JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
10 April 2002 *

In Case T-209/00,

Frank Lamberts, residing at Linkebeek (Belgium), represented by É. Boigelot, lawyer, with an address for service in Luxembourg,

applicant,

v

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

defendant,

APPLICATION for compensation for material and non-material damage allegedly suffered by the applicant as a result of the conduct of the European Ombudsman in dealing with his complaint,

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: M. Jaeger, President, K. Lenaerts and J. Azizi, Judges,
Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2001,

gives the following

Judgment

Legal context

1 The second paragraph of Article 21 EC provides that every citizen may apply to the Ombudsman established in accordance with Article 195.

2 Article 195(1) EC provides:

'The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of

maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

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

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

3 On 9 March 1994, the European Parliament, in pursuance of Article 195(4) EC, adopted Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ 1994 L 113, p. 15).

4 Article 14 of Decision 94/262 provides that the Ombudsman is to adopt the implementing provisions for that decision.

5 The Ombudsman's Annual Report for 1997 (OJ 1998 C 380, p. 1) states that on 16 October 1997, in accordance with Article 14 of Decision 94/262, he adopted implementing provisions which came into effect on 1 January 1998 ('the

implementing provisions'). The text of these provisions has been published in all the official languages of the Union on the Ombudsman's website.

6 The procedure for examining a complaint to the Ombudsman is thus laid down by Article 195(1) EC, Decision 94/262 and the implementing provisions.

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

8 Article 2(5) of Decision 94/262 provides that 'the Ombudsman may advise the person lodging the complaint to address it to another authority' (a similar provision is contained in Article 3.2 of the implementing provisions). In addition, Article 2(6) of Decision 94/262 provides that complaints submitted to the Ombudsman do not affect time-limits for appeals in administrative or judicial proceedings.

9 The Ombudsman is to inform the person lodging the complaint of the action he has taken on it (Article 2(9) of Decision 94/262 and Article 3.2 and 3.4 and Article 4.2 and 4.3 of the implementing provisions).

10 In order to clarify any suspected maladministration, the Ombudsman is to conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him (second subparagraph of Article 195(1) EC and Article 3(1) of Decision 94/262).

11 Article 3(1) of Decision 94/262 provides that the Ombudsman is to inform the institution or body concerned 'which may submit any useful comment to him'. Article 3(2) provides that the Community institutions and bodies are obliged to supply the Ombudsman with any information he has requested of them. Article 4.3 and 4.4 of the implementing provisions provide in respect of that stage of the procedure that the Ombudsman 'transmits a copy of the complaint to the institution concerned and invites it to submit an opinion within a specified time that is normally no more than three months. The invitation to the institution concerned may specify particular aspects of the complaint, or specific issues, to which the opinion should be addressed. The Ombudsman sends the opinion of the institution concerned to the citizen, unless he decides that it is inappropriate to do so in a specific case. The citizen has the opportunity to submit observations to the Ombudsman, within a specified time that is normally no more than one month'.

12 After considering the opinion of the institution or body concerned and any observations made by the citizen, the Ombudsman may either decide to close the case with a reasoned decision or to continue his inquiries. He is to inform the citizen concerned accordingly (Article 4.5 of the implementing provisions).

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

14 In that regard, Article 6.1 of the implementing provisions provides, under the title 'Friendly solutions', that 'as far as possible the Ombudsman cooperates with the institution concerned in seeking a friendly solution to eliminate [the maladministration] and to satisfy the citizen'. If such cooperation has been successful, the Ombudsman closes the case with a reasoned decision and informs the citizen and the institution concerned of the decision accordingly. However, Article 6.3 provides that '[i]f the Ombudsman considers that a friendly solution is not possible, or that the search for a friendly solution has been unsuccessful, he either closes the case with a reasoned decision that may include a critical remark or makes a report with draft recommendations'.

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

Facts

16 After working for the Commission of the European Communities since 1991 consecutively as a seconded national expert, a temporary member of staff and then a member of the auxiliary staff, the applicant took part in an internal competition for the establishment as officials of members of the temporary staff in Grade A. He was informed by letter of 23 March 1998 that he had passed the written tests and was invited to attend the oral test on 27 April 1998. The letter contained the following passage:

'The organisation of the tests does not permit any change in the times communicated to you'.

17 On 2 April 1998 the applicant suffered an accident necessitating strong medication. After the accident he was unable to work until 26 April 1998 inclusive.

18 After the oral test on 27 April 1998 the applicant was informed, by letter of 15 May 1998, that he had not obtained the minimum number of marks for the tests and that, therefore, he had not been included in the list of suitable candidates.

19 On 25 May 1998 the applicant requested the chairman of the competition selection board to re-examine his case, referring to his accident and the fact that he had taken the oral test under the influence of medicine capable of causing fatigue and reducing his powers of concentration. He stated that he had not asked for a postponement of his oral test in the light of the passage cited in paragraph 16 above contained in the letter inviting him to attend the oral test.

20 By letter of 10 June 1998, the Commission confirmed the result of the competition in which the applicant had taken part. It explained to him that he could have contacted the department responsible for arranging competitions to explain his problem 'when he returned to work on 14 April 1998' or, alternatively, he could have spoken to the members of the selection board at the beginning of the oral test as this would have enabled them to take whatever measures they felt necessary, for example, postponing his oral test to a later date. The Commission added, however, that if a candidate has taken an oral test and failed he is under no circumstances permitted to retake the test.

21 On 23 June 1998 the applicant again wrote to the chairman of the selection board, informing it that, contrary to what had been stated in the letter of 10 June 1998, he did not return to work on 14 April 1998 but on 27 April 1998, the date of the oral test. He pointed out that it was only during that test that he became

aware of the effects of his medication and that he had therefore not been in a position to draw the attention of the selection board to that fact before the test started. He sent a medical certificate concerning this, which stated that, due to the medication prescribed for him during the period 8 April to 8 May 1998, 'the patient [might have] experienced unusual tiredness as a result of the accident and the stress resulting from the effects of the treatment'.

22 Also on 23 June 1998, the applicant submitted to the Ombudsman a complaint, drafted in English, against the decision of 10 June 1998 confirming the decision of the competition selection board of 15 May 1998.

23 By letter of 22 July 1998 the Ombudsman informed the applicant that his complaint would be considered and that a request had been made to the President of the Commission to submit an opinion on the complaint by 31 October 1998.

24 In a letter sent to the applicant on 29 July 1998 the Commission reaffirmed the content of its letter of 10 June 1998, referred to above. In particular, it stated that the date on which the applicant had resumed work did not alter its assessment.

25 By fax of 29 October 1998, the Ombudsman sent the applicant the Commission's opinion, undated and drafted in French, regarding his complaint. In that opinion the Commission reiterated in essence the views already expressed in the abovementioned letters of 10 June and 29 July 1998. The Commission also attached to its opinion a copy of a notice of an internal competition which was not the notice for the competition in which the applicant had taken part.

26 On 17 November 1998 the Ombudsman sent the applicant the English translation of the Commission's opinion, which the latter had sent to the Ombudsman on 9 November 1998. Attached to that version of the opinion was the notice of the competition in which the applicant had taken part.

27 On 2 December 1998 the applicant sent his observations on the Commission's opinion to the Ombudsman.

28 On 21 October 1999 the Ombudsman sent the applicant his decision on the latter's complaint. In that decision the Ombudsman noted that his inquiry had indicated that in practice the Commission was prepared to take into account exceptional circumstances which prevented a candidate from attending on the day indicated in the invitation to attend an oral test. He added that, in the interest of good administration, the Commission should include a passage in the letter of invitation to the oral test informing candidates of that possibility.

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

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

31 The applicant wrote to the Commissioner responsible for the Directorate-General for Personnel and Administration, in a letter dated 9 November 1999, asking him to reconsider the applicant's case. The Commissioner replied, by letter of 15 December 1999, that in order to ensure equal treatment for candidates taking the tests, he could not allow the applicant to retake the oral test and that no other friendly settlement was possible either.

32 In a letter of 17 December 1999 the applicant asked the Ombudsman for an explanation of the latter's conclusion with regard to the consequences of the critical remark for his particular case. The applicant also suggested that the Ombudsman should seek a settlement with the Commission regarding his situation which did not necessarily involve allowing him to retake the oral test.

33 In a letter of 4 February 2000 the Ombudsman explained to the applicant the purpose of a critical remark. He also restated the position he had adopted in his decision of 21 October 1999 and informed the applicant that the Commission had acted upon his critical remark.

34 By letter of 3 March 2000 the applicant's lawyer wrote to the Ombudsman, objecting to the latter's position on the point of equal treatment in particular. He repeated the applicant's request that a friendly settlement be sought with the Commission.

35 On 31 March 2000 the Ombudsman informed the applicant that he had forwarded the letter of 3 March 2000 to the President of the Commission with a request that the latter should send his comments to him by 30 April 2000.

36 On 16 June 2000 the Ombudsman forwarded to the applicant the Commission's undated reply to the applicant's letter of 3 March 2000. In that reply the Commission reaffirmed its earlier position and again stated that it could not envisage any friendly settlement. The Ombudsman therefore closed the case.

Procedure and forms of order sought

37 By an application lodged at the Registry of the Court of First Instance on 9 August 2000, the applicant brought this action against the Ombudsman and the European Parliament.

38 By separate documents, lodged at the Registry of the Court of First Instance on 13 and 16 October 2000 respectively, the Ombudsman and the Parliament each raised a preliminary objection of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance.

39 By order of 22 February 2001 the Court of First Instance (Third Chamber) dismissed the application as inadmissible in so far as it had been brought against the European Parliament (Case T-209/00 *Lamberts* v *Ombudsman and Parliament* [2001] ECR II-765).

40 By order of the same date, the Court of First Instance (Third Chamber) joined the plea of inadmissibility submitted by the Ombudsman to the substance.

41 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure.

42 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 6 December 2001.

43 The applicant claims that the Court should:

— order the Ombudsman to pay him the sum of EUR 2 468 787 by way of compensation for material damage and the sum of EUR 124 000 by way of compensation for non-material damage, together with legal interest until payment in full;

— in the alternative, order the Ombudsman to pay him the sum of EUR 1 234 394 by way of compensation for material damage and the sum of EUR 124 000 by way of compensation for non-material damage, together with legal interest until payment in full;

— order the Ombudsman to pay the costs.

44 The Ombudsman submits that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— make an appropriate order as to costs.

Admissibility

Arguments of the parties

45 Referring to the order of the Court of First Instance of 3 July 1997 in Case T-201/96 *Smanor and Others* v *Commission* [1997] ECR II-1081, paragraphs 29 to 31, the Ombudsman claims that he has wide discretion with regard to the facts and the measures to be taken following his inquiries and that he is not bound to instigate an inquiry, draw up recommendations, pursue friendly settlements or send reports to the European Parliament. He concludes that his choice of the measure to be taken following his inquiry cannot give rise to non-contractual liability on the part of the Community. The only conduct which might possibly be

alleged to give rise to damage is the conduct of the institution accused of maladministration.

46 Moreover, relying on the order of the Court of Justice of 4 October 1991 in Case C-117/91 *Bosman* v *Commission* [1991] ECR I-4837, paragraph 20, and the order of the Court of First Instance of 10 December 1996 in Case T-75/96 *Sökta* v *Commission* [1996] ECR II-1689, the Ombudsman contends that an action for damages seeking compensation for loss caused by the alleged unlawfulness of a measure adopted by an institution is inadmissible if that measure has no legal effect. He points out that in its order of 22 May 2000 in Case T-103/99 *Associazione delle Cantine Sociali Venete* v *Ombudsman and Parliament* [2000] ECR II-4165, paragraph 50, the Court of First Instance held that the various measures which the Ombudsman may adopt following his inquiries do not produce legal effects *vis-à-vis* the complainant or third parties even where instances of maladministration are found to have occurred in the activities of an institution.

47 The applicant dismisses those arguments as unfounded.

Findings of the Court

48 First of all, it should be observed that the proceedings in this case have been brought against the Ombudsman and not against the Community, which alone has legal personality. However, it is settled case-law that it does not follow that because an action was brought directly against a Community body it is inadmissible. Such an action must be deemed to be directed against the Community represented by that body (Case 353/88 *Briantex and Di Domenico* v *Commission* [1989] ECR 3623, paragraph 7).

49 Similarly, it must be remembered that under Article 235 EC and the second paragraph of Article 288 EC, and Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as last amended by Council Decision 1999/291/EC, ECSC, Euratom of 26 April 1999 (OJ 1999 L 114, p. 52), the Court has jurisdiction in disputes relating to compensation for damage caused by Community institutions. The Court of Justice has in the past ruled that the term 'institution' used in the second paragraph of Article 288 EC must not be understood as referring only to the Community institutions listed in Article 7 EC. The term also covers, with regard to the system of non-contractual liability established by the Treaty, all other Community bodies established by the Treaty and intended to contribute to achievement of the Community's objectives. Consequently, measures taken by those bodies in the exercise of the powers assigned to them by Community law are attributable to the Community, according to the general principles common to the Member States referred to in the second paragraph of Article 288 EC (see to that effect Case C-370/89 *SGEEM and Etroy* v *EIB* [1992] ECR I-6211, paragraphs 12 to 16).

50 The Ombudsman is clearly a body established by the Treaty, which conferred on him the powers set out in Article 195(1) EC. The right of citizens to have recourse to the Ombudsman is an integral part of citizenship of the Union, as provided for in Part Two of the EC Treaty.

51 Furthermore, by the present action, the applicant is seeking to obtain compensation for damage allegedly sustained as a result of negligence on the part of the Ombudsman in the performance of the duties assigned to him by the Treaty.

52 The Court of First Instance therefore has jurisdiction to entertain an action for compensation against the Ombudsman.

53 That conclusion is not affected by the arguments put forward by the Ombudsman. First, he is mistaken in seeking in essence to establish a parallel with case-law which states that an action for damages is inadmissible where it is based on liability resulting from the Commission's failure to institute proceedings under Article 226 EC, since that institution is in any case under no obligation to institute such proceedings (order of the Court of Justice of 23 May 1990 in Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-2181, paragraph 13, and the order in *Smanor*, cited in paragraph 45 above, paragraph 30).

54 It should be noted that the role which the Treaty and Decision 94/262 have assigned to the Ombudsman differs, at least in part, from that assigned to the Commission in the context of proceedings under Article 226 EC for failure to fulfil obligations.

55 In the context of such proceedings the Commission exercises the powers conferred on it by Article 211 EC, first indent, in the general Community interest, in order to ensure the application of Community law (see to that effect Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15, and Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 35). Moreover, in that context it is for the Commission to decide whether it is appropriate to bring such proceedings (*Commission* v *Germany*, cited above, paragraph 37).

56 However, as regards the manner in which the Ombudsman deals with complaints, it is necessary to take into account the fact that the Treaty confers on all citizens both the subjective right to refer to the Ombudsman complaints concerning instances of maladministration on the part of Community institutions or bodies, apart from the Court of Justice and the Court of First Instance in the exercise of their judicial functions, and the right to be informed of the result of inquiries conducted in that regard by the Ombudsman under the conditions laid down by Decision 94/262 and the implementing provisions.

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

58 Second, the Ombudsman's argument that any measures he may take following his inquiries are not binding cannot be accepted either. The action for damages provided for under the Treaty was introduced as an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions of use dictated by its specific purpose (Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 6, and the order of the Court of Justice of 21 June 1993 in Case C-257/93 *Van Parijs and Others* v *Council and Commission* [1993] ECR I-3335, paragraph 14). Although actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action for damages seeks compensation for damage resulting from a measure, whether legally binding or not, or from conduct, attributable to a Community institution or body (see to that effect Case 118/83 *CMC* v *Commission* [1985] ECR 2325, paragraphs 29 to 31, Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 26, Case T-185/94 *Geotronics* v *Commission* [1995] ECR II-2795, paragraph 39, and Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, in particular paragraph 61, upheld on appeal by the Court of Justice in Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281).

59 In the present case, the applicant accuses the Ombudsman of wrongful conduct in dealing with his complaint. It is possible that such conduct may prejudice the entitlement which citizens enjoy under the Treaty and Decision 94/262 to have

the Ombudsman seek a non-judicial settlement of maladministration which affects them, and that it could cause them to sustain damage.

60 In the light of those considerations the application is admissible.

Substance

61 The applicant alleges that the Ombudsman committed several breaches of administrative duty in the course of dealing with his complaint. First, he claims compensation for material damage corresponding to the pay he would have received as an official in Grade A 4 up until pensionable age, together with the social advantages accorded under the Staff Regulations of Officials of the European Communities ('the Staff Regulations') and taking into account advancements and promotion he might have obtained in the course of a normal career. In the alternative, he claims payment of half that amount in the event that the Court of First Instance considers that his chances of establishment were not guaranteed. Second, he claims compensation for the non-material damage he allegedly suffered. He claims that since he failed the competition for an established post his professional and personal situation have been disastrous. As a result of the Ombudsman's breaches of administrative duty in dealing with the applicant's case, the applicant's uncertainty and anxiety regarding the progress of his career and regarding the satisfaction of having his rights restored were prolonged. The applicant considers that the injurious and destructive effects of the Ombudsman's breaches of administrative duty justify the award of EUR 124 000 in respect of non-material damage.

62 The Court observes that Article 288 EC makes clear that for the Community to incur liability the applicant must prove that the conduct of which the body concerned is accused was unlawful, that damage occurred and that there was a causal link between that conduct and the damage complained of (see Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and*

Others v *Council and Commission* [1981] ECR 3211, paragraph 5, and Case T-587/93 *Ortega Urretavizcaya* v *Commission* [1996] ECR-SC I-A-349 and II-1027, paragraph 77).

63 It is necessary, therefore, to consider first whether the Ombudsman did commit the breaches of administrative duty alleged by the applicant.

64 First, the applicant alleges that the Ombudsman failed to advise him, after he made his complaint and before the expiry of the relevant time-limits for bringing an action, to make a complaint to the administration and subsequently, or alternatively, to bring an action before the Court of First Instance seeking the annulment of the selection board's decision. Referring to Article 2(5) of Decision 94/262, the applicant considers that the Ombudsman is under an obligation to advise and inform citizens. The Ombudsman should have given the applicant guidance with regard to the choice between addressing a complaint to him and bringing an action before the Court of First Instance, which, in the applicant's view, would certainly have been successful.

65 In that regard, the Court observes, first of all, that, in the institution of the Ombudsman, the Treaty has given citizens of the Union, and more particularly officials and other servants of the Community, an alternative remedy to that of an action before the Community Court 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.

66 Moreover, as is clear from Article 195(1) EC and Article 2(6) and (7) of Decision 94/262, the two remedies cannot be pursued at the same time. Indeed, although complaints submitted to the Ombudsman do not affect time-limits for appeals to the Community Court, the Ombudsman must none the less terminate consideration of a complaint and declare it inadmissible if the citizen simultaneously brings an appeal before the Community Court 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.

67 In this case, the applicant did not challenge the decision of the selection board by bringing a complaint under Article 90(2) of the Staff Regulations or by bringing a direct action before the Community Court (Case T-133/89 *Burban* v *Parliament* [1990] ECR II-245, paragraph 17). On the contrary, the applicant deliberately chose the non-judicial remedy in order to seek a settlement for his dispute with the Commission, considering that that remedy would serve his interests best. At any event, it should be noted that, as it was a complaint brought by a servant of the Communities, the applicant was deemed to be aware of the procedure for bringing an action before the Court of First Instance since that procedure is expressly laid down in the Staff Regulations (Case T-12/94 *Daffix* v *Commission* [1997] ECR-SC I-A-453 and II-1197, paragraph 116).

68 That being the case, as the applicant points out, under Article 2(5) of Decision 94/262 and Article 3.2 of the implementing provisions the Ombudsman 'may' advise the citizen concerned to apply to another authority and, in circumstances such as those in the present case, to bring an action for annulment before the Court of First Instance. It may be in the interests of the proper performance of the task entrusted to him by the Treaty for the Ombudsman to routinely inform the citizen concerned of the measures to take in order to best serve his interests, including indicating to him the judicial remedies open to him and the fact that referring a complaint to the Ombudsman does not suspend the time-limit for pursuing such remedies. There is, however, no express provision requiring the Ombudsman to take such steps (order of the Court of First Instance of 30 March 2000 in Case T-33/99 *Méndez Pinedo* v *ECB* [2000] ECR-SC I-A-63 and II-273, paragraph 36).

69 The Ombudsman cannot, therefore, be accused of having failed to draw the applicant's attention to the fact that his complaint had no suspensive effect and of not advising him to bring an action before the Community Court. The Ombudsman did not, therefore, in this context commit a breach of administrative duty which could give rise to non-contractual liability on the part of the Community.

70 Second, the applicant complains that the Ombudsman failed to demonstrate impartiality and objectivity in dealing with his complaint, in that the Ombudsman took the Commission's opinion into account although that opinion, drafted

in English, the language in which the applicant had made the complaint, had been submitted after the time-limit set by the Ombudsman. He also points out that the English version of the opinion did not correspond to the French version originally sent as regards the description of the facts on which the selection board based its decision, in particular the number of marks the applicant obtained compared with the marks required in the notice of competition. Lastly, he contends that the annex to the English version of the Commission's opinion was not the same as that attached to the French version of the opinion.

71 In that regard, the Court of First Instance observes, first of all, that Article 4.3 of the implementing provisions merely states that the Ombudsman is to invite the institution concerned to submit an opinion 'within a specified time that is normally no more than three months'. The time-limit set by the Ombudsman for the institution concerned is therefore not absolute, so there is nothing to prevent the Ombudsman from taking into account an opinion delivered by that institution after the time-limit has expired. Second, whilst the applicant has rightly pointed out differences between the French and English versions of the Commission's opinion and the attached documents, the reasons given by the Commission for refusing to allow the applicant to retake the oral test are, as the Ombudsman has stated, the same in both versions. Since the result of the competition, and in particular the number of marks obtained in the oral test, are not disputed in this case, those grounds were the only relevant factors in the Ombudsman's consideration of the complaint submitted by the applicant.

72 Thus, contrary to what the applicant maintains, the Ombudsman did not act improperly in taking into account the Commission's opinion in either language version.

73 Third, the applicant points out that over 10 months elapsed between his observations on the Commission's opinion and the Ombudsman's decision on his complaint. The applicant raises the question whether the Ombudsman infringed his duty under Article 2(9) of Decision 94/262 to inform the person lodging the complaint of the action he has taken on it 'as soon as possible'.

74 The Court finds, first of all, that the relevant provisions do not specify a time-limit within which the Ombudsman must deal with complaints. It was only in his annual report for 1997, adopted on 20 April 1998, that the Ombudsman stated that 'the objective should be to carry out the necessary inquiries into a complaint and inform the citizen of the outcome within one year, unless there are special circumstances which require a longer investigation' (antepenultimate paragraph of the foreword).

75 It is not disputed that in that statement the Ombudsman merely set himself an indicative, not a mandatory, time-limit for dealing with complaints.

76 It must be stated, however, that in order to comply with the requirements of proper administration, in particular, the procedure before the Ombudsman must be completed within a reasonable time, to be determined according to the circumstances of the case.

77 In the present case, almost 16 months elapsed between the applicant making his complaint and the Ombudsman taking his decision. The applicant points out that the Ombudsman gave no indication that especially lengthy investigations had been needed in order to decide, in the light of the particular circumstances of the case, that a friendly settlement could not be achieved. However, in arguing thus the applicant overlooks the fact that the Treaty and Decision 94/262 conferred on the Ombudsman not only the task of seeking, so far as possible, a settlement in accordance with the specific interest of the citizen concerned, but also that of identifying and seeking to eliminate instances of maladministration in the public interest (see paragraph 57, above). It is not disputed that it was following intervention by the Ombudsman in connection with the applicant's complaint that, in the interests of proper administration, the Commission altered its administrative practice with regard to inviting candidates to attend the oral tests of a competition. In such circumstances and in view of the importance of the task conferred on the Ombudsman in the public interest, the fact that the Ombudsman exceeded the time-limit in this case cannot, as such, be regarded as a breach of his duties. That claim must therefore be rejected.

78 Fourth, whilst accepting that the Ombudsman is not bound to arrange a friendly settlement in every case in order to eliminate the instance of maladministration and satisfy the citizen concerned, the applicant argues that the Ombudsman is under an obligation to use his best endeavours and must therefore attempt to find such a settlement. According to the applicant, instead of considering the complaint and the documents relating to the complaint promptly and meticulously and trying to find a friendly settlement that would satisfy the applicant, the Ombudsman in this case merely obtained the Commission's observations and forwarded them to the applicant without analysing them; he even misunderstood their scope and drew inadequate conclusions from them. The applicant points out that he had told the Ombudsman that a friendly settlement need not necessarily involve an invitation to attend another oral test, which the Commission had moreover refused to issue. He stresses in his application and in his reply that other settlements could be envisaged, such as reassessment of the written test, the award of a post as special adviser or appointment of the applicant to an established post within the institution without a competition, as had happened in the past.

79 The Court of First Instance recalls first of all (see paragraph 57, above) that although Decision 94/262 confers on the Ombudsman the task of seeking, so far as possible, a settlement in accordance with the specific interest of the citizen concerned, he enjoys very wide discretion in that regard. Consequently, the Ombudsman cannot incur non-contractual liability save where he has committed a flagrant and manifest breach of his obligations in that connection.

80 As the applicant has rightly submitted, Article 3(5) of Decision 94/262 and Article 6 of the implementing provisions state that the Ombudsman must cooperate with the institution concerned in order to achieve that objective and cannot, in principle, merely forward the opinions of the institution to the citizen concerned. He must in particular decide whether a settlement acceptable to the citizen may be sought and adopt to that end an active role with regard to the institution concerned.

81 However, as Article 6.3 of the implementing provisions makes clear, there are some situations in which there is no prospect of a friendly solution. If that is so, the Ombudsman is to close the case, making a critical remark if appropriate or a report with draft recommendations with regard to the institution or body concerned.

82 In the present case it is clear both from the Commission's opinion on the applicant's complaint and from the letter of 15 December 1999 from the Commissioner responsible for personnel matters that the Commission refused to allow the applicant to retake the oral test or to seek an alternative settlement. That position was later confirmed in the Commission's reply to the applicant's letter of 3 March 200, sent to the applicant on 16 June 2000.

83 As is clear from the Ombudsman's decision, cited in paragraph 29 above, the Ombudsman took into account the fact that the Commission's refusal was based on its obligation to comply with the principle of non-discrimination between competition candidates (see to that effect Case T-102/98 *Papadeas* v *Committee of the Regions* [1999] ECR-SC I-A-211 and II-1091, paragraph 55), and on the fact that violation of that principle may lead to the annulment of the competition and may entail considerable financial and administrative costs for the institution. Moreover, it is in the light of those considerations that in his decision the Ombudsman examined the merits of the position taken by the Commission in the matter and considered that there were no grounds in the case to indicate that the Commission's decision to refuse to let the candidate retake the oral test had been taken in violation of any rule or principle binding upon that institution.

84 It should also be noted that it was only in the course of the proceedings before the Court of First Instance that the applicant gave examples of various alternative settlements which he considers should and could have been envisaged. It was therefore not possible for either the Ombudsman or the Commission to take a position on those specific proposals during the procedure before the present action commenced.

85 The Ombudsman was able, therefore, without being guilty of wrongful conduct, to conclude in his decision that there was no prospect of a friendly settlement acceptable to the applicant. The applicant is therefore wrong to allege that the Ombudsman was negligent in dealing with his complaint inasmuch as he failed to comply with the obligation to seek, as far as possible, a friendly settlement with the Commission which would have satisfied the applicant.

86 Fifth, the applicant contends that by making a critical remark in his decision of 21 October 1999 the Ombudsman was in breach of Article 7 of the implementing provisions. That provision states that the Ombudsman may only make a critical remark where, in particular, the instance of maladministration has no general implications. However, according to the applicant, in the present case the fact that the Commission altered its letter of invitation and that the applicant was mentioned in the Ombudsman's annual report for 1999 shows that the instance of maladministration established in this case did have such implications.

87 The Court considers that a breach of that provision by the Ombudsman, were it to be established, would not in any event cause damage to the applicant. Neither a critical remark nor a report which may contain a recommendation with regard to the institution concerned is designed to protect the individual interests of the citizen concerned against damage which may arise as a result of maladministration on the part of a Community institution or body. Consequently, that claim must also be rejected without the need to resolve the question raised by the applicant.

88 In the light of the foregoing, it must be concluded that the applicant has not shown that the Ombudsman committed any breach of his administrative duties in dealing with the applicant's complaint.

89 The application must therefore be dismissed without there being any need to consider whether the alleged material or non-material damage occurred or the causal link between that damage and the conduct of the Ombudsman.

Costs

90 Under the first subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for.

91 However, under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may order that the parties bear their own costs where the circumstances are exceptional.

92 In that regard, it is necessary to take into account, first, the fact that the Commission altered its administrative practice after the applicant had made his complaint to the Ombudsman, although that alteration could be of no benefit to the applicant.

93 Second, account should be taken of the similarity of the circumstances of this case to proceedings between the Communities and their servants, in which, according to Article 88 of the Rules of Procedure, the Community institutions and bodies are to bear their own costs.

94 In the light of those exceptional circumstances, the Court considers it appropriate to rule that each party is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders each party to bear its own costs.**

Jaeger Lenaerts Azizi

Delivered in open court in Luxembourg on 10 April 2002.

H. Jung
Registrar

M. Jaeger
President