

**ORDER N°2/2012 OF THE ORGAN OF FIRST INSTANCE OF THE EUROPEAN  
UNIVERSITY INSTITUTE**

Concerning an appeal introduced under Article 2, paragraph 3 of the Common Provisions  
by

- X, appellant,

v

- The European University Institute, via dei Roccettini 9, 50014 San Domenico di Fiesole, Italy, represented initially by the then Principal of the European University Institute, Mr Josep Borell Fontelles, and subsequently by the Principal ad interim, Professor Marise Cremona, respondent,

against the implied decision of the Principal of the European University Institute ("EUI") rejecting a complaint by the appellant dated 22 October 2011 concerning certain decisions of the Secretary General of the EUI of 19 July 2011.

**THE ORGAN OF FIRST INSTANCE**

Member of the Organ of First Instance exercising the judicial function: D. O’Keeffe,

Secretary of the Organ of First Instance: Mrs Silvia Salvadori,

Having regard to the written procedure,

Gives the following

**ORDER**

**FACTS**

1. An Appeal was lodged by X ("the appellant") by letter dated 22 May 2012 against the implied decision of the Principal of the EUI ("President") rejecting a complaint by the appellant dated 22 October 2011 concerning certain decisions of the Secretary General of the EUI of 19 July 2011. The Appeal bears the date 22 May 2012 and was sent by registered post on that date. It was received at the EUI and by the Secretary of the Organ of First Instance ("OFI") on 23 May 2012.
2. According to the facts set out in the Appeal, the appellant lodged a complaint dated 22 October 2011 concerning the decisions of the Secretary General of the EUI of 19

July 2011, which he claimed were notified to him on 22 July 2011. A copy of the complaint was not attached to the Appeal, nor was any supporting documentation. It appears from the Appeal that the President did not reply to the complaint.

3. According to Article 1(2) of the Common Provisions, a complaint may be submitted to the Principal by any person to whom paragraph 1 of the Common Provisions applies, against an act adversely affecting him. The complaint must be lodged within three months. In the case of an individual measure, the period shall start to run on the day of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification. The Principal shall notify the person concerned of his decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under Article 2 of the Common Provisions.
4. According to Rule 14(4) of the Rules of Procedure, appeals to the OFI must be submitted in writing within three months of the date of notification of the Principal's decision on a complaint or of expiry of the period prescribed in Article 74(2), now Article 1(2), of the Common Provisions. On the basis of the facts set out in the Appeal, that period appeared to have expired on 22 February 2012. It appeared to follow, on the basis of the facts set out in the Appeal, that the appeal should have been lodged at the OFI within three months, by 22 May 2012, whereas in fact it was lodged on 23 May 2012.

## **PROCEDURE**

5. On the basis of the information given in the Appeal and considering the date the appeal was lodged, it appeared to the OFI that the appeal *prima facie* raised issues concerning the respect of time-limits, which are a matter of public policy, which it was obliged to examine. However as the OFI considered that the Appeal did not provide supporting documentation without which it was impossible to verify the applicable time-limits, it considered that it was appropriate to ask the parties to answer certain questions concerning the respect of time-limits. Accordingly, on 28 May 2012, without engaging the procedure under Rule 16 (1) of the Rules of Procedure and acting under Rule 40 thereof, the OFI granted the appellant and the EUI the opportunity to lodge observations as regards the issue of the respect of time-limits only.
6. The EUI replied to the OFI on 6 June 2012. The EUI maintained that the appeal was out of time as the underlying complaint was out of time. The decisions of the

Secretary General at the origin of the complaint were dated 19 July 2011 and were brought to the appellant's notice according to the information contained in the Appeal on 22 July 2011. His complaint should therefore have been introduced by 22 October 2011. However his complaint, dated 22 October 2011, was not received by the President's office until 26 October 2011 (as attested by the date stamp of receipt affixed by the President's office). Referring to the case-law of the courts of the European Union, the EUI maintains that the complaint was therefore lodged out of time, as the applicable time is the date of reception by the President, and not the date of posting.

7. The EUI adds that even if the complaint was deemed to have been lodged on 22 October 2011, which it contests, in any event the appeal must be deemed to have been lodged outside the time limits as only the date of lodging with the Secretary of the Organ of First Instance should be taken into account as regards compliance with the time limits. In the present case, the appeal was lodged on 23 May 2012, that is out of time, even if one considered that time should have started to run on 22 February 2012 to appeal an implied decision to reject a complaint.
8. The appellant replied to the OFI on 26 June 2012. He stated that the decisions of the Secretary General of 19 July 2011 were received by him on 22 July 2011. He also provided documentary proof that his appeal was sent by registered post on 22 May 2012 to the Secretary of the OFI.
9. The appellant maintained that since the appeal was posted on 22 May 2012, it falls within the time-limits. He argues that there is insufficient information available as to whether the appeal should be received by a specific day and time or whether the post-mark is equally valid. He also remarks that it is difficult to predict if a document sent by registered mail will arrive by the deadline.
10. The OFI subsequently requested further information from the parties on 29 June 2012 and 2 July 2012. From the documentary proof provided by the EUI by letter dated 6 July 2012, it appears that the decisions of the Secretary General of 19 July 2011 were actually received by the appellant on 23 July 2011. This is attested by the signature and date on the return receipt for the letters which were sent by registered post.
11. From the documentary proof provided by the appellant by letter dated 4 July 2012, it appears that the complaint dated 22 October 2011 was received at the EUI on 25 October 2011. This is attested by the signature and date on the return receipt for the complaint which was sent by registered post.

## **FORMS OF ORDER SOUGHT BY THE PARTIES**

12. The appellant seeks the annulment of the second evaluation of EUI competitions IUE/5/2009 and IUE/6/2009 and re-evaluate the appellant's applications using the identical evaluation criteria as the ones used in the first evaluation. He also seeks disclosure of relevant documents of the first and second evaluation to the appellant, in order to make it possible to verify that the rules are correctly applied and Judgment No. 1/2011 correctly implemented. He also seeks material and moral damages.

The EUI claims that the Organ of First Instance should declare the appeal to be manifestly inadmissible without going to the substance of the case and to strike the appeal from the list of cases.

## **FINDINGS**

13. Article 1, paragraph 2 of the Common Provisions provides that any person to whom Article 1, paragraph 1 of the Common Provision applies may submit to the Principal a complaint against an act adversely affecting him, either where the Principal has taken a decision or where he has failed to adopt a measure prescribed by the Conditions of Employment of Teaching Staff, the Service Rules for Administrative Staff or the Common Provisions. The complaint must be lodged within three months. In the case of an individual measure, the period shall start to run on the day of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification. The Principal shall notify the person concerned of his decision, which must be reasoned, within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged before the OFI.
14. Rule 14(4) of the Rules of Procedure provides that appeals to the OFI must be submitted in writing within three months of the date of notification of the Principal's decision on a complaint or of the expiry of the period prescribed in Article 74(2), now Article 1(2), of the Common Provisions.
15. The Rules of Procedure do not appear to deal with the case of an appeal being lodged outside the time limits because the underlying complaint against which the appeal is directed was itself lodged outside the time limits. Without it being necessary to rule on the matter, Rule 18(1(b)) apparently refers to the situation of an appeal which has already been validly lodged. The matter therefore falls to be decided under Rule 40.

16. It follows from the case-law of the Courts of the European Union that the OFI may strike out appeals of its own motion. In particular, in the present case, it appears obliged to do so for the reasons set out below. It appears from the constant case-law of the Courts of the European Union that it is not always necessary to await an application by one of the parties, as this would lead to costs being needlessly incurred by the parties, which contrasts with the general principle of economy of procedure. This problem would be even greater in the case of unreasonable or vexatious actions.
17. In Case 154/99P, *Politi v. European Training Foundation* [2000] ECR I-5032, the European Court of Justice held that the periods for lodging complaints and bringing actions referred to in the Staff Regulations are matters of public policy and cannot be left to the discretion of the parties or the Court, which must ascertain, of its own motion if need be, whether they have been complied with. Those periods meet the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (see, in particular, Case 79/70 *Müllers v Economic and Social Committee* [1971] ECR 689, paragraph 18, and Case 276/85 *Cladakis v Commission* [1987] ECR 495, paragraph 11).
18. It follows from the rulings in Case T-78/91, *Moat and TAO/AFI v. Commission* [1991] ECR II-1388, Case T-1/91, *Della Pietra v. Commission*, [1992] ECR II-2147, and *Politi* that the OFI must determine of its own motion if need be whether the periods for lodging complaints and bringing appeals referred to in the Common Provisions have been complied with. It is the constant case-law of the European Union Courts that where an appeal is brought against a decision relating to a complaint which was itself lodged out of time, the appeal must be ruled out of time and therefore inadmissible as there is an absolute bar to proceeding because the underlying complaint was itself out of time and inadmissible (see the principles outlined in Case 55/64, *Lens v Court of Justice* [1965] ECR 837; Case 103/79, *Moat v. Commission* [1980] ECR 2579; Joined Cases 122 and 123/79, *Schiavo* [1981] ECR 473; Case 38/84, *K. v. European Parliament* [1985] 1267; Case 257/85, *Dufay* [1987] 1561; Case 232/85, *Becker v. Commission* [1986] ECR 3401; Case 231/84, *Valentini v. Commission* [1985] ECR 3027; Case T-455/04, *Beyatli v Commission*, [2007 FP-I-A-2-00071]; FP-II-A-2-00511; Order of the European Civil Service Tribunal of 10 September 2007 in *Speiser v. Parliament*; Case F-93/05, *Mische v. Commission*, judgment of the European Civil Service Tribunal of 29 September 2011, at para. 28).
19. When an individual introduces a complaint he is bound by all the rules governing that procedure includes a respect for the time-limits set out in the complaints procedure (see Case T-1/91, *Della Pietra v. Commission*, [1992] ECR II-2147, Case 192/94, *Maurissen v. Court of Auditors* [1996] ECR II-1229).

20. It follows from the Order of the Court of First Instance in Case T-78/91, *Moat and TAO/AFI v. Commission* [1991] ECR II-1388, that a staff case must necessarily be preceded by a complaint which has been rejected by express or implied decision. Indeed it is the constant case-law of the European Courts that an action brought before that preliminary period has been completed is premature and therefore inadmissible (see Case 130/86, *Du Besset v. Council*, Order of the European Court of Justice, [1986] ECR 2619 at 2621; Case 410/85, *Schina v. Commission*, judgment of the European Court of Justice [1987] ECR 3911 at 3929 and the judgment of the Court of First Instance in Case T-47/89, *Marcato v. Commission* [1990] ECR II-232 at para. 32).
21. Where there exists an absolute bar to proceeding (“une fin de non-recevoir d'ordre public”), the Community judicature may raise this issue of its own motion (see Case T-310/00, *MCI v. Commission* [2004] ECR II-3256 at para. 45). Likewise in Case C-341/00 P, *Conseil National des professions de l'automobile and Others v. Commission* [2001] ECR I-5266 at para. 32, the European Court of Justice held that where there is an absolute bar to proceeding the Community judicature may consider it at any time, even of its own motion (“une fin de non-recevoir d'ordre public que les juridictions communautaires peuvent à tout moment examiner, même d'office”).
22. It follows from the foregoing considerations that the OFI is entitled to examine the question of admissibility of an appeal of its own motion where there is an absolute bar to proceeding due to non-observance of the time-limits for lodging the complaint against which an appeal is directed, where an appeal is brought against an implied decision relating to a complaint which was itself lodged out of time. In those circumstances the appeal must be ruled out of time and therefore inadmissible and there is an absolute bar to proceeding because the underlying complaint was itself inadmissible.
23. In the present case, the OFI makes a finding of fact that the decisions of the Secretary General of the EUI of 19 July 2011 were officially notified to the appellant on 23 July 2011. This is proven by the signature and date on the return receipt for the letters of the Secretary General which were sent by registered post. It follows that according to Article 1(2) of the Common Provisions, the time-limit for lodging a complaint with the Principal was 23 October 2011.
24. The OFI takes judicial notice of the fact that 23 October 2011 fell on a Sunday, when it was materially impossible for the complaint to be received, due to the internal arrangements of the EUI regarding receipt of post at weekends. This situation is not specifically covered by the Rules of Procedure applicable to the OFI. It is therefore appropriate to have regard to the Rules of Procedure of the Courts of the European

Union, which should inspire the interpretation of the Rules of Procedure applicable to the OFI. The Rules of Procedure of the Courts of the European Union state clearly as regards the expiry of time-limits, "If the period would otherwise end on a Saturday, Sunday or official holiday, it shall be extended until the end of the first following working day." (See Article 100(2) of the Rules of Procedure of the European Civil Service Tribunal, Article 101(2) of the Rules of Procedure of the General Court of the EU and Article 80(2) of the Rules of Procedure of the European Court of Justice).

25. It follows that the three-month time-limit in question in the present appeal should be deemed to expire on the first full working day following Sunday 23 October 2011, that is Monday 24 October 2011.
26. The OFI makes a finding of fact that the appellant's complaint to the President dated and posted on 22 October 2011 was received at the EUI on 25 October 2011. This is proven by the signature and date on the return receipt for the complaint which was sent by registered post.
27. It is settled case-law of the European Union Courts that a complaint is lodged not when it is sent to an institution, but when it is received by it (see Case F-93/05, *Mische v. Commission*, judgment of the European Civil Service Tribunal of 29 September 2011, at para. 29; and of 13 December 2007 in Case F-73/06, *Van Neyghem v Commission*, paragraph 43, and the judgment of the European Court of Justice of 26 November 1981 in Case 195/80, *Michel v Parliament*, paragraphs 8 and 13).
28. Since the complaint was received at the EUI after 24 October 2011, the complaint was submitted outside the time-limits.
29. As the underlying complaint was out of time, the current appeal seeking the annulment of the implied decision to reject that complaint must be deemed to be out of time. There is an absolute bar to proceeding. The appeal is therefore inadmissible. It is unnecessary to consider whether other issues of admissibility arise. It is therefore appropriate to strike the appeal from the list of cases, without it being necessary to further hear the parties as the OFI has all the necessary factual and legal background to rule on the matter.

### **COSTS**

30. Article 2(6) of the Common Provisions provides that the European University Institute shall bear its own costs. The appellant should bear his own costs.

On those grounds

THE ORGAN OF FIRST INSTANCE

hereby orders as follows

1. The appeal shall be removed from the list of cases as there is an absolute bar to proceeding.
2. Each party shall bear its own costs.

Member of the Organ of First Instance: D. O’Keeffe

Secretary of the Organ of First Instance: Silvia Salvadori

Given on 10 July 2012