



## HIGHLIGHT

# A NEW DEROGATION TO THE ADMISSIBILITY OF AN APPLICATION IN STAFF CASES: THE *CERAFOGLI* JUDGMENT

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On 27 October 2016, the Extended Composition of the Appeal Chamber of the GC rendered the judgment in *ECB v. Cerafogli*.<sup>1</sup> The judgment is particularly important because the GC upheld the reversal of its case-law (*Reali v. Commission*),<sup>2</sup> proposed by the Civil Service Tribunal (CST) in its judgment of 18 September 2014, *Cerafogli v. ECB*.<sup>3</sup> The reversal concerns the conditions of admissibility of an application lodged by EU staff. Indeed, according to Art. 91, para. 2, of the Staff Regulation,<sup>4</sup> EU staff may bring legal proceedings only after exhausting the pre-litigation procedure. In so far as this pre-litigation procedure is to allow for an amicable settlement, at the beginning of the 1970's, the EU judges established the rule of correspondence between the complaint of the pre-litigation procedure and the subsequent action before the judge. This rule means that, for a plea before the EU judges to be admissible, it must have already been raised in the pre-litigation procedure, thus enabling the appointing authority to know in

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<sup>1</sup> General Court, judgment of 27 October 2016, case T-787/14 P, *BCE v. Cerafogli*.

<sup>2</sup> General Court, judgment of 27 October 2010, case T-65/09, *Reali v. Commission*.

<sup>3</sup> Civil Service Tribunal, judgment of 18 September 2014, case F-26/12, *Cerafogli v. Commission*.

<sup>4</sup> Regulation (EU, Euratom) 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union.

sufficient detail the criticisms made of the contested decision. There are, however, one legal and some case-law exceptions to this principle.<sup>5</sup>

With the judgment *BCE v. Cerafogli*, the GC confirmed a new exception holding that the rule of correspondence between the complaint and the application must not be applied to a plea of illegality, which may then be raised for the first time before the EU judges.

Before examining the GC's reasoning, it is worth recalling the CST's reasoning at first instance. The CST's approach was based on four grounds. Firstly, the principle that acts adopted by EU institutions are presumed lawful means that the administration cannot choose to disapply a general measure in force which in its view infringes a higher-ranking rule of law; secondly, the very nature of a plea of illegality is to reconcile the principle of legality and the principle of legal certainty; thirdly, Art. 277 TFEU provides for the possibility of challenging a measure of general application after the expiry of the period for bringing an action only in proceedings before the EU courts, so that such a plea cannot be fully effective in an administrative appeal procedure; fourthly, the sanction of inadmissibility of a plea of illegality raised for the first time in the application constitutes a limitation of the right to effective judicial protection which is not proportionate to the aim pursued by the correspondence rule, namely to permit an amicable settlement of the disputes.

The ECB put forward four grounds in support of its appeal before the GC. After upholding the reasoning of the CST concerning the aim of the plea of illegality, the GC rejected the appeal. The GC ruled that the scheme of this incidental legal remedy justifies that a plea of illegality is declared admissible where it is raised for the first time before it, by derogation from the rule of correspondence between the application and the complaint. Further, the GC held that the institution could withdraw the act of general application of which it is the author, but such a withdrawal does not amount to a finding of illegality, that falls within the exclusive competence of the EU judges. In the light of those findings, the GC judged that the formal requirement of informing the institution, in the context of a complaint, of a plea of illegality of an act of general application, is contrary to the structure and purpose of the plea of illegality. Since the reasons given in the judgment under appeal were sufficient to justify the admissibility of a plea of illegality raised for the first time before the CST by way of derogation from the rule of correspondence, the GC held that the other arguments advanced by the ECB were inoperative.

As already mentioned, the *Cerafogli* judgment is very important because with this decision, the GC intervenes yet again on the conditions of admissibility of staff cases.

<sup>5</sup> M.F. ORZAN, *La phase précontentieuse dans le domaine de la fonction publique européenne, à la lumière de la récente jurisprudence du Tribunal de l'Union européenne*, in *Revue des affaires européennes*, 2014, p. 582.

Indeed, in its role as an appeal judge, the GC has already given a ruling on the conditions of admissibility in the light of the rule of correspondence. However, in the *Moschonaki* judgment,<sup>6</sup> the GC did not uphold the relaxation of the conditions of admissibility proposed by the CST<sup>7</sup> which confirmed the principle established in the *Mandt* case (which was not appealed before the GC).<sup>8</sup> In *Mandt*, the CST ruled that the correspondence rule is not observed, only where the applicant who criticises in his complaint solely the formal validity of the act adversely affecting him, raises substantive pleas in the originating application, or in the opposite case where the applicant, after having disputed in the complaint only the substantive legality of the act adversely affecting him, submits an application containing pleas relating to the formal validity of that act, including its procedural aspects.<sup>9</sup> Nevertheless, the CST held that an applicant may raise for the first time before the EU judges different pleas of the same nature (substantive or procedural legality)<sup>10</sup>. In *Moschonaki*, the GC did not accept the CST's reasoning. It ruled that although the applicant raises pleas of the same nature (substantive or procedural legality) before the EU judges, if those pleas are different, the rule of correspondence is not respected. Indeed, the GC held that the CST's reasoning would allow the claimant to raise for the first time in the application pleas not discussed during the pre-litigation procedure and completely different from pleas disputed in the complaint. Nevertheless, in the same judgment, the GC pointed out that claims before the EU judges 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 judges by the presentation of pleas in law and arguments which, whilst not necessarily appearing in the complaint, are closely linked to it.<sup>11</sup> Moreover, the GC held that if in the rejection of the complaint, for the first time, the administration explains the reasons why the complaint cannot be accepted, the claimant may raise before the judges the pleas against these reasons in derogation to the rule of correspondence.<sup>12</sup>

The GC's reasoning in *Cerafogli* is based on the nature of the plea of illegality. The division of jurisdiction between the judges and the administration means that only the judges have the power to come to a finding of illegality of an act and, thus, the rule of correspondence, which is founded on the need to guarantee the aim of the pre-litigation procedure, which is the amicable settlement of disputes, would be worthless. The judgment is quite important because this opening up of the GC could have a remarkable impact. Indeed, during the pre-litigation procedure, EU staff may have a lawyer, but they

<sup>6</sup> General Court, judgment of 25 October 2013, case T-476/11 P, *Moschonaki v. Commission*.

<sup>7</sup> Civil Service Tribunal, judgment of 28 June 2011, case F-55/10, *AS v. Commission*.

<sup>8</sup> Civil Service Tribunal, judgment of 1 July 2010, case F-45/07, *Mandt v. Parliament*.

<sup>9</sup> *Ibid.*, para. 120.

<sup>10</sup> *Ibid.*, para. 122.

<sup>11</sup> *Moschonaki v. Commission*, cit., para. 73.

<sup>12</sup> *Ibid.*, para. 86.

are not obliged to. The fact that now pleas of illegality may be raised for the first time before the GC, where there is an obligation for the applicant to be represented by a lawyer, could increase the numbers of pleas of illegality before the EU judges.