Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

6 October 2021 *

(Appeal – Institutional law – Single statute for Members of the European Parliament – Members of the European Parliament elected in Italian constituencies – Modification of pension entitlements – Act adversely affecting an official – Provisional position – Independent legal effects)

In Case C-431/20 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 12 September 2020,

Carlo Tognoli, residing in Milan (Italy),

Emma Allione, residing in Milan,

Luigi Alberto Colajanni, residing in Palermo (Italy),

Claudio Martelli, residing in Rome (Italy),

Luciana Sbarbati, residing in Chiaravalle (Italy),

Carla Dimatore, as heir of Mario Rigo, residing in Noale (Italy),

Roberto Speciale, residing in Bogliasco (Italy),

Loris Torbesi, as heir of Eugenio Melandri, residing in Rome,

Luciano Pettinari, residing in Rome,

Pietro Di Prima, residing in Palermo,

Carla Barbarella, residing in Magione (Italy),

Carlo Alberto Graziani, residing in Fiesole (Italy),

Giorgio Rossetti, residing in Trieste (Italy),

Giacomo Porrazzini, residing in Terni (Italy),

* Language of the case: Italian.

Guido Podestà, residing in Vila Real de Santo António (Portugal),

Roberto Barzanti, residing in Sienna (Italy),

Rita Medici, residing in Bologna (Italy),

represented by M. Merola, avvocato,

Aldo Arroni, residing in Milan,

Franco Malerba, residing in Issy-les-Moulineaux (France),

Roberto Mezzaroma, residing in Rome,

represented by M. Merola and L. Florio, avvocati,

appellants,

the other party to the proceedings being:

European Parliament, represented by S. Alves and S. Seyr, acting as Agents,

defendant at first instance,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen (Rapporteur), C. Toader, M. Safjan and N. Jääskinen, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2021,

gives the following

Judgment

1 By their appeal, Mr Carlo Tognoli and the other appellants seek to have 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; 'the order under appeal'), by which the General Court dismissed as manifestly inadmissible their actions for annulment of the notes of 11 April 2019 drawn up by the Head of the 'Members' Salaries and Social Entitlements' Unit of the European Parliament's Directorate-General for Finance and concerning the adjustment of the amount 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) ('the notes at issue').

Background to the dispute

2 The appellants are either former Members of the European Parliament elected in Italy or surviving spouses of former Members of that institution. Each of them is entitled, on that basis, to a retirement pension or a survivor's pension.

3 On 12 July 2018, the Office of the President of the Italian Chamber of Deputies decided to recalculate, in accordance with the contribution system, the amount of the pensions of former members of that Chamber relating to the years of service completed until 31 December 2011 ('Decision No 14/2018').

4 By adding a comment on the appellants' pension statements for January 2019, the Parliament warned them that the amount of their pensions could be revised, in accordance with Decision No 14/2018, and that that recalculation might lead to recovery of sums unduly paid.

5 By an undated note from the Head of the 'Members' Salaries and Social Entitlements' Unit of the Parliament's Directorate-General for Finance, annexed to the appellants' pension statements for February 2019, the Parliament informed them, first of all, that its Legal Service had confirmed that Decision No 14/2018 was automatically applicable to their situation. That note stated, next, that once the Parliament had received the necessary information from the Camera dei deputati (Chamber of Deputies, Italy), it would notify the appellants of the redetermination of their pension entitlements and would recover any overpayment over the following 12 months. Lastly, the note informed the appellants that the definitive determination of their pension entitlements would be adopted by a formal act against which it would be possible to lodge a complaint or an action for annulment on the basis of Article 263 TFEU.

6 Subsequently, by the notes at issue, the Head of Unit informed the appellants that the amount of their pensions would be adjusted in line with the reduction of the amount of similar pensions paid in Italy to former members of the Chamber of Deputies pursuant to Decision No 14/2018. Those notes also stated that the amount of the appellants' pensions would be adjusted from April 2019 in accordance with the draft determinations of their new pension entitlements sent in annex to those notes. Furthermore, those notes gave the appellants a period of 30 days from the date of their receipt to submit their observations. If no such observations were submitted within the prescribed period, the notes at issue would be regarded as producing definitive effects which would entail, inter alia, the recovery of the amounts unduly paid for the months of January to March 2019.

7 By emails sent between 13 May and 4 June 2019, the appellants submitted their observations to the relevant department of the Parliament. 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 examination of their arguments.

8 After the action had been brought before the General Court, by letters of 20 June (Case T-396/19), of 8 July (Cases T-405/19, T-408/19, T-443/19 and T-464/19), of 15 July (Cases T-419/19, T-433/19, T-455/19, T-458/19 to T-462/19, T-469/19 and T-477/19) and of 23 July 2019 (Cases T-395/19, T-423/19, T-424/19 and T-428/19), the Head of the 'Members' Salaries and Social

Entitlements' Unit of the Parliament's Directorate-General for Finance stated that the observations submitted by the appellants did not contain anything capable of justifying a revision of the Parliament's position, as expressed in the notes at issue, and that, consequently, the pension entitlements as recalculated and the recovery plans for undue payments communicated in annex to those notes had become final.

9 In view of the specific nature of the situation of Mr Eugenio Melandri, who had applied for a derogation based on the level of his income, the Parliament had not given a definitive ruling on his situation at the time of the order under appeal.

The actions before the General Court and the order under appeal

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

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

12 Between 19 September and 4 October 2019, the appellants, with the exception of Ms Emma Allione and Mr Melandri, lodged statements of modification of their respective applications.

13 On 15 January 2020, the General Court decided to join the examination of the actions for annulment brought by the appellants.

14 By the order under appeal, adopted pursuant to Article 126 of the Rules of Procedure of the General Court, the latter dismissed the actions brought by the appellants as manifestly inadmissible.

15 The General Court held, first of all, in paragraph 57 of the order under appeal, that the notes at issue did not constitute acts adversely affecting the appellants and, therefore, could not be the subject of actions for annulment within the meaning of Article 263 TFEU. Consequently, in paragraph 63 of the order under appeal, it dismissed as manifestly inadmissible the appellants' head of claim seeking annulment of those notes.

16 In order to justify that assessment, it stated, in the first place, in paragraphs 51 to 53 of the order under appeal, that the fact that the new method of calculating pensions was applicable from April 2019 was not sufficient to establish that the Parliament had adopted a definitive position on the matter. First, the notes at issue expressly stated that they were drafts. Second, they stated that they would become final only in the absence of observations made by their addressees within 30 days of their receipt. Yet the appellants had submitted observations within that period.

17 In the second place, the General Court held, in paragraphs 56 and 60 of the order under appeal, that the Parliament's subsequent letters, referred to in paragraph 8 above, constituted the adoption of definitive positions by that institution with regard to the appellants and could not be regarded as measures which were purely confirmatory of the notes at issue.

18 In the third place, it held, in paragraphs 61 and 62 of the order under appeal, that the fact that the notes at issue did not specify the period within which the Parliament would respond to the appellants' observations was irrelevant, as were the complaints alleging a failure to state reasons and failure to observe the principle of proportionality.

19 Next, in paragraphs 66 and 67 of the order under appeal, the General Court rejected the appellants' head of claim seeking annulment of the decisions set out in the letters referred to in paragraph 8 above. In that regard, it considered that the statements of modification lodged by the appellants were manifestly inadmissible on the ground that a party can amend the form of order sought and the pleas in law of his or her initial action only where that action was itself admissible on the date on which it was brought.

20 Lastly, in paragraph 74 of the order under appeal, the General Court rejected the appellants' head of claim seeking an order that the Parliament pay the sums unduly withheld, in so far as that head of claim was manifestly inadmissible.

Forms of order sought

21 By their appeal, the appellants claim that the Court of Justice 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 and reserve the costs of the proceedings before the General Court.

22 The Parliament contends that the Court of Justice should:

– dismiss the appeal; and

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

The appeal

Arguments of the parties

23 The appellants put forward three grounds in support of their appeal, alleging (i) that the General Court committed an error of law in its assessment of whether the notes at issue were open to challenge, (ii) misinterpretation of Article 86 of the Rules of Procedure of the General Court, and (iii) failure to observe the adversarial principle and misinterpretation of Article 126 of those Rules of Procedure, respectively. The second and third pleas are submitted in the alternative.

24 In view of the arguments which they put forward in support of their grounds of appeal, the appellants must be regarded as seeking to have the order under appeal set aside in so far as, by that order, the General Court rejected their claims for annulment of the notes at issue and of the decisions set out in the letters referred to in paragraph 8 above.

25 By their first ground of appeal, the appellants claim that the notes at issue are challengeable acts.

26 According to the appellants, it is clear from the case-law of the Court that the essential criterion for determining whether an act is open to challenge relates to its legal effects and not to its definitive nature. Provisional measures have thus been considered to be open to challenge because they produced such effects.

27 The appellants maintain, in that regard, that the notes at issue produced their effects as from April 2019. Furthermore, those notes cause very serious harm to the appellants, which cannot be compensated in full *ex post facto*. Moreover, the provisional nature of those notes is not founded on an identified legal basis.

28 The appellants also claim, for the sake of completeness, that there was no clear evidence to support the conclusion that the notes at issue would be followed by decisions which were not purely confirmatory. They consider that the confirmatory nature of those decisions is, moreover, apparent from the Parliament's replies to the observations which they submitted, since the Parliament declared that it had no jurisdiction to take cognisance of the arguments put forward in those observations.

29 According to the appellants, it is also illogical to consider that the nature of the notes at issue may vary according to whether or not observations were submitted. In the first case, the submission of observations would have the sole effect of altering the date on which the measure becomes final, but that act would remain identical. In the second case, the act in question would become a definitive act without any additional action being required.

30 The Parliament contends that the reduction in the amount of the appellants' pensions was provisional and that it could have been revised on the basis of the observations submitted by the appellants, without the lack of any legal basis being relevant in that regard. That provisional nature is clear from the wording of the notes at issue and from the appellants' right to submit observations before those notes became final, a right which the appellants did in fact exercise. The Parliament's final position was not adopted until later.

31 According to the Parliament, the appellants have carried out an incomplete reading of the case-law of the Court of Justice, from which it follows that the decisive criterion for classifying an intermediate decision as an act open to challenge is the fact that the action brought against the final decision is not capable of providing sufficient judicial protection. In the present case, bringing an action against the decision finally adopted by the Parliament would have ensured such protection.

32 Moreover, the final decisions adopted by the Parliament are not purely confirmatory, since they are based on an analysis of the arguments raised by the appellants in their observations. The failure to indicate a deadline for replying to the observations on the notes at issue is, in that context, irrelevant.

Findings of the Court

33 As the General Court noted in paragraph 49 of the order under appeal, it is clear from the settled case-law of the Court of Justice that any measures adopted by the institutions, whatever their form, which are intended to have binding legal effects, are regarded as acts open to challenge,

within the meaning of Article 263 TFEU (judgments of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 31, and of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 46 and the case-law cited).

34 In order to determine whether the contested act produces such effects, it is necessary to examine the substance of that act 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 (judgments of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 32, and of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 47 and the case-law cited).

35 It should also be noted that, as the General Court stated, in essence, in paragraph 50 of the order under appeal, intermediate measures the aim of which is to prepare, in a procedure comprising several stages, the final decision do not, in principle, constitute acts which may form the subject matter of an action for annulment (see, to that effect, judgment of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraph 43 and the case-law cited).

36 Such intermediate acts are, first and foremost, acts which express a provisional opinion of the institution concerned (judgment of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraph 44 and the case-law cited).

37 The General Court held, in paragraphs 51 to 55 of the order under appeal, that the notes at issue did not set out the Parliament's definitive position, since the position adopted in those notes could have been altered in order to take account of the information contained in the appellants' observations.

38 In that regard, the argument put forward by the appellants that the notes at issue were not provisional on the ground that the Parliament ultimately considered that it was not competent to take cognisance of the arguments put forward in those observations cannot succeed.

39 First, in taking the view that it was not for it to rule on the legality of Decision No 14/2018, the Parliament ruled on the relevance of the observations submitted by the appellants and therefore reassessed its initial decisions in the light of those observations.

40 Second, the classification of the notes at issue as preparatory acts cannot, in any event, depend on the statement of reasons for decisions adopted subsequently by the Parliament.

41 However, the finding that an act of an institution constitutes an intermediate measure which does not express the final position of an institution is not sufficient to establish, systematically, that that act is not a 'challengeable act' for the purposes of Article 263 TFEU.

42 It is thus apparent from the case-law of the Court that an intermediate measure which has independent legal effects may form the subject matter of an action for annulment in so far as the illegality attaching to that measure cannot be remedied in an action brought against the final decision for which it represents a preparatory step (judgment of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraph 46 and the case-law cited).

43 Accordingly, where a challenge to the legality of an intermediate measure in such an action is not capable of ensuring effective judicial protection for the applicant against the effects of that act, it must be capable of forming the subject matter of an action for annulment, on the basis of

Article 263 TFEU (see, to that effect, judgments of 9 October 2001, *Italy* v *Commission*, C-400/99, EU:C:2001:528, paragraph 63; of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 56; and of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraph 48).

44 In the present case, it is important to point out that, as the General Court found in paragraph 51 of the order under appeal and as the appellants submit in their appeal, the notes at issue led to an immediate reduction in the amount of the appellants' pensions, with effect from April 2019, since the application of that reduction was not suspended pending the outcome of the proceedings conducted by the Parliament.

45 It follows that the notes at issue produced, as such, independent legal effects on the appellants' financial situation.

46 Such effects cannot be treated in the same way as the procedural effects of acts expressing a provisional position of the European Commission or the effects of such acts which have been recognised as not adversely affecting the interests of the persons concerned, which, the Court has held, cannot result in actions for annulment brought against such acts being admissible (see, to that effect, judgment of 11 November 1981, *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraphs 17 to 18).

47 The fact, stated by the General Court in paragraph 56 of the order under appeal, that it is apparent from the notes at issue that the Parliament would have recovered sums received for the months of January to March 2019 only in the absence of observations lodged by the appellants within 30 days of receipt of those notes is not capable of calling into question the immediate nature of the legal effects produced by those notes.

48 In addition, although the notes at issue provided that the Parliament was to adopt a final position after receipt of the appellants' observations, it is common ground that the adoption of such a position did not have a time limit.

49 The independent legal effects of the notes at issue could therefore have continued for a potentially long period, the end of which was not a priori defined.

50 It is also apparent from the order under appeal and from the information provided by the Parliament that, for one of the appellants, the institution's definitive position was not adopted until eight months after he received the note concerning him.

51 In those circumstances, since the lasting reduction in the amount of a pension is liable to have potentially irreversible consequences for the situation of the person concerned, the appellants had to have the right to effective recourse against the notes at issue and thus to prevent the reduction of their pensions (see, by analogy, judgments of 30 June 1992, *Italy* v *Commission*, C-47/91, EU:C:1992:284, paragraph 28, and of 9 October 2001, *Italy* v *Commission*, C-400/99, EU:C:2001:528, paragraph 63).

52 It follows that the bringing of an action for annulment of the final decisions which the Parliament was required to adopt after receipt of the appellants' observations was not capable of ensuring them effective judicial protection.

53 Nor is the right of the persons concerned, in the absence of a reply from the Parliament to the observations which they have submitted, to bring an action against the Parliament for failure to act, capable of guaranteeing them effective judicial protection.

54 It is true that the Parliament is required to reply to such observations within a reasonable period of time (see, to that effect, judgment of 28 February 2013, Review of *Arango Jaramillo and Others* v *EIB*, C-334/12 RX-II, EU:C:2013:134, paragraph 28) and the persons concerned therefore have the right to bring an action for failure to act if that institution does not comply with that obligation.

55 Furthermore, the Court has previously held that the possibility of bringing such an action for failure to act may be sufficient to prevent the Commission from perpetuating a state of inaction following the adoption of an intermediate measure adopted by that institution (see, to that effect, judgment of 18 March 1997, *Guérin automobiles* v *Commission*, C-282/95 P, EU:C:1997:159, paragraph 38).

56 However, those considerations cannot be decisive in the present case since, first, an action for failure to act brought against the Parliament would not be capable of calling into question the autonomous legal effects of the notes at issue and, second, the time needed to enable such an action to be examined and then, as the case may be, an action for annulment to be examined would be excessive in a context in which those notes immediately entail a reduction in the amount of the pensions paid to natural persons.

57 In the light of the foregoing, the General Court erred in law in holding, in paragraph 57 of the order under appeal, that the provisional nature of the notes at issue permitted the inference that they did not constitute acts adversely affecting the persons concerned and, therefore, that they could not be the subject of an action for annulment on the basis of Article 263 TFEU.

58 Consequently, the first ground of appeal must be upheld and the order under appeal must be set aside in so far as it rejected the appellants' head of claim seeking annulment of the notes at issue.

59 It also follows that the order under appeal must be set aside in so far as it rejected the appellants' head of claim seeking annulment of the decisions set out in the letters referred to in paragraph 8 above, since the rejection of that head of claim was based exclusively on the inadmissibility of the appellants' head of claim seeking annulment of the notes at issue.

60 In those circumstances, it is not necessary to examine the second and third grounds of appeal, in so far as they are not, in any event, of a nature to result in a more extensive setting aside of the order under appeal.

The actions before the General Court

61 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, where it has quashed the decision of the General Court, 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.

62 In the first place, since the Parliament maintained, by its plea of inadmissibility raised before the General Court, only that the actions for annulment brought by the appellants were inadmissible on the ground that the notes at issue were preparatory acts, it is appropriate, for the reasons set out in paragraphs 41 to 57 above, to reject that plea of inadmissibility.

63 In the second place, since the General Court's assessments related exclusively to the admissibility of those actions and the General Court dismissed those actions as manifestly inadmissible without opening the oral procedure, the Court of Justice does not have the information necessary to give final judgment in those actions.

64 Consequently, the cases must be referred back to the General Court for it to rule on the appellants' claims for annulment of the notes at issue and of the decisions set out in the letters referred to in paragraph 8 above.

Costs

65 Since the cases are being referred back to the General Court, it is appropriate to reserve the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Sets 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), in so far as it rejected the claims made by Mr Carlo Tognoli and Others for annulment of the notes of 11 April 2019 drawn up by the Head of the 'Members' Salaries and Social Entitlements' Unit of the European Parliament's Directorate-General for Finance and concerning the adjustment of the amount 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 of the decisions of the European Parliament set out in the letters of 20 June (Case T-396/19), of 8 July (Cases T-405/19, T-408/19, T-443/19 and T-464/19), of 15 July (Cases T-419/19, T-433/19, T-455/19, T-458/19 to T-462/19, T-469/19 and T-477/19) and of 23 July 2019 (Cases T-395/19, T-423/19, T-424/19 and T-428/19);**

2. **Dismisses the pleas of inadmissibility raised by the European Parliament before the General Court;**

3. **Refers the cases back to the General Court for a ruling on the claims made by Mr Carlo Tognoli and Others for annulment of those notes and those decisions;**

4. **Reserves the costs.**

[Signatures]