Reports of Cases

JUDGMENT OF THE GENERAL COURT (Appeal Chamber)

27 October 2016 [1]

(Appeal — Civil service — ECB Staff — Access to documents — Documents relating to the dispute between the parties in the proceedings — Partial refusal of access — Rule of correspondence between the application and the complaint — Plea of illegality)

In Case T-787/14 P,

APPEAL brought against the judgment of the European Union Civil Service Tribunal (Second Chamber) of 18 September 2014 *Cerafogli* v *ECB* (F-26/12, EU:F:2014:218) seeking to have that judgment set aside.

European Central Bank, represented initially by E. Carlini, M. López Torres and F. Malfrère, and subsequently by E. Carlini and F. Malfrère, acting as Agents, assisted by B. Wägenbaur, lawyer,

applicant,

supported by

European Commission, represented initially by J. Currall and G. Gattinara, and subsequently by Mr Gattinara, acting as Agents,

intervener in the appeal,

the other party to the proceedings being

Maria Concetta Cerafogli, residing in Rome (Italy), represented by S. Pappas, lawyer,

applicant at first instance

THE GENERAL COURT (Appeal Chamber),

composed of M. Jaeger, President, M. Prek, A. Dittrich, S. Frimodt Nielsen (Rapporteur) and G. Berardis, Judges,

Registrar: E. Coulon,

gives the following

1 — Language of the case: English.

Judgment

1 By its appeal lodged pursuant to Article 9 of Annex I to the Statute of the Court of Justice of the European Union, the European Central Bank (ECB) asks the Court to set aside the judgment of the European Union Civil Service Tribunal (Second Chamber) of 18 September 2014 in *Cerafogli* v *ECB* (F-26/12, 'the judgment under appeal', EU:F:2014:218) by which it (i) annulled the decision of 21 June 2011 of the Deputy Director General of the Human Resources, Budget and Organisation Directorate General (DG) ('the Human Resources DG') of the ECB partially rejecting the request for access to certain documents submitted by Ms Cerafogli on 20 May 2011, (ii) ordered the ECB to pay to Ms Cerafogli the sum of EUR 1 000, (iii) dismissed the action of Ms Cerafogli as to the remainder and, (iv) ordered the ECB to pay the costs.

Legal framework

2 Article 23.2 of the Rules of Procedure of the ECB adopted by Decision 2004/257/EC of the ECB of 19 February 2004 (OJ 2004 L 80, p. 33) provides that public access to documents drawn up or held by the ECB is to be governed by a decision of the Governing Council. On 4 March 2004, the Governing Council adopted Decision ECB/2004/3 on public access to European Central Bank documents (OJ 2004 L 80, p. 42).

3 Paragraph 7 of the Conditions of Employment for Staff of the ECB ('the Conditions of Employment') and Article 1.1.3 of the ECB Staff Rules ('the Staff Rules') govern the access of ECB staff to their personal files. In particular, the abovementioned Article 1.1.3 establishes that '[a] member of staff has the right, even after leaving the service of the ECB, to be made aware of all the contents of his file'.

4 On 1 August 2006, the Executive Board adopted rules on the access of ECB staff to documents connected with their employment relationship with the ECB. Some amendments were made to those rules and they were approved by the Executive Board on 30 September 2008 ('the rules applicable to requests for access to documents from ECB staff'). Under those rules, all requests for access to documents not covered by Decision ECB/2004/3 are to be processed by the Director-General of the DG 'Human Resources'. In addition, those rules include a certain number of exceptions to the right of access to documents which cover, in particular, preparatory documents, internal legal advice and decisions adopted by the Governing Council regarding the Conditions of Employment for Staff of the ECB.

Background to the dispute

5 The background to the dispute is set out in paragraphs 5 to 16 and 19 of the judgment under appeal, as follows:

> '5 On 28 October 2010, the [Civil Service Tribunal] delivered judgment in three disputes between the applicant and the ECB (*Cerafogli* v *ECB*, F-84/08, EU:F:2010:134; *Cerafogli* v *ECB*, F-96/08, EU:F:2010:135; and *Cerafogli* v *ECB*, F-23/09, EU:F:2010:138, "the judgments of 28 October 2010").
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> 6 By letter of 20 May 2011 ("the request of 20 May 2011"), the applicant asked the ECB to send her the following documents, pursuant to Decision ECB/2004/3:
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> "I) [a]ll the Executive Board Decisions — and the documents submitted to the Board — related to the [judgments of the] Tribunal ... in [C]ase F-96/08 and [C]ase F-84/08 including any related internal documents, memo[randa] and/or minutes;

II) [t]he Executive Board decisions — and the documents submitted to the Board — of allocating to [the applicant] a new [annual salary and bonus review] for the years 2005 and 2006, including any related internal documents, memo[randa] and minutes;

III) [a]ll the Executive Board Decisions — and the documents submitted to the Board — related to the Tribunal [C]ases F-96/08, F-84/08 and ... F-23/09 prior to the [judgments of the] Tribunal ... of 28 October 2010 including any related internal documents, memo[randa] and/or minutes."

7 According to the nature of the documents requested by the applicant, the ECB examined the request of 20 May 2011 either in the light of Decision ECB/2004/3 or in the light of the rules applicable to requests from ECB staff and, thus, made two separate decisions on 21 June 2011.

8 The first decision, signed by the Director-General of the DG for Secretariat and Language Services and the head of the Secretariat Division within that Directorate General, was made on the basis of Decision ECB/2004/3 ("the decision based on Decision ECB/2004/3"). By that decision, the ECB sent the applicant three documents relating to the Executive Board's decision of 24 May 2011 concerning the wage policy for 2008. However, the ECB refused to send her the preparatory documents connected with that decision, citing Article 4(3) of Decision ECB/2004/3, which prohibits access "to a document containing opinions for internal use as part of deliberations and preliminary consultations within the ECB ... even after the decision has been taken, unless there is an overriding public interest in disclosure". It also refused to produce the minutes of the relevant meetings of the Executive Board on the basis of Article 4(1)(a) of Decision ECB/2004/3, which protects "the public interest as regards ... the confidentiality of the proceedings of the ECB's decision-making bodies". Lastly, the ECB stated that the request of 20 May 2011 was connected with Decision ECB/2004/3 only in so far as it concerned the Executive Board's decision of 24 May 2011 as mentioned above, with the rest falling within the scope of the rules applicable to requests for access to documents from ECB staff, and that DG "Human Resources" would provide a separate response based on those rules.

9 The second decision was made by the Deputy Director-General of DG "Human Resources" on the basis of the rules applicable to requests for access to documents from ECB staff ("the decision based on the rules applicable to requests for access to documents from ECB staff"). By that decision, the ECB sent the applicant the most recent decisions concerning her annual salary and bonus reviews for 2005 and 2006, along with a note from the Director-General of the DG for Secretariat and Language Services addressed to the Director-General of DG "Human Resources" showing that, at its meetings of 23 November 2010 and 19 April 2011, the Executive Board had given its verdict on the decision not to bring an appeal against the judgments of 28 October 2010 and on the applicant's annual salary and bonus reviews for 2005 and 2006. However, the ECB refused to send the applicant any preparatory documents relating to the positions taken by the ECB's decision-making bodies or to internal legal advice, relying on the confidentiality of such documents.

10 By letter of 15 July 2011, the applicant submitted a "confirmatory application" on the basis of Article 7(2) of Decision ECB/2004/3, contesting the analysis of her request of 20 May 2011 under the two systems and repeating that request.

11 By letter of 5 August 2011, the President of the ECB replied to the confirmatory application, essentially confirming the decision based on Decision ECB/2004/3, but also providing the applicant with several other documents.

12 By letter of 12 August 2011 ("the decision of 12 August 2011"), the Director-General of DG "Human Resources" informed the applicant that her confirmatory application of 15 July 2011 had been examined as an administrative appeal against the decision based on the rules applicable to

requests from ECB staff. By that letter, he sent the applicant several documents, but stated that some of them had been only partially disclosed, pursuant to the confidentiality rules governing access to opinions of the ECB's Legal Service.

13 On 10 October 2011, the applicant filed a complaint with the President of the ECB against the decision of 12 August 2011, pursuant to paragraph 41 of the Conditions of Employment, in so far as that decision refused to grant her access to all of the documents requested or granted her only partial access to certain documents.

14 The ECB provided two responses to that complaint.

15 First, the President of the ECB rejected the complaint by decision of 12 December 2011 ("the decision rejecting the complaint"), although he did send the applicant additional information and documents concerning, inter alia, the ECB's wage policy and the judgments of 28 October 2010. However, some of those documents were only partially disclosed pursuant to the confidentiality rules governing access to internal legal advice, in accordance with the rules applicable to requests for access to documents from ECB staff, and to the personal data of ECB staff, pursuant to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

16 Second, by letter of 12 December 2011, the Deputy Director-General of DG "Human Resources" informed the applicant that the part of the complaint in which she stated that the request for access to documents submitted to the Executive Board should have been regarded as referring to all documents sent to one or more members of the Executive Board had been deemed to be a new request pursuant to the rules applicable to requests from ECB staff.

…

19 At the hearing, the applicant clarified her claim for annulment by stating that in requesting the annulment of "the decision of 21 June 2011" she is referring only to the decision based on the rules applicable to requests for access to documents from ECB staff and not to the decision based on Decision ECB/2004/3.'

Proceedings at first instance and judgment under appeal

6 By application received at the Registry of the Civil Service Tribunal on 23 February 2012, registered under reference F-26/12, Ms Cerafogli requested, in essence, annulment of the decision of 21 June 2011 of the ECB refusing to grant her access to certain documents and compensation for the non-material damage which she claims to have suffered as a result of that decision.

7 In support of her action at first instance, Ms Cerafogli put forward five pleas in law alleging, respectively (i) illegality of the rules applicable to requests from ECB staff, (ii) infringement of the principles of sound administration and transparency, (iii) infringement of the rights of the defence, (iv) breach of the duty to state reasons and (v) lack of competence on the part of the author of the decision based on the rules applicable to requests for access to documents from ECB staff.

8 By order of 15 January 2014, the Civil Service Tribunal reopened the oral procedure in order to allow the parties to submit observations on the admissibility of the various pleas raised by Ms Cerafogli and of the plea of illegality concerning the rules applicable to requests for access to documents from ECB staff, having regard to the rule of correspondence between the complaint and the legal action, in particular in the light of the judgment of 25 October 2013 in *Commission* v *Moschonaki* (T-476/11 P, EU:T:2013:557), as well as the judgments of 11 December 2008 in *Reali* v *Commission* (F-136/06,

EU:F:2008:168, paragraphs 47 to 51), and of 1 July 2010 in *Mandt* v *Parliament* (F-45/07, EU:F:2010:72, paragraph 121). The ECB and Ms Cerafogli submitted their observations on 5 and 6 February 2014 respectively.

9 In the judgment under appeal, the Civil Service Tribunal held the plea of illegality to be admissible.

10 It held, in that regard, the following:

'36 ... the case-law relating to the principle of effective judicial protection in the light of Article 47 of the Charter (judgment in *Otis and Others*, C-199/11, EU:C:2012:684, paragraphs 54 to 63, and judgment in *Koninklijke Grolsch* v *Commission*, T-234/07, EU:T:2011:476, paragraphs 39 and 40) has developed in a way which warrants a reassessment by the Tribunal as to whether it is appropriate to apply the rule of correspondence when a plea of illegality has been raised for the first time in the action (judgment of 12 March 2014 in *CR* v *Parliament*, F-128/12, ECR-SC, EU:F:2014:38, paragraph 29).

37 In particular, in paragraphs 37, 39 and 40 of the judgment in *Koninklijke Grolsch* v *Commission* (EU:T:2011:476) the General Court, having found that no provision of EU law requires the addressee of a statement of objections relating to an infringement of the competition rules to contest the individual matters of fact or of law set out therein during the administrative procedure, failing which it will not be able to do so during the subsequent judicial proceedings, rejected the European Commission's argument contesting the admissibility of a plea on the ground that it had not been raised clearly and precisely during the administrative phase. The General Court held that, in the circumstances described, such an argument effectively limited the applicant's access to justice and, more particularly, her right for her case to be heard before a court or tribunal. As the General Court pointed out, the right to an effective remedy and the right of access to an impartial tribunal are guaranteed by Article 47 of the Charter.

38 Although it is true that the case-law mentioned above was developed in a different field from that of disputes between EU institutions and their staff, the judgment in *Koninklijke Grolsch* v *Commission* (EU:T:2011:476) concerns the issue of whether a restriction on access to justice which was not expressly provided for by the legislature is compatible with Article 47 of the Charter. In the field of civil service disputes, the rule of correspondence between the pleas raised during the pre-litigation procedure and those raised in the application, although having a legislative basis in Article 91(1) of the Staff Regulations and, as regards ECB staff, in paragraph 41 of the Conditions of Employment and Article 8.1 of the Staff Rules, is a rule which originated in case-law.

39 The [Civil Service Tribunal] is of the view that there are three arguments against the idea that a plea of illegality raised for the first time in an action should be declared inadmissible solely on the ground that it has not been raised in the complaint preceding that action. Those arguments are connected with (i) the purpose of the pre-litigation procedure, (ii) the nature of a plea of illegality, and (iii) the principle of effective judicial protection.

40 First, regarding the purpose of the pre-litigation procedure, which is the same in the context of Article 91 of the Staff Regulations as in the context of ECB staff disputes, it is settled case-law that the pre-litigation procedure serves no purpose if complaints are made against a decision which cannot be altered by the administration. Thus, in the context of Article 91 of the Staff Regulations, case-law has ruled out the need to submit complaints against decisions made by selection boards or against staff reports (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 33 and the case-law cited).

41 By the same token, the obligation to raise a plea of illegality in the complaint, failing which the action will be inadmissible, does not fulfil the purpose of the pre-litigation procedure ...

42 Indeed, taking account of the principle of the presumption of legality regarding acts of the institutions of the European Union, according to which EU legislation remains fully effective as long as it has not been found to be unlawful by a competent court, an administration cannot leave unenforced an act of general application in force which, in its opinion, conflicts with a higher-ranking rule of law, with the sole aim of allowing for an out-of-court settlement of the dispute (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 35 and the case-law cited).

43 Such a course of action must *a fortiori* be excluded if the administration concerned is acting in a situation of circumscribed powers, since, in a situation of that kind, it is not in a position to withdraw or to amend the decision contested by the member of staff concerned, however well-founded it might consider a plea of illegality against the provision on the basis of which that decision was adopted (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 36).

44 Furthermore, the fact that a plea of illegality is being raised for the first time in the action cannot affect the principle of legal certainty since, even if the person concerned had raised a plea of that kind at the complaint stage, the administration could not have taken advantage of that fact to resolve the dispute with that person through an amicable settlement.

45 Secondly, regarding the nature of a plea of illegality, according to settled case-law, Article 277 TFEU gives expression to a general principle conferring upon any party to proceedings the right to challenge incidentally, for the purpose of obtaining the annulment of an act against which it is capable of bringing proceedings, the validity of an act of general application adopted by an institution of the European Union which constitutes the legal basis of the contested act, if that party was not entitled to bring a direct action challenging the act which thus affected him without his having been in a position to seek its annulment (judgment in *Simmenthal* v *Commission*, 92/78, EU:C:1979:53, paragraph 39; judgment in *Andersen and Others* v *Parliament*, 262/80, EU:C:1984:18, paragraph 6; and judgment in *Sina Bank* v *Council*, T-15/11, EU:T:2012:661, paragraph 43). Article 277 TFEU thus aims to protect the litigant against the application of an unlawful legislative act, on the basis that the effects of a judgment containing a declaration of inapplicability are limited to the parties to the dispute alone, and that that judgment does not affect the act itself, which has become unchallengeable (judgment in *Carius* v *Commission*, T-173/04, EU:T:2006:333, paragraph 45 and the case-law cited, and judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 38).

46 Even assuming that the obligation to raise a plea of illegality in the complaint, failing which the action will be inadmissible, can fulfil the purpose of the pre-litigation procedure, the [Civil Service Tribunal] considers that it is in the nature of such a plea to reconcile the principle of legality with the principle of legal certainty (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 39).

47 Moreover, it can be seen from the wording of Article 277 TFEU that the possibility of challenging an act of general application after the expiry of the period for bringing proceedings is not open to a party except in proceedings before one of the Courts of the European Union. A plea of that kind cannot therefore be fully effective in the context of an administrative appeal procedure (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 40).

48 Thirdly and lastly, the [Civil Service Tribunal] points out that the principle of effective judicial protection is a general principle of EU law to which expression is now given by the second paragraph of Article 47 of the Charter, pursuant to which "[e]veryone is entitled to a ... hearing ... by an independent and impartial tribunal ... established by law ...". That paragraph corresponds to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ("the ECHR") (review judgment in *Arango Jaramillo and Others* v *EIB*, C-334/12 RX-II, EU:C:2013:134, paragraphs 40 and 42).

49 According to the case-law of the European Court of Human Rights on the interpretation of Article 6(1) of the ECHR, to which reference must be made in accordance with Article 52(3) of the Charter, the exercise of the right to a tribunal may be subject to limitations, inter alia as to the conditions for the admissibility of an action. While the persons concerned should expect the rules establishing those limitations to be applied, the application of such rules should nevertheless not prevent litigants from taking advantage of an available legal remedy (see, to that effect, the judgment of the European Court of Human Rights in *Anastasakis v. Greece*, no. 41959/08, § 24, 6 December 2011; the review judgment in *Arango Jaramillo and Others* v *EIB*, EU:C:2013:134, paragraph 43; the order in *Internationale Fruchtimport Gesellschaft Weichert* v *Commission*, C-73/10 P, EU:C:2010:684, paragraph 53; and the judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 42).

50 In particular, the European Court of Human Rights has stated that the limitations on the right to a tribunal relating to the conditions of admissibility of an action must not restrict or reduce a litigant's access in such a way or to such an extent that the very essence of that right is impaired. Such limitations are not compatible with Article 6(1) ECHR unless they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued (see the judgments of the European Court of Human Rights in *Liakopoulou v. Greece*, no. 20627/04, § 17, 24 May 2006; *Kemp and Others v. Luxembourg*, no. 17140/05, § 47, 24 April 2008; and *Viard v. France*, no. 71658/10, § 29, 9 January 2014). The right of access to a tribunal is impaired when its rules cease to pursue the aims of legal certainty and the proper administration of justice and instead become a sort of barrier preventing a litigant from having his dispute settled on the merits by the competent court (view of Advocate General Mengozzi in the review judgment in *Arango Jaramillo and Others* v *EIB*, EU:C:2013:134, paragraphs 58 to 60; judgment of the European Court of Human Rights in *L'Erablière A.S.B.L. v. Belgium*, no. 49230/07, § 35, ECHR 2009 (extracts); judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 43).

51 Penalising the act of raising a plea of illegality for the first time in the application by declaring that plea inadmissible constitutes a restriction on the right to effective judicial protection which is not proportionate to the aim pursued by the rule of correspondence, which is to permit an amicable settlement of the dispute between the official concerned and the administration and to comply with the principle of legal certainty (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 44 and the case-law cited).

52 In that regard, the [Civil Service Tribunal] recalls that, according to the case-law, any official exercising ordinary care is deemed to be familiar with the Staff Rules (concerning the rules governing the remuneration of ECB staff, see the judgment in *BM* v *ECB*, F-106/11, EU:F:2013:91, paragraph 45, concerning the Staff Regulations, see the judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 45 and the case-law cited). However, a plea of illegality is likely to lead the [Civil Service Tribunal] to examine the legality of those rules in the light of general principles or higher-ranking rules of law which may go beyond the framework of the rules which directly apply to staff. Owing to the nature of a plea of illegality and to the reasoning which leads the person concerned to search for and invoke such illegality, a member of staff of the ECB who submits a complaint and does not necessarily have the appropriate legal expertise cannot be required to raise such a plea at the pre-litigation stage, failing which a plea of that kind raised at a later stage will be declared inadmissible. Accordingly, a declaration of inadmissibility in those circumstances is a disproportionate penalty for the member of staff concerned and is unjustified.

53 Moreover, making the possibility of raising a plea of illegality at the application stage conditional upon applying a rule of correspondence with the complaint may unduly favour a single category of officials and members of staff — namely, those who have legal expertise — over all other categories of officials and members of staff.

54 In the light of all of the foregoing, the plea of illegality which has been raised for the first time in the application must be declared admissible.'

11 Regarding the substantive examination of the plea of illegality, the Civil Service Tribunal found that Ms Cerafogli was justified in maintaining that the rules applicable to requests for access to documents from ECB staff had been adopted following an unlawful procedure, since the Staff Committee had not been consulted before those rules were adopted. It found, therefore, that the ECB had infringed Articles 48 and 49 of the Conditions of Employment and that the third claim put forward in the plea of illegality was therefore well founded, without it being necessary to examine the other claims put forward in that plea.

12 The Civil Service Tribunal held, therefore, that the decision of 21 June 2011, which was based on the rules applicable to requests for access to documents from ECB staff, was itself unlawful, without it being necessary to examine the other complaints put forward by Ms Cerafogli (paragraph 71 of the judgment under appeal).

13 The Civil Service Tribunal then held that, as a result of the annulment of the decision based on the rules applicable to the requests for access to documents from ECB staff, Ms Cerafogli was once again awaiting the ECB's final decision regarding her request of 20 May 2011 and that such a continuation of that situation of waiting and uncertainty, caused by the unlawfulness of the decision in question, constituted non-material damage which could not be entirely remedied by the annulment of that decision alone. In view of those circumstances and, in particular, the seriousness of the defect by which the rules applicable to requests for access to documents from ECB staff was vitiated as a result of the failure to consult the Staff Committee beforehand, tempered by the fact that the ECB had already provided Ms Cerafogli with several documents, the Civil Service Tribunal held that fair compensation for that damage would be afforded by ordering the ECB to pay the Ms Cerafogli EUR 1 000.

14 Finally, the Civil Service Tribunal ordered the ECB to pay the costs.

Procedure before the Court and forms of order sought

15 By document lodged at the Registry of the General Court on 28 November 2014 the ECB brought the present appeal.

16 Ms Cerafogli submitted a response within the time limit.

17 The ECB was granted leave, upon application, to submit a reply, which it lodged within the time limit.

18 Ms Cerafogli was granted leave to submit a rejoinder, which she lodged within the time limit.

19 By order of 29 June 2015, the president of the Appeal Chamber of the General Court gave the European Commission leave to intervene in support of the form of order sought by the ECB.

20 By order of 29 June 2015, the president of the Appeal Chamber of the General Court rejected Union for Unity (U4U)'s application for leave to intervene in support of the form of order sought by Ms Cerafogli.

21 On a proposal from the Judge-Rapporteur, the Court (Appeal Chamber), in the absence of an application submitted by the parties within the time limit provided for in Article 207 of the Rules of Procedure of the General Court, decided to rule on the present appeal without an oral procedure.

22 The ECB claims that the Court should:

— set aside the judgment under appeal;

— rule according to the pleas in law which it raised at first instance.

— order each party to bear its own costs.

23 The Commission claims that the Court should set aside the judgment under appeal.

24 Ms Cerafogli contends that the Court should:

— reject the appeal as unfounded in its entirety;

— uphold the judgment under appeal;

— order the ECB to pay the costs.

The appeal

25 The ECB, supported by the Commission, contests both the relevance of the analogy used by the Civil Service Tribunal between competition cases and civil service cases and the three arguments that led the Civil Service Tribunal to reassess the case-law on the admissibility of a plea of illegality raised for the first time before it, which related to (i) the purpose of the pre-litigation procedure, (ii) the nature of the plea of illegality and (iii) the principle of effective judicial protection.

26 In that regard, the ECB puts forward four grounds in support of its appeal.

27 The first ground of appeal alleges, first, an erroneous extrapolation by the Civil Service Tribunal of the judgment of 15 September 2011 in *Koninklijke Grolsch* v *Commission* (T-234/07, EU:T:2011:476) to staff cases, as these two types of litigation are distinct and that extrapolation leads to misinterpretation of the scope of the principle of effective judicial protection in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') (first part) and, secondly, inadequacy of the grounds (second part).

28 In support of its second ground of appeal, the ECB argues that, by holding that a plea of illegality could be raised for the first time before the court and not in the context of the pre-litigation procedure, the Civil Service Tribunal disregarded the purpose of the pre-litigation procedure, which is to encourage amicable settlement of disputes and which thus implies that the administration is aware of all the complaints that the staff member makes against the decision which he contests (first part), as well as the rights of the defence of the institution in the context of that pre-litigation procedure (second part). Furthermore, the ECB argues, in essence, that the Civil Service Tribunal was wrong to hold that the administration had no choice but to apply a rule of general application even though it considered it illegal and had not taken into account the special situation of the ECB, which is also the author of the provisions applicable to staff (third part), and that it misinterpreted the principle of legal certainty (fourth part).

29 The third ground of appeal alleges erroneous assessment of the nature of the plea of illegality and misinterpretation of Article 227 TFEU (first part), in so far as, in essence, the Civil Service Tribunal was wrong to hold that a plea of illegality cannot be fully effective in the context of an administrative appeal procedure. The ECB argues (i) that the protection of a litigant against the application of an unlawful act does not prevent admissibility criteria being imposed in order to validly raise a plea of illegality, (ii) that the fact that a plea of illegality may only be invoked incidentally does not mean that

it is impossible to raise such a plea in the context of an administrative appeal procedure and, finally, (iii) that it is important that the administration is informed as from the pre-litigation stage of the possible illegality of a provision of general application in order to ensure its rights of defence and to act, where appropriate, on a sound legal basis, not only with regard to the staff member who has brought a complaint, but also with regard to the staff as a whole. According to the ECB, the Civil Service Tribunal also infringed the principle of legal certainty (second part).

30 Finally, by its fourth ground of appeal, the ECB claims that the Civil Service Tribunal misinterpreted the principle of effective judicial protection and the principle of proportionality, in so far as, inter alia, it considered, in essence, that the inadmissibility of the plea of illegality at the stage of the action before the Courts of the European Union would be a disproportionate penalty for the staff member concerned, in particular if that staff member was not a lawyer or did not take advice (first part) and that it therefore failed to take into account certain facts that are relevant in the present case, namely that Ms Cerafogli was represented by a lawyer as from the pre-litigation procedure (second part).

31 Ms Cerafogli contests that line of argument.

32 It should be pointed out, first of all, that, like Article 90(2) of the Staff Regulations, paragraph 42 of the Conditions of Employment and Article 8.1 of the Staff Rules state that the ECB staff may bring legal proceedings only after exhausting the pre-litigation procedure, which, as regards ECB staff, is in two stages: a request for pre-litigation review and then a preliminary complaint.

33 It must be recalled that the legality of a decision must be assessed on the basis of the matters of fact and law available to the institution at the time when it adopted that decision. In view of the evolving nature of the pre-litigation procedure, the drawing up of the act establishing the institution's final position terminates with the adoption of the appointing authority's response to the complaint lodged by the member of staff. It follows that the legality of the definitive act adversely affecting the applicant is assessed in the light of the elements of fact and of law available to the institution on the adoption, whether express or implied, of that response, without prejudice to the possibility, for the institution, under the conditions set out by the case-law, to provide supplementary explanations during the contentious stage (judgment of 21 May 2014, *Mocová* v *Commission*, T-347/12 P, EU:T:2014:268, paragraph 45).

34 Furthermore, it has been held consistently that the rule of correspondence between the complaint and the subsequent action requires that, for a plea before the Courts of the European Union to be admissible, it must have already been raised in the pre-litigation procedure, thus enabling the appointing authority to know in sufficient detail the criticisms made of the contested decision. That rule is justified by the very purpose of the pre-litigation procedure, which is to allow for an amicable settlement of disputes arising between officials and the administration (judgment in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraphs 71 and 72, and the case-law cited).

35 It follows that, in actions brought by officials, claims before the Courts of the European Union may contain only heads of claim based on the same matters as those raised in the complaint, although those heads of claim may be developed before the Courts of the European Union by the presentation of pleas in law and arguments which, whilst not necessarily appearing in the complaint, are closely linked to it (see judgment of 25 October 2013 in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraph 73 and the case-law cited).

36 However, it should be pointed out, first, that, since the pre-litigation procedure is informal in character and those concerned are acting without the assistance of a lawyer at that stage, the administration must not interpret the complaints restrictively but must, on the contrary, examine them with an open mind and, secondly, it is not the purpose of Article 91 of the Staff Regulations, the corresponding provisions of the Conditions of Employment or Article 8.1 of the Staff Rules, to bind strictly and

absolutely the contentious stage of the proceedings, if any, provided that the action changes neither the legal basis nor the subject matter of the complaint (see judgment of 25 October 2013 in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraph 76 and the case-law cited).

37 Admittedly, according to established case-law, in order for such a pre-litigation procedure to be capable of achieving its objective, it is necessary for the appointing authority to be in a position to know in sufficient detail the criticisms which those concerned make of the contested decision (see judgment of 25 October 2013 in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraph 77 and the case-law cited).

38 However, it must be pointed out that, while it is necessary for the subject matter and cause of action to remain the same between the complaint and the application in order to allow disputes to be settled amicably by informing the appointing authority, at the complaint stage, of the criticisms raised by the staff member concerned, the interpretation of those concepts must not have the effect of restricting the possibilities for the staff member properly to challenge a decision adversely affecting him (judgment of 25 October 2013 in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraph 83).

39 That is why the concept of the subject matter of the dispute, which corresponds to the claims of the official concerned, and the concept of cause of action, which corresponds to the legal and factual basis of those claims, must not be interpreted restrictively (judgment of 25 October 2013 in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraph 84).

40 In that context, it must be pointed out in particular that merely changing the legal basis of a dispute is not sufficient for it to be regarded as having a new cause of action. There may be a number of legal bases supporting a single claim and, consequently, a single cause of action. In other words, relying in the application on the infringement of a specific provision which was not relied on in the complaint does not necessarily mean that the cause of action of the dispute has thereby been altered. Regard must be had to the substance of the cause of action rather than merely to the wording of its legal bases, and the Courts of the European Union must ascertain whether there is a close link between its bases and whether they relate in substance to the same claims (judgment of 25 October 2013 in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraph 85)

41 Furthermore, under Article 277 TFEU, notwithstanding the expiry of the period laid down in the sixth paragraph of Article 263 TFEU, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the European Union is at issue, plead the grounds specified in the second paragraph of that article, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

42 As the Civil Service Tribunal correctly pointed out in paragraph 45 of the judgment under appeal (see paragraph 10 above), it is settled case-law that Article 277 TFEU gives expression to the general principle conferring upon any party to proceedings the right to challenge indirectly, for the purpose of obtaining the annulment of an act against which it can bring proceedings, the validity of a previous act of an EU institution which constitutes the legal basis of the contested act, if that party was not entitled to bring a direct action challenging the act which thus affected him without his having been in a position to seek its annulment.

43 Thus, the possibility afforded by Article 277 TFEU of pleading the inapplicability of a rule or act of general application forming the legal basis of the contested implementing act does not constitute an independent right of action and recourse may be had to it only as an incidental plea. Article 277 TFEU may not be invoked in the absence of an independent right of action (judgments of 16 July 1981 in *Albini* v *Council and Commission*, 33/80, EU:C:1981:186, paragraph 17 and of 22 October 1996 in *CSF and CSME* v *Commission*, T-154/94, EU:T:1996:152, paragraph 16; see, to that effect, judgment of 11 July 1985 in *Salerno and Others* v *Commission and Council*, 87/77, 130/77, 22/83, 9/84 and 10/84, EU:C:1985:318, paragraph 36).

44 Since the purpose of Article 277 TFEU is not to enable a party to contest the applicability of any act of general application in support of any action whatsoever, the scope of a plea of illegality must be limited to what is necessary for the outcome of the proceedings. It follows that the general act claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general act in question (see, to that effect, judgment of 20 November 2007, *Ianniello* v *Commission*, T-308/04, EU:T:2007:347, paragraph 33 and the case-law cited). In that regard, the existence of such a connection may be inferred, inter alia, from the finding that the act against which the main action has been brought is essentially based on a provision of an act whose legality is contested (see, to that effect, judgments of 25 October 2006 in *Carius* v *Commission*, T-173/04, EU:T:2006:333, paragraph 46, and of 20 November 2007 in *Ianniello* v *Commission*, T-308/04, EU:T:2007:347, paragraph 33; see, to that effect and by analogy, judgment of 4 March 1998 in *De Abreu* v *Court of Justice*, T-146/96, EU:T:1998:50, paragraphs 25 and 29).

45 Finally, it should be pointed out that the illegality of the act of general application on which the individual decision is based cannot result in the annulment of the act of general application but only of the individual decision to which it has given rise (see, to that effect, judgment of 13 June 1958 in *Meroni* v *Haute Autorité*, 9/56, EU:C:1958:7, paragraph 2). Thus, as the Civil Service Tribunal rightly pointed out in paragraph 45 of the judgment under appeal, Article 277 TFEU aims to protect the litigant against the application of an unlawful legislative act, without affecting the act of general application itself, which has become unchallengeable by the expiry of the limitation periods provided for in Article 263 TFEU. Thus, a judgment which finds that an act of general application is not applicable acquires the force of *res judicata* only with regard to the parties to the dispute which gave rise to that judgment (see, to that effect, judgment of 21 February 1974 in *Kortner and Others* v *Council and Others*, 15/73 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73, EU:C:1974:16, paragraph 36).

46 It is apparent from the case-law set out in paragraphs 42 to 45 above that (i) a plea of illegality can be relied on only incidentally, in the course of an independent action brought before the Courts of the European Union and against an individual decision adversely affecting the applicant, (ii) the independent action must itself be admissible, (iii) the plea is admissible only in so far as the applicant is not entitled to bring a direct action against the act of general application that is connected to the individual decision adversely affecting him, (iv) it is for the Courts of the European Union to declare inapplicable the act of general application which it finds to be unlawful and to draw the consequences of that inapplicability on the individual act adversely affecting the applicant and (iv) that declaration of inapplicability has the force of *res judicata* only with regard to the parties to the dispute and does not have *erga omnes* effect.

47 The scheme of this incidental legal remedy, linked to the introduction of an independent action before the court, justifies that a plea of illegality should be declared admissible where it is raised for the first time before the Courts of the European Union, by derogation from the rule of correspondence between the application and the complaint.

48 It must be pointed out that, in accordance with settled case-law, it follows from the legislative and judicial system established by the Treaty that, although respect for the principle of the rule of law entails, for individuals, the right to challenge before the courts the validity of acts of general application, that principle also imposes upon all persons subject to EU law the obligation to acknowledge those acts are fully effective so long as they have not been declared to be invalid by a competent court (see, to that effect, judgments of 13 February 1979 in *Granaria*, 101/78, EU:C:1979:38, paragraph 5, and of 28 January 2016 in *Éditions Odile Jacob* v *Commission*, C-514/14 P, not published, EU:C:2016:55, paragraph 40).

49 Only the court is entitled, under the terms of Article 277 TFEU, to rule that an act of general application is unlawful and to draw the consequences of the inapplicability which results from this with regard to the act of individual scope contested before it. The institution to which the complaint is made is not afforded such jurisdiction by the Treaties.

50 The ECB argues that, in some cases, the institution may itself be the author of the act of general application — as in the present case — and it is therefore likely to draw the possible consequences of a plea of illegality which is invoked in support of a claim.

51 However, it is not, in this case, a competence which is assigned to it by the Treaties, or by an act of secondary legislation, but a power that the institution may assign to itself.

52 The institution could, of course, where appropriate, withdraw the act of general application of which it is the author, but such a withdrawal does not, however, imply any finding of illegality of that act, as such a finding lies within the competence of the court only.

53 Furthermore, the effects of the withdrawal of an act of general application by the institution, in so far as that institution is the author of that act, differ from those arising from a finding of illegality by the Courts of the European Union: as the withdrawal of an act operates retroactively, it deprives any act adopted under it of its legal basis, including acts that have not been appealed, while the finding of illegality made by the court, as it does not have *erga omnes* effect, entails the illegality of the individual contested decision, but leaves the act of general application in the legal order without affecting the legality of other acts which have been adopted pursuant thereto and which were not challenged within the period for appeal (see, to that effect, judgment of 21 February 1974, *Kortner and Others* v *Council and Others*, 15/73 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73, EU:C:1974:16, paragraphs 37 and 38).

54 Finally, as regards the possible repeal of an act of general application — or the possibility, for an institution, to combine the withdrawal of an act of general application, of which it is the author, with the maintenance of a part of its effects (judgment of 23 November 1999, *Portugal* v *Commission*, C-89/96, EU:C:1999:573, paragraphs 9 to 11) — that is effective for the future only and, therefore, does not affect the legality of the individual decision adopted on the basis of the contested act of general application (see, to that effect, judgment of 13 December 1995, *Exporteurs in Levende Varkens and Others* v *Commission*, T-481/93 and T-484/93, EU:T:1995:209, paragraph 46).

55 In other words, the institution may, clearly, withdraw or repeal an act of general application of which it is the author, where it considers that that act is vitiated by illegality, but such a withdrawal, or such repeal, is not equivalent to a finding of illegality or to the effects that result from such a finding, which may only be determined by the court in accordance with Article 277 TFEU.

56 In such circumstances, the formal requirement of informing the institution, in the context of a complaint, of a plea of illegality of an act of general application, failing which such a plea will be subsequently declared inadmissible before the Courts of the European Union, whereas the fate which that institution may reserve for that plea is not equivalent to a finding of illegality by the Courts of the European Union, in so far as the institution is the author of that act, is contrary to the structure and purpose of the plea of illegality.

57 That assessment is not undermined by the arguments advanced by the ECB in support of the first part of its second ground of appeal.

58 The ECB, supported by the Commission, argues in essence that the Civil Service Tribunal, by acknowledging that the staff member can raise for the first time a plea of illegality before the Courts of the European Union, by derogating from the rule of correspondence, disregarded the purpose of the pre-litigation procedure, which is to find an amicable settlement to the dispute arising between the staff member and the institution to which he belongs.

59 In that regard it should be pointed out that, in accordance with settled case-law, the principle of the rule of law entails, for all persons subject to EU law, the obligation to acknowledge those acts are fully effective so long as they have not been found to be unlawful by a competent court (see paragraph 48 above).

60 That principle cannot be called into question by an institution in order to find an amicable settlement to a dispute, between it and one of its staff members, in the absence of any decision of the court regarding the inapplicability of the act of general application.

61 The Civil Service Tribunal did not make an error of law, therefore, by accepting the admissibility of the plea of illegality on the grounds set out in paragraphs 42 and 45 to 47 of the judgment under appeal.

62 Consequently, in addition to the first part of the second ground of appeal, the third and fourth parts of the second ground of appeal put forward by the ECB, according to which it argues, first, that the Civil Service Tribunal was wrong to hold that the administration had no choice but to apply a rule of general application even though it considered it unlawful and had not taken into account the special situation of the ECB, which is also, in the present case, the author of the provisions applicable to staff (third part), and, secondly, that it misinterpreted the principle of legal certainty (fourth part), must be rejected.

63 For the same reasons, the first part of the third ground of appeal, by which the ECB argues that Civil Service Tribunal was wrong to rule that a plea of illegality cannot be fully effective in the context of an administrative appeal procedure, must also be rejected.

64 In that regard, none of the complaints put forward in support of that first part of the third ground of appeal can succeed.

65 In the first place, the ECB argues that the protection of a litigant against the application of an unlawful act does not preclude the requirement of admissibility criteria in order to validly raise a plea of illegality.

66 Admittedly, it is settled case-law that Article 47 of the Charter is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the courts of the European Union (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97, and order of 29 April 2015, *von Storch and Others* v *ECB*, C-64/14 P, not published, EU:C:2015:300, paragraph 55).

67 It should be noted, in that regard, that the possibility of invoking a plea of illegality in connection with a dispute between a staff member and an institution is subject to several conditions of admissibility: with regard to an incidental legal remedy, this requires that (i) an independent action has been brought, (ii) that it is brought against a decision adversely affecting the official, (iii) that this independent action is admissible, (iv) that the staff member was not able to seek annulment of the act of general application that served as the basis for the decision adversely affecting him, and (v) there is a sufficient connection between the act of general application and the contested individual decision.

68 However, the rationale of the legal framework of the plea of illegality and, in particular, the considerations relating to the fact that the court alone has the authority to determine the inapplicability of an act of general application, lead to the conclusion that raising the plea prior to the complaint stage cannot constitute an additional condition of admissibility.

69 In the second place, the ECB argues that the fact that a plea of illegality may only be invoked incidentally does not preclude raising such a plea in the context of an administrative complaint procedure.

70 Clearly, the incidental nature of the plea of illegality does not make it impossible to raise such a plea at the complaint stage. However, the fact that a staff member is entitled to raise such a plea at the complaint stage does not imply that failure to do so will result in the subsequent inadmissibility of such a plea before the Courts of the European Union.

71 In the third place, the ECB argues that it is important that the administration should be informed, as from the pre-litigation phase, of the possible illegality of a provision of general application in order to safeguard its rights of defence and to act, where appropriate, on a correct legal basis, not only with regard to the staff member who lodged a complaint, but also with regard to all staff.

72 It should be borne in mind that, according to settled case-law, respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in an act adversely affecting that person, a fundamental principle of EU law which must be guaranteed, even in the absence of any rules governing the proceedings in question. That principle requires that the person concerned must be placed in a position in which he can effectively make known his views on any information against him which might be taken into account in the act to be adopted (see order of 12 May 2010, *CPEM* v *Commission*, C-350/09 P, not published, EU:C:2010:267, paragraphs 75 and 76 and the case-law cited).

73 It must be noted, moreover, that, in view of the evolving nature of the pre-litigation procedure, the drawing up of the act establishing the institution's final position terminates with the adoption of the appointing authority's response to the complaint lodged by the member of staff (judgment of 21 May 2014, *Mocová* v *Commission*, T-347/12 P, EU:T:2014:268, paragraph 45).

74 Consequently, it must be held that, in the context of the administrative complaint procedure, the institution cannot claim the benefit of the rights of defence, as it is the author, and not the addressee, of the act capable of adversely affecting the staff member.

75 As to the remainder, the ECB does not dispute that its rights of defence are fully guaranteed in the context of the judicial proceedings, where it is able to present all the arguments that it considers appropriate if a plea of illegality is invoked against it in support of an independent action.

76 For the reasons set out in paragraphs 59 and 60 of the present judgment, the second part of the argument put forward by the ECB in support of that claim must also be rejected, which must therefore be rejected in its entirety, together with the second part of the third ground alleging disregard for the principle of legal certainty.

77 The argument of the ECB regarding the infringement of its rights of defence, advanced in support of the second part of its second ground of appeal must also be rejected.

78 Since the reasons given in paragraphs 42 and 45 to 47 of the judgment under appeal are sufficient to justify the admissibility of a plea of illegality for the first time before the Civil Service Tribunal by way of derogation from the rule of correspondence, it must be held that the other arguments advanced by the ECB must be held inoperative with regard to (i) its first ground of appeal, alleging an erroneous extrapolation by the Civil Service Tribunal of the judgment of 15 September 2011 in *Koninklijke Grolsch* v *Commission* (T-234/07, EU:T:2011:476) to staff cases, as those two types of dispute are

distinct and that extrapolation leads to an erroneous interpretation of the scope of the principle of effective judicial protection in the light of Article 47 of the Charter (first part) and, on the other hand, inadequacy of the grounds (second part), (ii) the first part of the fourth ground of appeal, by which the ECB claims that the Civil Service Tribunal misinterpreted the principle of effective judicial protection and the principle of proportionality, in that it held, inter alia and in essence, that inadmissibility of the plea of illegality at the stage of the action before the Courts of the European Union would constitute a disproportionate penalty for the staff member concerned and (iii) the second part of the fourth ground, alleging that the Civil Service Tribunal did not take into consideration certain facts which are relevant in the present case, namely the fact that Ms Cerafoglia was represented by a lawyer as from the pre-litigation procedure (see, to that effect, judgments of 2 June 1994 in *de Compte* v *Parliament*, C-326/91 P, EU:C:1994:218, paragraph 94, and of 29 April 2004 in *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 68).

79 Consequently, the Court approves the solution adopted by the Civil Service Tribunal accepting the admissibility of a plea of illegality raised for the first time before the Courts of the European Union, by derogation from the rule of correspondence.

80 The appeal must therefore be dismissed.

Costs

81 In accordance with Article 211(2) of the Rules of Procedure of the General Court, where an appeal is unfounded, the Court is to make a decision as to costs.

82 Under Article 134(1) of those Rules, which apply to the procedure on appeal by virtue of Article 211(1) of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the ECB has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by Ms Cerafogli.

83 Under Article 138(1) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 211(1) thereof, the institutions which intervened in the proceedings are to bear their own costs. The Commission must bear its own costs.

On those grounds,

THE GENERAL COURT (Appeal Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders the European Central Bank (ECB) to bear its own costs and to pay those incurred by Ms Maria Concetta Cerafogli;**

3. **Orders the European Commission to bear its own costs.**

Jaeger Prek Dittrich

Frimodt Nielsen Berardis

Delivered in open court in Luxembourg on 27 October 2016.

[Signatures]