JUDGMENT OF THE GENERAL COURT (Second Chamber)

19 October 2022 (*)

(Regulation (EU, Euratom) No 883/2013 – Investigation into evasion of the conventional, countervailing and anti-dumping duties imposed on imports of biodiesel into the European Union – OLAF Communication to national customs authorities – OLAF investigation report – Action for annulment – Act not open to challenge – Claim for compensation – Sufficiently serious breach of a rule of law intended to confer rights on individuals)

In Case T-81/21,

'**Sistem ecologica' production, trade and services d.o.o. Srbac,** established in Srbac (Bosnia and Herzegovina), represented by D. Diris, D. Rjabynina, C. Kocks and C. Verheyen, lawyers,

applicant,

v

European Commission, represented by J. Baquero Cruz and T. Materne, acting as Agents,

defendant,

THE GENERAL COURT (Second Chamber),

composed, at the time of the deliberations, of V. Tomljenović, President, F. Schalin and I. Nõmm (Rapporteur), Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure,

further to the hearing on 27 April 2022,

gives the following

Judgment

1 By its action under Articles 263 and 268 TFEU, the applicant, 'Sistem ecologica' production, trade and services d.o.o. Srbac, seeks, first, annulment of the final investigation report adopted by the European Anti-Fraud Office (OLAF) on 8 December 2020 ('the final report') and of OLAF's decisions contained in a communication sent on 9 June 2020 to the Member States ('the communication of 9 June 2020'), in letters of 25 and 27 November 2020 and in letters of 8 and 21 December 2020 (together, 'the contested acts') and, second, compensation in respect of the damage allegedly suffered by the applicant.

Background to the dispute

2 The applicant is a company established in Bosnia and Herzegovina.

3 An analysis of the trend in imports of biodiesel into the European Union since 2015 led OLAF to suspect the existence of fraud. That fraud relates, in particular, to imports of biodiesel into the

European Union presented as relating to biodiesel produced from used cooking oil from Bosnia and Herzegovina – which were eligible for preferential customs duties of 0% – when they in fact originated from the United States and should have been subject to conventional, anti-dumping and countervailing duties. OLAF also had suspicions about imports to the Netherlands from the United States.

4 On the basis of those suspicions, OLAF and the Croatian customs authorities conducted a random inspection of the contents of certain containers coming from the United States destined for Bosnia and Herzegovina that were presented as transporting ‘used cooking oil’. Those checks revealed that the contents in fact ranged between 93.5% and 97.4% biodiesel.

5 On 23 August 2019, OLAF opened an investigation registered under reference OC/2019/0749/B3. That investigation concerned, inter alia, a possible evasion of the conventional, countervailing and anti-dumping duties imposed on imports of biodiesel into the European Union.

6 On 4 September 2019, OLAF:

– sent the Member States, pursuant to Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ 1997 L 82, p. 1), communication AM 2019/037, by which it informed them of its suspicions of fraud and requested their assistance;

– requested the assistance of the US authorities pursuant to the Agreement between the European Community and the United States of America on customs cooperation and mutual assistance in customs matters (OJ 1997 L 222, p. 17).

7 On 18 September 2019, OLAF also sought the cooperation of the authorities of Bosnia and Herzegovina in accordance with Protocol 5 on Mutual administrative assistance in customs matters to the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part (OJ 2015 L 164, p. 2).

8 From 2 to 6 December 2019, OLAF, together with representatives of certain Member States, took part in an investigative mission in Bosnia and Herzegovina, participating in that regard in an on-the-spot inspection conducted by the Indirect Taxation Authority of Bosnia and Herzegovina (‘the ABFI’) at the applicant’s premises on 4 December 2019 (‘the inspection of 4 December 2019’).

9 Pursuant to Regulation No 515/97, OLAF sent the Member States the communication of 9 June 2020 by way of which it forwarded to them the preliminary results of the investigation. In that communication, OLAF:

– mentioned that the applicant was the biodiesel export company present in Bosnia and Herzegovina;

– concluded that there had been no biodiesel production in Bosnia and Herzegovina and that the imported biodiesel actually originated from the United States;

– requested that the Member States concerned, given the applicable limitation periods, urgently take all appropriate precautionary measures to protect the financial interests of the European Union, by applying the relevant provisions of the Union Customs Code and its implementing regulations.

10 Further to the communication of 9 June 2020, the Belgian customs authorities imposed on a biodiesel importer, by way of precautionary measures, the payment of EUR 3 026 388.74, corresponding to the conventional, countervailing and anti-dumping duties applicable to an import

of biodiesel from the United States. That importer initiated legal proceedings against the applicant before the courts of the Netherlands and of the United Kingdom.

11 By letter of 7 October 2020, pursuant to Article 9(4) of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by OLAF and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1), OLAF invited the applicant to comment, in writing and within a period of 10 working days, on the facts concerning it, as set out in the summary attached to that letter.

12 On 16 October 2020, the applicant submitted its comments, in which it contested the merits of OLAF's claims. It also argued that the procedural guarantees provided for in Regulation No 883/2013 had not been observed. In that respect, it claimed, inter alia, that OLAF should have allowed it to submit its comments before OLAF adopted its findings and communicated them to the national authorities.

13 On 27 October 2020, the applicant requested that OLAF send it certain documents contained in its file and that a meeting be held.

14 On 25 November 2020, OLAF refused to grant the applicant's requests on the grounds that, first, Regulation No 883/2013 did not afford the person concerned a right to access the file, and that it had been deemed appropriate to give the applicant the opportunity to comment in writing. In addition, it offered the applicant a further opportunity to submit written comments no later than 30 November 2020.

15 On 27 November 2020, the Director-General of OLAF replied to the applicant's complaint which, it is claimed, was contained in the latter's comments of 16 October 2020. He stated, inter alia, that neither the European Commission nor OLAF was obliged to allow the person concerned to express its views before a communication to the competent national authorities is made pursuant to Article 17(2) of Regulation No 515/97.

16 On 8 December 2020, OLAF adopted the final report which found, first, that the exports of 'used cooking oil' from the United States to the Netherlands were in fact biodiesel and, second, that the biodiesel exported by the applicant, although Bosnia and Herzegovina was declared as its origin, came in reality from the United States; this constituted an evasion of the applicable conventional, countervailing and anti-dumping duties. In support of that conclusion, OLAF relied, in particular, on the following factors, with the assistance of an industry expert:

– the condition of the applicant's factory during the inspection of 4 December 2019, which was not operational;

– energy consumption by the factory inconsistent with the consumption that would have been necessary to produce the volumes of biodiesel declared;

– an alleged use of methanol – an ingredient in the manufacture of biodiesel – significantly below what would be necessary to produce the volumes of biodiesel declared;

– an alleged ratio of glycerine production – a by-product in the manufacture of biodiesel – that was too low, making it improbable that biodiesel was produced from used cooking oil;

– a failure by the factory to control the quality of the used cooking oil, even though such checks must be made on a daily basis;

– the fictitious purchases of methanol from and sales of glycerine to the same company, which had no genuine activities;

– the transportation of the alleged used cooking oil to the factory, and then of the biodiesel from that factory, in the same flexi tanks, even though doing so is not recommended because of the risks of cross-contamination.

17 OLAF also referred to the results of an investigation initiated by the US authorities, from which it became apparent that the applicant's US supplier purchased biodiesel but recorded it in the bills of lading of the exported materials as 'used cooking oil'.

18 In its final report, OLAF also replied to the comments submitted by the applicant. In particular, it:

– stated that the route taken by the alleged 'used cooking oil' to Bosnia and Herzegovina was irrelevant, since the existence of the transportation of materials from the United States was not at issue, but rather the actual nature of those materials;

– pointed out that it did not deny that the applicant's factory would be capable of producing biodiesel but that, during the inspection of 4 December 2019, the machinery was dismantled;

– found that the study of the technological process of biodiesel production by the applicant, produced in August 2020, was unconvincing, since, inter alia, first, it did not explain the non-use of methanol; second, it indicated a level of energy consumption that was far too low and referred to the findings of an audit that had been carried out solely by examining accounting and financial documents; third, it referred to sampling from the flexi tanks carried out by the Bosnian customs authorities, the evidentiary value of which is debatable; and, fourth, it provided a truncated presentation of the analyses carried out by the Croatian customs authorities, which was contradicted by the applicant's own conduct.

19 On the same day, OLAF closed its investigation and made recommendations for follow-up actions.

20 On 14 December 2020, the applicant sent OLAF a complaint concerning the breach of the applicant's procedural guarantees in the course of the investigation.

21 On 21 December 2020, the Director of OLAF replied that that request would not be investigated since a complaint cannot be submitted once the investigation has been closed. He added that the applicant had had the opportunity to make its views known during the procedure and that a previous complaint had been investigated.

Forms of order sought

22 In its application, the applicant claims that the Court should:

– annul the decision set out in the communication of 9 June 2020;

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

– annul the decision taken by OLAF on 25 November 2020 refusing the applicant's request for access to its investigation file;

– annul the decision taken by OLAF on 25 November 2020 to consider the applicant's comments of 16 October 2020 as a complaint;

– annul the decision taken by OLAF on 27 November 2020 rejecting the alleged complaint of 16 October 2020;

– annul the decision taken by OLAF on 8 December 2020 to close the investigation concerning the applicant;

– annul the decision taken by OLAF on 21 December 2020 not to consider the applicant's 'complaints' of 14 December 2020 as 'complaints';

– declare that the information and data relating to the applicant and any relevant evidence forwarded to the national authorities constitute inadmissible evidence, including OLAF's 'mission report of 16 January 2020', the communication of 9 June 2020 and the final report ;

– declare all investigative procedures carried out in the investigation further to the aforementioned decisions unlawful;

– declare the conclusions drawn from those investigations unlawful;

– declare all information forwarded to the national authorities, including the communication of 9 June 2020 and the final report unlawful;

– order measures of inquiry and measures of organisation of procedure, in the form of the production of documents and of oral testimony;

– order the Commission to pay to the applicant the amount of EUR 3 026 388.74 in compensation in respect of damage suffered on account of OLAF's unlawful conduct, assessed provisionally, plus interest at the rate of 8% per annum from 15 June 2020 until payment in full, and damage caused to the applicant's professional activities and reputation;

– order the Commission to pay the costs.

23 In its reply, the applicant adds that the Court should order the Commission to pay to it, in the alternative, the amount of EUR 1 000 000 in legal expenses, assessed provisionally, and compensation for the damage suffered, established by the Court *ex aequo et bono*.

24 In its defence, the Commission contends that the Court should:

– dismiss any claims of failure to act, claims for annulment and requests for declaratory rulings as manifestly inadmissible or, in any case, as unfounded;

– declare the action for damages unfounded and dismiss it in its entirety;

– reject the request for measures of inquiry and measures of organisation of procedure;

– order the applicant to pay the costs.

25 In its rejoinder, the Commission adds that the Court should reject the additional claims for compensation made for the first time in the reply.

26 Furthermore, in its observations of 9 February 2022, the Commission contended that the Court should reject the new evidence submitted by the applicant on 20 January 2022 as inadmissible.

Law

The action in so far as it is brought under Article 263 TFEU

27 As a preliminary point, it should be borne in mind that, according to settled case-law, when a claim for annulment is brought before it, the Court has no jurisdiction to issue declaratory judgments (see order of 25 June 2014, *dos Santos Patrício* v *Commission*, T-170/14, not published, EU:T:2014:609,

paragraph 5 and the case-law cited).

28 It is clear that, by way of five of the heads of claim set out in its application, the applicant asks the Court to deliver a declaratory judgment, in so far as it is asked to find, first, that OLAF's conduct (see paragraph 22 above, second head of claim), the investigations that it conducted (ninth head of claim), the findings thereof (tenth head of claim) and the information communicated to the national authorities (eleventh head of claim) are all unlawful and, second, that the information transmitted by OLAF to the Member States is inadmissible as evidence (eighth head of claim).

29 It follows that the Court does not have jurisdiction to hear and determine the second, eighth, ninth, tenth and eleventh heads of claim.

30 Furthermore, the applicant puts forward 12 pleas in law in seeking annulment of several acts adopted by OLAF in the context of the investigation. The following are, in essence, contested:

– the communication of 9 June 2020, by way of which OLAF informed the national authorities of the preliminary results of the investigation and requested the adoption of interim protective measures;

– the letter of 25 November 2020 refusing the applicant a meeting and access to certain information on the file concerning it and describing part of its comments as a complaint;

– the letter of 27 November 2020 from the Director of OLAF rejecting the applicant's complaint;

– the final report and the OLAF decision to close the investigation concerning the applicant;

– the letter of 21 December 2020 from the Director of OLAF refusing to investigate the applicant's complaint of 14 December 2020.

31 The Commission disputes the admissibility of this head of claim, on the ground that the contested acts are not capable of forming the subject matter of an action for annulment.

32 The applicant takes the view that an action for annulment may be brought against the contested acts.

33 First, the applicant stresses the importance of OLAF's role and states that the Member States will act in accordance with OLAF's conclusions.

34 Second, the applicant takes the view that the contested acts were intended to produce, and have produced, definitive legal effects, and it observes that it has been held that acts adopted by OLAF can have such effects and form the subject matter of an action for annulment; In that connection, it claims that the communication of 9 June 2020 is comparable to the acts in respect of which the plea of inadmissibility was rejected in the order of 13 April 2011, *Planet* v *Commission* (T-320/09, EU:T:2011:172), since the impact of a communication made by OLAF is not confined within the institutions, bodies, offices or agencies of the European Union. The same reasoning applies, in the applicant's submission, to OLAF's subsequent acts and, in particular, to the final report.

35 Third, the applicant takes the view that the contested acts deprived it of the effective exercise of certain of its fundamental and procedural rights, and that to declare its claim for annulment inadmissible would be contrary to Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and to Articles 6 to 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('ECHR').

36 Fourth, the applicant submits, in essence, that there is no alternative remedy at EU level to the bringing of an action for annulment, and that any legal remedies before the national courts would not allow the lawfulness of the OLAF investigation to be examined and would, in any event, be

insufficient.

37 Under settled case-law, measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in its legal position are acts or decisions which may be the subject of an action for annulment under Article 263 TFEU (judgments of 11 November 1981, *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 9, and of 16 July 1998, *Regione Toscana* v *Commission*, T-81/97, EU:T:1998:180, paragraph 21).

Admissibility of the action for annulment in so far as it is directed against the final report and OLAF's decision to close the investigation

38 As a preliminary point, it should be noted that the applicant does not formally seek annulment, in its heads of claim, of the final report, but solely of OLAF's decision taken on the same day to close the investigation. However, it is apparent from the application, as a whole, that the applicant disputes therein the lawfulness of the investigation conducted by OLAF, which led to the adoption of the final report. The present action must therefore be understood as also being directed against the final report.

39 Admittedly, it follows from the characteristics of the final report, as explained in Article 11(1), (2) and (6) of Regulation No 883/2013, that that report, and the recommendations associated with it, are likely to have a considerable practical impact on the administrative and judicial proceedings which may be conducted by the authorities of the Member States against the applicant.

40 The fact remains that the final report and the recommendations associated with it are not binding on those to whom they are addressed, since it is for the competent authorities of the Member States 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 final investigation reports drawn up by OLAF, as recital 31 of Regulation No 883/2013 recalls.

41 It is clear that the concept of an act capable of being challenged by way of an action for annulment does not depend on the significance which the contested act may have in practice, on account of the probability that effects will follow therefrom, but solely on the question of whether or not it produces binding legal effects (see, to that effect and by analogy, judgment of 15 July 2021, *FBF*, C-911/19, EU:C:2021:599, paragraphs 39 to 45).

42 It must therefore be inferred that the final report does not constitute an act open to challenge by way of an action for annulment.

43 Furthermore, it should be observed that that finding does not deprive the applicant of legal remedies enabling it to challenge the validity of the final report.

44 First, the applicant has the possibility of requesting that the national courts refer questions to the Court of Justice concerning the validity of the OLAF report by means of a question referred for a preliminary ruling, since a legally non-binding EU act may be the subject of a question for a preliminary ruling on validity (see judgment of 15 July 2021, *FBF*, C-911/19, EU:C:2021:599, paragraph 54 and the case-law cited).

45 Second, in accordance with the system of legal remedies provided for by the Treaties, even though the applicant cannot bring an action for annulment against measures that have no binding legal effects, it is not however denied access to justice, since an action for non-contractual liability remains available if the conduct at issue is of such a nature as to entail liability for the European Union (see, to that effect, judgments of 4 October 2006, *Tillack* v *Commission*, T-193/04, EU:T:2006:292, paragraphs 97 and 99, and of 20 May 2010, *Commission* v *Violetti and Others*, T-261/09 P, EU:T:2010:215, paragraph 69, and order of 12 November 2018, *Stichting Against Child Trafficking* v *Commission*, T-658/17, not published, EU:T:2018:799, paragraph 29).

46 In the light of the foregoing, the applicant's action for annulment is inadmissible in so far as it is directed against the final report.

47 That finding must be extended to the closure of OLAF's investigation on 8 December 2020, which the applicant seeks to have annulled. It is apparent from a combined reading of Article 11(1) and (7) of Regulation No 883/2013 that the adoption of the final report is one of the grounds for closing an investigation, with the result that the scope of the investigation is not independent of that report. The form of order sought in that regard is therefore also inadmissible.

Admissibility of the action for annulment in so far as it is directed against the other acts adopted by OLAF in the context of its investigation

48 For similar reasons, it must be held that all the acts adopted by OLAF in connection with its investigation are equally incapable of forming the subject matter of an action for annulment.

49 In the first place, that finding applies, in particular, to the communication of 9 June 2020, by way of which OLAF informed the national authorities of the preliminary results of the investigation and recommended that they take precautionary measures, in so far as that communication has no binding effect on the authorities of the Member States.

50 In that connection, it should be noted that the parallel drawn by the applicant with the case giving rise to the order of 13 April 2011, *Planet* v *Commission* (T-320/09, EU:T:2011:172), is not relevant. In that case, what was at issue was the challengeable nature of decisions to activate warnings issued by OLAF during an investigation, in the Early Warning System (EWS) organised by Commission Decision 2008/969/EC, Euratom of 16 December 2008 on the [EWS] for the use of authorising officers of the Commission and the executive agencies (OJ 2008 L 344, p. 125), the objective of which was to ensure, within the Commission and its executive agencies, the circulation of restricted information concerning third parties who could represent a threat to the European Communities' financial interests and reputation or to any other fund administered by the Communities. The EWS relied on warnings allowing the identification of the level of risk associated with an entity according to categories ranging from W1, corresponding to the lowest level of risk, to W5, corresponding to the highest level of risk. In the order of 13 April 2011, *Planet* v *Commission* (T-320/09, EU:T:2011:172, paragraphs 27 and 45), the Court stated that the challengeable nature of the decisions to activate warnings derived from the existence of a 'duty' of the authorising officer concerned to adopt reinforced monitoring measures.

51 The communication of 9 June 2020 forms part of the implementation by OLAF of its obligation under Article 17(2) of Regulation No 515/97 to communicate 'to the competent authorities in each Member State, as soon as it becomes available, any information that would help them to enforce customs or agricultural legislation'. That communication is also linked to Article 12(1) of Regulation No 883/2013, under which '[OLAF] may transmit to the competent authorities of the Member States concerned information obtained in the course of external investigations in due time to enable them to take appropriate action in accordance with their national law'.

52 It is clear that the existence of a 'duty' on the part of national authorities to take any precautionary measures as may be requested by OLAF is apparent neither in Regulation No 515/97 nor in Regulation No 883/2013 (see, to that effect and by analogy, judgment of 23 May 2019, *Remag Metallhandel and Jaschinsky* v *Commission*, T-631/16, not published, EU:T:2019:352, paragraphs 48 to 53).

53 In the second place, the applicant also wrongly claims, in essence, that an action for annulment against the letters of 25 and 27 November 2020 and of 21 December 2020 is the only means of safeguarding the rights which it has during the OLAF investigation.

54 Although the approach relied on by the appellant had, in essence, been upheld by the Civil Service Tribunal (judgment of 28 April 2009, *Violetti and Others* v *Commission*, F-5/05 and F-7/05,

EU:F:2009:39, paragraph 77), it was rejected, on appeal, by the General Court, which pointed out, first, that the principle of effective judicial protection did not, on its own, provide a basis for the admissibility of an action and, second, that an applicant had available to him or her other remedies to ensure that the lawfulness of OLAF acts are reviewed (judgment of 20 May 2010, *Commission* v *Violetti and Others*, T-261/09 P, EU:T:2010:215, paragraphs 48 to 73). The Court of Justice has also recalled that, although the requirement as to binding legal effects must be interpreted in the light of the right to effective judicial protection as guaranteed in the first paragraph of Article 47 of the Charter, that right was not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union, and that, therefore, the interpretation of the concept of 'actionable measure' in the light of Article 47 of the Charter cannot lead to a situation where that requirement is disregarded on pain of exceeding the jurisdiction conferred by the FEU Treaty on the Courts of the European Union (see judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 52 and the case-law cited).

55 Furthermore, it should be noted that the question of a possible infringement of the applicant's rights during the investigation could be relevant to the assessment of the validity of OLAF's final report, which could be referred to the Court of Justice by means of a question referred for a preliminary ruling (see paragraph 44 above).

56 In the third place, as regards the letter of 25 November 2020 more specifically, it should be noted that the action brought against that letter also cannot be declared admissible on the ground that that letter amounts to a refusal to grant a request made under 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).

57 Admittedly, it is apparent from the case-law that, although a request for access to documents under Article 6(1) of Regulation No 1049/2001 must be made in written form, including electronic form, in one of the languages listed in Article 55 TEU and in a sufficiently precise manner to enable the institution concerned to identify the document, no provision of Regulation No 1049/2001 requires the applicant to specify the legal basis of his or her application or to justify it (see, to that effect, judgment of 13 January 2022, *Dragnea* v *Commission*, C-351/20 P, EU:C:2022:8, paragraphs 67 to 72).

58 Similarly, it has been held that the fact that a letter concerned a request for access to documents relating to OLAF investigations, that is to say a field governed by Regulation No 883/2013, did not preclude that request from being based, at the outset, on Regulation No 1049/2001, since it was common ground that that regulation could serve as the legal basis for a request for access to documents relating to an administrative procedure governed by another EU act (see, to that effect, judgment of 13 January 2022, *Dragnea* v *Commission*, C-351/20 P, EU:C:2022:8, paragraph 75).

59 It follows that, in principle, in such a situation, OLAF is required to examine the application submitted to it also in the light of Regulation No 1049/2001 and, therefore, to inform the applicant of his or her right to make a confirmatory application under Article 7(2) of that regulation. Inasmuch as, in the absence of such information, OLAF is deemed to make its response definitive, that response may accordingly be the subject of an action for annulment (see, to that effect, judgment of 13 January 2022, *Dragnea* v *Commission*, C-351/20 P, EU:C:2022:8, paragraphs 63, 64, 73 and 76).

60 However, it is clear that such reasoning, based on OLAF's obligation to examine of its own motion the request for access to the file pursuant to Regulation No 883/2013 which was also sent to it as a request for access to documents under Regulation No 1049/2001, cannot be extended to a situation in which the latter classification could not, in any event, lead to the disclosure of the documents requested.

61 That is the case where the request is made in the course of the investigation by a 'person concerned' within the meaning of Article 2(5) of Regulation No 883/2013, as is the case here, unlike the request

at issue in the judgment of 13 January 2022, *Dragnea* v *Commission* (C-351/20 P, EU:C:2022:8).

62 First, it should be pointed out that Article 9 of Regulation No 883/2013, entitled 'Procedural safeguards', provides for a number of rights in favour of persons concerned by an OLAF investigation, without enshrining, as such, all of the rights inherent in the protection of the rights of the defence. In particular, the right to avoid self-incrimination (paragraph 2) and the right to be heard (paragraph 4) are protected. By contrast, no right of access to the file is envisaged.

63 Second, it should be recalled that that lack of access to OLAF's file has been endorsed by the case-law, which has held that OLAF was under no obligation to grant a person concerned by an external investigation access to the documents which were the subject of such an investigation or to those drawn up by OLAF itself for that purpose, since the effectiveness and confidentiality of the mission entrusted to OLAF and OLAF's independence could be impeded. It has been held that observance of the rights of the defence was sufficiently guaranteed by the information which the person concerned had received and by the fact that he or she had been given the opportunity to state his or her views (see, to that effect, judgment of 20 July 2016, *Oikonomopoulos* v *Commission*, T-483/13, EU:T:2016:421, paragraphs 238 to 240 and the case-law cited).

64 Third, it follows logically that, where OLAF has refused to grant a request for access to the file made by a person concerned during the investigation, a request for access to documents under Regulation No 1049/2001 would necessarily fail, since the exception in Article 4(2) of Regulation No 1049/2001, which covers the protection of inspections, investigations and audits, is therefore applicable.

65 In the light of the foregoing, it must be found that the applicant's action, in so far as it is brought under Article 263 TFEU, must be dismissed as inadmissible, since it is directed against acts that are incapable of forming the subject matter of an action for annulment.

The action in so far as it is brought under Article 268 TFEU

66 The applicant claims, in essence, that the 12 pleas in law which it has put forward in support of its application for annulment of OLAF's acts demonstrate the existence of unlawful conduct on the part of OLAF, which caused it damage in respect of which it seeks compensation under Article 268 TFEU.

67 The Court has jurisdiction in matters of non-contractual liability under Article 268 TFEU and the second and third paragraphs of Article 340 TFEU. It is clear from the latter provision that the European Union must, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

68 According to settled case-law, the second paragraph of Article 340 TFEU is to be interpreted as meaning that the non-contractual liability of the European Union and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions, namely the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of (see judgment of 9 September 2008, *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 106 and the case-law cited).

69 Where one of those conditions is not satisfied, the action must be dismissed in its entirety without it being necessary to consider the other conditions for non-contractual liability on the part of the European Union (see judgment of 14 October 1999, *Atlanta* v *European Community*, C-104/97 P, EU:C:1999:498, paragraph 65 and the case-law cited).

70 The Court considers it sufficient, in the present case, to examine the condition relating to the unlawfulness of the conduct alleged against OLAF.

71 In order for the condition relating to the unlawfulness of the conduct alleged to be met, a sufficiently serious breach of a rule of law intended to confer rights on individuals must be established (judgment of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 42). As regards the requirement that the breach must be sufficiently serious, the decisive test for determining whether that requirement is met is whether the EU institution concerned has manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach (judgment of 10 December 2002, *Commission* v *Camar and Tico*, C-312/00 P, EU:C:2002:736, paragraph 54).

72 The applicant submits that the pleas in law that it has put forward in support of its claims for annulment demonstrate that there are sufficiently serious breaches of rules of law conferring rights on individuals.

73 The Court considers it appropriate to examine, as a preliminary point and jointly, the third, fourth and twelfth pleas in so far as they concern the lawfulness of the inspection of 4 December 2019, then the pleas concerning the other unlawful conduct which allegedly vitiated the investigation and which allege infringement of the rights of the defence (fifth, eighth and twelfth pleas), of Regulation No 1049/2001 (ninth plea), breach of the principles of transparency, independence and diligence (first and tenth pleas) and the pleas concerning the alleged bias on the part of the Director-General of OLAF (second plea), the disclosure of information in the press (sixth and seventh pleas), and the insufficient statement of reasons (eleventh plea).

The alleged unlawful conduct vitiating the inspection of 4 December 2019 (third, fourth and twelfth pleas)

74 In the context of its third and twelfth pleas, the applicant observes that, pursuant to Article 9 of Regulation No 883/2013, Article 48(1) of the Charter and Article 6 ECHR, OLAF was obliged to ensure respect for the applicant's right to avoid self-incrimination.

75 The applicant submits that, on 4 December 2019, OLAF carried out an on-the-spot inspection at its premises within the meaning of Article 9 of Regulation No 883/2013. That inspection was conducted under the direction of OLAF and, therefore, the unlawful conduct affecting that inspection is attributable to OLAF.

76 The applicant takes the view that the rules of EU law were not observed because it was not informed of the purpose of that inspection or of its right to remain silent, it did not have the opportunity to comment on statements gathered, and it did not receive a record of those statements. Furthermore, the refusal to grant it the rights under Article 9 of Regulation No 883/2013 because the inspection of 4 December 2019 took place outside the territory of the European Union constitutes a breach of the principle of non-discrimination. The applicant adds that the law of Bosnia and Herzegovina requires that an inspection order be produced and lays down an obligation to provide information of the legal consequences of an investigation, neither of which was observed.

77 Further, the applicant claims, in the context of its third and fourth pleas, that OLAF infringed Article 7(2) of Regulation No 883/2013 as OLAF's representatives did not produce any authorisation during the on-the-spot inspection carried out at the applicant's premises. The applicant claims that there is doubt as to the legitimacy of OLAF's presence at its premises and requests that the Court order the Commission to produce the application which OLAF sent to the ABFI on 18 September 2019 and the latter's agreement as to OLAF's presence during that inspection.

78 The Commission disputes the merits of the applicant's argument.

79 As recalled in paragraph 8 above, on 4 December 2019, OLAF and representatives of certain Member States participated in an inspection at the applicant's premises led by the ABFI.

80 The applicant essentially submits that the guarantees stemming from EU law applied and infers from this that the inspection is unlawful.

81 Such an argument cannot be accepted.

82 It follows from the wording of Protocol 5 on Mutual administrative assistance in customs matters to the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, that, first, the conduct of the inspection was under the responsibility of the ABFI, despite the presence of OLAF officials, and, second, the lawfulness of that inspection is not governed by EU law but by the law of Bosnia and Herzegovina.

83 Pursuant to Article 7(2) of that protocol, 'requests for assistance shall be executed in accordance with the legal or regulatory provisions of the requested Party'. Under Article 7(4), 'duly authorised officials of a Party may, with the agreement of the other Party and subject to the conditions laid down by the latter, be present at enquiries carried out in the latter's territory'.

84 Accordingly, the lawfulness of the inspection is a question which falls within the scope of the national law of Bosnia and Herzegovina, which the Courts of the European Union do not have jurisdiction to review (see, to that effect and by analogy, judgment of 27 April 2017, *FSL and Others* v *Commission*, C-469/15 P, EU:C:2017:308, paragraph 32).

85 It follows that it was for the applicant to challenge the lawfulness of that inspection before the national courts. In the absence of a declaration by those courts that that inspection was unlawful, OLAF was entitled to refer to it in its final report.

86 Finally, since on-the-spot inspections – depending on whether they are carried out in a Member State or in a third country – are not comparable situations, both in the light of the role played by OLAF and in the light of the legal rules governing their lawfulness, the applicant's argument alleging breach of the principle of non-discrimination cannot be accepted.

87 It follows that the inspection of 4 December 2019 cannot give rise to unlawful conduct attributable to OLAF.

88 In those circumstances, there are no grounds for granting the applicant's request that the application which OLAF sent to the ABFI on 18 September 2019, together with the latter's agreement regarding OLAF's presence at the time of that inspection, should be produced.

The alleged unlawful conduct arising from the infringement of the applicant's rights of defence (fifth, eighth and twelfth pleas in law)

89 First of all, the applicant alleges that OLAF did not give it the opportunity to comment before OLAF adopted its conclusions, doing so only after the communication of 9 June 2020, even though proceedings had been initiated on the basis of that communication. It is argued that this constitutes infringement of Article 9(4) of Regulation No 883/2013 and Article 41(2) of the Charter. The applicant adds that OLAF's duty to transmit information to the Member States under Regulation No 515/97 does not preclude the application of the procedural guarantees under Article 9(4) of Regulation No 883/2013 and Article 41(2) of the Charter.

90 Next, in its eighth plea in law, the applicant notes, in the first place, that on 25 November 2020 OLAF refused its request for access to the annexes to the communication of 9 June 2020 on grounds of confidentiality and the protection of its investigation. In the second place, the applicant adds that no precise explanations were provided in relation to those grounds and takes the view that this constitutes a breach of the principle of sound administration enshrined in Article 41(2)(b) of the Charter, under which a person has a right to access his or her file.

91 Lastly, under its twelfth plea in law, the applicant claims that its rights of defence were also infringed, since its comments of 16 October 2020 were wrongly classified as a complaint, that its actual complaint was not examined and that it was not given the opportunity to submit comments following the closure of the procedure on 8 December 2020.

92 The Commission contends that OLAF did not infringe the applicant's rights of defence.

93 The applicant essentially refers to three infringements of its rights of defence during the investigation, alleging that (i) it was not able to exercise its right to be heard prior to the communication of 9 June 2020, then before the Director of OLAF, and (ii) it was refused access to the file on 25 November 2020.

– *The alleged infringements of the applicant's right to be heard*

94 In the first place, as regards the lack of opportunity for the applicant to make its views known prior to the communication of 9 June 2020, it should be recalled that the exercise by a person concerned by an OLAF investigation of his or her right to be heard is envisaged in Article 9(4) of Regulation No 883/2013. According to that provision:

'Without prejudice to Articles 4(6) and 7(6), once the investigation has been completed and before conclusions referring by name to a person concerned are drawn up, that person shall be given the opportunity to comment on facts concerning him.

To that end, [OLAF] shall send the person concerned an invitation to comment either in writing or at an interview with staff designated by [OLAF]. That invitation shall include a summary of the facts concerning the person concerned and the information required by Articles 11 and 12 of Regulation (EC) No 45/2001, and shall indicate the time limit for submitting comments, which shall not be less than 10 working days from receipt of the invitation to comment. That notice period may be shortened with the express consent of the person concerned or on duly reasoned grounds of urgency of the investigation. The final investigation report shall make reference to any such comments.

In duly justified cases where it is necessary to preserve the confidentiality of the investigation and/or entailing the use of investigative proceedings falling within the remit of a national judicial authority, the Director-General may decide to defer the fulfilment of the obligation to invite the person concerned to comment …'

95 It clearly follows from the wording of Article 9(4) of Regulation No 883/2013 that it is only after its investigation that OLAF is required to hear the person concerned, and not during that investigation.

96 That interpretation of Article 9(4) of Regulation No 883/2013 is also consistent with the legislature's intention to reconcile the exercise of the right to be heard with the preservation of the effectiveness and confidentiality of the task entrusted to OLAF. First, that intention is manifested by the emphasis, in the first subparagraph of Article 9(4) of Regulation No 883/2013, on the fact that the exercise of that right is 'without prejudice to … [Article] 7(6)' of that regulation. That provision states that where 'investigations show that it might be appropriate to take precautionary administrative measures to protect the financial interests of the Union, [OLAF] shall without delay inform the institution, body, office or agency concerned of the investigation in progress'. Second, that intention stems from the possibility afforded to the Director of OLAF by the third subparagraph of Article 9(4) of Regulation No 883/2013 of deferring the fulfilment of the obligation to invite the person concerned to comment, in particular if that is necessary in order to preserve the confidentiality of the investigation.

97 In the present case, the applicant was invited to comment on 7 October 2020, which it did on 16 October 2020.

98 In that connection, it should be noted that, annexed to its letter of 7 October 2020, OLAF put forward a summary of the facts that was sufficient for the applicant to be able to exercise its right to be heard. Set out therein were the key elements of the investigation, namely the imports into the European Union concerned, the suspicions that those imports came, in fact, from the United States and why that constituted evasion of the conventional, anti-dumping and countervailing duties.

99 It follows from the foregoing that OLAF heard the applicant in accordance with Article 9(4) of Regulation No 883/2013. Moreover, as stated in paragraph 14 above, the applicant was even afforded the additional opportunity to submit written comments up until 30 November 2020.

100 The fact that OLAF sent the communication of 9 June 2020 to the Member States before the applicant submitted its comments does not invalidate that finding. In that regard, in so far as the applicant alleges infringement of its right to be heard under Article 41(2)(a) of the Charter, it is necessary to ascertain whether the applicant had more extensive protection under that provision than that afforded to it by Article 9(4) of Regulation No 883/2013, which meant that, notwithstanding the wording of that provision, OLAF should have heard the applicant before the communication of 9 June 2020 to the Member States.

101 Article 41(2)(a) of the Charter provides that the right to sound administration includes, inter alia, the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.

102 The right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely (see judgment of 4 June 2020, *EEAS* v *De Loecker*, C-187/19 P, EU:C:2020:444, paragraph 68 and the case-law cited).

103 It should also be recalled that the right to be heard forms part of the rights of the defence and that the principle of respect for those rights is a general principle of EU law which applies even in the absence of specific rules in that regard. That principle requires that the addressees of decisions which significantly affect the interests of those addressees should be placed in a position in which they may effectively make known their views with regard to the evidence on which those decisions are based (see, to that effect, judgment of 14 June 2016, *Marchiani* v *Parliament*, C-566/14 P, EU:C:2016:437, paragraph 51 and the case-law cited).

104 An infringement of the rights of the defence, which includes the right to be heard, must be examined in the light of the specific circumstances of each individual case (see, to that effect, judgment of 25 October 2011, *Solvay* v *Commission*, C-110/10 P, EU:C:2011:687, paragraph 63).

105 Admittedly, it should be observed that, even prior to the adoption of a measure which does not directly affect a party's rights, it may be necessary to place that party in a position to submit his or her observations in view of the extent of the consequences which that measure may have (see, to that effect, judgment of 10 July 2001, *Ismeri Europa* v *Court of Auditors*, C-315/99 P, EU:C:2001:391, paragraphs 25 to 35).

106 However, it cannot be accepted that the lack of opportunity for the applicant to make known its views prior to the communication of 9 June 2020 constitutes an infringement of Article 41(2)(a) of the Charter, in the light of the circumstances of the present case.

107 First of all, it remained open to the applicant to make its views known before the national authorities in any challenge brought against the precautionary measures that those authorities could have taken.

108 Next, the need for OLAF to safeguard the effectiveness and confidentiality of its investigation should be borne in mind. In the light of the evidence in its possession, OLAF could reasonably consider that there was fraud as to the origin of the imported biodiesel and a risk concerning the

financial interests of the European Union justifying the adoption of precautionary measures by the national authorities without first alerting the applicant.

109 Lastly, the importance, referred to in the first and second recitals of Regulation No 515/97, of cooperation between the Commission and the administrative authorities of the Member States in customs matters is also relevant. As part of that cooperation, OLAF – as an integral part of the Commission – pursuant to Article 17(2) of Regulation No 515/97, was required to communicate 'to the competent authorities in each Member State, as soon as it [became] available, any information that would help them to enforce customs or agricultural legislation'.

110 It follows from the foregoing that OLAF infringed neither Regulation No 883/2013 nor Article 41(2)(a) of the Charter by not hearing the applicant prior to the communication of 9 June 2020.

111 In the second place, in so far as concerns the alleged infringement of the applicant's right to be heard on account of the refusal of the Director-General of OLAF to investigate the applicant's complaint of 14 December 2020, it should be noted that Regulation No 883/2013, in the version applicable to the present case, did not provide that the person concerned could lodge a complaint regarding the manner in which the procedural guarantees referred to in Article 9 of that regulation had been applied. That mechanism had been set up by OLAF itself, was based on an examination of the complaints by the Legal Advice Unit and provided that the Director of OLAF was to take a decision in the light of the findings of that examination.

112 It is clear that OLAF did not infringe the rules which it had itself laid down, by refusing, on 21 December 2020, to investigate the complaint, since those rules precluded any possibility of lodging a complaint once the investigation had been closed.

113 In the light of the foregoing, it must be found that OLAF did not infringe the applicant's right to be heard.

– *Alleged infringement of the right of access to the file*

114 The applicant submits that OLAF's refusal to grant it access to the file on 25 November 2020 is unlawful.

115 It is sufficient, in that regard, to recall, as stated in paragraphs 62 and 63 above, that no access to the file is envisaged in Article 9(4) of Regulation No 883/2013, and that that absence does not constitute an infringement of the rights of defence of the person concerned, in so far as those rights are sufficiently guaranteed by the information which he or she has received and by the fact that he or she has been heard.

116 OLAF's refusal to grant the applicant access to its file is therefore not unlawful. It follows that the applicant's claims relating to infringements of its rights of defence, set out in its fifth, eighth and twelfth pleas, are unfounded.

The alleged unlawful conduct arising from an infringement of Regulation No 1049/2001 (ninth plea in law)

117 By its ninth plea in law, the applicant claims that, since the request for access to the file was made by its lawyer, a natural person residing in the Netherlands, the right of access to the documents covered by Regulation No 1049/2001 applied, and that OLAF could not rely on the exception laid down in the third indent of Article 4(2) of that regulation. The applicant takes the view, in essence, that the failure to interpret its complaint as constituting a request under that regulation is arbitrary and contradictory.

118 The Commission submits that OLAF did not infringe Regulation No 1049/2001.

119 It is sufficient, in that connection, to point out that, for the reasons set out in paragraphs 56 to 65 above, OLAF did not, in the circumstances of the present case, act unlawfully by not classifying of its own motion the applicant's letter of 27 October 2020 as a request for access to documents submitted under Regulation No 1049/2001.

120 In any event, even if OLAF was wrong not to make that classification, such an error cannot constitute a 'sufficiently serious breach' within the meaning of the case-law cited in paragraph 71 above.

121 In that regard, it should be recalled that it follows from settled case-law that the system of rules which the Court of Justice has worked out with regard to the second paragraph of Article 340 TFEU takes into account, inter alia, the complexity of the situations to be regulated, any difficulties in applying or interpreting the legislation, the clarity and precision of the rule infringed, and whether the error made was inexcusable or intentional (see, to that effect, judgments of 23 November 2011, *Sison* v *Council*, T-341/07, EU:T:2011:687, paragraph 40 and the case-law cited, and of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 30 and the case-law cited).

122 Even if the grounds set out in paragraphs 60 to 64 above were incorrect, they would nevertheless demonstrate the existence of difficulties in the interpretation and application of Regulations No 1049/2001 and No 883/2013 within the meaning of the case-law cited in paragraph 121 above, as regards the question whether a request for access to the file made by a person concerned under Regulation No 883/2013, even though the investigation concerning him or her is still pending, must be examined *ex officio* in the light of Regulation No 1049/2001.

123 The arguments put forward by the applicant under its ninth ground of appeal are therefore not such as to demonstrate the existence of unlawful conduct capable of giving rise to non-contractual liability on the part of the European Union.

The alleged unlawful conduct arising from the breach of the principles of transparency, independence and due diligence (first and tenth pleas)

124 In its first plea in law, the applicant submits that the investigation was conducted in breach of OLAF's obligation of independence under Article 3 of Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing [OLAF] (OJ 1999 L 136, p. 20), and of the general principle of transparency. It claims, in essence, that that lack of transparency and independence occurred at four stages of the investigation.

125 First, the criteria applied by OLAF in opening the investigation were too flexible. The applicant adds, in essence, that the Commission's refusal to enter into the file the decision of 23 August 2019 by which the investigation was opened, as well as an opinion delivered by the 'Investigation Selection and Review' Unit, makes it impossible to determine whether the opening of that investigation was consistent with Article 5 of Regulation No 883/2013, and asks the Court to order the production of those documents. It likewise alleges that OLAF widened the scope of its investigation, whilst preventing the applicant from exercising its procedural rights.

126 Second, the applicant criticises OLAF for the manner in which the on-the-spot inspection of 4 December 2019 was conducted.

127 Third, the applicant alleges that OLAF did not inform it of the results of the investigation and did not afford it the opportunity to express its views before the Member States were informed or even grant it access to the file.

128 Fourth, the applicant submits, in essence, that OLAF failed to take the applicant's comments of 16 October 2020 into account in the final report closing the investigation.

129 By its tenth plea in law, the applicant alleges that OLAF did not conduct its duties with due diligence.

130 The Commission contends that OLAF did not commit the unlawful acts alleged by the applicant.

131 Under Article 3 of Decision 1999/352, entitled ‘Independence of the investigative function’ OLAF is to ‘exercise the powers of investigation referred to in Article 2(1) in complete independence’ and ‘in exercising these powers, the Director of [OLAF] shall neither seek nor take instructions from the Commission, any government or any other institution or body’.

132 It should be observed that, under the guise of a vague reference to an infringement of Article 3 of Decision 1999/352 and of the principles of transparency and due diligence, the applicant is in fact disputing the way in which OLAF conducted the various stages of its investigation, namely the opening of the investigation, the inspection of 4 December 2019 in which OLAF representatives participated, the communication of 9 June 2020, the refusal of 25 November 2020 to grant the applicant access to certain material in the file, and the alleged failure to take the applicant’s comments into account in the final report.

133 First, as regards the inspection of 4 December 2019, for the reasons set out in paragraphs 82 to 87 above, it is sufficient to recall that it cannot give rise to unlawful conduct attributable to OLAF.

134 Second, it follows from paragraphs 95 to 99 above that OLAF was entitled to proceed with the communication of 9 June 2020 without first hearing the applicant.

135 Third, for the reasons set out in paragraphs 114 to 116 above, OLAF was entitled to refuse to grant the applicant’s request for access to the file.

136 The other arguments raised by the applicant as part of these two pleas cannot succeed.

137 In the first place, the applicant submits that OLAF should have sent it a summary of the interviews conducted during the on-the-spot inspection and the results of its investigation before communicating them to the Member States.

138 It is sufficient, in that regard, to reiterate that OLAF did not infringe the applicant’s right to be heard, as envisaged by Article 9(4) of Regulation No 883/2013. Under that provision, OLAF is required only to provide ‘a summary of the facts concerning the person concerned’, and not all the documents in its possession, since the applicant does not have a right of access to the file.

139 In the second place, the applicant claims, in essence, that its comments were not taken into account by OLAF when drawing up its final report. It is clear that that criticism has no factual basis, since the final report includes a summary of the comments submitted by the applicant and a response to those comments.

140 In the third place, the applicant takes the view that OLAF failed to fulfil its obligation of independence when the investigation was opened, and claims that this resulted in the use of excessively ‘flexible’ criteria. It requests that the Court order the production of two documents in order to be able to ascertain whether there was ‘a sufficient suspicion’ to justify the opening of an investigation.

141 Under Article 5(1) of Regulation No 883/2013, ‘the Director-General may open an investigation when there is a sufficient suspicion, which may also be based on information provided by any third party or anonymous information, that there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union’, ‘the decision by the Director-General whether or not to open an investigation shall take into account the investigation policy priorities and the annual management plan of [OLAF] established in accordance with Article 17(5)’, and ‘that decision shall also take into account the need for efficient use of [OLAF]’s resources and for proportionality of the

means employed'.

142 The existence of a suspicion justifying the opening of an investigation envisaged in Article 5(1) of Regulation No 883/2013 is an important condition from which the Director of OLAF cannot deviate. In that connection, the Court of Justice has had the opportunity to point out, even before the entry into force of Regulation No 883/2013, that a decision by OLAF's Director to open an investigation, like the decision of an institution, body, agency or organ established by, or on the basis of, the Treaties to request that an investigation be opened, may not be taken unless there are sufficiently serious suspicions relating to acts of fraud or corruption or other illegal activities detrimental to the financial interests of the European Union (see, to that effect, judgments of 10 July 2003, *Commission* v *ECB*, C-11/00, EU:C:2003:395, paragraph 141; of 25 February 2021, *Dalli* v *Commission*, C-615/19 P, EU:C:2021:133, paragraph 59; and of 20 July 2016, *Oikonomopoulos* v *Commission*, T-483/13, EU:T:2016:421, paragraph 174 (not published)).

143 In order to ascertain the existence of such serious suspicions when the investigation was opened, the Court may order the Commission to produce the evidence which led to the opening of the investigation (see, to that effect, judgment of 20 July 2016, *Oikonomopoulos* v *Commission*, T-483/13, EU:T:2016:421, paragraphs 13 (not published) and 179).

144 In that regard, the applicant requests that the Court order the Commission to produce those documents which may include the evidence on which the Director of OLAF relied in order to initiate the investigation. In the applicant's submission, the decision of 23 August 2019 opening the investigation and an opinion issued by the 'Investigation Selection and Review' Unit are relevant.

145 However, in the circumstances of the present case, the Court's examination of the accuracy of the suspicions on the basis of which the Director of OLAF decided to open the investigation is not necessary in order to ensure compliance with Article 5(1) of Regulation No 883/2013, since the existence of such suspicions to the requisite legal standard may be inferred from other evidence already on the file.

146 In that connection, it should be observed that the preliminary part of the final report highlights that, prior to the opening of the investigation, there existed certain suspicions, the accuracy of which is not disputed by the applicant.

147 As has been stated in paragraph 16 above, OLAF referred to an increase, from 2015, in imports into the European Union, from Bosnia and Herzegovina, of biodiesel produced from the processing of animal or vegetable fats imported from the United States, likely to be fraudulent in nature in the light of a number of indications. In that regard, OLAF highlighted, inter alia, the difference in the prices of those raw materials at US export and at import in Bosnia and Herzegovina. It also pointed out the questionable nature of the technology described by the applicant on its website, namely the production of biodiesel from used cooking oils from the United States, when that country itself is a major producer of biodiesel.

148 In response to those assessments, the applicant merely states that although 115 530 920 kilograms (kg) of biodiesel were imported into the European Union from 2015 to October 2019, only 116 597 536 kg of raw materials were exported from the United States, that there is therefore a significant difference of 1 066 616 kg and that, in essence, that factor is too vague to justify the opening of an investigation.

149 Such criticisms cannot succeed.

150 Both the use of the term 'suspicion' in Article 5(1) of Regulation No 883/2013 and in the case-law cited in paragraph 142 above and the reference in Article 5 of that regulation to there being 'a sufficient suspicion … that there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union' mean that it is not required that the evidence in OLAF's possession necessarily demonstrate the existence of fraud, corruption or other illegal activities in order for it to

open an investigation, but that it is sufficient that those elements should give rise to a reasonable suspicion as to the existence of such activities.

151 In the present case, it is clear that the elements described in paragraph 147 above were such as to give rise to a reasonable suspicion as to the existence of fraudulent acts committed by the applicant, justifying the opening of an investigation.

152 In those circumstances, it can be found that the applicant's first and tenth pleas have failed to establish the existence of unlawful conduct attributable to OLAF, without it being necessary to order the measures of inquiry requested by the applicant.

The alleged unlawful conduct arising from bias on the part of the Director-General of OLAF (second plea)

153 The applicant claims that OLAF's conduct was in breach of the principle of impartiality. More specifically, it takes the view that the Director-General of OLAF cannot be regarded as impartial when examining the complaints made by the applicant, since the Director-General is involved in the investigations concerning the applicant.

154 The Commission submits that the applicant has failed to put forward any arguments to substantiate its claim and contends that the Director-General was not directly involved in the conduct of the investigation.

155 As a preliminary point, it should be observed that there is disagreement between the parties as regards the complaint(s) raised by the applicant during the investigation. On the one hand, OLAF interpreted the reference in the comments submitted by the applicant on 16 October 2020 to the effect that its procedural guarantees laid down by Regulation No 883/2013 had not been observed as constituting a complaint to which the Director-General of OLAF replied on 27 November 2020. On the other hand, the applicant submits that the letter of 16 October 2020 did not contain any complaint, since its sole complaint was submitted on 14 December 2020, the investigation of which was refused by the Director of OLAF on 21 December 2020.

156 For the reasons set out in paragraphs 111 and 112 above, it should be pointed out that the Director of OLAF rightly refused to investigate the applicant's complaint of 14 December 2020, since the investigation was already closed at that date. The criticism alleging bias on the part of the Director of OLAF is therefore, in any event, ineffective in so far as concerns the refusal of 21 December 2020.

157 The question of possible bias on the part of the Director of OLAF is therefore relevant only in so far as concerns the examination of the complaint which, it is claimed, was set out in the applicant's comments of 16 October 2020, to which the Director-General of OLAF replied on 27 November 2020.

158 Article 41 of the Charter states, in paragraph 1 thereof, that 'every person has the right to have his or her affairs handled impartially … by the institutions, bodies, offices and agencies of the Union'.

159 Admittedly, the requirement of impartiality, to which the institutions, bodies, offices and agencies are subject in carrying out investigative tasks of the kind which are entrusted to OLAF, is intended, as well as ensuring that the public interest is respected, to protect the persons concerned and confers on them a right as individuals to see that the corresponding guarantees are complied with (see judgment of 6 April 2006, *Camós Grau* v *Commission*, T-309/03, EU:T:2006:110, paragraph 102 and the case-law cited). The applicant is therefore alleging breach of a rule intended to confer rights on individuals.

160 More specifically, the applicant refers to an infringement of the requirement of impartiality in its objective component, in accordance with which the institution, body, office or agency concerned

must provide sufficient guarantees to exclude any legitimate doubt as to any prejudice. According to the case-law, in order to show that the organisation of an administrative procedure does not ensure sufficient guarantees to exclude any legitimate doubt as to possible bias, it is not necessary to prove lack of impartiality. It is sufficient for a legitimate doubt to arise which cannot be dispelled (see judgment of 21 October 2021, *Parliament* v *UZ*, C-894/19 P, EU:C:2021:863, paragraph 54 and the case-law cited).

161 In the present case, it should be noted that the applicant refers exclusively to the involvement of the Director of OLAF in the investigation. It is clear that the requirement of impartiality does not require that the right to be heard be exercised before an authority that is different from, or entirely independent of, that which conducted the investigation.

162 Furthermore, the applicant has failed to adduce any evidence capable of demonstrating, in its specific case, an objective factor – such as a conflict of interests – capable of giving rise to a legitimate doubt, in the eyes of third parties, as to the impartiality of the Director of OLAF.

163 The applicant's second plea therefore does not make it possible to establish unlawful conduct on the part of OLAF.

The alleged unlawful conduct arising from the disclosure of information in the press (sixth and seventh pleas)

164 The applicant claims that an OLAF official leaked confidential information to the press following the inspection of 4 December 2019 and puts forward as evidence certain press articles and extracts from websites.

165 In its sixth plea, the applicant submits that the leaking of such information led to it being presented as guilty of criminal offences and to the assessment of its conduct being prejudged by the customs authorities and the courts of the Member States, thus constituting a breach of the applicant's right to the presumption of innocence as provided for in Article 48 of the Charter and Article 6 ECHR.

166 In its seventh plea, the applicant claims that the leaking of the information also constitutes a breach of the principles of confidentiality and data protection under Article 10 of Regulation No 883/2013.

167 The Commission contends that OLAF did not commit the unlawful acts highlighted by the applicant.

168 By those two pleas, the applicant submits that disclosures in the press are attributable to OLAF officials, which constitutes a breach both of the applicant's right to the presumption of innocence and of OLAF's confidentiality obligations under Article 10 of Regulation No 883/2013.

169 The principle of the presumption of innocence, which constitutes a fundamental right set out in Article 6(2) ECHR and in Article 48(1) of the Charter, confers rights on individuals which are enforced by Courts of the European Union. That principle has its corollary in the obligation to maintain confidentiality placed on OLAF pursuant to Article 10 of Regulation No 883/2013, and which also confers rights on individuals who are affected by an OLAF investigation in so far as they are entitled to expect that the investigations concerning them will be conducted in a manner that respects their fundamental rights (see, to that effect, judgment of 6 June 2019, *Dalli* v *Commission*, T-399/17, not published, EU:T:2019:384, paragraphs 168 and 169).

170 In the present case, it must be stated that the applicant has failed to adduce any evidence or indication that would allow the disclosure in question to be attributed to OLAF.

171 Admittedly, a reading of the articles put forward as evidence by the applicant tends to show that the information available to the press included not only facts capable of being in the public domain, such as the conduct of an inspection at the applicant's premises on 4 December 2019, but also

information relating to the investigative mission in Bosnia and Herzegovina.

172 However, the diverse range of the participants in that investigative mission – representatives of the authorities of certain Member States, the ABFI and OLAF – precludes it being established to the requisite legal standard that there was a breach, on the part of OLAF, of the presumption of the applicant's innocence, together with a failure on the part of OLAF to fulfil its obligations under Article 10 of Regulation No 883/2013.

173 It follows that the applicant, by those two pleas, has failed demonstrate the existence of unlawful conduct attributable to OLAF.

The alleged unlawful conduct arising from an inadequate statement of reasons (eleventh plea)

174 In the context of its eleventh plea, the applicant takes the view that OLAF infringed its duty to state reasons by failing to conduct an in-depth examination and not gathering sufficient information, by giving insufficient reasons for its refusal to grant access to the file, and by failing to state the reasons why the investigation was closed on 8 December 2020. It reiterates that it did not have access to its file before OLAF, which prevented it from exercising its rights before the national authorities or in respect of its customers that have turned against it.

175 The Commission contends that the letter of 25 November 2020 provided the applicant with sufficient reasons to justify its decision. It adds that there was no duty on the part of OLAF to inform the applicant of the closure of its investigation.

176 It must be stated that, under the guise of a criticism alleging breach of the obligation to state reasons, the applicant in fact merely repeats the criticisms which it put forward concerning the manner in which the investigation was conducted and which have already been answered.

177 The only aspects of the applicant's arguments which may possibly be linked to the criticism of an insufficient statement of reasons are set out in the reference to the fact that the reasons for refusing access to the file were insufficiently explained, while those for the closure of the investigation were not explained at all.

178 As regards the first criticism, it is sufficient to point out that it has no factual basis, since OLAF explained in detail, in its letter of 25 November 2020, the reasons why the request for access to the file submitted by the applicant was refused.

179 As regards the second criticism, it is sufficient to point out that, in so far as OLAF adopted a final report, of which the applicant was informed on 21 December 2021, the latter was in a position to understand the reason for closing the investigation, since, for the reasons set out in paragraph 47 above, the adoption of such a report constituted one of the grounds for closing the investigation.

180 The eleventh plea therefore fails to demonstrate any unlawful conduct attributable to OLAF.

181 In the light of the foregoing, it must be found that the applicant has failed to demonstrate the existence of one of the cumulative conditions to be satisfied if the non-contractual liability of the European Union is to be incurred.

182 That finding is not invalidated by the taking into account of the new evidence submitted by the applicant on 20 January 2022, which relates to the samples taken by the Croatian authorities at OLAF's request on certain containers from the United States bound for Bosnia and Herzegovina (see paragraph 4 above). It is apparent from that evidence that, contrary to what OLAF found, nine containers – not eight – were subject to checks carried out by the Croatian customs authorities.

183 Without there being any need to consider the admissibility of that evidence in the light of Article 85 of the Rules of Procedure of the General Court, it is sufficient to point out that the lack of precision

as to the number of containers checked is irrelevant, since all the checks yielded the same finding, namely the presence of biodiesel instead of the ‘used cooking oils’ declared.

184 Pursuant to the case-law cited in paragraph 69 above, the claim for compensation must therefore be rejected and, consequently, the action dismissed in its entirety, without it being necessary to rule on the admissibility of the additional claim for compensation, submitted at the reply stage by the applicant, which is disputed by the Commission.

Costs

185 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.

186 As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders ‘Sistem ecologica’ production, trade and services d.o.o. Srbac to pay the costs.**

Tomljenović Schalin Nõmm

Delivered in open court in Luxembourg on 19 October 2022.

E. Coulon M. van der Woude

Registrar President

* Language of the case: English.