

OPINION OF ADVOCATE GENERAL
TRSTENJAK

delivered on 11 September 2008¹

I — Introduction

1. In the present case, the Court of Justice has to decide on an appeal which the former Member of the European Parliament (MEP) Koldo Gorostiaga Atxalandabaso ('the appellant') has lodged against the order of the Court of First Instance of 24 April 2007 in Case T-132/06 *Gorostiaga Atxalandabaso v Parliament*.²

2. In that order, the Court of First Instance dismissed the action brought by the appellant for the annulment of the decision of the Secretary-General of the European Parliament of 22 March 2006 concerning the repayment of improperly received MEP's allowances.

II — Legal framework

3. Under Article 27 of the Rules Governing the Payment of Expenses and Allowances to Members of the European Parliament ('the EAM Rules'):

'2. Any Member who considers that these Rules have been incorrectly applied may write to the Secretary-General. In the event that no agreement is reached between the Member and the Secretary-General, the matter shall be referred to the Quaestors, who shall take a decision after consulting the Secretary-General. The Quaestors may also consult the President and/or the Bureau.

3. Where the Secretary-General, in consultation with the Quaestors, is satisfied that undue sums have been paid by way of allowances provided for Members of the

¹ — Original language: German.

² — Order of the Court of First Instance of 24 April 2007 in Case T-132/06 *Gorostiaga Atxalandabaso v Parliament*.

European Parliament by these Rules, he shall give instructions for the recovery of such sums from the Member concerned.

‘The own resources made available to the Commission and any amount receivable that is identified as being certain, of a fixed amount and due must be established by a recovery order to the accounting officer followed by a debit note sent to the debtor, both drawn up by the authorising officer responsible.’

4. In exceptional cases, and on a proposal submitted by the Secretary-General after consulting the Quaestors, the Bureau may, in accordance with Article 73 of the Financial Regulation and its implementing rules, instruct the Secretary-General temporarily to suspend the payment of parliamentary allowances until the Member has repaid the sums improperly used.

5. Pursuant to Article 73(1) of the Financial Regulation:

The Bureau’s decision shall be taken with due regard for the effective exercise of the Member’s duties and the proper functioning of the Institution, the views of the Member concerned having been heard before the adoption of the said decision.’

‘The accounting officer shall act on recovery orders for amounts receivable duly established by the authorising officer responsible. He/She shall exercise due diligence to ensure that the Communities receive their revenue and shall see that their rights are safeguarded.

4. Article 71(2) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (‘the Financial Regulation’)³ provides:

The accounting officer shall recover amounts by offsetting them against equivalent claims that the Communities have on any debtor who himself/herself has a claim on the Communities that is certain, of a fixed amount and due.’

3 — OJ 2002 L 248, p. 1.

6. Article 83 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the Financial Regulation⁴ states:

the principal authorising officer by delegation. The subdelegation of powers to authorising officers by subdelegation shall be performed by authorising officers by delegation.’

‘At any point in the procedure the accounting officer shall, after informing the authorising officer responsible and the debtor, recover established amounts receivable by offsetting in cases where the debtor also has a claim on the Communities that is certain, of a fixed amount and due relating to a sum established by a payment order.’

III — Facts and procedure

A — *Background to the dispute*

7. Article 5 of the Internal Rules on the Implementation of the European Parliament’s Budget, which were adopted by the Bureau on 4 December 2002, provides:

‘3. By delegation decision of the Institution, represented by its President, the Secretary-General shall be appointed principal authorising officer by delegation. ...

8. The appellant is a former Member of the European Parliament who exercised his mandate during the fifth legislative period (1999 to 2004). By letter of 26 November 2003, the Secretary-General of the European Parliament stated that, in the absence of supporting documents relating to the use of various parliamentary allowances, the appellant had a debt of EUR 176 516 to the European Parliament. Part of that debt had already been repaid since 2002.

4. The delegation of powers to authorising officers by delegation shall be performed by

9. By his decision of 24 February 2004, the Secretary-General ordered that a proportion of the subsistence allowance and of the general expenditure allowance were to be withheld in order to recover the remainder of the amount repayable, amounting to EUR 118 360.18, by offsetting. The decision also provided that if the appellant’s mandate

⁴ — OJ 2002 L 357, p. 1.

came to an end before the sum owed to the European Parliament had been repaid, the transitional end-of-service allowance and all other payments due to the appellant would be retained.

Secretary-General had not been competent to order the offsetting in question without having been instructed to do so by the Bureau.

10. On 20 April 2004 the appellant brought an action for annulment of the decision of 24 February 2004 before the Court of First Instance. In support of his application for the annulment of the decision, he raised eight pleas in law.

11. By judgment of 22 December 2005 in Case T-146/04 *Gorostiaga Atxalandabaso v Parliament*,⁵ the Court of First Instance partially annulled the decision of 24 February 2004. In paragraph 84 of that judgment, the Court stated that the contested decision comprised essentially two aspects, namely, first, the finding by the Secretary-General that the sums mentioned in the decision had been improperly paid to the applicant and that they had to be recovered and, secondly, the decision to effect recovery by means of offsetting against allowances payable to the applicant. After examining the second limb of the first plea, which related solely to the lawfulness of the second aspect of the contested decision, the Court annulled that decision in so far as it laid down that the recovery of the sum owed by the applicant should be effected by means of offsetting. The Court based that decision on grounds of a breach of the procedure laid down in Article 27(4) of the EAM Rules, since the

12. The first two points of the operative part of the judgment stated that the Court of First Instance:

- '1. Annuls the decision of the Secretary-General of the European Parliament of 24 February 2004 concerning the recovery of the sums paid to the applicant by way of parliamentary expenses and allowances in so far as it lays down that the recovery of the sum owed by the applicant shall be effected by means of offsetting;
2. Dismisses the remainder of the application.'

13. Neither of the parties appealed against that judgment.

⁵ — Case T-146/04 *Gorostiaga Atxalandabaso v Parliament* [2005] ECR II-5989

14. By decision of 1 February 2006, the Bureau instructed the Secretary-General to recover the improperly paid allowances pursuant to Article 27(4) of the EAM Rules.

15. On 22 March 2006 the Secretary-General adopted another decision (hereinafter also 'the contested decision') against the appellant, by which the proceedings against him for recovery of the amount receivable were resumed with the intention of remedying the procedural defect consisting in the failure to give instructions in accordance with the requirements of the judgment of 22 December 2005.

16. In the contested decision, the Secretary-General took account of both the judgment of 22 December 2005 and the decision of the Bureau of 1 February 2006. He also referred to the main stages of the procedure which had resulted in the ascertainment of the debt amounting to EUR 118 360.18 and pointed out that the decision had been adopted pursuant to the judgment of 22 December 2005.

17. Point 1 of the operative part of the contested decision states that in accordance with Article 73 of the Financial Regulation the Parliament's accounting officer had been instructed to recover the amount receivable of EUR 118 360.18. Points 1 and 2 make clear that recovery may be effected by offsetting against various allowances and other payments owed by the appellant.

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

18. By application lodged at the Registry of the Court of First Instance on 12 May 2006, the appellant brought an action for annulment against the decision of 22 March 2006. He claimed that the contested decision should be annulled and the Parliament ordered to pay the costs.

19. The appellant based his application on 11 pleas in law, which were all rejected by the Court of First Instance. In the contested order, the Court of First Instance dismissed the action in its entirety and ordered the appellant to pay the costs.

20. Mention will be made below only of the sections of the contested order which are relevant to the present appeal.

21. With his first plea in law, the appellant claimed an infringement of the principle of *res judicata*, because in his view it was not possible to rectify the recovery procedure, as the Court of First Instance had annulled the decision of 24 February 2004 because of a finding of *ultra vires*. The legal inexistence of that measure therefore precluded rectification.

22. In this regard, the Court of First Instance stated in paragraph 30 of the contested order that the Secretary-General had certainly been permitted to adopt the contested decision of 22 March 2006 pursuant to Article 27(4) of the EAM Rules, as interpreted in paragraphs 86 to 97 of the judgment, after the Bureau had instructed him to recover the amount receivable. Furthermore, in paragraph 32 of the contested order the Court of First Instance stated that even though the retention of EUR 40 398.80 no longer had any legal basis following the judgment, this could not have resulted in the extinction of the Parliament's claim against the appellant amounting to EUR 118 360.18, as it was a separate question in relation to that sum whether recovery by offsetting was possible.

23. The Court of First Instance therefore rejected the first plea in law as manifestly unfounded.

24. With his third plea in law, the appellant alleged *force majeure* to explain that it was impossible to produce supporting documents for certain expenditure.

25. The Court of First Instance rejected that plea as manifestly inadmissible because in its view that argument could not call into question the force of *res judicata* of the judgment of 22 December 2005.

26. With his seventh plea in law, the appellant complained at the failure to give notification of the decision of the Bureau of 1 February 2006. He took the view that the European Parliament had infringed Article 20 of the European Code of Good Administrative Behaviour, which establishes an obligation to give notification of decisions which affect the rights or interests of individual persons.

27. The Court of First Instance rejected that plea in law as manifestly unfounded with reference to the legally non-binding character of that code.

C — The procedure before the Court of Justice and forms of order sought

28. By an application of 2 July 2007, lodged at the Registry of the Court of Justice on 5 July 2007, the appellant brought the present appeal, in which he claims that the Court should:

- set aside the order of the Court of First Instance of 24 April 2007 in Case T-132/06;
- give a definitive ruling on the case;

- annul the decision of the Secretary-General of the European Parliament of 22 March 2006, ordering the reimbursement by the appellant of a sum of EUR 118 360.18 and proceeding to make a deduction from various parliamentary allowances owed to the appellant by the Parliament;

31. After the written procedure, a hearing took place on 5 June 2008 at which the parties made their oral observations.

D — Grounds of appeal and arguments of the parties

- order the defendant to pay its own costs and those incurred by the appellant.

32. The appellant raises six grounds of appeal against the contested order.

29. On 18 September 2007 the European Parliament lodged a response, in which it contends that the Court should:

- dismiss the appeal in its entirety as unfounded;

33. In his *first ground of appeal*, the appellant challenges the use of Article 111 of the Rules of Procedure of the Court of First Instance, which he claims denied him the right to a fair trial, since he had neither been given prior opportunity to express his views before the Court of First Instance nor been able to reply to the Parliament's arguments. The appellant also complains that because the Court of First Instance failed to inform him in advance that it had decided to give the decision by order he had been denied the opportunity to challenge that decision. Accordingly, the Court of First Instance had infringed the appellant's rights of defence, the adversarial principle and the right to a fair trial.

- order the appellant to pay the costs.

30. By order of 12 October 2007, the President of the Court of Justice found that the submission of a reply was not necessary.

34. The Parliament replies that the Court of First Instance properly applied Article 111 of its Rules of Procedure and did not infringe the appellant's rights of defence.

35. In his *second ground of appeal*, the appellant submits that the principle of impartiality was breached since the same judges ruled on the substance of the two successive actions which he brought in Cases T-146/04 and T-132/06, which gave rise, respectively, to the judgment of 22 December 2005 and to the order of 24 April 2007. That principle demands that a judge cannot hear and determine, even at the same level of jurisdiction, a case based on facts which are identical, or sufficiently connected, to those of a case on which he has ruled previously.

36. The Parliament contends that the argument put forward by the appellant is completely unfounded and not supported by the case-law of the Community judicature. In addition, the case in which the contested order was made concerned the question whether the Parliament had fulfilled its obligations under the judgment of 22 December 2005. In the view of the Parliament, there could therefore be no legal objection to the fact that the two cases were heard and determined by the same judge.

37. In his *third ground of appeal*, the appellant claims that the Court of First Instance incorrectly interpreted the scope of the judgment of 22 December 2005. Since the decision taken by the Secretary-General of the Parliament on 24 February 2004 had been annulled as *ultra vires*, the appellant in fact had no reason to lodge an appeal against that judgment before the Court of Justice, since the effect of the finding of *ultra vires* by the Court of First Instance was that the flawed decision did not exist.

38. The Parliament objects that the Court of First Instance only partially annulled the decision of the Secretary-General of the Parliament of 24 February 2004. In fact, it had been annulled only in so far as it ordered the recovery of the amounts owed by the applicant by offsetting.

39. In his *fourth ground of appeal*, the appellant challenges the systematic refusal to take into account the arguments which he had put forward to obtain the annulment of the decision of the Secretary-General of the Parliament of 22 March 2006. He submits that the latter decision is in fact a new decision, separate from the decision of 24 February 2004, and the Court of First Instance therefore had a duty to examine all the pleas, of substance and procedure, which he had put forward to challenge it.

40. The Parliament rejects that argument and points out that in the judgment of 22 December 2005 the Court of First Instance had agreed with the Parliament's view that the sums of money had been paid improperly. Consequently, the decision of 24 February 2004 could have been rectified.

41. In his *fifth ground of appeal*, the appellant criticises the Court of First Instance for having refused to consider the plea alleging *force majeure*, even though no such plea had been raised in the action brought against the decision of 24 February 2004. His appeal was based on facts which had come to light only after the decision in question.

44. The Parliament contends that the Court of First Instance merely established the non-legal character of the instrument relied on and therefore rightly rejected its applicability.

IV — Legal assessment

42. The Parliament points out that he had already raised an essentially identical plea in the proceedings which led to the judgment of 22 December 2005 and that the Court of First Instance had rightly rejected that plea. In any case, the facts adduced to prove the existence of *force majeure* occurred only after the adoption of the decision of 22 March 2006 and could not therefore result in its annulment.

A — *Examination of the grounds of appeal*

1. First ground of appeal: infringement of the right to a fair trial

43. In his *sixth ground of appeal*, the appellant criticises the Court of First Instance for wrongly having declined to examine whether the Parliament had breached the principle of sound administration, as laid down in Article 41 of the Charter of Fundamental Rights of the European Union and in the Code of Good Administrative Behaviour adopted by Parliament on 6 December 2001. In this connection, the appellant notes that the abovementioned principle forms an integral part of the fundamental principles of law whose observance the Court of Justice ensures.

45. Under Article 58 of the Statute of the Court of Justice, an appeal may lie only on the grounds of a breach of procedure which adversely affects the interests of the appellant. With his first ground of appeal, the appellant essentially objects to an application of Article 111 of the Rules of Procedure of the Court of First Instance, which he considers to be unlawful in so far as he was denied the right to a fair trial.

46. The appellant thus claims a breach of procedure which adversely affects his own interests and rights. This ground of appeal is

therefore admissible. It must be examined below whether that complaint is also well founded, that is to say, whether the Court of First Instance misapplied Article 111 of its Rules of Procedure.

47. Under Article 111 of its Rules of Procedure, the Court of First Instance may, by reasoned order, and without taking further steps in the proceedings, give a decision on the action 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. Such an order may be made of the Court's own motion at any stage of the proceedings, without any need to hear the parties with regard to this option.⁶ From a legal point of view, this procedural rule gives the Court of First Instance scope in assessing whether the abovementioned legal conditions have been satisfied and a margin of discretion as regards taking a decision by order. However, the provision also imposes on the Court the obligation to give reasons for its decision.

48. It is therefore consistent with the settled case-law of the Court of First Instance that a decision may be made by order under that provision if, for example, the Court considers that the information in the documents before it is sufficient to enable it to rule on the pending case.⁷ As is made clear by paragraph 23 of the contested order, this was the case in

this instance. Not only did the Court consider that it had all the facts relevant to the decision with the result that there was no need to arrange a hearing, but, after assessing the facts put forward, the Court was also convinced that the action was to be dismissed as manifestly inadmissible and in part as manifestly unfounded. There can therefore be no legal objection to the application of Article 111 of the Rules of Procedure of the Court of First Instance as a procedural rule in the present case.

49. In addition, the appellant does not show in sufficiently substantiated form to what extent he was denied the right to make his own submissions which he could not already have made in written form. In particular, the appellant has failed to explain which arguments made by the Parliament he would have wished to respond to in adversarial proceedings.

50. The first ground of appeal is therefore to be rejected as unfounded.

2. Second ground of appeal: infringement of the right to an impartial tribunal

51. An examination of the breach of the principle of judicial impartiality in the

6 — To that effect, see Rengeling, H.-W., Middeke, A. and Gellermann, M., *Handbuch des Rechtsschutzes in der Europäischen Union*, Munich, 2003, § 26, paragraph 18, p. 463, and Lenaerts, K., Arts, D. and Maselis, I., *Procedural Law of the European Union*, 2nd edition, London, 2006, paragraph 24-112, p. 577.

7 — Orders in Case T-48/91 *Minic v Court of Auditors* [1991] ECR II-479, paragraph 11, and in Case T-79/99 *Euro-Lex v OHIM (Eu-Lex)* [1999] ECR II-3555, paragraph 10.

proceedings at first instance alleged by the appellant first requires a few factual clarifications to be made.

52. The appellant claims that the substance of the two actions which he brought in Cases T-146/04 and T-132/06 were ruled on by the same judges. However, that is correct only in so far as all the members of the Second Chamber of the Court of First Instance which heard Case T-132/06 also participated in Case T-146/04, which had been assigned to the Second Chamber, Extended Composition. On the other hand, two of the judges who participated in Case T-146/04 did not take part in Case T-132/06. Furthermore, as the appellant rightly states, in the cases in question the same judges held the functions of President of the Chamber and Judge-Rapporteur.

53. In the opinion of the appellant, this fact is sufficient to show that there was a breach of the right to a fair trial by an impartial tribunal enshrined in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights'). In his view, that principle demands that a judge cannot hear and determine, even at the same level of jurisdiction, a case based on facts which are identical, or sufficiently connected,

to those of a case on which he has ruled previously.

54. In this regard, it must first be stated that the Community has not yet acceded to the ECHR,⁸ which precludes on legal grounds a direct application of the provisions of that international agreement within the Community legal order.⁹ Nevertheless, the Court has consistently held that fundamental rights form an integral part of the general

8 — In its Opinion 2/94 of 28 March 1996 [1996] ECR I-1759, the Court of Justice concluded, that as Community law then stood, the Community still had no competence to accede to the ECHR. However, the European Union is in the process of creating the legal conditions for accession. Thus, Article I-9(2) of the Treaty establishing a Constitution for Europe (OJ 2004 C 310, p. 1) made provision for such accession to the ECHR by the Union. This authorisation has now been incorporated into Article 6(2) of the Treaty on European Union as amended by the Treaty of Lisbon (OJ 2008 C 115, p. 1). Protocol No 14 to the ECHR of 13 May 2004, which primarily contains provisions on the reform of the European Court of Human Rights, provides, in Article 17, for the following to be inserted in Article 59 of the ECHR: 'The European Union may accede to this Convention.'

9 — Under Article 281 EC, the Community has legal personality and, as a subject of international law, is in principle bound, from the point of view of international treaty law, only by the international treaties ratified by it. Article 300(7) EC in turn governs the binding effect of those agreements within the Community, requiring the institutions of the Community and Member States to implement and comply with the Community agreements. According to settled case-law, the Community agreements duly established having regard to the requirements of primary law 'form an integral part of Community law'. The condition and the relevant date for the validity of international treaty law within the Community legal order are the entry into force of the agreement in question, that is its binding effect on the Community under international law (see Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5; Case 104/81 *Kupferberg* [1982] ECR 3641, paragraphs 11 to 13; and Case C-211/01 *Commission v Council* [2003] ECR I-8913, paragraph 57). Lenaerts, K. and Van Nuffel, P., *Constitutional Law of the European Union*, 2nd edition, London, 2005, paragraph 17-092, p. 740, also take the entry into force of the Community agreement as the basis. However, they point out that an agreement concluded by the Member States can also be binding on the Community, in particular where the Community undertakes to exercise its powers in accordance with that agreement. They refer in this connection to the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, mentioned in Article 63(1) EC, but do not mention the ECHR. Furthermore, in their memorandum of understanding of 10 and 11 May 2007, the Council of the European Union and the Council of Europe agreed to cooperate on law-making, but at the same time reaffirmed their decision-making autonomy.

principles of law whose observance the Court ensures.¹⁰ For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has particular significance.¹¹

the provision made in Article 6(1) of the ECHR, according to which, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. That fundamental right has taken on a similar form in Article 47 of the Charter of Fundamental Rights.

55. In the course of the further development of the European integration process, that case-law became embodied in Article 6(2) EU. According to that provision, the Union must respect fundamental rights, as guaranteed by the ECHR signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

56. In examining the second ground of appeal, high relevance must be attached to

57. I infer from those two provisions that the right to a fair trial enshrined therein and recognised in the case-law of the Court of Justice¹² necessarily includes the guarantee of an independent and impartial tribunal. This was recently confirmed by the Court of Justice in the judgment in *Chronopost and La Poste v UFEX and Others*¹³ relating to the requirements stemming from the rule of law in relation to the composition of a chamber, in connection with which the Court of Justice described the abovementioned guarantees as a 'cornerstone of the right to a fair trial', whose observance must be checked by the Court of Justice of its own motion, where this is disputed on a ground that does not immediately appear to be manifestly devoid of merit.¹⁴

10 — See Opinion 2/94, cited in footnote 8, paragraph 33; Case 29/69 *Stauder* [1969] ECR 419, paragraph 7; Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others v Common Assembly* [1957] ECR 39, 55; and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14.

11 — See, for example, *Stauder*, cited in footnote 10, paragraph 7; Case 4/73 *Nold v Commission* [1974] ECR 491; Case 44/79 *Hauer* [1979] ECR 3727, paragraph 15; Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 25; Case C-274/99 *P Connolly v Commission* [2001] ECR I-1611, paragraph 37; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71; Case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 35; Case C-229/05 *P PKK and KNK v Council* [2007] ECR I-439, paragraph 76; Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 29; Case C-450/06 *Varec* [2008] ECR I-581, paragraph 44; and Case C-14/07 *Weiss und Partner* [2008] ECR I-3367, paragraph 57.

12 — *Ordre des barreaux francophones et germanophone and Others*, cited in footnote 11, paragraph 29.

13 — Joined Cases C-341/06 P and C-342/06 P [2008] ECR I-4777.

14 — *Ibid.*, paragraph 46. The Court first made reference to the judgment of the European Court of Human Rights in *Remli v. France*, 23 April 1996, § 48, *Reports of Judgments and Decisions* 1996-II, which pointed out the duty of every national court to check whether its actual composition observed the principle of impartiality. The Court then referred to its own case-law on the matters which must be raised by the Court of its own motion (see Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67, and Case C-166/95 P *Commission v Daffix* [1997] ECR I-983, paragraph 25). Thus, the Court of Justice has essentially adopted the case-law of the European Court of Human Rights with effect for Community law.

58. There is a functional link between ‘independence’ and ‘impartiality’ in so far as the former is a requirement for the latter. The term ‘impartial’ refers primarily to the subjective position of the judges.¹⁵ They are to be above the parties and to take their decisions without regard to the person, objectively and according to the best of their knowledge and belief.¹⁶ The present principle of impartiality, which is also recognised in the legal orders of the Member States, originally dates back to the Roman law maxim of ‘*nemo debet esse iudex in propria causa*’.¹⁷

the absence of prejudice or bias.¹⁸ It regards it as a basic condition for the confidence which the courts in a democratic society must inspire.¹⁹ According to the established case-law of the European Court of Human Rights, the impartiality of a tribunal can be assessed on the basis of a subjective and an objective test.²⁰ The first test consists in ascertaining the personal conviction or the personal interest of the judge in a certain case. The impartiality of the judge is assumed in the absence of evidence to the contrary.²¹ The second test consists in examining whether the judge has offered sufficient guarantees to exclude any legitimate doubt as to his impartiality.²²

59. The European Court of Human Rights has held that ‘impartiality’ within the meaning of Article 6(1) of the ECHR normally denotes

60. In the present case, it must be stated that the appellant does not make any submissions to suggest personal bias on the part of the three judges involved. Consequently, they enjoy a presumption of impartiality. As the appellant subsequently clarified at the

15 — In the view of Calliess, G.-P., ‘Judicial Independence and Impartiality in International Courts’, *International Conflict Resolution*, Tübingen, 2006, p. 144, the principle of impartiality is characterised by the absence of unlawful influence and judicial bias in relation to the parties to the proceedings. According to Decaux, E. and Imbert, P.-H., *La Convention européenne des droits de l’homme* (ed. L.-E. Pettiti), 2nd edition, Article 6, p. 260, it must first be ascertained what a certain judge thought under the given circumstances and whether he had a specific reason to discriminate against the applicant.

16 — In that regard, see Frowein, J. and Peukert, W., *Europäische Menschenrechtskonvention*, Kehl/Strasbourg/Arlington, 1985, Article 6, paragraph 94, p. 153. In the view of Krekeler, W., ‘Der befangene Richter’, *Neue Juristische Wochenschrift*, 1981, p. 1633, the requirement of the impartial neutrality of the judge demands that in each individual case which he hears, and at each individual stage of the proceedings, he does not allow himself to be influenced by irrelevant, non-objective factors. In the case before him, he must decide without regard to the person only on the basis of the facts of the case and solely according to the law.

17 — See also Kanska, K., ‘Towards Administrative Human Rights in the EU — Impact of the Charter of Fundamental Rights’, *European Law Journal*, 2004, p. 313, which traces the requirement of impartiality back to that maxim of Roman law. Marriott, A., ‘Conflicts of Interest — A Way Forward?’, Appendix No 8 (to *Betriebs-Berater* 2003, Vol. 47), p. 3, links that maxim to the principles of the independence and impartiality of a dispute resolution body. The Roman law principle literally means that no one may be a judge in their own case (see Liebs, D., *Lateinische Rechtsregeln und Rechtssprichwörter*, Munich, 1998, p. 145).

18 — *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII.

19 — *Hauschildt v. Denmark*, 24 May 1989, § 48, Series A no. 154, and *Grievs v. the United Kingdom* [GC], no. 57067/00, § 69, 16 December 2003.

20 — *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, §§ 75 and 76, ECHR 2007-; *Forum Maritime S.A. v. Romania*, nos. 63610/00 and 38692/05, § 116, 4 October 2007; *Schwarzenberger v. Germany*, no. 75737/01, § 38, 10 August 2006; *Grievs v. the United Kingdom*, cited in footnote 19, § 69; and *Piersack v. Belgium*, 1 October 1982, § 30, Series A no. 53.

21 — See *Piersack v. Belgium*, cited in footnote 20, § 30, and *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 58, Series A no. 43. Reid, K., *A Practitioner’s Guide to the European Convention on Human Rights*, 2nd edition, paragraph IIA-090, p. 114 et seq., points out that that presumption is very difficult to refute in practice, with the result that even a negative opinion on the part of the judge concerning the case on which he must decide is not sufficient to be able to infer bias.

22 — *Findlay v. the United Kingdom*, 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I.

hearing, he does not object to their personal conviction or standpoint, but merely the fact that they participated in Cases T-146/04 and T-132/06. As a result, only the objective test of the impartiality of the Court of First Instance is to be applied, against the background of its composition in Case T-132/06,²³ the crucial factor, in accordance with the case-law of the European Court of Human Rights, being the precise circumstances of the specific case.²⁴ The personal standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the concern over the preservation of impartiality can be objectively justified.²⁵

61. It should be pointed out, first of all, that whilst the appellant relies on Article 6(1) of the ECHR, he does not refer at all to relevant case-law of the European Court of Human Rights which could support his plea in law. However, an examination of the previous case-law suggests that the argument put forward by the appellant is completely unfounded.

62. It is thus apparent from the judgment in *Schwarzenberger v. Germany*²⁶ that the mere fact that a court has made previous decisions concerning the same case cannot be held as in itself justifying fears as to the impartiality of that court. This applies, for example, to decisions taken by the same court prior to the actual judicial proceedings (pre-trial decisions),²⁷ but also to the specific circumstances examined by the Court of Justice in *Chronopost and La Poste v Ufex and Others*, in which the judges were asked to re-examine a case after a higher court set aside their original ruling after an appeal had been brought against it.²⁸

63. It follows that it is not possible to infer from Article 6(1) of the ECHR a general prohibition under which a judge may not participate in the same case. That notwithstanding, in assessing the objective impar-

23 — See *Diennet v. France*, 26 September 1995, § 36, Series A no. 325-A, and *Hauschildt v. Denmark*, cited in footnote 19, § 47, in which, in the absence of evidence of personal bias on the part of the national judges concerned, the European Court of Human Rights only applied an objective test of impartiality.

24 — *Schwarzenberger v. Germany*, cited in footnote 20, § 42. In connection with the requirements stemming from the rule of law in relation to the composition of a tribunal, Koering-Joulin, R., 'La notion européenne de tribunal indépendant et impartial au sens de l'article 6, par. 1, de la Convention européenne des droits de l'homme', *Revue de science criminelle et de droit pénal comparé*, 1990, p. 772, uses the expression 'structural impartiality'.

25 — *Lindon, Otchakovsky-Laurens and Joly v. France*, cited in footnote 20, § 77; *Kyprianou v. Cyprus*, cited in footnote 18, § 58; *Grieves v. the United Kingdom*, cited in footnote 19, § 69; *Incal v. Turkey*, 9 June 1998, § 71, *Reports of Judgments and Decisions* 1998-IV; *Findlay v. the United Kingdom*, cited in footnote 22, § 73; and *Hauschildt v. Denmark*, cited in footnote 19, § 48.

26 — Cited in footnote 20, § 42.

27 — *Schwarzenberger v. Germany*, cited in footnote 20, § 42; *Hauschildt v. Denmark*, cited in footnote 19, § 50; and *Romero Martin v. Spain* (dec.), no. 32045/03, 12 June 2006.

28 — *Schwarzenberger v. Germany*, cited in footnote 20, § 42; *Diennet v. France*, cited in footnote 23, § 38; and *Ringelsen v. Austria*, 16 July 1971, § 97, Series A no. 13. In *Chronopost and La Poste v Ufex and Others*, cited in footnote 13, paragraphs 56 to 60, the Court of Justice reached the same conclusion. In that judgment, the Court found that the mere fact that a chamber included a judge who was already part of another chamber which had already heard and determined the same case was not sufficient in itself to assume an unlawful composition of that chamber. The Court thus essentially concurred with the legal opinion of Advocate General Sharpston (see the Opinion of 6 December 2007 in that case, points 58 and 59).

ality of a tribunal, further aspects must be taken into consideration, for example whether the court has ruled on the same case or on two different cases, whether the competent chamber had the same composition in both cases and whether the first decision already had force of *res judicata*, with the result that the tribunal was bound by the substantive legal force of the first decision.²⁹

64. In this respect, it should be stated, first of all, that the three judges in question certainly did not participate in the same case, but in both procedural and substantive respects in two different cases. For example, the Court of First Instance was not called on to review the factual findings of the first case. Irrespective of the broad correspondence between the facts, Case T-132/06 did contain new factual elements and raised new points of law which the Court of First Instance had to assess. The subject-matter of the dispute was different in so far as this time it concerned the question whether and to what extent the European Parliament had complied with the judgment of 22 December 2005 by adopting the decision of 22 March 2006.

65. A judgment which is delivered in an action for annulment under Article 230 EC, as is clear from the first paragraph of Article 231 EC, is a judgment *in rem*, by which an act is judicially annulled in whole or

in part.³⁰ The Community judicature may not pronounce on effects of the judgment which go beyond annulment, for example a declaration or order of measures to be taken on the basis of the judgment.³¹ Consequently, the Court of First Instance was able to check indirectly whether the procedural breach giving grounds for the partial nullity of the decision of 24 February 2004 had been remedied only in the second proceedings.

66. Under those circumstances, bringing the case before some of the bench of judges who participated in the first case also had the advantage that the judges had precise knowledge of the background to the case and were able to concentrate on the new points of law. In this respect, this was also in the interests of the administration of justice.

67. With regard to the composition of the chamber which heard and determined Case T-132/06, I believe there is, against the background of the abovementioned case-law of the European Court of Human Rights, no evidence to suggest a breach of the principle of impartiality. As regards the objections raised by the appellant that the Judge-Rapporteur was identical in both cases, it is sufficient in my view to state that the Court of Justice made

29 — See *Lindon, Otchakovsky-Laurens and July v. France*, cited in footnote 20, § 79, which concerned the participation of two judges in two cases, where the first decision had force of *res judicata*. The European Court of Human Rights explained that any other judge would have been bound by the *res judicata* force of the first decision, which meant that their participation had no influence on the second decision.

30 — Cremer, W., *Kommentar zu EUV/EGV* (eds Calliess and Ruffert), 3rd edition, 2007, Article 231, paragraph 1; Rengeling, H.-W., Middeke, A. and Gellermann, M., *Handbuch des Rechtsschutzes in der Europäischen Union*, Munich, 2003, § 7, paragraph 107, p. 144.

31 — See Cremer, W., loc. cit. (footnote 30), Article 231, paragraph 1.

clear in the judgment in *Chronopost and La Poste v UFEX and Others*³² that the fact that the same judge was entrusted with the duties of Judge-Rapporteur in two successive cases cannot affect the assessment of impartiality, especially since the Court of First Instance takes its decisions in a collegiate formation.

68. Lastly, it should be borne in mind that the judgment of 22 December 2005 has not been challenged by either of the parties, with the result that that judgment has force of *res judicata*. Consequently, the judges hearing and determining Case T-132/06 would, like any others, be bound by the substantive legal force of that judgment. Their participation could not therefore have had any influence on the aspects covered, such as the ascertainment of the existence of the European Parliament's right to repayment vis-à-vis the appellant.³³

69. Therefore, the objective test likewise does not allow any doubts as to the impartiality of the Court of First Instance.

70. In the light of the foregoing, I conclude that there is no infringement of the appellant's right under Community law to an impartial tribunal. The second ground of appeal must therefore be rejected as unfounded.

3. Third ground of appeal: incorrect interpretation of the scope of the judgment of 22 December 2005

71. It appears from the statements made by the appellant regarding the third ground of appeal that he believes that the decision of 24 February 2004 as an act has been annulled in its entirety as a result of the judgment of the Court of First Instance of 22 December 2005. In my view, that understanding is based on a misinterpretation of the judgment in question.

72. Article 231 EC provides that the Court of Justice or the Court of First Instance must declare the act concerned to be void if the action for annulment brought against it is well founded. Nevertheless the effect of such a judgment *in rem* does not necessarily extend to the whole of the contested act. If that act comprises several elements which are severable from each other and only one of those elements infringes Community law, only that element is to be annulled.³⁴ Such a case of the partial nullity of an act exists in the main proceedings, as is apparent from a reading of the judgment of 22 December 2005.

73. Thus, in paragraph 84 of the judgment of 22 December 2005 the Court of First Instance stated that the decision of 24 February 2004

32 — Cited in footnote 13, paragraph 53.

33 — See point 11 of this Opinion.

34 — See Joined Cases 56/64 and 58/64 *Consten and Gründig v Commission* [1966] ECR 299; Case 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063, paragraph 21; and Case 92/78 *Simmmenthal v Commission* [1979] ECR 777, paragraph 107 et seq.

comprised essentially two aspects, namely, first, the finding by the Secretary-General of the Parliament that the sums mentioned in the decision had been improperly paid to the applicant and that they had to be recovered and, secondly, the decision to effect recovery by means of offsetting against allowances payable to the applicant. On the basis of the finding in paragraph 97 of that judgment that the Secretary-General was not competent to order the offsetting in question without having been instructed to do so by the Bureau in accordance with the procedure laid down in Article 27(4) of the EAM Rules, and that there was therefore a significant procedural breach which made the decision unlawful, the Court ruled that the contested decision had to be annulled in so far as it ordered such offsetting. The annulment thus related solely to the second aspect of the decision. That conclusion was repeated by the Court of First Instance in paragraphs 99 and 169 and, lastly, in the operative part of the judgment.

74. On the other hand, the Court rejected the other grounds for annulment in support of the action, which were directed against the first aspect of the decision, with the result that that aspect of the decision was not affected by the annulment. As the Court of First Instance rightly found in paragraph 52 of the contested order, the lawfulness of the decision in other respects was thus established, that is to say, in so far as it concerned the finding of the sums improperly paid. It follows that, contrary to the view taken by the appellant, the decision of 24 February 2004 could not be considered to

be null and void in its entirety. In so far as the appellant adopts the legally incorrect assumption, despite clear evidence to the contrary, of the ‘non-existence’ of the remaining aspect of that decision, it must be recalled that, according to the case-law of the Court of Justice,³⁵ Community measures are in principle presumed to be valid even where they are defective. Consequently, the appellant was required to appeal against the judgment of 22 December 2005 in order to eliminate completely the legal effects of the decision. Because he failed to do this, he must accept that the first aspect of the decision has become final in relation to him.

75. As the Court of First Instance rightly stated in paragraph 30 of the contested order, the partial nullity of the decision of 24 February 2004 does not preclude a resumption of the recovery procedure against the appellant — after the procedural breach has been remedied by rectifying the procedure laid down in Article 27(4) of the EAM Rules — especially since, according to established case-law,³⁶ annulment of a Community measure does not necessarily affect the preparatory acts. The implementation of the judgment of 22 December 2005 did not therefore require the Parliament to set aside the first aspect of its decision and

35 — The Court has consistently held that measures of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (see Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, paragraph 48; Case C-245/92 P *Chemie Linz v Commission* [1999] ECR I-4643, paragraph 93; and Case C-475/01 *Commission v Greece* [2004] ECR I-8923, paragraph 18).

36 — Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 34, and Case C-415/96 *Spain v Commission* [1998] ECR I-6993, paragraph 32.

completely reinitiate the recovery procedure.

76. This ground of appeal is therefore to be rejected as unfounded.

4. Fourth ground of appeal: failure to take into account the applicant's submissions

77. The appellant alleges that the Court of First Instance failed to take into account the arguments which he had put forward to obtain the annulment of the decision of 22 March 2006. In this connection, he refers to the statements made by the Court in paragraphs 53 and 54 of the contested order, according to which the arguments made against the first aspect of that decision were to be rejected.

78. The grounds given by the Court of First Instance for that decision essentially state that this aspect of the decision is a mere repetition of the first aspect of the decision of 24 February 2004, whose lawfulness was confirmed in the judgment of 22 December 2005. The Court takes the view that because the substantive legal force of the judgment applied to that aspect of the decision, all complaints which challenge its lawfulness must be rejected as manifestly inadmissible.

79. I consider it necessary, first of all, to make clear that, contrary to the way they are presented by the appellant in his appeal,³⁷ the statements of the Court of First Instance certainly do not relate to the entire decision of 22 March 2006, but solely to its first aspect, which is substantively similar to the first aspect of the decision of 24 February 2004.

80. Furthermore, there can be no objection from a legal point of view to the statements made by the Court of First Instance in paragraphs 49 to 54 of the contested order. Because of the abovementioned substantive correspondence, the relevant aspect of the decision of 22 March 2006 does not constitute a new measure, but merely a confirmatory act which does not produce any new legal effects and is not therefore admissible as the subject of an action for annulment.³⁸ In accordance with the case-law of the Court of Justice,³⁹ to

³⁷ — Paragraph 55 of the appeal.

³⁸ — Case 26/76 *Metro v Commission* [1977] ECR 1875, paragraph 4; Joined Cases 166/86 and 220/86 *Irish Cement v Commission* [1988] ECR 6473, paragraph 16; Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraph 28 et seq.; Case C-480/93 P *Zunis Holding and Others v Commission* [1996] ECR I-1, paragraph 14; Joined Cases T-121/96 and T-151/96 *Mutual Aid Administration Services v Commission* [1997] ECR II-1355, paragraph 48; Case T-224/95 *Tremblay and Others v Commission* [1997] ECR II-2215, paragraph 49; Case T-188/95 *Waterleiding Maatschappij 'Noord-West Brabant' v Commission* [1998] ECR II-3713, paragraphs 88 to 141; and order in Case T-235/95 *Goldstein v Commission* [1998] ECR II-523, paragraph 41. See also Cremer, W., loc. cit. (footnote 30), Article 230, paragraph 19; Lenaerts, K., Arts, D. and Maselis, I., loc. cit. (footnote 6), paragraph 7-016, p. 212.

³⁹ — The Court of First Instance refers to the judgment in Case 14/64 *Gualco (née Barge) v High Authority* [1965] ECR 51. See also Joined Cases 193/87 and 194/87 *Maurissen and European Public Service Union v Court of Auditors* [1989] ECR 1045, paragraph 26, and Case T-64/92 *Chavane de Dalmassy and Others v Commission* [1994] ECR-SC I-A-227 and II-723, paragraph 25, according to which an action against a confirmatory decision is inadmissible only if the confirmed decision has become final in relation to the person concerned for failing to bring an action within the time-limit.

which the Court of First Instance refers in paragraph 51 of the contested order, the first aspect of the decision of 22 March 2006 thus has the legal force of the first aspect of the decision of 24 February 2004.

81. The Court of First Instance therefore rightly concluded that the appellant's complaints against that decision were to be rejected as manifestly inadmissible. Consequently, this ground of appeal is also to be rejected as unfounded.

5. Fifth ground of appeal: failure to take into account circumstances of *force majeure*

82. The appellant alleges that the Court of First Instance, with reference to the force of *res judicata* of the decision of 24 February 2004, refused to consider his plea alleging *force majeure*, even though no such plea had been raised in the action brought against that decision. The appellant claims that, contrary to the assumptions made by the Court of First Instance, it is not a re-examination of a plea already assessed in the judgment of 22 December 2005. He argues that the fact that the Spanish Ministry of Justice did not

reply to his letter of 15 April 2006, by which he requested the surrender of copies of seized documents connected with his term as an MEP, constituted a case of *force majeure*.

83. In principle, the Community law concepts of *force majeure* and fortuitous events cover only those events which are abnormal and unforeseeable, over which the party relying upon them had no control, and the consequences of which could not have been avoided even if all due care had been exercised.⁴⁰ It follows that both *force majeure* and fortuitous events are concepts which contain an objective element and a subjective element, the former referring to abnormal circumstances outside the sphere of the party in question and the latter connected with his obligation to guard against the consequences of abnormal events by taking appropriate steps without making unreasonable sacrifices.⁴¹

84. It is not possible to concur with the appellant's statement that the Court of First

40 — Settled case-law. See, for example, Case 145/85 *Denkavit* [1987] ECR 565, paragraph 11; Case C-12/92 *Huygen and Others* [1993] ECR I-6381, paragraph 31; Case C-208/01 *Parras Medina* [2002] ECR I-8955, paragraph 19; Case C-105/02 *Commission v Germany* [2006] ECR I-9659, paragraph 89; Case C-377/03 *Commission v Belgium* [2006] ECR I-9733, paragraph 95; and Case C-314/06 *Société Pipeline Méditerranée et Rhône* [2007] ECR I-12273, paragraph 23.

41 — Case C-195/91 P *Bayer v Commission* [1994] ECR I-5619, paragraph 32, and order in Case C-325/03 P *Zuazaga Meabe v OHIM* [2005] ECR I-403, paragraph 25.

Instance failed to assess his third plea in law alleging *force majeure*. It should be borne in mind that the appellant had already referred in Case T-146/04⁴² and in Case T-132/06⁴³ to his inability to provide some items of his accounts. In both cases, he explained this by the detention of his treasurer and the seizure of numerous accounting documents by the Spanish and the French authorities, as well as of the sum of EUR 200 304 by the First Examining Magistrate at the Tribunal de grande instance (Regional Court), Paris. Although he expressly described those circumstances as *force majeure* only in Case T-132/06, it is clear that in Case T-146/04 he had already relied on what he considered to be unforeseeable circumstances outside his sphere of control and thus, from a legal point of view, alleged *force majeure* within the meaning of the definition cited above.

86. It is therefore necessary only to examine the alleged failure by the Spanish Ministry of Justice to reply to the letter of 15 April 2006. Irrespective of whether the mere failure to reply to a letter can in itself constitute *force majeure*, it must be stated that the appellant is relying on such circumstances for the first time in the present appeal proceedings. That claim does appear in the proceedings at first instance in connection with the 11th plea in law relating to alleged errors of assessment in the adoption of the contested decision,⁴⁴ but not in connection with the third plea in law concerning the existence of *force majeure*.⁴⁵ The Court thus assessed that claim in the context of the 11th plea in law, on the basis of the classification made in the application, and rejected it together with the other arguments. The rejection of the 11th plea as manifestly inadmissible is not contested by the appellant himself.

85. This was recognised by the Court of First Instance when it found in paragraph 54 of the contested order that the appellant had essentially put forward the same arguments against the first aspect of the contested decision as are summarised in paragraph 147 of the judgment of 22 December 2005. Because, as the Court also recognises, those arguments had already been rejected in that judgment and that judgment had become final, the Court also had to reject them as inadmissible with reference to the force of *res judicata* of the first aspect of the decision.

87. Furthermore, I would like to draw attention to the fact that, according to the appellant, the letter in question was sent to the Spanish Ministry of Justice on 15 April 2006, almost a month after the contested decision was adopted on 22 March 2006. Consequently, the absence of a reaction to that letter from the Spanish authorities could not influence the Parliament's decision. In this respect, the arguments put forward by the appellant are irrelevant.

42 — See Case T-146/04 *Gorostiaga Atxalandabaso v Parliament*, cited in footnote 5, paragraph 147.

43 — See paragraph 67 of the application in Case T-132/06.

44 — See paragraphs 94 to 98 (in particular paragraph 96) of the application in Case T-132/06.

45 — See paragraphs 66 to 69 of the application in Case T-132/06.

88. This ground of appeal must therefore be rejected as unfounded.

6. Sixth ground of appeal: failure to take into account the arguments concerning a breach of the principle of sound administration

89. According to the predominant view in legal doctrine,⁴⁶ the principle of sound administration, on which the appellant relies in connection with his sixth ground of appeal, is not an individual principle of administrative law, but a combination of several principles, or a kind of collective term for some or all the principles of administrative law. Sometimes it is used as a synonym for those principles which make up administrative procedure

based on the rule of law. For example, the principle of sound administration requires that the authorities repair faults or omissions,⁴⁷ that proceedings are conducted impartially and objectively⁴⁸ and that a decision is taken within a reasonable period.⁴⁹ In addition, it implies a comprehensive duty of care and regard for welfare on the part of the authorities,⁵⁰ and the right to a fair hearing, that is the obligation on officials, before taking a decision, to place those affected in a position in which they may make known their views,⁵¹ and the obligation to state reasons for the decision.⁵²

90. However, which principles may actually be subsumed under the notion 'principle of sound administration' varies and cannot always be defined precisely. In addition, it is difficult to establish whether it encompasses principles which the administration merely has to take into account or in fact rights which accord the individual a subjective right to

46 — In that respect, see Wakefield, J., *The right to good administration*, Alphen, 2007, p. 23; Lais, M., 'Das Recht auf eine gute Verwaltung unter besonderer Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs', *Zeitschrift für europarechtliche Studien*, 2002, Vol. 3, pp. 453 and 454, and Dutheil de la Rochère, J., 'The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration', *Continuity and change in EU law: essays in honour of Sir Francis Jacobs*, 2008, p. 169, which propose a combination of several principles. Lenaerts, K. and Van Nuffel, P., loc. cit. (footnote 9), paragraph 17-069, p. 713, also assume a plurality of legal principles which are listed under the expression 'principles of sound administration'. Martínez Soria, J., 'Die Kodizes für gute Verwaltungspraxis', *Europarecht*, 2001, Vol. 5, p. 685, points out that the notion of good administrative behaviour is used in different ways. It is common to these views that they subsume obligations to act on the part of the administration vis-à-vis the citizens. The list is not intended to be exhaustive, but is open to include new aspects of the relationship between the administration and the citizen.

47 — Case 55/70 *Reinartz v Commission* [1971] ECR 379, paragraphs 19 and 21.

48 — Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paragraph 245.

49 — Case C-99/98 *Austria v Commission* [2001] ECR I-1101, paragraph 73.

50 — Case 321/85 *Schwiering v Court of Auditors* [1986] ECR 3199, paragraph 18, and Joined Cases T-33/98 and T-34/98 *Petrobub and Republica v Council* [1999] ECR II-3837, paragraph 133.

51 — Joined Cases 33/79 and 75/79 *Kühner v Commission* [1980] ECR 1677, paragraph 25, and Case T-450/93 *Lisrestal and Others v Commission* [1994] ECR II-1177, paragraph 42.

52 — Case T-167/94 *Nölle v Council and Commission* [1995] ECR II-2589, paragraph 73.

demand a specific action or omission from the administration.⁵³ The relevant factors are, first of all, the legal character of the source and, secondly, the normative content of the relevant provisions.

institutions to implement that code. There is a similar variation in its binding character for the Community institutions and bodies in the context of the direct enforcement of Community law. However, the main source of inspiration in drafting Article 41 of the Charter of Fundamental Rights, which has now refined the principle of sound administration into a fundamental right of the individual, has from the beginning been the case-law of the Court of Justice.⁵⁴

91. Expressions of the principle of sound administration can be found in the Community legal order in numerous provisions of primary and secondary law, in Article 41 of the Charter of Fundamental Rights, in the Code of Good Administrative Behaviour of the European Ombudsman and in the procedural rules adopted by each of the Community

92. The starting point for examining whether in adopting a measure a Community institution has breached the principle of sound

53 — Wakefield, J., loc. cit. (footnote 46), p. 23, points out that the individual rules which the principle of sound administration as a whole encompasses have different statuses within the hierarchy of Community legal principles and are not therefore equally relevant. Whilst some appear to be no more than rules of procedure, others have acquired the status of a legally binding obligation. In my opinion, this view is suggested by the definition put forward by the former Ombudsman Jacob Södermann, in the absence of a legal definition of 'maladministration' within the meaning of Article 195(1) EC, in his 1997 Annual Report to the European Parliament, which has been used since then. It states that 'maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it'. As I have already argued in my Opinion in Case C-331/05 P *Internationaler Hilfsfonds v Commission* [2007] ECR I-5475, point 68, 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. Reference is also made to the Opinion of Advocate General Sir Gordon Slynn in Case 64/82 *Tradax v Commission* [1984] ECR 1359, point 1387, in which the Advocate General stated that he did not believe that there existed a general legal principle that the requirements in relation to sound administration were necessarily legally enforceable. A well-functioning filing system may well be an important part of sound administration, but there is no legally enforceable right to such a system. The Advocate General took the view in this connection that legislation and sound administration might overlap to some extent, but are not necessarily synonymous.

54 — According to Kanska, K., loc. cit. (footnote 17), p. 304, the case-law of the Community Courts is the main source of inspiration of the Convention in drafting Article 41 of the Charter of Fundamental Rights. In the Convention's Explanations relating to the Charter of Fundamental Rights, which are not legally binding, it is stated that that provision is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined inter alia good administration (see, inter alia, Case C-255/90 P *Burban v Parliament* [1992] ECR I-2253; *Nölle v Council and Commission*, cited in footnote 52; and Case T-231/97 *New Europe Consulting and Brown v Commission* [1999] ECR II-2403). The wording of that right in the first two paragraphs of Article 41 results from the case-law (Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15; Case 374/87 *Orkem v Commission* [1989] ECR 3283; Case C-269/90 *Technische Universität München* [1991] ECR I-5469; *Lisrestal and Others v Commission*, cited in footnote 51; and *Nölle v Council and Commission*, cited in footnote 52) and the wording regarding the obligation to give reasons comes from Article 253 EC. With regard to the role of the Community judiciary in developing the general legal principles of Community procedural law, see Schwarze, J., *European Administrative Law*, 1st edition, London, 2006, p. 59 et seq.

administration must, in the absence of a legally binding document which implements the rights stemming from Article 41 of the Charter of Fundamental Rights with effect for all Community institutions and bodies,⁵⁵ therefore always be the case-law of the Court of Justice.⁵⁶

of uniform rules for good administrative behaviour. In the absence of legally binding character, the appellant cannot derive rights for himself either from that resolution⁵⁸ or from the code drafted by the Ombudsman himself, which merely serves as a model for the Community institutions to adopt their own codes of behaviour.

93. The Court of First Instance was therefore correct, in paragraph 72 of the contested order, to refer to the non-regulatory character of the resolution of 6 September 2001,⁵⁷ by which the Parliament, on a proposal from the European Ombudsman, called on the Commission to submit an appropriate proposal for a regulation based on Article 308 EC with a view to the introduction

94. On the other hand, the appellant is correct in his view that in considering the seventh plea the Court of First Instance was required to consult other sources of law and not to restrict itself solely to Article 20 of the abovementioned Code of Good Administrative Behaviour, especially since in its application the appellant expressly relied on Article 41 of the Charter of Fundamental Rights.⁵⁹ Nevertheless, this failure in the statement of reasons cannot in itself justify setting aside the contested order, as the grounds on which the Court of First Instance based its decision to reject the seventh plea as

55 — In his speech to the Convention on 2 February 2000, in which he advocated the incorporation of the right to good administration, the European Ombudsman stressed that that principle had to be implemented through the adoption of a provision to ensure good administrative practice. Similarly, in the European Parliament report on the situation as regards fundamental rights in the European Union it was pointed out that in order to put into practice the content of Article 41 of the Charter of Fundamental Rights, it is essential to adopt a Code of Good Administrative Behaviour (Cornillet report of 21 June 2001, *The situation as regards fundamental rights in the European Union*, A5-0223/2001, p. 113 et seq.). Following a query from the European Ombudsman to all Community institutions and bodies, it emerged that no such rules existed. Thereupon, the Ombudsman produced a model code of good administrative behaviour and sent it to the Community institutions and bodies with the recommendation to adopt appropriate procedural rules. Those rules were to be published in the form of decisions in the *Official Journal of the European Union*. Whilst the decentralised agencies have adopted the model code, the Commission has published procedural rules which are entitled 'Code for Good Administrative Behaviour', but were not adopted as a decision, but as an annex to its Rules of Procedure (OJ 2000 L 308, p. 26).

56 — See also Lais, M., loc. cit. (footnote 46), p. 461, who takes the view that with regard to the right to good administration or the individual elements of which that right is composed, the limits and barriers developed by the Court of Justice and the content formulated by the Court of Justice apply first and foremost.

57 — European Parliament resolution of 6 September 2001 on the European Ombudsman's Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour, C5-0438/2000 — 2000/2212 (COS).

58 — In the view of Lenaerts, K. and Van Nuffel, P., loc. cit. (footnote 9), paragraph 17-140, p. 783, 'resolutions' are among the other acts not mentioned in Article 249 EC which the Community institutions may adopt. However, they point out that those acts do not always seek to produce legal effects. Schoo, J., *EU-Kommentar* (ed. J. Schwarze), 1st edition, Baden-Baden, 2000, Article 189 EC, paragraph 11, p. 1732, classifies political resolutions and calls on other institutions to act among the acts which the European Parliament adopts as a political discussion forum, and not as a legislative organ. As a call on the Commission to exercise its power of initiative in the Community rule-making procedure, the resolution of 6 September 2001 may be classified in this series of political acts.

59 — See paragraphs 49, 50 and 86 of the application. In the past the Court of First Instance has examined breaches of the principle of sound administration and itself referred to Article 41 of the Charter of Fundamental Rights. See Case T-54/99 *max.mobil v Commission* [2002] ECR II-313, paragraph 48, concerning the right to the diligent and impartial treatment of a complaint, and Case T-242/02 *Sunrider v OHIM* [2005] ECR II-2793 paragraph 51, in connection with the principle that decisions must be adopted within a reasonable time, as a component of the principle of good administration.

inadmissible in part and as unfounded in part withstand a judicial examination.

95. Thus, with regard to the appellant's complaint that he had not been informed of the decision of the Bureau of 1 February 2006, the Court of First Instance objected, first, in paragraph 72 of the contested order that this did not constitute the final decision adversely affecting him. In fact, it should be stated that the addressee of the decision of the Bureau of 1 February 2006 is not the appellant, but the Secretary-General of the Parliament. In addition, from a legal point of view, that decision has the character of instructions from the Bureau to the Secretary-General pursuant to Article 27(4) of the EAM Rules to recover the improperly paid sums by offsetting. However, those instructions are relevant only in the relationship between the Bureau and the Secretary-General and do not themselves produce any external effect. Only the execution of those instructions by the Secretary-General through the adoption of the decision of 22 March 2006 could affect the appellant's rights and thus give grounds for a separate complaint. It follows that, as the Court of First Instance rightly found, the appellant had to be informed of the decision of 22 March 2006, which concerned him directly, but not the decision of 1 February 2006.

96. Secondly, in paragraph 33 of the contested order, the Court of First Instance pointed out that the decision of 1 February 2006 was not evidence used against the appellant of which he should have had

cognisance.⁶⁰ The Court thus rightly denied an infringement of the appellant's rights of defence.

97. The Court of First Instance therefore found that the Parliament was not required to inform the appellant of the content of that decision. There was therefore no infringement of the appellant's right to information as a part of the principle of the right to a fair hearing in the administrative procedure.

98. The Court of First Instance thus rightly rejected the seventh plea in law as inadmissible in part and as unfounded in part. Because no breach of the principle of sound administration is apparent from that decision, this ground of appeal must also be rejected as unfounded.

B — *Result of my analysis*

99. In the light of the foregoing, the appeal is unfounded. It must therefore be dismissed in its entirety.

⁶⁰ — The Court of Justice referred to the case-law of the Community judicature, already cited in paragraph 118 of the judgment in Case T-146/04 *Gorostiaga Atxalandabaso v Parliament*, cited in footnote 5, on the general principle that the rights of the defence must be observed, according to which a person against whom an objection is directed by the Community administration must have the opportunity to comment on every document which the latter intends to use against him.

V — Costs

100. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of 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 European Parliament has applied for costs to be awarded against the appellant and the latter has been unsuccessful, the appellant must be ordered to pay the costs.

VI — Conclusion

101. In the light of the above considerations, I propose that the Court of Justice:

- dismiss the appeal in its entirety, and
- order the appellant to pay the costs of the appeal.