paragraph 42).

<sup>92</sup> It is appropriate to examine, in the light of that case-law, whether the documents sent by OLAF to the Luxembourg and French authorities and the documents sent by OLAF to the Commission are documents drawn up solely for the purposes of specific court proceedings.

<sup>93</sup> It is apparent from recital 1 to Regulation No 1073/1999 that the aim of OLAF's investigations is the protection of the Communities' financial interests and the fight against fraud and any other illegal activities detrimental to the Communities' financial interests. According to recital 5 to that regulation, OLAF's responsibility extends beyond the protection of financial interests to include all activities relating to safeguarding Community interests against irregular conduct liable to result in administrative or criminal proceedings. It is therefore to attain those objectives that OLAF carries out internal and external investigations, the results of which are presented in a report, in accordance with Article 9 of Regulation No 1073/1999, and that OLAF forwards information to the national authorities and the institutions, in accordance with Article 10 of Regulation No 1073/1999.

<sup>94</sup> In accordance with Article 9(2) of Regulation No 1073/1999, OLAF's reports constitute, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors, admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary.

- 95 The action taken by the national competent authorities or the institutions in response to the reports and information forwarded by OLAF is however within their sole and entire responsibility (order of the President of the Court in Case C-521/04 P(R) *Tillack v Commission* [2005] ECR I-3103, paragraph 32).
- 96 Therefore, it is possible that a communication from OLAF to the national authorities, pursuant to Article 10(1) and (2) of Regulation No 1073/1999 or to an institution, pursuant to Article 10(3) of that regulation, would not lead to the opening of judicial proceedings at national level or disciplinary or administrative proceedings at Community level.
- 97 To find under these circumstances that the various documents sent by OLAF were drawn up solely for the purposes of court proceedings would not correspond to the interpretation given by the case-law to that exception and runs counter to the obligation to construe and apply the exceptions restrictively (see paragraph 84 above).
- 98 Moreover, compliance with national procedural rules is sufficiently safeguarded if the institution ensures that disclosure of the documents does not constitute an infringement of national law. Therefore, in the event of doubt, OLAF should have consulted the national court and should have refused access only if that court objected to disclosure of the documents (*van der Wal*, paragraph 28).
- 99 It is clear from the documents before the Court that such consultation did not take place, as indeed the Commission admitted during the hearing when replying to a question from the Court.

100 The first contested decision states only in this respect:

‘Since judicial investigations are in progress in France and Luxembourg, access to the dossier is governed by the procedural rules which apply in those two countries. You may approach the competent French and/or Luxembourg authorities, in order to request access to the dossier which was sent to them. This will then be for them to decide, and OLAF will not object to their decision.’

101 Such an approach is inconsistent with that taken by the Court of Justice in *van der Wal* (paragraph 29). According to the Court, a procedure whereby the institution consults the national court in the event of doubt avoids the applicant’s having to make a request first to the competent national court and then to the Commission if that court considers that national procedural law does not preclude disclosure of the documents requested but considers that the application of Community rules may lead to a different solution. The procedure is therefore also consistent with the requirements of good administration.

102 Consequently, it must be held that the first contested decision is vitiated by an error in so far as it finds that the documents requested in the context of Case T-391/03 fall within the exception based on the protection of court proceedings within the meaning of Regulation No 1049/2001.

103 Nevertheless, as OLAF also raised another exception to justify refusal of access to those documents, it must be examined whether access could be refused on the basis of the third indent of Article 4(2) of Regulation No 1049/2001.

— The exception based on the protection of the purpose of inspections, investigations and audits

- 104 It must be stated at the outset that it is common ground that all of the documents to which access is requested do in fact relate to such activities.
- 105 The fact that a document concerns an inspection or investigation cannot in itself justify application of the exception invoked. According to established case-law, any exception to the right of access to Commission documents must be interpreted and applied strictly (Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 45).
- 106 In that respect, it should be recalled that, as regards the documents referred to in Case T-391/03, OLAF's investigations were already finished at the time of the adoption of the first contested decision, 1 October 2003. The final investigation report concerning Eurogramme was drawn up in July 2002. On 25 September 2003, OLAF drew up final investigation reports in accordance with Article 9 of Regulation No 1073/1999 concerning Eurocost and Datashop — Planistat. The applicants received, as persons implicated in these reports, copies of them by letter of 10 October 2003.
- 107 Moreover, concerning Case T-70/04, the IAS investigation ended with the final report of 22 October 2003.
- 108 Therefore, in the present case, it is appropriate to determine whether documents relating to inspections, investigations or audits were covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001, where the

specific inspections, investigations or audits were finished and had led to the drawing-up of final reports, but the action to be taken to follow up those reports had not yet been decided.

109 The Court of First Instance has held that the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted in such a way that this provision, the aim of which is to protect ‘the purpose of inspections, investigations and audits’, applies only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits.

110 Certainly, it is apparent from the case-law that various acts of investigation or inspection may remain covered by the exception based on the protection of inspections, investigations and audits as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the report to which access is sought is completed (see, to that effect, *Denkavit Nederland v Commission*, paragraph 48).

111 Nevertheless, to allow that the various documents relating to inspections, investigations or audits are covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001 until the follow-up action to be taken has been decided would make access to the IAS documents dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities.

112 Such a solution would be contrary to the objective of guaranteeing public access to documents relating to any irregularities in the management of financial interests, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers (see, to that effect, Case T-123/99 *JT's Corporation v Commission* [2000] ECR II-3269, paragraph 50).

- 113 It is therefore appropriate to ascertain whether, at the time of the adoption of the contested decisions, inspections and investigations were still in progress which could have been jeopardised by the disclosure of the requested documents, and whether these activities were carried out within a reasonable period.
- 114 In that connection, it should be noted that, according to settled case-law, the legality of an individual contested measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 7, and Case C-449/98 P *IECC v Commission* [2001] ECR I-3875, paragraph 87).
- 115 Moreover, according to settled case-law, the examination required for the purpose of processing a request for access to documents must be specific in nature. First, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, *Denkavit Nederland v Commission*, paragraph 45). Second, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision (Case T-188/98 *Kuijer v Council* [2000] ECR II-1959, paragraph 38, and Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, 'VKI', paragraphs 69 and 72).
- 116 That concrete examination must, moreover, be carried out in respect of each document referred to in the request for access. It is apparent from Regulation No 1049/2001 that all the exceptions mentioned in Article 4(1) to (3) are specified as being applicable 'to a document' (VKI, paragraph 70).

- 117 A concrete, individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001. In the context of applying the code of conduct, the Court has moreover already rejected as insufficient an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (*JT's Corporation v Commission*, paragraph 46, and *VKI*, paragraph 73).
- 118 It is therefore for the institution to assess, first, whether the document requested falls within one of the exceptions provided for by Article 4 of Regulation No 1049/2001, second, if so, whether the need for protection relating to the exception concerned is genuine and, third, whether it applies to the whole document.
- 119 The Court of First Instance must, therefore, examine whether the contested decisions were adopted in accordance with the aforementioned rules.
- 120 Concerning the documents sent to the French and Luxembourg authorities, it should be recalled that OLAF's investigation was finished and it is common ground that, at the time of the adoption of the first contested decision, neither the Luxembourg or the French authorities had decided what action to take in the light of the information sent by OLAF pursuant to Article 10 of Regulation No 1073/1999.

- 121 The information was sent to the national authorities with the aim of providing them with material which showed, in OLAF's view, different irregularities, and which, in accordance with Article 9(2) of Regulation No 1073/1999, could constitute admissible evidence in national court proceedings.
- 122 To grant access to these documents, even partial, could compromise the effective use of this material by the national authorities, given that the persons implicated in the suspected irregularities could have acted in such a way as to prevent the efficient conduct of the various procedures or investigations which those authorities might decide to initiate. The documents sent included, in particular, audit reports of companies, reports of interviews with Eurostat officials, reports concerning the checking of expenses and inspection reports, the disclosure of which could have informed the persons concerned about the actions which the national authorities were going to take.
- 123 Moreover, at the time of the adoption of the first contested decision, that is, on 1 October 2003, a reasonable period to decide what action to take in the light of the information sent by OLAF had not yet elapsed, as the information was sent to the Luxembourg authorities only on 4 July 2002 and to the French authorities only on 19 March 2003.
- 124 It follows that the Commission made no errors of law or of assessment in taking the view that, at the time of the adoption of the first contested decision, access to the documents sent to the French and Luxembourg authorities had to be refused on the ground that disclosure of these documents would undermine the protection of the purpose of inspections, investigations and audits.
- 125 The same findings apply to the final IAS report. At the time of the adoption of the second contested decision, that is, 19 December 2003, the investigation concerning

Eurostat was still not finished and the Commission had not yet decided on the consequences of the final IAS report. Thus, disclosure of the IAS report, even in it had been rendered anonymous, could have enabled the persons concerned to try to influence the result of the investigations, inspections or audits to follow.

- 126 Concerning the communication from OLAF to the Commission referred to in the press release of 19 May 2003, the Court has found that it also contains such precise information on the conduct of the various investigations concerning Eurostat that the refusal to disclose it, on the ground that to do so could undermine the protection of the purpose of inspections, investigations and audits for the same reasons as given above, was justified at the time of the adoption of the first contested decision.
- 127 With regard to the other communications from OLAF to the Commission, the first contested decision states that ‘all of these communications contain results of the investigation, the disclosure of which would prejudice the judicial proceedings in progress in France and Luxembourg’.
- 128 It may be seen from these vague and general remarks that OLAF made a decision *in abstracto* on the risk that disclosure of the documents concerned could pose to the measures that the Commission considered necessary for the protection of its interests or to the judicial proceedings in progress in France and Luxembourg, without showing to the requisite legal standard that disclosure of these documents would actually prejudice the protection of the purpose of inspections, investigations and audits and that the exception invoked actually applied to all the information contained in those documents.
- 129 Consequently, it has not been demonstrated, in the present case, that investigations or inspections would have been actually threatened by the disclosure of the communications from OLAF to the Commission other than that referred to in the press release of 19 May 2003.

- 130 Moreover, OLAF did not indicate in the first contested decision whether the risks which it described actually applied to all of the information in those documents. It is apparent from the first contested decision that OLAF based its assessments on the nature of the documents requested rather than on particular information actually contained in the documents in question. This was an error of law requiring the annulment of the contested decision (Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraph 31).
- 131 Consequently, it has not been shown to the requisite legal standard that the exception based on the protection of the purpose of inspections and investigations, assuming it to be applicable in the present case, applied to all of the communications from OLAF to the Commission other than that referred to in the press release of 19 May 2003.
- 132 The Court has found that at least part of these documents did not seem to fall in any way within the exception under the third indent of Article 4(2) of Regulation No 1049/2001.
- 133 It is not for the Court to substitute itself for the Commission and to indicate the documents to which total or partial access should have been granted, the institution being required, when giving effect to this judgment, to take into account the reasoning set out in it.
- 134 The same findings apply to the annexes to the IAS report of 7 July 2003, access to which was refused by the Commission on the sole ground that the investigation and the assessment which it carried out in order to draw the conclusions therefrom were still in progress and that those reports could still be used by OLAF in the context of its own investigations.

— The existence of an overriding public interest

135 It must still be examined whether an overriding public interest exists which should have justified disclosure of the documents sent to the French and Luxembourg authorities, the communication from OLAF to the Commission referred to in the press release of 19 May 2003 and the final IAS report.

136 In that respect, it should be recalled that, under Article 2(1) of Regulation No 1049/2001, the beneficiaries of the right of access to documents of the institutions are '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State'. That provision makes it clear that the purpose of the regulation is to guarantee access for everyone to public documents and not merely access for the requesting party to documents concerning him.

137 Consequently, the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account.

138 The general interest which the applicants claim is the right to a fair hearing. It is certainly true that the right to a fair hearing is in itself a general interest. However, the fact that this right is manifested in the present case by the applicants' individual interest in defending themselves implies that the interest which the applicants invoke is not a general, but rather a private, interest.

139 Consequently, the Commission did not err in law in taking the view that the right to a fair hearing invoked by the applicants as an overriding interest is not an overriding public interest justifying disclosure of the requested documents.

140 It follows from all of the above that the first contested decision must be annulled in so far as it refuses access to all of the communications from OLAF to the Commission other than that referred to in the press release of 19 May 2003, as must the second contested decision in so far as it refuses access to the annexes to the final IAS report of 7 July 2003.

### **Costs**

141 Article 87(3) of the Rules of Procedure provides that the Court may order that costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. In the circumstances of the present case, the Commission must be ordered to pay one third of the applicants' costs. Otherwise, the parties shall bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

- 1. Dismisses the applications for annulment of the decision of 18 August 2003 and the implicit decision to reject the applicants' applications of 21 and 29 October 2003 as inadmissible;**

- 2. Annuls the decision of the European Anti-Fraud Office (OLAF) of 1 October 2003 in so far as it refuses access to the communications from OLAF to the Commission other than that referred to in the press release of 19 May 2003, and the Commission decision of 19 December 2003 in so far as it refuses access to the annexes to the report of the internal audit service of 7 July 2003;**
  
- 3. Dismisses the remainder of the actions as unfounded;**
  
- 4. Orders the Commission to pay one third of the applicants' costs and the parties otherwise to bear their own costs.**

Jaeger

Tiili

Czúcz

Delivered in open court in Luxembourg on 6 July 2006.

E. Coulon

M. Jaeger

Registrar

President