Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 27 October 2016 [1]

Case C-337/15 P

European Ombudsman
v

Claire Staelen

(Appeal — Non-contractual liability — Handling by the Ombudsman of a complaint concerning the management of a list of suitable candidates in an open competition — Powers of investigation — Duty of care — Non-material harm)

1. Under Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter'), citizens of the Union are entitled to good administration by the institutions, bodies, offices and agencies of the Union in matters which concern them. The duty of care or, to use more explicit terms, the duty to examine carefully and impartially all the relevant aspects of the individual case ('the TUM principle'), [2] is inherent in the principle of good administration. It applies generally to the actions of the EU administration in its relations with the public. [3]

2. However, does breaching the right to good administration give rise to damages? In particular, does the European Ombudsman's breach of the TUM principle amount, as such, to a sufficiently serious breach of EU law which is intended to confer rights on individuals? That is, in a nutshell, what the Court is currently called upon to decide, more than 12 years after the delivery of the seminal judgment in *Lamberts*. [4]

3. In essence, the General Court has held that breaching the TUM principle amounts *per se* to a sufficiently serious breach of EU law and that, on four separate occasions, the Ombudsman failed to observe that principle when considering Ms Claire Staelen's complaint or in connection thereto. [5] Moreover, the General Court held that the Ombudsman failed to respond to her letters in reasonable time. As a consequence of those breaches, that Court awarded Ms Staelen EUR 7 000 as damage for her loss of confidence in the office of the Ombudsman and her feeling of wasted time and energy.

4. I disagree with the General Court and shall explain why in this Opinion. This leads me to advise the Court to set aside the judgment under appeal and to rule on the action lodged at first instance, rejecting Ms Staelen's action in the process as unfounded. [6]

1 — Original language: English.

2 — See, in particular, judgment of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14. As stated below, there has not been consistency in naming this principle, leading me to adopt a more neutral approach.

3 — Judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraph 92.

4 — Judgment of 23 March 2004, *Ombudsman* v *Lamberts*, C-234/02 P, EU:C:2004:174, delivered in Full Court formation ('*Lamberts*').

5 — Judgment of 29 April 2015, *Staelen* v *Ombudsman*, T-217/11, EU:T:2015:238 ('the judgment under appeal').

6 — By orders of 29 June 2016, *Ombudsman* v *Staelen*, C-337/15 P, not published, EU:C:2016:670, and of 20 July 2016, *Staelen* v *Ombudsman*, C-338/15 P, not published, EU:C:2016:599, the Court has dismissed Ms Staelen's own appeal and her cross-appeal against the judgment under appeal.

I – Legal framework

5. Article 3 of Decision 94/262/ECSC, EC, Euratom [7] provides:

'1. The Ombudsman shall, on [her] [8] own initiative or following a complaint, conduct all the enquiries which [she] considers justified to clarify any suspected maladministration in the activities of [EU] institutions and bodies ...

2. The [EU] institutions and bodies shall be obliged to supply the Ombudsman with any information [she] has requested of them and give [her] access to the files concerned … Officials and other servants of [EU] institutions and bodies must testify at the request of the Ombudsman ...'

II – Background to the proceedings [9]

6. On 14 November 2006, Ms Staelen lodged a complaint with the Ombudsman concerning the European Parliament's alleged mismanagement of the list of suitable candidates in Open Competition EUR/A/151/98, on which she appeared as a successful candidate.

7. At the end of her enquiry ('the initial enquiry'), the Ombudsman issued, on 22 October 2007, a decision in which she concluded that Parliament had not committed an act of maladministration.

8. On 29 June 2010, the Ombudsman decided to launch an enquiry of her own initiative, in order to reassess whether the Parliament had committed an act of maladministration ('the own initiative enquiry').

9. On 31 March 2011, the Ombudsman took a decision putting an end to the abovementioned enquiry and held, once more, that the Parliament had not committed an act of maladministration.

III – Procedure before the General Court

10. By application lodged on 20 April 2011, Ms Staelen brought an action for damages against the Ombudsman seeking to obtain compensation for loss she had allegedly suffered as a result of the Ombudsman's handling of her complaint mentioned above at point 6.

11. Following a public hearing held on 9 April 2014, the General Court partially upheld, in the judgment under appeal, Ms Staelen's action and ordered the Ombudsman to pay her EUR 7 000. The General Court dismissed the action as to the remainder, and ordered each party to bear half the costs incurred by the other party.

7 — Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ 1994 L 113, p. 15).

8 — Although most of the events at hand involve her predecessor, for the sake of consistency, I shall refer to the current holder of the office of Ombudsman — namely Ms Emily O'Reilly — who has been Ombudsman since 1 October 2013.

9 — Paragraphs 1 to 42 of the 339 paragraphs of the judgment under appeal set out the background to these proceedings in full.

IV – Procedure before the Court and forms of order sought

12. By her appeal lodged with the Court on 6 July 2015, the Ombudsman claims that the Court should:

— set aside the judgment under appeal (1) in so far as it concludes that (a) the Ombudsman committed several unlawful acts which constitute sufficiently serious infringements of EU law, (b) that non-material damage was established and that (c) there is a causal link between the unlawful acts identified by the General Court and that non-material damage, and (2) in so far as it orders the Ombudsman to pay compensation amounting to EUR 7 000;

— dismiss the application as unfounded in so far as the judgment under appeal is set aside;

— in the alternative, refer the case back to the General Court in so far as the judgment under appeal is set aside;

— make a just and equitable order as to costs.

13. In her response, lodged with the Court on 8 October 2015, Ms Staelen requests the Court to:

— dismiss the appeal as inadmissible in part and in any event ill founded;

— order the Ombudsman to pay EUR 50 000 for non-material damage;

— order the Ombudsman to pay all the costs relating to the present proceedings and the proceedings at first instance.

14. Only the Ombudsman presented oral argument at the hearing held on 6 September 2016.

V – Analysis

A – *Introductory remarks*

15. As a preliminary point of order, I observe that the second head of claim contained in Ms Staelen's response to the Ombudsman's appeal, by which she asks the Court to order the Ombudsman to pay EUR 50 000 for non-material damage, is manifestly inadmissible under Article 174 of the Rules of Procedure of the Court of Justice as going beyond the forms of order which a response to an appeal can seek. [10]

16. Turning to the Ombudsman's appeal, I note that it contains five grounds.

17. Specifically, the Ombudsman argues that the General Court erred in law in holding that: (i) a mere infringement of the TUM principle sufficed for the purpose of establishing the existence of a sufficiently serious infringement; (ii) a credible explanation given by an institution in the course of the Ombudsman's investigation does not exempt her from her duty to ascertain whether the facts on which that explanation is based are established; (iii) the unreasonably late responses to Ms Staelen's letters amount to a sufficiently serious infringement of EU law which triggers the non-contractual

10 — See, as regards the current Rules of Procedure, the Opinion of Advocate General Wathelet in *Commission* v *Andersen*, C-303/13 P, EU:C:2015:340, point 8, and, as regards the former Rules of Procedure, judgment of 5 July 2011, *Edwin* v *OHIM*, C-263/09 P, EU:C:2011:452, paragraphs 83 and 84. In Case C-338/15 P, Ms Staelen requested the Court to order the Ombudsman to pay the same amount.

liability of the Union; (iv) Ms Staelen's loss of confidence in the office of the Ombudsman could be classified as non-material harm without providing adequate explanation therefor; (v) a causal link existed between that loss of confidence and an irregularity which her office is alleged to have committed.

18. As the hearing made clear, in the case of the second to fourth parts of the first ground of appeal; the second part of the second ground of appeal; and the third and fourth grounds of appeal, the Ombudsman challenges both the substance of the findings of the judgment under appeal and the General Court's discharge of its duty to give reasons. In any event, the question whether the grounds of a judgment of the General Court are contradictory or inadequate is a question of law which is amenable, as such, to review on appeal.[11] Moreover, owing to its specific nature, a formal error consisting of little or no reasoning emerging from a decision given at first instance may arguably make it difficult for the Court, on appeal, to rule out an error of substance, in which case these two grounds may interlock.[12] In that light, for the purpose of this Opinion, I find it most appropriate to deal with the reasoning of the judgment under appeal separately after having considered the substance of each ground for appeal. I do so now.

B – *The first ground of appeal: activation of the liability of the Union for the Ombudsman's breach of the TUM principle in the course of the initial enquiry*

1. Arguments of the parties

19. The Ombudsman's first ground of appeal is split into four parts: an initial part relating to an error of law by the General Court in holding generally that any breach of the TUM principle amounts to a sufficiently serious breach of EU law, and three parts relating to three instances where the General Court held that the Ombudsman breached that principle in such a manner within the framework of the initial enquiry. Those three parts concern: (i) the Ombudsman's distortion, in her decision of 22 October 2007, of the content of the opinion of the European Parliament of 27 March 2007; (ii) the Ombudsman's alleged failure to enquire whether the Parliament had informed the other institutions of the inclusion of Ms Staelen in the list of successful candidates in Open Competition EUR/A/151/98 ('the information at issue'); and (iii) the alleged failure to investigate whether the information at issue had been forwarded to the Parliament's own Directorate-Generals ('DGs').

20. The Ombudsman considers that the general approach taken by the General Court, in particular in paragraph 86 of the judgment under appeal, is not compatible with EU law. She argues that the authorities cited do not support the findings of the General Court. Moreover, the Ombudsman considers that the General Court was wrong to hold, at paragraphs 141 to 145 of the judgment under appeal, that the three individual instances examined amounted to sufficiently serious breaches of EU law.

21. Ms Staelen argues that the Ombudsman confuses the discretion to launch an inquiry, which Article 3 of Decision 94/262 confers upon her, with the way in which that inquiry is conducted, and that the Ombudsman is wrong to claim that the judgment under appeal implies that any error amounts to a breach of the TUM principle and triggers her liability. Ms Staelen goes on to argue that the question of whether the Ombudsman distorted the opinion of the Parliament of 22 March 2007 is

11 — Judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraph 76 and the case-law cited.

12 — See, by way of example, judgment of 12 July 2005, *Commission* v *CEVA and Pfizer*, C-198/03 P, EU:C:2005:445, paragraphs 67 to 69. See also judgment of 9 September 2008, *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 89.

a factual assessment not reviewable on appeal. Ms Staelen posits that the Ombudsman is requesting the Court to temper the conditions governing the appellant's non-contractual liability, and that to do so would be at odds with the judgment in *Lamberts*. Furthermore, in response to the second and fourth part of the first ground of appeal, Ms Staelen argues that the General Court did not err in law.

2. Assessment

a) Admissibility

22. Ms Staelen's claim that the first and third parts of the first ground of appeal are inadmissible owing to their factual nature is unfounded.

23. Indeed, the first part of the first plea is a pure point of law in so far as it turns on whether a breach of the TUM principle amounts to a sufficiently serious breach of EU law intended to confer rights upon individuals. As for the other parts of the first ground of appeal, although admittedly linked to factual assessments — namely, in relation to the transmission of the information at issue — the Ombudsman's objection is one of law: whether the failure to investigate that transmission (or lack thereof) amounted to a sufficiently serious breach of EU law. At the very least, as stated by the Ombudsman in her reply, that involves considering the legal characterisation of the facts undertaken by the General Court and the legal conclusions it has drawn from them, which the Court obviously has jurisdiction to review on appeal. [13]

b) First part of the first ground of appeal: yardstick applicable when considering whether the Ombudsman has breached the TUM principle in such a way as to give rise to the non-contractual liability of the Union

i) General reflections on the scope of the TUM principle

24. The duty to examine carefully and impartially all the relevant aspects of the individual case is well established in EU administrative law. It is quintessential to a well-functioning administration, although it is not a concept with precise legal contours. [14] That is perhaps why, at times, the TUM principle has been referred to as the principle or duty of 'diligence', of 'care', or of 'solicitude', and perhaps also why it has served to buttress adjacent basic principles of administrative law such as impartiality and the timely handling of a case. [15]

25. The aspect of that principle (or duty) which is at the fore in the present case is the length to which the administration must go to clarify and examine the factual foundations of an individual case.

26. The particularity of this case is not, as such, whether the General Court was right to consider that the Ombudsman had, on several occasions, breached the TUM principle. Rather, it is mainly whether the General Court was right to hold that the breaches in question were of such magnitude that they triggered the non-contractual liability of the Union. Those issues prompt me to briefly reflect, in what follows, on the scope of the TUM principle.

13 — See, inter alia, judgment of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission and Commission* v *Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 84.

14 — Concurring, see Craig, P., 'Commentary on Article 41 of the Charter', in Peers, S., et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart Publishing, Oxford, 2014, p. 1078, at paragraph 41.28.

15 — See, on that issue, Mihaescu Evans, B., *The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system*, Luxembourg Legal Studies, vol. 7, Nomos Verlagsgesellschaft, Baden-Baden, 2015, p. 392 et seq. (see, in particular, pp. 394 to 401 regarding taxonomical inconsistencies in dealing with this subject).

27. From the outset, the TUM principle manifests itself at two different levels: within the internal EU administrative system, and at the Member State level when EU rules are implemented by national administrations. The focus of this opinion is the former. [16]

28. In short, the TUM principle involves two contrasting points of view: consideration for the administration, and for private individuals.

29. On the one hand, the administration is obviously not omniscient. Requiring it to perform investigative measures relating to even minor issues where the result might only be of little importance to its handling of an individual case could appear disproportionate and at odds with the efficient use of public resources. Moreover, depending on the circumstances, it is evident that, at times, it will be more reasonable to require individuals whose cases are being handled to provide the information sought after where that information can readily be provided by them [17] — that is particularly so as regards cases involving applications. Furthermore, interaction with other legal rules, such as those governing confidentiality, may limit the administration's ability to gather further information. Lastly, the TUM principle is no cure-all. Although obliging the administration to act with care and caution, it does not require the administration to shield economic operators from all harm flowing from normal commercial risks. [18]

30. On the other hand, public administrations are typically large and well equipped and, therefore, better suited than private individuals to handle cases, proffer advice and gather relevant information. [19] Thus, while individuals may be required to cooperate in an inquiry by transmitting all the information they are able to furnish, the administration must nevertheless conduct that inquiry with the greatest possible diligence in order to dispel the doubts which exist. [20] In point of fact, the authorities must exhaust as a matter of course all the possible means of establishing the facts on which the application of the EU provisions depends in any specific case. [21] Hence, it is doubtful that the TUM principle may be tempered out of a concern to lighten the administration's burden or reduce public expenditure, except where not to do so would clearly mean that the burden or expenditure would exceed the limits of what can reasonably be required. [22] Lastly, there is no reason to temper the obligations flowing from the TUM principle where the outcome of the administration's investigation of an individual case might lead to the imposition of a penalty. [23]

31. Against that backdrop, in a Union based on the rule of law, it is of paramount importance that the EU administration permanently strive to adopt decisions which are correct on their merits, in keeping with the general principle that administrative authorities must act in accordance with the law. Therefore, when considering an individual case, the EU authorities must gather, in the most timely and expeditious manner, all the information which, given the circumstances, is necessary and sufficient therefor, and which may enable the intended outcome to withstand prospective judicial scrutiny

16 — As regards the latter, for a Swedish account, see Reichel, J., *God förvaltning i EU och i Sverige*, Jure Publishing, Stockholm, 2006, p. 489 et seq.

17 — See, to that effect, judgment of 11 November 1986, *Irish Grain Board*, 254/85, EU:C:1986:422, paragraph 19. Cf. Hoffmann, H., 'Inquisitorial Procedures and General Principles of Law: The Duty of Care in the Case Law of the European Court of Justice', in Jacobs, L., and Baglay, S. (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives*, Ashgate, Farnham, 2013, p. 165.

18 — Judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraph 93.

19 — See, to that effect, judgment of 28 June 2007, *Internationaler Hilfsfonds* v *Commission*, C-331/05 P, EU:C:2007:390, paragraph 24.

20 — See, to that effect, judgment of 11 November 1986, *Irish Grain Board*, 254/85, EU:C:1986:422, paragraph 16.

21 — See, as regards the duty for national authorities to gather the facts when implementing EU law, judgment of 21 September 1983, *Deutsche Milchkontor and Others*, 205/82 to 215/82, EU:C:1983:233, paragraph 35.

22 — See, as regards the limits to the national authorities' possibility to rely on Article 36 of the EEC Treaty (now Article 36 TFEU), judgment of 20 May 1976, *de Peijper*, 104/75, EU:C:1976:67, paragraph 18.

23 — Compare, in this regard, with rules governing the related — although different — issue of the burden of proof, such as Article 3 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), as amended, and, for example, judgment of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 63, on the interaction between the TUM principle and rules on evidence.

successfully. The information gathered by the administration must, at the very least, allow the outcome it intends to give a pending case to be deemed appropriate and not unreasonable.[24] In no terms can it therefore be excluded that an authority may have to deploy greater resources than initially considered.

32. Having said all that, the fact still remains that, there being no indications to be found in Article 41 of the Charter or elsewhere in primary law, the assessment of whether the administration has discharged its obligation to examine all the relevant aspects of an individual case to a satisfactory degree is inherently casuistic. To be more precise, it will depend above all on two elements: first, the *factual circumstances* of that case and, second, the interpretation of the *specific EU rules* governing the procedure in question and the activities of the administration in that connection.[25]

33. Lastly, as for the issue of damages, it follows from the case-law that a breach of the TUM principle can, in principle, give rise to payment thereof.[26] In particular, the General Court has specified that 'a finding of an error which, in analogous circumstances, an administrative authority exercising ordinary care and diligence would not have committed, will support the conclusion that the conduct of the [EU] institution was unlawful in such a way as to render the [Union] liable under [Article 340 TFEU]'.[27] The General Court's use of the term 'support' appears to indicate that this test does not replace the traditional criteria for establishing the Union's non-contractual liability; however, the terms used in case-law vary.[28] In its case-law, the Court has not laid down a comparative test of that sort,[29] referring instead to a 'lack of care [that] became increasingly obvious'.[30]

ii) Substance

34. Against that introductory backdrop, I now turn to the approach taken by the General Court in the judgment under appeal criticised by the Ombudsman and, more specifically, paragraphs 85 to 88 thereof.

35. In paragraph 86 of the judgment under appeal, the General Court held that 'a mere breach of the [TUM principle] is sufficient to establish the existence of a sufficiently serious breach'.[31] As stated by the Ombudsman, that amounts to a distortion of the case-law: the Court has consistently held that where the EU body in question 'has only considerably reduced, or even no, discretion, the mere infringement of [Union] law *may* be sufficient to establish the existence of a sufficiently serious

24 — See, to that effect, judgment of 22 October 1991, *Nölle*, C-16/90, EU:C:1991:402, paragraph 13.

25 — See, as an example thereof, judgment of 6 November 2008, *Netherlands* v *Commission*, C-405/07 P, EU:C:2008:613, paragraphs 56, 57, 66 and 67.

26 — See judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraph 91.

27 — See judgments of 12 July 2001, *Comafrica and Dole Fresh Fruit Europe* v *Commission*, T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99, EU:T:2001:184, paragraph 134, and of 17 March 2005, *Agraz and Others* v *Commission*, T-285/03, EU:T:2005:109, paragraph 40 (overturned on appeal by judgment of 9 November 2006, *Agraz and Others* v *Commission*, C-243/05 P, EU:C:2006:708, only as concerns the issue of a loss; the Commission not having brought an appeal against the finding of a sufficiently serious breach of EU law).

28 — For instance, in its judgment of 12 July 2001, *Comafrica and Dole Fresh Fruit Europe* v *Commission*, T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99, EU:T:2001:184, paragraph 144, the General Court added that 'the finding of an error or irregularity on the part of an institution is not sufficient in itself to attract the non-contractual liability of the [Union] *unless that error or irregularity is characterised by a lack of diligence or care*' (emphasis added). In its judgment of 18 September 1995, *Nölle* v *Council and Commission*, T-167/94, EU:T:1995:169 ('*Nölle II*'), paragraph 89, the General Court distinguished between a complete failure to observe the TUM principle, and the simple failure properly to appreciate the extent of the obligations flowing therefrom.

29 — Compare with the judgment of 28 June 2007, *Internationaler Hilfsfonds* v *Commission*, C-331/05 P, EU:C:2007:390, paragraph 24, which in passing referred, in the context of proceedings seeking payment of damages, to 'all the care that a large and well-equipped institution owes to those having dealings with it'.

30 — Judgments of 9 December 1965, *Société anonyme des laminoirs, hauts fourneaux, forges, fonderies and usines de la Providence and Others* v *High Authority*, 29/63, 31/63, 36/63, 39/63 to 47/63, 50/63 and 51/63, EU:C:1965:120, at p. 937 (damages awarded), and of 30 January 1992, *Finsider and Others* v *Commission*, C-363/88 and C-364/88, EU:C:1992:44, paragraph 22 (damages not awarded). See also judgment of 15 March 1995, *COBRECAF and Others* v *Commission*, T-514/93, EU:T:1995:49, paragraph 70, where the General Court referred to an 'obvious lack of care'.

31 — The term used in the French version of the judgment — the language of procedure — is 'suffit' (suffices).

breach'.[32] And that is hardly surprising. Indeed, liability on the part of the Union presupposes that the EU body concerned has *manifestly and gravely* disregarded the limits of its discretion; the general or individual nature of a measure taken by that body not being a decisive criterion for identifying that limit.[33] Whether liability is incurred will depend on a number of non-exhaustive elements, including, but not limited to, the measure of discretion left to the EU body.[34] In other words, it is not every error that is sufficient to trigger the non-contractual liability of the Union; something more is required. The case-law of the Court referred to above at point 33 pertaining to the TUM principle confirms this: the lack of care must be *manifest*. If that were not the case, there would be little difference between an action for annulment under Article 263 TFEU and an action for damages under Article 268 TFEU.

36. Not only does the judgment in *Schneider Electric*, which the General Court cites as an authority, not support the view taken in the judgment under appeal, but[35] worse, the statement in paragraph 86 of that judgment is not reconcilable with the — correct — summary of the case-law governing the conditions for triggering the non-contractual liability of the Union given at paragraphs 71 and 72 thereof.

37. Moreover, the statements made by the General Court in the points which precede paragraph 86 of the judgment under appeal do not justify the conclusion drawn in that point.

38. In the first place, the General Court stated, at paragraph 86 of the judgment under appeal, that the Ombudsman does not have discretion concerning respect for the principle of diligence in a specific case. That statement, even if correct, is taken out of context. It is indeed true that the Ombudsman's discretionary powers do not liberate her from observing the TUM principle, inasmuch as it amounts to a general principle of law that the EU administration must observe at all times.[36] Yet it nevertheless remains that, in the light of what I have stated above at point 32, observance thereof will depend, first and foremost, on whether and how she decides to conduct her investigation. Indeed, observance of the TUM principle is a matter of circumstances. Hence, in so far as the Ombudsman's activities are concerned, the observance of the TUM principle will depend on the circumstances at hand which, in turn, will depend on how she has exercised her broad discretion.

39. Tellingly, the General Court appears to be aware of this problem. Indeed, it immediately attempts to limit the scope of the general statement made at paragraph 86 of the judgment under appeal by remarking, at paragraph 87, that not every irregularity committed by the Ombudsman amounts to a breach of the TUM principle, but only those which prevent her from examining carefully and impartially all the relevant elements.[37]

32 — See, for example, judgments of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 44; of 12 July 2005, *Commission* v *CEVA and Pfizer*, C-198/03 P, EU:C:2005:445, paragraph 65, and of 19 April 2007, *Holcim (Deutschland)* v *Commission*, C-282/05 P, EU:C:2007:226, paragraph 47 (emphasis added).

33 — Judgment of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 46; see also judgment of 19 April 2007, *Holcim (Deutschland)* v *Commission*, C-282/05 P, EU:C:2007:226, paragraph 49.

34 — See judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraphs 55 to 57.

35 — Judgment of 11 July 2007, *Schneider Electric* v *Commission*, T-351/03, EU:T:2007:212, paragraphs 117 and 118: 'where the institution criticised has only considerably reduced, or even no, discretion, the mere infringement of Community law *may* be sufficient to establish the existence of a sufficiently serious breach of Community law … The same applies where the defendant institution breaches a general obligation of diligence (see, to that effect, [judgment of 27 March 1990, *Grifoni* v *Commission*, C-308/87, EU:C:1990:134], paragraphs 13 and 14) or misapplies relevant substantive or procedural rules' (emphasis added). Moreover, the Court did not hold in that latter judgment that any breach of the TUM principle is sufficient to trigger the non-contractual liability of the Union.

36 — See Hoffmann, H., op. cit., pp. 153 and 154, who argues that 'the applicable rules and principles [of EU administrative law] relate to all aspects of administrative activity, be it subordinate legislation and administrative rule-making, or single case decision-making (adjudication). They apply irrespective of whether a decision is to be based upon objective criteria, or whether the administration enjoys a certain level of discretion', and, specifically, at p. 158, that 'the principle of the duty of care applies to all steps of an administrative procedure'.

37 — Equally telling is the fact that, as stated by the Ombudsman, at paragraph 205 of the judgment under appeal, the General Court considered that the Ombudsman breached the TUM principle in the context of her own initiative enquiry in part II.C.2 of that judgment, devoted to manifest errors of assessment.

40. In the second place, a key argument which led the General Court to consider, as it did, that the Ombudsman's breach of the TUM principle was sufficient to establish the existence of a sufficiently serious breach of EU law, emerges from the last sentence of paragraph 85. There, the General Court posited that the Ombudsman's respect for the TUM principle is particularly important, given her tasks under Article 228(1) TFEU and Article 3(1) of Decision 94/262.

41. In plain terms, by that statement of principle, the General Court required the Ombudsman to be 'holier than the Pope'. However, that notion is at odds with the decision of the Court in *Lamberts*, which put the Ombudsman on an equal footing with other EU bodies as regards the non-contractual liability of the Union. The specific nature of the Ombudsman's function, as highlighted in *Lamberts*, does not require the application of a stricter standard. Rather, it might be argued that to do so would be detrimental to the way in which the Ombudsman functions, which is to ensure that EU bodies voluntarily observe the principle of good administration and, where that is not the case, through recourse to non-coercive ('soft law') measures.[38] In particular, she has wide discretion to conduct her investigations as she sees fit, and is merely under an obligation to use her best endeavours.[39] Unlike what Ms Staelen claims, that discretion not only concerns the question of whether to open an inquiry, but also extends to 'the way in which [she] deals with [complaints]'[40] — including the appropriateness of applying an investigative measure pursuant to Article 3(2) and (3) of Decision 94/262. That explains why the Court ruled that it is only 'in *very exceptional circumstances* that a citizen will be able to demonstrate that the Ombudsman has committed a sufficiently serious breach of [EU] law in the performance of [her] duties likely to cause damage to the citizen concerned'.[41] Liability for *any and every* breach of the TUM principle, as demonstrated by the judgment under appeal, threatens that discretion and, accordingly, that function.

42. Moreover, to consider, as the General Court did, that the Ombudsman must lead by example, implies that her views are somehow more valid than others. Yet if that were so, it would be counter-intuitive for the Court then to refuse to recognise a binding effect of the Ombudsman's decisions for the issue of whether an EU body has observed the principle of good administration, as it indeed has.[42]

43. I therefore consider that, by holding, in paragraph 86 of the judgment under appeal, that 'a mere breach of the [TUM principle] is sufficient to establish the existence of a sufficiently serious breach', the General Court erred in law.

44. Lastly, the General Court also held, at paragraph 88 of the judgment under appeal, that the TUM principle is intended to confer rights upon individuals. As the Ombudsman does not contest that finding, the following observations are purely *obiter* on my part.

38 — See, to that effect, judgment of 28 June 2007, *Internationaler Hilfsfonds* v *Commission*, C-331/05 P, EU:C:2007:390, paragraph 26.

39 — *Lamberts*, paragraph 50.

40 — *Lamberts*, paragraph 52.

41 — *Lamberts*, paragraph 52 (emphasis added). Suksi, M., commenting on that judgment in *Common Market Law Review*, No 42, Kluwer Law, the Netherlands, 2005, p. 1773, argues that the Court designed a 'principle of self-restraint'.

42 — See, to that effect, judgment of 25 October 2007, *Komninou and Others* v *Commission*, C-167/06 P, not published, EU:C:2007:633, paragraph 44.

45. As authority for that view, the General Court cited its own case-law, which had referred to the TUM principle as 'a rule protecting individuals'.[43] To my knowledge, the Court has never stated anything to that effect.[44] On the one hand, Article 41 of the Charter, of which the TUM principle forms part, does refer to itself as a 'right' to good administration, which appears in Title V entitled 'Citizens' rights'. Moreover, according to Article 52(1) thereof, 'rights' may be 'exercise[d]', and the EU administration is bound to 'respect' them, pursuant to Article 51(1) of the Charter.[45]

46. On the other hand, as stated in the explanation provided as guidance to Article 52(5) of the Charter, the rights which must be respected are *subjective* rights. Here, an argument can be made that the real aim of the TUM principle is to protect the common good by ensuring that the administration generally acts in a manner consistent with the rule of law. This holds particularly true for the Ombudsman, who is charged not with granting a complainant the relief sought in the complaint, but rather with uncovering maladministration in the activities of the EU administration, pursuant to Article 2(1) of Decision 94/262. That aim may coincide with the private interest of a given individual — in this case Ms Staelen — but it cannot always be presumed to be so. A proper reading of *Nölle II* appears to confirm this: that judgment specifically refers to the capacity, in law or in fact, in which the parties involved in an administrative procedure take part.[46] That is why, as illustrated below at point 91, I consider it a matter of circumstances whether, in a given case, disregard for that principle involves the breach of a right conferred upon an individual.

47. Accordingly, I consider paragraph 88 of the judgment under appeal to be overly categorical. However, I recognise that the Ombudsman has not challenged that part of that judgment.

48. Be that as it may, it follows from the above that the first part of her first ground of appeal is well founded.

c) Second part of the first ground of appeal: seriousness of the breach of the TUM principle consisting of the distortion of the opinion of the Parliament of 22 March 2007

49. The second part of the first ground of appeal is also well founded.

50. Indeed, the General Court equated, at paragraph 142 of the judgment under appeal, the error consisting in distorting the content of the Parliament's opinion of 22 March 2007 with a failure to exercise diligence in the investigation of the case which amounted to a sufficiently serious breach of EU law. The General Court simply stated that 'the Ombudsman does not enjoy discretion in describing the content of a document'.

51. Although correct, that statement does not suffice, in itself, to establish the gravity of the error. In particular, the General Court did not examine whether the error was intentional, and whether it was excusable[47] — in particular in light of the fact that the Ombudsman argued, at first instance, that it was a simple error, and that it had been corrected. On all counts, the fact that the Ombudsman acknowledged having committed an error is irrelevant.

43 — *Nölle II*, paragraph 76.

44 — As for whether the powers of the Ombudsman under Decision 94/262 confer rights on private individuals, the General Court has responded to that question in the negative: see judgment of 10 April 2002, *Lamberts* v *Ombudsman*, T-209/00, EU:T:2002:94, paragraph 87.

45 — The Charter has become binding since the judgment of the Court in *Lamberts* was delivered. In that respect, the judgment in *Nölle II* is mentioned in the explanations provided as guidance to the interpretation of the Charter (OJ 2007 C 303, p. 17) relating to Article 41 thereof which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, are to be taken into account for its interpretation.

46 — *Nölle II*, paragraph 76.

47 — See, to that effect, judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 56. Although that paragraph refers to whether an 'error of law [is] excusable', nothing prevents that criterion from applying to errors of fact as well, given that the mentioned paragraph does not provide an exhaustive enumeration of relevant factors.

52. In particular, it seems to me that the present case differs fundamentally from the situation in *M*. There, the fact that the Ombudsman corrected an initial mistake (consisting of the naming, in the public version of an Ombudsman decision, of an EU official in connection with a case of maladministration) did not diminish the severity of the infringement of EU law at issue.[48] In contrast, in the present case, the gravity of the distortion of the content of the Parliament's opinion of 22 March 2007 is not immediately apparent to me, in particular why that error could not be corrected.

53. The fact that the General Court stated, at paragraph 102 of the judgment under appeal, that 'that error … constitutes a failure to exercise diligence … in the consideration of a fact which the Ombudsman [herself] deemed relevant', has no bearing. That statement is the basis for the finding of a breach of the TUM principle, and not that the breach was sufficiently serious.

54. Similarly, contrary to what Ms Staelen asserts, it does not emerge from paragraph 290 of the judgment under appeal that the breach was sufficiently serious. In any event, as argued by the Ombudsman, the fact that the General Court considered, in paragraphs 291 and 292 of the judgment under appeal, whether the measures taken by the Ombudsman might compensate the non-material harm allegedly suffered by Ms Staelen does not alter this, as that discussion relates to the quantification of the loss and not the seriousness of the infringement.[49]

55. In point of fact, the General Court does not provide any real explanation, as it ought to do,[50] as to how the Ombudsman's lack of diligence amounted to a sufficiently serious breach of EU law. Even if it were to be considered that the reasoning follows implicitly from paragraph 88 of the judgment under appeal, then that judgment would be contradictory, inasmuch as the General Court began its analysis by stating, in paragraph 72 thereof, that where the Ombudsman has no discretion, the mere infringement 'may' be sufficient to establish the existence of a sufficiently serious breach.

56. Therefore, I consider in any event that the General Court did not adequately discharge its duty to give reasons as to why the distortion of the content of the Parliament's opinion of 22 March 2007 by the Ombudsman amounted to a sufficiently serious breach of the TUM principle.

d) Third part of the first ground of appeal: seriousness of the breach of the TUM principle consisting of the failure to investigate whether the information at issue had been transmitted to the other EU bodies

57. At stake in the third part of the first ground of appeal is the General Court's finding that, by failing to investigate whether the information at issue had been transmitted to the other EU bodies, the Ombudsman breached the TUM principle in a manner serious enough to trigger the non-contractual liability of the Union.

58. At paragraph 143 of the judgment under appeal, the General Court held, in particular, that the Ombudsman 'does not demonstrate that [she] investigated and had in [her] possession the relevant elements to determine if, when and how the list of suitable candidates in question had been circulated to the other EU institutions, bodies, offices and agencies between 17 May 2005 and 14 May 2007'. It then stated that this failure to act diligently amounted to a sufficiently serious breach.

59. As correctly noted by the Ombudsman, that finding is predicated on the interpretation of the case-law made at paragraph 86 of the judgment under appeal. As I consider that interpretation to be flawed, so, consequently, is paragraph 143 of the judgment under appeal.

48 — Judgment of 24 September 2008, *M* v *Ombudsman*, T-412/05, not published, EU:T:2008:397 (see, in particular, paragraph 134). See, similarly, judgment of 7 February 1990, *Culin* v *Commission*, C-343/87, EU:C:1990:49, paragraph 28.

49 — See, to that effect, judgment of 14 October 2014, *Giordano* v *Commission*, C-611/12 P, EU:C:2014:2282, paragraphs 37 to 40.

50 — See, inter alia, judgment of 26 May 2016, *Rose Vision* v *Commission*, C-224/15 P, EU:C:2016:358, paragraph 24 and the case-law cited.

60. Should the Court, unlike me, not consider paragraph 86 of the judgment under appeal to be defective, it would strike me that, in any event, the General Court erred in law in not adequately discharging its duty to give reasons.

61. Indeed, the General Court does not provide any real explanation as to why the Ombudsman's failure to investigate whether the information at issue had been transmitted to the other EU bodies gave rise to a sufficiently serious breach of the TUM principle. The mere fact that the General Court states that the Ombudsman has not demonstrated that she investigated and had in her possession the relevant elements does not explain the gravity of the error, but rather relates to the Ombudsman having to bear the risk for the lack of evidence in relation thereto. As for whether the reasoning might be implied, I refer to what I have stated above at point 55.

62. It follows that the third part of the first ground of appeal must be upheld.

e) Fourth part of the first ground of appeal: seriousness of the breach of the TUM principle consisting of the failure to investigate whether the information at issue had been transmitted to the Parliament's DGs

63. Having held that the Ombudsman 'has not demonstrated that [she] investigated and had in [her] possession the relevant elements to assess the circulation of [the information at issue]', the General Court came to the conclusion, at paragraph 144 of the judgment under appeal, that the Ombudsman's failure to investigate whether the information at issue had been transmitted to the Parliament's DGs was sufficiently serious to trigger the non-contractual liability of the Union.

64. As correctly noted by the Ombudsman, that finding similarly turns on the incorrect interpretation of the case-law made at paragraph 86 of the judgment under appeal.

65. In any event, for reasons similar to those given above at points 60 and 61, I consider that the General Court erred in law in that it omitted to fulfil its obligation to state reasons as to why the Ombudsman's failure to investigate whether the information at issue had been transmitted to the Parliament's DGs was a sufficiently serious breach of the TUM principle.

66. Consequently, the fourth part of the first ground of appeal is well founded as well and so, accordingly, is that entire ground of appeal.

C – *The second ground of appeal: activation of the liability of the Union for the Ombudsman's breach of the TUM principle in the course of the own initiative enquiry*

1. Arguments of the parties

67. From the outset, the Ombudsman argues that by considering the duration of the validity of the list of successful candidates in relation to a breach of the TUM principle, the General Court ruled *ultra petita*, as Ms Staelen's claim was one of a manifest error of assessment. Furthermore, the Ombudsman argues that Article 3(1) and (2) of Decision 94/262 grants her the power to gather evidence in different ways and to decide whether to undertake further measures of inquiry. She argues that she may lawfully rely on information given by an institution, in so far as there is nothing to call the reliability of that evidence into question. She submits that she had no reason not to base her view on the Parliament's answer of 15 November 2010 to the question she asked in the course of her own initiative enquiry, and Ms Staelen, having been informed of that answer, did not react to it. The Ombudsman argues that she could not have foreseen that the Parliament would, nearly three years later, correct that information and, in any event, that the judgment under appeal contains no explanation as to why her error is sufficiently serious. Lastly, she criticises the General Court for

erroneously holding, first, at paragraph 113 of the judgment under appeal, that it was she who submitted the documents revealing the inaccuracy of the Parliament's opinion of 15 November 2010 and, second, at paragraph 199 thereof, that 'all [the] initially successful candidates had their name included on [the] list of suitable candidates for at least two years, four months and 20 days', when only one candidate was included on that list for a slightly longer period than Ms Staelen, as stated in paragraph 201 of the judgment under appeal. [51]

68. Ms Staelen argues that the presumption of good faith on the part of the administration is rebuttable. In Ms Staelen's view, once the Ombudsman has declared a complaint admissible, the reliability of the information has, in fact, been called into question. The good faith of complainants ought, in her view, to be put ahead of that of the administration, as the Ombudsman's enquiries are undertaken in the interest of the former. Ms Staelen concludes that the General Court did not err in considering that the Ombudsman did not have sufficient evidence on which to base her decision, and that this error was serious enough to activate the liability of the Union.

2. Assessment

69. The Ombudsman's claim that the General Court ruled *ultra petita* must be rejected. Indeed, as stated above at points 38 and 39, a close link exists between the TUM principle and the Ombudsman's discretion to choose whether and how to conduct her investigation. Far from redefining the subject matter of the action, the General Court expressed Ms Staelen's claim of a manifest error of assessment in terms of a breach of the TUM principle, which it was entitled to do. [52]

70. The remainder of this ground of appeal is, on my reading, divided in two parts: first, the Ombudsman submits that she did not breach the TUM principle by not conducting further investigations in the wake of the answer given by the Parliament. Second, she contends that, in any event, her conduct was not sufficiently serious for the purpose of establishing the non-contractual liability of the Union. I shall examine this ground in that order.

a) First part of the second ground of appeal: the alleged breach of the TUM principle by relying on the opinion of the Parliament of 22 March 2007

71. The passages specifically criticised by the Ombudsman, namely paragraphs 199, 205 and 223 of the judgment under appeal, all relate to the argument, reproduced in paragraph 197 thereof, that the Ombudsman erred in not taking the view that Ms Staelen was discriminated against as regards the duration of her inscription on the list of suitable candidates compared to the other successful candidates.

72. As a point of order, I cannot exclude the possibility that the Ombudsman is right in her criticism of the findings of fact referred to above at point 67. However, even though the Ombudsman does not argue that the General Court distorted the factual elements of the case at first instance, that criticism is ineffective inasmuch as those possible errors are immaterial. Indeed, as regards, first, the incorrect use of the terms 'at least', the General Court simply — and rightly — stated, at paragraph 203 of the judgment under appeal, that the explanation given by the Parliament was incorrect. Second, although

51 — Paragraph 201 of the English version of the judgment under appeal contains an error of translation, inasmuch as it uses the plural ('… shorter than that for the other successful *candidates* …'), whereas the French version of the judgment — the language of procedure — refers to '… une durée inférieure à celle d'*un* des autres lauréats du concours …' (emphasis added on both occasions).

52 — See, to that effect, judgment of 1 July 2008, *Chronopost* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 75 and the case-law cited.

the case file reveals that a key Parliament document, which stated that its opinion of 15 November 2010 was inaccurate, was produced at the initiative of Ms Staelen rather than the Ombudsman,[53] paragraph 113 of the judgment under appeal does not refer to that specific document. Therefore, the fact that that document was lodged at Ms Staelen's request is inconclusive.

73. Be that as it may, I do not consider that the General Court could reasonably hold, as it did at paragraph 205 of the judgment under appeal, that the Ombudsman breached the TUM principle by taking the view, in closing her own initiative enquiry, that the Parliament had not committed an act of maladministration 'without having received evidence to attest the date of recruitment of each of the successful candidates and when those explanations proved to be unfounded'.

74. As regards specifically the fact that the explanations later proved to be unfounded, I seriously doubt that the assessment of whether an authority has observed the TUM principle can validly depend only or mainly on events subsequent to the impugned conduct. An error may not be determined solely by having recourse to the wisdom of hindsight.

75. Turning, next, to paragraph 204 of the judgment under appeal, I note that the General Court held, in a general statement, that 'the fact that an explanation given by an institution to the Ombudsman in an inquiry may seem convincing does not exempt the Ombudsman from [her] responsibility to satisfy [herself] that the facts on which that explanation is based are proven where the explanation constitutes the sole basis for [her] finding that there is no maladministration on the part of that institution'. However, that statement does simply not suffice to show that the Ombudsman did not comply with the TUM principle.

76. Indeed, as explained above at point 32, observance of the TUM principle depends on the relevant factual circumstances and on the applicable rules governing the procedure in question and the activities of the administration. Therefore, an overly categorical view such as that displayed in paragraph 204 of the judgment under appeal is neither here nor there. At the very least, it leaves the erroneous impression that if only the Ombudsman had based her view on two statements, she would have observed that principle.

77. Consideration of the relevant factual circumstances and the applicable rules confirms the view that the General Court erred in law.

78. As for the relevant facts, first, as argued by the Ombudsman and without being gainsaid by Ms Staelen, the opinion of the Parliament of 15 November 2010 received comments neither from Ms Staelen who, as stated in paragraph 26 of the judgment under appeal, had explicitly requested the Ombudsman prior thereto to refrain from writing to her, nor from the persons acting on her behalf following Ms Staelen's request to terminate the direct communication.[54]

79. Second, it follows from paragraph 42 of the judgment under appeal that, in view of Ms Staelen's opposition to the own initiative enquiry and the lack of an overriding public interest, there were no grounds for further inquiries. Consequently, the Ombudsman closed that enquiry which, I would call to mind, was launched in the interest of correcting matters which Ms Staelen considered to be erroneous.

53 — It emerges from the file lodged at first instance that, following a request to that effect by Ms Staelen of 12 February 2014, the General Court requested, by decision of its Registrar of 20 March 2014, the Parliament to produce its written pleadings in a parallel case for damages between that institution and Ms Staelen, mentioned at point 52 of the judgment under appeal (a case which gave rise to the judgment of 29 April 2015, *CC* v *Parliament*, T-457/13 P, EU:T:2015:240), which it did on 27 March 2014. It emerges from the Parliament's rejoinder in that case (which the Ombudsman has annexed to her appeal in this case) that the Parliament claimed that it was in the course of those appellate proceedings that it had received new information on the duration of the inclusion of the original successful candidates in the list of successful candidates in competition EUR/A/151/98 (see paragraphs 70 to 78 of that judgment).

54 — See also paragraph 61 of the Ombudman's decision of 31 March 2011 putting an end to the own initiative enquiry.

80. Third, nothing in the facts set out by the General Court allows the conclusion to be drawn that the Ombudsman could not rely on the Parliament's opinion of 15 November 2010, whether due to its previous conduct or otherwise.

81. As for the applicable rules, I have already, above at point 41, expounded on the broad discretion which the Ombudsman enjoys. Moreover, pursuant to Article 9(1) of Decision 94/262, the Ombudsman performs her duties in the general interest of the Union and of its citizens — and not solely, as Ms Staelen would have it, as a tool to further individual interests. As the assessment of that general interest —whether raised by a complaint or by own motion — depends on the circumstances of each case, the number of relevant criteria to which the Ombudsman may refer when exercising her discretion ought not to be limited, nor, conversely, should she be required to have recourse exclusively to certain criteria.[55] That is, perhaps, particularly true for investigations commenced on the Ombudsman's own initiative. Yet the General Court simply discounted the Parliament's answer of 15 November 2010 and the fact that the Ombudsman considered it convincing. That approach, whereby the General Court substituted its own assessment for the Ombudsman's, is irreconcilable with the specific function of the latter.

82. It is, moreover, at odds with basic tenets of EU law which govern the way in which the Ombudsman conducts her investigations.

83. Indeed, I would call to mind, first, that the Union's bodies are to practise mutual sincere cooperation,[56] and that the Union Courts are empowered to review whether that duty has been correctly discharged. In societies governed by the rule of law, that requires, as a corollary, a duty of truthfulness. Hence, a — rebuttable — presumption of veracity attaches to statements given by those bodies.[57] If a statement given by an EU body constitutes a complete answer to the Ombudsman's questions, then the Ombudsman is not at liberty to second-guess the truthfulness or underlying motives of those statements without good reasons for doing so. However, where a full answer is not forthcoming, the Ombudsman can and in all likelihood must continue her enquiry. Ms Staelen's contention that the presumption is rebutted where the Ombudsman declares a complaint admissible finds no support in Decision 94/262: the fact that a complaint is admissible does not indicate that it is well founded, as the rules on admissibility contained in that decision are of a purely formal nature (see, inter alia, Article 2(2) to (4), (7) and (8) of Decision 94/262). To hold otherwise would deprive Article 3(6) of Decision 94/262, which refers only to the possibility of maladministration, of purpose.

84. Second, the principle which prevails in EU law is that of the unfettered evaluation of evidence, and the only relevant criterion for the purpose of assessing the evidence adduced relates to its credibility.[58] Accordingly, where that evidence is sufficiently credible and reliable, it may be superfluous to conduct further investigations.

85. In sum, neither the relevant facts nor the applicable rules lend support to the idea that the Ombudsman had breached the TUM principle.

86. In point of fact, the inaccuracy of the opinion of the Parliament of 15 November 2010 did not, in itself, allow the General Court to conclude that the Ombudsman breached the TUM principle.

55 — See, as regards the application of the TUM principle in relation to the Commission's assessment of the Union interest raised by a complaint alleging breach of the competition rules, judgment of 17 May 2001, *IECC* v *Commission*, C-450/98 P, EU:C:2001:276, paragraphs 57 and 58.

56 — See, to that effect, judgment of 6 October 2015, *Council* v *Commission*, C-73/14, EU:C:2015:663, paragraph 84 and the case-law cited.

57 — See, by analogy, judgment of 26 April 2005, *Sison* v *Council*, T-110/03, T-150/03 and T-405/03, EU:T:2005:143, paragraph 29 (upheld on appeal in judgment of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75).

58 — Judgment of 25 January 2007, *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraph 63.

87. It must be borne in mind that the General Court essentially inferred a breach of the TUM principle from a comparison of the actual duration Ms Staelen was included on the list of successful candidates with the answer provided by the Parliament on 15 November 2010. On the basis of the information which came to light during the proceedings at first instance, it held that Ms Staelen's name was included on that list for one month and eight days less than the only other remaining successful candidate, and that the answer provided by the Parliament on 15 November 2010 was incorrect. From the outset, it troubles me that the General Court appears to have tied the issue of whether the Ombudsman failed to exercise diligence with the separate issue of whether discrimination actually occurred. In any event, had the Parliament for the sake of argument given an opinion consistent with those findings, it stands to reason that the mere fact that the name of one other candidate featured on that list for a little over a month more than Ms Staelen would not permit the conclusion to be drawn that she had not been included on that list for a duration substantially comparable to that of the others, let alone that it would have been negligent of the Ombudsman to do so. At best, the data is inconclusive.

88. Therefore, although the Parliament's opinion of 15 November 2010 proved much later to be inaccurate, that does not mean that the Ombudsman failed to exercise diligence. It rather appears that Ms Staelen did not substantiate to the requisite standard her claim that she was the subject of discrimination which the Ombudsman was required, as a matter of diligence, to investigate further.

89. On that basis, I consider the first part of the second ground of appeal to be well founded.

b) Second part of the second ground of appeal: activation of the non-contractual liability of the Union

90. Should the Court hold that the Ombudsman did breach the TUM principle, I would observe that the General Court's finding of a sufficiently serious breach of that principle, in paragraph 205 of the judgment under appeal, is based on the general approach adopted at paragraph 86 thereof, which I consider to be flawed.

91. I should add — in furtherance of what I have stated above at point 46 — that in the context of an investigation launched by the Ombudsman of her own initiative, it will typically not be the aim of the TUM principle to protect the rights of a particular citizen, but rather the integrity of the investigation into whether maladministration has occurred. Admittedly however, as the Ombudsman made clear at the hearing, she does not challenge — formally speaking, at least — the finding made in paragraph 88 of the judgment under appeal.

92. In any event, and for reasons similar to those given above at points 60 and 61, the General Court erred in law in that, other than referring to its general reasoning at paragraphs 84 to 86 of the judgment under appeal, it failed to explain why the Ombudsman's omission to conduct further investigations following the receipt of the Parliament's opinion amounted to a sufficiently serious breach of the TUM principle.

93. It follows that the second part of the second ground of appeal must be upheld and, hence, the second ground in its entirety.

D – *The third ground of appeal: activation of the liability of the Union for the Ombudsman's breach of the duty to act within reasonable time*

1. Arguments of the parties

94. Agreeing with the General Court that her reply of 1 July 2008 to Ms Staelen's letters of 19 October 2007 and 24 January 2008 was unreasonably late, the Ombudsman submits that the General Court does not explain how that amounts to a sufficiently serious breach of the duty to act within reasonable time capable of giving rise to the non-contractual liability of the Union. In the Ombudsman's view, the approach taken by the General Court at paragraph 269 of the judgment under appeal erroneously equates a breach of that duty with payment of damages. In any event, she submits that the General Court failed to consider all the relevant circumstances, including the fact that the Ombudsman apologised for the tardy reply.

95. Although this is contained in the part of her response relating to the second part of the first plea, Ms Staelen argues that the General Court explained adequately, at paragraph 290 of the judgment under appeal, why the late reply amounted to a sufficiently serious breach of EU law.

2. Assessment

96. Where no specific provisions govern the applicable time limits, the requirement of legal certainty means that the EU bodies must exercise their powers within a reasonable time. The reasonableness of a period of time is to be appraised in the light of all the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity, the various procedural stages which the EU institution followed and the conduct of the parties in the course of the procedure. In any event, the reasonableness of a period cannot be determined by reference to a precise maximum limit determined abstractly. [59]

97. It is common ground that the Ombudsman breached the duty to act within a reasonable time when replying, on 1 July 2008, to Ms Staelen's letters of 19 October 2007 and 24 January 2008. That reply came, respectively, more than eight and five months after Ms Staelen's letters. By the present ground of appeal, the Ombudsman takes issue with the characterisation, at paragraph 269 of the judgment under appeal, of that breach as a sufficiently serious breach of a rule of law. In that paragraph, the General Court held that 'because the applicant has the right to have her requests dealt with in a reasonable time, failure to respect that time constitutes a sufficiently serious breach of a rule of law intended to confer rights on individuals which is capable of establishing the liability of the European Union'.

98. By doing so, the General Court amalgamated, on the one hand, the criterion of a sufficiently serious breach of a rule of law — which hinges on an assessment based on the criteria mentioned in *Brasserie du pêcheur* [60] — with, on the other hand, the requirement that EU bodies must exercise their powers within a reasonable time — which is based on different criteria, namely those stated above at point 96. However, according to case-law, in order for the liability of the Union to be triggered, an unreasonable delay must display an obvious lack of care. [61]

59 — See, to that effect, judgment of 14 June 2016, *Marchiani* v *Parliament*, C-566/14 P, EU:C:2016:437, paragraphs 95, 96, 99 and 100 and the case-law cited.

60 — Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraphs 55 to 57.

61 — Judgment of 15 March 1995, *COBRECAF and Others* v *Commission*, T-514/93, EU:T:1995:49, paragraph 70, concerning a delay of 15 months.

99. Therefore, the Ombudsman is right to argue that the General Court equated any breach of the duty to act within reasonable time with a sufficiently serious breach of a rule of law. In fact, it mirrors the general statement made above at paragraph 86 of the judgment under appeal. For the reasons stated above at points 35 to 43, that view is wrong in law.

100. Furthermore, for the reasons given above at point 54, Ms Staelen's argument that the General Court has explained why the delay is sufficiently serious must be rejected.

101. Lastly, it follows that I also consider that the General Court gave no reasons as to why the unreasonably late reply amounted to a sufficiently serious breach of EU law. In any event, I refer, *mutatis mutandis*, to the observations made above at points 60 and 61.

102. On that basis, I suggest upholding the third ground of appeal.

E – *The fourth ground of appeal: the indemnifiable nature of the non-material harm suffered by Ms Staelen*

1. Arguments of the parties

103. While considering that the General Court was right to hold, at paragraph 290 of the judgment under appeal, that the Ombudsman's conduct gave rise to a loss of confidence in that body, and regretting the fact that that conduct caused frustration for Ms Staelen, the Ombudsman questions, however, how those elements could be equated with non-material harm. She argues that the General Court erred in not providing any explanation in that respect.

104. Ms Staelen submits that the General Court did not err in law as regards the non-material harm but, rather, underestimated her loss.

2. Assessment

105. I would call to mind that once the General Court has found the existence of damage, it alone has jurisdiction to assess, within the confines of the claim, the method and extent of compensation for the damage. However, in order for the Court to be able to review the judgment of the General Court, that judgment must be sufficiently reasoned and, as regards the assessment of the damage, indicate the criteria taken into account for the purposes of determining the amount decided upon.[62] Conversely, the General Court's characterisation in law of the very existence of damage is also a matter which falls within the purview of the Court on appeal.

106. At paragraph 290 of the judgment under appeal, the General Court held that the various errors committed by the Ombudsman gave rise to 'a feeling of wasted energy and caused a loss of confidence in that institution' for Ms Staelen.[63] Although it considered, at paragraph 291 thereof, her loss to be mitigated by certain measures taken by the Ombudsman, it went on to hold, at paragraph 292, that those measures had not fully offset that loss, which it evaluated, at paragraph 294, to amount *ex aequo et bono* to EUR 7 000.

62 — See judgment of 9 September 1999, *Lucaccioni* v *Commission*, C-257/98 P, EU:C:1999:402, paragraphs 34 and 35 and the case-law cited.

63 — Although on this point, the appeal cites only that paragraph of the judgment under appeal in relation to Ms Staelen's loss of confidence, by subsequently contesting the notion that 'the elements singled out by the General Court might be related to non-material damage', it implicitly includes the feeling of wasted time and energy.

107. It is settled case-law that so far as concerns the second condition for the triggering of the Union's non-contractual liability, relating to damage, that condition requires that the damage for which compensation is sought be actual and certain. [64]

108. The threshold to be met for entitlement to compensation for non-material harm appears to be understandably high, and the Court has not lowered that threshold when prompted thereto. [65] In particular, in the context of an action for damages brought in conjunction with an action for annulment, the annulment of the challenged act is normally appropriate reparation for any non-material harm suffered, with the result that the claim for damages may serve no purpose. [66] Moreover, nebulous claims for non-material damages do not give rise to compensation. For instance, the Court has refused to grant compensation for non-material harm relating to a 'state of prolonged uncertainty' as regards career development. [67] So, I would posit that the more unusual the claim for non-material damages, the greater the need for the claimant to justify it objectively. By way of consequence, in order for the Court to exercise its review adequately, this would have to entail more detailed reasoning by the General Court if it considers such a claim to be founded.

109. However, where the harm done is particularly serious and the recognition of the illegality committed is insufficient, it may, exceptionally, be appropriate to award non-material damages. For example, in *Culin*, the applicant's candidature for a promotion within the Commission had been rejected. The Commission's reply to his complaint contained an unfavourable assessment of his managerial abilities, which proved to be incorrect. The Court held that assessment to be offensive in itself. It had, moreover, been widely disseminated within the Commission, causing the applicant clear non-material harm, independently of the decision rejecting his candidature. That harm was not entirely remedied either by the publication of a correction contained in an addendum, or by quashing the rejection. The Court therefore ordered the Commission to pay one symbolic French franc in non-material damages. [68]

110. Similarly, in *M*, the General Court held that the naming of a Commission official in an original published version of an Ombudsman decision breached that official's rights and tarnished his reputation, for which that official received EUR 10 000 in non-material damages. [69]

111. However, that is far from the situation in the case in point.

112. Indeed, unlike in the cases mentioned above, the General Court did not explain how Ms Staelen's reputed loss of confidence in the office of the Ombudsman affected her personally and deeply. In fact, it would rather be the Ombudsman who would have been affected thus: it was not Ms Staelen's reputation that was tarnished by the acts which the General Court considered to be unlawful.

64 — See judgments of 9 November 2006, *Agraz and Others* v *Commission*, C-243/05 P, EU:C:2006:708, paragraph 27, and of 21 February 2008, *Commission* v *Girardot*, C-348/06 P, EU:C:2008:107, paragraph 54.

65 — By way of examples, compare the judgment of 14 May 1998, *Council* v *De Nil and Impens*, C-259/96 P, EU:C:1998:224, paragraph 25, with that of 26 June 1996, *De Nil and Impens* v *Council*, T-91/95, EU:T:1996:92, paragraphs 49 and 50, and, moreover, that of 18 April 2013, *Commission* v *Systran and Systran Luxembourg*, C-103/11 P, EU:C:2013:245, paragraph 84, with that of 16 December 2010, *Systran and Systran Luxembourg* v *Commission*, T-19/07, EU:T:2010:526, paragraphs 324 and 325.

66 — See judgments of 7 February 1990, *Culin* v *Commission*, C-343/87, EU:C:1990:49, paragraph 26, of 28 February 2008, *Neirinck* v *Commission*, C-17/07 P, EU:C:2008:134, paragraphs 96 to 98 and, to that effect, of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 72. Some argue that this line of case-law is limited, in particular, to staff cases, see Opinion of Advocate General Mengozzi in *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2016:658, point 54.

67 — Judgment of 14 May 1998, *Council* v *De Nil and Impens*, C-259/96 P, EU:C:1998:224, paragraph 25 and point 2 of the operative part.

68 — See judgment of 7 February 1990, *Culin* v *Commission*, C-343/87, EU:C:1990:49, paragraphs 27 to 29.

69 — Judgment of 24 September 2008, *M* v *Ombudsman*, T-412/05, not published, EU:T:2008:397. In his Opinion in *Ombudsman* v *Lamberts*, C-234/02 P, EU:C:2003:394, point 143, Advocate General Geelhoed considered that a causal link existed between the alleged breaches of the Ombudsman's administrative duty in dealing with Mr Lambert's case and their 'injurious and destructive effects' on him, but refrained, at point 141 of that Opinion, from considering the issue of the damage itself, as the General Court had not done so in its judgment.

113. Besides, generally speaking, I am not convinced by an approach consisting in awarding non-material damages for the loss of trust in public bodies. Indeed, given that public bodies invariably can and do commit mistakes on a daily basis, I shall refrain from speculating on whether such trust can be gained and lost, observing simply that such an approach would only serve unnecessarily to foster a culture of litigation.

114. As for the recognition of the loss which Ms Staelen suffered in the form of her feeling of wasted time and energy, suffice it to say that the General Court manifestly fails to explain how it came to hold that the fact that Ms Staelen experienced that feeling entitled her to damages. Although the loss resulting from certain types of non-material harm may be difficult to quantify, damages for such a loss cannot be awarded solely based on the subjective declaration of the party claiming compensation therefor, but must also be outwardly and objectively verifiable.

115. The reasons stated in paragraphs 291 and 292 of the judgment under appeal explain why certain measures taken by the Ombudsman did not fully compensate Ms Staelen's alleged non-material harm, but not why that loss was recoverable in the first place.

116. Consequently, in considering that the loss of confidence and the feeling of wasted time and energy which Ms Staelen experienced could give rise to a recoverable loss, the General Court erred in law substantively, but also procedurally in providing no reasons therefor. Hence, the fourth ground of appeal ought to be upheld.

F – *The fifth ground of appeal: causation*

1. Arguments of the parties

117. Referring to paragraph 293 of the judgment under appeal, the Ombudsman argues that one of the irregularities identified by the General Court related to the own initiative enquiry. Citing paragraph 292 of the judgment under appeal, she submits that there cannot be a causal link. Accordingly, the General Court erred in law.

118. Ms Staelen did not express a view on this ground of appeal.

2. Assessment

119. So far as concerns the non-contractual liability of the Union, the question whether a causal link exists between the wrongful act and the damage — a condition for that liability to be incurred — is a question of law which, in consequence, is subject to review by the Court.[70] The causal link required to trigger the non-contractual liability of the Union under the second paragraph of Article 340 TFEU is established where the damage is the direct consequence of the wrongful act in question.[71]

120. It emerges from the appeal that, in the context of the fifth ground of appeal, the Ombudsman contests paragraph 293 of the judgment under appeal, read against paragraph 292 thereof.

70 — Judgment of 16 July 2009, *Commission* v *Schneider Electric*, C-440/07 P, EU:C:2009:459, paragraph 192.

71 — Judgment of 30 April 2009, *CAS Succhi di Frutta* v *Commission*, C-497/06 P, not published, EU:C:2009:273, paragraph 59 and the case-law cited.

121. At paragraph 293 of the judgment under appeal, the General Court held that the 'unlawful acts committed by the Ombudsman … constitute the decisive cause of [Ms Staelen]'s loss of confidence in the institution of the Ombudsman and of the perception that the complaint was a waste of time and energy. There is therefore a causal link between the unlawful acts and the non-pecuniary loss pleaded within the meaning of the case-law'.

122. The Ombudsman claims that the error committed in the context of the own initiative enquiry, namely, the failure to conduct further investigations in the wake of the opinion given by the Parliament of 15 November 2010, cannot have given rise to Ms Staelen's loss of confidence in the office of the Ombudsman when, according to paragraph 292 of the judgment under appeal, 'the reason for [Ms Staelen]'s objection to the Ombudsman's own-initiative inquiry was that loss of confidence'.

123. However, as the Ombudsman eventually recognised at the hearing, the terms used in her appeal do not actually challenge the finding made, in paragraph 293 of the judgment under appeal, that there was a causal link between the errors committed and Ms Staelen's perception that the complaint was a waste of time and energy. According to the last sentence of paragraph 290 of the judgment under appeal — which is not contested either — that perception was in part due to the error consisting in the Ombudsman's failure to conduct further enquiries in the wake of the Parliament's opinion of 15 November 2010.

124. It follows that even if the Ombudsman might be correct in respect of that particular error, the operative part of the judgment would not require changing. The fifth ground of appeal is therefore ineffective.

125. Should the Court consider this ground of appeal to be effective, I would consider it to be well founded. Indeed, it follows from paragraph 292 of the judgment under appeal that Ms Staelen's loss of confidence in the office of the Ombudsman predates the error linked to the Ombudsman's closure of the own initiative inquiry. A causal link has therefore not been established in relation to that error or, at least, the reasons given would seem contradictory.

126. However, my principal view is that the Court ought to reject the fifth ground of appeal as ineffective.

G – *Consequences of the assessment*

127. The Court has dismissed Ms Staelen's main appeal and cross-appeal.[72] The judgment under appeal is therefore final in so far as the question of an *increase* of the non-contractual liability incurred by the Ombudsman is concerned.

128. Moreover, it follows from the above that I consider the first to fourth grounds of appeal raised by the Ombudsman to be well founded.

129. In light thereof, I propose that the Court should set aside points 1, 3 and 4 of the operative part of the judgment under appeal, in accordance with Article 61 of the Statute.[73] I also propose that the Court give final judgment in this matter, pursuant to that same provision, as the state of the proceedings permits this in relation to Ms Staelen's application for damages concerning non-material harm.

72 — Orders of 29 June 2016, *Ombudsman* v *Staelen*, C-337/15 P, not published, EU:C:2016:670, and of 20 July 2016, *Staelen* v *Ombudsman*, C-338/15 P, not published, EU:C:2016:599.

73 — See, for an example, the operative part of the judgment of 14 May 1998, *Council* v *De Nil and Impens*, C-259/96 P, EU:C:1998:224, contrasted against that of the judgment of 26 June 1996, *De Nil and Impens* v *Council*, T-91/95, EU:T:1996:92.

130. According to settled case-law, the Union's non-contractual liability under the second paragraph of Article 340 TFEU is subject to the satisfaction of a number of conditions, namely the unlawfulness of the conduct alleged against the EU institution or body, the fact of damage and the existence of a causal link between the conduct of the institution or body concerned and the damage complained of.[74]

131. Since those conditions are cumulative, it is not necessary to consider the other conditions where one of them is not satisfied.[75]

132. It is clear to me that the Ombudsman did not breach EU law in a sufficiently serious manner on all five occasions singled out by the General Court. Moreover, given the circumstances underpinning the claim for non-material damages for the alleged harm caused by the Ombudsman in the course of the investigations at issue, it is not evident that the TUM principle conferred rights on Ms Staelen. In any event, I would advise the Court not to deal with that latter issue at first instance.

133. In fact, it seems more appropriate to consider the nature of the non-material harm arguably suffered by Ms Staelen.

134. Ms Staelen's arguments at first instance relating to her non-material harm are aptly summarised in paragraph 272 of the judgment under appeal. At paragraphs 288 and 289 thereof, the General Court rightly dismissed certain of her arguments, in so far as she sought compensation from the Ombudsman for the alleged wrongdoings of the Parliament and for her alleged loss consisting of a 'waste of money'.

135. Against that backdrop, for the reasons stated above at points 112 to 114, I do not find the remainder of Ms Staelen's arguments relating to her loss of confidence in the office of the Ombudsman, and her feeling of a waste of time and energy, to be convincing. As the burden of proof rests with Ms Staelen,[76] I conclude that her head of claim for damages relating to non-material harm does not concern a loss which is actual and certain within the meaning of Article 340 TFEU.

136. As one of the cumulative conditions for the non-contractual liability of the Union is not satisfied, I propose that the Court dismiss the remainder of Ms Staelen's action for damages relating to non-material harm and, in consequence, the action in its entirety.

H – *Costs*

137. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 138(2) thereof, applicable to appeal proceedings by virtue of Article 184(1), the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

138. The order of the Court of 29 June 2016 dismissed Ms Staelen's cross-appeal and reserved costs. I now propose that the Court should uphold the Ombudsman's appeal and set aside the judgment under appeal. Moreover, I propose that the Court dismiss the remainder of Ms Staelen's action for damages and, consequently, the action in its entirety. In her appeal, the Ombudsman has applied for the Court to make a just and equitable order as to costs. From this it follows that Ms Staelen ought to bear her own costs and those of the Ombudsman relating to the proceedings before the General Court and the Court.

74 — See, to that effect, judgment of 14 October 2014, *Giordano* v *Commission*, C-611/12 P, EU:C:2014:2282, paragraph 35 and the case-law cited.

75 — Judgment of 30 April 2009, *CAS Succhi di Frutta* v *Commission*, C-497/06 P, EU:C:2009:273, paragraph 40 and the case-law cited.

76 — See judgment of 14 October 2014, *Giordano* v *Commission*, C-611/12 P, EU:C:2014:2282, paragraph 36 and the case-law cited.

VI – Conclusion

139. In light of the foregoing, I propose that the Court should:

— declare inadmissible Claire Staelen's application, lodged in her response to the appeal, for damages for non-material harm;

— set aside points 1, 3 and 4 of the operative part of the judgment of 29 April 2015, *Staelen* v *Ombudsman* (T-217/11, EU:T:2015:238);

— dismiss the application for damages brought by Ms Staelen in Case T-217/11 so far as her non-material harm is concerned and, accordingly, the action for damages in its entirety;

— order Ms Staelen to pay her own costs and those of the Ombudsman in the proceedings before the General Court in Case T-217/11 and before the Court in Case C-337/15 P.