JUDGMENT OF THE COURT (Full Court)
23 March 2004 *

In Case C-234/02 P,

European Ombudsman, represented by J. Sant'Anna, acting as Agent, with an address for service in Luxembourg,

appellant,

supported by

European Parliament, represented by H. Krück and C. Karamarcos, acting as Agents, with an address for service in Luxembourg,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber) of 10 April 2002 in Case T-209/00 *Lamberts* v *Ombudsman* [2002] ECR II-2203, seeking to have that judgment set aside in part,

* Language of the case: French.

the other party to the proceedings being:

Frank Lamberts, represented by E. Boigelot, avocat, with an address for service in Luxembourg,

applicant at first instance and appellant on a cross-appeal,

THE COURT (Full Court),

composed of: V. Skouris, President, P. Jann, C.W.A Timmermans, C. Gulmann (Rapporteur), J.N. Cunha Rodrigues and A. Rosas, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: L.A. Geelhoed,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 May 2003,

after hearing the Opinion of the Advocate General at the sitting on 3 July 2003,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 24 June 2002 the European Ombudsman ('the Ombudsman') brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 10 April 2002 in Case T-209/00 *Lamberts* v *Ombudsman* [2002] ECR II-2203 ('the judgment appealed against') in which the Court of First Instance declared admissible the action for damages founded on the alleged misconduct of the Ombudsman in dealing with a complaint.

Legal framework

2 Article 195(1), (2) and (3) EC provides:

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

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

The person lodging the complaint shall be informed of the outcome of such inquiries. The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

2. ...

The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.

3. The Ombudsman shall be completely independent in the performance of his duties. In the performance of those duties he shall neither seek nor take instructions from any body....'

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

Article 14 of that decision, the Ombudsman adopted implementing provisions on 16 October 1997, which came into effect on 1 January 1998 ('the implementing provisions'). The procedure for examining a complaint to the Ombudsman is thus laid down by Article 195(1) EC, Decision 94/262 and the implementing provisions.

4 In essence, under Article 2(4), (7) and (8) of Decision 94/262 and Article 3 and Article 4.1 and 4.2 of the implementing provisions, when the Ombudsman receives a complaint of maladministration in the activities of Community institutions or bodies he is to instigate an inquiry unless, for one of the reasons indicated in the abovementioned provisions, the complaint must be dismissed as inadmissible, in particular where the Ombudsman fails to find sufficient grounds for an inquiry.

5 Under Article 2(5) of Decision 94/262 'the Ombudsman may advise the person lodging the complaint to address it to another authority'. In addition, Article 2(6) of Decision 94/262 provides that complaints submitted to the Ombudsman do not affect time-limits for appeals in administrative or judicial proceedings.

6 In accordance with the second subparagraph of Article 195(1) EC and Article 3(1) of Decision 94/262, the Ombudsman, on his own initiative or on the basis of complaints submitted to him, is to conduct the inquiries which he considers justified to clarify any suspected maladministration.

7 Under Article 3(1) of Decision 94/262 the Ombudsman is to inform of such action the Community institution or body which is the subject of the complaint or an inquiry and that institution or body may 'submit any useful comment to him'.

8 After considering the opinion of that institution or body and any observations made by the complainant, the Ombudsman may decide either to close the case with a reasoned decision or to continue his inquiries. Under Article 4.5 of the implementing provisions he is to inform the complainant and the institution or body concerned accordingly.

9 Where the Ombudsman finds an instance of maladministration in the activities of a Community institution or body he is, under Article 3(5) of Decision 94/262, to seek '[a]s far as possible... a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint'.

10 In that regard, Article 6 of the implementing provisions, entitled 'Friendly solutions', provides in paragraph 1 that 'as far as possible [the Ombudsman] cooperates with the institution concerned in seeking a friendly solution to eliminate [the maladministration] and to satisfy the citizen'. If the Ombudsman considers that such cooperation has been successful, he is to close the case with a reasoned decision and inform the citizen and the institution concerned of the decision accordingly. However, Article 6.3 provides that if he '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'.

11 With regard to the possibility of making a 'critical remark' within the meaning of the last-mentioned provision, Article 7.1 of the implementing provisions provides that the Ombudsman is to make a critical remark if he considers inter alia 'that it is no longer possible for the institution or body concerned to eliminate the instance of maladministration' and that the instance 'has no general implications'.

Facts

12 It is apparent from paragraphs 16 to 36 of the judgment appealed against that the facts underlying the dispute are essentially as set out below.

13 Mr Lamberts took part in an internal competition organised by the Commission of the European Communities for the establishment as officials of members of the temporary staff in Grade A. He failed the oral test and attributes that failure to the fact that, during that test, he was under the influence of medication capable of causing fatigue and reducing his ability to concentrate. He had been prescribed that treatment following an accident which had occurred some weeks prior to the oral test. He stressed that he had not requested a postponement of his oral test owing to a clause in the document inviting him to attend that test. Under that clause 'the organisation of the tests does not permit any change in the times communicated ...'.

14 After unsuccessfully seeking to have his case reexamined by the Commission's services he made a complaint to the Ombudsman.

15 After examining that complaint, the Ombudsman on 21 October 1999 sent Mr Lamberts his decision on it. In that decision the Ombudsman stated that, according to his inquiry, the Commission was in practice prepared to take into account exceptional circumstances which prevented a candidate from attending on the day indicated in the invitation to attend an oral test. He added that, for the sake of sound administration, the Commission should include a passage in the letter of invitation to the oral test informing candidates of that possibility.

However, as regards the Commission's refusal in this case to allow the complainant to retake the oral test, the Ombudsman noted in particular, in paragraphs 2.2 and 2.3 of his decision, that a 'competition has to be conducted in accordance with the principle of equal treatment of candidates. Violation of this principle may lead to the annulment of the competition. That may entail considerable financial and administrative costs for the administration. It appears from the Commission's opinion that the Commission considered that it was unable to offer a candidate the possibility of a second oral exam. The Ombudsman notes that there are no elements at hand which indicate that the decision of the Commission to refuse to let the candidate retake the oral exam has been taken in violation of any rule or principle binding upon the Commission'. The Ombudsman therefore considered that in the present case 'there was no instance of maladministration'.

In conclusion, the Ombudsman made a critical remark regarding the Commission's general administrative practice. In that remark he repeated his view that, as a matter of good administrative conduct, the Commission should as a general rule in future include a clause in the invitations to the oral test informing candidates that the date indicated may be changed in exceptional circumstances. As regards Mr Lamberts's complaint, the Ombudsman concluded that '[g]iven that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter'. The Ombudsman therefore decided to close the case.

Procedure before the Court of First Instance and judgment appealed against

By application lodged at the Registry of the Court of First Instance on 9 August 2000 Mr Lamberts brought an action against the Ombudsman and the Parliament for compensation for material and non-material damage allegedly suffered as a result of the manner in which the Ombudsman had dealt with his complaint. The Ombudsman and the Parliament sought an order that the action be declared inadmissible.

19 By order of 22 February 2001 the Court of First Instance dismissed the application as inadmissible in so far as it had been brought against the Parliament (Case T-209/00 *Lamberts* v *Ombudsman and Parliament* [2002] ECR II-765). By order of the same date it ordered that the objection of inadmissibility raised by the Ombudsman be dealt with together with the merits. The Ombudsman sought an order, in the alternative, that the action be dismissed as unfounded.

20 In the judgment appealed against, the Court of First Instance first examined the admissibility of the action against the Ombudsman. In paragraphs 48 to 52 of that judgment, it referred to the Court's case-law according to which under Articles 235 EC and 288 EC an action may be brought against any Community body in order to establish the non-contractual liability of the Community and to obtain reparation for damage caused by that body in the exercise of its competences. It concluded that it had jurisdiction in the case of an action for damages against the Ombudsman.

21 The Court of First Instance went on to hold, in paragraph 57 of the judgment appealed against, that:

'Decision 94/262... assigns to the Ombudsman not only the task of identifying and seeking to eliminate instances of maladministration on behalf of the public interest but also that of seeking, so far as is possible, a settlement that is in accordance with the specific interest of the citizen concerned. The Ombudsman has indeed, as he himself stressed, very wide discretion as regards the merits of complaints and the way in which he deals with them, and in so doing he is under no obligation as to the result to be achieved. However, even if review by the Community judicature must consequently be limited, it is possible that in very exceptional circumstances a citizen may be able to demonstrate that the Ombudsman has made a manifest error in the performance of his duties likely to cause damage to the citizen concerned.'

22 In paragraphs 58 and 59 of that judgment the Court of First Instance stated:

'58 ... the Ombudsman's argument that any measures he may take following his inquiries are not binding cannot be accepted either. The action for damages provided for under the Treaty was introduced as an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions of use dictated by its specific purpose... . Although actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action for damages seeks compensation for damage resulting from a measure, whether legally binding or not, or from conduct, attributable to a Community institution or body ....

59 In the present case, [Mr Lamberts] accuses the Ombudsman of wrongful conduct in dealing with his complaint. It is possible that such conduct may prejudice the entitlement which citizens enjoy under the Treaty and Decision 94/262 to have the Ombudsman seek a non-judicial settlement of maladministration which affects them, and that it could cause them to sustain damage.'

23 The Court of First Instance dismissed the action as unfounded since Mr Lamberts had not demonstrated that the Ombudsman had committed any breach of his administrative duties in dealing with his complaint.

24 As regards the relevant pleas in the present appeal the following matters emerge from the judgment appealed against.

25 First, Mr Lamberts criticised the Ombudsman for not drawing his attention to the possibility of bringing an action before the Court of First Instance for annulment of the Commission's decision. However, the Court of First Instance has held that a member of staff of the Communities is deemed to be aware of the procedure for bringing an action before the Court of First Instance. The Ombudsman may advise the individual on this point but is not compelled to do so by any provision of Community law.

26 Secondly, Mr Lamberts complained that the Ombudsman failed to demonstrate impartiality and objectivity in dealing with his complaint, in that the Ombudsman took the Commission's opinion into account although that opinion, drafted in English, the language in which Mr Lamberts had made the complaint, had been submitted after the time-limit set by the Ombudsman. He also pointed out that that version of the opinion did not correspond to the French version originally sent. In that connection the Court of First Instance noted that the time-limit set by the Ombudsman for the institution to submit its opinion is not absolute and that the language versions did not differ with regard to the relevant factors in the Ombudsman's consideration of the complaint brought before him.

27 Thirdly, Mr Lamberts maintained that the Ombudsman was under an obligation to use his best endeavours in order to arrange a friendly settlement acceptable to the citizen. The Court of First Instance pointed out that the Ombudsman enjoys very wide discretion in that regard. Consequently, non-contractual liability can be incurred by the Ombudsman only where he has committed a flagrant and manifest breach of his obligations in that connection. He cannot, in principle, merely forward the opinions of the institution to the citizen concerned. In the present case the Ombudsman examined the merits of the point of view defended by the Commission and was able, without being guilty of wrongful conduct, to conclude in his decision that there was no prospect of a friendly settlement acceptable to Mr Lamberts.

Forms of order sought by the parties before the Court

28 In his appeal the Ombudsman claims that the Court should:

— set aside the judgment appealed against inasmuch as it declares the action for damages admissible;

— declare that action inadmissible.

29 Mr Lamberts lodged a reply with the Court Registry. He contends that the Court should:

— dismiss the appeal;

— set aside the judgment appealed against with regard to the substance of the claim brought at first instance and accordingly:

— principally:

— order the Ombudsman to pay him an amount of EUR 2 468 787 by way of damages in respect of material and financial damage and an amount of EUR 124 000 by way of damages in respect of non-material

damage, together with interest to be determined by the Court until full payment,

— order the Ombudsman to pay the costs of the proceedings,

— in the alternative:

— order the Ombudsman to pay him an amount of EUR 1 234 394 by way of damages in respect of material and financial damage and an amount of EUR 124 000 by way of damages in respect of non-material damage, together with interest to be determined by the Court until full payment,

— order the Ombudsman to pay the costs of the proceedings.

30 The Parliament lodged a statement in intervention in support of the Ombudsman.

Main appeal

31 Article 56 of the Statute of the Court of Justice provides that an appeal may be brought before the Court, inter alia, against decisions of the Court of First Instance disposing of a procedural issue concerning a plea of lack of competence or inadmissibility and that such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions.

32 In the judgment appealed against the Court of First Instance first rejected the objection of inadmissibility raised by the Ombudsman against the action brought by Mr Lamberts and went on to dismiss the latter's action as unfounded.

33 Since the Ombudsman was unsuccessful in part in his submissions his appeal against the judgment of the Court of First Instance to the extent to which it rejected his plea of inadmissibility is therefore admissible (see, to that effect, Case C-73/97 P *France* v *Comafrica and Others* [1999] ECR I-185 and Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraph 50).

34 Next, the Ombudsman does not call in question the finding by the Court of First Instance that it has jurisdiction under Article 235 EC and the second paragraph of Article 288 EC to hear actions for damages brought against him *qua* Community body.

35 In fact the Ombudsman acknowledges that in principle a citizen may bring an action for damages in respect of the damage which the Ombudsman has caused him by any misconduct, that is to say actions distinct from the investigative procedures, which was committed in breach of the duties imposed on the Ombudsman by the Treaty and by the rules governing his status and infringed the individual rights of the citizen, such as the right to confidential treatment of certain information.

36 Conversely, he considers it to be in breach of Community law for an action for damages to be brought against him in circumstances such as those in the present case, where the action seeks a review of the legality of the inquiry conducted by him and of his decision to close the procedure. In that regard, the Court of First Instance exceeded the limits to which judicial review of his activity is subject.

37 In support of his appeal the Ombudsman raises a single plea based, on the one hand, on breach by the Court of First Instance of Community law, in particular, of Article 195 EC and Decision 94/262, and, on the other, on disregard or misinterpretation by the Court of First Instance of its own case-law and that of the Court.

38 That plea is divided into three limbs.

First limb of the plea

Presentation and arguments

39 In the first limb of his plea the Ombudsman, supported by the Parliament, criticises the Court of First Instance for carrying out a judicial review of the legality of the inquiry and of the decision to close the procedure, since, under the provisions governing the performance of the Ombudsman's duties and his liability, the power of review is conferred on the Parliament.

40 In that regard he relies on Article 195 EC and Article 3(7) and (8) of Decision 94/262 according to which the Ombudsman has to submit to the Parliament special reports and an annual report on his activities. Essentially he points out that those reports are analysed by the Parliament and deliberated on. He stresses that the inquiry conducted into the complaint by Mr Lamberts was mentioned in the 1999 annual report which was submitted to the Parliament in April 2000. After analysing it, the Parliament drew up its own report which it adopted in July 2000. By agreeing to examine on its merits a case in which Mr Lamberts contested the manner in which the Ombudsman had dealt with his complaint and the

conclusions which he had arrived at, the Court of First Instance wrongly conducted a review of the legality of the inquiry conducted by the Ombudsman and of his conclusions, which duplicates the review incumbent on the Parliament under the EC Treaty and which has already been conducted.

41 Furthermore, the Ombudsman maintains that Article 195(2) EC and Article 8 of Decision 94/262 provide for a specific procedure for the case where the Ombudsman is guilty of serious misconduct or several cases of misconduct calling in question his capacity to perform his duties. In that situation the Ombudsman may, at the request of the Parliament, be dismissed by the Court. If Mr Lamberts was of the view that the Ombudsman had not dealt correctly with his complaint, he ought to have referred the matter to the Parliament and not to the Court of First Instance in the context of an action for damages.

42 The Ombudsman and the Parliament add that the interpretations relied on by the Court of First Instance in declaring admissible an action for damages in respect of damage occasioned by the Ombudsman are likely to disturb the institutional equilibrium established around him and to call in question his independence under Article 195(3) EC.

Findings of the Court

43 The Court of First Instance did not err in law in considering that judicial review of the activities of the Ombudsman is not precluded by the review powers available to the Parliament in regard of him.

44 First, the obligation on the Ombudsman to report to the Parliament cannot be analysed as review by the Parliament of the proper performance by the Ombudsman of his duties in dealing with citizens' complaints.

45 Secondly, the procedure for dismissal of the Ombudsman relates to an appraisal of his overall activity and not to review by the Parliament of the performance by the Ombudsman of his tasks when dealing with a citizen's complaint.

46 In any event, the Parliament's powers with regard to the Ombudsman are not akin to judicial review.

47 Consequently, judicial review of the Ombudsman's activity does not duplicate review by the Parliament.

48 As regards the alleged risk that judicial review of the Ombudsman's activity calls in question his independence, a finding of liability owing to damage occasioned by the Ombudsman's activity concerns not the personal liability of the Ombudsman but that of the Community. It does not appear that the possibility that, under certain circumstances, the Community may incur liability owing to conduct on the part of the Ombudsman in the performance of his duties which is contrary to Community law is of such a nature as to call in question the Ombudsman's independence.

49 According to settled case-law on the Community's liability for damage caused to individuals by a breach of Community law attributable to a Community institution or body, a right to reparation is afforded where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (see Case C-472/00 P *Commission* v *Fresh Marine* [2003] ECR I-7541, paragraph 25, and case-law cited). As regards the second condition, the decisive test for finding that a breach of Community law is

sufficiently serious, in circumstances such as those in the present case, is whether the Community institution or body concerned manifestly and gravely disregarded the limits on its discretion (*Commission* v *Fresh Marine*, cited above, paragraph 26).

50 In order to determine whether there has been a sufficiently serious breach of Community law rendering the Community non-contractually liable owing to the conduct of the Ombudsman, regard must be had to the specific nature of the latter's function. In that context, it should be borne in mind that the Ombudsman is merely under an obligation to use his best endeavours and that he enjoys wide discretion.

51 Thus, contrary to the assertions of the Ombudsman and the Parliament, the review conducted by the latter over the former does not preclude judicial review which must be carried out with due regard for the specific nature of the Ombudsman's function.

52 Consequently, the Court of First Instance did not infringe the provisions of Community law governing the performance of the Ombudsman's duties and review of the Ombudsman by declaring admissible in principle an action for damages founded on the Community's non-contractual liability as a result of the alleged mishandling by the Ombudsman of a complaint. The Court of First Instance was therefore entitled to find, in paragraph 57 of the judgment appealed against, that not only does the Ombudsman enjoy very wide discretion as regards the merits of complaints and the way in which he deals with them, and that in so doing he is under no obligation as to the result to be achieved, but also that, even if review by the Community judicature must consequently be limited, it is possible that in very exceptional circumstances a citizen may be able to demonstrate that the Ombudsman has committed a sufficiently serious breach of Community law in the performance of his duties likely to cause damage to the citizen concerned.

53 The first limb of the plea is therefore unfounded.

Second limb of the plea

Presentation and arguments

54 In the second limb of his plea the Ombudsman, supported by the Parliament, criticises the Court of First Instance for erring in law by declaring admissible an action for damages which in actual fact is seeking to question the legality of the inquiry and the decision to close the procedure although, under the case-law of the Court of First Instance and the Court, the legal remedies provided for in that regard by the Treaty are not available where the Ombudsman is concerned.

55 The Ombudsman argued in particular that the inquiries which he conducts and the conclusions which he reaches, even if they are termed 'decisions', have no direct legal effect on the situation of citizens and no binding legal effect on the institution concerned. Consequently, he considers that, even if his inquiries were vitiated by formal defects and his conclusions by errors of law, those inquiries and conclusions could not in any event occasion loss to complainants who have suffered damage owing to maladministration attributable to a Community institution and not to the Ombudsman.

56 The Ombudsman further criticises the Court of First Instance for conducting, in paragraphs 64 to 85 of the judgment appealed against, a detailed analysis of his inquiry and conclusions, as it would have done in the case of an action for annulment, and thus for carrying out an actual review of legality of the whole of the inquiry and his conclusions.

57 In doing so, the Court of First Instance did not observe the distinction between actions for damages, on the one hand, and actions for annulment and for failure to act, on the other, and disregarded its own case-law and that of the Court from which it is apparent that the Ombudsman's inquiries and decisions cannot be subject to judicial review in the context of the two last-mentioned forms of action.

58 The Ombudsman criticises the Court of First Instance for none the less allowing such judicial review under the guise of an action for damages and thus opening the way to the introduction of numerous actions for annulment, or for failure to act, against the Ombudsman in the guise of purported actions for damages. The Court of First Instance failed to take account of the fact that, in actual fact, the action for damages against the Ombudsman constituted a misuse by Mr Lamberts of the actions for annulment and for failure to act.

Findings of the Court

59 The action to establish liability is an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions of use dictated by its specific purpose (Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 6, and the order of 21 June 1993 in Case C-257/93 *Van Parijs and Others* v *Council and Commission* [1993] ECR I-3335, paragraph 14). Although actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action to establish liability seeks compensation for damage resulting from a measure or from unlawful conduct, attributable to a Community institution or body (see to that effect Case 118/83 *CMC* v *Commission* [1985] ECR 2325, paragraphs 29 to 31; Case C-308/87 *Grifoni* v *Commission* [1990] ECR I-1203, and Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199).

60 One of the preconditions of the right to reparation is, as has been recalled in paragraph 49 above, that there must be a sufficiently serious breach of a rule of law conferring rights on individuals. Thus, with regard to the non-contractual liability of the Community, it is necessary to assess the conduct causing the damage in order to establish the liability of a Community institution or body.

61 In fact, if a Community court were unable to assess the legality of the conduct of a Community institution or body, the procedure provided for in Article 235 EC would be rendered ineffective.

62 Consequently, in the context of an action founded on the non-contractual liability of the Community and seeking reparation for loss allegedly caused by the manner in which the Ombudsman dealt with a complaint, it is appropriate to assess the lawfulness of the Ombudsman's conduct in the performance of his duties.

63 The Court of First Instance was therefore entitled, in paragraphs 64 to 85 of the judgment appealed against, to seek to determine whether the Ombudsman had committed the sufficiently serious breach of Community law alleged against him by Mr Lamberts and to review the manner in which the Ombudsman had dealt with the latter's complaint, in order to determine whether it should uphold the action brought before it.

64 In conclusion the Court of First Instance did not err in law as to the scope of the action for damages by declaring admissible the action brought by Mr Lamberts.

Accordingly, the second limb of the plea is unfounded.

Third limb of the plea

Presentation and arguments

In the third limb of his plea the Ombudsman, supported by the Parliament, is essentially alleging that the Court of First Instance infringed Community law by declaring admissible the action for damages brought against him by Mr Lamberts, although that action sought reparation of damage caused by the conduct of the Commission. In reality Mr Lamberts, who had not brought within the requisite time-limit an action for annulment against the decisions of the Commission concerning him, was seeking, in the guise of an action for damages against the Ombudsman, to circumvent the mandatory time-limits governing the action for annulment in order to challenge before the Community courts the legality of those Commission decisions.

Findings of the Court

The Ombudsman cannot in any event be held liable for the conduct of the Commission. An action seeking reparation for damage caused by the conduct of a Community institution or body must be directed against that institution or body.

68 In support of the action brought at first instance Mr Lamberts argued that he had suffered damage caused by the misconduct and negligence of the Ombudsman in the examination of his complaint. His action does not therefore seek reparation of damage caused by conduct of the Commission occasioning damage.

69 Accordingly, the Court of First Instance was right to hold, in paragraph 51 of the judgment appealed against, that, by means of the action brought before it, Mr Lamberts was seeking to obtain compensation for damage allegedly sustained as a result of negligence on the part of the Ombudsman in the performance of the duties assigned to him by the EC Treaty.

70 Consequently, the third limb of the plea relied on by the Ombudsman is unfounded.

71 In those circumstances the main appeal must be dismissed.

The cross-appeal

72 In support of his cross-appeal Mr Lamberts relies on two pleas.

73 The Ombudsman and the Parliament maintain that the cross-appeal should be rejected as inadmissible.

First plea

74 In his first plea Mr Lamberts criticises the Court of First Instance for infringing Decision 94/262 by not upholding any allegation of misconduct on the part of the Ombudsman. The Court of First Instance thus infringed Article 2(5) of that decision by not sanctioning the Ombudsman for failing to advise Mr Lamberts in due time to bring an action before the Community courts and Article 3(5) thereof by not sanctioning him for failing to seek to obtain a friendly solution satisfactory to the complainant; by failing to do these things the Ombudsman had not fulfilled the task for which he was established by the Parliament.

Admissibility of the plea

75 It must be borne in mind that, where an appellant challenges the interpretation or application of Community law by the Court of First Instance, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the Court of First Instance, an appeal would be deprived of part of its purpose (see order in Case C-488/01 P *Martinez* v *Parliament* [2003] ECR I-13355, paragraph 39 and case-law cited).

76 However, it follows from Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1), first subparagraph, (c) of its Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see order in *Martinez* v *Parliament*, paragraph 40 and case-law cited).

77 Where an appeal merely reproduces the pleas in law and arguments previously submitted to the Court of First Instance, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, it fails to satisfy that requirement. In reality, such an appeal amounts to no more than a request for re-examination of the application submitted to the Court of First Instance, which falls outside the jurisdiction of the Court of Justice (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 35).

78 However, in the present case, in his first plea, Mr Lamberts specifically identified the error of law alleged against the Court of First Instance and in fact criticised the interpretation of Community law on which it relied. In fact, that plea seeks to call in question the position adopted by the Court of First Instance on a point of law submitted to it at first instance, namely the interpretation of provisions of Community law under which the Ombudsman may advise the complainant to apply to another authority and must as far as possible seek a friendly solution.

79 The first plea is therefore admissible.

Substance of the plea

80 It should be stated that the provisions governing the performance of the Ombudsman's duties, and more specifically Article 2(5) of Decision 94/262, do

not impose on the Ombudsman any obligation to inform the complainant of the other legal remedies afforded to him and of the time-limits to be observed with regard to rights of action before the courts. Nor, *a fortiori*, is it incumbent on him to advise the complainant to pursue any particular legal remedy.

81 Whilst it may be in the interests of the proper fulfilment of the tasks conferred on him by the Treaty for the Ombudsman, if appropriate, to inform the citizen concerned of the actions to be brought in order to serve his interests in the best way possible, Article 2(5) of Decision 94/262 cannot be interpreted as founding a right in favour of the complainant to be referred to the Court of First Instance in order to bring before it an action for annulment against the decision of the institution which is the subject of the complaint.

82 As regards the search for a friendly solution to the dispute between the person who has referred a complaint to him and a Community institution, in accordance with Article 3(5) of Decision 94/262, the Ombudsman is solely required to cooperate with the institution concerned in order to seek a solution such as to eliminate the instance of maladministration and satisfy the complainant. In that regard he enjoys very wide discretion. In particular, he must assess whether the search for a solution satisfying the complainant may be contemplated, since there are situations in which the search for such a solution is not possible, as is envisaged in Article 6(3) of the implementing provisions, in which case the Ombudsman is to close the case with a reasoned decision. In any event, the Ombudsman cannot be criticised for not correctly performing the mission entrusted to him on the sole ground that he concluded that it was not possible to find a solution satisfactory to the complainant. The Court of First Instance did not therefore err in law either in its interpretation of the Community provisions under which the Ombudsman is to seek, as far as possible, a friendly solution or when it held in paragraph 85 of its judgment that the Ombudsman is able, without being guilty of wrongful conduct, to conclude in the decision closing a specific inquiry that there is no prospect of a friendly solution acceptable to the complainant.

83 The first plea raised by Mr Lamberts must therefore be rejected as unfounded.

Second plea

84 In his second plea Mr Lamberts alleges that the Court of First Instance erred in its appraisal in two significant respects.

85 First, Mr Lamberts alleges an error in that regard in paragraph 82 of the judgment appealed against inasmuch as it is therein stated that 'it is clear both from the Commission's opinion on the applicant's complaint and from the letter of 15 December 1999 from the Commissioner responsible for personnel matters that the Commission refused to allow the applicant to retake the oral test or to seek an alternative settlement', even though Mr Lamberts had never requested to retake the oral test.

86 In that regard, it should be pointed out, on the one hand, that the Court of First Instance recalled in paragraph 81 of the judgment appealed against that there are some situations in which the search by the Ombudsman for a friendly solution is not possible and considered, in paragraph 82, that that was indeed the case in this instance since the Commission refused to allow Mr Lamberts to retake the oral test or to seek an alternative settlement.

87 The critique by Mr Lamberts of paragraph 82 of the judgment appealed against does not, on the other hand, seek to demonstrate in what regard the Court of First Instance erred in law in verifying whether in the present case a friendly solution was possible.

The argument principally put forward by Mr Lamberts must therefore be rejected as inadmissible for the reasons stated in paragraph 76 above.

Secondly, the Court of First Instance is said to have erred in its assessment by its reliance on manifestly erroneous reasoning when, in paragraph 84 of the judgment appealed against, it claimed that 'it was only in the course of the proceedings before the Court of First Instance that the applicant gave examples of various alternative settlements which he considers should and could have been envisaged', even though it is clear from the evidence in the file, in particular Annex 26 where the applicant refers to the concept of 'special adviser', that Mr Lamberts mentioned such solutions when his complaint was being investigated and before the Ombudsman took his decision, and that the latter never took account of them.

Inasmuch as it refers to the whole of the evidence in the file, that critique of paragraph 84 of the judgment appealed against must be regarded as a criticism of the assessment of the evidence considered by the Court of First Instance, a matter which is not reviewable by the Court on an appeal, which is limited to points of law, in accordance with Article 225 EC and Article 58 of the Statute of the Court of Justice.

On the supposition that the reference to Annex 26 of the dossier submitted by Mr Lamberts to the Court of First Instance may be analysed as a plea alleging distortion of the clear sense of that document, it should be stated that that annex is constituted by correspondence between Mr Lamberts and the secretariat of the Ombudsman, and in particular by a letter of 12 March 1999 in which reference is made to the concept of 'special adviser'. In that letter Mr Lamberts refers to a practice of integration without prior competition, contrary to the rules concerning access to the Community civil service, as provided for by the Staff Regulations of

Officials of the European Communities, which was said to have been implemented in the context of the integration of the staff of the Schengen secretariat into the Secretariat-General of the Council of the European Union, and requests the appointing authority at the Commission to show flexibility in his regard.

92 In light of the abovementioned documents it does not appear that, at a stage earlier than that of the proceedings before the Court of First Instance, Mr Lamberts made concrete proposals as to the solutions which might be envisaged in preference to a fresh invitation to take the oral test. Besides, the Court of First Instance was right not to take into consideration the proposal that flexibility should be shown to Mr Lamberts as an alternative solution capable of being envisaged.

93 Thus, it was without distorting the clear sense of the evidence adduced before it that, in paragraph 84 of the judgment appealed against, the Court of First Instance took the view that Mr Lamberts had not proposed alternative solutions at a stage prior to the bringing of his action, with the result that the Ombudsman had been unable to take a view specifically on such proposals before that action was brought.

94 In light of the foregoing, the cross-appeal is to be dismissed in its entirety.

Costs

95 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. Under Article 69(3) thereof, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may however order that the costs be shared or that the parties bear their own costs. Since each of the parties has partially failed in its submissions, it is appropriate to order the parties to bear their own costs. Moreover, under Article 69(4) of the Rules of Procedure, the Parliament, which intervened in the proceedings, is to bear its own costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the appeal and cross-appeal;**

2. **Orders the parties to bear their own costs.**

Skouris Jann Timmermans

Gulmann Cunha Rodrigues Rosas

Puissochet Schintgen Macken

Colneric von Bahr

Delivered in open court in Luxembourg on 23 March 2004.

Registrar

R. Grass

President

V. Skouris