

## Case T-140/04

**Adviesbureau Ehcon BV**

**v**

**Commission of the European Communities**

(Public service contracts — Invitation to tender — Rejection of a tender —  
Non-contractual liability — Limitation — Inadmissibility — Action manifestly  
unfounded)

Order of the Court of First Instance (Third Chamber), 14 September 2005 . . . II - 3291

### Summary of the Order

- 1. Actions for damages — Limitation period — Starting point — Date to be taken into consideration*  
(Art. 288, second para., EC; Statute of the Court of Justice, Art. 46)
- 2. Non-contractual liability — Conditions — Unlawfulness — Damage — Causal link — One of the conditions not present — Dismissal of the action for damages in its entirety*  
(Art. 288, second para., EC)

3. *Non-contractual liability — Damage — Damage for which compensation is available — Costs incurred for the proceedings — Not included*  
(Art. 288, second para., EC)
4. *European ombudsman — Alternative to an action before the Community judicature — Not possible to pursue both remedies in parallel — Whether action before the Ombudsman appropriate is a matter for the citizen to decide*  
(Art. 195(1) EC; Statute of the European Ombudsman, Art. 2(6) and (7))

1. It is apparent from the second paragraph of Article 288 EC that the existence of Community non-contractual liability and the enforceability of a right to compensation for damage suffered depend on the satisfaction of a number of requirements: the conduct of the institution must be unlawful, there must be actual damage and there must be a causal relationship between the conduct of the institution and the damage alleged. The five-year limitation period which applies to proceedings alleging Community liability, provided for by Article 46 of the Statute of the Court of Justice, therefore cannot begin before all the requirements governing the obligation to provide compensation are satisfied and in particular before the damage to be made good has materialised.

disputed, the fact that it could only have known later that the criterion in question was allegedly applied in a discriminatory manner cannot postpone until that date the point from which the limitation period for the action for compensation started to run. The function of the limitation period is to reconcile protection of the rights of the aggrieved person and the principle of legal certainty. The length of the limitation period was thus determined by taking into account, in particular, the time that the party who has allegedly suffered harm needs to gather the appropriate information for the purpose of a possible action and to verify the facts likely to provide the basis of that action. Knowledge of the facts is not one of the conditions which must be met in order for the limitation period to run.

Since, in the context of Directive 80/778 relating to the quality of water intended for human consumption, the tenderer was aware of the fundamental reason for the rejection of its tender by the Commission, namely, its lack of experience in the design of water treatment facilities, a reason which it has always

Similarly, the fact that the tenderer allegedly became aware of additional

information in support of its action after the rejection by the Commission of its tender, even though it had since the beginning disputed the fundamental reason for that rejection, which also constitutes the event giving rise to the damage, within the meaning of Article 46 of the Statute, cannot place the point from which the limitation period started to run at the date on which the tenderer became aware of that information. This applies *a fortiori* because, on the day on which that tenderer claims to have received the tender documents of one of the tenderers accepted at the end of the selection stage, and even on the day on which it itself considers that it had enough evidence to bring proceedings for compensation, that is, when the Ombudsman adopted his decision critical of the Commission, the limitation period had not yet expired.

It follows that, unlike the situation in which an applicant is prevented from bringing proceedings within a reasonable time because he became aware of the event giving rise to the damage only belatedly, expiry of the limitation period cannot be fixed at a date later than the normal date of expiry of that period.

In addition, although the time bar applies only to the period preceding by more than five years the date of the act

stopping time from running and does not affect rights which arose during subsequent periods, this is only in the exceptional situation in which it is established that the damage in question was repeated on a daily basis after the occurrence of the event which caused it. That is not the position where the loss concerned, if proved, even though its full extent may not have been appreciated until after the rejection of the tenderer's tender for the contract in question, was nevertheless caused instantly by that rejection.

(see paras 39, 55-61, 67)

2. In order for the Community to incur non-contractual liability, a number of conditions must be met: the conduct of the Community institutions in question must be unlawful; there must be real and certain damage; and a direct causal link must exist between the conduct of the institution concerned and the alleged damage. If any one of those conditions is not satisfied the application must be dismissed in its entirety without it being necessary to examine the other preconditions for such liability.

The loss of the chance of securing a subsequent contract can be regarded as

real and certain damage only if, in the absence of the allegedly improper conduct by the Commission, there would be no doubt that the tenderer would have been awarded the first contract.

(see paras 75, 77)

3. As regards the loss suffered as a result of the costs allegedly incurred in gathering evidence, the costs incurred by the parties for the purpose of the judicial proceedings cannot as such be regarded as constituting damage distinct from the burden of costs. Furthermore, even though, as a rule, substantial legal work is carried out in the course of the proceedings prior to the judicial phase, by 'proceedings' Article 91 of the Rules of Procedure of the Court of First Instance refers only to proceedings before the Court of First Instance, to the exclusion of the prior stage. That follows in particular from Article 90 of the Rules of Procedure, which refers to 'proceedings before the Court of First Instance'. Therefore, to regard such costs as a loss for which compensation may be claimed in an action for damages would be inconsistent with the fact that costs incurred during the phase before the judicial proceedings are not recoverable.

(see para. 79)

4. In the institution of the Ombudsman, the Treaty has given citizens of the Union an alternative remedy to that of an action before the Community judicature in order to protect their interests. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings. Moreover, as is clear from Article 195(1) EC and Article 2(6) and (7) of Decision 94/262 on the regulations and general conditions governing the performance of the Ombudsman's duties, the two remedies cannot be pursued at the same time. Indeed, although complaints submitted to the Ombudsman do not affect time-limits for bringing actions before the Community judicature, the Ombudsman must none the less cease consideration of a complaint and declare it inadmissible if the citizen simultaneously brings an action before the Community judicature based on the same facts. It is therefore for the citizen to decide which of the two available remedies is likely to serve his interests best.

(see paras 83-84)