

Draft recommendation of the European Ombudsman in his inquiries into complaints 2986/2008/MF and 2987/2008/MF against the European Parliament

Recommendation

Case 2986/2008/MF - Opened on 20/01/2009 - Recommendation on 11/05/2010 - Decision on 29/09/2011

(Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1])

THE BACKGROUND TO THE COMPLAINTS

1. On 1 May 2004, the new Staff Regulations entered into force introducing a new pay and career scale for European Union officials. Annex XIII to Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 [2] ('Annex XIII to the Staff Regulations') provided for transitional measures in order to bring the existing basic salaries of officials recruited before 1 May 2004 into line with the new pay and career scale.

2. Article 7 of Annex XIII to the Staff Regulations is one such measure. It states the following:

" Basic monthly salaries of officials recruited before 1 May 2004 shall be determined in accordance with the following rules:

1. The renaming of grades pursuant to Article 2(1) of this Annex shall not lead to any changes in the basic monthly salary paid to each official.

2. For each official, a multiplication factor shall be calculated at 1 May 2004. This multiplication factor shall be equal to the ratio between the basic monthly salary paid to an official before 1 May 2004 and the applicable amount defined in Article 2(2) of this Annex.

[...]

5 Without prejudice to paragraph 3, for each official, the first promotion after 1 May 2004 shall, depending on the category occupied before 1 May 2004 and the step occupied at the time the promotion takes effect, lead to an increase in basic monthly salary to be determined on the basis of the following table ...



6. A new multiplication factor shall be determined upon this first promotion. That multiplication factor shall be equal to the ratio between the new basic salaries resulting from the application of paragraph 5 and the applicable amount in Article 2(2) of this Annex. Subject to paragraph 7, this multiplication factor shall be applied to the salary after advancement in step and adaptation of remunerations.

7. If, after promotion, the multiplication factor is less than 1, the official shall, by derogation from Article 44 of the Staff Regulations, remain in the first step of his new grade for as long as the multiplication factor remains below 1 or until he is promoted. *A new multiplication factor shall be calculated to take account of the value of the advancement in step to which he or she would have been entitled under that Article. Once the factor rises to 1, the official shall start to advance in step in accordance with Article 44 of the Staff Regulations. If the multiplication factor is higher than one, any balance shall be converted into seniority in the step ...* " (emphasis added)

Article 44 of the new Staff Regulations provides the following:

" An official who has been at one step in his grade for two years shall automatically advance to the next step in that grade ... "

3. After the new Staff Regulations entered into force, Parliament decided to introduce a practice (the 'Practice') whereby it would apply the first sentence of Article 7(7) above in the following way: the multiplication factor ('MF') of officials recruited before 1 May 2004 would automatically increase to 1, two years after their first promotion under the new Staff Regulations.

4. The complainants are both officials of the European Parliament of grade AD 11, and they entered into service prior to 1 May 2004 [3] . In accordance with Article 7 of Annex XIII, their MF was calculated after 1 May 2004 and amounted to 0.834. They have not yet been promoted under the new Staff Regulations and their last promotion occurred on 1 January 2004, that is, under the old Staff Regulations. For that reason, they have not been able to benefit from Parliament's Practice. Their MF has remained at the original amount of 0.834 and will not change until two years after their next promotion under the new Staff Regulations.

5. In 2007, the complainants compared their salaries with those of their colleagues who later attained the same grade and step following their respective promotions in 2005, that is, under the new Staff Regulations. Pursuant to the Practice, the MF of these colleagues increased automatically to 1 and their salaries increased by approximately EUR 300 more than the complainants' salaries, whose MF remained at less than 1.

6. The complainants challenged this difference in treatment, which, in their view, existed between officials as a result of the date of their respective promotions.

7. On 6 June 2007, they both submitted requests under Article 90(1) of the Staff Regulations. They requested the Appointing Authority to increase the MF applicable to their salaries to 1 with retroactive effect.



8. On 19 October 2007, the Appointing Authority rejected their requests. It stated that their situation was in compliance with the provisions of both the old Staff Regulations and Annex XIII to the new Staff Regulations. They were promoted in January 2004, and an MF was applied to their salaries in accordance with Article 7(2) of Annex XIII.

9. The Appointing Authority further stated that it had not violated the principle of equal treatment because the complainants were not in a situation comparable to that of the colleagues mentioned in their complaints. Their dates of promotion and their grade before 1 May 2004 were different.

10. The Appointing Authority stated that the first promotion constituted the essential step in the transition from the old to the new Staff Regulations. Until the transitional period came to an end, a higher grading did not necessarily mean a higher salary. The Appointing Authority concluded that Parliament's decision was based on an objective criterion, which consisted of setting an MF of 1 no later than two years after an official's first promotion under the new Staff Regulations.

11. On 17 January 2008, the complainants lodged complaints under Article 90(2) of the Staff Regulations against the Directorate-General for Personnel and Administration's decision to reject their requests to rectify retroactively the MF of their basic salaries. By letter of 5 June 2008, the Appointing Authority rejected their complaints on the same grounds as their requests under Article 90(1) of the Staff Regulations.

12. On 7 November 2008, the complainants turned to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

13. In their complaints to the Ombudsman, the complainants alleged that Parliament's Practice was incompatible with Article 7 of Annex XIII to the Staff Regulations.

14. In their respective complaints, both complainants claimed that they should be treated the same way as those who, as a result of the Practice, have received an MF of 1. The Ombudsman decided, however, not to include this claim into his inquiry. In light of their allegation, he considered that the complainants' claim could not be sustained. Assuming that his inquiry were to conclude that Parliament's decision on the MF was contrary to law, and therefore constituted an instance of maladministration, the Ombudsman would not be able to ask Parliament to apply such an MF to the complainants with retroactive effect.

THE INQUIRY

15. On 20 January 2009, the Ombudsman opened an inquiry into the complainants' allegation. He asked Parliament to forward him its Bureau's formal decision as regards this matter and to explain the legal basis behind the Practice.



16. On 1 July 2009, Parliament sent its opinion. The Ombudsman forwarded it to the complainants with an invitation to make observations, which they sent on 13 August 2009.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Alleged incompatibility of Parliament's decision on the multiplication factor with Article 7 of Annex XIII to the Staff Regulations

Arguments presented to the Ombudsman

17. The complainants alleged that Parliament's Practice is incompatible with Article 7 of Annex XIII to the Staff Regulations.

18. In support to their allegation, the complainants submitted the following three arguments:

(i) Parliament automatically, and thus arbitrarily, applied an MF of 1 to all officials two years after their first promotion under the new Staff Regulations.

(ii) This discriminated against those officials recruited under the old Staff Regulations, whereas the rationale behind the transitional rules of Annex XIII to the Staff Regulations was to avoid such discrimination.

(iii) The European Commission applies Article 7 of Annex XIII to the Staff Regulations in a different way. It does not automatically apply an MF of 1 to *all* officials two years after their respective promotions under the new Staff Regulations. Those officials who, after being promoted, still have an MF of less than 1, remain in their same grade and step. A new MF is then calculated. When an official advances in step, if his/her MF exceeds 1, this excess is converted into seniority in step.

19. In its opinion on the complaints, Parliament recalled that Annex XIII to the Staff Regulations laid down transitional measures applicable to officials of the Communities following the entry into force of the new Staff Regulations.

20. For officials recruited before 1 May 2004, Article 7 of Annex XIII laid down a " *complex mechanism* " in which the MF played a key role. In this context, the first promotion under the new Staff Regulations constituted an essential step, in the transition between the old salary scale and the new one.

21. According to Parliament, it emerged from the above provisions that officials would not receive the whole amount of their salaries under the new salary scale as long as their MF was less than 1.



22. Parliament also stated that "[t]he Community judge has also recently highlighted the difficulties in interpreting Article 7 of Annex XIII. " Faced with provisions " which are formally ambiguous, making a strict and uniform interpretation impossible ", and also " aware of the anomalies " inherent in organising the transition between the two salary scales, Parliament devised an approach " intended to reduce the period during which the mechanism instituted by Article 7 of Annex XIII would give rise to problems. "

23. In the Ombudsman's understanding, Parliament describes and justifies its Practice as follows. It automatically grants an MF of 1 to all officials, at the latest, two years after their first promotion under the new Staff Regulations. After the first promotion, a new MF, and therefore a new salary, is calculated according to the mechanisms of Article 7 of Annex XIII. However, 24 months following the promotion (when the financial implications of a step increase and a new MF have to be calculated), the official is instead automatically granted an MF of 1 and, from then on, he/she receives the full salary under the new salary scale for the first step in his/her new grade. At this moment, the new theoretical MF is calculated by increasing the salary received until that time by 4.2% [4] , and then establishing the ratio between the new salary thus obtained and the applicable amount for the first step in the relevant grade. If the theoretical new MF is still less than one, the missing percentage is converted into seniority and the official remains in the first step of his/her new grade for the supplementary period so calculated.

24. Consequently, the first promotion is the mechanism which triggers the transition between the old and the new salary scale, and the time taken for this transition can be different for each person.

25. However, in Parliament's view, the transitional measures were not intended to be long-lasting. It therefore decided to pursue the " *legitimate objective* " of reducing the transitional period. Even if this administrative practice accentuated disparities in salaries over a given period of time, the first promotion under the new Staff Regulations constitutes an objective criterion which all staff can hope to achieve at a given point in their careers.

26. Under the new Staff Regulations, it is possible for an official, when he/she attains an MF of 1, to receive a higher salary than those of his/her colleagues in a higher grade but with an MF inferior to 1. Similarly, when some colleagues advance in step, they might receive more than an official who was already at the same step on 1 May 2004. A balance will be achieved upon completion of the transition.

27. For this reason, Parliament again stressed the legitimate objective pursued by its Practice, " *which was to reduce as far as possible the overall transitional period.* " According to Parliament, the legislator wished to be consistent with the general principle underlying Annex XIII to the Staff Regulations, namely, that transitional provisions are not intended to be applied beyond a reasonable period.

28. Parliament put forward that the difficulties in interpreting Article 7 of Annex XIII were highlighted by the Community Judiciary [5] . In the *Lafili* judgment, it rightly underlined that: " *en*



tout état de cause, la thèse défendue par le requérant comporterait une dérogation illimitée dans le temps à l'article 66 du statut, ce que l'article 7, paragraphe 7, de l'annexe XIII ne prévoit pas non plus expressément, et irait à l'encontre de l'économie même d'une disposition transitoire, ainsi qu'il ressort des points 85 à 87 du présent arrêt. "

29. Parliament therefore considered that its actions remained true to the spirit of the transitional provisions in question and to the intention of the Community legislator. However, because of "*the complexity of the mechanism*" and "*the opacity of the legal text*", Parliament "*was forced to decide on its own interpretation in order to shorten the transitional period.*"

30. The mechanism under Article 7(7) of Annex XIII and the Practice arising from the interpretation of that Article had no bearing whatsoever on promotions which took place before 1 May 2004.

31. Parliament emphasised that the complainants were promoted on 1 January 2004 and there was no legal basis allowing them to benefit from an MF of 1 after their last promotions, in January 2004. An MF was applied to their salaries, pursuant to Article 7(2) of Annex XIII to the Staff Regulations [6]. Consequently, their MF will only be increased to 1 within a maximum of two years following their first promotion under the new Staff Regulations.

32. On the basis of these considerations, the Appointing Authority, in its replies dated 5 June 2008 to the complainants' Article 90(2) complaints, concluded that their administrative situations were in conformity with the principle of equal treatment. As a matter of fact, the administrative situation of an official promoted before the new Staff Regulations entered into force was not comparable to that of an official promoted under the new Staff Regulations. Hence, the contested decisions did not violate the principle of equal treatment.

33. The Appointing Authority further noted that the *Lafili* judgment (in paragraph 85 thereof) clearly outlined that the provisions of the Staff Regulations on the new career structure and the basic monthly salary apply to future situations [7]. In addition, the judgment stated that "*it was inherent in the nature of a transitional provision to include exceptions to some rules whose application was necessarily affected by the change of system.*"

34. Parliament went on to address the Ombudsman's request for a copy of its Bureau's formal decision concerning the MF. Following the Court of Auditors' comments concerning the applicability of the MF, the Bureau formally endorsed the Practice by means of the official reply formulated by Parliament. Parliament attached to its opinion the following documents:

(i) Minutes of its Bureau meeting of 22 September 2009 [8]. Page 13 of these Minutes contained a point entitled "*Annual report by the Court of Auditors – adoption by the Bureau of Parliament's replies to the Courts' observations – Note from the Secretary General*"; and

(ii) A copy of an extract from the Official Journal C-287 [9]. The Court of Auditors' relevant observations were contained in points 11.7-11.9 thereof (*Specific assessment in the context of the statement of assurance – MF applicable to salaries*) and Parliament's replies to those



observations are contained in points 11.7-11.11.

35. In their joint observations, the complainants stated, in summary, that the issue was not whether provisions of the Staff Regulations were incompatible with Parliament's decision, but rather the opposite, since the Staff Regulations must always take precedence over the practices of individual institutions.

36. The purpose of the MF was to ensure that all officials recruited before 1 May 2004 were gradually transferred, in an orderly and non-discriminatory way, from the old salary scale to the new one. Parliament deliberately and wilfully thwarted this purpose by deciding unilaterally to pursue the "*legitimate objective*" of reducing the transitional period. However, it was never under any obligation to do so.

37. The "*endorsement*", to which Parliament referred in its opinion when speaking about its reaction to the Court of Auditor's observations, could at best be described as implicit and dating from 22 September 2008. This was 21 months after staff promoted in 2005 were informed of the Director-General's decision to introduce the Practice. It would appear that this lack of an authoritative basis for his decision was further compounded by the failure to consult the Legal Service. This was in breach of Article 3 of the Bureau decision of 28 January 2004 [10], which states that "[i]n the case of administrative procedures, the Legal Service shall provide assistance in accordance with the conditions annexed thereto."

38. The complainants finally noted Parliament's statement that it was "*forced to decide on its own interpretation of the complex and opaque provisions of Article 7 in order to shorten the transitional period.*" In their view, this objective was purely self-imposed. Parliament itself admitted that the other institutions, such as the Court of Auditors or the Court of Justice, have interpreted the provisions of Article 7 differently. The complainants found no evidence that the courts had experienced difficulties in the interpretation and application to which Parliament repeatedly referred. In support of their assertions, the complainants submitted the "*notices to staff*" concerning the matter, which were issued in 2007 by the Court of Auditors [11] and the Court of Justice [12]. In these notices, the Court of Auditors and the Court of Justice both informed their staff of their respective policies regarding advancement in step after promotion following the reform of the Staff Regulations.

39. The complainants completed their observations by forwarding to the Ombudsman a copy of "*Parliament's Resolution of 23 April 2009 with observations forming an integral part of its Decision on discharge in respect of the implementation of the EU general budget for the financial year 2007- section VI- EECs*" ('the Resolution of 23 April 2009'). In point 7 of this Resolution, Parliament stated the following: "*the provisions of the Staff Regulations concerning the multiplication factor should be interpreted and implemented by all the institutions in the same way in order to ensure the equal treatment of their staff; awaits the Civil Service Tribunal's ruling on an appeal brought by a Commission official, and expects the EESC to align its practice (if necessary retroactively) to this ruling.*"

The Ombudsman's assessment leading to a draft recommendation



40. At the outset, the Ombudsman expresses his disappointment that Parliament is unable to produce any formal administrative decision establishing such an important administrative practice as the one under review. As the complainants rightly pointed out, Parliament's reply to the Court of Auditors' observations cannot constitute such a decision with retroactive effect.

41. Second, the Ombudsman notes that, in point 11.11 of its observations, the Court of Auditors stated that the provisions of the Staff Regulations concerning the MF should be interpreted and implemented by all the institutions in the same way. This would ensure a "*legal and regular application of the Staff Regulations by all institutions enabling thereby an equal treatment of their staff.*" Parliament expressly reiterated this in its Resolution of 23 April 2009.

42. In light of the above, the Ombudsman is puzzled by Parliament's unilateral decision to abstain from following the above objective, while being aware that other institutions have a different practice. He notes, in this respect, that the Commission, the Court of Justice and the Court of Auditors (and apparently all other institutions) have decided to implement fully the first sentence of Article 7(7) Annex XIII to the Staff Regulations and to calculate an MF for each official following his/her respective promotion after 1 May 2004. An official in these institutions therefore remains in the first step of his/her new grade for as long as his/her MF remains below 1 or until he/she is promoted again.

43. Parliament considered that it was justified to use its own interpretation and its challenged Practice for two reasons. First, because of the "*complex*" and "*opaque*" nature of the provisions of Article 7 of Annex XIII to the Staff Regulations, which, in Parliament's view, allows for its own interpretation. Second, because the transitional period should be shortened.

44. The Ombudsman does not, however, consider the above reasons to be convincing.

45. The Ombudsman notes that, in paragraphs 37, 83 and 89 of the judgment in *Lafili*, the Court stated that the wording of Article 7 was "*ambiguous*", "*misleading*", and "*ambivalent*". It added that the wording used in paragraphs 6 and 7 of Article 7 does indeed allow for an interpretation which is "*not entirely literal*", but one which must still conform to the objective of the relevant transitional provisions. [13]

46. However, Parliament's interpretation of Article 7 was not merely "*literal*", but rather amounted to a change in the law [14]. The Ombudsman considers that the administrative organs of Parliament were not allowed to interpret the Article in this way.

47. While the judgment in *Lafili* concerns the interpretation of the last sentence of Article 7, which covers situations in which the MF could become higher than 1 after promotion, the challenged Practice of Parliament refers to situations in which, after promotion, the MF would still be less than 1. These situations are covered by the first sentence of Article 7(7) of Annex XIII, which, in the Ombudsman's view, is clear: "*If, after promotion, the multiplication factor is less than 1, the official shall, by derogation from Article 44 of the Staff Regulations, remain in the first step of his new grade for as long as the multiplication factor remains below 1 or until he*



is promoted. " (emphasis added)

48. Contrary to the above provision, Parliament decided to apply an MF of 1 to everyone two years after their first promotion under the new Staff Regulations, even if they still had an MF of less than 1. The Ombudsman points out, in this respect, that the rationale behind the provision in the first sentence of Article 7(7) appears rather to be that the transition to the new career and salary system should be phased and applied individually. The result achieved is exactly the contrary.

49. The Ombudsman understands that Parliament's ultimate goal was to reduce the transitional period by as much as possible for the large number of officials concerned. The Ombudsman notes, however, that Parliament did not explain why the transitional period necessarily had to be shortened. He recalls that, on the contrary, it was rather clear from the preparatory works of the new Staff Regulations that the transitional period would apply individually to each official and that some of them might not even attain an MF of 1 during their careers.

50. However, even if one were to consider that this goal of reducing the transitional period had merits, such an approach does not, as the present complaints show, exclude the possible unfair treatment of staff belonging to the same function group. In fact, as a result of Parliament's own particular interpretation of Article 7(7) of Annex XIII to the Staff Regulations, the MF of officials promoted under the new Staff Regulations increased automatically to 1. Their salaries therefore became higher than those officials who were promoted earlier than 1 May 2004 and whose MF remained at less than 1.

51. Parliament might be correct in saying that (i) officials promoted before 1 May 2004 and those promoted after this date are not in identical situations; and (ii) consequently, the complainants' arguments of discrimination in this regard cannot be sustained. However, as the present complaints show, Parliament's Practice has indeed created a situation in which officials in the same function group, who were recruited before the new Staff Regulations came into force, are being unfairly treated financially, depending on the date of their respective promotions (see paragraph 5 above).

52. The Ombudsman would also like to highlight that Parliament's Practice gives its officials a clear financial advantage over officials of every other institution. Parliament's officials receive the full salary of the new pay scale two years after their first promotion under the new Staff Regulations. Officials from the other institutions, who are promoted to the same grade on exactly the same date, potentially continue to have an MF applied to their salaries, as foreseen in Article 7(7) of Annex XIII to the Staff Regulations. This difference in treatment of officials is exactly what the European Parliament, as a political institution, wanted to prevent when it adopted its the Resolution of 23 April 2009 (see the quote above in paragraph 39).

53. In summary, the Ombudsman considers that Parliament's Practice:

(a) of applying an MF of 1 to its officials who, two years after their first promotion, still have an MF of less than 1, is not in conformity with Article 7(7) of Annex XIII to the Staff Regulations;



(b) leads to the unfair financial treatment of its officials, depending on the dates of their respective promotions; and

(c) gives a clear financial advantage to its officials over officials working for other EU institutions.

As a result, the Ombudsman concludes that the Practice is in breach of Articles 4, 5 and 11 of the European Code of Good Administrative Behaviour [15] and is, therefore, an instance of maladministration.

54. The Ombudsman notes that, in its reply to the Court of Auditors' observations, Parliament promised that its Secretary-General would appoint an administrative working group in charge of examining the subject in depth and proposing any amendments if necessary.

55. In light of the above, the Ombudsman makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

B. The draft recommendation

On the basis of his inquiries into the complaints, the Ombudsman makes the following draft recommendation to Parliament:

Parliament should explain the measures it intends to take in order to comply with the Staff Regulations, and bring its practice into line with that of the other institutions.

Parliament should explain the conclusions and recommendations of the working group on this matter it committed itself to appointing, as well as the subsequent measures taken by its Appointing Authority.

Parliament and the complainants will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, Parliament shall send a detailed opinion by 31 August 2010. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been, or will be, implemented.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 11 May 2010

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.



[2] OJ L 124, 27.04.2004, p. 1.

[3] Cases 2986/2008/MF and 2987/2008/MF have been dealt with jointly.

[4] The difference between step 1 and step 2 in the new salary scale (see Article 8(2) of Annex XIII to the Staff Regulations).

[5] Case F-22/07 *Lafili v Commission*, judgment of 4 September 2008, not yet published in the ECR, paragraph 91.

[6] Article 7(2) of Annex XIII to the Staff Regulations provides the following:

" For each official, a multiplication factor shall be calculated at 1 May 2004. This multiplication factor shall be equal to the ratio between the basic monthly salary paid to an official before 1 May 2004 and the applicable amount defined in Article 2(2) of this Annex ... "

[7] The French original version of paragraph 85 is as follows:

" Le Statut des Fonctionnaires est entré en vigueur le 1er mai 2004 de telle sorte que, sous réserve des dispositions transitoires et de principes généraux tels que le principe de sécurité juridique, de non-rétroactivité ou de protection des droits des acquis, les dispositions nouvelles du statut qui régissent la nouvelle structure de carrière et le traitement mensuel de base s'appliquent aux situations à naître. "

[8] PV BUR 22-09-2008 (available on Parliament's Intranet).

[9] OJ 2008 C 287, pp. 111–114.

[10] Reference PE 339.484/BUR (available on Parliament's Intranet).

[11] Staff notice of the Court of Auditors No 01/07 entitled *" Advancement to a higher step after promotion since the reform of the staff regulations. "*

[12] Staff notice of the Court of Justice No 04/07 entitled *" Advancement to a higher step after promotion since the reform of the staff regulations. "*

[13] Paragraph 83 of the judgment in *Lafili* : *" ... le libellé de l'article 7, paragraphes 6 et 7, est suffisamment ambivalent pour justifier la recherche d'une interprétation non exclusivement littérale qui soit conforme à l'économie et à la finalité des dispositions transitoires en cause. "*

[14] The Ombudsman recalls, however, that the Court of Justice is the highest authority for interpreting Union law.

[15] See *The European Code of good Administrative Behaviour* and, more precisely, Article 4 (lawfulness), Article 5 (absence of discrimination) and Article 11 (fairness) thereof.

