Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 15 July 2021 [1]

Case C-431/20 P

Carlo Tognoli,
Emma Allione,
Luigi Alberto Colajanni,
Claudio Martelli,
Luciana Sbarbati,
Carla Dimatore, as heir of Mario Rigo,
Roberto Speciale,
Loris Torbesi, as heir of Eugenio Melandri,
Luciano Pettinari,
Pietro Di Prima,
Carla Barbarella,
Carlo Alberto Graziani,
Giorgio Rossetti,
Giacomo Porrazzini,
Guido Podestà,
Roberto Barzanti,
Rita Medici,
Aldo Arroni,
Franco Malerba,
Roberto Mezzaroma
v

European Parliament

(Appeal – Single statute for Members of the European Parliament – Members of the European Parliament elected in Italian constituencies – Adjustment of pension entitlements by the European Parliament – Challengeable act – Concept – Binding legal effects – Statement of modification of the application – Admissibility)

[1] Original language: French.

I. Introduction

1. By their appeal, Mr Carlo Tognoli and the other appellants seek to have set aside of the order of the General Court of the European Union of 3 July 2020, *Tognoli and Others* v *Parliament*,[2] by which that Court dismissed as manifestly inadmissible their actions seeking annulment of the letters of 11 April 2019 drawn up by the Head of the 'Members' Salaries and Social Entitlements' Unit of the European Parliament's Directorate-General (DG) for Finance, concerning the adjustment of the pensions they receive,[3] following the entry into force, on 1 January 2019, of Decision No 14/2018 of the Ufficio di Presidenza della Camera dei deputati (Office of the President of the Chamber of Deputies, Italy).[4]

2. Those letters, sent to a number of former Members of the European Parliament or persons having succeeded to their rights, were the subject of numerous actions which the General Court declared to be manifestly inadmissible. The Court has before it appeals against those decisions, which were delivered on the same day in analogous terms.[5]

3. The Court must therefore rule on the circumstances in which actions may be brought against decisions of the Parliament adjusting the pensions of Members of the European Parliament, taken through an administrative procedure in relation to which there are no specific regulations.

4. The main issue for consideration on this appeal – and that in Case C-408/20 P, which the Court has decided to examine at the same time – relates to the concept of a 'challengeable act' for the purposes of Article 263 TFEU.[6]

II. Legal framework

5. Article 86 of the Rules of Procedure of the General Court[7] provides:

'1. Where a measure the annulment of which is sought is replaced or amended by another measure with the same subject matter, the applicant may, before the oral part of the procedure is closed, or before the decision of the General Court to rule without an oral part of the procedure, modify the application to take account of that new factor.

…

2 T-395/19, T-396/19, T-405/19, T-408/19, T-419/19, T-423/19, T-424/19, T-428/19, T-433/19, T-437/19, T-443/19, T-455/19, T-458/19 to T-462/19, T-464/19, T-469/19 and T-477/19, not published, EU:T:2020:302; 'the order under appeal'.

3 See point 11 of this Opinion.

4 'Decision No 14/2018'.

5 At the same time as the present appeal, the Court will deal with that brought by another former Member of the European Parliament (*Poggiolini* v *Parliament* (C-408/20 P) against the order of 3 July 2020, *Falqui and Poggiolini* v *Parliament* (T-347/19 and T-348/19, not published, EU:T:2020:303). Other appeals are pending in *Coppo Gavazzi and Others* v *Parliament* (C-725/20 P) and *Santini and Others* v *Parliament* (C-198/21 P), in relation to identical letters dated 11 April 2019 and 8 May 2019. Those appeals have been brought, respectively, against the judgments of 15 October 2020, *Coppo Gavazzi and Others* v *Parliament* (T-389/19 to T-394/19, T-397/19, T-398/19, T-403/19, T-404/19, T-406/19, T-407/19, T-409/19 to T-414/19, T-416/19 to T-418/19, T-420/19 to T-422/19, T-425/19 to T-427/19, T-429/19 to T-432/19, T-435/19, T-436/19, T-438/19 to T-442/19, T-444/19 to T-446/19, T-448/19, T-450/19 to T-454/19, T-463/19 and T-465/19, EU:T:2020:494), and of 10 February 2021, *Santini and Others* v *Parliament* (T-345/19, T-346/19, T-364/19 to T-366/19, T-372/19 to T-375/19 and T-385/19, not published, EU:T:2021:78). The written part of those proceedings is ongoing.

6 That concept forms the subject matter of the first ground of appeal in the present case and the second ground in Case C-408/20 P. My analysis of the two cases will be presented in identical terms.

7 Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-11/tra-doc-en-div-t-0000-2018-201810296-05_01.pdf.

6. Without prejudice to the decision to be taken by the General Court on the admissibility of the statement modifying the application, the President shall prescribe a time limit within which the defendant may respond to the statement of modification.

7. The President shall, where appropriate, prescribe a time limit within which any interveners may supplement their statements in intervention in the light of the statement modifying the application and the statement in response. Those statements shall be served simultaneously on the interveners for that purpose.'

III. Background to the dispute

6. The background to the dispute is set out in paragraphs 1 to 9 of the judgment under appeal and can be summarised as follows.

7. As former Members of the European Parliament, elected in Italy, or the surviving spouses of such Members of the European Parliament, the appellants receive either an old-age pension, paid pursuant to the Rules Governing the Payment of Expenses and Allowances to Members of the European Parliament, or a survivor's pension.

8. On 12 July 2018, the Office of the President of the Chamber of Deputies decided, by Decision No 14/2018, to recalculate the amount of the pensions of former members of that chamber, on a contributions basis, for years of service completed on or before 31 December 2011.[8] On that basis, the amount of the pensions paid to the former members or their surviving spouses was reduced with effect from 1 January 2019.

9. The Parliament informed the appellants, through a remark on their January 2019 pension statements, that the amount of their pensions might change as a result of the implementation of Decision No 14/2018, and that it might be necessary, following such a change, to recover sums unduly paid.

10. By an undated letter from the Head of the 'Members' Salaries and Social Entitlements' Unit of the European Parliament's DG for Finance, attached to their February 2019 pension statements, the appellants were informed that:

– the Parliament's legal department had confirmed that Decision No 14/2018 was automatically applicable to their situation;

– as soon as the Parliament received the necessary information from the Camera dei deputati (Chamber of Deputies, Italy), it would notify them of their recalculated pension entitlements and recover any overpayment over the following 12 months, and

– their pension entitlements would be finally determined by a formal act, in respect of which it would be possible to make a complaint under Article 72 of the Decision of the Bureau of the European Parliament of 19 May and 9 July 2008 concerning implementing measures for the Statute for Members of the European Parliament,[9] or to bring an action for annulment under Article 263 TFEU.

[8] Paragraph 3 of the order under appeal records that the lawfulness of Decision No 14/2018 is to be examined in proceedings which are pending before the Consiglio di giurisdizione della Camera dei deputati (Judicial Council of the Chamber of Deputies, Italy).

[9] OJ 2009 C 159, p. 1.

11. By the letters of 11 April 2019,[10] the Head of Unit informed the appellants that, as he had announced in his letter of February 2019:

– the amount of their pensions would be adjusted to reflect the reduction in the analogous pensions paid, in Italy, to former members of the national parliament, under Decision No 14/2018, with retroactive effect from 1 January 2019, in accordance with the provisional redeterminations of pension entitlements attached to those letters, and

– they had 30 days, running from receipt of the letters, in which to make their observations, in default of which the letters would be considered to have definitive effect meaning, amongst other things, that amounts unduly received in respect of January to March 2019 would have to be repaid.

12. By emails sent between 13 May and 4 June 2019, the appellants sent their observations to the competent department of the Parliament.

13. By emails sent between 22 May and 24 June 2019, the Parliament acknowledged receipt of those observations and informed the appellants that they would receive a reply after their arguments had been considered.

14. By letters dated between 20 June and 23 July 2019, and therefore after the appellants had brought their actions at first instance,[11] the Head of the 'Members' Salaries and Social Entitlements' Unit of the European Parliament's DG for Finance indicated that their observations did not contain anything to justify a change to the Parliament's position, as set out in the letters at issue, and that the pension entitlements and the schedule for recovery of sums unduly received, as recalculated and notified in the attachment to the letters, had consequently become definitive on the date of notification of those decisions.

15. However, as at the date of the order under appeal, the Parliament had not made a final decision on the situation of Mr Eugenio Melandri (Case T-437/19), as this was somewhat unique.

IV. The procedure before the General Court and the order under appeal

16. By applications lodged at the Court Registry between 28 June and 8 July 2019, the appellants brought actions for annulment of the letters at issue.

17. On 16, 19 and 24 September 2019, the Parliament, by separate documents, raised a plea of inadmissibility in respect of those actions.

18. Between 19 September and 4 October 2019, the applicants, with the exception of Ms Allione (Case T-396/19) and Mr Melandri (Case T-437/19), lodged statements of modification of their respective applications. Between 15 and 28 October 2019, the Parliament lodged observations on those statements.

[10] 'The letters at issue'.

[11] See point 16 of this Opinion. In just one of the cases, that of Ms Emma Allione (Case T-396/19), the Parliament's response, dated 20 June 2019, predates the application, which was lodged on 28 June 2019. See, in that regard, paragraphs 10 and 12 of the order under appeal.

19. Between 3 and 12 November 2019, the applicants, with the exception of Mr Melandri (Case T-437/19), [12] lodged their observations on the pleas of inadmissibility raised by the Parliament in respect of the applications.

20. By orders of 10 December 2019, the Court decided to reserve its decision on the pleas of inadmissibility until it ruled on the substance of the case. On 27 and 28 January 2020, the Parliament lodged its defences.

21. On 3 February 2020, the Court decided that a second exchange of pleadings was unnecessary.

22. By the order under appeal, made under Article 126 of its Rules of Procedure, the Court dismissed the actions as manifestly inadmissible.

23. First, as regards the request for annulment of the letters at issue, the Court began by holding that the pleas of inadmissibility had been raised by the Parliament in due time, as the time limits were subject to an extension on account of distance of a single period of 10 days. [13]

24. The Court then held that the letters at issue did not constitute acts adversely affecting an official. [14] Having observed that the fact that the new method of calculating the pensions had been applied from April 2019 was not sufficient, in itself, to establish that the Parliament had taken a definitive position on the amount of the pensions, [15] the Court held, on the basis of the wording of the letters at issue, the fact that – as mentioned in those letters – the applicants had the opportunity to make observations, and the fact that they had taken that opportunity, [16] that the Parliament's replies to the applicants constituted the definitive decisions of that institution and hence could not be regarded as merely confirming the letters at issue. [17]

25. Finally, the Court held that the fact that the letters at issue did not indicate any date by which the Parliament would respond to the applicants' observations was irrelevant, as were the objections based on failure to state reasons and infringement of the principle of proportionality. [18]

26. Second, the Court held that the statements of modification lodged by the applicants were manifestly inadmissible, on the ground that their initial applications had not been admissible when lodged, [19] and that in any event, the heads of claim set out in those statements, which related to other 'prior, preparatory, subsequent or connected' documents, had to be dismissed as inadmissible, on the basis that they did not indicate the subject matter of the dispute in a sufficiently precise manner. [20]

27. Third, the Court dismissed, as manifestly inadmissible, the applicants' claims for an order requiring the Parliament to pay the sums it had unduly retained on the ground that, under settled case-law, it had no power to issue directions to the EU institutions. [21]

[12] Mr Melandri died on 27 October 2019. On 30 January 2020, the Court was informed that Mr Loris Torbesi intended to pursue the proceedings.

[13] See paragraphs 45 and 48 of the order under appeal.

[14] See paragraph 57 of the order under appeal.

[15] See the last sentence of paragraph 51 of the order under appeal.

[16] See paragraphs 52 and 53 of the order under appeal.

[17] See paragraphs 56 and 60 of the order under appeal.

[18] See paragraphs 61 and 62 of the order under appeal.

[19] See paragraphs 66 and 67 of the order under appeal.

[20] See paragraph 69 of the order under appeal.

[21] See paragraphs 73 and 74 of the order under appeal.

V. Forms of order sought by the parties

28. The appellants claim that the Court should:

– set aside the order under appeal;

– refer the case back to the General Court, and

– order the Parliament to pay the costs of the appeal.

29. The Parliament contends that the Court should:

– dismiss the appeal and

– order the appellants to pay the costs of the appeal.

VI. The appeal

30. Under the appellants' principal ground of appeal, they argue that the letters at issue were challengeable acts. They raise two secondary grounds, one based on an error in the interpretation of Article 86 of the Rules of Procedure of the General Court, and the other on breach of the principle *audi alteram partem* and an error in the interpretation of Article 126 thereof.

A. The first ground of appeal, under which it is argued that the letters at issue were challengeable acts

31. Under this ground of appeal, the appellants contend that the General Court was wrong to hold that the letters at issue were not acts adversely affecting an official, in respect of which an action for annulment could be brought pursuant to Article 263 TFEU. [22]

1. Arguments of the parties

32. The applicants submit:

– principally, that under settled case-law of the Court, whether an act is challengeable depends on its legal effects and not on whether it is definitive, especially in the absence of an identified legal basis distinguishing a provisional from a definitive act. In the present case, the letters at issue produced their effects on the amount of the pension payments made from April 2019, and furthermore, for the sake of completeness;

– that it was not clear that the letters at issue might be followed by decisions which would not be merely confirmatory, that it is apparent from the content of the Parliament's responses to their observations that they were merely confirmatory, and that the Parliament is contradicting itself in submitting that it was obliged to apply Decision No 14/2018;

[22] See points 24 and 25 of this Opinion.

– that the nature of the letters at issue cannot change depending on whether or not observations are made, when nothing further is required given the Parliament's decision to transpose Decision No 14/2018 automatically, and that, in the absence of any indication as to when the Parliament would respond, they could not wait before bringing their actions, and

– that Ms Allione (Case T-396/19) brought her action against the relevant letter on the same date on which the Parliament responded to her written observations, which was the day on which that act became definitive.

33. The Parliament maintains that the reduction in the amount of the pension could have been altered upon consideration of the appellants' observations and that its definitive position was determined after the letters at issue, as can be seen from the wording of those letters and the fact that the appellants took the opportunity to make written observations. The lack of a legal basis enabling the letters to be regarded as preparatory has no bearing on their classification, the Parliament's practice being intended to guarantee the right of those concerned to be heard before a definitive decision reducing the amount of their entitlements is taken. As regards the immediate effects of the letters, the Parliament submits that these were provisional.

2. Assessment

34. By the first ground of appeal, the appellants essentially challenge the General Court's assessment with regard to the test of legal effect which, in the light of the case-law of the Court, must be satisfied if the remedy provided for by Article 263 TFEU is to be available.

35. It should therefore be borne in mind that any provisions adopted by the institutions, whatever their form, which are intended to have binding legal effects capable of affecting the interests of the applicant, a natural or legal person, by bringing about a distinct change in the legal position of that person, are regarded as 'challengeable acts' for the purposes of Article 263 TFEU. [23]

36. By contrast, any act not producing binding legal effects, such as preparatory acts, implementing measures, mere recommendations and opinions and, in principle, internal instructions, falls outside the scope of the judicial review provided for in Article 263 TFEU. [24]

37. In order to determine whether the contested act produces binding legal effects, it is necessary to examine the substance of that act and the intention of its author, [25] and to assess those effects on the basis of objective criteria, such as the content of the act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted it. [26]

[23] See judgments of 25 February 2021, *VodafoneZiggo Group* v *Commission* (C-689/19 P, EU:C:2021:142, paragraph 48 and the case-law cited), and of 22 April 2021, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo* v *Commission* (C-572/18 P, EU:C:2021:317, paragraph 46 and the case-law cited).

[24] See judgment of 22 April 2021, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo* v *Commission* (C-572/18 P, EU:C:2021:317, paragraph 47 and the case-law cited).

[25] On the irrelevance of whether the act satisfies certain formal requirements, see judgment of 17 July 2008, *Athinaïki Techniki* v *Commission* (C-521/06 P, EU:C:2008:422, paragraphs 42 to 45).

[26] See judgment of 22 April 2021, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo* v *Commission* (C-572/18 P, EU:C:2021:317, paragraph 48 and the case-law cited).

38. Thus, intermediate measures whose aim is to prepare the final decision do not, in principle, constitute acts which may form the subject matter of an action for annulment. That is the case where the measure expresses a provisional opinion of the institution. [27]

39. Nor is an intermediate measure capable of forming the subject matter of an action if it is established that the illegality attaching to that measure can be relied on in support of an action against the final decision for which it represents a preparatory step. In such circumstances, the action brought against the decision terminating the procedure will provide sufficient judicial protection. [28]

40. Moreover, the contested decision can be the subject of an action for annulment only if, even without altering the terms of the earlier decision, the amendment of some of the grounds of the latter changed the substance of what was decided in the operative part, thus affecting the applicants' interests in the sense required by the case-law on Article 263 TFEU. Otherwise, it is a confirmatory measure which cannot be challenged under that article.

41. In the present case, applying the case-law that I have referred to in points 35 and 38 of this Opinion, [29] the General Court identified the matters arising from the content of the letters at issue, which were the use of the word 'provisional' and the indication that the adjustment of the pension entitlements, and the recovery of sums unduly received in respect of January to March 2019, would only become definitive upon expiry of a period of 30 days, during which the applicants had the opportunity to make observations. The Court held that the fact that the applicants had taken advantage of that opportunity prevented the provisional determinations of the new pension entitlements from becoming definitive, and consequently that the letters which followed the applicants' observations constituted the Parliament's definitive decisions.

42. Furthermore, the Court held that those letters were not purely confirmatory measures, as the letters at issue were not definitive, and that the fact that they did not indicate any date by which the Parliament would respond was irrelevant in that regard.

43. Under the first ground of appeal, the appellants do not challenge the findings of the Court in relation to the content of the letters at issue or the context in which they were sent. The appellants submit that the Court erred in law in determining whether those letters were open to challenge, particularly with regard to the powers of the administrative body which had sent them. They argue that the letters reduced the amount of the pensions with immediate effect.

44. It is apparent from paragraphs 5, 6 and 51 of the order under appeal that the Court found that the letters at issue had been sent by the Parliament, which has decision-making power, and that it is the system for determining the amount of the pensions of Members of the European Parliament that requires the Parliament to adjust the amount of the pensions paid. According to the findings of the Court, in that context, the practice followed by the Parliament's DG of Finance was to inform the applicants, in February 2019, of the forthcoming adjustment to the amount of the pensions, which resulted from the fact that decision No 14/2018 was automatically applicable,

[27] See judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 50 and the case-law cited).

[28] See judgments of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 53 and the case-law cited), and of 22 April 2021, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo* v *Commission* (C-572/18 P, EU:C:2021:317, paragraph 50 and the case-law cited).

[29] See paragraphs 50 and 51 of the order under appeal.

and – two months later, by the letters at issue – of its actual implementation, and of the possibility of making observations during the 30-day period running from the sending of those letters.

45. It can therefore be concluded from that that the Parliament unequivocally took a measure which had legal effects affecting the interests of the appellants and which was binding on them.

46. The Court reached its conclusion that the letters at issue were not decisions by pointing to the fact that there was an opportunity to make observations following the letters, noting that that opportunity had been taken, that the appellants' observations has been considered, and that the sums unduly paid in and after January 2019 had not been recovered.

47. In taking that approach, the Court failed to have regard to the following matters, which are apparent from its findings:

– the fact that there was no suspension, in the event of observations being received, of the binding effects of the letters at issue affecting the interests of the appellants, and

– the certainty that the Parliament could not reconsider the principle of its decision, given that it was an obligatory consequence of Decision No 14/2018.

48. It follows, in those particular circumstances, which differ markedly from those giving rise to the case-law cited by the Court in paragraph 50 of the order under appeal, that, unlike the letters of February 2019, the letters at issue cannot be regarded merely as providing information to the appellants with a view to establishing their point of view and ensuring that the Parliament was as well informed as possible when it came to take its decision – or, in other words, as a step which was required to be taken before restricting their rights.

49. In those circumstances, the letters at issue could only have been regarded as setting out a preliminary view, or as preparatory in nature, if the Parliament had clearly indicated that its decision to reduce the pensions following decision No 14/2018 would not take practical effect unless those concerned did not make any observations, or until the expiry of a certain period during which such observations could be made, which was not the case.

50. In that regard, the observation that the Parliament did not give full effect to the reduction in the amount of the pensions, which took effect from April 2019, in that it did not recover the sums unduly paid between January and March 2019, is of no relevance. This does not affect the classification of the letters at issue based on the automatic adjustment in the amount of the pension payments made and to be made, as the substantive conditions for recovery of payments unduly received are also linked to decision No 14/2018.

51. The characterisation of the letters at issue as challengeable acts is supported by the fact, apparent from paragraph 56 of the order under appeal, that, in the procedure for adjustment of the pensions, no further decision is taken on expiry of the period of 30 days during which the person entitled to the pension can make observations, or in the event of such observations being rejected. Thus, in the absence of a review procedure leading to a decision with a detailed statement of reasons, in response to observations from those entitled to the pensions, the lawfulness of the act adjusting the amount of those pensions will be assessed, on expiry of that period, on the basis of information which would have been available to the Parliament when it informed the person entitled to the pension.

52. Similarly, in circumstances such as those of the present case, the Parliament cannot legitimately argue that the appellants, who made observations after receiving the letters at issue, ought to have waited for it to provide them with confirmation of the reduction in the amount of their pensions, at which point that response to their observations could have been regarded as a definitive – and therefore challengeable – act. It was highly unlikely that the appellants would succeed, by taking that step, in altering the principle of the amount of the pensions being reduced as a result of Decision No 14/2018, according to the information provided by the Parliament, and they were therefore faced with the risk that the Parliament's response would be regarded, for lack of any new material, as a confirmatory act against which they could not bring an action. [30]

53. The preceding analysis is supported by the case-law on the definition of an act adversely affecting an official in the context of civil service litigation in which the pecuniary effects of a decision are challenged. Thus, a monthly salary statement may show that a decision has been taken. [31] When such a payslip gives material form, for the first time, to the implementation of a new act of general application concerning the fixing of pecuniary rights, it necessarily represents, in regard to its addressee, the adoption of an administrative decision of individual application producing mandatory legal effects of such a kind as to have a direct and immediate effect on the interests of the official concerned. On the other hand, the subsequent payslips merely reflect the continuation of the effects of the initial administrative decision of individual application, and can be characterised as confirmatory administrative decisions of individual application. [32]

54. I would also refer to the settled case-law under which, where a candidate in a competition seeks review of a decision taken by a selection board, it is the decision taken by the latter after the review of the candidate's situation that constitutes the act adversely affecting him, because the decision taken after the review replaces the selection board's original decision accordingly. [33]

55. Finally, since, in my view, the status of the letters at issue as challengeable acts, for the purposes of Article 263 TFEU, essentially arises from the series of items of information provided to the appellants, and the fact that a general decision was made in circumstances putting the judicial protection of the appellants in doubt, I think it is appropriate to draw the attention of the Court to the import of the judgment of 28 June 2018, *Spliethoff's Bevrachtingskantoor* v *Commission*. [34]

56. In some respects, the facts of that case are similar to those underlying the first ground of appeal. The Court observed that the appellant had received an email which it could regard as constituting notification of the rejection of its proposal by the European Commission, [35] and that it was not aware of the existence of the definitive decision which had been taken by the Commission after the action had been brought. Unlike the General Court, which, declaring the

30 See point 40 of this Opinion.

31 See judgment of 15 June 1976, *Wack* v *Commission* (1/76, EU:C:1976:91, paragraph 5).

32 See judgments of 12 December 2019, *Tàpias* v *Council* (T-527/16, EU:T:2019:856, paragraph 37), and of 5 December 2012, *Lebedef and Others* v *Commission* (F-110/11, EU:F:2012:174, paragraphs 36 and 37 and the case-law cited).

33 See judgment of 5 September 2018, *Villeneuve* v *Commission* (T-671/16, EU:T:2018:519, paragraph 24).

34 C-635/16 P, EU:C:2018:510; 'the judgment in *Spliethoff's Bevrachtingskantoor* v *Commission*'.

35 In paragraph 66 of the judgment in *Spliethoff's Bevrachtingskantoor* v *Commission*, the Court observed that 'it is clear from the terms of the email of 17 July 2015, as set out in paragraph 21 of this judgment, that [the Innovation and Networks Executive Agency (INEA)] expressly *informed* [*Spliethoff's Bevrachtingskantoor BV*] *of the fact that its "application [had] not been successful*". It is true that INEA clarified that *the procedure* leading to the adoption of the Commission decision on the selection of projects and the award of grants was *still under way*. However, it added that "*in the unlikely case that the adoption of this decision results in changes in relation to your proposal, you will be informed separately by email*". [The company] did not subsequently receive any other email from INEA or the Commission in that regard'. Emphasis added.

action to be inadmissible, had held that it had been brought against an email of which the Commission was not the author, and that the contested measure was merely provisional,[36] the Court held that, on the findings made by the General Court, having regard to the circumstances of the case and in order to guarantee for the appellant the right to effective judicial protection, it should have recognised that the subject matter of the action against the Commission[37] was the annulment of the definitive decision.

57. The Court thus based its judgment in that case not on the provisional nature of the measure at issue, but on the fact that it was impossible for the applicant to identify the Commission implementing decision which constituted the definitive measure, under the procedure which had been followed, also taking account of the fact that the email at issue contained information on the possible recourses and the fact that these had been pursued in ignorance of the implementing decision.[38] From that point of view, the judgment is worthy of particular attention in that it illustrates the procedural consequences that ought to flow from uncertainty as to the nature and scope of measures, with regard to their legal effects, arising from their wording and context.[39] I therefore suggest that, as a secondary basis for its judgment, the Court should adopt analogous reasoning.

58. In my view it follows from all the foregoing that the General Court erred in law in rejecting, as manifestly inadmissible, the applicants' actions for annulment of the letters at issue, on the ground that those letters were not challengeable acts in respect of which such actions could be brought pursuant to Article 263 TFEU.

59. Consequently, I suggest that the Court should hold that the first ground of appeal is well founded and set aside the order under appeal accordingly, and that it is not necessary to consider the second and third grounds of appeal, which are advanced in the alternative.

60. However, since it may be that the Court decides to reject the first ground of appeal, I will go on to consider the two other grounds.

B. The second ground of appeal, based on an error of law in the interpretation of Article 86 of the Rules of Procedure of the General Court

1. Arguments of the parties

61. Under the second ground of appeal, the applicants submit essentially that as the statements of modification relate to the acts giving definitive status to the theoretically provisional acts which had originally been challenged. It would be illogical and contrary to the requirements of procedural economy – and would constitute a denial of justice – to declare them inadmissible.

[36] See judgment in *Spliethoff's Bevrachtingskantoor* v *Commission* (paragraphs 31, 34 and 65).

[37] See judgment in *Spliethoff's Bevrachtingskantoor* v *Commission* (paragraph 71).

[38] See judgment in *Spliethoff's Bevrachtingskantoor* v *Commission* (paragraphs 66 to 70).

[39] See, in that regard, Opinion of Advocate General Kokott in *Spliethoff's Bevrachtingskantoor* v *Commission* (C-635/16 P, EU:C:2018:28, points 6 and 7). The Advocate General stated that the appellant had brought another action before the General Court seeking annulment of the Commission implementing decision, and that the Commission had objected that it had been brought late.

62. They refer to the judgments of 9 November 2017, *HX* v *Council*[40] and *Spliethoff's Bevrachtingskantoor* v *Commission*, arguing that it is apparent from those judgments that Article 86 of the Rules of Procedure of the General Court is to be interpreted in such a way as to guarantee effective judicial protection.

63. Furthermore, they submit, the Court was wrong to hold, in paragraphs 68 and 69 of the order under appeal, that the statements of modification did not identify the measures to which they related in a sufficiently clear manner.

64. The Parliament contends that:

– the ground does not relate to Ms Allione or Mr Torbesi,[41] who did not lodge a statement of modification;

– the decisions finally adopted did not replace the letters at issue, and the decision in the judgment in *Spliethoff's Bevrachtingskantoor* v *Commission*, which was based on an excusable error on the part of the appellant, cannot be transposed to the present case;

– the arguments relating to paragraphs 68 and 69 of the order under appeal are unfounded given the clear distinction which the Court drew between the definitive decisions of the Parliament and the other measures referred to in the statement of modification, and

– the principle of effective judicial protection cannot justify a departure from the conditions of admissibility laid down in Article 86 of the Rules of Procedure of the General Court.

2. Assessment

65. In its judgment of 20 September 2018, *Spain* v *Commission*,[42] the Court observed that:

– it is settled case-law of the Court of Justice that the forms of order sought by the parties may not, in principle, be altered.[43] Article 86 of the Rules of Procedure of the General Court, on the modification of the application initiating proceedings, is a codification of pre-existing case-law on the admissible exceptions to that principle;[44]

– Article 86 provides that, where a measure the annulment of which is sought is replaced or amended by another measure with the same subject matter, the applicant may, before the oral part of the procedure is closed, or before the decision of the General Court to rule without an oral part of the procedure, modify the application to take account of that new factor;

40 C-423/16 P, EU:C:2017:848.

41 The reference should be to Mr Melandri – see point 18 and footnote 12 above.

42 C-114/17 P, EU:C:2018:753, paragraphs 52 to 54, 56 and 59 and the case-law cited.

43 See Opinion of Advocate General Sharpston in *Spain* v *Commission* (C-114/17 P, EU:C:2018:309, point 40), where she observed that 'Article 76(d) of the Rules of Procedure of the General Court requires the applicant to specify in its application the subject matter of the proceedings. As a matter of principle, it is not permitted for a party to alter that subject matter during the proceedings; and the merits of an action must be examined solely in the light of the claims contained in the application initiating the proceedings'. Advocate General Sharpston referred, in that connection, to the judgment of 11 November 2010, *Commission* v *Portugal* (C-543/08, EU:C:2010:669, paragraph 20 and the case-law cited).

44 See, in that regard, the details given in the Opinion of Advocate General Sharpston in *Spain* v *Commission* (C-114/17 P, EU:C:2018:309, point 42 and footnote 23), where she also observed that the exceptions addressed the possibility of the author of the contested measure amending it, or replacing it with another, in order to frustrate the proceedings.

– as an exception to the principle that the subject matter of the proceedings may not be altered, Article 86 must be interpreted strictly, and

– the applicant is required, in a statement in modification of the application, to set out unambiguously and in a sufficiently clear and precise manner the subject matter of the proceedings and the form of order sought by the applicant, so that the General Court does not rule *ultra petita*. On that basis, a statement in modification must, in accordance with Article 86(4)(a) of the Rules of Procedure of the General Court, contain, inter alia, the modified form of order sought. [45]

66. Neither the case-law cited by the General Court, nor that referred to by the appellants in support of their appeal, addresses procedural issues of the kind raised by their actions.

67. The decisions on inadmissibility referred to in paragraph 66 of the order under appeal merely serve to reiterate the applicable principles, without providing any illustrations relevant to the present case. In the order of 14 January 2015, *Solar World and Others* v *Commission*, [46] the General Court held that the actions were inadmissible for lack of any interest in bringing proceedings, and in the order of 21 November 2019, *ZW* v *EIB*, [47] that they were inadmissible by reason of delay.

68. As to the case-law referred to by the applicants, the facts of the case which gave rise to the judgment of 9 November 2017, *HX* v *Council*, [48] are not comparable. HX's representative had learnt at the hearing that a measure had been introduced amending that which had been challenged in the application, and, due to a lack of clarity in the version of the Rules of Procedure of the General Court corresponding to the language of the proceedings, he had not provided written confirmation of his intention to amend the claims put forward at the hearing. The Court held that the General Court was under an obligation to inform the appellant of his error and to place him in a position of being able to rectify it.

69. In the case which gave rise to the second judgment referred to, that in *Spliethoff's Bevrachtingskantoor* v *Commission*, the Court did not rule on the conditions of applicability of Article 86 of the Rules of Procedure of the General Court. [49]

70. Having regard to the wording of Article 86 and the context in which it was accepted that the applicant should be able to amend the terms in which the application was initially put before the General Court, it does not seem to me that an extension of the scope of that article, to cover cases where the applicant may be mistaken as to the import of the allegedly unlawful measure, can be envisaged.

71. While I am very conscious of the fact that Article 86 of the Rules of Procedure of the General Court is intended to satisfy the requirement of procedural economy, by avoiding the need for the applicant to bring a fresh action before the General Court in separate proceedings, I have

[45] See, in relation to this formal requirement, inserted into the Rules of Procedure of the General Court in 2015, Opinion of Advocate General Sharpston in *Spain* v *Commission* (C-114/17 P, EU:C:2018:309, point 43 and footnote 24), where she observed that the General Court previously allowed the applicant to amend the application at the hearing.

[46] T-507/13, EU:T:2015:23.

[47] T-727/18, not published, EU:T:2019:809.

[48] C-423/16 P, EU:C:2017:848, paragraph 21.

[49] See, to the same effect, Opinion of Advocate General Sharpston in *Spain* v *Commission* (C-114/17 P, EU:C:2018:309, footnote 36).

reservations about changes to the subject matter of the proceedings being effected by a statement of modification, as referred to by the Court in the judgment of 20 September 2018, *Spain* v *Commission*.[50]

72. Such an amendment of the initial application justifies special attention to the question whether the proceedings comply with the adversarial principle.[51] The formal conditions set out in Article 86 seek to attain that objective.

73. While some flexibility can be accepted in the stringency of these requirements, on the basis that the contested measure can be identified by implication from the statements and from the whole argument set out in the application, and that an application formally brought against a decision which is part of a group of decisions forming a whole could be regarded as directed also, so far as necessary, against the others,[52] it seems to me that the conditions of applicability of Article 86 of the Rules of Procedure of the General Court must be strictly limited to cases in which a definitive decision has been amended.

74. In other words, since Article 86 cannot be interpreted with a view to addressing uncertainty over the nature and scope of contested measures arising from their wording and context, it seems to me that it is only through an interpretation of the concept of a 'challengeable act', in the light of such circumstances, that effective judicial protection and the sound administration of justice can be guaranteed.[53]

75. For all of those reasons, I take the view that the second ground of appeal should be rejected, on the basis that the General Court correctly applied the settled case-law of the Court when it held, as the main ground for its decision, that the statements of modification, which had been lodged on the basis of Article 86 of the Rules of Procedure of the General Court, following pleas of inadmissibility raised by the Parliament, by all the applicants except for Ms Allione and Mr Torbesi, in Cases T-396/19 and T-437/19, so as to seek the annulment of any other measure, letter or prior communication preparatory, subsequent or connected to the provisional decisions, were inadmissible.

C. The third ground of appeal, based on breach of the principle audi alteram partem and an error of law in the application of Article 126 of the Rules of Procedure of the General Court

1. Arguments of the parties

76. The appellants submit that:

– the General Court ought to have allowed them to respond to the plea of inadmissibility raised by the Parliament in relation to the statements of modification, either directly or through a second exchange of pleadings, and

[50] C-114/17 P, EU:C:2018:753. See point 65 of this Opinion.

[51] See judgment of 9 November 2017, *HX* v *Council* (C-423/16 P, EU:C:2017:848, paragraph 23).

[52] See judgment of 8 July 2020, *Neda Industrial Group* v *Council* (T-490/18, not published, EU:T:2020:318, paragraph 53 and the case-law cited).

[53] See points 55 to 57 of this Opinion.

– the fact that the General Court decided that its decision on the pleas of inadmissibility should be reserved until it ruled on the substance of the case, and that the Parliament should produce the defences, demonstrates that the inadmissibility of the actions was not manifest.

77. The Parliament maintains that:

– this ground does not relate to Ms Allione or Mr Torbesi,[54] who did not lodge a statement of modification;

– it is apparent from Article 86(6) of the Rules of Procedure of the General Court that that court may verify the admissibility of a statement of modification on its own initiative, without receiving observations from the applicants, and

– the General Court may rule on the inadmissibility of an action at any time, under Article 126 of the Rules of Procedure, and procedural decisions taken at an earlier time have no bearing on the matter.

78. In response to the Court's written question as to the relevance of Article 86(6) of the Rules of Procedure of the General Court, with regard to breach of the principle *audi alteram partem*, the applicants maintain that that provision, which reserves to the General Court the power to determine whether the conditions of admissibility of a statement of modification are met, does not preclude the application by analogy of Article 130(4) of those rules, with a view to receiving the applicant's observations on the arguments raised by the defendant in support of its plea of inadmissibility. The Parliament states that the General Court complied with the principle *audi alteram partem* by setting a time limit within which it was to respond to the statements of modification, and that it ruled on the admissibility of those statements, in the light of its case-law, without adopting the arguments raised in the Parliament's observations in defence, set out in paragraph 65 of the order under appeal.

2. Assessment

79. Article 86(6) of the Rules of Procedure of the General Court provides that 'without prejudice to the decision to be taken by the General Court on the admissibility of the statement modifying the application, the President shall prescribe a time limit within which the defendant may respond to the statement of modification'.

80. Article 130(4) of the Rules of Procedure, which concerns objections dealt with by way of orders, provides that as soon as the defendant has submitted an application, by separate document, for the General Court to make a ruling on inadmissibility without going to the substance of the case, the President shall prescribe a time limit within which the applicant may submit in writing his or her pleas in law and the form of order which he or she seeks.

81. In the present case, the Parliament raised its objection of inadmissibility, in relation to the statements of modification, in the observations referred to in paragraph 20 of the order under appeal, which were based on Article 86(6) of those rules. It appears from paragraph 21 of the order under appeal that the applicants were notified of those observations after they had lodged their observations on the pleas of inadmissibility raised by the Parliament in relation to the applications, and this is corroborated by footnote 3 to the applicants' reply to the Court's question.

[54] The reference should be to Mr Melandri – see point 18 and footnote 12 above.

82. First, it must be observed that, under Article 83 of the Rules of Procedure of the General Court, the application and the defence may be may be supplemented by a reply from the applicant and by a rejoinder from the defendant unless the General Court decides that a second exchange of pleadings is unnecessary because the contents of the file in the case are sufficiently comprehensive. The General Court's decision as to whether to allow the applicant to lodge a reply under that provision is a matter for its discretion. [55]

83. Second, I would point out that it was under Article 126 of its Rules of Procedure that the General Court decided that the statements of modification were manifestly inadmissible.

84. That provision permits the General Court, where it has examined the admissibility of an application either on its own initiative or on the basis of observations submitted in defence, to determine that it is manifestly inadmissible, without opening its assessment to discussion by the parties, and at any stage of the proceedings.

85. Accordingly, if an applicant takes the view that the General Court has incorrectly applied that provision, he or she must challenge the assessment made by the court of first instance as to its conditions of applicability. [56] The only pleas which can be effective are those directed against the grounds of inadmissibility on which the General Court based its decision.

86. In the present case, the decision of the General Court is based on the settled case-law to which it referred in paragraph 66 of the order under appeal. That reasoning is challenged under the second ground of appeal.

87. In those circumstances, I suggest that the Court should dismiss the third ground of appeal as unfounded.

D. The action at first instance

88. Given that the Court may decide to set aside the order under appeal, I should consider whether it would be possible for it to give substantive judgment in the case.

89. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

90. In this instance, the Court is not in a position, at this stage of the proceedings, to give substantive judgment on the actions which the appellants have brought before the General Court, given that the judgment of that court relates only to the Parliament's plea of inadmissibility.

91. On the other hand, the Court does have before it the material necessary to give a final ruling on that plea of inadmissibility. [57]

[55] See order of 15 January 2020, *BS* v *Parliament* (C-642/19 P, not published, EU:C:2020:32, paragraph 5 (view of Advocate General Pikamäe, point 7 and the case-law cited)).

[56] See order of 15 January 2020, *BS* v *Parliament* (C-642/19 P, not published, EU:C:2020:32, paragraph 5 (view of Advocate General Pikamäe, point 10 and the case-law cited)).

[57] See judgments of 9 July 2009, *3F* v *Commission* (C-319/07 P, EU:C:2009:435, paragraph 98), and of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 78). See also judgment of 28 February 2019, *Council* v *Growth Energy and Renewable Fuels Association* (C-465/16 P, EU:C:2019:155, paragraph 128).

92. I therefore suggest that the Court should rule that the plea of inadmissibility, based on the proposition that an action for annulment cannot be brought against the letters at issue, should be dismissed.

93. On that basis, it will be necessary to refer the case back to the General Court for it to deal with the applicants' actions for annulment of the letters at issue.

VII. Costs

94. On the basis that the matter is to be referred back to the General Court, it would be appropriate to reserve the costs of the appeal proceedings.

VIII. Conclusion

95. In the light of the foregoing considerations, I suggest that the Court should:

– set aside the order of the General Court of the European Union of 3 July 2020, *Tognoli and Others* v *Parliament* (T-395/19, T-396/19, T-405/19, T-408/19, T-419/19, T-423/19, T-424/19, T-428/19, T-433/19, T-437/19, T-443/19, T-455/19, T-458/19 to T-462/19, T-464/19, T-469/19 and T-477/19, not published, EU:T:2020:302);

– dismiss the plea of inadmissibility raised by the European Parliament before the General Court;

– refer the case back to the General Court of the European Union of for it to rule on the claims of Mr Carlo Tognoli and the other applicants seeking annulment of the letters of 11 April 2019 drawn up by the Head of the 'Members' Salaries and Social Entitlements' Unit of the European Parliament's Directorate-General (DG) for Finance, concerning the adjustment of the pensions they receive, following the entry into force, on 1 January 2019 of Decision No 14/2018 of the Ufficio di Presidenza della Camera dei deputati (Office of the President of the Chamber of Deputies, Italy), and

– reserve the costs.