Tort liability of the European Community

Article 288 EC contains the basis for the non-contractual liability of the European Community. It is recalled that in Brasserie the ECJ brought its regime on State liability in line with the system of Community liability. Any developments in the one context are thus relevant for the requirements in the other. This section will monitor those cases under art. 288 EC where the courts consider the linkage between the two contexts and thus explicitly develop the ius commune of State and EC liability, on the basis of the general principles common to the Member States.


In issue here was the liability of the Community for a Commission Directive restricting the use of certain substances in sun tan lotion. The claimant Bergaderm, manufacturer of the cosmetic product Bergasol, was put into liquidation allegedly as a result of this measure. Bergaderm contended that the Commission had acted unlawfully in adopting its Directive. Both the CFI and the ECJ dismissed the application for damages. For the first time, as far as I know, the Court has explicitly referred to the case law on State liability in the context of liability of the Community. The linking of these two regimes as proclaimed by the ECJ in paras. 40-42 of Brasserie has now been put into practice. That is to say, it cited Brasserie as authority for the position that in the context of Art. 288 (liability of the EC), a system of rules had been worked out including the margin of discretion available to the body adopting an act as a relevant factor in determining whether a breach of Community law had occurred or not. This is not spectacular in itself, as the introduction of this factor into the State liability regime in Brasserie was of course based on the case law under Art. 288 (ex 215) EC. Nonetheless, the ECJ confirmed, in the context of liability of the EC, that the conditions for liability of both the State and the EC are and should be the same in like circumstances. In particular, in both contexts, the requirement of a sufficiently serious breach must be satisfied. In turn, this will depend on the margin of discretion within which the body adopting the act - in this case of a legislative nature - must remain. The ECJ reviewed the applicant's appeal in the light of the three Brasserie conditions (conferral of rights, sufficiently serious breach and direct casual link).

2. Case C-312/00 P Camar and Tico [2002] ECR I-11355 (10/12/02)

The CFI had given judgment for the claimants and held the Community liable for a manifest and grave error of appraisal by the Commission. This is yet another "European Banana Law" case, dealing with Commission regulations adopted after damage caused to banana plantations in Martinique, St Lucia and other Caribbean islands by the tropical storms Debbie, Iris, Luis and Marilyn. Applicant Camar imported Somalian bananas into Italy and claimed to have suffered loss in this business as a result of the Commission's failure to adopt Regulations such as the ones regarding the Caribbean bananas. The CFI gave judgment for Camar on the liability point. The Commission's appeal against the CFI's liability ruling was rejected by the ECJ. Interestingly, this case sheds light on the liability conditions for administrative action. The CFI had held the Community liable on the ground "that any infringement of law constitutes illegality which may give rise to liability on the part of the Community" (para. 21 ECJ's judgment). Quite explicitly, the fact that the administrative action was exercised in a context of a broad discretion was deemed irrelevant:

"21. ... the [Commission] Decision [in issue] was to be regarded as an administrative act, even if it was based on Article 30 of Regulation No. 404/93, which gives the Commission broad discretionary power, and that, therefore, since the decision had been taken in breach of that provision, the first condition required to render the Commission liable was satisfied.

22. After holding that the other conditions in that regard were also satisfied and that, therefore, the liability of the Community was incurred by virtue of the Commission's action, the Court of First Instance stated, at paragraph 212 of the contested judgment, that there was no need to adjudicate on the liability of the Council, which Camar had alleged in the alternative."
On appeal, what did the ECJ say about the CFI's approach to liability for administrative action?

"52. As for the Council's ground of appeal complaining that the Court of First Instance based itself, in order to hold the Commission liable, on its case-law according to which, in the field of administrative action, any infringement of the law constitutes illegality that is capable of rendering the Community liable, it is appropriate to point out that the system of rules which the Court has worked out in relation to the non-contractual liability of the Community takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question (see Joined Cases C46/93 and C-48/93 Brasserie du pêcheur and Factortame [1996] ECR I-1029, paragraph 43, and Bergaderm and Goupil v Commission, cited above, paragraph 40).

It is appropriate to point out also that, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (see the judgments cited above Brasserie du pêcheur and Factortame, paragraph 51, and Bergaderm and Goupil v Commission, paragraphs 41 and 42).

As to the second condition, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion (see the judgments cited above Brasserie du pêcheur and Factortame, paragraph 55, and Bergaderm and Goupil v Commission, paragraph 43). Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-5/94 Hedley Lomas [1996] ECR I-2553, paragraph 28; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 Dillenkofer and Others [1996] ECR I-4845, paragraph 25; Case C-127/95 Norbrook Laboratories [1998] ECR I-1531, paragraph 109; Case C-424/97 Haim [2000] ECR I-5123, paragraph 38, and Bergaderm and Goupil v Commission, cited above, paragraph 44).

It follows from the foregoing that the decisive test for determining whether there has been such an infringement is not the individual nature of the act in question, but the discretion available to the institution when it was adopted.

In those circumstances, it must be held that the Court of First Instance made an error of law when it held that the Commission's liability could arise from the mere illegality of the Decision on 17 July 1997, without taking account of the discretion which the Commission enjoyed in the adoption of that measure."

Accordingly, there can no longer be any doubt about the applicability of the SSB-requirement across the board: it applies to both legislative and administrative action. See also the Opinion of A-G Stix-Hackl of 16 April 2002, Nos. 133-140. But despite the doctrinal importance of these considerations, the victory were the applicant in the case in hand was pyrrhic:

"57. However, it should be pointed out that where the grounds of a judgment of the Court of First Instance disclose an infringement of Community law but the operative part of the judgment is shown to be well founded for other legal reasons, the appeal must be dismissed (see Case C-30/91 P Lestelle v Commission [1992] ECR I-3755, paragraph 28, and Case C-210/98 P Salzgitter v Commission [2000] ECR I-5843, paragraph 58).

At paragraph 145 of the contested judgment, the Court of First Instance held that, as the Court of Justice pointed out in paragraph 38 of its judgment in T. Port, cited above, the Commission has a broad discretion when assessing whether transitional measures are necessary on the basis of Article 30 of Regulation No. 404/93.

Furthermore, as is apparent from paragraph 18 of this judgment, the Court of First Instance concluded, at paragraph 149 of the contested judgment, both that the Commission had committed a manifest error of appraisal in considering that Camar was capable of overcoming the difficulties caused by the transition from the Italian national arrangements to the Community system by relying on the operation of the market, and that the only way that Camar could deal
with the difficulties it faced was for the Commission to adopt transitional measures as provided for in Article 30 of Regulation No. 404/93.

Such manifest and grave disregard, by the Commission, of the limits placed on its discretion is a sufficiently serious infringement of Community law, within the meaning of the case-law cited at paragraphs 53 and 54 of this judgment, and is therefore such as to render the Community liable.

As a result, the claim that the contested judgment should be set aside, in so far as it orders the Commission to compensate Camar for the damage pleaded in this case, must be dismissed.”

Camar thus confirms that post-Bergaderm, the conditions for liability of the EC and an MS are identical. Or, in the words of A-G Stix-Hackl, Opinion of 16 April 2002, No. 128 (not yet available in English):

"On peut tirer de l'arrêt [Bergaderm] ]que la Cour souligne les parallèles entre la responsabilité desÉtats membres et celle de la Communauté. Cela se traduit par une identité de critères instrumentaux dans l'un et l'autre cas."


Key words: Appeal; Bananas; Common organisation of the markets; Export licence scheme; Action for damages; Proof of damage and causal link.

The German banana importer sued the Community for the costs of having had to obtain licences to import bananas from Costa Rica under contracts with exporters, whilst a pertinent requirement under Regulation 478/95 had been declared invalid in an earlier judgment by the ECJ (Joined Cases C364/95 and C-365/95, [1998] ECR I-1023). In essence, this 2003 T. Port case concerns proof of damage, which can only be reviewed on appeal to a limited extent. The CFI's ruling that the claimant had failed to sufficiently establish the existence and extent of the alleged damage was upheld. Consequently the Community could not incur liability. The ECJ reiterates the cumulative nature of the conditions for the 288 EC liability:

"30. According to settled case-law recalled by the Court of First Instance in paragraph 42 of the contested judgment, the Community's non-contractual liability depends on the coincidence of a set of conditions as regards the unlawfulness of the acts alleged against the Community institutions, the fact of damage and a causal link between the conduct of the institution and the damage complained of (Joined Cases C-258/90 and C-259/90 Pesquerias De Bermeo et Naviera Laida v Commission [1992] ECR I 2901, paragraph 42). The cumulative nature of those conditions means that if one of them is not satisfied, the Community cannot incur non-contractual liability (see, to that effect, inter alia Case C257/98 P Lucaccioni v Commission [1999] ECR I-5251, paragraphs 63 and 64, and Case C-237/98 P Dorsch Consult v Council and Commission [2000] ECR I-4549, paragraph 54)."


Provisional antidumping and countervailing duties imposed on imports of farmed Atlantic salmon originating in Norway by the Commission. Errors in the assessment of compliance with undertakings made by Fresh Marine. FM sued for damages for lost profits. ECJ does not have jurisdiction to review the assessment of facts by the CFI in appeal proceedings. About the components of the applicable liability regime, notably the conditions for EC liability, the ECJ said:

"24 In that regard, the system of rules which the Court of Justice has worked out in relation to the noncontractual liability of the Community takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question (see
According to settled case-law, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (see Brasserie du Pêcheur and Factortame, paragraph 51, Bergaderm and Goupil, paragraphs 41 and 42, and Commission v Camar and Tico, paragraph 53).

26 As regards the second condition, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see, inter alia, Bergaderm and Goupil, paragraphs 43 and 44, and Commission v Camar and Tico, paragraph 54).

27 Therefore, the determining factor in deciding whether there has been such an infringement is not the general or individual nature of the act in question but the discretion available to the institution concerned (see, to that effect, Bergaderm and Goupil, paragraph 46, and Commission v Camar and Tico, paragraph 55).V

28 Since the provisional anti-dumping and countervailing duties were imposed on the basis of Article 8(10) of Regulation No 384/96 and Article 13(10) of Regulation No 2026/97 respectively, the limits to which the Commission's discretion was subject in this case must be determined."

It follows that the requirement of an SSB applies at all times, but whether one obtains depends on the discretion available to the EC body in question - not the kind of act, i.e. a legislative or a non-legislative one. The ECJ concluded that the Commission clearly had not complied "with its obligation to impose provisional [anti-dumping] duties only where there is reason to believe that the undertaking has been breached" (para. 31). Accordingly, in the circumstances of the present case, it had committed a sufficiently serious breach. The ECJ also held there to have been a direct casual link between the conduct and the damage; it was immaterial that the CFI had partly come to a different conclusion as it had correctly applied all the other conditions for liability.

Finally, the ECJ approved the CFI's recognition of contributory negligence of the importer estimated as 50% (as a result, it could only claim 50% of its loss). This is settled case law since Mulder II and Brasserie.


This appeal from a CFI ruling concerns the liability of the Community for unlawful conduct of the European Ombudsman. The ECJ confirms that the EC is liable for any wrongdoing by the Ombudsman. The case is of little practical value as the Ombudsman limited scope of powers is not likely to generate much litigation. However, the judgment is important doctrinally as there can now no longer be any doubt that the Brasserie test of a "sufficiently serious breach" (SSB) applies not only to legislative acts but to individual administrative acts as well (ECJ cites Fresh Marine in this regard; see also Camar, discussed above). Before Bergaderm, there was a dichotomy in the liability regime of the EC: SSB applied to legislative conduct only. Any other conduct by the Community was not subject to the requirement of a sufficiently serious breach; but proof of fault did apply. Likewise, the requirement of a Schutznorm, i.e. violation of a norm protecting the claimant in the interests harmed, does (implicitly) apply, see Cases 19, 20, 25, 30/69 Richez Parise [1970] ECR 325 and Case 145/83 Adams v Commission [1985] ECR 3539 (liability for administrative acts); Case 9/69 Sayag v. Leduc [1969] ECR 329 and Cases 169/83 and 136/84 Leussink-Brummelhuis v. Commission [1986] ECR 2801 (liability for factual acts).
However, the dichotomy between legislative and non-legislative acts for the purposes of liability is no longer relevant in the light of the complete merger of the State liability with the EC liability regimes post-Bergaderm, see also Case C-472/00 P Fresh Marine [2003] ECR I-7541, [2003] 3 C.M.L.R. 39, Casenote by Jill Wakefield, 41 C.M.L.Rev. 235 (2004).

According to the ECJ in Re Ombudsman, it is settled case-law that the liability of the Community is subject to 3 conditions: the violated norm must be intended to confer rights on individuals; the breach is sufficiently serious (SSB); and a direct causal link between the loss and the breach. The decisive test for the SSB is whether the Community body has manifestly and gravely disregarded the limits on its discretion (para. 49). As far as the Ombudsman is concerned, regard must be had to the specific nature of its function. That is, the Ombudsman "is merely under an obligation to use his best endeavours and that he enjoys wide discretion"(para. 50). Put differently, there is a duty of best efforts not an obligation of result.

In addition, the crucial element within the test of SSB is, again, confirmed: the scope of discretion within which the body can operate. Like in Kobler, dealing with liability of courts, the liability of the Ombudsman is very limited due to its specific nature as Ombudsman (and as courts in Kobler). The ECJ thus concluded that the CFI was right to declare admissible in principle an action for damages allegedly caused by the mishandling of a complaint by the Ombudsman; according to A-G Geelhoed, the same applies to similar conduct by the European Parliament (No. 110). Not surprisingly, the action was declared unfounded as there was no breach of a "duty of care" by the Ombudsman. Indeed, the ECJ explicitly states: "it is possible that in very exceptional circumstances a citizen may be able to demonstrate that the Ombudsman has committed a sufficiently serious breach of Community law in the performance of his duties likely to cause damage to the citizen concerned" (para. 52). Very exceptional circumstances: cf., as said, the liability of national courts under Kobler.

Notable is that the ECJ applied its SSB test without more to the handling of a complaint by the Ombudsman: a non-legislative act. This confirms again, in my view, that the Brasserie test applies across the board to any kind of conduct by a Community body or institution. Whether any breach of a protective norm is sufficiently serious, depends on the level of discretion enjoyed by the body in issue. The merger of the Francovich liability with the 288 EC liability is thus complete. There are numerous judgments by the CFI applying the Bergaderm/Brasserie merged liability criteria, including the irrelevance of the distinction between legislative and administrative acts. See e.g. the series of cases about the impossibility of relying on WTO rules, focusing on the requirement that the rule of law infringed must be intended to confer rights on individuals, where the CFI concluded that the provisions in issue, the WTO agreement, did not, so that the Community could not incur liability for any infringement of those rules:


In Joined Cases T-344/00 and T-345/00 CEVA Santé Animale and Pharmacia Entreprises v Commission [2003] ECR II-229 (judgment of 26 February 2003) the CFI did not refer to Bergaderm on the liability point. The case deals with the inability of CEVA to market a
pharmaceutical product, progesterone, during a 1.5 year period because the Commission had failed to adopt relevant legislation authorising it to do so (so-called MRLs: maximum residue limits). Instead of applying Bergaderm, it held that:

"103. That being so, the inaction of the Commission between 1 January 2000 and 25 July 2001 constitutes a clear and serious breach of the principle of sound administration giving rise, in principle, to liability on the Community's part. There is therefore no need in the present case to establish whether the Commission's inaction was administrative or legislative in nature, or to determine the exact scope of its discretion in setting MRLs."

In my view, post-Bergaderm, there can never be any need any more to decide whether the conduct is administrative or legislative as the same criterion for liability, SSB, applies to both in any event. Decisive is, as of course applied here by the CFI, whether the body in question had committed a sufficiently serious breach. Of course, a clear and serious breach of the principle of sound administration will qualify as such.

The CFI then considered "[t]he damage sustained and the causal link between the unlawful conduct and the damage" and found the damage to be attributable to the Commission's inaction.

"108. In view of the fact that it is not yet possible to fix the amount of damages, it is appropriate, for reasons of economy of procedure, to give an initial interlocutory ruling on the liability of the Community and defer to a subsequent stage of the proceedings the question of assessing the damage attributable to the Commission's inaction between 1 January 2000 and 25 July 2001 (see, to that effect, Joined Cases C-104/89 and C-37/90 Mulder and Others v Council and Commission [1992] ECR I-3061, paragraph 37, and Case T-76/94 Jansma v Council and Commission [2001] ECR II-243, paragraph 102)."

In the Operative part of the judgment, it ruled as follows: "... 2. The Commission's inaction between 1 January 2000 and 25 July 2001 is such as to render the Community liable. 3. Within six months of the date of delivery of the present judgment the parties shall inform the Court of the amount of damages which they claim, as agreed with the Commission. 4. In the event of failure to agree the amount, the parties shall submit to the Court, within the same period, their calculations of the amount of damages attributable to the Commission's inaction between 1 January 2000 and 25 July 2001. 5. The costs are reserved." However, on appeal the CFI's ruling was set aside, see: Case C-198/03 P Commission v. CEVA Santé Animale [2005] ECR I-6357; [2005] 3 CMLR 30

The ECJ ruled that the CFI had failed to give proper reasons for disregarding some of the relevant (conflicting) scientific evidence and had misconstrued the broad scope of the Commission's discretion in taking measures for the protection of public health. The ECJ also explicitly referred to the merged ius commune liability regime by citing Brasserie and Bergaderm. See in particular the following passages: "61. The second paragraph of Article 288 EC requires the Community, in the case of non-contractual liability, to make good, in accordance with the general principles common to the laws of the Member States, any damage caused by its institutions or servants in the performance of their duties. 1. The system of rules which the Court has worked out with regard to that provision takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question (Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029, paragraph 43; Case C-352/98 P Bergaderm and Goupil v Commission [2000] ECR I-5291, paragraph 40; Case C-312/00 P Commission v Camar and Tico [2002] ECR I-1355, paragraph 52; and Case C-472/00 P Commission v Fresh Marine [2003] ECR I-7541, paragraph 24). 2. The Court has ruled that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and, finally, there must be a direct causal link between the breach of the obligation devolving on the institution and the damage sustained by the injured parties ( Brasserie du Pêcheur and Factortame , paragraph 51; Bergaderm and Goupil v Commission , paragraphs
3. With regard to the second condition, the Court has stated that the decisive test for determining whether a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion (Brasserie du Pêcheur and Factortame, paragraph 55; Bergaderm and Goupil v Commission, paragraph 43; Commission v Camar and Tico, paragraph 54; and Commission v Fresh Marine, paragraph 26).

4. Where that institution has only a considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Bergaderm and Goupil v Commission, paragraph 44; Commission v Camar and Tico, paragraph 54; and Commission v Fresh Marine, paragraph 26).

5. The determining factor in deciding whether there has been such an infringement is therefore the discretion available to the institution concerned (Bergaderm and Goupil v Commission, paragraph 46; Commission v Camar and Tico, paragraph 55; and Commission v Fresh Marine, paragraph 27).

6. While the question as to the scope of the Commission's discretion in establishing MRLs had been the subject of discussion between the parties, with the applicants at the time arguing that the Commission did not have any discretion and the Commission, on the contrary, arguing that it had a broad discretion (see paragraphs 61, 64 and 65 of the judgment under appeal), the Court of First Instance did not at any point in the judgment under appeal explain in detail the discretion which the Commission enjoys in establishing MRLs.

68. Nor did the Court of First Instance set out adequately for legal purposes the reasons or circumstances which might exceptionally have explained why such an analysis would serve no purpose (for the inadequacy of the reasoning given in paragraph 101 of the judgment under appeal, see above paragraphs 52 to 54 of the present judgment).

1. It must for those reasons be concluded that the Court of First Instance erred in law in holding in paragraph 103 of the judgment under appeal, without having established the scope of the discretion enjoyed by the Commission, that the Commission's inaction between 1 January 2000 and 25 July 2001 constituted a clear and serious breach of Community law giving rise to liability on the part of the Community.

2. The ground of appeal must therefore be upheld.

3. In those circumstances, without it being necessary to rule on the other grounds adduced in support of the appeal, in particular that alleging misinterpretation and incorrect application of the principle of sound administration to the facts of the present case, the appeal must be upheld and the judgment under appeal set aside to the extent to which it found that there had been inaction on the part of the Commission between 1 January 2000 and 25 July 2001 of such kind as to give rise to liability on the part of the Community. The ECJ found there not to have been a sufficiently serious breach by the Commission in the light of its broad discretion. See also the somewhat curious case about liability of the Community for alleged trademark infringement by the adoption of the official euro sign, Case 195/00 Travelex [2003] ECR II-1677.

In Travelex, the applicants, among other things, pleaded breach of the principle of equality of public burdens (in French: principe d'égalité devant les charges publiques; in German: Sonderopfer). The CFI deals with this argument under the heading no-fault liability. I understand this to mean liability for lawful acts (as in the leading case of Dorsch Consult (Case C-237/98 P Dorsch Consult v Council and Commission [2000] ECR I-4549); indeed, this is also how the applicants formulate this basis of liability:

"155. The applicants allege that liability may be incurred under Article 288 EC even where the conduct of the Community institution in question is not unlawful, provided that the burden of that conduct falls disproportionately and unfairly on certain individuals and constitutes unequal discharge of public burdens."

What did the CFI think about this cause of action?
"161. It should be noted that, if the principle of no-fault liability were recognised in Community law, a precondition for such liability would in any event be the cumulative satisfaction of three conditions, namely the reality of the damage allegedly suffered, the causal link between it and the act on the part of the Community institutions, and the special and unusual nature of that damage (Case C-237/98 P Dorsch Consult v Council and Commission [2000] ECR I-4549, paragraphs 17 to 19, and Case T196/99 Area Cova and Others v Council and Commission [2001] ECR II-3597, paragraph 171).

The CFI found no evidence of the existence of actual and certain damage attributable to the Commission. See the page on liability of the Community for lawful acts for more details on the requirements for liability in this situation.

See also Case T-160/03 **AFCon Management Consultants and Others v Commission** [2005] ECR II-981 (judgment of 17 March 2005) This is a successful damages claim in the context of a tendering procedure managed by the European Commission. AFCon was not awarded a contract but a competitor (the GFA Consortium) was whilst one of their staff (Mr A) had also been involved in the selection process; there was therefore a conflict of interests. The CFI ruled as follows: “90. It follows from the foregoing that the Commission, in failing to investigate the relations between Mr A and the GFA consortium, made a manifest error of assessment. In infringing the principle of sound administration in that way, the Commission also violated the principle of equal treatment as between tenderers, which requires it to examine each tender impartially and objectively in the light of the requirements and general principles governing the tendering procedure, in order to ensure that all the tenderers are afforded the same opportunities.

91. The principle of equal treatment prohibits comparable situations from being treated differently and different situations from being treated alike, unless such treatment is objectively justified. In this instance, there were serious doubts as to the lawfulness of GFA’s tender. As long as those doubts subsisted, the consortium’s situation was different from that of all the other tenderers. By failing to open an inquiry aimed at putting an end to that situation, the Commission treated GFA in the same way as all the other tenderers, even though such treatment was not objectively justified. In infringing the principle of equal treatment in that way, the Commission violated a rule of law whose purpose is to confer rights on individuals.

2. However, since it has been established that the Commission failed to act with due diligence to take the steps needed to continue with the tendering procedure, the legality of the decision not to exclude GFA from the remainder of the procedure cannot be assessed. Whether the decision is lawful is directly dependent on the result of the inquiry which the Commission should have undertaken in order to satisfy itself that there was no collusion. Since the factual aspects of the case-file do not support a finding of such collusion, the Court must reject the complaints by which the applicants seek to show that the Commission should have excluded GFA from the tendering procedure.

3. As regards whether the illegality found is such as to cause the Community to incur liability, it is necessary to bear in mind that the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion (see Brasserie du Pêcheur and Factortame, cited above, paragraph 55, and Bergaderm and Goupil v Commission, cited above, paragraph 43). The Court therefore holds that, on account of the abovementioned circumstances of the conflict of interests and of the risk of fraud which it entails, the Commission’s omission is of a manifest and serious nature and is thus such as to cause the Community to incur liability. […] Damages were awarded for losses sustained in the tender procedure as well as interest. Accordingly: “On those grounds, THE COURT OF FIRST INSTANCE (Fifth Chamber) hereby:

1. Orders the Commission to pay AFCon the sum of EUR 48 605, together with interest thereon from delivery of this judgment until full payment. The rate of interest to be applied is to be calculated on the basis of the European Central Bank’s rate for its main refinancing operations, in force during the period concerned, plus two percentage points. The amount of interest is to be calculated on the basis of compound interest”. Case T-415/03 **Cofradia de pescadores de “San**
Those passages are designed for the protection of the interests of individuals (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77), which is sufficient. A violated norm constitutes a Schutznorm (see, to that effect, Case T-113/96 

Dubois et Fils v Council of the European Union [2005] ECR II-4355 (19 October 2005) This case concerns the Common Fisheries Policy, and in particular the allocation of fishing quotas per Member State, which limits catches (we will recall that fishing quota considerations were the trigger for the British Act limiting the registration of foreign-owned vessels which led to the Factortame saga). Spanish vessels owners and associations of owners brought an action for annulment of Council Regulations allowing the Portuguese fleet to fish in a particular ICES area, which was rejected as inadmissible by the CFI. However, Spain brought, successfully, an action for annulment against these Regulations before the ECJ. Then 98 shipowners and 11 fishermen associations brought an action for damages under Article 235 EC. The case evolves around the 'conferral of rights' issue. The CFI considers whether the 'principle of relative stability' and Article 161(1)(f) of the Act of Accession may be regarded as being intended to confer rights. It recalled the fixed case law by reference to many of the above cases: "34 It should be noted that, according to settled case-law, as regards the Community's noncontractual liability for the unlawful conduct of its institutions, a right to reparation is recognised where three conditions are met: the rule of law infringed must be intended to confer rights on individuals and the breach must be sufficiently serious; actual damage must be shown to have occurred and there must be a direct causal link between the infringement attributable to the Community and the damage sustained by the injured parties (see Joined Cases T-332/00 and T-350/00 Rica Foods and Free Trade Foods v Commission [2002] ECR II-4755, paragraph 222, and Case T-195/00 Travelex Global and Financial Services and Interpayment Services v Commission [2003] ECR II-1677, paragraph 54; see also, to that effect, Case C-352/98 P Bergadermand Goupil v Commission [2000] ECR II-5291, paragraph 42; Case C-312/00 P Commission v Camar and Tico [2002] ECR I-11355, paragraph 53; and Case C-472/00 P Commission v Fresh Marine [2003] ECR I-7541, paragraph 25)." As for the requirement of "conferral of rights on individuals (so-called Schutznorm requirement), the CFI applied a two-step approach: did the Council breach a rule of law (step 1), if so, whether that rule is intended to confer rights on individuals (step 2). In this case, the Council was held to have acted contrary to the principle of relative stability in EC fisheries law as well as provisions from the applicable Act of Accession of Portugal and Spain. Step 1 was therefore satisfied. The CFI accordingly proceeded with step 2. It noted that it is not a requirement of "conferral of rights" that the violated norm is a higher ranking one: "85. In that regard, it must be noted at the outset that, contrary to the Council's submissions, it is unimportant whether or not the rule of law infringed constitutes a higher-ranking rule of law (see, to that effect, Bergaderm and Goupil v Commission, supra, paragraphs 41, 42 and 62). The arguments put forward by the parties on this point are therefore invalid."

So what is the test? The CFI elaborated as follows: "86. Further, it has been held in case-law that a rule of law is intended to confer rights on individuals where the infringement concerns a provision which gives rise to rights for individuals which the national courts must protect, so that it has direct effect (Joined Cases C-46/93 and C-48/93 Brasserie du pêcheur and Factortame [1996] ECR I-1029, paragraph 54), a provision which creates an advantage which could be defined as a vested right (see, to that effect, Case T-113/96 Dubois et Fils v Council of the European Union [1998] ECR II-125, paragraphs 63 to 65), a provision which is designed for the protection of the interests of individuals (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and Others v Council and Commission [1978] ECR 1209, paragraph 5), or a provision which entails the grant of rights to individuals, the content of those rights being sufficiently identifiable (Joined Cases C-178/94, C179/94, C-188/94 to C-190/94 Dillenkofer and Others [1996] ECR I-4845, paragraph 22)." A non-exhaustive list may be drawn up from this passage. A violated norm constitutes a Schutznorm in the following circumstances:

- when it has direct effect;
- when it creates an advantage in the form of a vested right;
- when it protects individuals' interests;
- when the right is implicit but sufficiently identifiable. It would seem that the CFI has herewith reformulated the rule of the Kampffmeyer case and merged it with the ECJ's rulings under State liability. The CFI recalls that the principle of relative stability concerns only relations between Member States, as it reflects a criterion for the distribution between MS fishing opportunities. It does 'not confer on fishermen any guarantee that they can catch a fixed quantity of fish' (para 89). Moreover, the CFI notes the possibility offered to MS to exchange quotas. As to the Accession Act, its sole purpose is to apportion the quota for anchovies in a particular area, and
does not make reference to the situation of anchovies fishermen in the two countries who may fish in this area or to any obligation of the Council to take account of their situation (para 91). The Member States are thus the 'holders' of the fishing rights, with the result that the rules are not intended to confer rights on individuals (para 93). The claim is thus rejected. T-364/03 Medici Grimm KG v Council of the European Union [2006] ECR II-79 (judgment of 26 January 2006): Medici Grimm II, available in French here. This case concerns a claim for compensation brought by an importer of handbags produced in China, who had been required to pay anti-dumping duties of 38% pending anti-dumping investigations by the Commission. A Council Regulation then cleared the applicant from involvement in dumping and grants it a 0% rate. However, the Regulation rejects retroactive application of the 0% rate. This element of the regulation was declared unlawful by a Court's judgment (Medici Grimm: Case T-7/99, [2000] ECR II2671). The CFI notes that such judicial declaration of illegality is not sufficient in itself, for 'the case law requires a sufficiently serious breach of a rule of law intended to confer rights on individuals (ref. to Bergaderm). The CFI considers a 2-stage approach is required: first, it needs to examine whether the breach is sufficiently serious, then what is the nature of rule of law. Regarding the sufficiently serious breach, the CFI, after having repeated the Bergaderm proviso, recalls the objective test spelt out in Comafrica and Dole: 'the finding of an irregularity which in comparable circumstances would not have been committed by a normally prudent and diligent administration permits the conclusion that the conduct of the institution constituted an illegality of such kind as to give rise to the liability of the Community under Article 288 EC.' (para 79). It then refers to Brasserie and Camar and Tico to recall that the Community rules on the non-contractual liability of the Community 'take account of the complexity of the situations to be regulated and the difficulties in the application and interpretation of the legislation.' (para 80). It also pointed out that there must be no difference between State and EC liability: "81 Furthermore, the protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage (Bergaderm and Goupil v Commission, paragraph 41). It must therefore be recognised that, as with proceedings relating to the liability of Member States for infringement of Community law, in order to determine whether an infringement of Community law committed by a Community institution constitutes a sufficiently serious breach, the Community Court hearing a claim for compensation must take account of all the factors which characterise the situation put before it, and those factors include,

in particular, the clarity and precision of the rule infringed, and whether any error of law was inexcusable or intentional (see, by analogy, Case C-424/97 Haim [2000] ECR I-5123, paragraph 43, and Case C-63/01 Evans [2003] ECR I-14447, paragraph 86)." The CFI examined the Council’s discretion regarding the retroactive application. It considered that the Council was faced with a ‘difficult legal question, without any precedent in case law, which was only resolved’ by the CFI judgment in Medici Grimm I (para 92) and therefore had substantial discretion. It refused the applicant’s argument that the Council misused its power in refusing to give retroactive effect to the Regulation, for the Council had looked at the nature of the investigation, to conclude that it should have only prospective effects. The first condition for Community liability not being fulfilled, the CFI does not examine the second one. T-309/03, Manel Camós Grau v. Commission [2006] ECR II-1173. Action for compensation of non-material damage and damage to employment prospects caused to Mr Camos Grau, a Commission official, by an OLAF investigation. Question on the admissibility of the action; connection with annulment actions considered. The claim is admissible: “78 Individuals who, by reasons of the conditions as to admissibility laid down under the fourth paragraph of Article 230 EC, cannot contest directly certain Community acts or measures, none the less have the opportunity of putting in issue conduct lacking the features of a decision, which accordingly cannot be challenged by way of an action for annulment, by bringing an action for noncontractual liability under Article 235 EC and the second paragraph of Article 288 EC, where such conduct is of such a nature as to entail liability for the Community (Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 Philip Morris International and Others v Commission [2003] ECR II, paragraph 123). It is open to individuals in an action for damages of that kind to put forward unlawful acts which have been committed when an administrative report is drawn up and adopted, even though that report is not a decision directly affecting the rights of the persons mentioned therein (Case C-315/99 P Ismeri Europa v Court of Auditors [2001] ECR I-
Moreover, the action for damages is an independent form of action, with a particular function to fulfil within the system of legal remedies and subject to conditions for its use conceived with a view to its specific purpose (see Case C-234/02 P Ombudsman v Lamberts [2004] ECR I-2803, paragraph 59, and the case-law cited there).” On the merits, the CFI focussed on “conferral of rights” and “sufficiently serious breach”. It stated: “In order to give a ruling on the non-contractual liability of the Community, it is necessary in the present case to consider first of all whether the rules of law which are alleged to have been infringed are intended to confer rights on individuals. The applicant relies on infringements of the principles of impartiality, natural justice and objectivity, of the protection of legitimate expectations and of sound administration. He also argues that the right to a fair hearing, the procedural requirements relating to the drawing up of reports by OLAF and the obligation to provide adequate reasons were contravened. It is sufficient to hold in that regard that at least the requirement of impartiality, to which the institutions are subject in carrying out investigative tasks of the kind which are entrusted to OLAF, is intended, as well as ensuring that the public interest is respected, to protect the persons concerned and confers on them a right as individuals to see that the corresponding guarantees are complied with (see, to that effect, Case C-269/90 Technische Universität München [1991] ECR I-5469, paragraph 14). It must accordingly be held that the applicant is alleging the infringement of a rule which is intended to confer rights on individuals.” In other words: the principle of impartiality is a Schutznorm. Assessing OLAF’s conduct, the CFI found a conflict of interests with respect to one of its officials. The CFI is quite firm in its criticism of OLAF: “The one-sided, and therefore biased, attitude to the Commission’s involvement, which is methodologically suspect given the essential role of the financial monitoring function, could lead only, by omission, to an erroneous appraisal of the precise responsibility of the relevant services of the institution and, accordingly, of their members. … It follows from the above that the content and the conclusions of the OLAF report fail to satisfy the requirement of impartiality. Such an infringement by OLAF of the rule of law concerned represents an infringement which is all the more serious since OLAF was set up in order to carry out investigations into all unlawful activities that might damage the interests of the Communities and against which administrative or criminal proceedings may lie and was established as an autonomous service of the Commission in order to give it the functional independence judged necessary for it to carry out its duties. Furthermore, in the light of the knowledge of the conflict of interest on Mr P.’s part, which OLAF moreover accepted in removing that investigator, the confirmation in the final report of the bias given to the investigation under Mr P.’s influence means that the infringement of the requirement of impartiality is manifest in its nature.” In addition, the requirements of loss suffered and causation were also satisfied. That is, regarding the claimant’s honour and professional reputation; not for the alleged pecuniary losses. Accordingly, he was awarded € 10,000 as non-pecuniary damages. T-367/03 Yedas Tarim ve Otomotiv Sanayi ve Ticaret AS v Council of the EU and EC Commission [2006] ECR II-873. A case which confirms the Commission’s discretion in the infringement procedure (Art. 226 EC), which makes it impossible to claim compensation from the Community for failure by the Commission to start infringement proceedings against a Member State. The Community cannot be held responsible for lack of financial support to Turkey resulting from the opposition of a Member State. Even if this could constitute a violation of its obligations by a Member State, that does not oblige the Commission to start a 226 EC infringement procedure (para. 51). Therefore, the fact that the Commission did not engage an infringement procedure cannot constitute an illegal act giving rise to non-contractual liability of the Community. Case T-279/03 Galileo [2006] ECR II-1291. The case raises new points in the context of tortious liability as well as for Community liability in the absence of unlawfulness. No English version was available in April 07. New for liability in tort, and presumably not relevant in the context of liability for lawful acts as it is linked to prohibiting future unlawful conduct, is the ruling that the CFI has the power to order the Commission to do or not to do something. Despite well-established case-law that the Community courts cannot issue any injunctions to the other institutions – see inter alia Case C-63/89 Les Assurances du Crédit v Council and Commission [1991] ECR I-1799, para. 30 – the CFI recognised that it can nonetheless give orders to the Commission as a matter of reparation in kind (para. 63). It noted that Galileo concerns the alleged infringement of a trade mark and that apart from financial compensation the holder of the right is entitled to immediate cessation of any
infringements. On the facts, however, no infringement by the Commission of any trademark owned by the claimants was established. Likewise, as noted on our page regarding “EC Liability for Lawful Acts” (see www.francovich.eu), the claimants also failed to make out the case that they had suffered any unusual damage (i.e. going beyond the regular entrepreneurial risks of doing business). An appeal against the CFI’s judgment is pending before the ECJ under Case No. C-325/06P, O.J. 2006 C 224/28.

Case T-193/04 Tillack [2006] nyr (4 October 2006) German journalist sues for compensation for damage to his reputation after OLAF had alleged he had bribed a Commission official to obtain information about irregularities. Action dismissed on the ground that no causation was proven with respect to one particular claim and that there was no sufficiently serious breach regarding the other. The judgment clarifies that the principle of sound administration as such is no Schutznorm, i.e. does not confer rights on individuals: “127 In that regard, first, the principle of sound administration, which is the only principle alleged to have been breached in this context, does not, in itself, confer rights upon individuals (Case T-196/99 Area Cova and Others v Council and Commission [2001] ECR II-3597, paragraph 43), except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (O.J. 2000 C 364, p. 1), which is not the case here. 128 For the sake of completeness, the classification as an ‘act of maladministration’ by the Ombudsman does not mean, in itself, that OLAF’s conduct constitutes a sufficiently serious breach of a rule of law within the meaning of the case-law. 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 Courts 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 (Case T-209/00 Lamberts v Ombudsman [2002] ECR II-2203, paragraph 65). 129 Also, in view of the autonomy granted to OLAF by Regulation No 1073/1999 and of the general objective of press releases of providing information to the public, OLAF enjoys discretion as regards the appropriateness and content of its press releases in respect of its investigatory activities.” In summary, what is the position regarding “conferral of rights” after these 2006 CFI judgments? Reading Tillack in conjunction with Camos Grau a distinction must be made between the principles of equal treatment – does confer rights as such (see AFCOn, cited above) – and of sound administration: does not. However, more concrete manifestations of the latter do satisfy the requirement of conferral of rights on individuals for the purposes of EC liability (following Brassie and Bergaderm). They are – and as constituting specific rights:
- the right to have affairs handled impartially, fairly and within a reasonable time (Tillack and Camos Grau);
- the right to be heard;
- the right to have access to files;
- the duty to give reasons. The CFI cited, and was clearly inspired by Art. 41 of the EU Charter of fundamental rights entitled “Right to good administration:” “4. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:
- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.
1 Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

2 Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language." The same provisions may be found in Art. II-101 of the Constitution. How does this approach fit into the CFI's overarching formulation in San Pedro (cited above) of “conferral of rights?” Presumably, the specific rights are classified as vested rights, like the principles conferring rights; whereas the right to good administration as such features under none of the groupings listed by the CFI. It may be argued that another approach would have been possible, namely to hold that also the right to good administration as such confers rights as it protects individuals’ interests. Future case law might shed some light on the matter. Finally, it follows from Dolianova, that the general principle of the prohibition of unjust enrichment does satisfy the “conferral of rights” test; in other words: this is a Schutznorm, see this Website “EC Liability for Lawful Acts” (www.francovich.eu).

Further reading