OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 15 September 2009 [1]

I — Introduction

1. By its appeal, Internationaler Hilfsfonds eV, a non-governmental organisation active in the field of humanitarian aid, claims, in essence, first, that the Court should set aside the judgment of the Court of First Instance of the European Communities of 5 June 2008 [2] ('the judgment under appeal') by which that court dismissed as inadmissible the action brought by the appellant against the decision allegedly contained in the letter from the Commission of 14 February 2005 refusing it access to certain documents and, secondly, that it should annul that decision and give final judgment in the matter.

II — Relevant legislation

A — *Community rules on public access to documents of the European Parliament, the Council of the European Union and Commission of the European Communities*

2. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [3] defines the principles, conditions and limits of the right of access to the documents of those institutions laid down in Article 255 EC. That regulation has been applicable since 3 December 2001.

3. Under the second paragraph of Article 4(3) of Regulation No 1049/2001, access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned is to be refused even after the

1 — Original language: French.

2 — Case T 141/05 *Internationaler Hilfsfonds* v *Commission* [2008] ECR II-84.

3 — OJ 2001 L 145, p. 43.

decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. Under Article 6(1) of Regulation No 1049/2001, applications for access to a document are to be made in any written form, including electronic form, without the applicant being obliged to state reasons for the application.

5. In this regard, Regulation No 1049/2001 draws a distinction between the processing of initial applications and that of confirmatory applications.

6. As regards the processing of initial applications, Article 7(1) and (2) of Regulation No 1049/2001 provides as follows:

'1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position'.

7. As regards the processing of confirmatory applications, Article 8(1) of Regulation No 1049/2001 provides:

'A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or

her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively'.

8. Moreover, under the first and second paragraphs of Article 2 of the Annex to Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure, [4] all applications for access to a document are to be sent by mail, fax or email to the Secretariat-General of the Commission or to the relevant Directorate-General or department. In addition, the Commission is to answer initial and confirmatory access applications within 15 working days from the date of registration of the application. In the case of complex or bulky applications, the deadline may be extended by 15 working days. Reasons must be given for any extension of the deadline and it must be notified to the applicant beforehand.

9. As regards the processing of initial applications, Article 3 of the Annex to Decision 2001/937 provides that the applicant is to be informed of the response to his application either by the Director-General or the head of department concerned, or by a Director designated for that purpose in the Secretariat-General or by a member of staff they have designated for that purpose. Moreover, the provision requires that any answer which is even partly negative is to inform the applicant of his right to submit, within 15 working days from receipt of the answer, a confirmatory application to the Secretary General of the Commission.

10. With respect to the processing of confirmatory applications, Article 4 of the Annex to Decision 2001/937 provides that the power to take decisions on confirmatory applications is delegated to the Secretary General, who is assisted in the preparation of the decision by the competent Directorate-General or department. That article also provides that the decision is to be taken by the Secretary General after agreement of the Legal Service. The decision is to be notified to the applicant in writing, where appropriate by electronic means, and must inform him of his right to bring an action before the Court of First Instance or to lodge a complaint with the European Ombudsman.

B — *Community rules on complaints to the European Ombudsman*

11. The second paragraph of Article 195(1) EC provides:

'In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own

4 — OJ 2001 L 345, p. 94.

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.'

12. Under Article 2(6) of Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, [5] as amended by Decision 2002/262/EC, ECSC, Euratom of the European Parliament of 14 March 2002 [6] ('Decision 94/262'), complaints submitted to the Ombudsman are not to affect time-limits for appeals in administrative or judicial proceedings. According to Article 2(7), 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 is to be filed without further action.

5 — OJ 1994 L 113, p. 15.
6 — OJ 2002 L 92, p. 13.

13. Article 6 of the decision of the European Ombudsman of 8 July 2002 adopting implementing provisions for Decision 94/262, as amended on 5 April 2004, entitled 'Friendly solutions', provides:

'6.1 If the Ombudsman finds maladministration, as far as possible he cooperates with the institution concerned in seeking a friendly solution to eliminate it and to satisfy the complainant.

6.2. If the Ombudsman considers that such cooperation has been successful, he closes the case with a reasoned decision. He informs the complainant and the institution concerned of the decision.

6.3. If the Ombudsman considers that a friendly solution is not possible, or that the search for a friendly solution has been unsuccessful, he either closes the case with a reasoned decision that may include a critical remark or makes a report with draft recommendations'.

14. Article 8 of the decision of the European Ombudsman of 8 July 2002, as amended on 5 April 2004, entitled 'Reports and recommendations', states:

'8.1. The Ombudsman makes a report with draft recommendations to the institution concerned if he considers either:

(a) that it is possible for the institution concerned to eliminate the instance of maladministration, or

(b) that the instance of maladministration has general implications.

8.2. The Ombudsman sends a copy of his report and draft recommendations to the institution concerned and to the complainant.

8.3. The institution concerned sends the Ombudsman a detailed opinion within three months. The detailed opinion could consist of acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendations.

8.4. If the Ombudsman does not consider that the detailed opinion is satisfactory, he may draw up a special report to the European Parliament in relation to the instance of maladministration. The report may contain recommendations. The Ombudsman sends a copy of the report to the institution concerned and to the complainant'.

III — Background, forms of order sought by the parties and procedure before the Court

15. In 1998, the appellant signed Contract LIEN 97-2011 with the Commission with a view to co-financing a medical aid programme it was organising in Kazakhstan.

16. Following the unilateral termination of Contract LIEN 97-2011 by the Commission and its claim for recovery of the sums paid, against which the appellant lodged a complaint with the Ombudsman on 7 March 2002, the appellant applied, on 9 March 2002, to the Commission for access to the documents relating to that contract.

17. On 8 July 2002, the Commission sent the appellant a list of the documents contained in four files. On the basis of the provisions of Article 4(3) of Regulation No 1049/2001, it refused the appellant's application in relation to some of the documents contained in the first three files and in relation to all the documents contained in the fourth file.

18. By letter of 11 July 2002, the appellant applied to the President of the Commission for full access to the documents relating to Contract LIEN 97-2011.

19. On 26 July 2002, the Commission replied to the appellant, referring to the letter of 8 July 2002.

20. On 26 August 2002, the appellant consulted the files to which the Commission had agreed to grant it access.

21. In March 2003, the Ombudsman closed the complaint lodged by the appellant on 7 March 2002 concerning the unilateral termination of the contract by the Commission and its claim for recovery of the sums paid. He concluded in particular that the Commission and the appellant appeared to have found an amicable solution.

22. In early October 2003, the Commission and the appellant stated, however, that they were unable to reach such an amicable solution.

23. On 6 October 2003, the appellant lodged a complaint with the Ombudsman criticising the Commission's refusal to grant it full access to the documents relating to Contract LIEN 97-2011.

24. On 15 July 2004, the Ombudsman sent the Commission a draft recommendation in which he concluded that the Commission had failed to handle the appellant's application for full access to the documents on the file concerning Contract LIEN 97-2011 properly and asked it to reconsider the application. Moreover, he recommended that the Commission should grant access to those documents unless it could show that access to them was covered by one of the exceptions set out in Regulation No 1049/2001.

25. On 12 October 2004, the Commission sent a detailed opinion to the Ombudsman in which it informed him that it had accepted his

draft recommendation and had reconsidered the appellant's application for access to the documents relating to Contract LIEN 97-2011. Nevertheless, despite its reconsideration, it maintained its refusal to grant the appellant access to the documents to which it had already denied it access, with the exception of five of them, copies of which were attached to the opinion.

26. On 14 December 2004, the Ombudsman adopted a definitive decision concerning the complaint lodged by the appellant on 6 October 2003. In conclusion, the Ombudsman made a critical remark concerning the Commission's administrative practice in the case at issue. In that connection, he observed that the fact that the Commission had failed to provide valid reasons capable of justifying its refusal to grant the appellant access to a number of documents relating to Contract LIEN 97-2011 constituted an instance of maladministration. However, having taken the view that the European Parliament could not take action to assist the appellant and the Ombudsman in that case, the Ombudsman did not consider it necessary to submit a special report to the European Parliament and decided to close the case on the appellant's complaint.

27. On 22 December 2004, on the basis of the Ombudsman's conclusions in his decision of 14 December 2004, the appellant sent the Commission an application for full access to the documents relating to Contract LIEN 97-2011.

28. On 14 February 2005, in response to that application, the Director of the 'Operational Support' Directorate of the EuropeAid Co-operation Office sent the appellant's lawyer a letter in which he stated that, having adopted a position on the Ombudsman's decision of 14 December 2004, the Commission intended not to grant access to the documents covered by the exceptions provided for in Regulation No 1049/2001, other than those which had already been made available on 26 August 2002 and the five documents annexed to the detailed opinion of 12 October 2004, the contents of which had been forwarded to the appellant.

29. On 11 April 2005, the appellant brought an action before the Court of First Instance for annulment of the decision allegedly contained in the letter of 14 February 2005.

30. In the judgment under appeal, the Court of First Instance considered, principally, that the letter of 14 February 2005 was merely confirmatory of the decision of 26 July 2002, which had become definitive in relation to the appellant, and that the action against that act must therefore be declared inadmissible. In that context, the Court of First Instance dismissed the appellant's claim that the Ombudsman's conclusions in his decision of 14 December 2004 and the developments during, and results of, the inquiry which he had conducted when dealing with the appellant's complaint constituted new factors enabling the time-limits for bringing proceed-

ings to be re-opened. It also held that the decision allegedly contained in the letter of 14 February 2005 had not been preceded by reconsideration of the appellant's situation.

31. For the sake of completeness, the Court of First Instance considered that, even if the letter of 14 February 2005 was not merely confirmatory of the decision of 26 July 2002, the action brought by the appellant against that act was premature in so far as it was only a response to an initial application within the meaning of Article 7(1) of Regulation No 1049/2001, following which the appellant should have submitted a confirmatory application within the meaning of Article 7(2) of that regulation.

32. The Court of First Instance therefore dismissed the action as inadmissible and ordered the appellant to pay the costs of the proceedings.

33. By document lodged at the Court Registry on 7 August 2008, the appellant brought an appeal against the judgment under appeal. It claims, principally, that the Court should set aside the judgment under appeal, annul the decision contained in the letter of 14 February 2005, give final judgment in the matter and order the Commission to pay the costs in full. In the alternative, the appellant claims that the Court should refer the case back to the Court of First Instance.

34. In its response, the Commission contends that the Court should dismiss the appeal as being in part inadmissible and in part unfounded and order the appellant to pay the costs of the proceedings.

35. The appellant and the Commission presented oral argument to the Court at the hearing on 30 June 2009. For the purposes of the hearing, the parties were asked to focus inter alia on the consequences of the failure to indicate the remedies available, as required in Article 8(1) of Regulation No 1049/2001, in a decision rejecting an application for access to documents, and in particular whether the time-limits for bringing proceedings start to run against such a decision and whether the case-law on the inadmissibility of an action for annulment brought against an act which merely confirms a previous act not challenged within the prescribed period is applicable in the context of Regulation No 1049/2001.

IV — Legal analysis

A — *Preliminary considerations*

36. In support of its case for the setting-aside of the judgment under appeal, the appellant raises three grounds of appeal, alleging, respectively, erroneous legal classification of the letter of 26 July 2002 as containing a decision against which an action could be

brought, erroneous legal classification of the letter of 14 February 2005 as constituting a merely confirmatory act and misinterpretation of Article 7(2) of Regulation No 1049/2001.

37. It should be pointed out that the first two grounds raised by the appellant are directed against the principal assessment made by the Court of First Instance to the effect that the act contested at first instance was merely confirmatory of the decision contained in the letter of 26 July 2002.

38. However, the third ground relates to the assessment made by the Court of First Instance 'for the sake of completeness' to the effect that the action was premature, which was based on a premiss diametrically opposed to the conclusion of its principal finding, namely that the act contested at first instance was not merely confirmatory.

39. The second part of the reasoning pursued by the Court of First Instance was clearly put forward in the alternative, more than for the sake of completeness, in the event that, as the appellant maintained, the contested act could not be classified as merely confirmatory.

40. Although the use of such a technique by the Court of First Instance is not entirely beyond reproach, particularly in that it is indicative of some hesitation on its part as to the correct legal classification to be given to a Community act, it cannot in itself constitute a sufficient ground for setting aside the judgment under appeal, in particular where, as in this case, the second part of the reasoning followed by the Court of First Instance is specifically intended to respond to the line of argument advanced out by the appellant in support of the admissibility of its action at first instance.

41. The fact remains that, for the purposes of the present proceedings, as the Commission rightly pointed out in its response to the appeal, even if the principal assessment made by the Court of First Instance must be rejected if the appeal is to lead to the judgment under appeal being set aside and to prompting the Court to find that the action at first instance was admissible, the Court would necessarily also have to uphold the third ground of appeal.

42. Conversely, if the third ground of appeal were to be dismissed, the Court could only conclude that the declaration as to the inadmissibility of the action at first instance was well founded, irrespective of the success or otherwise of the first two grounds of appeal.

43. I therefore take the view that the third ground of appeal must be examined first of all. Only if that ground is to be upheld will the Court be required to determine whether at least one of the other two grounds of appeal is well founded.

44. I have to say here and now, however, that the third ground of appeal should in my view be dismissed, and the appeal likewise dismissed accordingly. Consequently, I shall examine the first and second grounds of appeal only in the alternative.

B — *Principally, the third ground of appeal, based on a misinterpretation of Article 7(2) of Regulation No 1049/2001*

1. Arguments of the parties

45. The appellant points out first that the assessments set out in paragraphs 105 to 108 of the judgment under appeal support the view it put forward at first instance, namely that the application for access made on 22 December 2004 should have been regarded as an entirely new initial application within the meaning of Article 7(1) of Regulation No 1049/2001 and, moreover, should have been treated as such by the Commission. However, the appellant does not understand how the Court of First Instance was able to conclude in paragraphs 109 and 110 of the judgment under appeal that the reply contained in the contested act constituted an initial reply against which the appellant should have submitted a confirmatory application within the meaning of Article 7(2) of Regulation No 1049/2001 rather than bringing an action directly before the Court of First Instance under Article 230 EC. In the appellant's view, bearing in mind in particular the clear and definitive response contained in the letter of 14 February 2005, there was no point requiring it to submit to the Commission a new, confirmatory application which would only have caused it to waste time and to incur additional lawyers' fees. Moreover, it submits that Article 7(2) of Regulation No 1049/2001 is an optional rule and that, taking into account the circumstances of the case, it was no longer obliged to submit a new, confirmatory application. In addition, the appellant complains that the Court of First Instance committed a procedural error in rejecting its request to supplement the Report for the hearing of 1 February 2007 by including in it the argument based on the optional nature of the provisions of Article 7(2) of Regulation No 1049/2001.

46. The Commission proposes that this ground should be dismissed, pointing out, on the one hand, that the appellant agreed that it had not submitted a confirmatory application within the meaning of Regulation No 1049/2001 and, on the other hand, that the initial response under Article 7(1) of that regulation does not constitute an act open to challenge.

2. Assessment

47. First of all, as I have already mentioned, the line of reasoning pursued by the Court of First Instance in paragraphs 103 to 110 of the judgment under appeal is premised on the hypothesis that the act contested at first instance (the letter of 14 February 2005) was not merely confirmatory of the decision contained in the letter of 26 July 2002, as, moreover, the appellant had maintained. The latter alleged before the Court of First Instance (and continues to maintain before the Court of Justice in this appeal) that the application for access to the documents relating to Contract LIEN 97-2011 which it submitted to the Commission on 22 December 2004 constituted an (entirely new) initial application within the meaning of Article 7(1) of Regulation No 1049/2001.

48. It will be noted that, both at first instance and in the course of the present appeal, the appellant does not in any way appear to have based its allegation on the proposition that the case-law of the Court concerning the inadmissibility of an action directed against an act which merely confirms a previous act not challenged within the prescribed period is simply not relevant *in the context of Regulation No 1049/2001*.[7] On the contrary, it appears rather to accept that such case-law is applicable in the context of Regulation No 1049/2001, but claims that, *in the light of the circumstances of the case at issue*, the contested act cannot be classified as being *merely* confirmatory of the decision contained in the letter of 26 July 2002.

49. In paragraphs 103 to 110 of the judgment under appeal, the Court of First Instance did not comment on the specific reasons behind the appellant's allegation that the contested act was not merely confirmatory of the decision contained in the letter of 26 July 2002, but simply assumed that that was the case in order to examine whether the contested act was none the less a measure against which an action could be brought, as the appellant claimed. In my view, that approach cannot in itself be called into question, as the Court of First Instance is not obliged to rule on all aspects of the dispute but only on those which are essential to enable it to give judgment, having regard in particular to the arguments of the parties and the proper administration of justice.[8]

50. That being so, it is important to recall that, in its assessment in paragraphs 105 to 110 of the judgment under appeal, the Court

7 — Although, in response to a written question addressed to the applicant pursuant to Article 54a of the Rules of Procedure of the Court of Justice, the applicant was 'willing' for the Court to consider the application of 22 December 2004 to be a confirmatory application, that response, apart from the fact that it was not articulated in and was inconsistent with the applicant's arguments in support of the third ground of appeal, was formulated solely were it 'to serve the purpose of the administration of justice' and 'in the alternative', although it was not reiterated at the hearing before the Court. In those circumstances, it would appear difficult to accord it any status, even that of an argument in support of this ground of appeal.

8 — It was on that basis that the Court accepted that the Court of First Instance could rule on the merits of a case without even ruling on an objection of inadmissibility in so far as the action was, in any event, held to be unfounded: see Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraph 52, a practice which the Court itself also applies (see Case C-233/02 *France* v *Commission* [2004] ECR I-2759, paragraph 26).

of First Instance held, in essence, that the action for annulment brought against the contested act was premature in so far as that act was merely a preparatory measure for a future final act.

51. In this regard, it follows from the case-law that, in the case of acts or decisions adopted by a procedure involving several stages, and particularly where they are the culmination of an internal procedure, it is in principle only those measures which definitively determine the position of the institution concerned upon the conclusion of that procedure which are open to challenge and not intermediate measures whose purpose is to prepare for the final decision. [9]

52. By contrast, the form in which an act or decision is adopted is in principle irrelevant as far as the admissibility of an action for annulment is concerned, as the classification of an act as open to challenge is dependent on the actual substance of the acts and the intention of their authors. [10]

53. The administrative procedure for access to documents under Regulation No 1049/2001 comprises two successive stages, in accordance with Articles 7 and 8 of that regulation. [11]

54. Article 7 governs the processing of initial applications. A reply to such an application containing a total or partial refusal to grant access to the documents requested (or a failure to reply within the time-limit prescribed by Article 7 of Regulation No 1049/2001) may be the subject of a confirmatory application asking the institution to *reconsider its position*. Under Article 8 of Regulation No 1049/2001, total or partial refusal (whether express or by implication) to grant access to the documents requested in a confirmatory application entitles the applicant to institute court proceedings against the institution, under the conditions laid down in Article 230 EC.

55. It follows that, as the Court of First Instance rightly held in paragraph 104 of the judgment under appeal, only the reply to a confirmatory application may produce legal effects such as to affect the interests of the applicant and, therefore, form the subject of an action for annulment under Article 230 EC.

56. That assessment is not invalidated by the appellant's claim that Article 7(2) of Regulation No 1049/2001 simply provides an option to make a confirmatory application. For, while

9 — See in particular Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 10; Case C-147/96 *Netherlands* v *Commission* [2000] ECR I-4723, paragraph 27; and Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraph 42.

10 — See to that effect *Athinaïki Techniki* v *Commission*, paragraphs 42 and 43.

11 — See also recital 13 of Regulation No 1049/2001.

it is true to say that Regulation No 1049/2001 did not seek to impose on every applicant the obligation to make a confirmatory application, thus leaving to the applicant the decision whether or not to contest, within the framework of the administrative procedure, the 'position' adopted by the institution in its reply to the initial application, the regulation none the less clearly makes the admissibility of an action for annulment under Article 230 EC subject to both stages of the administrative procedure having been exhausted.

57. Moreover, although the appellant does not specifically say so, it follows from the wording of the contested act and the intention of its author that the Court of First Instance was right to take the view, in paragraph 109 of the judgment under appeal, that that act was in fact a response to an initial application under Article 7(1) of Regulation No 1049/2001. Furthermore, while it is not for the Court, on appeal, to undertake a new assessment of the facts, I would also point out that the appellant does not in any way criticise the Court of First Instance, in the context of the third ground of appeal, for having distorted the sense of the facts presented to it.

58. None the less, the appellant cannot claim, without patently contradicting its line of argument, that the Court of First Instance was right to take the view (like the Commission) that the application submitted on 22 December 2004 was an entirely new application for access to the documents relating to Contract LIEN 97-2011 under Article 7(1) of Regulation No 1049/2001 and, at the same time, that it is entitled to ignore the procedural rules laid down in that regulation on the ground that that would waste time and incur additional lawyers' fees. Moreover, if, as the appellant maintains, the application made on 22 December 2004 should have been regarded as an entirely new application, the factual circumstances preceding that application are of little importance for the purposes of examining whether its argument in support of this ground of appeal is well founded.

59. Moreover, it should also be pointed out that the application of 22 December 2004 was sent to the Commission by the appellant's counsel and the act contested at first instance was notified directly to him. As a legal practitioner, the appellant's counsel should therefore have exercised the prudence necessary to ensure that the appellant observed the requirements of the administrative procedure that precedes the bringing of an action for annulment under Regulation No 1049/2001. In the same connection, it cannot reasonably be alleged, as the appellant's representative implied at the hearing before the Court, that the procedural rules laid down in Regulation No 1049/2001 are obscure and difficult to interpret.

60. Accordingly, I consider that the Court of First Instance was entirely correct in finding, in paragraph 110 of the judgment under

appeal, that, even if the contested act was not merely confirmatory, it constituted a reply to an initial application within the meaning of Article 7(1) of Regulation No 1049/2001 which could not form the subject of an action for annulment under Article 230 EC.

61. With regard to the appellant's ancillary argument, it need only be pointed out that the appellant does not explain how the alleged procedural error committed by the Court of First Instance could affect the operative part of the judgment under appeal. That notwithstanding, the appellant explicitly acknowledges, in paragraph 20 of its appeal, that its letter to the Court of First Instance setting out its request that the argument concerning the optional nature of the provisions of Article 7(2) of Regulation No 1049/2001 be taken into account in the Report for the hearing was attached to the file at first instance. Accordingly, the argument in question was indeed taken into account by the Court of First Instance, as is confirmed by implication, moreover, by the assessment, in paragraph 109 of the judgment under appeal, relating, in essence, to the obligation to comply with the two-stage administrative procedure laid down in Articles 7 and 8 of Regulation No 1049/2001 before bringing any action for annulment under Article 230 EC.

62. I therefore propose that the third ground of appeal be dismissed.

63. In those circumstances, since paragraph 1 of the operative part of the judgment under appeal, which declares the action at first instance to be inadmissible, is, in my view, well founded, there would be no further need to examine the first and second grounds of appeal.

64. I shall therefore examine those two grounds of appeal only in the alternative, in the event that the Court does not subscribe to the proposal I have just made.

C — *In the alternative, the first and second grounds of appeal, based, respectively, on the erroneous legal classification of the letter of 26 July 2002 as containing a decision against which an action may be brought and the erroneous legal classification of the letter of 14 February 2005 as constituting a merely confirmatory act*

1. The first ground of appeal, based on the erroneous legal classification of the letter of 26 July 2002 as containing a decision against which an action may be brought

(a) Arguments of the parties

65. According to the appellant, the Court of First Instance wrongly classified the letter of 26 July 2002 in reply to a confirmatory

application under Article 8 of Regulation No 1049/2001 as being a measure against which an action for annulment may be brought under Article 230 EC. If the Court of First Instance had not failed to note that the letter of 26 July 2002 had been adopted in breach of essential procedural requirements, it would have been prompted to find that the decision contained in that letter was void or legally non-existent. In this regard, the appellant observes that the letter of 26 July 2002 was not adopted by the Secretary General of the Commission, contrary to Article 4 of the Annex to Decision 2001/937, does not state the reasons on which it is based and does not give any indication of the remedies available, in disregard of Article 8(1) of Regulation No 1049/2001.

66. The Commission first of all expresses doubts as to the admissibility of the first ground of appeal in that the appellant does not specify the disputed parts of the judgment which it seeks to have set aside and appears, at least in certain respects, to complain that the Court of First Instance committed errors in establishing or assessing the facts, an issue which the Court of Justice does not have jurisdiction to review on appeal.

67. On the substance, in so far as the ground of appeal is confined to erroneous legal classification of the letter of 26 July 2002, the Commission rejects the appellant's line of argument. First, it considers that, if the defects raised by the appellant constituted an infringement of essential procedural requirements, they would certainly not have prompted the Court of First Instance to find that the decision of 26 July 2002 did not exist; they might at most have led to its being unlawful and, therefore, open to challenge on that basis. It was precisely in order to be able to argue that the decision was open to challenge that the appellant had the option of bringing an action against it, which option it did not take up. Secondly, the Commission considers that, even assuming that the letter of 26 July 2002 was legally non-existent, there would still have been a negative decision, in accordance with Article 8(3) of Regulation No 1049/2001, on the expiry of the 15-day time-limit, and the appellant could have brought an action for annulment against it. Consequently, even if the Court of First Instance erred in finding that there was a valid, express decision, the letter of 14 February 2005 should none the less still be regarded as merely confirmatory of a negative decision (by implication) which the appellant should have challenged within the prescribed period.

(b) Assessment

68. The Court need not spend too much time on the doubts expressed by the Commission as to the admissibility of this ground of appeal.

69. In my view, despite the rather muddled nature of the arguments it puts forward in support of this ground of appeal, the appellant identifies to the requisite legal standard the assessments in paragraphs 79 to 81 of the

judgment under appeal (to the effect that the decision of 26 July 2002 constituted an act adversely affecting the appellant against which an action for annulment could be brought and which had become definitive) as being vitiated by errors of law. Moreover, contrary to the Commission's submission, the appellant's criticisms are premised not on a challenge to the assessment of the facts carried out by the Court of First Instance but on the incomplete examination of the facts presented to that court. The Community judicature has already accepted as admissible on appeal a plea alleging an incomplete examination of the facts by the court adjudicating on the substance. [12] It should certainly do so in the case of an argument put forward in support of a plea in law.

70. As to the substance, the first ground of appeal could prove more difficult to dispose of than it at first appears.

71. It is true that the allegation of failure on the part of the Court of First Instance to take into account the appellant's contention that the letter of 26 July 2002 did not state the reasons on which it was based can readily be declared invalid. In paragraph 78 of the judgment under appeal, which has not been criticised by the appellant, the Court of First Instance held that it was apparent from the very wording of that letter, which referred expressly to the letter of 8 July 2002, that the Commission had clearly indicated to the appellant that it did not wish to revise its initial reply. The appellant cannot therefore claim that the Court of First Instance failed to take into consideration the alleged lack of a statement of reasons in the letter of 26 July 2002. On the contrary, it did examine whether reasons had been given for the refusal contained in the letter of 26 July 2002, specifically highlighting the fact that that letter had, at least in summary, set out the reasons for which the Commission had denied the appellant full access to the file on Contract LIEN 97-2011.

72. However, as regards the other two defects adversely affecting the decision of 26 July 2002, it is common ground, on the one hand, that that decision was not adopted by the competent authority designated by Article 4 of the Annex to Decision 2001/937, namely the Secretary General of the Commission, and did not give any indication of the remedies available, contrary to the institution's duty to the applicant under Article 8(1) of Regulation No 1049/2001, and, on the other, that the Court of First Instance neglected to examine those defects.

73. At this stage, the Court could confine its review to determining whether, if the Court of First Instance had examined the two irregularities adversely affecting the decision of 26 July 2002, it would have drawn the conclusion that that decision was divested of any 'legal effectiveness' in the sense that it had

12 — Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 392 to 406, and judgment of 19 September 2008 in Case T-253/06 P *Chassagne* v *Commission*, paragraph 57.

to be regarded as void or non-existent, as the appellant claims.

74. It seems to me, however, that the complaint that the Court of First Instance did not examine certain facts which were allegedly put before it calls for a more comprehensive examination of this ground of appeal.

75. I therefore suggest that it be ascertained first of all whether the Court of First Instance was obliged to examine the two defects adversely affecting the decision of 26 July 2002 which were identified by the appellant in its appeal.

(i) The obligation to take into consideration the lack of competence of the author of the decision of 26 July 2002

76. With regard to the lack of competence of the author of the decision of 26 July 2002, it is common ground that that complaint was not raised before the Court of First Instance.

77. The question therefore arises whether the Court of First Instance should have raised such an irregularity of its own motion.

78. As I have already had occasion to state in points 102 to 109 of my Opinion in *Common Market Fertilizers* v *Commission*, [13] the issue of lack of competence of the author of the act must, *in principle*, be raised by the Community judicature of its own motion [14] as a matter of public policy. In my view, that issue, *in principle*, satisfies the two fundamental criteria, identified by Advocate General Jacobs in points 141 and 142 of his Opinion in *Salzgitter* v *Commission*, [15] for establishing:

— 'whether the rule infringed is designed to serve a fundamental objective of the Community legal order and whether it plays a significant role in the achievement of that objective'; and

— 'whether the rule infringed was laid down in the interest of third parties or the public in general and not merely in the interest of the persons directly concerned'. [16]

13 — Case C-443/05 P [2007] ECR I-7209.

14 — See to that effect Case 19/58 *Germany* v *High Authority* [1960] ECR 225, in particular at 233 and 234; Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 28; and Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraphs 56 and 57.

15 — Cited in preceding footnote.

16 — As I stated in my Opinion in *Common Market Fertilizers* v *Commission*, unlike Advocate General Jacobs, I do not believe that the requirement that the breach of Community law should be manifest relates to classification as a matter of public policy. It is rather a condition precedent to the existence of an obligation on the Community judicature to raise the issue of its own motion.

79. It is true that the rules on competence are designed to guarantee a fundamental objective (or value) of the Community legal order, namely institutional balance, and are generally established in the public interest.

80. The fact remains, however, that if, *in principle*, the issue of lack of competence of the author of the act must be raised by the court of its own motion, the best approach is to assess on a case-by-case basis — that is to say by reference to the specific rule of competence supposedly infringed — whether the aforementioned two criteria, including therefore that relating to the significant role of the rule in attaining the objective or fundamental value in question, are fulfilled. [17]

81. It is precisely in that regard, in my view, that the rule infringed in this case, namely Article 4(1) of the Annex to Decision 2001/937, under which the power to reply to confirmatory applications for access to documents is delegated to the Secretary General, does not play a significant role in the observance of institutional balance. It is rather one of the Commission's internal management or administrative measures, in accordance with the legal basis on which it is founded, that is to say Article 14 of the Rules of Procedure of the Commission, in the version applicable at the time when the decision of 26 July 2002 was adopted. [18] Failure to comply with such a rule does not therefore seem to me to be one of the questions which the Community judicature *must* examine of its own motion.

82. It follows, in my view, that the Court of First Instance did not commit any error of law by not raising of its own motion the lack of competence of the author of the decision of 26 July 2002.

(ii) The obligation to take into consideration the failure to indicate the remedies available when the decision of 26 July 2002 was adopted

83. It is important to bear in mind that, although, in the orders in *Guérin automobiles* v *Commission*, [19] the Court held that there was no general obligation on the Community

17 — See, on that point, Case 280/87 *Hecq* v *Commission* [1988] ECR 6433, paragraph 12, in which the Court refused to examine of its own motion the competence of a head of department to adopt management decisions in relation to an official.

18 — Article 14 of the Rules of Procedure of the Commission, which entered into force on 1 January 2001 (OJ 2000 L 308, p. 26), provided that '[t]he Commission may, provided the principle of collective responsibility is fully respected, delegate the adoption of management or administrative measures to the Directors-General and Heads of Service, acting on its behalf and subject to such restrictions and conditions as it shall impose'.

19 — Orders in Case C-153/98 P [1999] ECR I-1441, paragraph 15, and Case C-154/98 P [1999] ECR I-1451, paragraph 15. See also to that effect the order of 7 December 2004 in Case C-521/03 P *Internationaler Hilfsfonds* v *Commission*, paragraph 44.

administrative authorities to inform individuals of the legal remedies available, that statement is, however, conditional on 'the absence of express provisions of Community law'.

84. As regards public access to documents of the European Parliament, the Council and the Commission, Article 8(1) of Regulation No 1049/2001 expressly requires an institution which totally or partially refuses access to 'inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 [EC] and 195 [EC], respectively'.

85. In this case, as I have already said, the Commission therefore had a duty to inform the applicant of the remedies available against the decision of 26 July 2002 when it was adopted. [20]

86. As the documents lodged before the Court of First Instance show, and as the Commission acknowledged in its response to the appeal, [21] the appellant did indeed rely, albeit only briefly in the context of the examination by the Court of First Instance of the admissibility of its action for annulment, on a failure to indicate the remedies available against the decision of 26 July 2002.

87. It is true that, according to case-law, the Court of First Instance is not obliged to respond in detail to every single argument advanced by a party in order to give reasons for its judgment to the requisite legal standard. [22]

88. None the less, in the light of the requirement laid down by Article 8(1) of Regulation No 1049/2001, of which the Court of First Instance could not have been unaware, and the manifest failure on the part of the Commission to indicate the remedies available when it adopted the decision of 26 July 2002, the appellant's intention in referring to the irregularity affecting that decision was clearly that the Court of First Instance should

20 — The question whether that information must appear in the grounds of the decision itself or in the act by which the decision is notified is not crucial and, in any event, is not covered by Regulation No 1049/2001. What does matter is that the information on the remedies available should be communicated at the time when access to the documents requested is totally or partially refused.

21 — See, respectively, paragraph 4 (p. 4) of the appellant's observations on the objection of inadmissibility raised by the Commission before the Court of First Instance and footnote 2 (p. 4) of the response to the appeal before the Court of Justice.

22 — See in particular to that effect Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 121; Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 81; and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 91.

examine the possible consequences of that failure as regards the admissibility of the action brought before it, which, it should be remembered, was being expressly contested by the Commission.

89. As I shall explain in more detail later in this Opinion, such an examination ought in particular to have led the Court of First Instance to consider whether reliance as against the appellant on the time-limits for bringing proceedings was precluded.

90. Consequently, in my view, by refraining from examining the failure to indicate the remedies available against the decision of 26 July 2002, as the appellant had asked it to do, and, therefore, by failing to consider the possible consequences of that irregularity when a decision based on Article 8(1) of Regulation No 1049/2001 was adopted, the Court of First Instance at the very least gave inadequate reasons [23] for the conclusion it reached in the judgment under appeal to the effect that the decision of 26 July 2002 constituted an act open to challenge which had become definitive when the action was brought against the act adopted on 14 February 2005.

91. As I see it, the error of law with respect to the obligation to state reasons on which I have just focused cannot be made good by the Court on appeal because the review which the Court is required to carry out in this case does not relate exclusively to grounds of pure law but, at least in part, to the assessment of facts which were not examined by the Court of First Instance. [24]

92. It follows that the judgment under appeal should be set aside in part, that is to say in so far as, principally, it declares the action brought by the appellant inadmissible on the ground that it was brought against an act which was merely confirmatory of the act adopted on 26 July 2002.

93. If the Court took the same approach, there would be no further need to rule on the second ground of appeal as the latter would not be capable of bringing about a more extensive setting-aside than that which I have just proposed. [25]

23 — It is worth bearing in mind that the Court of Justice has already held that an inadequate statement of reasons can, and indeed must, be raised by the Community judicature of its own motion (see, in particular, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67, and the case-law cited).

24 — See in this regard Case C-361/01 P *Kik* v *OHIM* [2003] ECR I-8283, paragraph 101; Case C-93/02 P *Biret International* v *Council* [2003] ECR I-10497, paragraph 60 and Case C-94/02 P *Biret et Cie* v *Council* [2003] ECR I-10565, paragraph 63; Case C-447/02 P *KWS Saat* v *OHIM* [2004] ECR I-10107, paragraphs 46 to 51; and judgment of 30 April 2009 in Case C-497/06 P *CAS Succhi di Frutta* v *Commission*, paragraphs 57 to 67. See also, with regard to the possibility of a substitution of grounds, the Opinion of Advocate General Léger in Case C-294/95 P *Ojha* v *Commission* [1996] ECR I-5863, point 179.

25 — See, by analogy, Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others* v *Ufex and Others* [2003] ECR I-6993, paragraph 43.

94. It would then be sufficient for the Court to rule on the merits of the third ground of appeal directed against the assessment made by the Court of First Instance 'for the sake of completeness' or, more correctly, in the alternative, to the effect, essentially, that, even if the letter of 14 February 2005 was not merely confirmatory, the action for annulment brought by the appellant would in any event have been premature. The judgment under appeal could be set aside in full only if the third ground of appeal were upheld.

95. However, as I have said earlier, the third ground of appeal must in my view be rejected.

96. Therefore, even if the Court examined the first ground and took the view that the judgment of the Court of First Instance must be set aside in part, there would be no need for it to decide on the second ground of appeal.

97. Moreover, it is important to make clear at this stage that, even if the Court decides to uphold the first and third grounds of appeal and considers itself able to rule on the admissibility of the action for annulment at first instance, that action could not, in my view, be found to be admissible on the basis of the appellant's arguments to the effect that the decision of 26 July 2002 was non-existent or void or the fact, if that is the case, that reliance on the time-limits for bringing proceedings against that decision was precluded.

98. First, with regard to the alleged non-existence of the decision of 26 July 2002, it should be recalled that, according to settled case-law, acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are withdrawn or annulled. [26]

99. It is only by way of exception to that principle that acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be deemed to have had no legal effect, even provisional, that is to say that they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality. [27]

26 — Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 10; 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.

27 — *Commission* v *BASF and Others*, paragraph 49, *Chemie Linz* v *Commission*, paragraph 94, and *Commission* v *Greece*, paragraph 19.

100. The gravity of the consequences attaching to a finding that an act of an institution of the European Community is non-existent requires that, for reasons of legal certainty, such a finding should be reserved for quite extreme situations. [28]

101. The Court has thus refused to regard as legally non-existent decisions that were tainted by irregularities consisting in the failure to authenticate the act and/or the lack of competence of its author. [29]

102. In this case, in the light of the case-law just cited, the irregularity affecting the letter of 26 July 2002 concerning the failure to indicate the remedies available certainly does not seem to me to be of such obvious gravity as to render it so intolerable to the Community legal order that it brings about the legal non-existence of that letter.

103. Conversely, and secondly, as the Commission rightly maintains, that irregularity could have been challenged in the context of an action for annulment, under Article 230 EC, against the decision contained in the letter of 26 July 2002, on grounds of infringement of Article 8(1) of Regulation No 1049/2001.

104. It is, however, common ground that the appellant did not avail itself of that option against the letter in question, not because it was unaware of the remedy of court proceedings to which reference should have been made when the decision of 26 July 2002 was adopted, in accordance with Article 8(1) of Regulation No 1049/2001, but essentially for reasons of expediency, as the appellant indicated for the first time in paragraph 10 of its appeal. [30]

105. Moreover, even if the alleged defect could of itself have brought about the annulment of the decision of 26 July 2002, [31] the Community judicature could not, however, have invalidated that decision in the context of an action brought exclusively against the letter of 14 February 2005 without disregarding the scope of the dispute.

28 — *Commission* v *BASF and Others*, paragraph 50, *Chemie Linz* v *Commission*, paragraph 95, and *Commission* v *Greece*, paragraph 20.

29 — See in this regard *Commission* v *BASF and Others*, paragraphs 48 to 53, and Case C-107/99 *Italy* v *Commission* [2002] ECR I-1091, paragraph 45.

30 — The appellant indicates in that paragraph that it 'considered that an inquiry by the Ombudsman would produce better and faster results than proceedings before the Court of First Instance in Luxembourg, which experience shows are lengthy'.

31 — For the record, I would point out that, under Article 231 EC, if the action for annulment is well founded, the Court of Justice must declare the act concerned to be void.

106. Thirdly, and finally, I likewise do not consider that the failure to provide information on the remedies available when the decision of 26 July 2002 was adopted has the further consequence in this case of precluding reliance on the time-limits for bringing proceedings.

107. It is generally true that the national laws of a number of Member States penalise a failure by the administrative authorities to indicate the remedies available not by rendering the decision concerned unlawful but by precluding reliance on the time-limits for seeking the judicial remedies which are available against the administrative act at issue. [32] Generally, that solution thus permits the national court to disapply the time bar applicable to a remedy in cases where the administrative authorities have not fulfilled their obligation to the addressee of the act to provide information on the remedies available. Such a penalty is, in principle, expressly provided for by law or by a measure of general application, but may also be inferred by the courts.

108. The objection might be raised that, in Community law, neither the Treaty nor Regulation No 1049/2001 has expressly conferred on the Community judicature jurisdiction to penalise a failure to provide information on the remedies available against a decision refusing access to documents by precluding reliance as against the addressee of that decision on the time-limits for bringing proceedings.

109. In my view, however, such jurisdiction may be inferred from the system of remedies provided for in the EC Treaty, in particular the jurisdiction conferred on the Court of Justice under Article 230 EC and the requirement under Article 8(1) of Regulation No 1049/2001. To allow the Community judicature to preclude reliance on the time-limits for bringing proceedings in cases where the Community administrative authorities have failed to inform the addressee of the remedies available against a decision refusing access to documents will enable individuals to seek review of the legality of the action taken by the Community institutions in this field by thus guaranteeing their right to obtain a judicial determination.

110. In short, therefore, this would amount not to conferring an additional head of jurisdiction on the Community judicature but to permitting it to perform fully its function of reviewing the legality of acts adopted by the Community institutions in the context of the application of Regulation No 1049/2001.

111. At the hearing before the Court, the Commission also submitted, in arguing that reliance on the time-limits for bringing proceedings should not be precluded, that,

32 — With no claim to exhaustiveness, time-limits for bringing proceedings cannot be relied on in Belgian, Danish, Estonian, Finnish, French, German. Greek, Italian, Luxembourg, Netherlands, Polish, Portuguese or Spanish law.

under Article 8(3) of Regulation No 1049/2001, failure to reply to a confirmatory application within the prescribed period is equivalent to a refusal by implication against which the time-limit for court proceedings starts to run. Since an implied negative decision by definition does not contain any indication of the remedies available, it would, according to the Commission, be unreasonable to conclude from this that the time-limits for bringing proceedings can never be relied on as against the addressee of such a decision.

112. Although it is true that that argument lacks neither force nor logic, I nevertheless doubt that the general inference that must be drawn from it is, as the Commission also argued at the hearing, that the indication of the remedies available, which the administrative authorities are required to give under Article 8(1) of Regulation No 1049/2001, can be regarded only as a mere reminder of the relevant provisions of the EC Treaty and failure to provide that information cannot be penalised.

113. In the administrative legal systems of certain Member States, such as the French Republic and the Italian Republic, under whose law silence from the administrative authorities beyond a given time-limit is equivalent to a rejection of an application, that situation has not been an insurmountable obstacle to the introduction of provisions requiring the administrative authorities to indicate the judicial remedies available when adopting an *express* individual decision of refusal and penalising failure to provide that information by precluding reliance on the time-limits for bringing proceedings.

114. In this case, the decision of 26 July 2002 was indeed an express decision refusing to disclose to the appellant all the documents relating to Contract LIEN 97-2011.

115. So, while, in my view, there is no reason why the failure to indicate the remedies available when adopting a decision under Article 8(1) of Regulation No 1049/2001 should not be open to the penalty of precluding reliance on the time-limits for bringing proceedings, the question remains whether the penalty should be automatic or on a case-by-case basis.

116. In that regard, it seems reasonable to take the view that there must be a presumption that, in the absence of information on the remedies available, as required by Article 8(1) of Regulation No 1049/2001, the applicant is assumed to have been unable to exercise his right of action within the prescribed period. Such a presumption strikes me as being consistent with the objectives pursued by

Regulation 1049/2001 of giving the fullest possible effect to the right of access and of facilitating the exercise of that right by the citizens of the European Union. [33]

117. None the less, I also consider that that presumption should not be absolute. It must be possible for the court, when considering whether to preclude reliance on the time-limits for bringing proceedings, to choose not to on the basis of the specific circumstances of each case. In particular, the degree of information provided to the applicant or his clearly demonstrated intention not to assert his right to pursue a judicial remedy should, in my view, constitute relevant factors which must be taken into consideration. [34]

118. In the present case, as stated in point 104 of this Opinion, following the adoption of the decision of 26 July 2002, the appellant chose to lodge a complaint with the Ombudsman, an extrajudicial remedy which must also be mentioned in any decision rejecting a confirmatory application for access to documents, rather than bring an action for annulment before the Court of First Instance, for reasons of expediency, as it indicated for the first time in paragraph 10 of its appeal. [35] It was therefore fully informed of the possibility of bringing an action for annulment against the decision of 26 July 2002, but did not avail itself of it.

119. In the light of all the foregoing considerations, I take the view that the action at first instance could not be declared admissible on the ground that the failure to indicate the remedies available when the decision of 26 July 2002 was adopted rendered that decision non-existent or void or precluded reliance on the time-limits for bringing court proceedings.

120. In the light of the foregoing observations, it would not be necessary to rule on the merits of the second ground of appeal. I shall

33 — Of course, such a presumption means that there is no requirement on the applicant to demonstrate any excusable error permitting it to derogate from the rules governing time-limits for bringing proceedings. Moreover, that presumption also means that, in principle, a decision adopted in breach of the obligation to indicate the remedies available has not become definitive as against the applicant. In such circumstances, the latter is entitled to challenge either the confirmed decision or the so-called confirmatory decision or both: see Joined Cases 193/87 and 194/87 *Maurissen and European Public Service Union* v *Court of Auditors* [1989] ECR 1045, 1075, paragraph 26, and Case C-135/06 P *Weißenfels* v *Parliament* [2007] ECR I-12041, paragraph 54.

34 — Somewhat like a consumer's waiver of his right to have the courts disapply an unfair contractual term: see in this regard Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 33.

35 — There seems to be some dispute over whether the appellant was represented by counsel at the time when the decision of 26 July 2002 was notified. While counsel for the appellant implied that that was the case at the hearing before the Court, none of the documents in the case-file supports that suggestion, as the correspondence at that time was addressed directly to the director of the appellant organisation.

none the less examine that ground of appeal for such purposes as this may serve.

2. The second ground of appeal, based on the erroneous legal classification of the letter of 14 February 2005 as constituting a merely confirmatory act

(a) Arguments of the parties

121. First, the appellant takes the view that the Court of First Instance wrongly refused to recognise, in paragraphs 87 to 92 and 101 of the judgment under appeal, that the conclusions and results of the inquiry carried out by the Ombudsman constituted new factors allowing the time-limits for bringing proceedings to be reopened. Secondly, it maintains that, in the light of the Commission's general conduct, it is incomprehensible that, in paragraphs 93 to 100 of the judgment under appeal, the Court of First Instance held that the letter of 14 February 2005 had not been preceded by reconsideration of the appellant's situation. According to the appellant, it is perfectly clear that the Commission treated its letter of 22 December 2004 as a completely new application for access to the file relating to Contract LIEN 97-2011 and that, after analysing the situation, the Commission wished to give an independent and final reply to it. In those circumstances, the letter of 14 February 2005 could not therefore be classified as an act merely confirming the decision of 26 July 2002. At the hearing before the Court, the appellant contended that, in any event, the Court's case-law on the inadmissibility of an action brought against an act which merely confirms a previous act not challenged within the prescribed period is not relevant in the context of the application of the provisions of Regulation No 1049/2001.

122. The Commission rejects the criticisms directed against the assessments made by the Court of First Instance. In its view, the Court of First Instance rightly held, in paragraph 86 of the judgment under appeal, that the Ombudsman's decision finding an instance of maladministration cannot call into question the definitive nature of the decision adopted by the Commission on 26 July 2002. A contrary solution would have the effect of undermining the lack of suspensory effect of the complaint procedure initiated before the Ombudsman on the time-limits for bringing court proceedings. Such a ruling would also disregard the non-judicial character of the procedure initiated before the Ombudsman and the unenforceable nature of his opinions. As for the criterion of non-reconsideration of the appellant's situation, the Commission considers, in substance, and in response to a written question put by the Court under Article 54a of its Rules of Procedure, that this is not a separate condition from that requiring the existence of a new factor, which is lacking in this case.

3. Assessment

(a) Applicability of the case-law on the inadmissibility of an action brought against an act which merely confirms a previous act not challenged within the prescribed period in the context of Regulation No 1049/2001

123. It is settled case-law that the time-limits prescribed in Article 230 EC are a matter of public policy and are not subject to the discretion of the parties or the Court, since they were established in order to ensure that legal positions are clear and certain. [36]

124. Moreover, according to the case-law, an action for annulment directed against a decision *merely* confirming a previous decision not challenged within the prescribed period is inadmissible. [37]

125. The Court of First Instance applied that case-law in the judgment under appeal when it held that the letter of 14 February 2005 rejecting the application for full access to the file relating to Contract LIEN 97-2011 constituted an act which merely confirmed the decision of 26 July 2002.

126. The Court of First Instance did not indicate (at least not expressly) any doubt as to the applicability of such case-law in the context of public access to documents under Regulation No 1049/2001.

127. As I have already indicated in point 48 of this Opinion, in its appeal, the appellant criticises the Court of First Instance for having wrongly applied the case-law on merely confirmatory acts rather than for having considered that case-law to be relevant in the context of the application of the provisions of Regulation No 1049/2001.

128. It is true that the appellant objects to the refusal of the Court of First Instance to assess the application submitted on 22 December 2004 as an entirely new application, when, in its submission, it was considered as such by the Commission in its reply of 14 February 2005. [38]

36 — See on that point Case C-246/95 *Coen* [1997] ECR I-403, paragraph 21, and the order of 8 December 2005 in Case C-210/05 P *Campailla* v *Commission*, paragraph 28.

37 — See, in particular, Case 26/76 *Metro SB-Großmärkte* 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-480/93 P *Zunis Holding and Others* v *Commission* [1996] ECR I-1, paragraph 14; and Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647, paragraph 39.

38 — As I have already indicated, in the assessment in the alternative in paragraphs 103 to 110 of the judgment under appeal (challenged under the third ground of appeal examined above), the Court of First Instance accepted that the application made on 22 December 2004 constituted an entirely new application.

129. That claim is, however, more akin to a request for a fresh assessment of the facts, which certainly cannot be considered by the Court on appeal, [39] or to a complaint that the Court of First Instance distorted the clear sense of the evidence, than to an invitation to the Court to verify whether the case-law on merely confirmatory acts is properly applicable in the context of the application of Regulation No 1049/2001.

130. Moreover, it was only belatedly, that is to say following the questions put by the Court prior to the hearing, that the appellant claimed that the case-law on merely confirmatory acts was inapplicable.

131. The conclusion might therefore be drawn from this that, in the present case, the Court does not have to decide whether the Court of First Instance committed an error of law in finding, by implication but necessarily, that the case-law on merely confirmatory acts was applicable in the context of Regulation No 1049/2001.

132. It is, however, legitimate to ask, on the one hand, whether, in particular where the Court of First Instance is required to settle a question relating to the conditions governing the admissibility of an action for annulment, be it following an objection of inadmissibility or where it carries out such an examination of its own motion, [40] that court does not have a duty to take account of all the provisions of the legislation applicable to the facts presented to it, including those, if any, which might preclude a possible declaration that the action concerned was inadmissible and, on the other hand, whether the Court of Justice should not raise of its own motion the failure of the Court of First Instance to take into consideration the provisions of the legislation it is required to consider when deciding on the admissibility of an action for annulment.

133. The reply to the first part of that question must, in my view, be clearly positive. Its task of *juris dictio* requires the court to be able to apply to the facts put before it by the parties the rules of law relevant to the resolution of the dispute. Once the legislation relevant to the dispute has been defined, it is the duty of the court exercising judicial review to apply that legislation in full, as it may otherwise be forced to base its decision on erroneous legal considerations. Such a requirement forms part of the impartiality of justice and its proper administration, in particular where the court adjudicating on the substance has to examine the conditions governing the admissibility of an action for annulment, which, as already indicated, it may verify of its own motion.

39 — See, in particular, Case C-425/07 P *AEPI* v *Commission* [2009] ECR I-3205, paragraph 44 and case-law cited.

40 — In that regard, the Court of First Instance, rightly in my view, considers that the question of the admissibility of an action brought against a merely confirmatory act may be raised of its own motion by the court adjudicating on the substance of the case (see Case T-86/97 *Apostolidis* v *Court of Justice* [1998] ECR-SC I-A-167 and II-521, paragraphs 18 to 25).

134. As regards the second question, I also consider that the Court of Justice should not tolerate a distortion of the law in relation to the conditions governing the admissibility of an action for annulment, an issue which, in my view, meets the criteria set out in point 78 of this Opinion. In accepting such a distortion, the Court would be allowing its own judgment to be tainted by errors of law committed at first instance which prompted the Court of First Instance to declare the action inadmissible when, *irrespective of the other assessments in the judgment under appeal* and in the light of the comments that follow, consideration of all the provisions of the applicable legislation should lead to the conclusion that the action for annulment was admissible. [41]

135. Consideration of all the provisions of Regulation No 1049/2001 should have led the Court of First Instance to dismiss the objection of inadmissibility raised by the Commission, which the latter had based on the case-law of the Court of Justice relating to merely confirmatory acts.

136. In my view, the Court of First Instance would have come to that conclusion on a reading of Article 4(7) in conjunction with Article 6(1), last sentence, of Regulation No 1049/2001.

137. In that regard, it is important to recall, on the one hand, that Article 4(7) of Regulation No 1049/2001 provides that the exceptions to access to a document of the institutions are to apply only for the period during which protection is justified on the basis of the content of the document, the maximum period being, in principle, 30 years. On the other hand, under Article 6(1), last sentence, of that regulation, the applicant is not obliged to state reasons for the application.

138. A combined reading of those provisions means that an application for access to a document may be made at any time during the maximum period of 30 years in order to ascertain from the institution concerned, even after the partial or total rejection of an initial application for access, whether the conditions for the application of one of the exceptions to public access to a given document continue to apply in the light of the actual content of the document, the applicant being under no obligation to give reasons for the application. This interpretation thus also includes the situation where, pursuant to Regulation No 1049/2001, an application is submitted after an identical previous application, in which case the applicant does not have to rely on the emergence of a new fact between the rejection of the first confirmatory application and the new application in order to establish the admissibility of any court proceedings brought against rejection of the latter application.

41 — While it is understandable that the issue of distortion of the facts by the Court of First Instance cannot be raised by the appeal court of its own motion, since the exceptional nature of an examination of the facts by the latter is intended to protect the persons directly affected by the facts at issue, conversely, review of a distortion of the law would seem to be a natural part of the role of the appeal court and seeks to protect the public interest.

139. In other words, in the light of the abovementioned provisions of Regulation No 1049/2001, the fact that a decision refusing access to a particular document, which was adopted at a given point in time, has become definitive in relation to an applicant cannot prevent the applicant from submitting a new application for access relating to the same subject-matter. It is then the duty of the institution concerned to ascertain whether the conditions under which the application was initially refused are still present, whether the applicant requests it to do so or not. A new refusal decision, provided that it has been adopted in accordance with the two-stage procedure laid down in Regulation No 1049/2001, must be open to challenge before the Community judicature. Such a decision would indeed be confirmatory but not *merely* confirmatory, as the assessment of the conditions under which the application was refused would have been carried out at a different time from that conducted when the first decision was adopted.

140. Since such an act is not merely confirmatory, there is no requirement of legal certainty which should lead the Community judicature to find that the time-limits for bringing court proceedings had not been complied with.

141. On the other hand, the effect of the view that the case-law on the *merely* confirmatory nature of an act applies in the context of Regulation No 1049/2001 is ultimately to crystallise the reasons for the refusal to grant access to a given document and, hence, to disregard the necessarily temporary nature of the exceptions to the principle of the widest possible public access to the documents held by the institutions, as provided for by that regulation.

142. Finally, it should be noted that the approach set out above is not of course meant to give free rein to any improper, repeated applications and bringing of actions. In this regard, it is common ground that Community law does not tolerate the improper use of its provisions. In any event, there is not the slightest suggestion in the documents before the Court that the provisions of Regulation No 1049/2001 are being misused in this case.

143. I therefore consider that the Court of First Instance erred in accepting the Commission's objection of inadmissibility, based on the alleged merely confirmatory nature of the contested act, on the assumption that the case-law of the Court of Justice relating to merely confirmatory acts was relevant in the context of the application of the provisions of Regulation No 1049/2001.

144. In those circumstances, and in so far as the Court examines the second ground of appeal, it would, in my view, be appropriate to set aside in part the judgment under appeal.

(i) Application to this case of the case-law on the inadmissibility of an action brought against an act which merely confirms a previous act not challenged within the prescribed period

145. Even if the Court does not accept the proposal made in the previous paragraph of this Opinion, the second ground of appeal should none the less be upheld, in my view, on the ground that the Court of First Instance wrongly classified the Ombudsman's decision finding an instance of maladministration in relation to the processing of the application for access to documents in this case as not constituting a (substantial) new factor (or fact) within the meaning of the case-law on acts merely confirming a previous act not challenged within the time-limits for bringing court proceedings. [42]

146. In that regard, I would point out first that, in order to conclude, principally, that the letter of 14 February 2005 was merely confirmatory and therefore not open to challenge, the Court of First Instance held, on the one hand, that that letter did not contain any new factor as compared with the decision of 26 July 2002 and, on the other hand, that it had not been preceded by reconsideration of the situation of the appellant, the addressee of the decision of 26 July 2002.

147. The Court of First Instance relied on that twofold criterion by reference to its own case-law and paragraph 18 of the judgment of the Court of Justice in *Grasselli*. [43]

148. However, as the Commission rightly maintains in reply to a written question put by the Court, and contrary to the findings of the Court of First Instance in paragraphs 69 and 82 of the judgment under appeal, it does not seem to me to be in any way clear from the 'previous decisions' or 'settled case-law' of the Court that the fact that the situation of the addressee of the previous act was not reconsidered constitutes an independent criterion for identifying an act as merely confirmatory of a previous decision.

149. It is true, and I am not unaware of the fact, that, in two recent orders, the Court confirmed the existence of the two cumulative conditions, also referred to in paragraphs 69 and 82 of the judgment under appeal, for

42 — There is no doubt that this question, which falls within the scope of the review of the legal classification of the facts by the Court of First Instance, is a point of law which may therefore, as such, be submitted to the Court of Justice on appeal: see, in that connection, Cases C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 26; C-154/99 P *Politi* v *European Training Foundation* [2000] ECR I-5019, paragraph 11; and C-470/00 P *Parliament* v *Ripa di Meana and Others* [2004] ECR I-4167, paragraph 41.

43 — Case 23/80 *Grasselli* v *Commission* [1980] ECR 3709.

identifying the merely confirmatory nature of an act. [44]

150. However, it follows from most of the case-law of the Court — some of it cited in the two abovementioned orders —, including paragraph 18 of *Grasselli* v *Commission*, cited in paragraph 82 of the judgment under appeal, that the merely confirmatory nature of an act derives exclusively from the absence of any new factor or, more precisely, any substantial new fact as compared with the previous act which it confirms. [45]

151. By contrast, the fact that the situation of the addressee of the previous act was not reconsidered does not make it possible to determine whether the administration refrained from reconsideration because no new factor or fact had emerged between the previous decision and the contested act or, on the contrary, whether it refrained from such reconsideration despite the fact that it was obliged to reconsider a previous decision which had become definitive precisely because a (substantial) new factor or fact *had* emerged.

152. Furthermore, the only relevant judgment of the Court of Justice, that is to say *Herpels* v *Commission* [46] — on which the abovementioned orders were founded in order to confirm the case-law of the Court of First Instance to the effect that non-reconsideration of the situation of the addressee of the act constitutes an independent criterion for identifying the merely confirmatory nature of an act —, despite some ambiguity in its wording, concerned the *converse* situation, that is to say the definitive outcome of a reconsideration of the addressee's position following a substantial amendment of the decision initially taken by the administration, with the result that the contested act could not be regarded as a *mere confirmation* of that decision. [47]

153. It therefore seems rash to draw from that single judgment of the Court the general conclusion that the fact that the addressee's situation was not reconsidered constitutes a relevant criterion for identifying the existence of a merely confirmatory act.

154. In short, it is only the emergence of a (substantial) new factor or fact that *justifies* the reconsideration by the administration of a

44 — Orders in Case C-512/03 P *Internationaler Hilfsfonds* v *Commission* and *Campailla* v *Commission*, paragraph 23.

45 — See in that regard Joined Cases 109/63 and 13/64 *Muller* v *Commission* [1964] ECR 663, at 674; Case 24/69 *Nebe* v *Commission* [1970] ECR 145, paragraph 8; Case 33/72 *Gunnella* v *Commission* [1973] ECR 475, paragraphs 10 and 11; and Case C-417/05 P *Commission* v *Fernández Gómez* [2006] ECR I-8481, paragraph 46. See also the Opinion of Advocate General Reischl in Case 343/82 *Michael* v *Commission* [1983] ECR 4023, point 1.

46 — Case 54/77 *Herpels* v *Commission* [1978] ECR 585.

47 — Paragraphs 11 to 14.

previous decision which has become definitive. [48] In that case it is logical that the lawfulness of the decision adopted following such reconsideration may, if appropriate, be challenged before the Community judicature even if that decision confirms the previous decision in full or in part. [49]

155. Similarly, it is the non-emergence of a new factor or fact that justifies non-reconsideration of the previous decision which has become final. However, in that case, the non-existence of a new factor or fact is sufficient to establish the inadmissibility of an action brought against the act confirming the previous decision.

156. For, if the administration reconsiders the decision when it is not obliged to do so because no new factor or fact has emerged, an action against the act confirming the previous decision will be inadmissible, [50] as the act merely confirms the decision.

157. Conversely, if the administration refuses to reconsider a previous decision which has become definitive when the application for reconsideration is properly based on new factors or facts, an action for annulment of the decision will be admissible. [51]

158. It therefore appears to me, in the light of most of the case-law of the Court summarised above, that the fact that the administration does not reconsider a previous decision which has become definitive does not, as such, make it possible to determine that the act subsequently adopted is merely confirmatory.

159. Consequently, in this case, the relevance of the criticisms which the appellant directs against the assessments made by the Court of First Instance concerning the fact that the decision of 26 July 2002 was not reconsidered depends entirely on the merits of its complaints concerning the finding of the Court of First Instance as to the non-emergence of new factors.

48 — See Joined Cases 42/59 and 49/59 *Snupat* v *High Authority* [1961] ECR 53, at 62; Case 43/64 *Müller* v *Councils of the EEC, EAEC and ECSC* [1965] 385, at 397; Case 326/82 *Aschermann and Others* v *Commission* [1984] ECR 2253, paragraph 13; Case 127/84 *Esly* v *Commission* [1985] ECR 1437, paragraph 10; Case 191/84 *Barcella and Others* v *Commission* [1986] ECR 1541, paragraph 13; Case 153/85 *Trenti* v *ESC* [1986] ECR 2427, paragraph 11; Case 232/85 *Becker* v *Commission* [1986] ECR 3401, paragraph 8; Case 302/85 *Pressler-Hoeft* v *Court of Auditors* [1987] ECR 513, paragraph 6; Case 125/87 *Brown* v *Court of Justice* [1988] ECR 1619, paragraph 13; Case C-459/98 P *Martínez del Peral Cagigal* v *Commission* [2001] ECR I-135, paragraph 45; and the order of 26 March 2003 in Case C-170/01 P *Inpesca* v *Commission*, paragraph 72.

49 — See in particular in this regard Case T-186/98 *Inpesca* v *Commission* [2001] ECR II-557, paragraph 48.

50 — See to that effect *Trenti* v *ESC*, paragraphs 13 and 14, and *Inpesca* v *Commission*, paragraph 49.

51 — See *Muller* v *Commission*, p. 674, and Case 28/72 *Tontodonati* v *Commission* [1973] ECR 779, paragraphs 3 to 5.

160. As I have already said, for the reasons set out below, the line of argument advanced by the appellant to challenge the finding of the Court of First Instance to the effect that the Ombudsman's decision identifying an instance of maladministration in relation to access to the documents requested in this case did not constitute a new factor within the meaning of the case-law referred to above must, in my view, be upheld.

161. It should be recalled here that, in dismissing the argument put forward by the appellant at first instance, the Court of First Instance took the view that the orders in *Internationaler Hilfsfonds* v *Commission* [52] precluded such a classification of the Ombudsman's decision, despite the factual differences between the present case and that which gave rise to the abovementioned orders (paragraphs 84 and 85 of the judgment under appeal). It also held, in paragraph 86 of the judgment under appeal, that, in the light of Article 2(6) of Decision 94/262, according to which complaints submitted to the Ombudsman are not to affect time-limits for appeals in administrative or judicial proceedings, and the order of the Court of Justice in *Internationaler Hilfsfonds* v *Commission*, cited above, those differences could not mean, by converse implication, that a finding of an instance of maladministration by the Ombudsman constitutes a new factor and that an appellant which has not brought court proceedings against an initial decision may therefore circumvent the relevant time-limits.

162. It should be pointed out that, as the case-law shows, the condition requiring a fact or a factor to be 'new' is fulfilled if the fact or factor in question emerged after the adoption of the previous decision which has become definitive. [53]

163. In this case, there is no doubt that that was true of the decision of the Ombudsman adopted on 14 December 2004.

164. I do doubt, however, whether the merits of the finding by the Court of First Instance that that decision was not new can be invalidated by that finding alone. If that were the case, the error committed by the Court of First Instance would constitute a patent distortion of the clear sense of the evidence, as, moreover, the appellant alleges.

165. More correctly — albeit, admittedly, by a stretch of interpretation — the assessment of the Court of First Instance is based on the implicit but necessary inclusion in the term 'new' of the criterion requiring that the relevant fact or factor justifying reconsider-

52 — Order in Case T-372/02 *Internationaler Hilfsfonds* v *Commission* [2003] ECR II-4389, paragraph 40, and order in Case C-521/03 P, paragraph 49.

53 — See in particular *Nebe* v *Commission*, paragraph 8; Case 127/84 *Esly* v *Commission* [1985] ECR 1437, paragraph 11; and *Inpesca* v *Commission*, paragraph 50.

ation by the administration of the previous decision which has become definitive must be 'substantial' or 'sufficiently substantial', as the case-law of the Court has also established. [54]

166. That criterion thus appears to be met by a fact which is capable of substantially altering the situation on the basis of which the appellant made the initial application that gave rise to the previous decision which has become definitive. [55] It is also correct, in my view, to classify as 'substantial' or 'sufficiently substantial' a fact capable of substantially altering the conditions under which the previous act whose reconsideration is sought was adopted, such as, in particular, a fact which casts doubt on the merits of the solution adopted by that act. [56]

167. That is precisely the case of a decision of the Ombudsman, such as that of 14 December 2004, which finds an instance of maladministration in the processing of an application requesting access to certain documents on the ground that the administration did not provide valid reasons capable of justifying the refusal to disclose those documents, in disregard of Regulation 1049/2001.

168. Such a situation is, of course, different from that in which the Ombudsman, following a complaint, simply confirms the assessment made by the administration, which was the situation that gave rise to the abovementioned orders of the Court of Justice and the Court of First Instance in *Internationaler Hilfsfonds* v *Commission*.

169. Moreover, the classification of a decision of the Ombudsman, such as that adopted on 14 December 2004, as a 'substantial new fact' is not, in my opinion, precluded by either Article 2(6) of Decision 94/262 or Article 195 EC, contrary to the finding of the Court of First Instance.

170. On the one hand, recognition of such a classification does not call into question the fact that the lodging of a complaint with the Ombudsman does not have suspensory effect on the time-limits for bringing court proceedings against the initial decision, as provided for by Article 2(6) of Decision 94/262. Those time-limits continue to run against the initial decision, which may even become definitive in relation to the applicant, either where the Ombudsman does not identify any instance of maladministration or where, although an instance of maladministration has been identified, the latter, being merely procedural, does

54 — For the category of judgments which refer expressly to the 'substantial new fact', see *Aschermann and Others* v *Commission*, paragraph 13; *Trenti* v *ESC*, paragraph 11; *Becker* v *Commission*, paragraph 9; and order in *Inpesca* v *Commission*, paragraph 72; for the category referring to a 'sufficiently important/substantial new fact', see *Muller* v *Commission*, at 674, and *Esly* v *Commission*, paragraph 12.

55 — See to that effect *Becker* v *Commission*, paragraph 11; order in *Inpesca* v *Commission*, paragraph 73; and judgment in *Inpesca* v *Commission*, paragraph 51. See also *Esly* v *Commission*, paragraphs 11 and 12.

56 — See Case T-94/96 *Hagleitner* v *Commission*, [1998] ECR-SC I-A-489 and II-1467, paragraphs 31 and 32, and Case T-12/08 P *M* v *EMEA*, paragraph 54.

not in particular raise any doubt as to the merits of the solution adopted in the previous act not challenged within the time-limits for bringing court proceedings.

171. The time-limits for bringing court proceedings would not therefore be reopened simply because the matter had been referred to the Ombudsman, but because his decision finding an instance of substantial maladministration in the processing of an application for access to documents constituted a substantial new fact within the meaning of the case-law of the Court.

172. On the other hand, while it is true that Article 195 EC does not impose an obligation on the institutions *which have been the subject of a complaint* to the Ombudsman to reconsider their position, that assessment does not apply to a situation where, following an inquiry, the Ombudsman identifies an instance of maladministration the substance of which relates specifically to the merits of the solution arrived at by the institution concerned in the act, which has become definitive, whose reconsideration is sought.

173. There would, however, be no point seeking in a legislative text, or even in the EC Treaty, the origin of the obligation to reconsider a Community act which has become definitive following the emergence of a substantial new fact since that obligation is based on a general principle of administrative law, [57] as the Court of First Instance rightly held in the judgment in *Inpesca* v *Commission*.

174. In my view, the approach of treating a decision by the Ombudsman such as that adopted in 14 December 2004 as a substantial new fact justifying reconsideration by the administration of a previous decision which has become definitive ensures the effectiveness of a finding of an instance of maladministration by the Ombudsman and at the same time preserves the discretion of the requested institution. On the one hand, contrary to what the Commission maintains in its response to the appeal, an institution will be all the more likely to comply diligently with the requirement of proper administration in the context of access to documents if it is aware of the possibility open to an applicant of requesting the reconsideration of a decision refusing access following a finding by the Ombudsman of an instance of maladministration. On the other hand, it is clear that, despite the obligation to reconsider the merits of the previous decision refusing access, the institution will retain the power not to disclose the requested document on the basis of the exceptions laid down by Article 4 of Regulation No 1049/2001. [58]

175. On those grounds, I consider that the Court of First Instance erred in taking the

57 — Paragraph 54.

58 — It may also be worth bearing in mind that the Ombudsman's conclusions are not in themselves binding on the Community judicature, although they may be an indication that the principle of sound administration has been infringed; see Case C-167/06 P *Komninou and Others* v *Commission*, paragraph 44.

view that the Ombudsman's decision of 14 December 2004 could not be classified as a new factor, in the sense of a substantial new fact, such as to justify reconsideration of the decision contained in the letter of 26 July 2002 refusing the appellant access to certain documents relating to Contract LIEN 97-2011.

176. The Court of First Instance also erred therefore in so far as, in ruling in paragraphs 93 to 100 of the judgment under appeal that the Commission had not reconsidered the appellant's situation, it by implication but necessarily denied that the Commission had an obligation to reconsider that situation, despite the fact that a substantial new fact had emerged between the adoption of the initial decision and that of the act contested at first instance, that is to say the Ombudsman's decision of 14 December 2004 finding an instance of maladministration in the processing of access to the documents requested by the appellant.

177. In the light of all the foregoing considerations, I propose that the second ground of appeal should be upheld and the judgment of the Court of First Instance set aside in part in so far as that court upheld the objection of inadmissibility raised by the Commission and found that the action at first instance was directed against an act which merely confirmed the decision contained in the letter of 26 July 2002.

178. However, such partial setting-aside of the judgment of the Court of First Instance will be capable of rendering the action at first instance admissible only if the third ground of appeal were upheld.

179. However, as I have already said earlier, I take the view that the third ground of appeal should be rejected.

180. I therefore propose that the appeal be dismissed. [59]

V — Costs

181. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 69(2) of the same rules, applicable to appeal proceedings pursuant to

59 — In those circumstances, of course, there is no further need for the Court to adjudicate on the appellant's claim that the decision allegedly contained in the letter of 14 February 2005 should be annulled or, *a fortiori*, the claim that the Court should give final judgment in the matter. In this regard, even if the Court were to uphold the appeal, it could not grant the latter claim since, as the Commission rightly states in its response, the Court of First Instance has not itself had the opportunity to give final judgment in the matter. The state of the proceedings would not therefore permit the Court of Justice to give final judgment within the meaning of the first paragraph of Article 61 of the Statute of the Court of Justice.

Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for. As the Commission has applied for costs and the appellant should, in my view, be unsuccessful, the latter should be ordered to pay the costs of the appeal.

VI — Conclusion

182. In the light of the foregoing considerations, I propose that the Court should decide as follows:

(1) dismiss the appeal;

(2) order Internationaler Hilfsfonds eV to pay the costs.