Reports of Cases

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

Case C-408/20 P

Danilo Poggiolini
v

European Parliament

(Appeal – Single Statute for Members of the European Parliament – Member of the European Parliament elected in an Italian constituency – Adjustment of pension entitlements by the European Parliament – Plea alleging that the action is inadmissible – Extra time on account of distance – e-Curia application – Challengeable act – Concept – Binding legal effects – Statement of modification of the application – Admissibility)

I. Introduction

1. By his appeal, Mr Danilo Poggiolini seeks to have set aside the order of the General Court of the European Union of 3 July 2020, *Falqui and Poggiolini* v *Parliament*,[2] whereby the General Court dismissed as manifestly inadmissible his action for annulment of the note 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; that note concerned the adjustment of the amount of Mr Poggiolini's pension[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. The aforementioned note, addressed to a number of former Members of the European Parliament or those entitled under them, was the subject of numerous actions, which were declared manifestly inadmissible by the General Court. The Court of Justice is hearing appeals brought against those decisions, which were delivered on the same date in analogous terms.[5]

1 Original language: French.

2 T-347/19 and T-348/19, not published, 'the order under appeal', EU:T:2020:303.

3 See point 16 of this Opinion.

4 'Decision No 14/2018'.

5 Apart from the present appeal, the appeal brought by 20 former Members of the European Parliament or those entitled under them is being heard at the same time (the case of *Tognoli and Others* v *Parliament* (C-431/20 P)). Other appeals are pending in the cases of *Coppo Gavazzi and Others* v *Parliament* (C-725/20 P) and *Santini and Others* v *Parliament* (C-198/21 P), concerning identical notes dated 11 April 2019 or 8 May 2019. The 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). Those proceedings are currently at the written stage.

3. The Court must thus rule on the conditions in which actions may be brought against decisions of the European Parliament ('the Parliament') concerning the review of the pensions of Members of the Parliament, taken in the context of an administrative procedure which is not subject to any specific rules.

4. The main issue for consideration on this appeal – and that in Case C-431/20 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

A. The Rules of Procedure of the General Court

5. Article 56a(1) of the Rules of Procedure of the General Court [7] states:

'Without prejudice to the cases referred to in Article 57(2), Article 72(4), Article 80(1), Article 105(1) and (2), Article 147(6), Article 148(9) and Article 178(2) and (3), all procedural documents shall be lodged and served via e-Curia. [8]'

6. Article 60 of the Rules of Procedure specifies:

'The procedural time limits shall be extended on account of distance by a single period of 10 days.'

7. Article 81(1) of the Rules of Procedure provides:

'Within two months after service on him of the application, the defendant shall lodge a defence …'

8. Article 86(1) of the Rules of Procedure is worded as follows:

'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.'

9. Article 130(1) of the Rules of Procedure of the General Court reads as follows:

'A defendant applying to the General Court for a decision on inadmissibility or lack of competence without going to the substance of the case shall submit the application by a separate document within the time limit referred to in Article 81.'

6 That concept forms the subject matter of the second ground of appeal in the present appeal and the first ground of appeal in Case C-431/20 P. Both cases will be analysed on an identical basis.

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

8 In the words of Article 1(2)(k) of the Rules of Procedure of the General Court, '"e-Curia" means the computer application of the Court of Justice of the European Union that enables procedural documents to be lodged and served electronically'.

B. The e-Curia Decision

10. Article 6 of the Decision of the General Court of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia [9] provides:

'Procedural documents, including judgments and orders, shall be served by e-Curia on the holders of access accounts in the cases which concern them.

The intended recipients of the documents served referred to in the preceding paragraph shall be notified by email of any document served on them by means of e-Curia.

A procedural document shall be served at the time when the intended recipient (representative or assistant) requests access to that document. In the absence of any request for access, the document shall be deemed to have been served on the expiry of the seventh day following the day on which the notification email was sent.

…'

III. The background to the dispute

11. The background to the dispute is described in paragraphs 1 to 9 of the order under appeal and may be summarised as follows.

12. The appellant is a former Member of the Parliament, elected in Italy. In that capacity, he receives a retirement pension granted on the basis of the Rules Governing the Payment of Expenses and Allowances to Members of the European Parliament.

13. On 12 July 2018, the Office of the President of the Chamber of Deputies decided, by Decision No 14/2018, to recalculate, on a contributions basis, the amount of the pensions of former deputies of that chamber (Italy) relating to the years in office completed up to 31 December 2011. [10] On that basis, the amount of the pensions paid to a number of Italian deputies was reduced with effect from 1 January 2019.

14. The Parliament informed the appellant, by a comment placed on his pension slip for January 2019, that the amount of his pension might be reviewed in application of Decision No 14/2018 and that that review might lead to recovery of amounts unduly paid.

15. By an undated note of the Head of the Members' Salaries and Social Entitlements Unit of the Parliament's DG Finance, attached to the payslip for February 2019, the appellant was advised that:

– the Parliament's Legal Service had confirmed that Decision No 14/2018 was automatically applicable to his situation;

[9] OJ 2018 L 240, p. 72, 'the e-Curia Decision'.

[10] It is stated in paragraph 3 of the order under appeal that examination of the lawfulness of Decision No 14/2018 is pending before the Consiglio di giurisdizione della Camera dei deputati (Judicial Council of the Chamber of Deputies, Italy).

– as soon as the Parliament had received the necessary information from the Camera dei deputati (Chamber of Deputies, Italy), it would notify the appellant of the new amount of his pension entitlement and would recover any difference over the next 12 months; and

– the amount of his pension entitlement would be finally determined by a formal act against which he would be entitled to lodge a complaint under Article 72 of the Decision of the Bureau of 19 May and 9 July 2008 concerning implementing measures for the Statute for Members of the European Parliament [11] or bring an action for annulment under Article 263 TFEU.

16. By a note of 11 April 2019, [12] the Head of Unit informed the appellant that, as he had indicated in his note of February 2019:

– the amount of the appellant's pension would be adjusted, in line with the reduction of the analogous pensions paid, in Italy, to former members of the national parliament, in application of Decision No 14/2018, from April 2019, with retroactive effect to 1 January 2019, in accordance with the provisional redetermination of pension entitlements attached to the note at issue, and

– the appellant could, within a period of 30 days from receipt of that note, submit his written observations and, should he fail to do so, the effects of the note would be considered to be final and would entail, in particular, recovery of the amounts unduly received for January to March 2019.

17. By email of 22 May 2019, the appellant communicated his observations to the competent service of the Parliament. By email of the same date, the Parliament acknowledged receipt of those observations and informed the appellant that he would receive a response following consideration of his arguments.

18. By letter of 8 July 2019 – namely, after the action at first instance had been lodged – the Head of the Members' Salaries and Social Entitlements Unit of the Parliament's DG Finance informed the appellant that there was nothing in his observations to justify a change in the Parliament's position, as set out in the note at issue, and that, consequently, the pension entitlement and the schedule to recover the amount unduly paid, as re-calculated and communicated in an annex to that note, had become final on the date of notification of that decision.

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

19. By application lodged at the General Court Registry on 10 June 2019, the appellant brought an action for annulment of the note at issue. On 29 August 2019, the Parliament, by a separate document, claimed that the action was inadmissible.

20. On 6 September 2019, the appellant lodged a statement of modification of his application and on 10 October 2019 he lodged his observations on that plea of inadmissibility.

21. On 9 October 2019, the Parliament lodged its observations on the appellant's statement of modification of the application.

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

[12] 'The note at issue'.

22. By the order under appeal, adopted under Article 126 of its Rules of Procedure, the General Court dismissed the appellant's action as manifestly inadmissible.

23. In the first place, concerning the application for annulment of the note at issue, the General Court decided that the plea of inadmissibility had been submitted by the Parliament within the prescribed time limit, since the time limit must be calculated by reference to an extension on account of distance of a single period of 10 days, which is applicable even when the act in question is filed via e-Curia. [13]

24. Next, the General Court held that the note at issue was not an act adversely affecting those to whom it was addressed. [14] After observing that the fact that the new method of calculating pensions had been applicable since April 2019 did not in itself suffice to prove that the Parliament had adopted a definitive position on the amount of the pensions, [15] the General Court inferred from the wording of the note at issue and from the fact that the appellant had been given the opportunity to submit observations, as stated in that note, and had in fact done so, [16] that the Parliament's response to the appellant constituted its final decision and could not therefore be analysed as an act that merely confirmed the note at issue. [17]

25. Lastly, the General Court considered that its finding that the application for annulment of the note at issue was inadmissible did not undermine the right to effective judicial protection or allow the Parliament to avoid review by the General Court. [18]

26. In the second place, the General Court held that the statement of modification lodged by the appellant was manifestly inadmissible on the ground that a party cannot modify the form of order sought and his or her pleas in law if his or her initial application was not itself admissible on the date on which it was lodged. [19]

27. In the third place, the General Court dismissed as manifestly inadmissible the appellant's claim that the Parliament should be ordered to pay the sums which it had unduly withheld, on the ground that, according to settled case-law, the General Court cannot issue directions to the EU institutions. [20]

V. The forms of order sought

28. The appellant claims that the Court of Justice should:

– set aside the order under appeal;

– consequently, annul the note at issue and the note of 8 July 2019;

– failing that, refer the case back to the General Court; and

[13] See paragraphs 40 to 44 of the order under appeal.
[14] See paragraph 53 of the order under appeal.
[15] See the final sentence of paragraph 47 of the order under appeal.
[16] See paragraphs 48 and 49 of the order under appeal.
[17] See paragraphs 52 and 56 of the order under appeal.
[18] See paragraphs 57 and 58 of the order under appeal.
[19] See paragraphs 62 and 63 of the order under appeal.
[20] See paragraphs 66 and 67 of the order under appeal.

– order the Parliament to pay the costs of both sets of proceedings.

29. The Parliament contends that the Court should:

– dismiss the appeal; and

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

VI. The appeal

30. In support of his appeal, the appellant puts forward three grounds, alleging, respectively, that the Parliament's plea that his action was inadmissible was lodged out of time, that the note at issue is a challengeable act, and that the application for annulment set out in the statement of modification of his application is admissible. In addition, he reiterates the pleas which he put forward at first instance.

A. The first ground of appeal: the Parliament's plea alleging that the appellant's action was inadmissible was lodged out of time

1. Arguments of the parties

31. The appellant maintains that the General Court infringed Article 60, Article 81(1) and Article 130(1) of its Rules of Procedure and Article 6 of the e-Curia Decision by finding that the Parliament's plea of inadmissibility had been properly lodged by separate document on 29 August 2019, when the time limit expired on 25 August 2019.

32. He claims that the extension of the procedural time limits provided for in Article 60 of the Rules of Procedure applies only where it is necessary to communicate by post and that it therefore does not apply where the procedural documents are lodged and served by means of the e-Curia system, which guarantees the immediacy of paperless communications, as stated in the preamble to the e-Curia Decision.

33. The Parliament submits, first, that the ground of appeal is inadmissible in part, in that the appellant does not explain how the General Court infringed Article 6 of the e-Curia decision, and, second, that it is otherwise unfounded, on the ground that it is based on a manifestly erroneous interpretation of Article 60 of the Rules of Procedure, which applies for any document lodged via e-Curia, which has to be used for that purpose, as provided for in Article 56a(1) of the Rules of Procedure.

2. Assessment

34. The use of the e-Curia application, provided for in Article 56a of the Rules of Procedure of the General Court, was made binding for the lodging and service of procedural documents in proceedings before the General Court, in view of the advantages of the immediacy of paperless communication offered by that application, as stated in recital 3 of the e-Curia Decision.

35. Nonetheless, the rule laid down in Article 60 of the Rules of Procedure, which provides that the procedural time limits are to be extended on account of distance by a single period of 10 days, without further detail as to the method whereby procedural documents are lodged, has not been amended.

36. Such a period on account of distance is also provided for in Article 51 of the Rules of Procedure of the Court of Justice. When calculating the time limits for appeals, the Court of Justice also takes that period into account, even where the e-Curia application is used. [21]

37. In those circumstances, I consider that the first ground of appeal is unfounded.

B. The second ground of appeal, alleging that the note at issue was a challengeable act

1. Arguments of the parties

38. In support of that ground of appeal based on Article 263 TFEU, Article 47 of the Charter of Fundamental Rights of the European Union and the principle of the effectiveness of judicial protection, the appellant claims that:

– the note at issue is not merely a preparatory act, because it had binding legal effects, namely the immediate reduction of his pension, and the submission of observations within the prescribed period following receipt of that note could not have any effect;

– on the date on which he brought his action, the Parliament had not yet responded to his observations, and he brought the action before the General Court within the period prescribed in Article 263 TFEU in order to avoid being out of time; and

– the argument that the submission of observations for the purpose of a reconsideration of the note at issue would have meant that it was impossible to bring an action against that note would be contrary to the effectiveness of judicial protection and would allow the Parliament to avoid any judicial review by not responding to the observations or by adopting a confirmatory response.

39. The Parliament contends that:

– the review of the amount of the pension was provisional in nature and might have been amended in the light of the written observations supplied by the appellant;

– for the reasons stated by the General Court in paragraphs 48 and 49 of the order under appeal, there was no doubt that the revision of the amount of the pension was provisional in nature, which is also clear from the email sent to the appellant, in which he was informed that the Parliament would respond to his observations;

– after examining those observations, the Parliament adopted a final decision; and

– an action against that decision would have ensured adequate judicial protection.

[21] See orders of 11 June 2020, *GMPO* v *Commission* (C-575/19 P, not published, EU:C:2020:448, paragraph 31), and of 5 May 2021, *Comprojecto-Projectos e Construções and Others* v *ECB and Banco de Portugal* (C-450/20 P, not published, EU:C:2021:356, paragraphs 11 and 12).

40. As regards the appellant's argument relating to the risk that the General Court's power to review the Parliament's acts would be undermined, the Parliament refers to paragraph 58 of the order under appeal.

2. Assessment

41. By this second ground of appeal, the appellant takes issue, in essence, with the General Court's assessment with regard to the test of legal effect which, in the light of the case-law of the Court of Justice, must be satisfied if the remedy provided for by Article 263 TFEU is to be available.

42. It should therefore be borne in mind that any provisions adopted by the institutions, in whatever form, which are intended to produce binding legal effects capable of affecting the interests of the natural or legal person concerned by bringing about a distinct change in his or her legal position are regarded as 'challengeable acts' for the purposes of that provision. [22]

43. 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. [23]

44. In order to determine whether the contested act produces such effects, it is necessary to examine the substance of that act and the intention of the institution which adopted it [24] and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act. [25]

45. Thus, intermediate measures the aim of which 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 if they express a provisional opinion of the institution. [26]

46. Nor are intermediate acts capable of forming the subject matter of an action if it is established that the illegality attaching to those acts can be relied on in support of an action against the final decision for which they represent a preparatory step. In such circumstances, the action brought against the decision terminating the procedure will provide sufficient judicial protection. [27]

47. Furthermore, the decision at issue can constitute the subject matter of an action for annulment only if, even without altering the terms of the operative part of the preceding decision, the modification of certain grounds of the latter decision altered the substance of what

[22] 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).

[23] 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).

[24] On the lack of impact of certain procedural requirements, see judgment of 17 July 2008, *Athinaïki Techniki* v *Commission* (C-521/06 P, EU:C:2008:422, paragraphs 42 to 45).

[25] 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).

[26] 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).

[27] 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).

was decided in its operative part, and in doing so affected the applicants' interest within the meaning of the case-law relating to Article 263 TFEU. If it did not, it constitutes a confirmatory act which cannot be challenged under that article.

48. In the present case, applying the case-law corresponding to that referred to in points 42 and 45 of this Opinion,[28] the General Court identified the matters arising from the content of the note at issue, namely the word 'provisional' that was used and the indication that the review of the pension entitlement and the recovery of the amounts unduly received for January to March 2019 would become final only on expiry of a period of 30 days during which observations could be formulated. The General Court found that the fact that the appellant exercised that option prevented the proposal to fix a new pension entitlement from becoming final and that, consequently, the letter communicated subsequent to the appellant's observations constitutes the Parliament's final decision.

49. In addition, the General Court held that that subsequent letter is not a purely confirmatory act, since the note at issue was not final, and that, in that regard, the fact that that note failed to specify the period within which the Parliament was required to respond was irrelevant.

50. In the context of the second ground of appeal, the appellant does not dispute the General Court's findings concerning the content of the note at issue and the context in which it was issued. The appellant maintains that the General Court erred in law when assessing whether that note was a challengeable act, claiming that the note had as its effect the immediate reduction of the amount of his pension.

51. It follows from paragraphs 5, 6 and 47 of the order under appeal that the General Court found that the note at issue was issued by the Parliament, which is empowered to take decisions, and that it is in accordance with the system for fixing the amount of the pensions of Members of the European Parliament that the Parliament is under an obligation to review the amount of the pensions paid. According to the findings of the General Court, in that context, it was the practice of the Parliament's Directorate-General for Finance to inform the appellant, in February 2019, of the forthcoming review of the amount of his pension, as a result of the automatic applicability of Decision No 14/2018, and then, two months later, by the note at issue, that the review was being implemented and that he had the option to formulate observations within 30 days from the date on which that note was issued.

52. It may, therefore, be inferred that the Parliament unequivocally adopted a measure entailing legal effects that affected the appellant's interests and were binding upon him.

53. In order to conclude that the note at issue does not constitute a decision, the General Court established that the appellant had the option to formulate observations following that note and found that that option had been exercised, that the appellant's observations had been considered, and that the sums unduly paid since January 2019 had not been recovered.

54. In taking that approach, the General Court did not take the following elements, which result from its findings, into consideration:

– the fact that the binding effects of the note at issue that affected the appellant's interests would not be suspended if observations were received; and

[28] See paragraphs 46 and 47 of the order under appeal.

– 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.

55. It follows that, in those particular circumstances, which are very different from those that gave rise to the case-law cited by the General Court in paragraph 46 of the order under appeal, the note at issue, unlike the note sent in February 2019, cannot be regarded as a mere letter addressed to the appellant for information with a view to ascertaining his views and to providing the Parliament with as much information as possible before the Parliament took its decision or, in other words, as a necessary step before it restricted the appellant's rights.

56. In those circumstances, the note at issue could only be analysed as the adoption of a preliminary or preparatory position if the Parliament had clearly shown that its decision to reduce the pensions following Decision No 14/2018 would produce actual effects only if the appellant failed to submit observations or upon expiry of a certain period for formulating observations, which was not the case in this instance.

57. In that regard, the finding that the Parliament did not give full effect to the reduction of the amount of the pension – which was effective from April 2019 – by not recovering the sums unduly paid between January and March 2019, is ineffective. That finding cannot alter the classification of the note at issue that results from the automatic review of the amount of the pension due and the pensions that would fall due, since the substantive conditions of the recovery of the amount unduly paid are also linked to Decision No 14/2018.

58. The fact that the note at issue is challengeable is borne out by the finding, resulting from paragraph 52 of the order under appeal, that in that procedure for the review of pensions, no other decision is taken upon expiry of the period of 30 days during which the recipient of the pension may formulate observations or in the event that those observations should be rejected. Thus, in the absence of a reconsideration procedure leading to a decision, containing detailed reasoning, in response to the observations of the recipients of the pension, the lawfulness of the act which altered the amount of the pension will be assessed on expiry of that period on the basis of the information available to the Parliament at the time when it informed the recipient.

59. Likewise, in circumstances such as those of the present dispute, the Parliament cannot legitimately argue that the appellant – who after receiving the note at issue formulated observations – ought to have waited for the Parliament to confirm the reduction of the amount of his pension to him, such that that response to his observations might be regarded as a final act and therefore as challengeable. In fact, such a step on the appellant's part was highly unlikely to succeed with respect to the principle of the reduction of the amount of pensions that depended on Decision No 14/2018, according to the information which had been reiterated by the Parliament, and would have exposed the appellant to the risk that the Parliament's response would, in the absence of new evidence, be regarded as a confirmatory act and as not open to challenge. [29]

60. The foregoing analysis is supported by the case-law relating to the definition of an act adversely affecting the person to whom it is addressed in disputes involving the civil service where the pecuniary effects of a decision are challenged. Thus, a monthly payslip may reveal the existence of a decision. [30] Where that payslip shows, for the first time, the implementation of a new act of general application concerning the fixing of pecuniary rights, it necessarily represents,

[29] See point 47 of this Opinion.

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

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. By contrast, the subsequent payslips merely reflect the continuation in time of the effects of that initial administrative decision of individual application and might be classified as confirmatory administrative decisions of individual application. [31]

61. I would also refer to the settled case-law according to which, where a candidate in a competition seeks review of a decision taken by a selection board, it is the decision taken by the selection board following the review of the candidate's situation that constitutes the act adversely affecting him or her, since the decision taken following the review replaces the selection board's original decision. [32]

62. Lastly, since in my view the challengeable nature of the note at issue, for the purposes of Article 263 TFEU, arises essentially from the series of items of information provided to the appellant and from the fact that a general decision was taken in circumstances that render the appellant's judicial protection uncertain, I consider it appropriate to draw the Court's attention to the scope of the judgment of 28 June 2018, *Spliethoff's Bevrachtingskantoor* v *Commission*. [33]

63. In certain aspects, the circumstances of the case that gave rise to that judgment bear comparison with those forming the basis of the second ground of appeal. The Court of Justice observed that the appellant in that case had received an email that it might regard as constituting notification of the rejection of its proposal by the European Commission [34] and was not aware of the definitive decision taken by the Commission after the appellant had brought its action. Contrary to the General Court, which, in order to declare the action inadmissible, had found that the action was directed against an email of which the Commission was not the author and that the contested act was merely provisional in nature, [35] the Court of Justice inferred from the findings of the General Court that the latter should, having regard to the particular circumstances of the case and in order to guarantee effective judicial protection for the appellant, have recognised that the subject matter of the action brought against the Commission [36] was the annulment of the definitive decision.

64. Thus, in that judgment the Court of Justice did not rule on the provisional nature of the act at issue, but on the fact that the appellant was unable to identify the Commission's implementing decision that constituted the definitive act, having regard to the procedure that was implemented, and also taking into account the fact that the email at issue contained information about the remedies available and that those remedies were exercised in ignorance of the implementing decision. [37] In that sense, that judgment merits particular attention in that it

[31] 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).

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

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

[34] 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 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*". [Spliethoff Bevrachtingskantoor BV] did not subsequently receive any other email from INEA or the Commission in that regard'. Emphasis added.

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

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

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

illustrates the procedural consequences that ought to flow from uncertainty as to the nature and scope of acts as regards their legal effects, on account of their wording and context.[38] Consequently, and in the alternative, I propose that the Court should apply analogous reasoning.

65. I infer from all of those considerations that the General Court erred in law in rejecting as manifestly inadmissible the appellant's action for annulment of the note at issue on the ground that that note does not constitute a challengeable act, capable of constituting the subject matter of such an action under Article 263 TFEU.

66. Consequently, I propose that the Court should hold that the second ground of appeal is well founded and that it should, therefore, set aside the order under appeal, without there being any need to examine the third ground of appeal, which is put forward in the alternative.

67. However, in case the Court should decide to reject the second ground of appeal, I shall complete my analysis by addressing the last ground of appeal.

C. The third ground of appeal, alleging the admissibility of the claim for annulment of the note of 8 July 2019, formulated in the statement of modification of the application, and concerning the need to convert that statement into an application

1. Arguments of the parties

68. The appellant takes issue, in the alternative, with paragraphs 62 and 63 of the order under appeal, in that it declared inadmissible his claim for annulment of the note at issue set out in his statement of modification. He maintains that, since that application satisfies the conditions laid down in Article 76 of the Rules of Procedure of the General Court and was lodged within the period prescribed for bringing an action, the General Court should, in application of the principle that legal acts should be preserved, have converted the action and classified the statement of modification as an application on the basis of Article 86 of the Rules of Procedure.

69. The appellant explains that the principle on which he relies is provided for in Italian law and applied by the Italian courts and that he thought that he would be able to take advantage of it by lodging his statement of modification. The failure to examine the substance of his application prevented him from securing protection of his legal position and therefore constituted a breach of his rights of defence.

70. The Parliament contends that the General Court did not err in law in holding that the inadmissibility of the statement of modification was the consequence of the inadmissibility of the claim for annulment of the note at issue. In the alternative, the Parliament contends that only the decision taken following examination of the appellant's observations could constitute the subject matter of an action. It adds that there is no provision of the Rules of Procedure of the General Court and no general principle of EU law that would require the General Court to convert the statement of modification into an application and that Italian law and Italian case-law cannot be relied upon. It adds that no breach of the principle of effective judicial protection by the General Court can be alleged, while the appellant was able to bring an action for annulment against the decision rejecting his observations on the note at issue.

[38] 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 pointed out that the appellant had brought before the General Court a further action for annulment of the Commission Implementing Decision which the Commission had claimed was out of time.

2. Assessment

71. Since, in support of the third ground of appeal, the appellant takes issue with the decision of the General Court in so far as that court ought to have reclassified his claim in the way that an Italian court might have decided to do, I propose that the Court of Justice should hold that this ground of appeal is manifestly unfounded.

D. The pleas in law and legal arguments set out in the claim for annulment of the note at issue and the note of 8 July 2019

72. The appellant reiterates the pleas which he raised in support of his claim for annulment of the note at issue and the note of 8 July 2019, on the ground that the General Court did not adopt a decision on the substance.

73. The Parliament contends that those pleas are inadmissible, in that they are not directed against the order under appeal and are ineffective, since the General Court did not rule on the substance of the application.

74. As is apparent from the claims which the appellant has put forward in his appeal, he is asking the Court of Justice to rule on the claim for annulment of the note at issue and the note of 8 July 2019. Indeed, if the Court of Justice decides to set aside the order under appeal, it is appropriate to consider whether it can dispose of the case.

E. The action at first instance

75. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court of Justice quashes the decision of the General Court, it may 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.

76. In the present case, the Court of Justice is not in a position, at this stage of the proceedings, to adjudicate on the substance of the action brought by the appellant before the General Court, since that court adjudicated only on the plea of inadmissibility raised by the Parliament.

77. On the other hand, the Court has the necessary information to give final judgment on that plea of inadmissibility. [39]

78. Accordingly, I propose that the Court should hold that that plea of inadmissibility, alleging that the note at issue is not capable of forming the subject matter of an action for annulment, must be rejected.

79. Consequently, the case should be referred back to the General Court for consideration of the appellant's action for annulment of the note at issue.

[39] 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).

VII. Costs

80. As the case should be referred back to the General Court, the costs relating to the proceedings on appeal before the Court of Justice should be reserved.

VIII. Conclusion

81. Having regard to the foregoing considerations, I propose that the Court of Justice should:

– set aside the order of the General Court of the European Union of 3 July 2020, *Falqui and Poggiolini* v *Parliament* (T-347/19 and T-348/19, not published, EU:T:2020:303), in so far as it relates to the action brought by Mr Danilo Poggiolini;

– reject the plea of inadmissibility relating to Mr Poggiolini's action raised by the European Parliament before the General Court;

– refer the case back to the General Court for a decision on Mr Poggiolini's submissions relating to the annulment of the note 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 amount of his pension 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.