ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
11 July 2005 *

In Case T-294/04,

Internationaler Hilfsfonds eV, established in Rosbach (Germany), represented by H. Kaltenecker, lawyer,

applicant,

v

Commission of the European Communities, represented by M.-J. Jonczy and S. Fries, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for compensation for damage alleged to have been suffered comprising the lawyers' fees incurred in three sets of proceedings before the European Ombudsman,

* Language of the case: German.

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

composed of M. Jaeger, President, J. Azizi and E. Cremona, Judges,

Registrar: H. Jung,

makes the following

Order

Legal context

1 The second paragraph of Article 288 EC provides as follows:

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

2 Under the second paragraph of Article 21 EC, every citizen of the Union may apply to the European Ombudsman established in accordance with Article 195 EC.

3 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.'

4 On 9 March 1994, pursuant to Article 195(4) EC, the Parliament adopted Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ 1994 L 113, p. 15).

5 Under Article 2(6) of Decision 94/262, complaints submitted to the Ombudsman are not to 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 terminate consideration of it, the outcome of any enquiries he has carried out up to that point are to be filed without further action.

Facts

6 The applicant is a non-governmental organisation (NGO) governed by German law which provides support to refugees and to victims of war and catastrophe. Between 1993 and 1997 it submitted six applications for the co-financing of projects to the Commission.

7 When the Commission services considered the initial applications, they concluded that the applicant was not eligible for aid granted to NGOs as it did not satisfy the general conditions for the co-financing of projects. The applicant 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 applicant could not be regarded as an eligible NGO.

8 On 5 December 1996, the applicant 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 applicant was ineligible remained valid.

9 The applicant 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 applicant's requests fairly and objectively.

10 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 applicant was incomplete, that the Commission had held back certain documents without cause and that, consequently, the Commission's conduct could constitute 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 applicant 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 applicant.

11 As regards fair and objective consideration of the 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 applicant was ineligible. Lastly, with regard to the fact that the Commission had failed to take a formal decision on the applications submitted by the applicant 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.

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

13 By application lodged on 15 December 2001, the applicant brought an action against the letter of 16 October 2001. In its judgment in Case T-321/01 *Internationaler Hilfsfonds* v *Commission* [2003] ECR II-3225, the Court of First Instance annulled the Commission's decision of 16 October 2001 refusing the applications for co-financing made by the applicant in December 1996 and September 1997 and ordered the defendant to pay the costs.

14 In its application, the applicant 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.

Procedure and forms of order sought by the parties

15 By application lodged on 23 July 2004, the applicant brought the present action.

16 The applicant contends that the Court should:

— order the defendant to pay the applicant EUR 54 037 on account of material damage suffered;

— order the defendant to pay the costs.

17 The defendant contends that the Court should:

— dismiss the application as inadmissible and/or unfounded;

— order the applicant to pay the costs.

Law

18 Under Article 111 of the Rules of Procedure, where it is clear that the Court of First Instance has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible or manifestly lacking any foundation in law, the Court of First Instance may, without taking further steps in the proceedings, give a decision on the action by way of reasoned order.

19 In the present case, the Court of First Instance considers that the documents on the file shed sufficient light on the case to enable it to give a decision on the action without taking further steps in the proceedings.

Admissibility

Arguments of the parties

20 The defendant points out that it has repeatedly been held that, in order to satisfy the requirements of Article 44(1)(c) of the Rules of Procedure, an application seeking

compensation for damage allegedly caused by a Community institution on the basis of the Community's non-contractual liability must set out the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons for which the applicant considers there to be a causal link between that conduct and the damage it claims to have suffered, and the nature and extent of that damage (Joined Cases T-215/01, T-220/01 and T-221/01 *Calberson GE* v *Commission* [2004] ECR II-587, paragraph 176).

21 The defendant states that, in spite of having read the application several times, it has failed to identify the wrongful conduct alleged against it. It adds that the emphasis the applicant places on the Ombudsman's decisions and the fact that the applicant quotes widely from these in its application led it to conclude that the applicant regards the defendant's conduct referred to in these decisions as unlawful in any event. It submits that it is not for it to unravel the tangle of accusations and extract those which are relevant in order to establish unlawful conduct on its part that is capable of giving rise to liability on the part of the Community.

22 The applicant considers that the application satisfies all the requirements of Article 44(1)(c) of the Rules of Procedure.

Findings of the Court

23 It should be noted that, under the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to the Court of First Instance by virtue of the first paragraph of Article 53 of that Statute, and under Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, all applications must contain the subject-matter of the dispute and a brief statement of the pleas in law on which the

application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and sound administration of justice, it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order of 28 April 1993 in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20 and judgment of the Court of First Instance in Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 29).

24 In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage (*Dubois et Fils* v *Council and Commission*, cited above at paragraph 23, paragraph 30).

25 In the present case, it should be noted from the outset that the applicant's written pleadings are not clear. There cannot, however, be any doubt that the action seeks to establish the Community's non-contractual liability in order to obtain compensation for the damage alleged to have been suffered, namely the lawyers' fees incurred by the applicant in the three sets of proceedings before the Ombudsman.

26 It should then be pointed out that it is also possible to identify in the application two categories of allegedly wrongful conduct on the part of the defendant which, according to the applicant, caused it the alleged damage, namely the conduct which was the subject of the Ombudsman's criticisms and the conduct held to be unlawful by the Court of First Instance in its judgment in *Internationaler Hilfsfonds* v *Commission*, referred to at paragraph 13 above. More specifically, the first category of conduct at issue relates to the fact that the list of documents provided by the defendant was incomplete, that the defendant was not given a formal hearing on the information received by the defendant from third parties, and the fact that the

defendant allowed an excessively long period of time to elapse before explaining, by letter of 29 July 1996, the principal reasons which had led it, in 1993, to conclude that the applicant was ineligible. The second category relates to the failure to reconsider the applicant's eligibility in the context of its applications for co-financing submitted in 1996 and 1997. It must, however, be pointed out that the defendant put forward a defence to each of those categories of wrongful conduct alleged.

27 Further, the applicant states expressly that there is a direct causal link between the damage alleged and the various instances of the Commission's wrongful conduct complained of. It states that since it was lacking essential knowledge of the law and given the defendant's uncooperative and even, at times, obstructive conduct, it considered that it had no option but to take legal advice if it was to bring the complaint proceedings it had initiated before the Ombudsman to a successful conclusion and obtain a reply from the defendant to the numerous requests it had submitted to it on many occasions during the previous years.

28 Lastly, it is also possible to identify in the application the extent of the damage allegedly caused by the conduct of the defendant complained of. In this regard, the applicant claims that the lawyers' fees it incurred in the proceedings before the Ombudsman amount to a total of EUR 54 037.

29 It is clear from the foregoing that the application satisfies the requirements of clarity and precision under Article 44(1)(c) of the Rules of Procedure.

30 Consequently, the defendant's plea of inadmissibility must be dismissed.

Merits

Arguments of the parties

31 The applicant points out that what it is expecting to achieve from this action is the delivery of a judgment laying down the principle that it is possible, by means of an action for damages, to obtain reimbursement of lawyers' fees legitimately incurred in complaint proceedings before the Ombudsman.

32 It notes that an action for damages must seek compensation for damage arising out of acts of the Community institutions, their failure to adopt one or more acts, or their unlawful conduct. In this case there was serious negligence, consisting of the failure to adopt legal acts, together with unlawful conduct such as the failure to give the applicant a hearing, the compiling of an incomplete list of documents, the failure to give consideration to carrying out an audit procedure, defamatory claims of fraudulent conduct or the incorrect assessment that was made of the applicant's position and of its eligibility for the co-financing of NGO operations. That unlawful conduct on the part of the defendant constitutes various forms of infringement of the many principles of sound administration which are regarded as rules offering sufficient protection for the purposes of the second paragraph of Article 288 EC.

33 The applicant maintains that if the defendant had not conducted itself in an unlawful manner, it would not have been obliged to instigate the various complaint proceedings after taking legal advice, and thus the damage, namely, the payment of lawyers' fees, would not have arisen. A causal link is thus established between the wrongful acts of the defendant and the damage that occurred.

34 It places emphasis on the fact that an action for damages is an independent right of action and on its right to bring an action in non-contractual liability on the basis of the proceedings before the Ombudsman. Lastly, it maintains that the defendant's wrongful conduct was continuous and therefore open to challenge by way of an action for damages since the five year time-limit for bringing such an action has not yet expired.

35 The defendant contends that the action is manifestly unfounded.

36 It points out, firstly, that lawyers' fees relating to proceedings before the Ombudsman are never recoverable. In contrast to proceedings before the Community courts, proceedings before the Ombudsman are actually designed in such a way as to make legal representation unnecessary. Implicit in the individual's freedom to choose to be legally represented in the proceedings before the Ombudsman is the obligation to bear the costs thus incurred personally. According to the defendant, it is precisely because of this lack of freedom of choice in proceedings before the Community courts, in which legal representation is obligatory, that judicial proceedings entail a decision on costs which includes lawyers' fees.

37 The defendant adds that, whilst the applicant is free to apply only to the Ombudsman or, in any event, to apply to the Ombudsman before bringing proceedings before the Court of First Instance, it cannot however freely give rise to expenditure that is neither obligatory nor necessary to be borne by the defendant.

38 Secondly, the defendant argues that the applicant has failed to establish that the conditions conferring entitlement to compensation have been met in the present case.

39 With regard to the first two conditions, namely the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals, the defendant submits that it is the applicant's view that it is sufficient to refer to the Ombudsman's decisions. However, the Ombudsman's decisions are subject to their own conditions, which are not the same as those that must be met in order to found a right to compensation. A critical comment or a finding of abuse by the Ombudsman cannot simply be treated as a sufficiently serious breach of a rule of law, such as the principle of sound administration. The Ombudsman's decisions are not therefore binding on the Court of First Instance and do not relieve it of its obligation to consider whether the conditions in question have been met. This approach is confirmed by the order of the President of the Court of First Instance in Case T-193/04 R *Tillack* v *Commission* [2004] (ECR II-3575, paragraph 60).

40 As regards the third condition, namely that there must be a causal link between the wrongful conduct and the damage alleged, the defendant observes that the applicant does no more than assert that there is a direct causal link. The defendant adds that it is not for it to establish that the conditions have been met and, as the applicant has failed to fulfil its obligation in this respect, the action must be dismissed as manifestly unfounded.

41 In the alternative, the defendant submits that the Ombudsman's complaints focused on three issues, namely the circumstances in which the decision was taken in 1993 that the applicant was ineligible, access to the file, and the applications submitted by the applicant in 1996 and 1997 on which no decision was taken.

42 With regard to the circumstances in which the decision was taken in 1993 that the applicant was ineligible, the defendant points out that under Article 46 of the Statute of the Court of Justice, proceedings against the Community in matters arising from non-contractual liability are barred after a period of five years from the occurrence

of the event giving rise thereto. Since the applicant failed to bring an action within five years of the date when the decision was taken and assert its claim in respect of the alleged damage before the competent institution, any right to claim compensation is time-barred.

43 With regard to access to the file, the defendant states that this was given in February 1998 and thus also falls outside the five-year time-limit. Since 1998 the applicant has brought no action in this regard either and has failed to assert its claim before the Community institutions; therefore, it must also be regarded as time-barred. Moreover, there was no serious breach of a rule of law.

44 As to the fact that no decision was taken on the applications submitted in 1996 and 1997, the defendant considers that any claims thereby arising are also time-barred. Since it submitted its applications, the applicant has failed to bring an action for failure to act or for damages. It cannot therefore now assert a claim in respect of damage which would not have occurred had it had recourse to those legal remedies.

45 As regards the conduct that was held to be unlawful by the Court of First Instance in its judgment in *Internationaler Hilfsfonds* v *Commission,* cited at paragraph 13 above, the defendant submits that the question of whether such a breach is sufficiently serious as to found a claim for compensation does not need to be resolved since there was not in any event a causal link with the expenses claimed, and this is so in two respects. Firstly, the lawyers' fees claimed relate to proceedings which took place before the judgment was delivered. Secondly, there is no causal link.

Findings of the Court

46 The first point to be noted is that the purpose of the applicant's action is to obtain compensation from the Community for lawyers' fees incurred in three sets of proceedings before the Ombudsman.

47 It should then be noted that in the institution of the Ombudsman, the Treaty has given citizens of the Union an alternative remedy to that of an action before the Community Court 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 (Case T-209/00 *Lamberts* v *Ombudsman* [2002] ECR II-2203, paragraph 65).

48 Moreover, as is clear from Article 195(1) EC and Article 2(6) and (7) of Decision 94/262, the two remedies cannot be pursued at the same time. Indeed, although complaints submitted to the Ombudsman do not affect time-limits for appeals to the Community Court, the Ombudsman must nonetheless terminate consideration of a complaint and declare it inadmissible if the citizen simultaneously brings an appeal before the Community Court based on the same facts. It is therefore for the citizen to decide which of the two available remedies is likely to serve his interests best (*Lamberts* v *Ombudsman*, cited in paragraph 47 above, paragraph 66).

49 In its judgment in *Internationaler Hilfsfonds* v *Commission*, cited in paragraph 13 above, the Court of First Instance annulled the Commission's decision of 16 October 2001 refusing the applications for co-financing made by the applicant in December 1996 and September 1997 and ordered the defendant to pay the costs. In that action, the applicant had also claimed that the defendant should reimburse the costs of the proceedings before the Ombudsman. In its judgment, the Court of First Instance held that costs relating to proceedings before the Ombudsman cannot be regarded as expenses necessarily within the meaning of Article 91(b) of the Rules of Procedure and are therefore not recoverable.

50 Under Article 91(b) of the Rules of Procedure, 'expenses necessarily incurred by the parties for the purposes of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers' are to be regarded as recoverable costs. It follows from that provision that recoverable costs are limited, first, to those incurred for the purposes of proceedings before the Court of First Instance and, second, to those necessary for those purposes (see order in Case T-80/97 DEP *Starway* v *Council* [2002] ECR II-1, paragraph 24, and the case-law cited). Further, the Court of First Instance has held that even though, as a rule, substantial legal work is carried out in the course of the proceedings preceding the judicial phase, by 'proceedings' Article 91 of the Rules of Procedure refers only to proceedings before the Court of First Instance, to the exclusion of any prior stage. That follows in particular from Article 90 of the Rules of Procedure, which refers to 'proceedings before the Court of First Instance' (see order in Case T-38/95 DEP *Groupe Origny* v *Commission* [2002] ECR II-217, paragraph 29, and the case-law cited).

51 In the present case, the applicant is seeking to recover by means of a claim for damages the very same lawyers' fees it incurred in the proceedings before the Ombudsman. In this regard, it must be pointed out that to admit such expenditure as allowable by way of damages would be contrary to the case-law of the Court of First Instance that such expenditure is not recoverable by way of costs.

52 Indeed, it should be noted 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.

53 Further, it should be noted that the Court of Justice has held 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 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 has 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 (Case 54/77 [1978] ECR 585, paragraphs 45 to 50).

54 It should be made clear that an applicant is free to choose to apply to the Ombudsman prior to initiating proceedings before the Court of First Instance, by contrast with the pre-litigation procedure under Article 90 of the Staff Regulations of Officials of the European Communities.

55 In the light of the foregoing considerations, it must be held that lawyers' fees incurred in proceedings before the Ombudsman are not recoverable by way of an action for damages.

56 For the sake of completeness, it must be pointed out that the applicant has failed to establish a direct causal link between the defendant's alleged unlawful conduct and the damage for which it seeks compensation. The services of a lawyer are, it must be repeated, 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.

57 It follows that the action must be dismissed as manifestly unfounded.

Costs

58 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The action is dismissed as manifestly unfounded in law.

2. The applicant shall bear the costs.

Luxembourg, 11 July 2005.

H. Jung — Registrar

M. Jaeger — President