

**ORDER N°1/2012 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 by the Principal of the European University Institute, Mr Josep
Borell Fontelles, respondent,

against the implicit rejection of the Principal of the European University Institute not to
provide information requested by the appellant on 4 April 2011 concerning the current
composition of the High Council of the EUI and the contact information of its members.

THE ORGAN OF FIRST INSTANCE

Member of the Organ of First Instance exercising the judicial function in accordance with
Articles 2 and 3 of Decision 8/06 of the High Council of 8 December 2006 establishing
an Organ of First Instance within the Appeals Board of the European University Institute:
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” (hereinafter “the appellant”) by letter dated 2
November 2011 against the implicit rejection of the Principal of the European
University Institute (hereinafter “the EUI”) not to provide information requested by
the appellant on 4 April 2011 concerning the composition of the High Council of the
EUI and the contact information of its members. The appeal was received by the
Secretary of the Organ of First Instance on 4 November 2011.

2. On 4 April 2011, the appellant requested the Principal of the EUI to provide him with the fully complete and updated list of the members of the EUI's High Council. The appellant requested the President to provide the following information: (i) whom the members are representing; (ii) since when they are acting on the High Council; (iii) their complete current contact details; (iv) the function they occupy in the High Council. The appellant noted that the requested information was not publicly available on the EUI's web-site, that a list of High Council members which appeared as an annexe to the President's Annual Report 2010 referred to 2009 and did not contain all the information requested. The appellant stated that he made his request as a citizen of two EUI member states, as a former employee of the EUI, and as a person who had legitimately filed an appeal to the Organ of First Instance.
3. The appellant did not receive a reply from the Principal.
4. The appellant states that the Principal should have replied to his request within 4 months, and that a failure to reply within that period should be considered as a rejection of the request. He maintains that what needs to be done in case the person who filed the request does not accept the rejection is not fully clear. He states that upon rejection the person who has filed the request has 3 months to file a complaint with the EUI Principal. However the appellant states that given the fact that the Principal rejected a request which concerned him and him alone and not someone else in the EUI administration, it is unclear to the appellant whether he should file a complaint with the Principal giving him a further 4 months to decide or whether he should file an appeal to the Organ of First Instance. The appellant states that given the confusion and his legitimate right to a speedy justice, he filed on the same day, 2 November 2011, both a complaint with the Principal and this appeal, which are identical in contents.
5. The appellant maintains that the information requested should be publicly available on the EUI's web-site. According to the appellant the only information the EUI provides is a section on the High Council on the EUI web-site, and a list of the persons who participated in High Council Meetings is published in the EUI President's Annual Reports. He argues that it cannot be assumed that these lists are fully accurate and updated. He also complains that the list as published does not contain contact information.
6. The appellant gives three reasons why the issue of getting direct access to High Council members is particularly important to him. First, he wishes to address the High Council on the issue of the status of the High Council document "Guidelines concerning the EUI's recruitment policy" (IUE/150/5 (CS4) which was mentioned in

Judgment N° 1/2011 of the Organ of First Instance of 29 April 2011 (*IB v. EUI*) and was never fully clarified. Second, he wishes to address with the High Council issues relating to the inadequate functioning of the EUI's system of judicial review. Third, the appellant maintains that he requires direct access to the High Council rather than through the Principal.

PROCEDURE

7. The Organ of First Instance decided that it was appropriate in the context of the present appeal to examine first the question of admissibility. On 11 November 2011, without engaging the procedure under Rule 16 (1) of the Rules of Procedure and acting under Rule 40 thereof, the Organ of First Instance addressed the following questions to the EUI:
 1. Does the Organ of First Instance have the power to declare an appeal manifestly inadmissible, notwithstanding Article 3 (1) first sub-paragraph of Decision 8/06 of the High Council of 8 December 2006 establishing an Organ of First Instance within the Appeals Board of the European University Institute?
 2. Has the appellant substantiated the grounds of admissibility of his appeal in accordance with Rule 17(1) of the Rules of Procedure? In particular: (a) Is the current appeal admissible given that it does not concern a decision of the Principal which implicitly or explicitly rejects a complaint, nor does it concern a request for stay of execution or for provisional measures? (b) Was the appellant on 4 April 2011 a person to whom Article 1 of the Common Provisions applied? (c) Did the request for information made by the appellant on 4 April 2011 constitute a request that the Principal should take a decision relating to him, within the meaning of Article 1(1) of the Common Provisions
8. The EUI replied to the questions posed by the Organ of First Instance on 12 January 2012. On the same day, it also introduced an application requesting the Organ of First Instance to rule on the admissibility of the appeal without going to the substance of the case.

FORMS OF ORDER SOUGHT BY THE PARTIES

9. The appellant claims that the Organ of First Instance should order the EUI to make the full list of current representatives of the EUI's members available with their current contact addresses (postal, e-mail and phone) to the appellant and on the EUI's web-site and to commit to its continuous updating. While not contained in the initially denied request, the appellant also claims that the EUI should also disclose

publicly on its web-site how much direct and indirect financial and in-kind support it receives from each of its members. The appellant makes no application concerning costs.

The EUI claims that the Organ of First Instance should declare the appeal, at the request of the EUI, to be manifestly inadmissible without going to the substance of the case. It also requests the Organ of First Instance, in conformity with Article 2(6) of the Common Provisions, to order the appellant to pay the EUI's costs.

LEGAL CONTEXT

10. According to Article 1, paragraph 1, of the Common Provisions, any person to whom the Conditions of Employment of Teaching Staff, the Service Rules for Administrative Staff (Staff Regulations and the Conditions of Employment for Other Servants) and the Common Provisions apply, may submit to the Principal a request that he take a decision relating to him. If at the end of a four month period, no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged to the Principal in accordance with Article 1, paragraph 2 of the Common Provisions.
11. 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. 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 under Article 2 of the Common Provisions.
12. Article 2 of the Common Provisions deals with appeals. It follows from Article 2(3) of the Common Provisions that the Organ of First Instance may be asked to deal only with a decision of the Principal which implicitly or explicitly rejects a complaint, as laid down in Article 1 of the Common Provisions, as well as requests for stay of execution or for provisional measures.

PROVISIONS CONCERNING ADMISSIBILITY

13. According to Rule 17(1) of the Rules of Procedure, the appellant must substantiate the grounds of admissibility of his appeal, as mentioned in Article 1 of the Common Provisions.
14. Rule 17(2) of the Rules of Procedure states as follows: “If, in a reasoned report sent to members of the [Appeals] Board, the Chairman considers the appeal to be manifestly inadmissible and they do not raise any objections within two months, the appellant shall be informed without delay that his appeal has been declared inadmissible for the reasons set out in the report, of which he shall be sent a copy.”
15. Rule 18(2) of the Rules of Procedure provides that the Board may strike out an appeal, ruling in accordance with the procedure set out in Rule 17(2).
16. According to Article 3 (1) first sub-paragraph of Decision 8/06 of the High Council of 8 December 2006 establishing an Organ of First Instance within the Appeals Board of the European University Institute (hereinafter “Decision 8/06”), without prejudice to the second and third subparagraphs of Article 3 (1), the Rules of Procedure of the Appeals Board shall apply *mutatis mutandis* before the Organ of First Instance, with the term “Board” thus referring to the Organ of First Instance, and the term “the Chairman” (of the Board) referring to the member of the Organ exercising judicial functions at the level of first instance in the case concerned.
17. According to Article 3 (1) second sub-paragraph of Decision 8/06, “As it conflicts with the purpose of the Organ, the first subparagraph of Rule 35 of the Rules of procedure is inapplicable”. That provision provides that judgments shall not be appealable.
18. According to Article 3 (1) third sub-paragraph of Decision 8/06, “As the judicial function is exercised by one sole member, Rules 17(2), 18(2) and 31 of the rules of procedure are inapplicable” to the Organ of First Instance. Rule 31 refers to situations where a member is replaced by another member during the course of the oral proceedings.

OBSERVATIONS SUBMITTED BY THE EUI

19. The EUI submitted two documents, one in reply to the questions posed by the Organ of First Instance, the other being an application requesting the Organ of First Instance to rule on the admissibility of the appeal without going to the substance of the case.

The EUI suggests various grounds for dismissing the appeal such as manifest inadmissibility or manifest lack of competence.

20. In its reply to the questions posed by the Organ of First Instance, the EUI notes that there is a growing number of complaints, some of which are frivolous, and it considers it essential to clarify the rules as regards novel situations, requiring an interpretation of the existing rules.
21. The EUI maintains that the Organ of First Instance is manifestly not competent to rule on this matter as Article 2 of the Common Provisions governing appeals to the Organ of First Instance only applies to persons to whom Article 1 of the Common Provisions apply. The EUI maintains that on 4 April 2011, when the appellant made his request to the Principal, he was not a person to whom Article 1 of the Common Provisions applied as he was neither a member of the staff of the EUI within the meaning of the Staff Rules nor was he a candidate for an open competition. The EUI adds that even if the appellant is to be considered, as a former employee of the EUI and as a former candidate for competitions organised by the EUI, as a person to whom the Staff Regulations apply within the meaning of Article 1 of the Common Provisions, then the question remains as to whether a “decision” has been taken concerning him.
22. The EUI notes that under the system of complaints and appeals under Articles 1 and 2 of the Common Provisions, an appeal to the Organ of First Instance may only concern an act adversely affecting the appellant, either where the Principal has taken a decision or where he has failed to adopt a measure prescribed by the applicable Staff Rules. In the present case, the Principal was not obliged to give the requested information to the appellant. His implicit refusal to do so cannot be considered to be an act adversely affecting the appellant as it does not meet the test set by the case-law of the European Court of Justice according to which such an act is “any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position”. Since the appellant’s request for information could not produce a decision adversely affecting him, it follows that the appellant’s request for information cannot be classed as a “request” within the meaning of Article 1 of the Common Provisions.
23. The EUI maintains that it follows from Articles 1 and 2 of the Common Provisions that an appeal is admissible only if the appellant has previously made a complaint against an act adversely affecting him, in accordance with Article 1(2) of the Common Provisions, whereas here, even if one considered the request for information to be a “request” within the meaning of Article 1(1) of the Common Provisions, the appellant introduced the appeal directly which was received on 4 November 2011,

without awaiting the expiry of the time-limits following his complaint to the Principal on 2 November 2011. The EUI claims that the appeal is also manifestly inadmissible as it does not show the appellant's interest to act, nor does it explain the purpose of the appeal or the arguments relied on.

24. As regards the question whether the Organ of First Instance has the power to declare an appeal manifestly inadmissible, notwithstanding Article 3 (1) first sub-paragraph of Decision 8/06, the EUI maintains that the Organ of First Instance may not, of its own motion, reject an act as manifestly inadmissible under Rule 17(2), nor may it avail of Rule 18(2) to strike out a case. However it argues that these provisions do not apply to other procedural issues, such as manifest incompetence, no need to adjudicate (“non lieu à statuer”), absolute bar to proceeding (“fins de non-recevoir d’ordre public”) or applications for a decision not going to the substance of the case. The EUI also maintains that the Organ of First Instance may legitimately reject an appeal at the request of a party without violating Article 3 (1) first sub-paragraph of Decision 8/06. The EUI notes that the Rules of Procedure of the different Courts of the European Union confer on those Courts powers to declare an action manifestly inadmissible and also to rule, at the request of one of the parties, on admissibility, on lack of competence or other preliminary plea not going to the substance of the case (see Articles 91, 114 and 78 of the Rules of Procedure of the Court of Justice of the European Union, the General Court and the European Union Civil Service Tribunal). For this reason, the EUI has submitted a separate application requesting the Organ of First Instance to hold the appeal manifestly inadmissible without going to the substance of the case.
25. The EUI further maintains that the Organ of First Instance may, of its own motion, reject the appeal as inadmissible if there is an absolute bar to proceeding such as lack of locus standi, absence of interest to act, or failure to respect the procedure and the time-limits.
26. Finally the EUI asks that the appellant be condemned to pay all the costs of the appeal in conformity with Article 2(6) of the Common Provisions on the grounds that it is unreasonable and vexatious.
27. In its separate application requesting the Organ of First Instance to hold the appeal manifestly inadmissible without going to the substance of the case, the EUI maintains the same reasoning as in the reply to the questions posed by the Organ of First Instance. It claims that the appeal is manifestly inadmissible for a series of reasons which it offers as cumulative or alternatives: the appellant has no locus standi, there is no act adversely affecting the appellant, and/or the appellant has not respected the

pre-litigious procedure provided by Article 1 of the Common Provisions. The EUI notes that all the national and European systems provide for the possibility to reject cases as being manifestly inadmissible without going to the substance of the case, and that the solution it proposes, a ruling on manifest inadmissibility on the application of one of the parties, should be available to the Organ of First Instance. This would discourage appeals which abuse the system, which it maintains is the case of the present appeal. Accordingly it requests the Organ of First Instance, in conformity with Article 2(6) of the Common Provisions, to order the appellant to pay the EUI's costs.

FINDINGS OF THE ORGAN OF FIRST OF FIRST INSTANCE

28. The current appeal was lodged in the absence of a decision of the Principal which implicitly or explicitly rejects a complaint. It does not concern a request for stay of execution or for provisional measures. It therefore prima facie raises questions of admissibility on the ground that there is an absolute bar to proceeding (“fin de non-recevoir d'ordre public”).
29. It appears from a literal reading of the Rules of Procedure as amended by Article 3 (1) third sub-paragraph of Decision 8/06 that the Organ of First Instance does not have the express power under Rule 17(2) of the Rules of Procedure, to declare of its own motion an appeal manifestly inadmissible in the case of an appeal which does not concern a decision of the Principal which implicitly or explicitly rejects a claim, as laid down in Article 1 of the Common Provisions, or a request for stay of execution or for provisional measure. Moreover, according to the same literal reading, it appears that the Organ of First Instance has no express power as regards manifest inadmissibility concerning appeals which are lodged by persons to whom Article 1 of the Common Provisions does not apply, or even as regards frivolous or vexatious appeals.
30. This situation raises questions of public policy concerning the correct administration of justice. It also raises concerns given the administrative and financial burden imposed on the EUI in responding to such appeals. Accordingly the Organ of First Instance examined whether an alternative interpretation of the Rules of Procedure as amended by Article 3 (1) third sub-paragraph of Decision 8/06 was available.
31. A possible interpretation of the Rules of Procedure as amended by Article 3 (1) third sub-paragraph of Decision 8/06 would be to conclude that the amendment concerning Rule 17(2) refers simply to the specific collegiate procedure prescribed therein, which allows for “Chairman’s action” concerning manifest inadmissibility, while still

preserving the possibility of intervention by other Member of the Appeals Board, thus preserving the collegiate character of the Board. On this view, the amendment to Rule 17(2) operated by Decision 8/06 simply referred to the inapplicability of the collegiate procedure in the case of the Organ of First Instance as it is not a collegiate body. This interpretation is arguably strengthened by the explanation in Article 3(1) third sub-paragraph that Rules 17(2), 18(2) and 31 of the Rules of Procedure are inapplicable to the Organ of First Instance “as the judicial function is exercised by one sole member”. Similarly, in the French language version, the text states “*Du fait même que la fonction juridictionnelle est exercée par un membre unique, l'article 17, paragraphe 2, l'article 18, paragraphe 2, et l'article 31 du règlement de procédure ne sont pas applicables.*” (emphasis added) If this interpretation were accepted, then the Rules of Procedure should be interpreted to mean that the Organ of First Instance preserved the power to rule of its own motion on manifest inadmissibility but no specific procedure was prescribed on the ground that it was unnecessary as the judicial function is exercised by one sole member.

32. Further support for this interpretation comes from the rules concerning discontinuance. As a result of Article 3 (1) third sub-paragraph of Decision 8/06, no express procedure is provided for the Organ of First Instance to strike an appeal out of its list of cases. On the other hand, the power for the Organ of First Instance to strike out an appeal at the request of the appellant appears to be conserved, under Rule 18 (1), together if necessary with Rule 40.
33. The situation is different with regard to manifest inadmissibility. Unlike the case of discontinuance, in the absence of Rule 17(2), there appears to be no express power for the Organ of First Instance to dismiss a case on the ground of manifest inadmissibility, either of its own motion or at the request of one of the parties. Moreover the EUI legislator, in adopting Decision 8/06, expressly referred to Article 17 when providing in Article 6(2) of that Decision that the Appeals Board may apply to manifestly ungrounded appeals the procedure established in Rule 17 of the Rules of Procedure for manifestly inadmissible appeals. It appears to the Organ of First Instance, in the absence of a definitive ruling by the Appeals Board on the point, that this confirms that the legislator purposefully denied the Organ of First Instance an express power to reject manifestly inadmissible appeals and that the alternative interpretation explored above should therefore not be adopted.
34. However this finding does not lead to the conclusion that the Organ of First Instance may not reject appeals on other grounds of admissibility 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.

35. In the present case, the appellant lodged a complaint with the Principal dated 2 November 2011. His appeal to the Organ of First Instance, also dated 2 November 2011, was received on 4 November 2011. He thus did not follow the procedure prescribed by Articles 1 and 2 of the Common Provisions or await the expiry of the time-limits set out therein.
36. 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).
37. It is constant case-law that when an individual introduces a complaint he is bound by all the rules governing that 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). This includes a respect for the time-limits set out in the complaints procedure.
38. 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).
39. It follows from the judgments in *Moat*, *Della Pietra*, *Politi* and the other case-law cited above that the Organ of First Instance 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 and must hold that an appeal which has been brought before a complaint has been rejected by express or implied decision is premature and therefore inadmissible as there is an absolute bar to proceeding.

40. It is the constant case-law of the European courts that where there exists “une fin de non-recevoir d'ordre public” (translated in English as “absolute bar to proceeding”), 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”).
41. It follows that the Organ of First Instance is entitled to examine the question of admissibility of its own motion where there is an absolute bar to proceeding .
42. In the present instance, it follows from the Common Provisions and from the case-law cited above, that the appeal should have been preceded by a complaint which was rejected by express or implied decision. Since that is not the case, the appeal is premature and 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 dismiss the appeal, without it being necessary to further hear the parties as the Organ of First Instance has all the necessary factual and legal background to rule on the matter.
43. Given the conclusion reached above by the Organ of First Instance on its own motion, it is not necessary to rule on the separate application of the EUI requesting the Organ of First Instance to declare the appeal inadmissible without going to the substance of the case.

COSTS

44. As regards the request of the EUI contained in both its reply to the questions of the Organ of First Instance and in its separate application, that the appellant be condemned to pay all the costs of the appeal in conformity with Article 2(6) of the Common Provisions it should be noted that the costs incurred by the EUI were occasioned by replying to the questions posed by the Organ of First Instance which was faced with a particularly difficult question of interpretation of the relevant legal provisions which had arisen for the first time since the Organ of First Instance was

established. It is therefore not appropriate in the case of the present appeal to depart from the normal rules as to costs; this is without prejudice to future appeals where the Organ of First Instance may, in accordance with Article 2(6) of the Common Provisions, order a party to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur.

45. Article 2(6) of the Common Provisions provides that the 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 is dismissed as inadmissible as there is an absolute bar to proceeding.
2. Each party shall bear its own costs.

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

Secretary of the Organ of First Instance: Silvia Salvadori

Given on 23 January 2012