OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 28 March 2007[1]

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I — Introduction

1. The present case concerns an appeal against an order of the Court of First Instance of the European Communities of 11 July 2005,[2] in which it dismissed as manifestly unfounded the action for damages on grounds of non-contractual liability brought against the Community by a non-privileged applicant pursuant to the second paragraph of Article 288 EC.

2. The appellant and applicant in the main proceedings (hereinafter 'the appellant') is a non-governmental organisation (NGO) governed by German law which provides support to refugees and to victims of war and catastrophe. In its original action it claimed reimbursement of lawyers' fees which it had incurred in three sets of proceedings before the European Ombudsman against the Commission. According to the appellant, its costs amount to EUR 54 037. It is now asking the Court of Justice of the European Communities to conduct a judicial review of the decision taken at first instance.

II — Legal framework

3. The second paragraph of Article 288 EC provides:

'In the case of non-contractual liability, the Community shall, in accordance with the

2 — Order of the Court of First Instance in Case T-294/04 *Internationaler Hilfsfonds* v *Commission* [2005] ECR II-2719.

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.'

4. The second paragraph of Article 21 EC provides that every citizen of the Union may apply to the Ombudsman established in accordance with Article 195.

5. Article 195(1) EC provides:

'The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.

The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.'

6. On 9 March 1994, pursuant to what was then Article 194(4) EC, the European Parliament adopted Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties.[3]

7. Under Article 2(6) of Decision 94/262, complaints submitted to the Ombudsman do not affect time-limits for appeals in administrative or judicial proceedings. Moreover, under Article 2(7) of Decision 94/262, when the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or termin-

3 — OJ 1994 L 113, p. 15.

ate consideration of it, the outcome of any enquiries he has carried out up to that point are to be filed without further action.

III — Facts and procedure

A — *Facts in the main proceedings*

8. The dispute concerns a number of applications submitted by the appellant to the Commission in which it requested co-financing for certain support projects. Between 1993 and 1997 it submitted to the Commission a total of six applications for the co-financing of projects.

9. When the Commission services considered the initial applications, they concluded that the appellant was not eligible for aid granted to NGOs as it did not satisfy the General Conditions for the co-financing of actions. The General Conditions for the co-financing of actions undertaken by European NGOs in developing countries lay down the criteria for the eligibility of NGOs and of projects, define specific requirements for the submission of applications and include detailed explanations of financing arrangements.[4] The appellant was informed of that decision by letter of 12 October 1993. By letter of 29 July 1996, the Commission set out the principal reasons which had led it to determine that the appellant could not be regarded as an eligible NGO.

10. On 5 December 1996 the appellant submitted a new project to the Commission. An amended version of that project was submitted to the Commission under a fresh application in September 1997. The Commission did not take a decision on those new applications for co-financing since it considered that the decision of 12 October 1993 that the appellant was ineligible remained valid.

11. The appellant then lodged three successive complaints with the Ombudsman, one in 1998 and the other two in 2000. Those complaints essentially related to two questions, namely access by the applicant to the file and whether the Commission had considered the appellant's applications fairly and objectively.

12. As regards access to the file, in a decision of 30 November 2001 the Ombudsman found that the list of documents which the Commission had provided to the appellant

4 — A new version of the General Conditions was adopted in 2000. The General Conditions are not published in the Official Journal but can be requested from the Commission.

was incomplete, that the Commission had held back certain documents without cause and that, consequently, the Commission's conduct could constitute an instance of maladministration. He proposed that the Commission authorise suitable access to the file. That access was provided in the Commission's offices on 26 October 2001. The Ombudsman also found an instance of maladministration in the fact that the appellant had not been given a formal hearing on the information received by the Commission from third parties which had been used in taking a decision against the appellant.

13. As regards fair and objective consideration of the appellant's applications, in a further decision also delivered on 30 November 2001 the Ombudsman concluded in connection with the Commission's consideration of information received from third parties that the Commission had failed to deal with the matter fairly and objectively. Further, in his decision of 11 July 2000, the Ombudsman criticised the fact that the Commission had allowed an excessively long period of time to elapse before providing in writing the reasons which had led it in 1993 to conclude that the appellant was ineligible. Lastly, with regard to the fact that the Commission had failed to take a formal decision on the applications submitted in December 1996 and September 1997, in his decision of 19 July 2001 the Ombudsman recommended that the Commission should come to a formal decision on those applications before 31 October 2001.

14. In order to comply with the Ombudsman's recommendation, on 16 October 2001 the Commission sent the appellant a letter rejecting the two projects submitted in December 1996 and September 1997 on the ground that the appellant was ineligible for co-financing.

15. By application lodged with the Court of First Instance on 15 December 2001, the appellant brought an action against that letter. In its judgment of 18 September 2003 in Case T-321/01,[5] the Court of First Instance annulled the Commission's decision of 16 October 2001 refusing the applications for co-financing submitted by the applicant in December 1996 and September 1997 and ordered the defendant to pay the costs.

16. In its application in Case T-321/01 the appellant had also claimed that the defendant should reimburse the costs it had incurred in the proceedings before the Ombudsman. In its judgment, the Court of First Instance held that the costs relating to proceedings before the Ombudsman could not be regarded as expenses necessarily incurred within the meaning of Article 91(b) of the Rules of Procedure of the Court of First Instance and were therefore not recoverable.

5 — Case T-321/01 *Internationaler Hilfsfonds* v *Commission* [2003] ECR II-3225.

B — *The proceedings before the Court of First Instance and the contested order*

17. By application received by the Registry of the Court of First Instance on 23 July 2004, the appellant brought a fresh action, this time pursuant to the second paragraph of Article 288 EC and claiming that the Community should be ordered to pay EUR 54 037 on account of material damage suffered.

18. In its decision adopted on 11 July 2005 in the form of an order, the Court of First Instance dismissed the action as manifestly unfounded in the absence of non-contractual liability on the part of the Community.

19. The Court of First Instance based its decision on a number of arguments which essentially amounted to a single ground: the necessary causal link did not exist between the conduct of the Community institution and the damage claimed since legal representation was not necessary in proceedings before the European Ombudsman.

20. The Court of First Instance dismissed the action as manifestly unfounded because the costs relating to proceedings before the Ombudsman cannot be regarded as expenses necessarily incurred within the meaning of Article 91(b) of the Rules of Procedure of the Court of First Instance and are therefore not recoverable. It pointed out that under that provision recoverable costs are limited, first, to those incurred for the purpose of proceedings before the Court of First Instance and, second, to those necessary for that purpose.

21. The Court of First Instance stated that, unlike proceedings before the Community Courts, proceedings before the Ombudsman are designed in such a way as to make recourse to legal advice unnecessary. It suffices to set out the facts in the complaint and there is no need to set out any legal arguments. Accordingly, it is implicit in the individual's freedom to choose to be legally represented in the proceedings before the Ombudsman that he must bear such costs personally. It is precisely on account of the lack of such freedom of choice in proceedings before the Community Courts, in which representation by a lawyer is obligatory, that judicial proceedings entail a decision on costs which includes lawyers' fees.

22. Further, the Court of First Instance noted that the Court of Justice held in its judgment of 9 March 1978 in Case 54/77 [6] that the costs of consulting a lawyer at the stage of an administrative complaint, under the pre-litigation procedure governed by Article 90 of the Staff Regulations of Officials

6 — Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraph 45 to 50.

of the European Communities, must be distinguished from lawyers' fees incurred as a result of contentious proceedings. Whilst in such circumstances it is not possible to prohibit those concerned from seeking legal advice even at that stage, it is their own decision and the defending institutions cannot be held liable for the consequences. The Court of Justice therefore decided that there is no causal link in law between the alleged damage, namely the lawyers' fees incurred at the pre-litigation stage, and the action of the Community and, therefore, an application for compensation in such circumstances must not only be dismissed but may be regarded as without any legal justification and therefore vexatious and this must be borne in mind in connection with the order as to costs.

23. In the light of the foregoing considerations, the Court of First Instance held that lawyers' fees incurred in proceedings before the Ombudsman are not recoverable by way of an action for damages.

24. With regard to the other requirements for an action for damages against the Community on grounds of non-contractual liability, the Court of First Instance pointed out, lastly, that the appellant failed to establish a direct causal link between the defendant's alleged unlawful conduct and the damage for which it seeks compensation. It repeated that the services of a lawyer are unnecessary in proceedings before the Ombudsman. In those circumstances, the fact that an individual is free to choose to bring a matter before the Ombudsman and to be legally represented in so doing cannot be regarded as the necessary and direct consequence of instances of maladministration for which the Community institutions might be held liable.

C — *Proceedings before the Court of Justice and forms of order sought by the parties*

25. By an application of 2 September 2005 lodged at the Registry of the Court of Justice on 6 September 2005, Internationaler Hilfsfonds e.V. brought the present appeal.

26. The appellant claims that the Court should:

— set aside the order of the Court of First Instance of 11 July 2005 and either refer the case back to the Court of First Instance or order the respondent to pay to the appellant the amount of EUR 54 037,

and

— order the Commission to pay the costs.

27. By a document of 9 November 2005, registered at the Registry of the Court of Justice on 10 November 2005, the Commission lodged a response, in which it claims that the Court should:

— dismiss the appeal,

and

— order the appellant to pay the costs.

28. After the written procedure, a hearing took place on 16 November 2006 at which the parties made their oral observations.

D — *Pleas in law and arguments of the parties*

29. Internationaler Hilfsfonds e.V. bases its appeal on three pleas in law which are directed at the three main arguments cited by the Court of First Instance in its order.

30. With the first plea in law, it objects that the Court of First Instance's finding that the costs relating to proceedings before the Ombudsman are not recoverable under Article 91(b) of the Rules of Procedure of the Court of First Instance is irrelevant in assessing whether those costs may be recovered as damages by means of an action for damages pursuant to the second paragraph of Article 288 EC.

31. It also challenges the Court of First Instance's assessment that, unlike proceedings before the Community Courts, proceedings before the Ombudsman are designed in such a way as to make recourse to legal advice unnecessary. In its view such an inference cannot be drawn either from the rules or from the implementing provisions.

32. In its reply the Commission acknowledges that claims for the recovery of costs of proceedings and claims for damages are subject to different requirements and are mutually independent. However, that does not preclude a comparison being drawn between the two claims where they are subject to similar requirements. The 'necessity' of costs of legal representation is relevant in connection with both a claim for the recovery of costs relating to proceedings and a possible claim for damages in so far as that criterion is relevant for ascertain-

ing whether there is a causal link and for examining obligations in relation to the mitigation of damage.

33. It states that it is indeed contradictory, when the costs of the proceedings are examined, for the necessity of the costs incurred to be denied but, when entitlement to damages is examined, for it to be considered that the appellant might have felt itself bound to incur such costs.

34. A comparison shows that, where the law recognises and provides for the necessity of legal representation, it also ensures that the costs incurred in that connection are covered. In complaints proceedings before the Ombudsman, however, the law has expressly rejected such necessity.

35. With its second plea in law, the appellant objects to the misinterpretation of or the failure to follow the case-law of the Community Courts on the part of the Court of First Instance.

36. First of all, it disputes the relevance of the Court of Justice's decision in *Herpels* v *Commission* [7] to the claims in this action on the ground that that judgment should be seen exclusively in the light of the employment relationship between the Community and its servants, with the result that no inferences can be drawn from it for the present case.

37. It also claims that the Court of First Instance's judgment in *AFCon Management Consultants and Others* v *Commission*, [8] in which the Commission was ordered to pay compensation on account of irregularities in the award of a contract, was disregarded. The loss claimed in that case included lawyers' fees incurred by the applicant in connection with a complaint to the Ombudsman. The appellant claims that the Court of Justice should take issue with the Court of First Instance's failure to observe that judgment and to draw a comparison with its case.

38. The Commission, on the other hand, takes the view that the decision in *Herpels* is fully applicable to the present case. It is irrelevant that that was a staff case and that there is a contractual relationship between the Commission and its servants. In contrast, it is significant that in both cases a claim for damages was made for the same costs, namely the costs of legal representation in

7 — Cited above in footnote 6.

8 — Case T-160/03 *AFCon Management Consultants and Others* v *Commission* [2005] ECR II-981.

extra-judicial proceedings. It is also relevant that both cases involved extra-judicial complaint proceedings, where legal representation is not obligatory and the complainants had therefore been free to decide as they saw fit on the need for legal representation.

39. The Commission also points out that failure to follow a previous decision of the same court does not constitute an error of law *per se*, since the Communities' judicial system is not based on the principle of legally binding precedents.

40. Thirdly, the appellant claims that the Court of First Instance was wrong to fail to recognise the causal link between the Commission's unlawful conduct and the damage it suffered. In the view of the appellant, the causal link between an unlawful act and damage always exists where general experience shows that the institution's conduct would normally cause damage such as that incurred. This follows from the theory of adequacy recognised in German law and also by the Community Courts.

41. Lastly, the appellant argues that in the case in point the principle of 'equality of arms' required it to obtain legal representation to protect its interests, since the Commission called on the assistance of its Legal Service in the abovementioned complaints in the proceedings before the Ombudsman.

42. The Commission observes that according to case-law the damage must result directly from the conduct which has been challenged. This criterion corresponds with the requirement of adequacy cited by the appellant. It may be inferred from this that a causal link is not direct where the damage incurred was under no circumstances necessary but was the consequence of a free decision by the party having suffered the damage. In complaint proceedings which are designed in such a way that the complainant does not have to submit any legal arguments and unresolved points of fact and legal would if necessary be investigated by the Ombudsman himself, the decision to obtain legal representation is a free one.

43. In view of the way in which the complaint proceedings are thus designed, the 'equality of arms' argument is also inappropriate because it is actually the Ombudsman himself who stands alongside the complainant.

IV — Legal analysis

44. Appeals to the Court of Justice are limited to points of law only under Article 225 EC. Since the appellant is essentially complaining of an infringement of Community law in the order made at first instance, its appeal satisfies that requirement governing admissibility.

45. The appellant bases its appeal on three different pleas in law whose merits will be examined below in the specified order.

A — *Examination of the pleas in law*

1. First plea in law: recoverability of lawyers' fees by way of an action for damages

46. First of all, the appellant objects to the argument cited by the Court of First Instance that to admit such expenditure as allowable by way of damages would be contrary to the case-law of the Court of First Instance, according to which such expenditure is not recoverable. In so far as the Court of First Instance compares the claim for damages which has been made with the recovery of costs relating to proceedings, the appellant considers this approach to be wrong.

47. I cannot share that view. In fact, I consider that in this regard the Court of First Instance examined an important aspect which must not be overlooked in the case to be decided. The specific issues are the conflict between a procedural claim for the recovery of costs and a substantive claim for damages and whether the claim for damages may go beyond that which procedural law grants a party seeking legal redress. In order to explain my view of the law, I would first like to make a few general remarks on the relationship between the Community's law on costs and its law on damages.

(a) The Community's law on costs

(i) The Community Courts' rules on costs

48. The underlying principle governing the law on costs in proceedings before the Community Courts is that the unsuccessful

party is liable and is to be ordered to pay the costs, and in particular must reimburse the expenses necessarily incurred by the opposing party. Under Article 69(2) of the Rules of Procedure of the Court of Justice and under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

49. However, the scope of this procedural claim for the recovery of costs, to which the successful party is entitled under the law on costs, is subject by law to limits which also have their origin in an assessment by the legislature.

50. Thus Article 73(b) of the Rules of Procedure of the Court of Justice clarifies Article 69 to the effect that expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of lawyers, are to be regarded as recoverable costs. In principle only costs which have been caused by the judicial proceedings are taken into consideration. According to settled case-law, 'proceedings' under Article 73(b) of the Rules of Procedure of the Court of Justice refers only to proceedings before the Court, namely the contentious stage, and does not include any prior stage. [9] The same applies to the Court of First Instance under Article 91(b) of its Rules of Procedure.

51. The consequence is that expenses incurred by the parties in a preceding administrative procedure are not covered by the decision on costs. [10]

52. Lastly, according to case-law, with regard to the period before the action is brought the reimbursement of expenses incurred in drafting the application may be claimed. [11] On the other hand, expenses and fees for preparing reports on the prospects of success and on the admissibility of the action

9 — Orders in Case C-104/89 DEP *Mulder and Others* v *Council and Commission* [2004] ECR I-1, paragraph 45, Case C-107/91 *Empresa Nacional de Urânio* v *Commission* (not published in the ECR, paragraph 21), and Case C-294/90 *British Aerospace* v *Commission* [1994] ECR I-5423, paragraph 12.

10 — Costs charged by applicants in respect of meetings with the services of the Commission after the decision contested in the main proceedings was adopted and before those proceedings were brought must also be regarded as irrecoverable costs (see the order of the Court of First Instance in Case T-251/00 DEP *Lagardère and Canal+* v *Commission* [2004] ECR II-4217, paragraph 22). The same applies to the holding of meetings with the respective authorities irrespective of the fact that the aim of the meeting in question was to avoid bringing proceedings before the Court of First Instance (see the order of the Court of First Instance in Case T-251/00 DEP *Lagardère and Canal+* v *Commission* [2004] ECR II-4217, paragraph 22). With regard to the Court of First Instance, there is likewise no right to reimbursement of costs incurred by the appellant in an administrative procedure or in proceedings immediately prior to the actual court case (see Case T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 5133 and 5134).

11 — Order in Joined Cases T-177/94, T-377/94 and T-99/95 *Altmann and Others* v *Commission* [1998] ECR-SC I-A-299 and, II-883, paragraph 21.

by assistants do not constitute recoverable costs.[12]

53. In the contested order the Court of First Instance rightly pointed out that complaint proceedings before the Ombudsman are an alternative remedy to that of an action before the Community Court which the Treaty has given citizens of the Union in order to protect their interests. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings. In addition, the Court of First Instance drew the correct conclusion from the interpretation of Article 195(1) EC and Article 2(6) and (7) of Decision 94/262 that the two remedies cannot be pursued at the same time.

54. In my view, the commendable achievement of the decision at first instance is that it made clear that complaint proceedings before the Ombudsman are certainly not mandatory proceedings which precede proceedings before the Community Courts and which must always be pursued before judicial proceedings are brought. It can be inferred from that decision that complaint proceedings before the Ombudsman are not part of the remedy created by the legislature to offer legal protection before the Community Courts to those affected by acts of Community institutions which are contrary to Community law. It is therefore understandable that the rules on costs laid down in the Rules of Procedure of the Court of Justice and of the Court of First Instance do not make any provision concerning the recoverability of costs which might arise in connection with complaint proceedings.

(ii) The absence of rules on costs in respect of proceedings before the European Ombudsman

55. In the absence of an internal connection with the Community judicial system, the question then arises as to the existence of special rules on costs in respect of complaint proceedings before the European Ombudsman governing such questions. A procedural claim for the recovery of costs on the part of the appellant would have to be derived primarily from an appropriate legal basis. However, no such rules on costs exist, which on closer examination can be explained both by the spirit and purpose of the complaint proceedings and by the Ombudsman's role, which is conferred on him under Article 195(1) EC as part of the institutional structure of the European Union.

12 — Order in Case T-25/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd Fluggesellschaft* v *Commission* (not published in the ECR, paragraph 34).

— Differences as compared with the Community judicial system

56. As Advocate General Geelhoed has already stated in his Opinion in *Lamberts*, [13] the institution of Ombudsman is one of the instruments by which the Treaty gives substance to citizenship of the Union. Citizens of the Union have the right to complain to the Ombudsman about instances of maladministration in the actions of Community institutions and bodies. The Ombudsman thus plays a part in protecting citizens' rights. It is also clearly evident from the background to the institution of a European Ombudsman that it was seen as one of the mechanisms for protecting the specific rights of European citizens. However, Advocate General Geelhoed also pointed out, correctly in my opinion, that although the purpose of the complaints procedure before the Ombudsman is to protect citizens' rights, it does not provide the same sort of legal protection as that afforded by a court or tribunal. [14]

57. It is apparent that the complaint proceedings before the Ombudsman are not adversarial, quasi-judicial proceedings in the proper sense, in which the complainant and the Community body in question are opposing parties and it is left to an impartial third party to settle the dispute. Neither Article 3(5) of the regulations and general conditions governing the performance of the Ombudsman's duties [15] nor Article 6 of the implementing provisions [16] suggests that the Ombudsman plays the role of intermediary between the parties. Rather, it is clear from those provisions that the Ombudsman, together with the body or institution concerned, will as far as possible endeavour to find a solution to put an end to the maladministration and uphold the complaint lodged, which tends to suggest that the Ombudsman is close to the administration. [17]

58. A further breach of principle in the contested proceedings results from the Ombudsman's power under Article 3(1) of the regulations and general conditions governing the performance of the Ombudsman's duties, according to which he may on his own initiative conduct all the enquiries which he considers justified to clarify any suspected maladministration in the activities of Community institutions and bodies.

59. The differences with the Community judicial system are also clear in cases where the European Ombudsman takes action following a complaint. For example, access to complaint proceedings is less restrictive

13 — Opinion of Advocate General Geelhoed in Case C-234/02 P *Lamberts* [2004] ECR I-2803, point 55.

14 — Ibid., point 56.

15 — Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, adopted on 9 March 1994 (OJ 1994 L 113, p. 15), as amended by the Decision of 14 March 2002 deleting Articles 12 and 16 (OJ 2002 L 92, p. 13).

16 — Decision of the European Ombudsman adopting implementing provisions, adopted on 8 July 2002 and amended by the Decision of the Ombudsman of 5 April 2004 (available at http://www.ombudsman.europa.eu/lbasis/en/provis.htm).

17 — See also the Opinion of Advocate General Geelhoed in Case C-234/02 P *Lamberts*, cited in footnote 13, point 63.

for natural or legal persons than an action brought before the Community Courts. The entitlement to bring an action as a requirement for the admissibility of judicial proceedings is intended to prevent class actions and thereby ensure that only actions brought by those who are actually and directly affected by the unlawful action of the Community bodies are admitted. [18] Whilst, for example, the institution of an action for annulment by natural or legal persons against an unlawful Community legal act not addressed to them pursuant to the fourth paragraph of Article 230 EC is subject to the requirement that the act is of direct and individual concern to the person bringing the action, a complaint to the Ombudsman is not subject to any special requirements governing admissibility. Consequently, persons who are not affected by an instance of maladministration in the activities of the bodies and institutions are also entitled to lodge complaints with the Ombudsman. [19]

60. A further specific feature of the Ombudsman's function that should be mentioned is the fact that the Ombudsman is merely under an obligation to use his best endeavours, is completely independent and enjoys wide discretion with regard to the performance of his duties. [20] He therefore has at his disposal a broad range of instruments for settling disputes between citizens and the Community body in question. If the Ombudsman establishes an instance of maladministration, he seeks as far as possible to find remedies and to give satisfaction to the complainant by means of an amicable settlement. If the Ombudsman considers that an amicable settlement is not possible or efforts to reach an amicable settlement prove unsuccessful, he either closes the case with a reasoned decision which may also include critical remarks or produces a report containing draft recommendations. However, a distinctive feature of all these measures is their non-binding character, as the Ombudsman cannot legally require the administration to change its conduct. This also explains why decisions taken by the Ombudsman in complaint proceedings may be the subject of an action before the Community Courts only to a limited extent. The only means available to him to compel bodies and institutions to change their conduct are the strength of his arguments and the public pressure which he may exert by criticising instances of maladministration in his reports. [21]

61. In cases of smaller-scale irregularities, this wide discretion may even cause him to refrain entirely from taking action against the body in question, which is not an option

18 — Borowski, M., Die Nichtigkeitsklage gem. Art. 230 Abs. 4 EGV, *Europarecht*, Vol. 6, 2004, p. 893. Opinion of Advocate General Lagrange in Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes* [1962] ECR 471.

19 — Cadeddu, S., The proceedings of the European Ombudsman, *Law and contemporary problems*, Vol. 68 (2004), No 1, p. 165, 166; Karkowska, U., Concept, Function and Effectiveness of the European Ombudsman (Part 1), *Human Rights within the European Union*, Berlin, 2004, p. 192; Rzeznik, J., Concept, Function and Effectiveness of the European Ombudsman (Part 2), *Human Rights within the European Union*, Berlin, 2004, p. 199, and Chiti, M. P., Il mediatore europeo e la buona amministrazione comunitaria, *Rivista italiana di diritto pubblico comunitario*, year X (2000), No 2, p. 323, compare complaint proceedings before the Ombudsman with the *actio popularis*.

20 — Case C-234/02 P *Lamberts* [2004] ECR I-2803, paragraph 50.

21 — Rzeznik, J., Concept, Function and Effectiveness of the European Ombudsman (Part 2), *Human Rights within the European Union*, Berlin, 2004, p. 215.

open to the Community Courts in the light of the right to effective legal protection enshrined in Community law. [22] In relation to the complainant the practical consequence is that the Ombudsman cannot offer it any definite guarantee of success. [23]

62. These fundamental differences make clear that individual legal protection is not a primary feature of complaint proceedings before the Ombudsman.

63. If the optimisation of the Community administration and not individual legal protection is the focus for the Ombudsman's efforts, it is logical not to lay down any rules governing costs for complaint proceedings. Rather it appears fair and correct to order the party that avails itself of the possibility of submitting a complaint to pay the costs. Such a conclusion is consistent with the legislature's aim of offering citizens a low-cost, flexible solution with a view to making the public aware of misconduct on the part of the administration. [24]

64. Therefore the appellant does not have any basis under the law on costs for its claim for the recovery of its lawyers' fees.

— No necessity to have recourse to legal advice

65. In the absence of any provision of law which expressly establishes the requirement for natural or legal persons to be represented by a lawyer in proceedings before the Ombudsman, like the third paragraph of Article 19 of the Statute of the European Court of Justice, it must be assumed at least that such representation is not prescribed.

22 — Cadeddu, S., cited above (footnote 19), p. 169. Access to the courts is one of the universally recognised fundamental rights. The same applies to the prohibition of the denial of justice, a principle recognised under international law. According to the judgment of the European Court of Human Rights of 21 February 1975 in Golder v United Kingdom, Application No 4451/70, Series A, No 18, paragraph 35, Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms should be interpreted in the light of those principles. The European Community has made it an important general principle of its legal order in the form of the right to effective legal protection. See, most recently, the Opinion of Advocate General Stix-Hackl in Case C-467/01 *Ministero delle Finanze* v *Eribrand* [2003] ECR I-6471, point 52, and the Opinion of Advocate General Léger in Case C-224/01 *Köbler* v *Austria* [2003] ECR I-10239, point 67.

23 — Garzón Clariana, G., Holding the administration accountable in respect of its discretionary powers: the roles and approaches of the Court, the Parliament and the European Ombudsman, *The European Ombudsman — Origins, establishment, evolution, Commemorative volume published on the occasion of the 10th anniversary of the institution*, Chapter 12, p. 209.

24 — Söderman, J., The Citizen, the Administration and Community Law — General report prepared by The European Ombudsman for the 1998 FIDE Congress in Stockholm, Sweden, 3 June 1998: 'Access to the Ombudsman is normally easy to obtain, direct and free of costs' (p. 28). 'It should be obvious that the judiciary is the basic upholder of Community law at the national as well as at the Community level. Court proceedings are normally the first choice when a company or business wants to obtain its rights under Community law. The situation for a citizen who has a problem with the national administration in a Community law issue is different. Court proceedings can be time consuming and costly and are not a practical possibility in many cases' (p. 35); Garzón Clariana, G., cited above (footnote 23), p. 209. At the hearing the appellant argued that the low cost of complaint proceedings was one of the main reasons for having recourse to the European Ombudsman and not the Community Courts.

66. Recourse is had to the services of a lawyer traditionally only in matters of law.[25] The primary function of a lawyer is to advise those seeking justice about the legislation that relates to their legal problem and to ensure that arrangements are made for the preservation of evidence, as the most important prerequisite for any success in legal proceedings.

67. In his Opinion in *Lamberts*, Advocate General Geelhoed referred to the consistent case-law of the Court of Justice on the concept of 'court or tribunal' in Article 234 EC and found that complaint proceedings do not display all their characteristics.[26] In my view, the question of the necessity of legal assistance depends above all on the answer to the question whether the resolution of legal problems is the main focus of the complaint proceedings before the Ombudsman. For that purpose it is necessary to consider the term 'maladministration' within the meaning of Article 195(1) EC since it defines the competence *ratione materiae* of the Ombudsman.

25 — See the Opinion of Advocate General Stix-Hackl in Case C-193/05 *Commission* v *Luxembourg* [2006] ECR I-8673, point 64. Under Paragraph 3 of the Bundesrechtsanwaltsordnung (Federal Regulation on the profession of lawyer, BGBl. I 1959, p. 565, last amended by Article 42 of the Law of 19 April 2006 I 866) the lawyer is 'the authorised independent adviser and representative in all matters of law'. Under the Code of Conduct for European Lawyers (originally adopted by the Plenary Session of the Council of Bars and Law Societies of Europe on 28 October 1988, and amended by the Plenary Sessions on 28 November 1998 and on 6 December 2002) a lawyer 'must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert'.

26 — Cited above (footnote 13), points 57 to 61.

68. The definition put forward by the then Ombudsman Jacob Södermann, in the absence of a legal definition in primary law, in his 1997 Annual Report to the European Parliament, which has been used since then, states that 'maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it'. It can be inferred from this definition that in principle maladministration should be construed not only as the infringement of binding rules of law, but also any breach of the principles of ordinary administrative practice which are usually classified as part of 'soft law' on account of their non-binding nature. This definition is consistent with Article 195 EC and Article 2(7) of Decision 94/262, which define the Ombudsman's powers vis-à-vis the judicial system and which implicitly assume that the Ombudsman can also deal with matters of law, albeit not exclusively.[27]

69. As difficult as the distinction may be for complainants in a specific case, being unfamiliar with the law, that definition is irrelevant to them in practice, especially since the Ombudsman is required not only to clarify the facts of his own motion with the assistance of the complainant and the body or institution, but also inevitably to examine any points of law that might arise. The Ombudsman thereby takes from the

27 — Chiti, M.P., cited above (footnote 19), p. 314, concludes that the European Ombudsman's powers of review extend to 'unlawful administrative conduct' but also to acts of Community bodies and institutions which are lawful but, because of their nature, may be described as 'unreasonable administrative conduct'.

complainant the burden of having to safeguard his own interests which require protection.

70. In response to the appellant's argument that it is necessary to have recourse to a lawyer in order to uphold the principle of equality of arms because the European Commission uses its Legal Service for its defence, it must be pointed out that, despite the need for a legal examination of the case in question, the Commission's Legal Service does not necessarily play the same role as in proceedings before the Community Courts. For example, it must take account of the fact that, in accordance with the abovementioned provisions, the efforts of the Ombudsman and the Commission in complaint proceedings are intended to lead to an amicable settlement. In addition, not all complaints against the Commission concern matters of law. The Legal Service has the duty of working out an amicable solution and presenting it in an appropriate legal form. [28] In this regard the appellant's right to proceedings based on the rule of law should be regarded as protected.

71. Because of the differences when compared with proceedings before the Community Courts which have been discussed, in particular with regard to the non-judicial and predominantly non-legal nature of complaint proceedings and in view of the special role played by the Ombudsman, recourse to a lawyer is neither prescribed nor necessary in my view.

(b) The non-contractual liability of the Community

72. The independent legal order of the Community is based on the legal traditions of the Member States which are in turn subject to the principle of the rule of law pursuant to Article 6(2) of the Treaty on European Union. The obligation to observe the rule of law is therefore one of the general principles of Community law. The main form taken by that principle is the liability of public authorities, [29] under which compensation is granted in the European Union Member States in the event of unlawful

28 — Eeckhout, J.-C./Godts, P., The European Commission's Internal Procedure for Dealing with the European Ombudsman's Inquiries, *The European Ombudsman — Origins, establishment, evolution, Commemorative volume published on the occasion of the 10th anniversary of the institution*, Chapter 10, p. 176.

29 — See Bogdandy, A., Die außervertragliche Haftung der Europäischen Gemeinschaften, *Juristische Schulung*, 1990, Vol. 1, p. 872; and in: Grabitz/Hilf, Das Recht der Europäischen Union, Art. 288 EGV, paragraph 14 (January 2001 Supplement); Borchardt, Handbuch des EU-Wirtschaftsrechts / Manfred Dauses (ed.), P I. paragraph 221; Ruffert, M., *Kommentar zum EUV/EGV*, 1st edition (1999), Art. 288, paragraph 1, judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 29 and 30.

damage caused by such authorities.[30] The central provision on official liability is the second paragraph of Article 288 EC, under which in the case of non-contractual liability, the Community 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. On the basis of the permission to develop the law, the Court of Justice has developed the characteristics of a specific definition of liability under Community law.[31]

73. The Community's non-contractual liability within the meaning of the second paragraph of Article 288 EC is incurred when three cumulative conditions are satisfied, namely unlawful conduct on the part of the Community, actual and certain damage, and a causal link between the unlawful conduct and the damage alleged.[32] As the law has developed, this basic definition of liability has been clarified in the case-law of the Community Courts[33] to the effect that

30 — In some European Union Member States, the liability of the State for breaches of duty by its organs or servants is laid down in the constitution, e.g. in Article 26 of the Slovenian Constitution, Article 34 of the German Basic Law, Article 9(3) of the Spanish Constitution and Article 7 of the Bulgarian Constitution. Under Article 23(1) of the Austrian Federal Constitutional Law, the Federation, the Länder, the municipalities and the other bodies and institutions established under public law are liable for damage which persons acting on their behalf in execution of the laws have wrongly inflicted on any person by unlawful conduct. That constitutional provision is implemented by ordinary legislation in the form of the Amtshaftungsgesetz (Law on liability of public authorities) (Paragraph 1(1)) and the Organhaftpflichtgesetz (Law on liability of public organs) (Paragraph 1(1)) (with regard to the law on liability of public authorities in some Member States see Ossenbühl, F., *Staatshaftungsrecht*, 5th edition, Munich 1998, p. 10; García de Enterría, E., *La responsabilidad patrimonial del Estado legislador en el Derecho español*, Cizur Menor 2005, p. 71; Schrameyer, K., Die Amtshaftung des bulgarischen Staates, *Osteuropa-Recht*, 51st year (2005), Vol. 2, p. 167; Schwarzenegger, P., *Staatshaftung — Gemeinschaftsrechtliche Vorgaben und ihre Auswirkungen auf nationales Recht*, Vienna 2001, p. 245 et seq.). In some other Member States with a common law legal system, the general rules of tort are applied, for example in the United Kingdom (Fairgrieve, D., *State liability in tort — A comparative law study*, Oxford 2003, p. 16; Gromitsaris A., Die methodologische Herausforderung des Europarechts: Zum Verhältnis von Rechtsdogmatik, Rechtsgeschichte, Rechtsvergleichung und Rechtstheorie am Beispiel des Staatshaftungsrechts, *Theorie des Rechts und der Gesellschaft: Festschrift für Werner Krawietz zum 70. Geburtstag*. 2003, p. 20). In other legal orders, such as the French system, judicially derived principles and/or special laws are applied to determine State liability (Braibant, G./ Stirn, B., *Le droit administratif français*, 6th edition, Paris 2002, p. 315-363).

31 — Lenaerts, K./Arts, D./Maselis, I., *Procedural Law of the European Union*, 2nd edition, London 2006, paragraph 11-001, points out that the Court of Justice regards these general legal principles merely as a source of inspiration with a view to developing an independent system of official liability law for the Community; Schockweiler, F./Wivenes, G./ Godart, J. M., Le régime de la responsabilité extra-contractuelle du fait d'actes juridiques dans la Communauté européenne, *Revue trimestrielle de droit européenne*, January-March 1990, p. 74; Gellermann, M., EUV/EGV, Rudolf Streinz (ed.), Munich 2003, p. 2397, paragraphs 1, 8; Baratta, R., Trattati dell'Unione Europea e della Comunità Europea, Antonio Tizzano (ed.), Milano 2004, p. 1291.

32 — Lenaerts, K./Arts, D./Maselis, I., cited above, paragraph 11-024; Schütz, H.J./Bruha, T./König, D., *Casebook Europarecht*, Munich 2004, p. 377. See Opinion of Advocate General Poiares Maduro in Case C-243/05 P *Agraz and Others* v *Commission* [2006] ECR I-10833, point 1.

33 — Case C-55/90 *Cato* v *Commission* [1992] ECR I-2533, paragraph 18, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*, cited above in footnote 29, Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41 and 42, Case C-312/00 P *Commission* v *Camar and Tico* [2000] ECR I-11355, paragraph 53, Case C-472/00 P *Commission* v *Fresh Marine Company* [2003] ECR I-7541, paragraph 25, Case C-234/02 P *Lamberts* [2004] ECR I-2803, paragraph 49, and Case C-243/05 P *Agraz and Others* v *Commission* (cited in footnote 32), paragraph 26. Lenaerts, K./Arts, D./Maselis, I., cited above (footnote 31), paragraph 11-024, and Schwarzenegger, P., *Staatshaftung — Gemeinschaftsrechtliche Vorgaben und ihre Auswirkungen auf nationales Recht*, Vienna 2001, p. 90 et seq., outline the developments in case-law which have led to the extension of the basic definition of liability.

the action of a body may be regarded as contrary to Community law only if the infringement is sufficiently serious. Consequently, not every infringement of Community law gives rise to liability under the second paragraph of Article 288 EC.[34]

74. If one of the criteria in the definition of liability is not met, 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.[35]

75. The legal concept of 'damage' covers both a material loss *stricto senso*, that is to say, a reduction in a person's assets, and also the loss of an increase in those assets which would have occurred if the harmful act had not taken place. The object of compensation is to restore the assets of the victim to the condition in which they would have been apart from the unlawful act, or at least to the condition closest to that which would have been produced if the unlawful act had not taken place. These general remarks are not limited to the field of private law, but apply also to the liability of public authorities, and more especially to the non-contractual liability of the Community.[36]

76. From a purely formal perspective, and without examining the aspects of causality which remain to be considered more closely and the question of legal attribution, the loss of assets suffered by the appellant in the complaint proceedings before the Ombudsman in the form of lawyers' fees could objectively satisfy the requirements of a natural reduction in a person's assets. However, another question is whether, in the light of Community law, and procedural law in particular, such a loss of assets can be regarded as damage for the purposes of the law on liability. Given that the appellant's claim clearly runs counter to the Community's law on costs, I have reservations about according it a substantive claim, by way of the law on compensation for damage, which ultimately pursues the same aim.

34 — Rather, in connection with liability on grounds of administrative misconduct, the primary or secondary Community legislation infringed may not seek exclusively to protect the public, but must — at least partly — serve the interests of the applicant. See Case C-352/98 P *Bergaderm and Goupil* v *Commission*, cited above in footnote 33, paragraph 42. Koenig, C./Pechstein, M./Sander, C., *EU-/EG-Prozessrecht*, 2nd edition, Tübingen 2002, paragraph 727, refer to the liability-limiting function of that requirement; Lenaerts, K./Arts, D./Maselis, I., cited above (footnote 31), paragraph 11-037, recognise in that criterion an expression of the '*Schutznormtheorie*' developed in the German legal order, which can now also be found in the legal orders of many other European Union Member States, such as Denmark, Greece, Italy, Portugal and the Netherlands (paragraph 11-037). With regard to the criterion of a sufficiently serious breach, such a breach exists in their view where the *Community institution concerned has manifestly and gravely disregarded the limits on its discretion* (paragraph 11-039).

35 — Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 65.

36 — Opinion of Advocate General Capotorti in Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, at 2998 and 2999.

77. As has already been argued, Community procedural law grants a right to compensation which covers only fairly specific costs which are generally connected with the performance of procedural acts. The procedural claim for the recovery of costs thus includes an assessment by the legislature which should be understood as a limit on attribution to the effect that the protection of rights at a pre-litigation stage is the responsibility of the party itself. It is therefore possible to infer from the rules of procedural law that a party has a duty itself to bear the extra-judicial costs of protecting its rights. That is the risk inherent in bringing proceedings which the party must take.

78. In my opinion, recognising an excessive (substantive) claim for the recovery of costs based on Community liability law which goes further in its scope than what a party is offered by way of compensation under procedural law runs the risk of undermining the assessment made by the legislature which underlies the law on costs. An action based on the Community's non-contractual liability for compensation in respect of costs which are not recoverable *de lege lata* can only have the effect of circumventing the applicable provisions. [37]

79. In paragraph 50 of its order, the Court of First Instance therefore correctly addressed the law on costs and rejected a procedural claim for reimbursement of lawyers' fees on that basis with reference to case-law and

37 — Under Paragraph 91 of the German Zivilprozessordnung (Code of Civil Procedure — ZPO as amended by the notice of 5 December 2005 (BGBl. I p. 3202), last amended by the Law of 22 December 2006 (BGBl. I p. 3416)), the losing party must bear the costs of the proceedings, and in particular reimburse the costs incurred by the opposing party in so far as they were necessary for the purposes of duly enforcing or defending the party's rights. The legal fees and expenses of the successful party's lawyer must be reimbursed in all proceedings; however, the travel costs of a lawyer who is not admitted to practice in the court hearing the case and who does not reside within the jurisdiction of that court are to be reimbursed only in so far as recourse to the lawyer was necessary for the purposes of duly enforcing or defending the party's rights. As in Community procedural law, lawyers' fees are reimbursed in so far as they are 'necessary'. Pre-litigation measures are in principle not required to be reimbursed, as is made clear by the notion of 'legal dispute', which covers the entire proceedings from bringing an action or lodging an application to serving the judgment or other decision terminating the proceedings. According to the consistent case-law of the Bundesgerichtshof (German Federal Court of Justice), in addition to this procedural claim for the recovery of costs there is also an independent substantive claim, which can overlap with or extend further than the first claim in the sense that exceptionally it also extends to costs incurred at a pre-litigation stage, including lawyers' fees. The latter claim can be made in so far as recourse to a lawyer was necessary in the case. Behind that case-law lies a general legal conviction that the party causing the damage does not as such have to reimburse all the costs of bringing an action duly incurred by the party which has suffered the damage, but only those costs which were necessary and appropriate from the point of view of the party which has suffered the damage in order to protect his rights, in particular with a view to eliminating the damage (Sammlung zivilrechtlicher Entscheidungen des Bundesgerichtshofs, Vol. 127, p. 350). The criterion used for the point of view of the party which has suffered damage is the perspective of a prudent, economically minded person (Sammlung zivilrechtlicher Entscheidungen des Bundesgerichtshofs (BGHZ), Vol. 111, p. 178). The position taken by the Bundesgerichtshof is based on an accepted view which assumes that the efforts taken to protect rights at an extra-judicial stage are in principle the responsibility of the party itself (BGHZ, Vol. 66, p. 114). Accordingly, recourse to a lawyer in simple cases is unnecessary and the associated expenditure can therefore be regarded as irrecoverable. However, lack of business experience on the part of one of the parties or illness may lead to a different assessment.

then pointed out, in paragraph 51, the inconsistency that would arise if a claim for damages identical in scope were recognised.

80. The Court of First Instance's remarks on the nature of the complaint proceedings before the Ombudsman are justified by the effort to make clear the differences between those proceedings and proceedings before the Community Courts. They seek to make clear that complaints are not preliminary proceedings which form part of the judicial proceedings. When the Court of First Instance also draws attention to the fact that the complaint proceedings are designed in such a way that legal representation is not necessary, it is once again raising the criterion of necessity under the law on costs.

81. This indicates that the Court of First Instance correctly understood the problems surrounding the conflict between a procedural and a substantive claim for recovery of costs and, by rejecting the latter, found a solution consistent with the presumed intention of the legislature which takes account of the coherence of Community law. Since the Court of First Instance did not commit an error of law, the first plea should be rejected.

2. Second plea in law: Misunderstanding of the case-law of the Community Courts

(a) The *Herpels* judgment [38]

82. The same arguments can be used to counter the appellant's objection to the reference by the Court of First Instance to the *Herpels* judgment. Going beyond its relevance in terms of the Staff Regulations, it is possible to draw from that decision criteria which could offer a solution to the present case. In paragraphs 45 and 49 that decision refers to the pre-litigation stage of the procedure which is governed by Article 90 of the Staff Regulations, for which no specific form is prescribed, and certainly no legal duty on the part of staff to be represented by a lawyer. It is conceivable that the Court of First Instance attempted to draw a parallel here with complaint proceedings before the Ombudsman which, as has already been stated, do not require any legal representation.

83. Because there is no requirement for legal representation in pre-litigation proceedings, the Court of First Instance evidently takes the view that the appellant is responsible for its own decision. Thus there is a clear attempt to introduce into the definition of liability under Community law an attribution

38 — Cited in footnote 6 above.

element which has already been discussed in connection with the law on costs and which will be examined more closely in order to gain a better understanding in connection with causality.

(b) The judgment in *AFCon Management Consultants and Others* v *Commission* [39]

84. In so far as the appellant considers that it can infer legal consequences for the pending case from the judgment in *AFCon Management Consultants and Others* v *Commission*, it must be pointed out that that judgment cannot require either the Court of First Instance or the Court of Justice to adopt a particular interpretation of Community law. As autonomous judicial bodies in the institutional system of the European Union, they are bound by the law alone. This follows from Article 220 EC, under which the Community Courts, each within its jurisdiction, are to ensure that in the interpretation and application of the Treaty the law is observed. The term 'law' within the meaning of that provision covers all binding written and unwritten rules of Community and Union law. These include, in addition to primary and secondary legislation, general legal principles and custom. [40] However, the sources of Community law do not include the judgments of the Community Courts. Judgments are an expression of the interpretation which the Community Courts give to the law, but they should not be confused with the law itself. [41]

85. The binding authority of precedent is not an inherent feature of the Union's judicial system. [42] Although, in the interest of legal certainty and the uniform interpretation of Community law, the Community Courts endeavour in principle to give a coherent interpretation to the law, the general structure of both the Community legal order and the judicial system means that the Community Courts are not bound by their previous decisions. Historically, this can be explained by the fact that the Community was originally founded by States belonging to the family of continental European civil law systems, with the result that the supranational legal order thereby created has similar characteristics. [43] Another reason is the fact that the Court of Justice was

39 — Case T-160/03 *AFCon Management Consultants and Others* v *Commission* [2005] ECR II-981. The Court of First Instance granted the applicants compensation for the damage they had suffered in connection with a tender procedure on the ground of an unlawful decision of the Commission. The applicants had claimed compensation for damage corresponding to the losses sustained by them as a result of their taking part in the tender procedure. This covered the costs which AFCon incurred to no effect when it submitted its tender and the costs relating to the complaints made to the Commission and the Ombudsman. The Court regarded the lawyers' fees in the complaint proceedings as part of the costs of challenging the legality of the tender procedure.

40 — Rengeling, H.-W./Middeke, A./Gellermann, M., *Handbuch des Rechtsschutzes in der Europäischen Union*, Munich 2003, paragraph 4, p. 38.

41 — See Arnull, A., *Interpretation and Precedent in European Community Law*, European Community Law in the English Courts (ed. Andenas, M./Jacobs, F.), Oxford 1998, p. 130.

42 — Arnull, A., cited above, p. 126; Arnull, A., Owning up to fallibility: precedent and the Court of Justice, *Common Market Law Review*, Vol. 30, 1993, p. 248.

43 — Stone Sweet, A./McCown, M., *Discretion and Precedent in European Law*, Judicial Discretion in European Perspective (ed. Ola Wiklund), Stockholm 2003, p. 109.

originally set up as a court of first and last instance before a further judicial body was added by the Council decision establishing a Court of First Instance.[44] Accepting the binding authority of precedent along common law lines would have been inappropriate in so far as it would have been possible to alter judgments having the force of *res judicata* only by amending the founding treaties. Against the background of the associated constitutional obstacles in the Member States, the Court of Justice had to be put in a position to depart from its previous case-law if necessary and to steer developing Community law in a different direction.[45]

86. These principles also apply to the subsequently created Court of First Instance. Thus, the Court of First Instance cannot be barred from distancing itself from an earlier decision.[46] This is self-evident, since otherwise, if it were bound strictly by an earlier judgment, an appeal to the Court of Justice would be redundant. If, as in the present case, a departure from the case-law of the Court of First Instance is a possibility, this can only be interpreted as a call to the Court of Justice to take a binding and final decision on a point of law that requires clarification.

87. On those grounds a plea in law cannot be based on a departure by the Court of First Instance from an earlier judgment alone. The second plea in law must therefore also be rejected.

3. Third plea in law: Causal link

88. It is settled case-law that only a direct link of cause and effect between the allegedly unlawful conduct of the institution con-

44 — Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1, and OJ 1989 L 241). The Court of First Instance was given a new status enshrined in primary law with the revision of Articles 220, 224, 225 and 225a EC by the Treaty of Nice.

45 — Colneric, N., Auslegung des Gemeinschaftsrechts und gemeinschaftsrechtskonforme Auslegung, *Zeitschrift für europäisches Privatrecht*, 13th year (2005), Vol. 2, p. 229, refers to the Court of Justice's practice of citing its previous case-law in the interest of legal certainty and uniform application of the law. In her view, it is nevertheless inevitable that the Court of Justice occasionally has to make corrections to its own case-law. However, that step is taken only if there are pressing reasons to do so. Nowadays the Court of Justice takes care to highlight clearly any changes to its case-law. Arnull, A., cited above (footnote 42), p. 126; Arnull, A., Owning up to fallibility: precedent and the Court of Justice, cited above (footnote 43), p. 248. Barceló, J., *Precedent in European Community Law, Interpreting precedents — A comparative study* (ed. MacCormick, N./ Summers, R.), Vermont 1997, p. 420, points out that there is broad consensus in legal literature on the fact that the Court of Justice is not bound by its own decisions. It often mentions its earlier decisions, but is not legally obliged to do so.

46 — According to Arnull, A., Owning up to fallibility: precedent and the Court of Justice, cited above (footnote 45), p. 262, there can be no doubt that the Court of First Instance is not bound by its earlier decisions. This also applies to decisions which have been confirmed by the Court of Justice. There is no written rule laying down such binding authority and it would be surprising if a court whose members came predominantly from civil law legal systems were to consider themselves bound to follow a decision which they thought would not lead to the right outcome in a specific case.

cerned and the damage pleaded can give grounds for non-contractual liability on the part of the Community under the second paragraph of Article 288 EC. The burden of proof for establishing the existence of such a causal link rests on the appellant.[47]

89. In so far as the appellant relies on a serious infringement of law, it is not possible to deny such an infringement. In its now final judgment of 18 September 2003, the Court of First Instance ruled that the Commission breached its duty to decide fairly and objectively on the applications for co-financing of projects from 1996 and 1997 by failing to examine whether the appellant satisfied the required conditions for eligibility.[48] Instead, the Commission continued to rely on the information which it had previously obtained from third-party sources regarding the appellant's activity without giving it an opportunity for a formal hearing. The European Ombudsman had previously condemned the failure to observe the applicant's right to be heard as an instance of maladministration.[49] It is therefore clear that the proceedings before the Ombudsman and the Court of First Instance were a consequence of the unlawful conduct of the Commission.

90. Only actions which general experience shows are typically capable of causing damage like that which has occurred may be regarded as causal. That is not the case where the occurrence of damage as a consequence of the action was entirely improbable because it was remote from any experience. The misconduct on the part of the body in question must be the direct and in particular the determining cause of that damage,[50] which means that remote consequences may not be attributed to the Community.[51]

91. General experience indicates that there is no causal link between an unlawful act by the Community body and damage where the person concerned has himself contributed to

47 — Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211, paragraphs 51 to 56, Case 310/81 *Ente Italiano di Servizio Sociale* v *Commission* [1984] ECR 1341, paragraphs 16 and 17, order of the Court of First Instance in Case T-346/03 *Krikorian and Others* v *Parliament, Council and Commission* [2003] ECR II-6037, paragraph 23.

48 — Case T-321/01 *Internationaler Hilfsfonds* v *Commission* [2003] ECR II-3225, paragraph 61.

49 — Case T-321/01 *Internationaler Hilfsfonds* v *Commission* [2003] ECR II-3225, paragraph 13.

50 — Orders of the Court of First Instance in Case T-614/97 *Aduanas Pujol Rubio and Others* v *Council and Commission* [2000] ECR II-2387, paragraph 19, Joined Cases T-611/97, T-619/97 and T-627/97 *Transfluvia and Others* v *Council and Commission* [2000] ECR II-2405, paragraph 17, and Case T-201/99 *Royal Olympic Cruises and Others* v *Council and Commission* [2000] ECR II-4005, paragraph 26, confirmed on appeal by the order of the Court of Justice in Case C-49/01 P *Royal Olympic Cruises and Others* v *Council and Commission*, not published in the ECR. Ruffert, M., *Kommentar zum EUV/EGV*, 1st edition (1999), Art. 288, paragraph 20.

51 — Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091, paragraph 19 et seq., Joined Cases 169/83 and 136/84 *Leussink-Brummelhuis* v *Commission* [1986] ECR 2801, paragraph 22, and Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 43.

the occurrence of the damage. [52] That person has a duty to take all steps available to him in order to avert or reduce damage. Only damage which could be caused to a prudent person is recoverable. [53] If the person concerned does not exercise the necessary care, the Community is either not liable or is liable only in part for the damage suffered. [54]

92. In the present case the appellant pursued the complaint proceedings before the Ombudsman and had recourse to legal representation even though, as has been seen, such representation was neither legally obligatory nor necessary. That step was therefore based on a voluntary decision for whose consequences the Community cannot be made liable retroactively. In the judgment in *Herpels*, to which the Court of First Instance also refers in its order, the Court of Justice clearly makes the same basic assumption when it states that although it is not possible to prohibit the seeking of legal advice by those concerned at the pre-litigation stage, it is their own decision and the institution concerned cannot be held liable for the consequences. In *Herpels* the Court of Justice concluded that in such a case there is in law no causal link between the alleged damage and the action of the Commission. [55]

93. The Community legal order and the legal orders of its Member States are based on the idea of freedom and individual responsibility. A common factor is that they leave individuals to decide how best to safeguard their interests which require protection. A consequence of that freedom to safeguard one's own rights is the dispositive principle as the procedural corollary of private autonomy under substantive law. That principle, which is also recognised in European Union procedural law, states that it is for the parties alone to initiate and

52 — Case T-28/03 *Holcim* v *Commission* [2005] ECR II-1357, paragraph 123, Case 26/81 *Oleifici Mediterranei* v *European Economic Community* [1982] ECR 3057, paragraph 24, and Case 169/73 *Compagnie Continentale* [1975] ECR 117, paragraph 22 et seq. Several authors point out that the causal link between an unlawful act of a Community body and damage sustained as a result of (negligent) conduct by the party suffering the damage can be broken wholly or in part. A causal link must be rejected above all in cases where the damage is caused at least partly through lack of attention and insufficient foresight having regard to the available information, through calculation errors, or generally through imprudence and mismanagement on the part of the market operator. This conclusion is based on the consideration that an economic risk that is intentionally taken cannot, if it materialises, be passed on automatically to the Community (see Toth, A. G., *The concepts of damage and causality as elements of non-contractual liability*, The Action for Damages in Community Law, The Hague 1997, p. 193. Arnull, A./Dashwood, A./Dougan, M./Ross, M./Spaventa, E./ Wyatt, D., *Wyatt and Dashwood's European Union law*, 4th edition, London 2000, p. 496; Craig, P./De Búrca, G., EU law: Text, Cases, and Materials, 3rd edition, p. 569; Gellermann, M., *EUV/EGV* / Rudolf Streinz (ed.), Munich 2003, p. 2397, paragraph 27; Berg W., *EU-Kommentar*/Jürgen Schwarze (ed.), Baden-Baden 2000, p. 2299, paragraph 64; Gilsdorf, P./Niejahr, *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, Baden-Baden 2004, Art. 288 EG, paragraphs 76 and 81; Bieber, R./Epiney, A./Haag, M., *Die Europäische Union — Europarecht und Politik*, 6th edition, Baden-Baden 2004, paragraphs 119 and 120, Lenaerts, K./Arts D./ Maselis, I., cited above (footnote 31), paragraph 11-059; Baratta, R., *Trattati dell'Unione Europea e della Comunità Europea*, Antonio Tizzano (ed.), Milano 2004, p. 1293; Borchardt, *Handbuch des EU-Wirtschaftsrechts*/Manfred Dauses (ed.), P. I. paragraph 255).

53 — Case 36/62 *Société des Aciéries du Temple* v *High Authority* [1963] ECR 289, at 296.

54 — Joined Cases 14/60, 16/60, 17/60, 20/60, 24/60, 26/60, 27/60 and 1/61 *Meroni and Others* v *High Authority* [1961] ECR 133, Case 4/67 *Muller* v *Commission* [1967] ECR 365, Case 169/73 *Compagnie Continentale* v *Council* [1975] ECR 117, paragraphs 22 and 23; Case T-572/93 *Odigitria* v *Council and Commission* [1993] ECR II-2025, and Case T-514/93 *Cobrecaf* v *Commission* [1995] ECR II-621. See Toth, A.G., *The concepts of damage and causality as elements of non-contractual liability*, The Action for Damages in Community Law, The Hague 1997, p. 195.

55 — Case 54/77 *Herpels* v *Commission*, cited above in footnote 6, paragraphs 45 to 49.

terminate proceedings and to change their subject-matter.[56] That freedom must apply a fortiori at a pre-litigation stage.

94. The Community legal order gives citizens the option to decide whether to seek a remedy in the Community Courts or to submit complaints to the Ombudsman. In principle citizens are expected to ascertain in advance the special features of each type of proceedings, such as the need for legal representation and to take due account of them. Consequently citizens must themselves be responsible for the consequences of any breach of that duty to exercise proper care. The crucial factor in choosing appropriate proceedings is always the goal pursued. If citizens are seeking a legally binding obligation to be imposed on a Community institution, they will have to seek legal protection from the Community Courts.[57] On the other hand, the main purpose of the procedure before the Ombudsman is to give citizens the possibility of a remedy in cases where judicial proceedings are not available or would not produce an appropriate result. The Ombudsman procedure therefore supplements legal protection proper.[58]

95. There is therefore no causal link between the action of the Commission and the expenditure incurred by the appellant in the form of lawyers' fees in respect of the proceedings before the Ombudsman. Rather, taking a normative approach, it should be attributed to the appellant. The Court of First Instance was thus right to refuse to recognise a causal link. The third plea in law must therefore also be rejected.

96. This conclusion at the end of my analysis of the law on liability is consistent with the Community's procedural law and law on costs and, in my view, is the only reasonable solution in this case having regard to the principle of the unity of the Community legal order. From an institutional point of view too, to allow damages would lead to the circumvention of important rules, since it could encourage citizens to pursue complaint proceedings before the Ombudsman before having recourse to the Community Courts in order to take advantage of an additional level of review. They would not run any risk regarding costs since they could claim back the lawyers' fees, which are normally not recoverable, by way of a claim

56 — Lennarz, T., *Die Rechtsprechung des Europäischen Gerichtshofs und des Gerichts erster Instanz zu prozessualen Fragen des Verfügungsgrundsatzes und der Fristen*, Frankfurt am Main 2004, p. 21.

57 — Diamandouros, N., Reflections on the Future Role of the Ombudsman in a Changing Europe, *The European Ombudsman — Origins, establishment, evolution, Commemorative volume published on the occasion of the 10th anniversary of the institution*, Chapter 14: *'The right to seek a judicial remedy is fundamental and wherever the rule of law exists, the courts are its most essential guarantors. Where ombudsmen also exist, citizens can choose the non-judicial ombudsman remedy as an alternative to going to court. It is important to underline that this does not involve duplication of roles, nor the possibility of inconsistent interpretation and application of the law, primarily because the decisions and recommendations of ombudsmen are not legally binding'* (p. 236).

58 — Opinion of Advocate General Geelhoed in Case C-234/02 P *Lamberts*, cited in footnote 13 above, point 65.

for damages on the basis of liability for public authorities. Those complaint proceedings would therefore develop into a kind of preliminary procedure taking place before the matter was brought before the Community Courts, which cannot be the intention of the Union legislature.

B — *Result of my analysis*

97. In the light of the above, I conclude that the Court of First Instance was right to dismiss as manifestly unfounded the action for damages brought against the Community by Internationaler Hilfsfonds e.V. The appeal should therefore be dismissed.

V — Costs

98. Pursuant to Article 122 of its Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which apply to appeals pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for an order for costs against the appellant and since its appeal has been unsuccessful, it must be ordered to pay the costs of these proceedings.

VI — Conclusion

99. I propose that the Court:

— dismiss the appeal;

— order Internationaler Hilfsfonds e.V. to pay the costs.