Registry's translation, the French text alone being authoritative.

103rd Session **Judgment No. 2628**

The Administrative Tribunal,

Considering the complaints filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 8 May 2006 by the following 196 complainants and corrected on 4 July: Mr R. B., Mr M. A., Mr A. A., Mr S. A., Mr G. A., Mr K. A., Mr B. A., Miss M. B., Mr P. B. (his second), Mr A. B., Mrs E. B.-E., Miss C. B., Mr G. B., Mr B. B. (his second), Mr L. B., Mr H. B., Mr H. B., Mr I. B., Miss S. B., Mrs I. B.-E., Mr F. B., Mr B. B., Mr S. B., Mr A. C. S., Miss S. C., Mr M. C., Mr R. C., Mrs L. C., Mr R. C., Mr R. C., Mr R. C., Mr M. C., Mr E. C., Mr P. C., Mr C. C., Mr D. D., Miss C. d'A., Mr J. D. K., Mr R. d. S., Mr A. d. V., Mr M. D.'A., Mr F. D. (his second), Miss A. D., Mr M. D., Mr F. D., Mr H. D., Mr A. D., Mr V. D., Miss M. D., Mr R. D., Mr C. D., Mr C. D., Mr S. D., Mr A. D., Mr K. D., Mr R. E., Mr B. E., Miss B. E., Mr R. E. (his second), Mr M. E., Miss E. E., Mr J. F., Mr U. F., Mr J. F., Mrs M. F.-H. (her second), Mr R. G., Mr C. G., Mr F. G., Miss N. G., Mr B. G., Mr D. G., Mrs C. H., Mr P. H., Mr H. H., Mr T. H., Mr F. H., Miss B. H., Mr P. H., Mr C. H., Mr D. I., Mr T. J., Mr F. J., Mr G. J., Miss A. J., Mr A. J., Mr J. K., Mr H. K., Mr F. K., Miss C. K., Mr R. K., Miss N. K., Mr V. K., Mr T. K., Miss I. K., Mr M. K., Mr J. L., Mr A. L., Mrs A. L., Mr G. L., Mr M. L., Mr J.-M. L., Mr M. L., Mr M. L., Mr J. L., Mr P. L., Mr H. L., Mr F. L. (his second), Mr D. M. P., Mr S. M., Mrs H. M., Mr J. M., Mr A. M., Mr J. M., Mr K. M., Mr N. M., Mr J. M., Mr R. M., Mr M. N., Mr R. O., Mr B. O., Mr T. O., Mr W. O., Mr A. O., Mr M. O., Mr M. P., Mr I. P. M., Mr M. P., Mr S. P. (his second), Mr D. P., Mr M. P., Mrs V. P., Mr T. P., Mr E. P. (his second), Mr C. P., Mr M. R. (his second), Mr T. R., Mr P. R., Mr A. R., Mr S. S., Mr S. S., Mr A. S. P., Mr A. S., Mr S. S. (his second), Mr N. S., Mr S. S., Mr S. S., Mr K. S., Miss E. S., Mr K. S., Mr E. S., Mr S. S., Mr J. S., Mr J. S., Mr B. S., Mr E. S., Mr A. S., Mr K. F. M. S., Mr A. M. S., Mr J. S., Mr J.-M. S., Mr J. S., Mr P. S., Mr E. S., Mr D. T., Miss C. T., Mr L. T. B., Miss N. T. R., Mr J. T., Mr A. T., Mr D. U., Mrs S. U., Mr J. v. B., Mr M. v. B., Mr J. v. B., Mr J. v. d. R., Mr P. v. d. V., Mr J. V. d. B., Mrs R. V. d. B., Mr W. v. d. M., Mrs M. v. L., Mr I. V. W., Miss I. V. E., Mr D. V., Mr M. V., Mr P. V., Mr J. V., Mr B. V. (his second), Mr J. V., Mr M. V., Mr G. V., Miss E. W., Mr S. W., Mr P. W., Mr W. W., Mr R. W. and Mr R. Z., the Agency's reply of 19 October, the complainants' rejoinder of 22 November 2006 and Eurocontrol's surrejoinder of 23 February 2007;

Considering the applications to intervene filed on 23 November 2006 by Mr F. D., Mr P. E. F., Mr V. P., Mr F. S., Mr P. v. L., Mrs A. V. and Mrs R. V.;

Considering the observations made by Eurocontrol on 29 December 2006 on these applications to intervene;

Considering also the complaints filed against the Eurocontrol Agency on 8 May 2006 by the following 51 complainants and corrected on 4 July: Mr W. v. L. (his second), Mr R. B. (his second), Mr B. B., Mr V. C., Mr H. D. S. (his second), Mr F. D. (his second), Mrs M. D., Mr D. D. (his second), Mrs D. D., Mr D. D. (his second), Mrs A. D., Mr M. D., Mr G. E., Mr M. F., Mr M. F., Mr G. G., Mr R. G., Mr T. H., Mr J. H. (his second), Mr R. H, Mr B. H. (his second), Mr L. J., Mr U. K., Mr A. K., Miss E. K., Mr J. L., Mrs M. L.-v. W. (her third), Mr P. L. (his second), Mr L. M. L. C., Mr P. M., Mrs L. M. (her second), Mr F. M. (his second), Mr H. M., Mr B. N., Mr S. N. (his second), Mr E. O., Mr A. P., Mr D. R. (his third), Mrs T. S. (her second), Mr J.-P. S. (his second), Mr G. T., Mr D. T., Mr S. T., Mr V. U., Mr K. V. d. V., Mr R. v. Z., Mr F. V. (his second), Mr C. V. (his second), Mr F. V. (his second), Miss S. W. (her second) and Miss E. Z. (her second), the Agency's reply of 19 October, the complainants' rejoinder of 22 November 2006 and Eurocontrol's surrejoinder of 23 February 2007;

Considering Article II, paragraph 5, 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. On account of the duties they perform, they are regularly entitled to ancillary remuneration. In May and June 2005, all but ten 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 September 2005 the ten complainants who had not yet filed an internal complaint and 179 of the other complainants filed internal complaints, also directed against the taxation of ancillary remuneration and claiming reimbursement of excess amounts unduly levied since their entry into service.

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 cite the applicable provisions and assert that the legislator intended to establish a more favourable tax regime for the items of remuneration listed under Article 4(2) of Annex V to the Staff Regulations and Annex VI to the General Conditions of Employment. They accuse the Agency of resorting to an "artifice" in order to reconstitute the notional gross remuneration of each staff member, the idea being to "maintain the appearance of lawfulness". They charge it with establishing a system that is obscure and incomprehensible for those concerned. They add that this "contrivance" breaches the fundamental principle of the hierarchy of rules. By adding the ancillary remuneration listed in Article 4(2) of aforementioned Annex V or VI to the basic salary and allowances provided for in Article 62 of the Staff Regulations or General Conditions of Employment, Eurocontrol has extended the scope of Rule of Application No. 27. The Rules, however, merely serve to implement the provisions of the Staff Regulations or General Conditions of Employment, including their annexes and appendices, and they are therefore lower in rank than the said provisions.

According to the complainants, contrary to the assertion of the Director of Human Resources in the impugned decisions, the "Community net remuneration" does not necessarily constitute the net remuneration to be paid to each official or servant but "only part of the remuneration in the case of all those who are entitled to one or more of the items of supplementary remuneration or allowances referred to" in Article 4(2) of Annex V or VI. They

submit that the amounts provided for in Article 4(2) must be added to the remuneration, after the compulsory deductions, and that this should be done after tax has been levied on those amounts at the average rate applicable to other taxable items of remuneration paid to the persons concerned during the previous month. This average rate should be determined by taking the amount of tax resulting from taxation of principal remuneration at the rates in force in the European Union and dividing it by the amount of remuneration, which corresponds to a "Community average rate". They claim to have suffered a financial injury from this unlawful application of Rule No. 27 inasmuch as the items of remuneration listed in Article 4(2) of Annex V or VI cited above are taxed at the marginal rate in force in the European Union instead of "a Community average rate". They add, however, that the obscurity of the method of calculation prevents them from determining the exact amount of the injury.

Subsidiarily, the complainants contend that Article 2(2)(c) of Rule No. 27 also breaches the principle of the hierarchy of rules since it infringes Article 4(2) of Annex V or VI by subjecting the staff member's remuneration to "the internal tax applicable at the European Communities in accordance with the rules in force" – i.e. to a marginal rate, the only tax rate that exists in the European Communities – although Article 4(2) of the annexes provides, as an exception, that ancillary remuneration should be taxed at an average rate. The application of Article 2(2)(c) of Rule No. 27 should therefore be excluded in favour of Article 4(2) of Annex V or VI.

The complainants ask the Tribunal to quash the impugned decisions, to correct the method of calculating net remuneration, to rule that this correction will have three months' retroactive effect as well as prospective effect, to order Eurocontrol "to correct the payslips as appropriate and to reimburse the amount of unduly levied tax", and to order the Agency to pay them interest on the sums due as well as costs, which they estimate at 1,000 euros "per party".

C. In its replies Eurocontrol acknowledges that the complaints are receivable but contends that, even if the complainants' argument were to prevail, the Tribunal could not order it to maintain a particular method of taxation in the future, since the Agency remains free to modify its tax rules provided that it complies with its internal procedures and general principles of law.

On the merits, the defendant submits that the complainants' description of the method of calculation of net remuneration is erroneous. 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 and Annex VI to the General Conditions of Employment merely set out the modalities of Eurocontrol's internal taxation system. They make no reference to the European Communities. Rule of Application No. 27 was adopted in application of Article 64 of the Staff Regulations and of Article 64 of the General Conditions of Employment and concerns the "adjustment" provided for in these articles, describing the principles whereby equality between net remuneration at Eurocontrol and net remuneration paid by the European Communities is ensured. As Article 4(2) of Annex V to the Staff Regulations and Article 2(2)(c) of Rule No. 27 have different purposes, they cannot contradict each other. 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 Article 2(2)(c) of Rule No. 27 requires that Eurocontrol's tax rules (the average rate) 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 Eurocontrol's taxation system, with its scale and rates, has an impact not only on the remuneration of officials and servants but also on the fees charged to airspace users in the form of route fees, and on tax revenues for the Organisation's budget.

The Agency applies for joinder of the cases B. and others, v. L. (No. 2) and others, A. and others and D. K. (No. 2) and others on the ground that their subject matter is the same and their claims similar.

D. In their rejoinders the complainants reiterate their arguments. They maintain that the Agency unlawfully extended the scope of Rule No. 27. In their view, the Director General was not authorised, "[w]ithout having laid down specific rules governing the taxation of special remuneration and allowances", to subject such remuneration and allowances to the same tax regime as that which applies to principal remuneration. They claim that the legislator's intention to apply "a more favourable tax regime" to remuneration referred to in Article 4(2) of Annex V or VI had been clearly expressed and accuse the Director General of deliberately flouting that intention by using only the marginal rates in force in the European Union to determine Community net remuneration. In so doing, he breached the principle of the hierarchy of rules as well as the principle that an organisation must abide by its own internal rules.

Rejecting the Agency's arguments, the complainants contend that the Permanent Commission, at its 52nd Session, only decided to introduce an internal tax system in the Organisation – whilst stipulating that the staff's net remuneration should remain unaffected by the introduction of the system – and to amend the provisions in force accordingly. They maintain in particular that there was no intention of ensuring parity of net remuneration between Eurocontrol and the European Union. While the principle of absolute equality of net remuneration is applicable to basic salaries, the same cannot be held to apply to operational and other allowances that do not exist in the European Union. The complainants submit that the tax regime applicable to "special remuneration" is clearly a more favourable regime and they do not see why it could not be used to determine the Community net income. The Director General should have applied the Community average rate which, though it may not exist as such in the European Union's tax rules, can easily be calculated.

The complainants reject the application for joinder with the cases of A. and others and D. K. (No. 2) and others on the ground that they are unaware of the arguments raised by the parties to those cases. They expand their claims by asking the Tribunal to rule "that ancillary remuneration must be taxed at a 'Community' average rate derived from the tax rates effectively applied to the remuneration of servants and officials of EUROCONTROL, i.e. those in force in the European Union".

E. In its surrejoinders the Agency expresses surprise at the complainants' reasoning in the light of the goal they are pursuing. If their reasoning were to be accepted, the net ancillary remuneration to be paid to a member of Eurocontrol's staff would, in its view, be substantially less than at present. It reaffirms that ancillary remuneration forms part of the remuneration referred to in Articles 62 and 62a and in Annex V to the Staff Regulations and Annex VI to the General Conditions of Employment. Rule No. 27, for its part, is applicable to all salaries and allowances subject to Eurocontrol internal tax. It 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. 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 contends that the complainants are making a "fundamental mistake" when they claim that it was decided to align the taxation of remuneration at Eurocontrol with that in force in the European Union and expresses surprise at the fact that they dispute the existence of equality of remuneration between Eurocontrol and the European Union. It reaffirms that the current rules are applied correctly and consistently.

Lastly, the Agency notes that the complainants are not opposed to a joinder of the cases of B. and others and v. L. (No. 2) and others. It states that it understands their opposition to joinder of the other two cases, since they are unaware of the pleas and claims put forward, but maintains that the four cases can be joined and leaves the matter to the discretion of the Tribunal.

F. The interveners have filed memoranda that are identical, *mutatis mutandis*, to the complainants' rejoinders. They file the same claims.

G. In its observations on the applications to intervene, the Agency acknowledges that the interveners have a cause of action since they are in the same situation, in fact and in law, as the complainants. It considers, however, that their claim for costs is irreceivable.

CONSIDERATIONS

1. One group of complainants, numbering 196, all staff of Eurocontrol's Upper Area Control Centre in Maastricht (Netherlands), subject to the General Conditions of Employment, who regularly receive ancillary

remuneration on account of the duties they perform, challenges, by complaints dated 8 May 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 the taxation of their ancillary remuneration.

Another group of complainants, numbering 51, posted to the Central Flow Management Unit (CFMU) in Brussels or to the Upper Area Control Centre in Maastricht and who regularly receive the same ancillary remuneration on account of the duties they perform, challenges, by complaints dated 8 May 2006, the same decisions of 9 February 2006.

2. The defendant applies for joinder of all these complaints and their joinder with two other cases also to be heard by the Tribunal this day.

The complainants make no comment on the joinder of the above-mentioned complaints but are opposed to joinder to the other two cases on the ground that they are unaware of the arguments raised by the parties to those two cases.

The Tribunal considers it appropriate to join only the complaints mentioned under 1, above.

3. *Mutatis mutandis* the facts pertaining to these cases are the same as those in Judgment 2627, also delivered this day.

4. The complainants' claims, as set out in their complaint brief and presented in greater detail in their rejoinder, are set out under B and D, above.

They assert, primarily, that the defendant's application of Rule of Application No. 27 breaches the principle of the hierarchy of rules and, subsidiarily, that Article 2(2)(c) of Rule No. 27 infringes that same principle.

5. The defendant contends that some of the claims may be irreceivable. It submits that the complainants seem to expect the Tribunal to order it to continue applying in the future the method of taxation that might be deemed correct if they were to succeed, whereas it must remain free to modify its tax rules in the future – provided that it complies with its internal procedures and general principles of law.

6. On the merits, Eurocontrol is primarily accused of having applied Rule No. 27 unlawfully in calculating the internal tax on ancillary remuneration.

The relevant provisions and the arguments of the parties are set out under A to E above, to which reference may be made.

7. The Tribunal concludes from its analysis of the relevant provisions that, even if the defendant's interpretation of Article 2(2)(c) of Rule of Application No. 27 is assumed to be correct, this provision cannot impede the application of Article 4(2) of Annex V to the Staff Regulations or Annex VI to the General Conditions of Employment, which creates an exception and which, as the complainants point out, is a higher-ranking provision than Rule No. 27. It follows that by refusing to use only the average rate provided for in Article 4(2) of Annex V or VI when calculating the internal tax on ancillary remuneration pursuant to Article 2(2)(c) of Rule No. 27, the defendant failed to observe the hierarchy of rules and thus breached the provisions of Article 4(2) of Annex V or VI, which is a higher-ranking rule.

The arguments regarding the intentions of the legislator and the impact on route fees and on tax revenues for the Organisation's budget are immaterial under the circumstances, since the defendant must comply with its own rules.

8. The decisions of 9 February 2006 must therefore be set aside and there is no need to examine the complainants' subsidiary plea.

Ancillary remuneration must be taxed at the average rate in accordance with the provisions in force. The payslips for the last three months preceding the date of filing of the internal complaints must therefore be corrected as appropriate. 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 complainants are entitled to reimbursement, where appropriate, of the unduly levied internal tax plus interest at the rate of 8 per cent per annum, and also to costs amounting to a total of 5,000 euros.

9. By a letter dated 4 December 2006, the Registrar of the Tribunal transmitted to Eurocontrol for comment seven applications to intervene. While acknowledging that the interveners have a cause of action since they are in the same situation, in fact and in law, as the complainants, the defendant submits that their claims for the award of 1,000 euros in costs are irreceivable, not to mention unreasonable.

As the complaints are allowed, the Tribunal finds that, in keeping with its case law, the applications to intervene should also be allowed insofar as the interveners are in the same situation, in fact and in law, as the complainants; however, the interveners should not be awarded 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 amounts of internal tax unduly levied, plus interest at the rate of 8 per cent per annum, as indicated under 8, above.

4. It shall pay the complainants a total sum of 5,000 euros in costs.

5. All other claims are dismissed.

6. The applications to intervene are allowed insofar as the interveners are in the same situation, in fact and in law, as the complainants.

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

Catherine Comtet

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* 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.

Updated by PFR. Approved by CC. Last update: 28 August 2007.