

limit, a complaint directed against the act in question. In the second case, on the other hand, the administrative procedure must commence with the submission of a request, within the meaning of Article 90(1) of the Staff Regulations, for compensation. It is only the express or implied rejection of that request which constitutes a decision having adverse effect against which a complaint may be directed and it is only after the express or implied rejection of that complaint that an action for damages may be brought before the Court of First Instance.

2. When it comes to classifying a document addressed by an official to the appointing

authority as a request within the meaning of Article 90(1) of the Staff Regulations or as a complaint within the meaning of paragraph 2 of that article, the Court of First Instance is not bound by the wishes of the parties.

Where, upon examining the circumstances of the case, it becomes apparent that the document which the applicant described as a complaint contains a request to the appointing authority to take a decision and cannot be regarded as constituting a challenge to a decision, express or implied, adversely affecting the person concerned, that document must be regarded as a request.

ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
25 February 1992 *

In Case T-64/91,

Antonio Marcato, a former official of the Commission of the European Communities, residing at Abano-Terme (Italy), represented by G. Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 65 Avenue Guillaume,

applicant,

* Language of the case: French.

Commission of the European Communities, represented by J. Griesmar, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for compensation for the material and non-material damage allegedly suffered by the applicant in the performance of his duties,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

composed of: K. Lenaerts, President, D. Barrington and H. Kirschner, Judges,

Registrar: B. Pastor, Administrator,

makes the following

Order

Facts, procedure and forms of order sought

1 By application lodged at the Court Registry on 4 September 1991, Antonio Marcato, a former official of the Commission, brought an action in which he claims that the Court of First Instance should order the Commission to pay him BFR 1 470 000 as compensation for the damage which he considers he has suffered because—in his own words—he was obliged to request early retirement, and BFR 1 000 000 as compensation for the humiliation and annoyances to which—according to his own allegations—he was subjected.

- 2 The applicant was born in 1928 and was a Grade B 3 official in DG XIX of the Commission. At his request, he was granted early retirement with effect from 1 May 1990.

- 3 Since he had not been included on the list of officials most deserving of promotion to Grade B 2 in 1988, the applicant brought two actions before the Court of Justice seeking the annulment of that list (Case 317/88, which became Case T-47/89 after it was referred to the Court of First Instance, and Case 115/89, which became Case T-82/89). The Court of First Instance dismissed the action in Case T-47/89 as inadmissible (judgment in Joined Cases T-47/89 and T-82/89 [1990] ECR II-231) and then in its judgment of 5 December 1990 in Case T-82/89 *Marcato v Commission* [1990] ECR II-735 the Court of First Instance annulled the decision excluding the applicant's name from the said list. The reason for the annulment was that the decision at issue had been based on oral statements which the assistant to the Director-General of DG XIX had made within the Promotions Committee. Contrary to Article 6 of the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations'), those statements had been neither written down nor placed in the applicant's personal file. Consequently, the applicant was not able to exercise his right to make comments on them, which amounted to an infringement of his right to a fair hearing. Furthermore, the Court of First Instance observed that the applicant had not lost his interest in seeking the annulment of the said decision as a result of his retirement, in particular because he retained the possibility of seeking compensation for the damage which the measure at issue might have caused him (paragraph 54 of the judgment). Both judgments have become final.

- 4 The minutes of the meeting of the Promotions Committee on 15 and 16 June 1988, during which the assistant to the Director-General made the abovementioned statements, were reproduced in the judgment of the Court of First Instance at paragraph 7 of its judgment (Case T-82/89 *Marcato v Commission* [1990] ECR II-735, p. 739):

'The committee takes formal note of the detailed explanations furnished by the representative of Directorate-General XIX as regards the conduct of Mr Mercato (sic). That opinion is in conformity with the line taken in the past by other representatives of Directorate-General XIX and would therefore seem to be confirmed. However, in view of certain differences in the report concerning Mr Mercato, the committee considers that his position should be clearly defined'.

In the annex to its rejoinder in Case 317/88 (subsequently T-47/89), the defendant had produced two reports of meetings which the applicant had with his superiors in April and June 1989. By order of 6 December 1989 the Court excluded those reports from the hearing. Subsequently, the applicant brought a new action seeking, in substance, the annulment of the two sets of minutes and the award of one ECU as symbolic compensation for the non-material damage which he claimed to have suffered. That action was dismissed as inadmissible by the Court in its judgment in Case T-5/90 *Marcato v Commission* [1991] ECR II-731) on the ground that a pre-litigation procedure under Articles 90 and 91 of the Staff Regulations had not taken place. That judgment has become final.

On 6 February 1991 the applicant submitted to the Commission a document entitled 'complaint' in which the subject in point was described as 'complaint under Article 90 of the Staff Regulations'. In the standard form, which is prescribed within the Commission for the registration of requests and also of complaints and which is headed 'request/complaint', neither of those headings was deleted. In the document at issue the applicant requested compensation which he quantified as follows:

- financial loss of BFR 42 000 per month for 35 months, amounting to BFR 1 470 000, owing to the fact that he was obliged to seek early retirement;
- compensation for the humiliation and annoyances to which he had been subjected during a long period and which had resulted in the deterioration of his health: BFR 1 000 000.

In support of those claims the applicant maintained, in substance, that a 'defamation campaign' was conducted against him by two successive assistants to the Director-General of DG XIX, Mr Leygues and Mr Brüchert, and by his immediate superior, Mr Lemoine, all three of whom had opposed his promotion by making criticisms concerning him within the Promotions Committee. After he had been informed for the first time by the staff representatives on the Promotions Committee of the criticisms made by Mr Lemoine, the applicant spoke with him in July 1985 about that attitude. The applicant maintains that he had begun to encounter difficulties in his work after the meeting and that subsequently other

tasks were assigned to him with the result that he considered that he had been placed in a 'situation of active inactivity, that is to say, in reality, "in a siding"'. According to the applicant, the situation created by Mr Leygues, Mr Brüchert and Mr Lemoine had exasperated him and had resulted in genuine exhaustion, both mental and physical, which forced him to apply for early retirement three years before the prescribed date.

8 On 15 February 1991 the Commission sent to the applicant a memorandum in standard format headed 'Your complaint under Article 90(2) of the Staff Regulations ...' and informed him which division and person were responsible for examining his case and offered him the possibility of a meeting. However, the applicant was informed by fax message of 29 May 1991 that his 'Request No 20/91 under Article 90(1) of the Staff Regulations' would be placed on 5 June 1991 before the Commission's 'inter-service-complaints' group. The applicant's attention was drawn to the 'fact that the rules ... concerning the treatment of complaints do not apply in the present case'. The applicant was requested to acknowledge receipt of the letter by fax message to the Commission.

9 The applicant replied by fax message on 30 May 1991 using, in particular, the following terms:

'Thank you for your invitation following my complaint under Article 90(2) of the Staff Regulations submitted on 6 February 1991 ...'.

10 The meeting of the Commission's inter-service group took place on 5 June 1991. The applicant did not subsequently receive any express reply from the administration.

11 It was in those circumstances that the applicant brought the present action which was registered at the Registry of the Court of First Instance on 4 September 1991.

By a document dated 8 October 1991 the Commission submitted a plea of inadmissibility against the application pursuant to Article 114 of the Rules of Procedure of the Court of First Instance and requested the Court to rule on its plea without entering into the substance of the case. The applicant submitted his observations on the plea of inadmissibility in a document lodged on 4 December 1991 at the Registry of the Court.

In the procedure on the objection of inadmissibility, the Commission claims that the Court should:

- dismiss the present action as inadmissible;
- make an appropriate order as to costs.

The applicant contends that the Court should:

- declare the present action admissible and, consequently, dismiss the objections of inadmissibility formulated by the Commission as a plea in bar;
- in any event, join the issue of admissibility to the substance of the case and, consequently, continue the procedure to that end;
- order the defendant to pay all the costs.

By virtue of Article 114(3) of the Rules of Procedure of the Court of First Instance, the remainder of the proceedings on the objection raised is to be oral, unless the Court otherwise decides. The Court (Fifth Chamber) considers that in the present case it has sufficient information from the documents before it and that there is no need to open the oral procedure.

Admissibility

- 15 The Commission states *in limine* that the mention in the judgment of the Court in Case T-82/89 *Marcato v Commission*, cited above, of the possibility of an action for compensation referred to the damage which the applicant might have suffered as a result of his name not being included on the list of officials found to be most deserving of promotion in 1988, whereas the present action, in contrast, concerns damage of a different kind.
- 16 In support of its objection, the Commission argues that the present action is inadmissible because it was not preceded by a pre-litigation procedure in accordance with Articles 90 and 91 of the Staff Regulations. It considers that the document entitled 'complaint' submitted on 6 February 1991 by the applicant was a request under Article 90(1) of the Staff Regulations, the implied rejection of which, on 6 June 1991, constituted a legal 'act adversely affecting' him. Since the applicant did not submit a complaint within the meaning of Article 90(2) of the Staff Regulations against that decision of implied rejection, the Commission considers that Article 91(2) precludes the action from being admissible.
- 17 According to the Commission, the fact that the present case concerns an action for compensation for damage is irrelevant. The Commission observes that action for damages arising from the employment relationship between an official and the institution employing him do not fall within the scope of Articles 178 and 215 of the EEC Treaty but within that of Article 179 of the Treaty and of Articles 90 and 91 of the Staff Regulations. It infers from this that proceedings for compensation must, if they are not to be inadmissible, have been preceded by an act adversely affecting the applicant which itself must have been the subject of a complaint, subsequently rejected. It refers to the judgment in Case 32/68 *Grasselli v Commission* [1969] ECR 505, p. 511, in which the Court of Justice held that the second sentence of Article 91(1) of the Staff Regulations conferred on the Community judicature unlimited jurisdiction only where there is a dispute regarding the legality of an act having adverse effect within the meaning of the first sentence of Article 91(1) and it asserts that, in the absence of claims for annulment, the Court of First Instance has no jurisdiction in proceedings for compensation for damage.

8 The Commission also refers to the judgment in Case T-5/90 *Marcato v Commission*, cited above, in which the Court of First Instance stated that in the case of an action seeking the reparation of damage allegedly caused by conduct which has no legal effect, the administrative procedure must commence with the submission of a request, pursuant to Article 90(1), to the appointing authority to make good the damage and it is only against the decision rejecting such a request that the person concerned may submit a complaint to the administration, pursuant to Article 90(2).

9 The Commission acknowledges that the applicant maintains that he submitted a complaint, and not a request, and that he confirmed that in his fax message of 30 May 1991. However, it states that the 'conduct' of Mr Brüchert, Mr Leygues and Mr Lemoine, against which that complaint was directed, did not constitute acts adversely affecting the applicant, since nothing in that conduct amounted to a decision. The Commission adds that, in any event, if that conduct constituted an act adversely affecting the applicant, his complaint with respect to it was out of time since the conduct occurred several years before the date of the complaint.

0 According to the Commission, it is also irrelevant that the applicant, as he stated in his application, submitted his complaint within a period of three months from the judgment of the Court of First Instance given on 5 December 1990 in Case T-82/89. In that regard, it wonders how the applicant was able to discover in that judgment (which was in his favour) a measure opening for him, in the same way as an act adversely affecting him, a period under the Staff Regulations for submitting a complaint.

1 In those circumstances, the defendant considers that, regardless of the legal nature of the document of 6 February 1991 (request or complaint), the present action is inadmissible.

2 The applicant, for his part, states in his application that he correctly exhausted the pre-litigation procedure, since he submitted his complaint 'within the three month period running from the judgment of 5 December 1990', and that complaint was

the subject of an implied rejection on 6 June 1991. He adds that his interest in bringing proceedings to obtain compensation for damage suffered cannot be denied and the defamatory remarks made regarding him constitute acts adversely affecting him.

- 23 In his observations in reply to the objection of inadmissibility raised by the Commission the applicant confirms that the present action does not concern measures adopted by the Commission in compliance with the judgment of the Court of First Instance of 5 December 1990 (Case T-82/89 *Marcato v Commission*, cited above), but seeks compensation which is separate from and complementary to that which might be available to him as a result of the implementation of that judgment.
- 24 As regards the admissibility of the present action, he relies firstly on the last sentence of Article 91(1) of the Staff Regulations which confers unlimited jurisdiction on the Community judicature in disputes of a pecuniary nature. From this he concludes that he may make a separate claim for compensation for the damage which he considers he has suffered, provided he has previously exhausted the procedure under Article 90 of the Staff Regulations.
- 25 The applicant considers that, in the context of an action for damages, Article 90 must be interpreted in the light of its primary function, which is to enable the appointing authority to define its position, before proceedings are brought before the Court of First Instance, on the claims of the person concerned for compensation. He observes that the fundamental substantive prerequisite for such an action is the existence of a service-related fault which may take the form of a measure in the nature of a decision or a purely factual form. According to the applicant, the complaint may validly be directed against the wrongful conduct which is the source of the damage, whether or not it involves a measure in the nature of a decision.
- 26 He is of the opinion that, in the present case, that wrongful conduct is constituted by the defamatory remarks which, without being legal measures in the nature of a decision, are manifestations of an intention to harm and, as such, are capable of giving rise to compensation.

27 The applicant considers that it would be entirely inappropriate in the present case to require him to have previously submitted a request within the meaning of Article 90(1) of the Staff Regulations in order to obtain a decision from the appointing authority with respect to his claim for compensation. In his view, in the present case there is nothing to request of the appointing authority for the purposes of Article 90(1) of the Staff Regulations, since such a procedure is required only if the person concerned seeks from the appointing authority a definition of position which can give rise to an act adversely affecting him.

28 The applicant adds that the wrongful conduct which gave rise to the damage was found to exist by the Court in its judgment in Case T-82/89, cited above. He considers that, in those circumstances, he rightly submitted a complaint within a period of three months from the judgment against that conduct which adversely affected him, in order to comply with the principle according to which the administration must have prior knowledge of a dispute before it is brought before the competent court.

29 Lastly, the applicant contests the Commission's argument according to which an action for damages is necessarily dependent on there being a claim for annulment. He considers that the language of the judgment in Case 32/68 *Grasselli v Commission*, cited above, referred to by the Commission in that connection, simply means that there must be a real dispute between the official and his institution and that the dispute must be brought before the Court only after the prior administrative procedure has been exhausted. According to the applicant, no interpretation based on the structuring of the provisions justifies the conclusion that the principle of the autonomy of the action for damages, affirmed by the Court of Justice in the context of Articles 178 and 215 of the EEC Treaty, is not applicable in proceedings concerning the Community civil service. He adds that the situation would be different only in the exceptional case where an action for damages sought the payment of a sum which in amount corresponded exactly with the benefit that the applicant would obtain from the annulment of an individual decision, which is not the situation in the present case.

30 It is necessary to reject, *in limine*, the Commission's argument based on the judgment in Case 32/68 *Grasselli v Commission*, cited above, according to which, in disputes between the Communities and their staff, an action for compensation is admissible only if it is accompanied by a claim for annulment. As the Court of

Justice subsequently held, in particular in its judgment in Case 9/75 *Meyer-Burckhardt v Commission* [1975] ECR 1171, p. 1182, the action for annulment and the action for damages are distinct types of action, not only when they are actions brought on the basis of Articles 173 and 178 of the EEC Treaty, but also when they concern disputes between the Communities and their servants, such as are referred to in Article 179 of that Treaty. Accordingly, an applicant may choose either one or the other means of redress, or both jointly, provided that he complies with the procedure laid down in Articles 90 and 91 of the Staff Regulations.

- 31 The admissibility of the present action for damages therefore depends on the question whether a pre-litigation procedure has taken place in accordance with Articles 90 and 91 of the Staff Regulations.
- 32 On this point it must be observed that the pre-litigation procedure required by the Staff Regulations is different, where the damage for which reparation is sought is alleged to have been caused by an act adversely affecting the person concerned within the meaning of Article 90(2) of the Staff Regulations, from the procedure which is necessary where the damage is alleged to have been caused by conduct containing nothing in the nature of a decision.
- 33 In the first situation the admissibility of the action for damages is made subject to the condition that the person concerned has brought before the appointing authority, within the prescribed time-limit, a complaint against the act which caused him damage and that he has brought the action within a period of three months from the rejection of that complaint (see the judgment in Case 9/75 *Meyer-Burckhardt v Commission*, cited above, p. 1182 et seq.). In the second situation, on the other hand, the administrative procedure, which must necessarily precede the action for damages, in accordance with Articles 90 and 91 of the Staff Regulations, comprises two stages. First, the person concerned must submit a request to the appointing authority for compensation. It is only the express or implied rejection of that request that constitutes a decision adversely affecting him against which a complaint may be directed and it is only after there has been a decision expressly or impliedly rejecting that complaint that an action for damages may be brought before the Court (see the judgment of the Court in Case T-5/90 *Marcato v Commission*, cited above, paragraph 50 et seq., and the judgment of the Court of Justice in Case 200/87 *Giordani v Commission* [1989] ECR 1877, p. 1901).

The applicant argues, against that requirement of a two-stage pre-litigation procedure, that it would be sufficient, in order to attain the objective of Article 91(2) of the Staff Regulations, that is to say to inform the appointing authority of the matters causing the person concerned to be aggrieved, so as to make possible or facilitate an amicable settlement of the dispute, to submit to the appointing authority, before bringing an action for damages, a complaint against conduct which, whilst not producing legal effects, constitutes a service-related fault which caused damage. However, that argument conflicts with the wording of the provisions in point and is incompatible with the system of means of redress established by Articles 90 and 91 of the Staff Regulations. Under that system an action may be brought before the Community judicature only when there has been an act producing legal effects, an act which may consist, according to the case, of an implied decision of rejection of a request, and only when the complaint by the person concerned against that act has been rejected. In contrast, in the absence of such an act, it is not sufficient for compensation to be sought, for the first time, when the person concerned submits a complaint (see the judgment of the Court of Justice in Case 200/87 *Giordani v Commission*, cited above).

It must be added that the interpretation of the Staff Regulations put forward by the applicant is incompatible, where there is a series of events giving rise to damage, with the system of time-limits laid down in Article 90 of the Staff Regulations. According to Article 90(2) of the Staff Regulations, the period allowed for submitting a complaint begins to run, according to the case, from dates which are clearly defined. The publication of the measure, the notification of the decision, the date on which the person concerned received notification, or the date of expiry of a time-limit are all precise elements which make it possible to determine very clearly when the period starts to run. In the case of a series of events giving rise to damage, there is clearly no such precise date. In the interests of legal certainty, the need for a request within the meaning of Article 90(1) of the Staff Regulations is therefore obvious.

The applicant argues that in the present case, in which there was also a series of events which he regards as constituting as many service-related faults, time began to run from the date of delivery of the judgment of the Court of 5 December 1990 in Case T-82/89 *Marcato v Commission*, cited above. However, it must be observed that the Staff Regulations do not contain any provisions that allow the date of delivery of a judgment to be used as the starting point of the period prescribed for submitting a complaint. The delivery of that judgment therefore did not dispense the applicant from following the pre-litigation procedure prescribed by the Staff Regulations.

- 37 Nor is it open to the applicant to maintain that he only became aware of the facts on which he relies on the date of the delivery of the aforesaid judgment. In that regard, it must be observed that in paragraph 7 of the judgment, referred to by the applicant the Court merely quoted an extract from the minutes of the meetings of the Promotions Committee of 15 and 16 June 1988. Those minutes already appeared in an annex to the defence, dated 28 March 1989, lodged by the Commission in Case 317/88 (which became Case T-47/89). The applicant was therefore aware of the facts in question long before the Court delivered its judgment on 5 December 1990.
- 38 Consequently, the applicant's argument that, in the context of an action for damages, a complaint may be brought against any conduct amounting to a service-related fault, regardless of whether it has the character of a decision or is purely factual in nature, cannot be accepted.
- 39 It must therefore be determined whether or not the conduct alleged to have given rise to the damage, for which the applicant seeks compensation, constitutes an act adversely affecting him.
- 40 According to the applicant, the damage of which he complains arises from the defamatory remarks said to have been made with respect to him within Promotions Committees during the various promotion procedures and the 'humiliation and annoyances' to which he was subjected. As the applicant himself acknowledges, such conduct is purely factual in nature, and nothing in it amounts to a decision. It was not capable of affecting the applicant's legal situation.
- 41 That finding is not affected by the fact that the present action for damages was brought subsequent to the judgment of the Court of 5 December 1990 in Case T-82/89. The applicant refers to that judgment in order to demonstrate the validity of his allegations concerning the existence of certain service-related faults which preceded the decision contested in Case T-82/89 and which, according to the applicant, not only rendered the said decision unlawful, but moreover, caused him damage extending beyond the consequences of it. Whilst those matters of a purely factual nature formed the basis of the finding by the Court that the decision

in the preparation of which they occurred was vitiated, this does not, however, confer on such conduct the character of a decision. The damage alleged by the applicant therefore does not arise from acts adversely affecting him within the meaning of Article 90(2) of the Staff Regulations. Consequently, the Staff Regulations require, in the present case, a pre-litigation procedure in two stages.

The applicant should therefore first have submitted a request for compensation for the damage of which he complains.

On 6 February 1991 he submitted a document headed 'complaint' and he confirmed in his fax message of 30 May 1991 that he had meant to submit to the appointing authority a complaint under Article 90(2) of the Staff Regulations. Although the applicant did not intend to submit a request under Article 90(1) of the Staff Regulations, it must nevertheless be pointed out that the Court is not bound by the wishes of the parties when it comes to classifying a document submitted by an applicant as a 'request' or 'complaint' (see the order of the Court of 1 October 1991 in Case T-38/91 *Coussios v Commission* [1991] ECR II-763, paragraph 25).

In that regard, it must be pointed out that the document headed 'complaint under Article 90 of the Staff Regulations' submitted by the applicant contains elements which, in substance, relate more to a request under Article 90(1) of the Staff Regulations than to a complaint under the second paragraph of that article. The applicant's objective is to obtain payment of the sum of BFR 2 470 000. In the document in question he requested that the appointing authority take the decision to pay him that sum. However, a request addressed to the appointing authority to take a decision is typical of the content of a request under Article 90(1) of the Staff Regulations. The typical content of a complaint, in contrast, is a request to the appointing authority to annul a decision, whether express or implied, which it has already taken concerning an official. In the document in question the applicant did not ask the appointing authority to reconsider a particular measure which it had adopted concerning him. The circumstances of the present case are therefore different both from a situation in which compensation is sought concurrently with

annulment of an act having an adverse effect (see, for example, the judgment of the Court of Justice in Case 200/87 *Giordani v Commission*, cited above) and a situation in which an official requests that the appointing authority annul an alleged decision which, in actual fact, does not adversely affect him. (See, for example, the judgment of the Court of First Instance in Case T-5/90 *Marcato v Commission*, cited above.) In both of the last-mentioned situations the document submitted by the official may be regarded as constituting a complaint, even though that complaint may prove to be inadmissible. On the other hand, in the present case the document submitted by the applicant did not have the content of a complaint.

⁴⁵ From all of the foregoing considerations it follows that the letter of 6 February 1991, although described as a 'complaint' by the applicant, was, in actual fact, a request within the meaning of Article 90(1) of the Staff Regulations. It must be added that the applicant was informed of this in the fax message sent to him by the Commission on 29 May 1991, albeit that in its letter of 15 February 1991 the Commission had used the term 'complaint'.

⁴⁶ That request was the subject of a decision of implied rejection, in accordance with Article 90(1), on 6 June 1991. That decision of rejection was not followed by a complaint under Article 90(2) of the Staff Regulations. Consequently, no pre-litigation procedure in accordance with Articles 90 and 91 of the Staff Regulations took place. The present action for damages must therefore be dismissed as inadmissible.

Costs

⁴⁷ Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs. However, Article 88 of those Rules provides that in proceedings brought by servants of the Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

1. **The application is dismissed as inadmissible;**
2. **The parties shall bear their own costs.**

Luxembourg, 25 February 1992.

B. Pastor
Registrar

K. Lenaerts
President