THE COURT (Second Chamber)

hereby:

1. Dismisses the action as inadmissible;
2. Orders each party to bear its own costs.

Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 8 May 1973.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 5 APRIL 1973 [1]

Mr President,
Members of the Court,

The introduction into the system for the protection of officials' rights and interests provided by the Regulations, of a preliminary requirement to be complied with before judicial proceedings can be begun, must necessarily occasion discussion and argument as to the criteria for applying the new rule, and especially for establishing the minimum condition for such requirement to be considered discharged.

The present case, at the current stage of argument as to the admissibility of the proceedings introducing the action, offers a typical case for your judgment; its solution will undoubtedly constitute an important precedent for the clarification of the problems arising in relation to the definition of the requirement now imposed of an administrative appeal, which henceforth constitutes a condition of admissibility of an application before this Court, in conformity with the new text of Article 91 of the Staff Regulations resulting from the amendment brought about by Regulation No 1473/72 of the Council of 30 June 1972.

The interest of the parties in obtaining your judgment on the admissibility of the present application is, however, only relative. Since there is no doubt as to the admissibility of the new application,

1 — Translated from the Italian.

substantially identical in content, which the same applicant submitted on 22 March last (Case 112/73) which appears to have been preceded by an administrative appeal in due form, it may be asked whether the defendant still maintains a sufficient interest in the present case to justify persisting with the objection of inadmissibility. It is clear that the Commission has a general interest in obtaining your solution, Members of the Court, to the procedural question raised in this case, so that it may be guided thereby in the eventuality of similar situations in the future. But it may be doubted whether the Court is obliged to pronounce on a question which in the circumstances is purely academic owing to the lack of any real interest by the parties in the particular case in question: 'judex judicat, Tribonianus aut Ulpianus respondeat!'

Perhaps, as regards the purpose to be served by our common task, we may find encouragement in the prospect that your judgment can play a real part in dividing the costs between the parties to the case.

There are other reasons also which establish the essentially academic character of our Court's consideration of the question of admissibility. In Judgment 44/71 (Marcato v Commission, Rec. 1972, p. 433: I refer to the original French text, since the Italian translation erroneously attributes to the defendant the considerations proper to the Court) which you confirmed in the more recent decision in the other Marcato case 37/72 of 15 March last, it was held that a complaint to the administration against the decisions of a Selection Board is pointless, because the administrative authority has no power to annul or alter decisions of this kind. Accordingly, the only means of protection against such acts at the disposal of interested parties is an application before this Court.

In these circumstances, it seems to me that it would be futile to impose on officials who seek to protect themselves against the decision of a Selection Board preliminary compliance with a procedure which could not serve the purpose for which it was established. Cessante ratione legis, cessat et ipsa lex! Accordingly, in the light of your judgments, an application to the Court ought to be admitted in this case, even in the absence of a complaint to the administration, at least in so far as concerns the action of Selection Boards which escape control by the administrative authority. And this would suffice.

However that may be, it is now my task to consider the problems concerning the concept of a complaint to the administration arising from the objection to the admissibility of the application which has been raised by the defendant.

You know that the Council, in making the introduction of an application before the Court dependent upon the prior submission of the complaint to the administration envisaged by Article 90 (2), as they did by means of the abovementioned Regulation No 1473/72, wished to prevent disputes open to settlement at administrative level from being prematurely brought before the Court.

On the hypothesis that, under the new rules governing applications, the existence of a preliminary complaint is considered necessary even in relation to the decisions of Selection Boards, in order to decide on the objection of inadmissibility raised by the defendant against the application presented by Miss Campogrande impugning certain acts by a Selection Board, it is necessary to determine the nature of the complaint envisaged by Article 90 (2) of the Staff Regulations as it now stands. The Regulation in question, published on 16 July 1972, although it fixed 1 July of the same year as the date on which it was to take effect, is clearly not to be applied to officials prior to the date of its publication. It is clear that until this date the applicant could have impugned the decision in question without the

necessity of going through the preliminary procedure of a complaint. But because the application was introduced only on 28 August last, by virtue of the general principle 'tempus regit actum', this application is governed by the new rules in force at the date of its presentation.

In order to establish the admissibility of the application it is necessary, therefore, to ascertain whether the condition precedent of the new system, that is the submission of a complaint, has been satisfied.

This question, regarding the present case, cannot, however, be separated from considerations of a more general character concerning certain aspects of the new system of applications.

Without wishing to cast doubt here upon the advantage of a procedure for sifting at administrative level the disputes which arise between officials and administration in relation to the implementation of the Staff Regulations, it seems to me quite clear that a system of this kind, conceived in the interests of economizing on judicial and administrative labour, must provide adequate safeguards for those directly interested, the officials.

It is in the light of this proposition that the new procedure is to be interpreted. If a complaint to the administration has to meet substantially the same requirements as are needed for an application to the Court, the result for the official would certainly not be simplification and alleviation but aggravation and complication. If the procedure of an administrative complaint has been judged necessary in an attempt to avoid, as far as possible, the complexity and the burdens of judicial procedure, it is necessary to give the complaint a shape devoid of formality, and, in particular, it is necessary to prevent compulsory requirements of method and form in presentation from precluding the possibility of judicial control which must be available to an interested party if the dispute fails to be settled at administrative level. Further, against this requirement is to be set another requirement which is a corollary of making a complaint obligatory: it must be ensured that the requests of the interested party are brought to the knowledge of the administrative authority, which is competent to give the official satisfaction, before this authority is confronted by these same requests in court.

The lack of precise formal rules in considering the administrative complaint must be reflected also in the conditions laid down by Article 90 (2), for requests submitted by officials in relation to administrative acts adversely affecting them.

The establishing of a fixed procedure always leads inevitably to a limitation of the free development of the arguments which the law could have admitted in favour of the interested parties; but we must prevent the result from going beyond what is substantially its proper scope.

Accordingly, if we turn now to the circumstances of the present case, one of the first in which the Commission raises the new objection of inadmissibility, we must examine the situation as regards the substance of what has been done, and with special consideration also of the timing of the application. We must not forget that the amendment in question came into force in July 1972, at the very time the administrative procedure in dispute was coming to an end, since it had been opened by the letter sent on 18 May 1972 by the applicant to Mr Coppé, and to which he had replied by letter of 11 July following.

In assessing the request contained in the letter of 18 May, we must bear in mind that this was written before the publication of the amendments made in Article 91 of the Staff Regulations.

In this letter Miss Campogrande expressed a detailed and direct protest to the member of the Commission who was competent in administrative matters (it

does not seem to me worthwhile to dwell upon the issues raised by the defendant relative to the fact that the letter was not addressed to the Commission itself nor submitted through an immediate superior: the fact that the letter was not returned to the sender, and that moreover it was answered by the Competent member of the Commission, is in fact sufficient to cure any irregularity of this sort). This protest was directed against a decision taken by a Selection Board regarding the applicant, and of which the applicant had notice, we do not know how, even before the decision itself had come to be published officially. In the light of this last circumstance it might be difficult to recognize the existence of a formal complaint strictly so called. However, in the spirit mentioned above, we must give due weight to the fact that the reasoned representations of the aggrieved party received a reply from the very organ to which the formal complaint also ought to have been directed; and the said reply was written, when the competent member of the Commission knew the facts, virtually so as to constitute a reasoned statement of rejection.

The essential conditions for recognizing in a request the character of a formal complaint are firstly a formal condition, that the request be addressed to the competent authority, and secondly a substantive condition, that the said authority be clearly requested to intervene, either by modifying a position taken up or by making good a failure on the part of an inferior body bearing on the legal position of the official who presents the request.

It seems to me that once a request meets these two basic requirements, no more should be demanded, so as not to render unduly difficult the position of the official who, it must not be forgotten, ought not to be virtually compelled (in a purely administrative procedure) to avail himself of the services of a lawyer.

In the present case, the applicant, addressing the member of the Commission responsible for administrative matters, had requested the modification of an administrative provision affecting her adversely.

What you are now asked, Members of the Court, is whether the applicant ought, in order to comply with the formalities of the new Article 91, to have repeated to the same body the complaint to which the competent authority had already given a detailed reply. To a question of this kind, I maintain (at least at the moment of first implementation of the new Regulation) that an affirmative answer is not possible. Bearing in mind the fact that the possibility of judicial protection is ensured for officials by the very treaties establishing the Communities, as well as the considerations which we expounded above (arguing against a rigid interpretation of the administrative complaint procedure as now laid down in the new version of Article 91 of the Staff Regulations), it is not possible to demand compliance, by the virtual repetition of the contents of a complaint already submitted, with a procedure which there is every reason to consider pointless, merely to put it into forms and words more appropriate to the procedural requirements imposed by the new system.

Accordingly, reserving all questions of substance and of equating complaint to application, I submit that you dismiss the objection of inadmissibility, at least in so far as concerns those submissions in the application which were substantially contained in the letter of 18 May 1972, and that you proceed to the examination of the merits of the application.

In any event, whatever the result of the application, the costs attributable to the proceedings concerned with the objection of inadmissibility raised by the defendant ought to be borne by the latter.