

Legal Service

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LEGAL NOTE

**Re: Commission proposal for a reform of the Staff Regulations
Compatibility of the recommendations from the Council Working Party
on the Staff Regulations (partial mandate) with EU Law**

I. Introduction

1. On 13 May 2013, at the first trilogue meeting concerning the reform of the Staff Regulations, the rapporteur, Ms ROTH-BEHRENDT, asked, with the agreement of Mr LEHNE, Chairman of the Legal Affairs Committee, for a legal opinion of the Legal Service in relation to the subject of Council document 9318/13 of 6 May 2013.
2. The legal opinion below is based on the documents available to the Legal Service, i.e. the Commission proposal for a Regulation of the Parliament and of the Council amending the Staff Regulations, Parliament's amendments, the recommendations from the Council Working Party on the Staff Regulations (hereafter "the partial mandate") and a contribution from the Council Legal Service.

II. Legal Analysis

A. As to the procedure

3. The partial mandate needs some scrutiny with respect to procedural requirements.
4. Firstly, it follows from Article 293(1) of the Treaty on the Functioning of the European Union (hereafter "TFEU") that unanimity is required where the Council intends to amend a proposal from the Commission.
5. Some provisions of the partial mandate are not based on the proposal of the Commission. This is overtly the case for the proposed modification to Article 83(2) of the Staff Regulations, which aims to increase the contribution by

officials to the cost of the pension scheme from 33% to 45%. Such provisions cannot be adopted by the Council under the same procedural rules as amendments to provisions in the Commission's proposal, but their adoption would require unanimity.

6. Secondly, the Commission may, under Article 293(2) of the TFEU, alter its proposal at any time during the procedure, as long as the Council has not acted, power that extends to the possibility to withdraw the proposal, notably when the Commission deems that it is altered by the Council to such an extent that it changes the nature of the proposal (cf. French legal concept of "dénaturation"). It is up to the Commission to assess whether the nature of its proposal has been changed but an objective analysis suggests that this is the case.
7. The version of Annex XI of the Staff Regulations which was applicable until 31.12.2013 laid down *how* remunerations and pensions were to be annually adjusted to account for changes in the cost of living while Article 65 states that the Council has a duty to review annually whether adjustments are needed. It is clear that this obligation on the Council is subject to review by the Court of Justice which has the power to annul the Council's decision or find manifest error of assessment or misuse of power for failing to undertake the review.
8. In the partial mandate, Article 65 has had most its binding elements removed. There is only one formal obligation left, that is, to review remuneration each year but without necessarily committing to any result. The proposed Annex XI also fails to meet the target of adjustment to account for change in the cost of living since it provides that "*the amount of the update shall not exceed 2% to the upside*". Yet no one can seriously predict that annual inflation will be kept below than 2.1% until 2020.
9. Article 65 and Annex XI are thus altered in the partial mandate to such an extent that they no longer fulfil their very function. "Dénaturation" of an important part of the Commission proposal would thus appear to be indisputable.
10. Concerning the use by the Commission of its power to withdraw a proposal, although it has been rather exceptional so far, it should be noted that the Commission has recently decided to withdraw its proposal on a Regulation on mandatory marking of origin for some products imported from third countries [COM(2005)0661]. In any case, a majority of Commissioners is required under Article 250 of the TFEU for the Commission to take a decision to withdraw a proposal.

B. As to the general principles of Union law

11. Two such principles are relevant in relation to both the procedure and the substance.
12. Firstly the **principle of good faith**, already known as a binding legal principle as early as in Roman law and a cornerstone in many legal systems throughout

Europe, expresses the general expectation that natural and legal persons behave honestly and fairly in relation to each other, in trust building truth.

13. When the Council justifies the imposition of a solidarity levy onto pensions as necessary compensation for pensioners benefiting from adjustments under Annex XI while the present Article 82(2) of the Staff Regulations states “[where] the Council, in accordance with Article 65 (1), decides to adapt remunerations, the same adaptation shall be applied to pensions”, this raises serious doubts about the good faith of the argumentation.
14. Secondly, the **principle of proportionality** is arguably relevant as well. It should however be added that **appropriateness** is a prerequisite to proportionality. Indeed, it does not serve any purpose to assess whether a measure is proportionate to the objective if it is not appropriate to achieve it.
15. Consistently, conjunctural issues are to be dealt with by conjunctural measures while structural measures are only appropriate for treating structural problems. It is therefore rather unconvincing that the Council justifies structural measures that impact the European civil service in the long term by the economic crisis. Such argumentation fails to convince not only as to proportionality but primarily as to appropriateness, not to mention good faith.
16. Concerning the substance, the **principle of acquired rights** (or vested rights, cf. French “droits acquis”) is essential. Initially, this notion was at the core of labour law throughout Europe in the private sector just as in the civil service. Taking paid holiday as an example, it is understood as an acquired right, not only inasmuch as the employer would not be allowed to claim back the holiday already taken by the employee, but it is also understood to include an unquestioned right to paid holiday in the future. This was the common understanding of the notion of acquired rights as a legal guarantee of stability until the late 1970s and this was reflected in the case law of the Court of Justice at that time: “[it] emerges from a comparative study of this problem of law that, in the six Member States an administrative measure conferring individual rights on the person concerned cannot in principle be withdrawn, if it is a lawful measure; in that case, since the individual right is vested, the need to safeguard confidence in the stability of the situation thus created prevails¹ over the interests of an administration desirous of reversing its decision” (Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community. - Joined cases 7/56, 3/57 to 7/57)²; “Furthermore [Regulation n° 160/80] provides transitional measures intended progressively to reabsorb the distortions without bringing about a reduction in the amounts actually paid. Moreover, the effect of Council Regulation n° 161/80 (...) was to increase, also from 1 July 1979, the remuneration resulting from the application

¹ Our emphasis.

² Joined cases 7/56, 3/57 to 7/57 Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community [1957] ECR 39.

of Regulation n° 160/80 in such a way that, apart from certain special cases, the reductions in basing salaries resulting from the revision of the scale were immediately re-absorbed. In those circumstances, there has been disregard neither of legitimate expectations nor of vested rights³ (*Kirsten Andersen v European Parliament* – Case 262/80).⁴

17. Since 1980s there has been a growing concern that the traditional approach to acquired rights could jeopardize competitiveness. Labour law was then dramatically reformed in some Member States and gradually altered in others to the effect that rights benefitted from in the past could be questioned as to their continuation in the future. This evolution is similarly visible,⁵ if as yet unsettled,⁶ in the case law of the Civil Service Tribunal and of the General Court.
18. This is the reason why the **principle of legitimate expectations** has an increased importance and relevance in such matters which used to be more extensively covered by the principle of acquired rights.
19. Compliance with the principle of legitimate expectations is of special concern in relation to measures in the partial mandate affecting career prospects. Indeed, though the Court's case law does not consider that officials have any subjective right to promotion,⁷ it conferred early recognition and protection to the principle of entitlement to reasonable career prospects.⁸ A combined breach of officials' legitimate expectations and of their reasonable career prospects would fuel litigation that might result in compensation to be paid by the European Union, which would run contrary to the Council's main objective of saving money.
20. Finally, the Legal Service confirms that attention should be paid to the **principle of equal treatment**, which requires that two categories of person whose factual and legal circumstances disclose no essential difference are treated equally unless the difference in treatment is objectively justified. However, the said principle does not justify treating different situations identically.⁹
21. By way of example, imposing the solidarity levy on pensioners at the same rate as officials cannot be justified by the principle of equal treatment since officials who are paid a full salary and often benefit from foreign residence allowance or expatriation allowance are not in the same situation as pensioners, who are paid a

³ Our emphasis.

⁴ Case 262/80 *Kirsten Andersen and others v European Parliament* [1984] ECR 195, paragraphs 20 and 21.

⁵ Judgment of the Civil Service Tribunal of 29 September 2011 in Case F-70/05 *Mische v Commission*, paragraphs 63 and 64, not yet published. Judgment of the General Court of 2 July 2010 in Case T-485/08 P *Lafili v Commission*, paragraph 88, not yet published.

⁶ Case T-47/05 *Angé Serrano and Others v Parliament* [2008] ECR-Staff Cases I-A-2-00055; II-A-2-00357, paragraph 110.

⁷ Judgment of the Civil Service Tribunal of 15 February 2011 in Case F-68/09 *Barbin v Parliament*, not yet published.

⁸ Case 17/68 *Andreas Reinartz v Commission* [1969] ECR 61, paragraph 42.

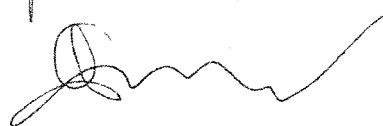
⁹ Case C-496/08 P *Angé Serrano and Others v Parliament* [2010] ECR p. I-1793, paragraphs 99 to 101.

retirement pension at a maximum of 70% of their final basic salaries without such allowances.

III. Conclusions

22. The Legal Service reaches the following conclusion:

The Council partial mandate fails obviously to comply with general principles of European Union law on an unprecedented scale. Subject to the Commission's own assessment, the alteration of the Commission's proposal reaches an extent by which "denaturation" seems likely. In addition, should the Commission not withdraw its proposal, the adoption of some of its provisions would require unanimity voting in Council.

P. O.


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Visa: *By delegation of the Jurisconsult,*


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Annex

