ORDER OF THE COURT (Sixth Chamber)
3 December 1992 *

In Case C-32/92 P,

Andrew Macrae Moat, an official of the Commission of the European Communities, residing at Brussels, represented by Luc Govaert, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14 A, Rue des Bains,

appellant,

APPEAL against the order made by the Court of First Instance of the European Communities (Fourth Chamber) on 4 December 1991 in Case T-78/91 *Andrew Macrae Moat* v *Commission of the European Communities*, seeking to have that judgment set aside

the other party to the proceedings being:

Commission of the European Communities, represented by John Forman, Legal Advisor, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. F. Mancini, F. A. Schockweiler, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

Advocate General: C. Gulmann,
Registrar: J.-G. Giraud,

after hearing the Opinion of the Advocate General,

makes the following

* Language of the case: English.

Order

1 By application lodged at the Court Registry on 7 February 1992, Andrew Macrae Moat lodged an appeal, under Article 49 of the Protocol on the Statute of the Court of Justice of the EEC and the corresponding provisions of the Protocols on the Statutes of the Court of Justice of the ECSC and EAEC, against the order of the Court of First Instance of 4 December 1991 in Case T-78/91 *Moat* v *Commission* [1991] ECR II-1387 by which that court dismissed Mr Moat's action for the annulment of the referendum organized by the Commission on 18 October 1991 in which staff were asked to vote on the compromise reached by the Permanent Representatives Committee of the Council and staff representatives on the method of adapting the remuneration of officials, for a declaration recognizing the right of TAO/AFI and other trade unions and professional associations to continue the negotiations pursuant to the Council Decision establishing a concertation procedure which was adopted at the 713th meeting of the Council, held on 22 and 23 June 1981, and for an order that the Commission should pay TAO/AFI exemplary damages, estimated at BFR 1 000 000.

2 As regards the facts giving rise to the dispute between Mr Moat and the Commission, the Court of First Instance found that:

'Since May 1991, the trade unions and professional associations which have members among the Commission's staff have been conducting negotiations on the adaptation of the remuneration of officials and other servants of the Communities in the context of the Decision of 22/23 June 1981 establishing a concertation procedure as between the Council, on the one hand, and the staff, represented by the trade unions and professional associations, on the other, for use in the event of disputes about proposals relating to the amendment of the Staff Regulations or to the implementation of its provisions. The negotiations had not even reached the stages of discussions with members of the Council and arbitration provided for in sections II and III of the Decision of 22/23 June 1981, when, by a note dated 15 October 1991, the Secretary-General of the Commission, Mr Williamson, and the Director-General for Personnel and Administration, Mr De Koster, announced that a referendum by secret ballot would be held on 18 October 1991 for officials and other servants of the Community to vote on the compromise put forward by the President of COREPER with regard to the method for the adaption of their remuneration. In another note, dated 15 October 1991 and signed by a member of

the Commission, Mr Cardoso e Cunha, the Commission told the staff that in its opinion the negotiations should end, and invited the staff to approve the proposed compromise. On 17 October 1991 Mr Moat, in his capacity as President of the Brussels Section of TAO/AFI, submitted a complaint under Article 90(2) of the Staff Regulations in which he asked for the withdrawal of the aforementioned two notes of 15 October 1991. The referendum was held on 18 October 1991. The applicants claim that irregularities took place both before and during the referendum, and that the organization of the referendum was contrary to Article 24a of the Staff Regulations, which guarantees the right of association.'

3 In declaring Mr Moat's action inadmissible, the Court of First Instance stated first of all that:

' First, in so far as the action was brought by Mr Moat, it must be pointed out that the Court has consistently held that, as a general rule, any action, within the meaning of Article 179 of the EEC Treaty, brought by an official against the institution which employs him must necessarily be preceded by a complaint which has been rejected by express or implied decision. As a result of Article 91(2) of the Staff Regulations, an action brought before that preliminary procedure has been completed is premature and therefore inadmissible (see, for example, the order in Case 130/86 *Du Besset* v *Council* [1986] ECR 2619, at 2621, the judgment in Case 401/85 *Schina* v *Commission* [1987] ECR 3911, at 3929, and the judgment of the Court of First Instance in Joined Cases T-47/89 and T-82/89 *Marcato* v *Commission* [1990] II-231, at II-241).'

4 The Court of First Instance went on to state that:

' In this case, Mr Moat, in his capacity as President of the Brussels Section of TAO/AFI, submitted a complaint on 17 October 1991. He then brought this action without waiting for the Commission to take an express decision rejecting the complaint or for the expiry of the four-month period laid down in Article 90(2) of the Staff Regulations after which a complaint is deemed to have been rejected. Accordingly, it must be held that in so far as the action was brought by Mr Moat it is manifestly inadmissible, and it is unnecessary to consider whether the other admissibility requirements laid down in Article 91(2) of the Staff Regulations have been satisfied.

According to Article 111 of the Rules of Procedure of the Court of First Instance, where an action is manifestly inadmissible, the Court may, without taking further steps in the proceedings, give a decision on the action by reasoned order. Since, in so far as it was brought by Mr Moat, the action is manifestly inadmissible it is appropriate to dismiss it pursuant to Article 111 of the Rules of Procedure without its being necessary to notify the action to the Commission beforehand.'

5 According to Article 119 of its Rules of Procedure, the Court of Justice may at any time dismiss the appeal in whole or in part where it is clearly inadmissible or clearly unfounded, without opening the oral procedure.

6 The applicant relies on a single ground of appeal. According to him, the fact that the referendum was organized on 18 October 1991 constitutes a rejection of the complaint which he had lodged on the previous 17 October. He therefore considers that the Court of First Instance was wrong to hold the action which he had brought on 30 October 1991 to be premature and inadmissible.

7 The Commission contends primarily that the appeal is inadmissible on the ground that the act challenged by the applicant cannot be regarded as an act adversely affecting him.

8 Since the question relating to the existence of an act adversely affecting an official is one which arises before the question whether the pre-litigation procedure was conducted in accordance with the conditions laid down in Article 90 of the Staff Regulations of Officials, that question must be considered first, contrary to the approach taken by the Court of First Instance in its judgment.

9 According to established case-law, only acts which directly and individually affect the legal position of the persons concerned may be regarded as acts adversely affecting them (see the order of the Court of Justice in Case 327/87 *Progoulis* v *Commission* [1988] ECR 3091 and the judgment of the Court of Justice in Case 204/85 *Stroghili* v *Court of Auditors* [1987] ECR 389).

10 In the present case, the applicant's action challenged in substance the Commission's decision to organize a referendum amongst its staff. By an order made today in Case C-322/91 the Court of Justice has declared the action brought by the TAO/AFI against that same decision inadmissible on the ground that the referendum organized by the Commission was merely an internal measure not creating any obligation for any person whatever to participate in that referendum. That measure could not therefore have any direct and immediate effect on the applicant's legal position (paragraph 9). Similarly, since that decision did not significantly affect the legal position of the TAO/AFI, it could not therefore be regarded as an act adversely affecting the applicant.

11 In the absence of such an act, the action brought before the Court of First Instance was inadmissible. It follows that the operative part of the contested judgment is therefore well founded, albeit for reasons of law other than those set forth therein (see the judgment of 9 June 1992 in Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755).

12 In those circumstances, without there being any need to consider the plea made by the applicant in support of his appeal, it must be held that the appeal is clearly unfounded and must therefore be dismissed pursuant to Article 119 of the Rules of Procedure.

Costs

13 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Under Article 70 of those rules, costs incurred by the institutions in proceedings brought by officials of the Community are to be borne by the institutions. However, according to Article 122 of those rules, Article 70 is not applicable to appeals brought by an official or other servant of an institution against that institution. Since Mr Moat has failed in his action, he must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the applicant's appeal.

2. Orders the applicant to pay the costs.

Luxembourg, 3 December 1992.

J.-G. Giraud

Registrar

C. N. Kakouris

President of the Sixth Chamber