

The Administrative Tribunal,

Considering the complaints filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 9 June 2006 by the following 45 complainants: Mr C. A., Mr T. B., Mr F. B. (his second), Mr J. B. (his fourth), Mr N. C. (his second), Mrs P. C., Mr P. C. (his second), Mr F. C. (his second), Mr L. D. B., Mrs A. D. B. (her second), Mr R. D. B. (his second), Mr P. D. R., Mrs M. D. (her second), Mr G. F. (his second), Mr L. G. (his second), Mr J. G. (his second), Mr R. H. (his second), Mr D. H., Mr J. H., Mr J. I. A. (his third), Mrs D. K. (her second), Mr P. L. (his third), Mr S. L. (his second), Mr A. L. (his third), Mr M. M. (his second), Mr T. M. (his second), Mr M. M. (his second), Mr V. M., Mrs C. M. (her second), Mr G. M. (his second), Mr A. O. (his second), Mr N. P. (his second), Mrs C. P., Mr T. P. (his second), Mr D. P.-C. (his third), Mr A. P. (his second), Mr V. P., Mr C. R., Mr R. R. (his second), Mr C. S. (his second), Mr M. S. (his second), Mr P. T. (his third), Mr Y. V., Mr J.-M. W. and Mr M. Y., the Agency's reply of 29 September, the complainants' rejoinder of 12 December 2006 and Eurocontrol's surrejoinder of 16 March 2007;

Considering also the complaints filed by Messrs M. D. K. (his second), A. L., G. L. (his second), E. M., P. Q. (his second) and R. T. against the Eurocontrol Agency on 16 June 2006, the Agency's reply of 29 September, the complainants' rejoinder of 12 December 2006 and Eurocontrol's surrejoinder of 16 March 2007;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. Under a tax protocol signed by the Member States of Eurocontrol in 1978, the remuneration of the Agency's staff is exempt from national tax and subject to an internal tax levied directly at source. The protocol entered into force on 1 January 1981. Although the tax system adopted differs from that applicable in the European Communities, Eurocontrol's Permanent Commission decided, at its 52nd Session in November 1978, that the net remuneration of Agency staff should remain unaffected by the introduction of the internal tax.

The statutory provisions introducing the internal tax were published in Office Notice No. 110/80 of 2 December 1980. An Article 62a was inserted in the Staff Regulations governing officials of the Eurocontrol Agency and in the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre. Articles 62 and 62a of the Staff Regulations read as follows:

“Article 62

In accordance with a ruling of the Director General and save as otherwise expressly provided, an official who is duly appointed shall be entitled to the remuneration carried by his grade and step.

An official may not waive his entitlement to remuneration.

Remuneration shall comprise:

- 1) basic salary;
- 2) family allowances;
- 3) expatriation allowance;

4) other allowances, inter alia travelling and housing allowances.

#### Article 62a

An official's remuneration shall be subject to an internal tax for the benefit of the Organisation pursuant to the provisions of Annex V."\*

Article 64 stipulates that:

"An official's remuneration expressed in the currency of the country where the Agency has its headquarters shall, after the compulsory deductions set out in these Staff Regulations or in any implementing provision, be subject to adjustment to take account of the taxation system applicable and of the living conditions in the relevant country of posting.

The weightings reflecting living conditions in the various countries of posting shall be fixed by the Provisional Council on the proposal of the Director General. The procedure governing the aforesaid adjustment shall be prescribed in a rule laid down by the Director General."\*\*

Article 4(1) of aforementioned Annex V\*\*\*, entitled "Determination of the amount and method of levy of the tax on Eurocontrol staff remuneration", lays down the principle of a monthly deduction at source based on a graduated scale. Article 4(2) reads:

"Notwithstanding the provisions of paragraph 1 above,

- a) remuneration in respect of overtime (whether lump sums or not), and
- b) remuneration in respect of unusual working hours,\*\*\*\*

shall be assessed for the purpose of taxation at the average rate applied to the other taxable items of remuneration paid to the person concerned in the month preceding that of payment."

Rule of Application No. 27 of the Staff Regulations, applicable by analogy to staff subject to the General Conditions of Employment and "concerning the method of calculating remuneration by applying Article 64 of the service regulations and the Eurocontrol internal tax", reads as follows:

#### Article 1

The purpose of these provisions is to lay down the method of calculating remuneration by applying Article 64 of the Staff Regulations governing Officials of the EUROCONTROL Agency and Article 64 of the General Conditions of Employment, the internal tax, and the Permanent Commission's decision at its 52nd Session to the effect that net remuneration of Agency staff should remain unaffected by the introduction of an internal taxation system.

#### Article 2

1. The adjustment of remuneration provided for in Article 64 of the two sets of service regulations aforementioned shall be effected according to the internal taxation system and to country of posting by reference to the cost-of-living weightings fixed by the Provisional Council.
2. Net remuneration shall be determined on the basis of the following factors, and in the following sequence:
  - a) basic salary, plus the allowances provided for in Article 62 of the service regulations, less deductions in pursuance of Articles 72, 73 and 83 of the aforesaid regulations;
  - b) application of the cost-of-living weighting;
  - c) deduction of the internal tax applicable at the European Communities in accordance with the rules in force;
  - d) adjustment of the result obtained under a) so as to give, after deduction of the EUROCONTROL internal tax, the net figure obtained under a), b) and c) above.

[...]

The complainants are posted either to the Agency's Maastricht Upper Area Control Centre (Netherlands) or to the Central Flow Management Unit (CFMU) in Brussels or Brétigny-sur-Orge (France). On account of the duties they perform, they are regularly entitled to ancillary remuneration. In May and June 2005, all but one of the complainants filed standard internal complaints challenging their payslips for the months of February, March and April 2005 on the ground that their ancillary remuneration had been overtaxed, in breach of the provisions of Annex V or VI cited above and of Rule of Application No. 27. In August and September 2005 the complainant who had not yet filed an internal complaint and 44 of the other complainants filed internal complaints against the back payslip covering the period from 1 July 2004 to 30 June 2005 and against "all payslips since 1 July 2005".

The Joint Committee for Disputes examined the internal complaints at its meeting on 19 December 2005. According to the opinion signed by the Chairman of the Committee on 26 January 2006, the Committee was unable to deliver a majority opinion on the two sets of complaints because the two members appointed by the Staff Committee and the two members appointed by the Administration disagreed on the action to be taken on the said complaints. By memoranda of 9 February 2006, which constitute the impugned decisions, the Director of Human Resources, acting on behalf of the Director General, dismissed the internal complaints.

B. The complainants submit that the legislator wished to apply a lower rate of taxation to the items of remuneration listed under Article 4(2) of Annex V to the Staff Regulations. They accuse the Agency of breaching that provision by applying the marginal rate – rather than the average rate – when determining the Community net ancillary remuneration.

They point out that the defendant guarantees its officials and servants net remuneration, known as the "Community net", corresponding to the net remuneration of officials of the European institutions, and that this is not a "ceiling" level of remuneration but a "floor" level. They explain that in practice the defendant has a two-step procedure for calculating remuneration:

“- To begin with, it calculates the Community net, which constitutes the reference figure, on the basis of the Community tax rate.

- It next artificially reconstitutes Eurocontrol's gross taxable amount, on the basis of the Community net, by increasing the basic salary by a tax adjustment, to which Eurocontrol's tax rate is then applied.”

It was at this second stage (reconstitution of Eurocontrol's gross taxable amount) that the defendant applied, in the impugned payslips, the average rate provided for in Article 4(2) of Annex V to the Staff Regulations. In the complainants' view, however, this average rate should have been applied at the first stage – i.e. when determining the Community net – instead of the marginal rate. They argue that this is the only way of ensuring that Article 4(2) of the said Annex produces its full impact on officials' (net) remuneration.

They add that the defendant, in calculating their (net) remuneration as set forth in the impugned payslips, applied a marginal rate in breach of the aforementioned provision; and that it was only after that remuneration had been determined that it applied an average rate in fixing gross remuneration, an operation that had no impact on their net remuneration. They infer from this that the decisive rate is clearly that used at the first stage – determination of the Community net. They argue, however, that no provision in force at Eurocontrol provides for application of the marginal rate.

The defendant therefore clearly breached Article 4(2) of Annex V to the Staff Regulations when it used the marginal rate to determine Community net ancillary remuneration.

They add that if Eurocontrol were to argue that the marginal rate was applied in pursuance of Article 2(2)(c) of Rule of Application No. 27, this would constitute a breach of the principle of the hierarchy of rules since the Rules are ranked lower than the Staff Regulations. They also accuse it of establishing a system that is obscure and incomprehensible for those concerned. Lastly, they contend that the Agency has "failed to comply with its duty of care and with the principle of sound administration".

The complainants ask the Tribunal to set aside the impugned decisions and to declare void the contested payslips (as well as the subsequent payslips containing the same defect) and to order the Agency to reimburse, with interest,

“the excess amounts levied as tax on [their] supplementary remuneration since the date of [their] entry into service”. They also claim costs, which they estimate at 1,000 euros per complainant.

C. In its replies Eurocontrol challenges the receivability of the claim for reimbursement of “alleged excess tax” imposed on the ancillary remuneration of the complainants since they joined the Agency. It notes that, according to the Tribunal’s case law, any recovery of overpayments can relate only to the three months preceding the date on which the claim is filed. The complainants’ claim therefore disregards the rules of prescription.

On the merits, the defendant explains that net principal remuneration and net ancillary remuneration are calculated separately. The former is paid at the beginning of the month for the current month, while the latter – pertaining to overtime and/or unusual working hours – cannot be determined, by definition, until the end of the month. Annex V to the Staff Regulations merely sets out the modalities of Eurocontrol’s internal taxation system and it is Rule of Application No. 27 that lays down the principles whereby equality between net remuneration at Eurocontrol and net remuneration paid by the European Communities is ensured. Rule No. 27 was adopted in application of Article 64 of the Staff Regulations and concerns the “adjustment” provided for in that provision. Article 4(2) of Annex V to the Staff Regulations and Article 2(2)(c) of Rule of Application No. 27 have different purposes. Consequently, they cannot contradict each other and the complainants’ argument that Rule No. 27 is unlawful in part is therefore without merit.

The Agency submits that the remuneration paid must be equal to that paid by the European Union institutions after application of those institutions’ taxation system. This, it submits, is consistent with Article 2(2)(c) of Rule No. 27, which reads as follows:

“deduction of the internal tax applicable at the European Communities in accordance with the rules in force”.

The “rules in force”, according to the defendant, are those applied by the European Communities. For taxation of ancillary remuneration, the European Communities use the marginal rate (the highest bracket) applied to principal remuneration because this is what is prescribed by their tax rules. The complainants are therefore wrong, it holds, to argue that Eurocontrol’s tax rules should be borrowed to calculate a “European Communities net remuneration”, which would in any case be fictitious since it would not correspond to that actually paid by the European Communities to their officials. For the defendant what is important, because it is what the legislator had in mind, is equality of net remuneration between the two institutions despite the introduction of a heavier taxation system at the Agency.

In addition, it points out that the use of Eurocontrol’s marginal rate or average rate has no effect on an official’s net ancillary remuneration but it does affect Eurocontrol’s tax revenues and the cost of the fees charged to airspace users covered by the Organisation.

The defendant requests the joinder of the complaints filed in these two cases.

D. In their rejoinders the complainants assert that it is the complexity of the taxation system in force at Eurocontrol that prevented them from understanding and checking the correctness of the tax imposed on their ancillary remuneration. They had therefore been unable to challenge their payslips previously. They acknowledge that such payslips cannot be challenged more than three months after their date of issue but point out that, as regards the period prior to February 2005, they are not challenging their payslips but claiming compensation for loss of remuneration.

The complainants submit that the “average rate” mentioned in Article 4(2) of Annex V to the Staff Regulations is the average Community rate and not the average tax rate at Eurocontrol, which is higher. The legislator’s intention was clearly to ensure that the Agency’s staff would enjoy a more favourable tax regime for their ancillary remuneration. They point out that Rule No. 27 makes no reference to identical remuneration or taxation of officials of Eurocontrol and the European Communities. They accuse the defendant of misinterpreting the phrase “in accordance with the rules in force” in Article 2(2)(c) of Rule No. 27. In their view, it refers to the rules in force at Eurocontrol and not to those applicable within the Communities. Any other interpretation would be inconsistent with Article 4(2) of Annex V and would therefore breach the principle of the hierarchy of rules. They add that the Agency is wrong in seeking to treat Rule No. 27 separately from Annex V to the Staff Regulations.

E. In its surrejoinders Eurocontrol acknowledges that its taxation system may seem complicated but notes that it

is less complicated than national systems and that an Office Notice issued in 1993 shows how to make the necessary calculations. It submits, on the other hand, that the complainants have modified their claim for reimbursement, with interest, of the amounts levied as tax on their ancillary remuneration since the date of entry into service, converting it into a claim for compensation. This, it argues, is a new claim and as such it is irreceivable.

The Agency contends that Annex V to the Staff Regulations deals solely with Eurocontrol's tax and that it contains no reference to or mention of the tax system in force in the European Union. It follows that the average rate mentioned in Article 4(2) can only be the Agency's average tax rate. Rule No. 27 constituted a response to the Permanent Commission's stipulation that the net remuneration of Agency staff should remain unaffected by the introduction of the internal tax. With regard to the "rules in force" mentioned in Article 2(2)(c) of Rule No. 27, this refers solely to rules of the European Communities. It sees no reason to "mix and match" the tax regimes of the European Union and Eurocontrol by taking part of one and inserting it in the other. The Agency points out that ancillary remuneration such as overtime also exists in the European Union. It maintains that the impugned decisions are "legally consistent and cause no injury to the staff".

Lastly, the Agency notes that the complainants are not opposed to the joinder of the complaints in the cases of A. and others and D. K. (No. 2) and others. It requests that these complaints be joined also with those filed in the cases of B. and others and v. L. (No. 2) and others.

## CONSIDERATIONS

1. A first group of complainants challenges, by complaints filed on 9 June 2006, the decisions of 9 February 2006 whereby the Director of Human Resources, acting on behalf of the Director General, dismissed their internal complaints against their payslips for the months of February, March and April 2005.

A second group of complainants challenges the same decisions of 9 February 2006 by complaints filed on 16 June 2006.

The defendant, noting that the subject matter of all these complaints is the same and that the briefs in support of the complaints are couched in identical terms, requests that the cases be joined so that they can be dealt with in a single judgment.

The complainants leave it to the Tribunal to rule on the request for joinder, while indicating that any such joinder should not entail a reduction in the costs claimed for each complainant.

The Tribunal considers it appropriate to join the complaints in order to render a single decision.

2. The facts pertaining to these cases, the arguments raised by the parties and the applicable provisions to which reference may be made are set out under A to E, above.

### *Receivability*

3. In their rejoinder the complainants acknowledge that a payslip cannot be challenged more than three months after its date of issue but point out that they are not challenging their payslips for the period before February 2005 but are actually claiming compensation for loss of remuneration during that period due to over-taxation since their entry into service and that such compensation is based on the rules of liability. They cite in support of this argument a judgment by the Court of Justice of the European Communities.

Without ruling on the appropriateness of applying that precedent to the present case, the Tribunal notes that in any case no claim for compensation based on the rules of liability was filed during the internal appeal proceedings. It follows that such a claim must be declared irreceivable before this Tribunal for failure to exhaust internal means of redress, in accordance with Article VII, paragraph 2, of the Statute of the Tribunal.

### *Merits*

4. The complainants accuse Eurocontrol of having unlawfully applied for the purpose of calculating Community net ancillary remuneration, the marginal rate instead of the average rate provided for by Eurocontrol's

tax rules. The defendant maintains that the marginal rate used by the European institutions must be applied.

This difference of opinion between the parties stems from their different interpretation of Article 2(2)(c) of Rule of Application No. 27.

The defendant submits that “the rules in force” referred to in that clause are those which apply to the European Communities, while the complainants contend that “the rules in force” are those contained in Article 4(2) of Annex V to the Staff Regulations.

5. The Tribunal considers that, although the scope of Article 2(2)(c) of Rule of Application No. 27, which refers to “the rules in force” without further detail, may be ambiguous, the defendant’s interpretation would contravene and negate the express terms of Article 4(2) of Annex V to the Staff Regulations, a higher-ranking provision which establishes, for certain categories of staff, an exceptional method for calculating the tax due in respect of ancillary remuneration.

6. It follows that the defendant, by applying the marginal rate to calculate the internal tax on ancillary remuneration instead of the average rate provided for in Article 4(2) of Annex V to the Staff Regulations, breached the said article.

The impugned decisions of 9 February 2006 dismissing the internal complaints filed by the complainants against their payslips for the months of February, March and April 2005 must therefore be set aside and the payslips cancelled. The Agency must ensure that the same action is taken in respect of subsequent payslips containing the same irregularity in the calculation of internal tax.

The defendant must therefore, where appropriate, reimburse the complainants for the excess tax levied on their ancillary remuneration from February 2005 onwards, plus interest at the rate of 8 per cent per annum.

7. The complainants are entitled to a total sum of 5,000 euros in costs.

## DECISION

For the above reasons,

1. The decisions of 9 February 2006 are set aside.
2. The payslips for the months of February, March and April 2005 are cancelled.
3. The Eurocontrol Agency shall reimburse, where appropriate, the excess amounts levied, plus interest at the rate of 8 per cent per annum, as indicated under 6, above.
4. It shall pay the complainants a total sum of 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2007, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

\* The wording of the same articles in the General Conditions of Employment is similar, but the term “servant” is used instead of “official” and reference is made to an Annex VI instead of V.

\*\* Article 64 of the General Conditions of Employment is identical, *mutatis mutandis*.

\*\*\* Annex VI in the case of the General Conditions of Employment.

\*\*\*\* Here Annex VI to the General Conditions of Employment adds “the allowance provided for in Article 69a of the General Conditions of Employment and the allowance provided for in Article 69d thereof”. The citation is otherwise identical.