ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

15 October 2004 *

In Case T-193/04 R,

Hans-Martin Tillack, represented by I. Forrester QC and T. Bosly, C. Arhold, N. Flandin, J. Herrlinger and J. Siaens, lawyers,

applicant,

v

Commission of the European Communities, represented by C. Docksey and C. Ladenburger, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for suspension of any further implementation or action pursuant to the alleged complaint of the European Anti-Fraud Office (OLAF) of 11 February 2004 to the Belgian and German judicial authorities and for an order that OLAF refrain from obtaining, inspecting, examining or hearing the contents of any documents and information in the possession of the Belgian judicial authorities following the search of the applicant's home and office carried out on 19 March 2004,

* Language of the case: English.

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal context

1 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) governs inspections, checks and other measures undertaken by OLAF employees in the performance of their duties.

2 Article 10 of Regulation No 1073/1999 is headed 'Forwarding of information by the Office'. Article 10(2) provides as follows:

'Without prejudice to Articles 8, 9 and 11 of this Regulation, the Director of the Office shall forward to the judicial authorities of the Member State concerned the information obtained by the Office 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.'

Facts

3 The applicant is a journalist, employed by the German magazine *Stern*.

4 He wrote two articles, published in *Stern* on 28 February and 7 March 2002 respectively, concerning allegations of irregularities recorded by a European Communities official, Mr Van Buitenen. The articles' terms showed that the applicant had detailed knowledge of the content of a memorandum dated 31 August 2001 drafted by Mr Van Buitenen ('the Van Buitenen memorandum') and of two confidential internal OLAF notes on that memorandum, dated 31 January and 14 February 2002 ('the internal notes').

5 On 12 March 2002 OLAF opened an internal investigation, in accordance with Article 4(1) of Regulation No 1073/1999, in order to identify the European Communities officials or other servants at the source of the leak that had resulted in disclosure of the Van Buitenen memorandum and the internal notes.

6 In a press release of 27 March 2002 announcing the opening of the investigation, OLAF stated that 'it [was] not excluded that payment may have been made to somebody within OLAF (or possibly another EU institution) for these documents'.

7 *Stern* issued a press release on 28 March 2002 in which it confirmed that it was in possession of the Van Buitenen memorandum and the internal notes but denied that any of its collaborators had paid money to an official or other servant of the Commission for providing those documents.

8 After requesting OLAF to withdraw the accusations of bribery directed against him, on 22 October 2002 the applicant complained to the European Ombudsman. On 18 June 2003 the European Ombudsman submitted his draft recommendation to OLAF, in which he concluded that the making of allegations of bribery without a reliable factual basis, in the press release of 27 March 2002, constituted an instance of maladministration and that OLAF should consider withdrawing the allegations of bribery that were referred to in the press release. In response to that recommendation, OLAF issued a press release on 30 September 2003 entitled 'OLAF clarification regarding an apparent leak of information' and informed the European Ombudsman thereof. The Ombudsman adopted his decision on 20 November 2003, including in its conclusions a critical remark.

9 On 11 February 2004 OLAF, on the basis of Article 10(2) of Regulation No 1073/1999, forwarded information to the prosecuting authorities in Brussels (Belgium) and Hamburg (Germany) setting out the results of the internal investigation opened on 12 March 2002.

10 Following the forwarding of that information, an investigation for breach of professional secrecy was opened in Belgium. On 19 March 2004, the Belgian federal police searched the home and the office of the applicant upon the instructions of the examining magistrate in Brussels. Numerous documents and other belongings of the applicant were seized. On 23 March 2004 the applicant brought proceedings challenging the seizure before the examining magistrate entrusted with the case, who rejected his application. The applicant brought an appeal against that decision before the chambre des mises en accusation (Chamber for Indictments) in April 2004.

Procedure

11 By application lodged at the Registry of the Court of First Instance on 1 June 2004, the applicant brought an action for annulment of the measure by which OLAF

forwarded certain information to the Brussels and Hamburg prosecuting authorities on 11 February 2004 ('the contested measure') and for compensation for the injury caused to him by that decision and related acts adopted by OLAF.

12 By separate document, lodged at the Court Registry on 4 June 2004, the applicant requested the President of the Court of First Instance, in accordance with Article 243 EC:

— to order the suspension, in whole or in part, of any further implementation or action pursuant to OLAF's 'complaint' of 11 February 2004 to the Belgian and German judicial authorities;

— to order that OLAF refrain from obtaining, inspecting, examining or hearing the contents of any documents and information in the possession of the Belgian judicial authorities as a result of their search of the applicant's home and office on 19 March 2004, and their seizure of his files, computer and other records;

— pending further enquiry and pending the receipt of observations on behalf of OLAF, to order that OLAF refrain with immediate effect from taking any action pursuant to its complaints of 11 February 2004, without prejudice to how the Court may rule with respect to the above two claims;

— to order the Commission to pay the costs;

— to take such other or further steps as justice may require.

13 By document lodged at the Registry on 17 June 2004, the International Federation of Journalists (IFJ) applied for leave to intervene in support of the forms of order sought by the applicant.

14 On 21 June 2004 the Commission submitted its written observations on the application for interim measures.

15 On 28 June 2004 the applicant lodged his observations on the IFJ's application for leave to intervene. The Commission did not lodge such observations within the time that it was allowed.

16 On 19 July 2004 an informal meeting attended by the applicant and the Commission took place before the President of the Court of First Instance. At that meeting the parties undertook to consider the possibility of a friendly settlement of the dispute. By letter lodged at the Court Registry on 30 July 2004, the Commission submitted its observations on the possibility of a friendly settlement. On 9 August 2004 the applicant lodged his response to the Commission's observations.

17 In light of the observations lodged by the Commission and the applicant, the President of the Court of First Instance invited the intervener to lodge its observations on the application for interim measures.

18 The intervener lodged its statement in intervention on 7 September 2004.

19 On 14 and 15 September 2004 the applicant and the Commission lodged their respective observations on the IFJ's statement in intervention.

Law

20 By virtue of, first, Articles 242 EC and 243 EC and, second, Article 225(1) EC, the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

21 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that an application for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if either of them is not fulfilled (order in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30). Where appropriate, the judge hearing such an application must also weigh up the interests involved (order in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73).

The application for leave to intervene

22 Under the second paragraph of Article 40 of the Statute of the Court of Justice, applicable to the Court of First Instance by virtue of the first paragraph of Article 53 of the Statute, the right of private parties to intervene is subject to the condition that they establish an interest in the result of the case.

23 An interest in the result of the case means a direct, present interest in grant of the forms of order sought by the party whom the intervener wishes to support (order in Case C-186/02 P *Ramondín and Ramondín Cápsulas* v *Commission* [2003] ECR I-2415, paragraph 7). In order to grant leave to intervene, it must be checked that the intervener is directly affected by the measure at issue and that his interest in the result of the case is established (see the order in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen* v *British Coal and Commission* [1997] ECR I-3491, paragraph 53).

24 In accordance with settled case-law, representative associations whose object is to protect their members in cases raising questions of principle liable to affect those members are allowed to intervene (*National Power and PowerGen*, cited above, paragraph 66, order in Case C-151/98 P *Pharos* v *Commission* [1998] ECR I-5441, paragraph 6, and order in Case T-53/01 R *Poste Italiane* v *Commission* [2001] ECR II-1479, paragraph 51). More specifically, an association may be allowed to intervene in a case if it represents an appreciable number of undertakings active in the sector concerned, its objects include protection of its members' interests, the case may raise questions of principle affecting the functioning of the sector concerned and the interests of its members may therefore be affected to an appreciable extent by the forthcoming judgment or order (see, to this effect, the order in Case T-87/92 *Kruidvat* v *Commission* [1993] ECR II-1375, paragraph 14).

25 It should be noted, finally, that the adoption of a broad interpretation of the right of associations to intervene is intended to facilitate assessment of the context of cases whilst avoiding multiple individual interventions which would compromise the effectiveness and proper course of the procedure (*National Power and PowerGen*, paragraph 66).

26 The IFJ has applied for leave to intervene in support of the forms of order sought by the applicant. It states that it is an international trade union organisation, in the form of an international non-profit-making organisation, that it represents an appreciable number of members, that its objects and activities include representing its members and defending the professional and social rights of journalists at a global level and that the present case raises questions of principle of such a kind as to affect its members.

27 The applicant states that he has no objection to the IFJ's application. The Commission did not lodge any observations.

28 It should be noted first of all that the IFJ has stated, without being contradicted by the applicant or the Commission, that it represents more than 500 000 members in 109 countries. The IFJ may therefore be considered to represent an appreciable number of members in the sector concerned.

29 Second, with regard to the IFJ's objects, Section III of its constitution states that it seeks to 'protect and strengthen the rights and freedoms of journalists' and to 'respect and defend freedom of information, media freedom and the independence of journalism particularly through research and monitoring of violations and taking action to defend journalists and their work'.

30 Finally, the present case raises in particular the question whether, first, the forwarding, under Article 10(2) of Regulation No 1073/1999, by a Community organ to national authorities of information liable to result in the disclosure of a journalist's sources may, in certain circumstances, be considered unlawful and, second, its forwarding may be such as to cause harm to the career and reputation of the journalist who used those sources that may be made good in an action for damages. More specifically, the question is raised in the present case as to whether and, if so, in what circumstances, the President of the Court could be led to adopt interim measures designed to compel a Community institution to refrain from having any contact at all with national judicial authorities concerning a judicial investigation opened by them. Given that the position which the President of the Court might adopt on those questions potentially concerns the scope of the principle of the protection of journalists' sources, it is liable to affect the conditions under which the IFJ's members operate.

31 Since the IFJ's interests are therefore liable to be affected by the position adopted by the President of the Court, its application for leave to intervene should be granted.

Prima facie admissibility of the application for annulment

32 It is settled case-law that, in principle, the issue of the admissibility of the action before the court adjudicating on the merits should not be examined in proceedings for interim measures, so as not to prejudge the main action. It may nevertheless appear necessary, when it is contended that the main application to which the application for interim measures relates is manifestly inadmissible, to establish whether there are any grounds for concluding prima facie that the main application is admissible (orders in Case 376/87 R *Distrivet* v *Council* [1988] ECR 209, paragraph 21, and Case T-392/02 R *Solvay Pharmaceuticals* v *Council* [2003] ECR II-1825, paragraph 53).

33 It should therefore be ascertained whether there are any grounds for concluding prima facie that the application for annulment made by the applicant in the main proceedings is admissible.

Arguments of the parties

34 The Commission contends that the application for annulment is manifestly inadmissible. In its submission, the contested measure does not constitute a challengeable act. The application is directed against letters sent by OLAF to the Belgian and German authorities by which OLAF merely forwarded to them information obtained by it during internal investigations into matters liable to result in criminal proceedings. The forwarding of this information did not as such produce any binding legal effects so as to affect the interests of the applicant by bringing about a distinct change in his legal position. This analysis is also confirmed by the judgment in Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International* v *Commission* [2003] ECR II-1 and by the orders in Case T-215/02 *Gómez-Reino* v *Commission* [2003] p. I-A-345 and ECR II-1685 and Case T-29/03 *Comunidad Autónoma de Andalucía* v *Commission* [2004] ECR II-2923.

35 The applicant submits that the actions of the Belgian authorities flow directly from the decision of OLAF to file a complaint against him. He observes that OLAF is a most important organ whose activities enjoy the firm support of the Member States. Not to have given effect to a request by OLAF to seize 'evidence' could therefore have seemed to be a breach by the Kingdom of Belgium of the duty of loyal cooperation set forth in Article 10 EC.

36 The applicant adds that for the time being there is no reliable Belgian judicial means of preventing OLAF from gaining access to the seized documents. There is nothing

to prevent OLAF from intervening as a civil party in the proceedings before the Belgian courts and requesting access to the documents and information seized during the searches. Even before any formal charge is laid by the Belgian authorities, OLAF may request access to the file from the Principal Crown Prosecutor who, although he has a margin of discretion in the matter, is likely to accede to such a request. Consequently, the present case requires judicial review at Community level (judgments in Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23, and Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraph 20).

37 The IFJ, putting forward the same arguments as the applicant, maintains that the application for annulment is entirely admissible.

Findings of the President of the Court

38 Only a measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment (judgments in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, Case C-476/93 P *Nutral* v *Commission* [1995] ECR I-4125, paragraphs 28 and 30, Case T-54/96 *Oleifici Italiani and Fratelli Rubino* v *Commission* [1998] ECR II-3377, paragraph 48, and Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraph 77).

39 In the present instance, the act challenged is the measure by which OLAF forwarded information to the Belgian and German authorities, in accordance with Article 10(2) of Regulation No 1073/1999.

40 This provision states that 'the Director of the Office shall forward to the judicial authorities of the Member State concerned the information obtained by the Office during internal investigations into matters liable to result in criminal proceedings'.

41 In addition, it is stated in the 13th recital in the preamble to Regulation No 1073/1999 that 'it is for the competent national authorities or the institutions, bodies, offices or agencies, as the case may be, to decide what action should be taken on completed investigations on the basis of the report drawn up by the Office'.

42 It should also be noted that, in his letter of 11 February 2004 forwarding the information, the Director of OLAF expressed himself in the following terms:

'... On the basis of Article 10(2) of Regulation No 1073/1999 ... and with a view to the possible institution of judicial proceedings, I enclose the interim report in this case containing information on matters liable to result in criminal proceedings.'

43 Far from confirming the applicant's analysis, Regulation No 1073/1999 and the letter of 11 February 2004 thus show that the forwarding of information by OLAF to the national judicial authorities does not give rise to any binding legal effect in relation to the latter, which remain free to decide what action should be taken on OLAF's investigations.

44 It is true that the duty to cooperate in good faith set out in Article 10 EC obliges national judicial authorities to treat seriously information forwarded by OLAF under Article 10(2) of Regulation No 1073/1999. However, that duty does not impose any obligation on the national authorities to take specific steps if they consider that the

information forwarded by OLAF does not warrant them. Thus, any decision by the national authorities to take action on information forwarded by OLAF flows from the independent exercise of the powers vested in those authorities.

45 As regards the argument derived from the right to effective judicial protection, the applicant has not in any way shown in what way he would be prevented from contesting the decision of the national judicial authorities to order a search of his home and his office. On the contrary, it is clear from the applicant's explanations that he brought proceedings challenging the decision of the examining magistrate entrusted with the case and that judicial proceedings are currently in progress at national level. Given the legal remedies which thus remain available to the applicant at national level, it is not necessary to consider whether, in exceptional cases, the right to effective judicial protection can render a Community act open to challenge which otherwise would not be.

46 Since OLAF's decision to forward the report at issue to the national judicial authorities has no binding legal effect, it does not constitute a challengeable act.

47 Consequently it does not appear, at this stage, that there are grounds for concluding that the application for annulment is prima facie admissible.

48 In view of the foregoing, the President of the Court will examine only the applicant's arguments relating to his application for damages.

Prima facie case

Arguments of the parties

49 In order to show that his application for damages is prima facie well founded, the applicant contends that 'the contested measure, [the] March 2002 and September 2003 press releases which infringed the principles of good administration and proportionality, as well as further public statements made by OLAF on the ongoing investigation against the applicant have already seriously harmed the applicant's professional reputation and standing in professional circles'.

50 He adds that he 'is gravely injured in at least two ways'. First, he maintains that it 'will be much more difficult for him to obtain new information from the sources on whom he relies to practise his profession'. Second, he submits that he 'will be seriously handicapped in selling his stories to magazines and newspapers' and that 'OLAF's actions have thus also damaged [his] career chances and opportunities'. He considers that 'all this damage was directly caused by OLAF's unlawful actions', and states that 'further details are set forth in the application in the main action'.

51 The Commission submits that the applicant has not demonstrated that the condition relating to a prima facie case is met here.

Findings of the President of the Court

52 It is settled case-law that, in order for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC, a number of

conditions must be met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (see the judgments in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41 and 42, and Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 53). If any one of those conditions is not satisfied, the entire action must be dismissed and it is unnecessary to consider the other conditions for non-contractual liability on the part of the Community (judgment in Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 65).

53 With regard to the second condition, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (judgments in Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 28, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 25, Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 109, Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 38, and *Bergaderm and Goupil*, cited above, paragraphs 43 and 44).

54 So far as concerns the third condition, relating to the causal link, it is settled case-law that there must be a direct link of cause and effect between the fault allegedly committed by the institution concerned and the damage pleaded, the burden of proof of which rests on the applicant (judgment in Case T-220/96 *EVO* v *Council and Commission* [2002] ECR II-2265, paragraph 41 and the case-law cited). It has in addition been made clear that the wrongful conduct of the institution concerned must be the determining cause of that damage (order in Case T-201/99 *Royal Olympic Cruises and Others* v *Council and Commission* [2000] ECR II-4005, paragraph 26, upheld on appeal by order of the Court of Justice of 15 January 2002 in Case C-49/01 P *Royal Olympic Cruises and Others* v *Council and Commission*, not published in the ECR).

55 In the present instance, it is apparent from the application for interim measures that the applicant seeks, in his action on the substance, to obtain compensation for the damage allegedly sustained by him as a result of the harm to his career, his reputation and his standing. It also seems to be apparent from his application that the damage results from two factors: (i) the contested measure and (ii) the issuing of OLAF's press releases in March 2002 and September 2003.

56 As regards, first, the damage alleged to result from the contested measure, the applicant does not in any way explain in what way there is prima facie a causal link between the conduct of which the Commission is accused, namely the simple forwarding by OLAF of information to the national authorities, and the damage which he claims to have suffered.

57 The lack of explanation in this connection is all the more significant because it has already been found, in paragraph 46 above, that the mere forwarding of the report in question by OLAF to the national authorities had no binding effect in relation to the latter, which remained free to decide what action should be taken following the forwarding of the report.

58 It is clear that, without a decision by the national authorities to open a judicial investigation, the applicant would not have suffered the damage that he claims to have suffered. Accordingly, there is no causal link between the conduct of which the Commission is accused and the damage allegedly suffered by the applicant.

59 It must therefore be concluded, without it being necessary to examine whether the applicant has demonstrated that he has suffered any damage, that the applicant has not established to the required legal standard that the contested measure is such as to give rise to non-contractual liability on the part of the Community.

60 So far as concerns, second, the damage allegedly suffered by the applicant following the issue by OLAF of the press releases in March 2002 and September 2003, the application for interim measures contains no matter of law or of fact enabling the President of the Court to assess in what way the conduct complained of is contrary to the principles of good administration and of proportionality. It is sufficient to state, without it being necessary to consider whether those two rules are such as to confer rights on individuals within the meaning of the applicable case-law (see paragraph 52 above and, in particular, the judgment in Case T-196/99 *Area Cova and Others* v *Council and Commission* [2001] ECR II-3597, paragraph 43), that the mere fact, pleaded by the applicant, that in 2003 the European Ombudsman found an 'instance of maladministration' does not for all that mean that the principle of good administration as interpreted by the Community judicature has been infringed here. It is also to be noted that the facts known to the European Ombudsman when he gave his final decision, on 20 November 2003, are not necessarily identical to those before the Court of First Instance today.

61 Furthermore, even if the conduct in question were unlawful, the application for interim measures would not contain any particulars enabling the President of the Court to assess in what way the issue by OLAF of the press releases in March 2002 and September 2003 could be characterised as a 'sufficiently serious breach' capable of giving rise to non-contractual liability on the part of the Community (see paragraph 53 above).

62 It follows from the foregoing that, without prejudice to the decision that the Court will adopt in the main proceedings, in light of the information available to the President of the Court the applicant has not established to the required legal standard that his application for damages is not manifestly unfounded.

63 The application for interim measures should accordingly be dismissed without it being necessary to consider whether the other conditions for granting relief are satisfied.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 15 October 2004.

H. Jung — Registrar

B. Vesterdorf — President