OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 3 July 2003 [1]

I — Introduction

1. This case concerns the appeal brought by the European Ombudsman against the judgment of the Court of First Instance in *Lamberts* v *European Ombudsman.* [2] In that case the Court of First Instance declared admissible a citizen's application for damages concerning the European Ombudsman's action in the performance of his duties. It subsequently rejected the application as unfounded.

2. The European Ombudsman requests the Court to annul the judgment of the Court of First Instance on the point of admissibility. The citizen concerned, Mr Lamberts, asks the Court to confirm the judgment as regards admissibility and to grant the merits of the application at first instance.

3. In order to assess the admissibility of the application at first instance, a more detailed examination must be made of the status and powers of the Ombudsman appointed by the European Parliament on the basis of Article 195 EC, including review of his conduct.

II — Legal framework

4. Pursuant to Article 21(2) EC every citizen of the Union may apply to the Ombudsman established in accordance with Article 195. Article 195 EC provides as follows:

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

1 — Original language: Dutch.
2 — Case T-209/00 [2002] ECR II-2203.

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

3. The Ombudsman shall be completely independent in the performance of his duties. In the performance of those duties he shall neither seek nor take instructions from any body. The Ombudsman may not, during his term of office, engage in any other occupation, whether gainful or not. ...'

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.

5. On 9 March 1994 Parliament adopted, pursuant to Article 195(4) EC, Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties. [3]

The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

6. Under Article 14 of Decision 94/262 the Ombudsman is authorised to adopt the implementing provisions for that Decision. He adopted the implementing provisions on 16 October 1997 and they came into force on 1 January 1998. The text of the provisions was published in all the official EU languages on the Ombudsman's website. [4]

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

3 — OJ 1994 L 113, p. 15.

4 — www.euro-ombudsman.eu.int

7. The substance of the provisions of Decision 94/262 which are relevant to this case are set out in full in the disputed judgment of the Court of First Instance (paragraphs 6 to 15).

8. The action before the Court of First Instance was brought on the basis of Article 235 EC, under which the Court of Justice has jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288 EC. The second paragraph of Article 288 provides: 'In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'.

III — Facts

9. The essence of this case is as follows. Mr Lamberts took part in an internal competition at the Commission for the establishment as officials of members of the temporary staff in Grade A. He failed the oral test and attributes that failure to the fact that, during that test, he was under the influence of medication capable of causing fatigue and reducing his ability to concentrate. He had been prescribed that treatment following an accident which had occurred some weeks prior to the oral test. He had not requested a postponement of his oral test owing to a clause in the document inviting him to attend that test, which essentially said that the time of the test could not be changed.

10. He subsequently applied to the European Ombudsman, who dealt with the complaint, but not to Mr Lamberts's satisfaction. Mr Lamberts's proposal for a friendly settlement with the Commission was rejected by the Commission. The Ombudsman did, however, make a critical remark regarding the Commission's general administrative practice.

11. Thereafter, in the interest of good administrative conduct, the Commission included a special clause in all letters of invitation to oral tests informing candidates that the date indicated might be changed in exceptional circumstances. However, the Ombudsman concluded, with reference to Mr Lamberts, that that change in policy had no effect on past procedures.

12. For a more detailed description of the facts of the case I will refer now to the disputed judgment of the Court of First Instance.

IV — The disputed judgment

13. The Court of First Instance first considers the admissibility of the application (paragraphs 48 to 60 of the judgment). It refers to the case-law of the Court, which

essentially states that under Article 235 EC in conjunction with Article 288 EC action may be brought against any Community body in connection with non-contractual liability for actions carried out by a body in the performance of its duties. The Court concludes that the action is admissible.

14. The Court also points out, among other things, that review of the Ombudsman by the Community judicature must be limited in view of the very wide discretion which he enjoys. However, it cannot be excluded that a manifest error by the Ombudsman may cause damage to the citizen concerned. The Court also points out that Article 235 EC constitutes an autonomous form of action in Community law.

15. The application is dismissed (paragraphs 61 to 89 of the judgment) because of Mr Lamberts's failure to show that the Ombudsman committed any breach of his administrative duties in dealing with his complaint. The Court reaches that conclusion on the basis of its assessment of five of the arguments adduced by Mr Lamberts.

16. First, Mr Lamberts alleged that the Ombudsman should have advised him of the possibility of bringing an action before the Court of First Instance against the Commission's decision. In the Court of First Instance's view, however, it is up to the citizen to choose which is the best remedy for him. That is particularly true of a Community member of staff, who must be regarded as familiar with the arrangements for bringing an action before the Court of First Instance. The Ombudsman may advise a citizen on this point, but there is no provision of Community law requiring him to do so.

17. 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 even though the English version of that opinion (English being the language in which the applicant had made the complaint) had been submitted after the time-limit set by the Ombudsman. Furthermore, the English version of the opinion was different from the French version originally submitted. The Court of First Instance observes here that the time-limit set for an institution to submit an opinion to the Ombudsman need not be seen as absolute, and that there is no difference between the language versions on the points that are relevant to the Ombudsman's investigation.

18. Third, the applicant complains of the slowness with which the Ombudsman dealt with his complaint. Over 10 months elapsed between the Commission's opinion and the Ombudsman's decision, and 16 months elapsed between the complaint being submitted and the conclusion of the procedure. The Court of First Instance states that the relevant provisions do not specify a time-limit within which the Ombudsman must deal with complaints. It states, however, that the procedure before the Ombudsman must be completed within

a reasonable time according to the circumstances of the case. Nevertheless, it must also be taken into account that the Ombudsman not only has to serve the individual interest of the complainant, but also has the task, in the public interest, of identifying and seeking to rectify instances of maladministration.

19. Fourth, the applicant argues that the Ombudsman is under an obligation to use his best endeavours to arrange a friendly settlement and satisfy the citizen concerned. The Court of First Instance recalls that the Ombudsman enjoys very wide discretion in that regard and therefore cannot incur non-contractual liability save where he has committed a flagrant and manifest breach of his obligations in that connection. The Ombudsman cannot, in principle, merely forward the opinions of the institution concerned to the citizen. In the present case, however, the Ombudsman examined the merits of the position taken by the Commission and was able, without being guilty of wrongful conduct, to conclude in his decision that there was no prospect of a friendly settlement acceptable to the applicant.

20. Fifth, the applicant contends that, by making a critical remark in his decision, the Ombudsman was in breach of Article 7 of the implementing provisions. Under that provision the Ombudsman may only make a critical remark where the instance of maladministration has no general implications. The Court of First Instance states in that respect that a possible breach of that provision cannot harm the applicant's interests, since it is not the aim of the provision to protect his individual interests.

V — Appeal before the Court of Justice

21. By application of 21 June 2002 lodged at the Registry of the Court on 24 June 2002 the European Ombudsman brought the present appeal, claiming that the Court should:

— annul the decision concerning the admissibility of the action for damages in the judgment of the Court of First Instance;

— declare that that action is inadmissible.

22. By application of 29 August 2002 lodged at the Registry of the Court on 2 September 2002 Mr Lamberts lodged a reply contending that the Court should:

— dismiss the appeal;

— set aside the judgment of the Court of First Instance with regard to the merits of the claim brought at first instance and accordingly:

— principally:

— order the Ombudsman to pay him an amount of EUR 2 468 787 by way of damages in respect of material and financial damage and an amount of EUR 124 000 by way of damages in respect of non-material damage, together with interest to be determined by the Court until full payment,

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

— in the alternative:

— order the Ombudsman to pay him an amount of EUR 1 234 934 by way of damages in respect of material and financial damage and an amount of EUR 124 000 by way of damages in respect of non-material damage, together with interest to be determined by the Court until full payment,

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

23. On 30 August 2002 the European Parliament lodged a statement in intervention in support of the Ombudsman's decision. On 30 October 2002 the President of the Court ruled that statement to be admissible.

24. Following an exchange of written submissions a hearing was held in the case on 13 May 2003.

VI — Pleas and arguments of the parties

A — *Admissibility*

25. The Ombudsman argues in his appeal that the Court of First Instance's decision to declare the application at first instance admissible and the grounds for that decision are contrary to the legislation governing the Ombudsman's performance of his duties.

26. First of all, the disputed judgment contravenes the constitutional scheme established by the EC Treaty concerning the liability of the Ombudsman.

27. In reviewing the legality of the inquiry procedure conducted by the Ombudsman and of the decision closing the case, the Court of First Instance overstepped the limits of judicial review of action by the Ombudsman. This was a case where the applicant contested the manner in which the Ombudsman had dealt with his complaint, and the Ombudsman's conclusions. Reviewing the legality of the inquiry procedure, the conclusions reached and the time-limits imposed is a matter for the European Parliament, not the Community judicature.

28. In addition, Article 195(2) EC and Article 8 of Decision 94/262 provide for a procedure to be followed for the case where the Ombudsman is guilty of serious misconduct calling in question his capacity to perform his duties. The European Parliament can then apply to the Court to dismiss the Ombudsman.

29. Secondly, the Court of First Instance fails to distinguish between actions for damages on the one hand and actions for annulment or for failure to act on the other.

30. The Ombudsman recognises that it is open to a citizen to bring an action for damages against the Ombudsman on the ground of the latter's conduct. Such an action may not relate to the inquiry procedure itself, but may concern the infringement of a specific obligation upon him, for instance. The Ombudsman gives as an example an infringement of the confidential treatment of documents or information.

31. According to the Ombudsman there is no common constitutional tradition whatsoever of submitting Ombudsmen's inquiries and findings to judicial review. On the contrary, in the Nordic countries, where the office of Ombudsman originated, such review is excluded on constitutional grounds. Articles 6 and 13 of the ECHR also do not suggest any other conclusion. Complainants always have the right to bring judicial proceedings against a Community institution or body, and therefore do not need to apply to the Ombudsman and then appeal against his conclusions.

32. According to the case-law of the Court of First Instance the Ombudsman's inquiries and conclusions are not subject to judicial review because actions cannot be brought for annulment or for failure to act. By submitting those inquiries and conclusions to detailed analysis in the present proceedings, the Court of First Instance nevertheless opens up the possibility of such judicial review, in the guise of an action for damages. The Court of First Instance carries out such an analysis despite the fact that it recognises that review by the judicature has to be limited.

33. Thirdly, the Ombudsman points out that the action for damages, although brought against the Ombudsman, relates to damage caused by the action of the Commission. The purpose of the Ombudsman's inquiry is not, however, to protect the interests of injured citizens who have suffered damage as a result of the wrongful conduct of the institutions.

34. Mr Lamberts takes the view that the Court of First Instance's decision on the question of admissibility was correct. He adduces the following arguments in support.

35. First of all, he disputes the Ombudsman's view that his action relates to the damage he suffered as a result of the action of the Commission. It actually relates to the Ombudsman's misconduct in dealing with his complaint, as the Court of First Instance rightly identified.

36. Secondly, it is to be regarded as a denial of justice that actions for damages may not be brought against the Ombudsman. For a body to be granted powers presupposes that that body will accept liability in the event of misconduct or if it fails to perform its duties. At the hearing, Mr Lamberts argued in that context that the Ombudsman is to be regarded as the representative of a citizen bringing a complaint. A remedy must be open to that citizen if his representative fails in the performance of his duties.

37. Judicial review of the legality of the Ombudsman's conduct guarantees both the legitimacy of the system and legal certainty, even though the Treaty provides for review by the European Parliament. He refers to a letter of 17 December 1999 from the President of the European Parliament, informing him that Parliament cannot intervene in the Ombudsman's internal procedures. The European Parliament also does not have the power to make good damage resulting from the Ombudsman's misconduct.

38. Incidentally, in his reply the Ombudsman argues that the letter from the President of the European Parliament is new evidence which is not admissible in an appeal to the Court.

39. Finally, Mr Lamberts contends that admissibility cannot be assessed without also examining the substance of the case.

40. The European Parliament begins by examining the role of the Ombudsman in dealing with a complaint. In a complaint regarding maladministration the Ombudsman approaches the Community institution concerned. The citizen in question benefits only indirectly from this action by the Ombudsman, through the repercussions which the Ombudsman's approach to the institution may have.

41. Parliament agrees with the Ombudsman's view that the Court of First Instance failed to distinguish between actions for damages and actions for annulment or for failure to act. When examining the admissibility of the action the Court of First Instance used an interpretation far removed from the spirit and letter of the relevant Community legislation. Parliament refers in particular to paragraphs 57 and 59 of the contested judgment.

42. That interpretation could prejudice the position conferred on the Ombudsman in the Treaty, and the institutional balance. In particular:

— the Ombudsman performs his duties entirely independently. The Treaty makes a distinction between judicial and non-judicial review. The type of review carried out by the Court of First Instance here is tantamount to duplication.

— A review of legality by the Court of First Instance has the effect of depriving Parliament's review of substance. Parliament tests every aspect of the Ombudsman's conduct against the requirements of the EC Treaty. The ultimate element of that review is that Parliament alone can apply to have the Ombudsman dismissed. A dual review — political and judicial — is not provided for in the Treaty.

43. Parliament recognises that a citizen may bring an action for damages against the Ombudsman, which must relate to the obligations that Community legislation places upon the latter. The Ombudsman's conduct must form the origin of the damage.

44. According to Parliament the grounds which the Court of First Instance gives concerning the principles of the compensation procedure are inadequate. The Court of First Instance refers to the autonomous nature of the procedure, but nevertheless tests the legality of the Ombudsman's conduct without drawing the obvious conclusions from it. The Court of First Instance does not take account of the fact that the Ombudsman has no binding powers over the Community institutions in respect of the damage that the applicant has suffered. The Ombudsman's conduct cannot result in non-contractual liability. The only conduct that can result in liability is the conduct of the Commission. An action for damages cannot arise from the unlawfulness of an action by a Community institution — in this case the Ombudsman — if that action has no effect in law.

B — *The action in the main proceedings*

45. Mr Lamberts bases his action on a plea of breach of Community law by the Court of First Instance. First, he alleges breach of

the obligation arising from the Statute of the Court of Justice to give grounds for judgments. Second, he alleges breach of Community legislation on the duties and powers of the Ombudsman, and of principles of Community law such as equality of treatment for officials and the obligation to base a decision on admissible grounds.

46. His complaint is that the Ombudsman failed to fulfil the duties conferred on him in that he:

— did not advise Mr Lamberts in good time to bring an action before the Community judicature;

— did not try to achieve a friendly settlement.

47. Mr Lamberts also points out that, in his appeal, the Ombudsman recognises that damage was suffered as a result of the Commission's action, which should have led the Ombudsman to devote greater attention to dealing with the complaint.

48. In particular, Mr Lamberts further alleges that the Court of First Instance made substantial errors of appraisal. It incorrectly claimed that the Commission refused to allow Mr Lamberts a second oral examination, when in fact Mr Lamberts had never requested one. The Court of First Instance also incorrectly states that it was not until the proceedings before it that Mr Lamberts suggested alternative settlements. The conclusion that the Court of First Instance reaches in paragraph 84 of the disputed judgment, that neither the Ombudsman nor the Commission could have taken a position on those settlements, is therefore incorrect.

49. In his reply the Ombudsman brings a procedural defence against Mr Lamberts's arguments. Appeals must be limited to points of law. Mr Lamberts, however, contests only the actual findings of the Court of First Instance. Furthermore, an application for appeal must precisely reproduce the critical elements of the disputed judgment, together with the legal arguments on which the appeal is based. In the present case, however, the appeal merely repeats the pleas and arguments already put before the Court of First Instance, including arguments based on facts which the Court of First Instance has already specifically dismissed.

50. The European Parliament agrees with the Ombudsman's arguments.

VII — Status and powers of the European Ombudsman

A — *Introduction*

51. In this section of my Opinion I shall outline the status and powers of the European Ombudsman, focusing on the following points:

— Is the Ombudsman comparable with a court or tribunal, or is he a body entrusted with certain administrative powers?

— Is the primary aim of the Ombudsman's procedure for dealing with complaints to satisfy the complainant — an extension of the role of judge — or does it primarily serve the public interest in that the actions of the Community institutions are kept under closer scrutiny?

— Review of the conduct of the Ombudsman himself. Under Community law the Ombudsman is generally accountable to the European Parliament, but how significant is that general accountability for the issue of whether his conduct in individual cases can be submitted to judicial review?

52. I feel that the status and powers of the Ombudsman need to be assessed before we can establish to what extent he can be held liable by the Community judicature for misconduct in the performance of his duties.

B — *Characteristics of the Ombudsman*

53. The institution of Ombudsman has a long tradition going back to the appointment of an Ombudsman in Sweden in 1809. Since then the institution of Ombudsman — or a closely comparable figure — has existed in all the Member States of the European Union. The Ombudsman is essentially a body which examines citizens' complaints against the government, produces reports and makes recommendations to the administration. His independence from the administration is guaranteed — and this applied even to the Swedish Ombudsman in the 19th century — by the fact that he is attached not to the executive, but to the parliament.

54. Since the Maastricht Treaty the EC Treaty has made provision for an Ombudsman, an organ of the European Community, in Articles 21 and 195 EC.

55. The institution of Ombudsman is one of the instruments by which the Treaty gives substance to citizenship of the Union. Citizens of the Union have the right to complain to the Ombudsman about instances of maladministration in the actions of Community institutions and bodies. The Ombudsman thus plays a part in protecting citizens' rights. It is also clearly evident from the background to the institution of a European Ombudsman that it was seen as one of the mechanisms for protecting the specific rights of European citizens. [5]

56. Although the purpose of the complaints procedure before the Ombudsman is to protect citizens' rights, it does not provide the same sort of legal protection as that afforded by a court or tribunal.

57. On that point, I would refer to the case-law of the Court on the concept of a court or tribunal within the meaning of Article 234 EC. It is settled case-law that the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. It must also be able to give judgment in proceedings intended to lead to a decision of a judicial nature, and it must have the power to deliver binding decisions in application of rules of law. [6]

58. The institution of Ombudsman has most of the characteristics listed by the Court. It has its legal basis in Article 195 EC, it is permanent and its independent status is laid down in Article 195(3) EC.

59. However, the complaints procedure before the Ombudsman displays only a very few of the listed characteristics of judicial proceedings. The primary feature is that the Ombudsman enjoys a great deal of freedom in deciding how he examines the complaint. While there is provision for both the complainant and the institution complained against to be involved in the handling of the complaint, that is not entirely a procedure *inter partes*. I would refer here to Article 6 of the implementing provisions, which provides not for the

5 — For a description, see the Ombudsman's Annual Report for 1995, available at www.euro-ombudsman.eu.int.

6 — See, among others, the judgments in Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraphs 14 and 15, and Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraphs 13 and 14.

Ombudsman to have a role between the parties, but for cooperation between the Ombudsman and the institution complained against. The most important consideration, however, is that the Ombudsman does not have the power to deliver decisions which are binding on the parties. The settlement of disputes is not an issue. The procedure is therefore designed not to settle legal disputes, but — as the Ombudsman himself describes it in his 1995 Annual Report — to prevent them.

60. In view of that absence of binding authority, it is also logical that the EC Treaty should not make provision for the right to appeal to the Community judicature against decisions taken by the Ombudsman as part of the complaints procedure.

61. From that point of view, the Ombudsman does not have the characteristics of a court or tribunal. Furthermore, while the Ombudsman has the power to make critical remarks as a result of a complaint, they are intended not to satisfy the complainant, but to serve the public interest instead.

62. I would also point out here that the Ombudsman can carry out inquiries on his own initiative. The fact that he has the power to do so indicates that the Ombudsman is to be regarded as an administrative body, rather than as comparable to a court or tribunal. I would observe, however, that that power is in addition to the power to act upon complaints, rather than a second primary duty, as is clear from the background to the body of Ombudsman, [7] the Ombudsman's own view that his primary duty is to deal with complaints, [8] and the operation of the Ombudsman in practice. For example, the most recent annual report available (for 2001) shows that the Ombudsman investigated 204 complaints and initiated inquiries himself on only 4 occasions. In many cases own-initiative inquiries arise from earlier complaints, suggesting that the problems raised in complaints are of a more general nature.

63. In short, the Ombudsman does not offer any legal protection in the proper sense. The Ombudsman is to be regarded as an administrative body whose task — primarily via complaints — is to identify in the public interest instances of maladministration by the Community institutions and to help to put an end to that maladministration. It is also appropriate for that task that the Ombudsman is appointed by the European Parliament and that he is required to submit to Parliament an annual report on his inquiries.

7 — See, on this subject, paragraphs I.1.1 and I.2.1 of the Ombudsman's Annual Report for 1995, cited in footnote 5.

8 — See paragraph I.4 of the Ombudsman's Annual Report for 1995, cited in footnote 5.

C — *The complaints procedure in detail*

64. As I said, citizens are not given any legal protection comparable to the legal protection provided by the courts. The Ombudsman has largely investigative powers and he can endeavour to reach settlements. He may conclude his inquiries with a reasoned decision, but it can never contain more than 'critical remarks' and 'recommendations'.

65. The procedure before the Ombudsman therefore does not take the place of the legal protection provided by the courts. I would point out here that Article 195 EC states that the Ombudsman may not investigate facts that are or have been the subject of legal proceedings. The main purpose of the procedure before the Ombudsman is to give citizens the possibility of seeking satisfaction in cases where judicial proceedings are not an option or would not produce an appropriate result. The Ombudsman's procedure therefore supplements legal protection proper.

66. None of this alters the fact, however, that Community law affords complainants certain procedural rights. First of all, Article 21 of the EC Treaty itself gives European citizens the right to lodge a complaint and the right to receive an answer in the language in which the complaint was made. The complainant's procedural rights are set out in greater detail in the implementing provisions. If, as in the present case, an inquiry is started, the complainant has the right to inspect the opinion that the institution concerned forwards to the Ombudsman and the right to respond to that opinion. The Ombudsman then reaches a decision which — and this is the only right that the complainant has at this stage — is sent to the complainant.

67. That brings me to the content of the Ombudsman's decision should he establish that an institution is guilty of maladministration. First and foremost (Article 6 of the implementing provisions) he must seek a friendly settlement between the complainant and the institution, reflecting the Ombudsman's duty — referred to earlier — to prevent a dispute before the courts. The procedure is thus primarily a form of mediation. Only if a friendly settlement appears impossible can the Ombudsman use other means, namely critical remarks and draft recommendations. The institution may respond to the draft recommendations, after which the Ombudsman may send a report with recommendations to the European Parliament. The institution is not obliged to comply with any critical remark or recommendation.

68. A further element in the present case is that Mr Lamberts accuses the Ombudsman of failing to refer him to the Court of First

Instance, as a result of which the deadline for bringing an action expired. In Community law Article 2(5) of Decision 94/262 allows the Ombudsman to advise the person lodging the complaint to address it to another authority. Community law does not, however, give the complainant a specific right to be referred.

69. The question is — and Mr Lamberts's action relates to this — whether the Ombudsman is, in certain circumstances, under an obligation to use his powers to reach a friendly settlement and to give a referral. Can his failure to use those powers be unlawful in respect of a complainant?

D — *Review of the Ombudsman*

70. Article 195(3) establishes the independence of the office of Ombudsman. The essence of that independence is found in the second sentence, which prohibits the Ombudsman from seeking or taking instructions from any body in the performance of his duties. It would be contrary to the guarantees given for the Ombudsman to perform his duties under review.

71. I cannot agree with the opinion of the Ombudsman himself and the European Parliament that it is the task of the European Parliament to review the Ombudsman's performance of his duties. Article 195 EC does not provide for such review. Only in very exceptional circumstances can the European Parliament propose to the Court that the Ombudsman be dismissed, but that would not be as a result of a review of the Ombudsman's performance of his duties in dealing with an individual complaint. I assume that only a negative assessment of his performance as a whole could lead to dismissal.

72. In addition — but this is not a review of his performance of his duties — the European Parliament may decide not to extend the Ombudsman's term of office and to appoint a new Ombudsman upon its expiry. The fact that the Ombudsman is required to report to the European Parliament should also not be seen as part of a review procedure. The reporting requirements are of an entirely different nature. Their purpose is to enable Parliament to form a political assessment of the operation of — and sometimes maladministration in — the institutions. There is one further reason why it is difficult to conceive of review by the European Parliament: the Ombudsman also has the power to investigate maladministration in the European Parliament itself.

73. In conclusion, this means that the European Parliament's claim that review by the Court of First Instance would result in duplication is flawed for the simple reason that Parliament itself does not conduct any review.

74. The Court of Justice is also not responsible for reviewing the Ombudsman's performance of his duties, except as part of the dismissal procedure referred to in earlier paragraphs.

75. In short, the Ombudsman performs his duties independently and without review. That does not mean, however, that the legal consequences of specific actions by the Ombudsman cannot be subject to judicial review by the Community judicature. In that case it would not be a review of performance of duties, but legal protection for the individual whose interests have been directly affected by that action.

76. The EC Treaty does not allow for appeal against decisions of the Ombudsman. He is not referred to in Article 230 EC, or in any other provision of the Treaty or subordinate Community legislation [9] regulating the powers of the Court.

77. The question is whether that satisfies the principle, recognised by the Court, that individuals must genuinely be able to rely before the courts on the rights they derive from the Community legal order. The right to effective legal protection is, according to the Court, one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. [10]

78. As I stated earlier (see point 65), Community law grants citizens certain rights in the procedure before the Ombudsman. It is not inconceivable that the right to effective judicial protection means that the citizens in question must be able to appeal

9 — The Court may, for instance, rule on the legality of decisions of the Office for Harmonisation in the Internal Market (trade marks and designs) (see Article 63 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1)), or of the European Data Protection Supervisor (see Article 32(3) of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1)).

10 — See, among others, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39.

against decisions of the Ombudsman. However, that is not the question at issue in this case, since Mr Lamberts did not lodge an appeal, but brought a claim for damages.

79. The fact that Community law does not specifically provide for administrative redress in respect of decisions of the Ombudsman is no reason to conclude that the actions of the Ombudsman cannot result in damage eligible for compensation under Community law. On the contrary, it is precisely because there is no administrative redress that the citizens concerned need an alternative.

80. In the present case, when assessing the admissibility of the application at first instance, the question is whether damages can be awarded using the compensation procedure set out in Article 235 in conjunction with Article 288 EC.

E — *The Ombudsman's liability*

81. In his Opinion in *Köbler* [11] Advocate General Léger gave a detailed analysis of the liability of States for damage caused to citizens.

82. A number of elements of that analysis — which I support — are relevant to the present case. They are:

a) the right to compensation as a fundamental principle of Community law, [12]

b) the State as a single entity, [13]

c) the importance of a body's independence for liability.

83. With regard to a), as the Advocate General explains with reference to *Brasserie du Pêcheur and Factortame*, [14] the right to compensation is recognised as a fundamental principle of Community law and a

11 — Opinion in Case C-224/01 [2003] ECR I-10239, I-10243.

12 — See in particular point 35 of his Opinion.

13 — See in particular point 44 et seq. of his Opinion.

14 — Judgment in Case C-46/93 and Case C-48/93 [1996] ECR I-1029, and in particular point 22 et seq. of the Opinion of Advocate General Tesauro.

necessary extension of the principle of effective judicial protection and access to the courts.

84. With regard to b), it flows from international law that where the liability of the State is at issue, the State is regarded as a single entity. It makes no difference whether the damage is attributable to the legislature, the judicature or the executive.

85. With regard to c), the conduct of a body that is independent of the executive must still be regarded as the conduct of the State. Counter-arguments relating to the independence of the judicature — or in the present case the Ombudsman — are to be dismissed. However, when determining whether there is a sufficiently serious breach of Community law, account must be taken of the specific function of an independent body.

86. That analysis, given in the context of the liability of a national court, also applies to the liability of organs of the Community itself. From the case-law of the Court I infer that where there has been a breach of Community law, it is irrelevant whether the damage arising from that breach has been caused by the actions of a Community body or by a national authority. The conditions for the liability of the Member State for damage caused to individuals as a result of a breach of Community law cannot in principle be different from those that apply to the Community's liability in similar situations, according to the judgment in *Bergaderm and Goupil*. [15]

87. It follows from the above observations that the Community can be held liable for the conduct of the Ombudsman. When assessing whether that liability also arises in a particular case, account must be taken of the specific function of the Ombudsman. He performs his duties independently, is not under review, and he enjoys wide discretion in dealing with complaints submitted to him.

88. In his analysis in *Köbler*, Advocate General Léger cites the excusability of the misconduct in question as the decisive criterion for determining whether there is liability. [16] That excusability depends on the clarity and precision of the rule of law breached and on the existence and state of judgments of the Court.

15 — Case C-352/98 P [2000] ECR I-5291, paragraph 41. See also the judgment in *Brasserie du Pêcheur and Factortame*, cited in footnote 14, paragraph 42.

16 — Point 139 of his Opinion, cited in footnote 11.

89. I also agree with this analysis, even though I would prefer to talk of reprehensibility rather than (in)excusability. If the law breached is clear and precise, the Ombudsman may be liable. As I explain from point 129 below with reference to the present case, account must be taken not just of the wording, but also of the purpose of the rule of law breached.

VIII — Assessment of the scope of the appeal findings

90. Article 225 EC limits the right of appeal to the Court of Justice to points of law only. In addition, the Court's Rules of Procedure place a number of restrictions on the arguments that the parties may submit. Article 113(2) of those Rules, for example, states that the subject-matter of the proceedings before the Court of First instance may not be changed, and Article 116(1) states that new claims are not permitted.

91. The case-law of the Court clearly states that 'an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal.... That requirement is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the contested judgment, confines itself to reproducing the pleas in law and arguments previously submitted to the Court of First Instance. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake.' [17]

92. The Ombudsman and the European Parliament infer from the Court's form of words cited here that Mr Lambert's application to have the judgment of the Court of First Instance set aside may not be examined.

93. I do not agree with that view. First of all, I would point out that the form of words in question has been interpreted very subtly by the Court. In its judgment in *Associação dos Refinadores de Açúcar Portugueses(ARAP)* [18] the Court states the following: 'However, provided that the appellant challenges the interpretation or application of Community law by the Court of First Instance, the points of law examined at first instance may be discussed again in the course of an appeal .... Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the Court of First Instance, an appeal would be deprived of part of its purpose'. As the Court states subsequently,

17 — Judgment in *Bergaderm and Goupil*, cited in footnote 15, paragraphs 34 and 35.

18 — Case C-321/99 P [2002] ECR I-4287, paragraphs 49 and 50.

the main appeal specifically seeks to challenge the position adopted by the Court of First Instance on various points of law raised before it at first instance.

94. The appeal must clearly indicate which aspects of the judgment under appeal are criticised and the pleas in law and arguments on which the appeal is based. That brings me to the present proceedings. Mr Lamberts attempts to show that the Court of First Instance breached Community law, and he particularly refers for that purpose to a number of specific points in the disputed judgment.

95. Mr Lamberts's main complaint relates to the Ombudsman's performance of his duties. [19] Mr Lamberts claims that, in not referring him to the Community judicature and not trying to reach a friendly settlement, the Ombudsman failed to fulfil the mission entrusted to him. Essentially, Mr Lamberts seeks a ruling on the substance of the duties and powers assigned to the Ombudsman under Community law. Seen in those terms, this is a point of law concerning the interpretation of Community law, and I therefore find this complaint admissible.

96. In assessing that point of law the Court may also examine the point raised by Mr Lamberts as to whether the Ombudsman must perform his duties with extra care where the complainant has suffered damage.

97. The situation is quite different with Mr Lamberts's allegation that the Court of First Instance made errors of appraisal (see point 48 of this Opinion) in its assessment of what actually happened during the complaints procedure before the Ombudsman. Here Mr Lamberts is essentially seeking a re-examination of the facts, which is outside the scope of an appeal. I therefore propose that the Court declare inadmissible the complaint concerning errors of appraisal.

98. The Ombudsman and the European Parliament further argue that the letter of 17 December 1999 from the President of the European Parliament may not be taken into account. [20]

99. According to Article 113 of the Rules of Procedure new claims are not allowed. Nor is it possible, on appeal, to put forward complaints which have not already been pleaded at first instance. It must always be examined whether the party is still acting within the framework of the complaint (or plea in law) put before the Court of First

19 — See points 45 and 46 above.

20 — See point 38 above.

Instance, or whether it is introducing a completely new point. [21]

100. I consider that in the present case there is no question of a new complaint. Mr Lamberts argued at first instance that the Ombudsman is subject to judicial review. That claim was rejected by the Ombudsman himself in his appeal, when he argued among other things that review is a matter for the European Parliament. Mr Lamberts is now submitting the letter in support of his earlier claim. The letter illustrates the fact that review by the European Parliament is not of the same nature as judicial review. In short, the Court may include the letter of 17 December 1999 in its appraisal.

IX — Assessment of the admissibility of the action at first instance

A — *The nature of the compensation procedure and the Ombudsman's liability*

101. The Ombudsman refers first of all to the constitutional basis in the EC Treaty and claims that judicial review of the conduct of the Ombudsman is limited. Review of the legality of the inquiry procedure lies, in his view, with the European Parliament, not with the Community judicature. The European Parliament adduces similar arguments.

102. As I indicated earlier (point 73), I consider this position to be fundamentally wrong. The European Parliament does not review the Ombudsman's performance of his duties in individual cases, and its authority here is of no relevance to review by the Community judicature.

103. That brings me to the compensation procedure provided for in the EC Treaty. Article 288 EC contains a general rule for making good damage caused by the Community institutions or their servants in the performance of their duties. The Court of Justice has jurisdiction in disputes on that subject (Article 235 EC). That jurisdiction is not subject to any restrictions.

104. Article 235 in conjunction with Article 288 EC sets out the general legal

21 — See the Opinion of Advocate General Mischo in Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, points 38 to 40.

principles on which unlawful acts and the related compensation are based. In essence, everyone in society in principle bears the consequences of any damage he suffers. If, however, that damage is attributable to another person's unlawful conduct, that other person may be held liable and may, in certain circumstances, be required to make good the damage. The duty to make good damage in the event of unlawful conduct applies to the government just as to individuals.

105. The compensation procedure referred to in Article 235 in conjunction with Article 288 EC provides for compensation for damage caused by (the unlawful conduct of) the institutions of the European Communities and their servants. As the Court of First Instance rightly states in the contested judgment, 'The term also covers... 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'. [22]

106. I would point out that the Court's jurisdiction in actions for compensation against the Community is exclusive. The national courts have no jurisdiction. [23]

107. Furthermore, the compensation procedure under Article 235 EC is particularly important in that there is no means of appeal against decisions of the Ombudsman. An action for damages is the only way in which a citizen affected by the conduct of the Ombudsman can assert his right to proper legal protection. [24]

108. Seen from the citizen's point of view, if he suffers damage as a result of a Community body's action or failure to act, he must be able to hold that body liable. A procedure must be available to him in law to assert his claim for liability in a direct and simple manner. That is the purpose of Article 235 EC. It makes no difference to the citizen which body caused him damage, nor is it relevant in the performance of which duty that damage occurred.

109. Viewed in that light I cannot agree with the very conservative opinions which the Ombudsman and the European Parliament have put forward in these proceedings on the subject of the Ombudsman's liabi-

22 — See paragraph 49 of the judgment of the Court of First Instance, where reference is made to the Court's judgment in Case C-370/89 *SGEEM and Etroy* v *EIB* [1992] ECR I-6211, paragraphs 12 to 16.

23 — See, for example, Case C-275/00 *First and Franex* [2002] ECR I-10943, paragraph 43.

24 — See also point 79 above.

lity. The institution of Ombudsman was introduced precisely in order to give the citizens of the European Union a means of taking action against maladministration on the part of a Community institution. In other words, the Ombudsman is there for European citizens who feel that they have been failed by a Community institution's action or failure to act.

110. In my view it is contrary to the fundamental purpose of the Ombudsman for a European citizen to be left empty-handed in the event of maladministration by the Ombudsman himself, and this certainly applies, of course, if the Ombudsman's action or failure to act causes damage. I would therefore have found it appropriate to the Ombudsman's duties if he had advocated the broadest possible liability. The same applies to the European Parliament, which is elected by the citizens of the European Union.

111. In short, the Ombudsman may be held liable for his actions under Article 235 in conjunction with Article 288 EC. There is no restriction arising from Community law.

112. When establishing the unlawfulness of the Ombudsman's conduct, account must naturally be taken of the particular function which the Ombudsman is required to fulfil.

B — *The conditions for liability and more particularly the lawfulness of government action*

113. The Ombudsman and the European Parliament claim that the compensation procedure is wrongly used to question the lawfulness of the Ombudsman's action or failure to act.

114. That claim brings me to the conditions which the Court uses for presuming liability for public action, irrespective of whether it relates to the conduct of a Community body or a national authority (see point 84 above). According to settled case-law the Community can be non-contractually liable and there can be entitlement to compensation for the damage suffered only if a number of conditions are met: the conduct of which the Community institutions are accused must be unlawful as a result of a sufficiently serious infringement of a rule of law, the rule of law infringed must be intended to confer rights on individuals, the damage suffered must be real and there must be a causal link between the conduct and the damage suffered.

115. It flows from this that an appraisal of the lawfulness of the action at the root of that damage is essential for establishing whether there is public liability, since the

unlawful nature of an action is one of the constituent elements of a duty to make good damage. Here I leave aside the possibility of liability in the event of lawful action by the Community. The Community judicature has never yet held the Community liable in the event of lawful action. Nevertheless, the Court does not entirely preclude such liability, albeit only under very serious conditions. [25] The doctrine of liability in the event of lawful public action is not an issue in the present case, and in view of the conditions which the Court imposes, it could never be a satisfactory solution here.

116. In short, if the Community judicature could not test the lawfulness of the action of an institution, the procedure under Article 235 EC would be deprived of all meaning. Furthermore — and I will emphasise this point once again — it is precisely because there is no specific appeal process open to the citizen concerned that there is an interest in allowing the lawfulness of an action by the Ombudsman to be tested using the procedure under Article 235, since the citizen has a right to proper legal protection which is recognised in Community law.

117. I therefore do not agree with the position of the Ombudsman and the European Parliament. As the Court of First Instance rightly states in paragraph 58 of its judgment, that procedure is an autonomous form of action. It refers here to its own case-law and that of the Court, which hold that the procedure may relate to any damage resulting from a measure, whether legally binding or not, or from conduct, attributable to a Community institution or body. In short, the procedure under Article 235 EC is not limited to a particular form of damage.

118. That being the case, Parliament's claim that only measures by the Community that have legal consequences can give rise to compensation must also be dismissed.

119. The Community judicature also need not show restraint in its assessment. Restraint of assessment relates to a different issue in the present case. As the Court of First Instance rightly states, the Ombudsman enjoys a wide margin of discretion. The judicature need only show restraint in assessing the use made of that margin of discretion, when it must not put itself in the administrative body's shoes. The requirement that the breach be sufficiently serious then comes into play. The Court uses as a decisive test for this whether a Community institution manifestly and gravely disregarded the limits on its discretion. Where the institution in question has only con-

25 — See Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraphs 18 and 19.

siderably reduced, or even no, discretion, the mere infringement of Community law may, however, be sufficient to establish the existence of a sufficiently serious breach. [26]

120. Where an administrative body enjoys a wide margin of discretion, the Community judicature must examine whether the body has exceeded the limits of that discretion and thus acted unlawfully. If those limits have been exceeded, then a sufficiently serious breach exists.

C — *The origin of the damage*

121. The Ombudsman's third argument essentially concerns the origin of the damage. The damage occurred through the action of the Commission, and the procedure before the Ombudsman is not intended to remedy that damage. That is why the application is not admissible. Mr Lamberts contests this by arguing that serious misconduct by the Ombudsman actually lies at the root of the damage.

122. I agree with the Ombudsman's position in so far as he contends that he cannot be held liable for the actions of the Commission. Article 235 in conjunction with Article 288 EC does, admittedly, provide for the non-contractual liability of the European Community as such, but that does not mean that a body can be held liable for damage caused by another body or institution. A claim for damages must be made against the body or institution that caused the damage.

123. However, the application at first instance relates to damage resulting from what Mr Lamberts alleges was the Ombudsman's breach of his administrative duties. He claims that he suffered damage as a result of the manner in which his complaint was dealt with by the Ombudsman, and he puts forward arguments in support of that view. He does not contest the Commission's earlier decision.

124. On the basis of what Mr Lamberts thus established as the subject-matter of the dispute the Court of First Instance was able to find the application admissible. The application related to the conduct of the Ombudsman himself. Whether the Ombudsman's conduct did actually cause the alleged damage is a question that must be answered when assessing the merits of the claim, not when assessing admissibility.

26 — See *Bergaderm and Goupil*, cited in footnote 15, paragraphs 43 and 44.

D — *Conclusion*

125. On the basis of the above considerations I have reached the conclusion that the application at first instance was correctly ruled admissible by the Court of First Instance. The Ombudsman's appeal must therefore be dismissed.

X — Substance

A — *Introduction*

126. As I said, according to settled case-law the Community may have non-contractual liability and there may be entitlement to have the damage suffered made good where:

— the conduct of which the Community institutions are accused is unlawful as a result of a sufficiently serious breach of a rule of law;

— the rule of law infringed is intended to confer rights on individuals;

— the damage suffered is real, and

— there is a causal link between the conduct and the alleged damage.

Below I shall look at the first two criteria together, which mainly concern unlawfulness, and the third and fourth criteria together, which both relate to damage.

127. The Court may confine its appraisal to Mr Lamberts's complaint concerning the Ombudsman's performance of his duties. In point 97 above I concluded that the other points that Mr Lamberts had put forward were not admissible.

128. More particularly, what is at issue is:

— the possibility of referring a complainant to another competent authority (Article 2(5) of Decision 94/262 and Article 2.5 of the implementing provisions). To what extent can this power of the Ombudsman be regarded as an obligation?

— seeking a friendly settlement (Article 6 of the implementing regulations). To what extent does the term 'seek' imply an obligation for the Ombudsman?

B — *Referral to another competent authority*

129. Article 2(5) of Decision 94/262 and Article 2.5 of the implementing provisions provide only that the Ombudsman has the power, not the obligation, to refer a complainant. Referral is thus primarily formulated as a service which the Ombudsman performs for the complainant, rather than as an administrative duty. From that point of view, if the Ombudsman does not refer a complainant he is still within the limits of his discretion and there is thus no question of a sufficiently serious breach of Decision 94/262 and the implementing provisions.

130. The fact that the Ombudsman remained within the limits of his discretion and thus acted in accordance with the letter of the Community legislation applicable does not, in my view, mean that he fulfilled all the obligations which Community law places upon him. A breach of Community law may not just occur where action is not in accordance with the wording of a regulation, but it can also flow from a legal principle.

131. More particularly, I would refer in the present case to the principle of due care. The referral of a complainant is not, in my view, an informal option which the Ombudsman can use or not use as he sees fit. The due care which the Ombudsman too must show in the performance of his duties may require him to make use of that power, certainly in a case such as the present where the person concerned has a deadline for bringing an action before the Community judicature. It is true that failure to refer a complainant does not deprive him of access to the judicature, but in doing so the Ombudsman is not acting in accordance with one of the aims for which the body of Ombudsman was set up. He ought to make it as easy as possible, not more difficult, for the citizen to obtain satisfaction. The principle of due care therefore means that the Ombudsman should take his power of referral seriously.

132. I now come to the question of whether that lack of due care also involves

unlawfulness in respect of the complainant. I consider that in not referring the complainant the Ombudsman is not acting unlawfully in respect of him. As the Court of First Instance rightly states, it is the choice of the complainant himself not to bring an action before the Community judicature. In other words, the complainant is responsible for the choice that he makes.

133. If he chooses not to bring an action (in good time), he cannot subsequently blame the Ombudsman for that. The Court of First Instance also points out here that a member of staff of a Community institution may certainly be assumed to know his rights.

134. For the sake of completeness I would also make the following point. The choice which a citizen has of applying either to the judicature or to the Ombudsman is not, by definition, a choice between the greater (the judicature) and the lesser (the Ombudsman). In many disputes between a government body and a citizen a mediation procedure is more appropriate than proceedings before the courts. If a government body has formally acted correctly, but has not taken the interests of the citizen concerned fully into account, proceedings before the courts do not offer the citizen a solution. That appears to be the situation here. The Commission can organise a competition as it sees fit, within the limits of Community law, of course. Formally speaking it need not make exceptions for sick candidates. Nevertheless, it may be desirable in the interests of sound administration to make allowance for illness. A complaint to the Ombudsman may cause the Commission to review its procedure, as indeed happened in the present case, although Mr Lamberts did not benefit from it himself.

C — *Friendly settlement*

135. Article 6 of the implementing provisions regulates friendly settlements. The Ombudsman is required to seek a friendly settlement, which he does by working with the institution where maladministration has been established. The search for a friendly settlement is, for the complainant, the most important instrument that the Ombudsman possesses. Nevertheless it is nothing more than a search, and the Ombudsman has very wide discretion to assess whether a friendly settlement is possible and whether it is likely to succeed.

136. That wide discretion in inherent in the nature of the procedure before the Ombudsman, which primarily involves

mediating between parties. A mediator may be expected to use his best endeavours, but cannot be expected to achieve a result. That result depends on the attitude of the parties. A mediator must also be able to determine when mediation does not serve (or no longer serves) any purpose.

137. The Court of First Instance found, with regard to the Ombudsman's discretion,[27] that the Ombudsman cannot incur non-contractual liability save where he has committed a flagrant and manifest breach of his obligations. That appears to me to be a correct view in law, and I would add that such a serious breach can only exist where the Ombudsman has demonstrably not mediated when he could have done so.

138. The assessment of whether there has been a flagrant and manifest breach is a factual one and cannot be reviewed by the Court on appeal.

D — *Appraisal*

139. In the present case the Court may establish that the finding of the Court of First Instance that the Ombudsman did not act unlawfully is based on a correct interpretation of Community law. The Court may therefore find Mr Lamberts's present appeal unfounded.

E — *Damage and the causal link*

140. For the sake of completeness I will now consider the damage suffered and the causal link between the Ombudsman's conduct and the damage.

141. First of all, the damage suffered. The assessment of whether damage was actually suffered on the scale claimed by Mr Lamberts is a factual question that cannot be considered on appeal. Since the Court of First Instance did not assess the damage in its judgment — nor did it need to — I shall disregard that issue. I therefore consider Mr Lamberts's claim[28] that the Ombudsman actually recognises the existence of damage to be irrelevant in this appeal.

27 — Paragraph 79 of the disputed judgment.

28 — See point 47 above.

142. That brings me to the causal link. The damage claimed by Mr Lamberts arises from a decision of the Commission, not the conduct of the Ombudsman. Mr Lamberts claims that he suffered damage as a result of the fact that he failed the competition and was therefore unable to enter service with the Commission. It is not within the Ombudsman's competence to review the Commission's decision. In other words, there is no causal link between the Ombudsman's conduct and the occurrence of the damage.

143. I would also point out that, in addition to the material damage resulting from the Commission's action, Mr Lamberts also claims non-material damage arising, according to paragraph 61 of the Court of First Instance's judgment, from the injurious and destructive effects of the Ombudsman's breaches of administrative duty in dealing with his case. Viewed in that manner a causal link does exist with the non-material damage. This application for non-material compensation appears from Mr Lamberts's claim not to be separate, but is in addition to the material damage suffered. Should the Court come to assess the damage, the application for non-material damage need not be assessed separately.

XI — Conclusion

144. In the light of the foregoing I propose that the Court:

— Declare the European Ombudsman's appeal to be unfounded;

— Also declare unfounded Mr Lamberts's application, made in his reply, to annul the judgment of the Court of First Instance delivered on 10 April 2002 in Case T-209/00 *Lamberts* v *European Ombudsman*.