The Administrative Tribunal,

Considering the complaints filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Mr J. W. on 15 April 2006, by Mr F. C., Mr J.-L. F., Mr R. J. I., Mr W. L., Mr G. P., Mrs M. J. S.-P. and Mr J. V. on 29 April 2006, by Mrs M. J. A. M. (her second) on 2 May 2006 and by Mrs B.-M. M. on 16 May 2006;

Considering Eurocontrol's reply of 22 September, the complainants' rejoinder of 4 December 2006 and the Agency's surrejoinder of 2 March 2007;

Considering the applications to intervene filed by Mr B. B., Mr J. C., Mr G. D., Ms Y. F., Mr M. G., Ms M. P., Ms F. R., Mr J. S., Ms M. T. and Ms D. V. on 19 April 2007 and the Agency's comments thereon of 25 April 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 case and the pleadings may be summed up as follows:

A. From 1997 onwards, successive working groups examined the possibility of reforming Eurocontrol's pension scheme. For the past 20 years a budgetary scheme had been in place. Pensions were paid from the Agency's budget and, in the absence of an actual pension fund, an undertaking by the Member States to guarantee the payment of pensions was incorporated in the Staff Regulations governing officials of the Eurocontrol Agency. By Decision No. 102 of 5 November 2004, after consultation with the staff unions, the Permanent Commission for the Safety of Air Navigation approved the setting-up of a pension fund for current and future staff, into which employee and employer contributions would be paid. These contributions, and the interest earned on them, would finance pension rights acquired after 1 January 2005. Pension rights acquired prior to that date by staff members who had not yet retired (past service liabilities) would be financed by means of specific annual contributions by the Member States, spread over a period of 20 years. Only existing pensions would continue to be paid from the Agency's budget.

The decision to set up the pension fund was accompanied by several other measures. On 4 April 2005 the Permanent Commission approved a reduction in pension benefits, an increase in contributions and an increase in the age of retirement. These measures, which took effect on 1 July 2005, were brought to the attention of the staff in Office Notice No. 11/05 of 20 June 2005. Between 20 September and 17 October 2005 the complainants, who are staff members serving at the Experimental Centre at Brétigny-sur-Orge (France), lodged identical internal complaints challenging "the totality of the measures concerning pensions applied from 1 July 2005". They contended, on the one hand, that the measures in question were based on "legally flawed" actuarial studies and were therefore "null and void" and, on the other hand, that some of the measures violated their acquired rights. Having received no reply, they filed complaints with the Tribunal at various dates between 15 April and 16 May 2006, challenging the implied dismissal of their internal complaints.

In the meantime, the matter had been referred to the Joint Committee for Disputes, which, in an opinion dated 12 May 2006, concluded that the internal complaints were unfounded. It considered that the complainants had not substantiated their assertion that the actuarial studies on which the challenged measures were allegedly based were flawed. Moreover, since they had not taken into account the effect, on their individual cases, of the transitional measures accompanying the pension reform, their argument based on a breach of acquired rights could not be sustained. A copy of the Committee's opinion was sent to each of the complainants under cover of a memorandum of 13 June 2006, by which the Director of Human Resources informed them that the Director General had decided to dismiss their internal complaints as being legally unfounded.

B. The complainants contend, firstly, that the various decisions by which the Permanent Commission adopted

the contested measures were based on false information. They submit that changes to the contribution rate or to the age of retirement could only be made on the basis of actuarial studies, in accordance with Article 83 of the Staff Regulations. Actuarial studies had been carried out in 1999 and 2002 by an external company but, despite being based on the same input parameters, they yielded results that differed considerably, with the 2002 study suggesting an increase of 31.5 per cent in the contribution rate between 1999 and 2002. The Agency is unable to provide a plausible explanation for this discrepancy. The results of the 2002 study cannot be verified, particularly because the external company is unwilling to provide details of its calculations and methods. Eurocontrol, for its part, issued a "reconciliation document" in which it purported to reconcile the 1999 and 2002 studies by attributing the increase in the contribution rate to three irrelevant factors. According to the complainants, all the contested measures are based, explicitly or implicitly, on these actuarial studies and hence on false and misleading information.

Secondly, the complainants argue that the measures introduced on 1 July 2005 violate their acquired rights. They refer in particular to the fact that the cost-of-living weightings applied to pensions pursuant to Article 82(1) of the Staff Regulations, which until 1 July 2005 were calculated on the basis of the cost of living in the capital city of the Member State where the pensioner resides (capital weighting), are now calculated on the basis of the cost of living in the country as a whole (country weighting). The complainants submit that, although transitional measures ensure that the change to country weightings is being introduced gradually, they will eventually lose the cost-of-living weighting so that, in real terms, their pensions will be cut. Insofar as these measures were not foreseen by the Staff Regulations and have been applied to pension rights that were "paid for" under the old rules, they violate acquired rights; and given that there was no indication, prior to the 2002 actuarial study, that the pension scheme was financially imbalanced, there was no justification for reducing pension rights acquired prior to 2002. The complainants also argue that the change to country weightings is discriminatory, in that it has virtually no impact on pensioners in Belgium and Luxembourg but drastically affects pensioners in France, for whom it will entail a reduction of some 14 per cent in the purchasing power of their pensions over a period of eight to ten years.

Subsidiarily, the complainants contend that the procedure of formal consultation with the trade unions was not completed prior to the approval of the contested measures by the Member States, and that the said measures are "morally reprehensible and repugnant" insofar as they apply immediately to existing pensioners or their survivors, who cannot easily defend themselves against "arbitrary decisions". They also criticise Eurocontrol for failing to answer their internal complaints within the statutory time limits, thereby depriving them of the opportunity to have their cases examined on the merits within the Organisation.

The complainants ask the Tribunal to set aside "the decisions which produced the 1 July 2005 measures" and to award them moral damages, "because the Administration knowingly used false information in damaging [their] Pension Scheme". They also claim costs.

C. In its reply Eurocontrol contends that only two of the complaints are receivable, the remaining eight complaints having been filed after the expiry of the three-month period provided for in Article 93(3) of the Staff Regulations. It also raises doubts as to whether the complainants have a cause of action, given that they are challenging general measures without specifying how each measure will affect them individually.

In response to the allegation that the measures which entered into force on 1 July 2005 were decided on the basis of false information, the Agency points out that these measures were not confined to modifying the contribution rate or the age of retirement, but were part of a thorough and lasting reform of the pension scheme entailing amendments to the Staff Regulations. Whilst the actuarial studies conducted in 1999 and 2002 were an important element in the assessment of the situation, they were merely one element amongst others. Eurocontrol maintains that the "reconciliation document" issued in May 2002 provided the necessary explanations regarding the differences noted between the results of the two studies. It states that, in any case, no action was taken on the basis of these studies, since they had been conducted in connection with another approach to reforming the pension scheme, known as the "global solution", which was subsequently abandoned in favour of an approach largely based on the pension reform implemented by the European Union. It adds that actuarial studies carried out in 2005 and 2006, neither of which has been contested by the complainants, have confirmed the validity of the new scheme.

Eurocontrol considers that in order to establish a violation of their acquired rights, the complainants must be more precise and must indicate how particular measures affect them individually. It submits that they had no legitimate expectation that the pension scheme would be immutable and explains that, like many developed countries and international organisations, it was obliged, particularly on account of the increase in life expectancy, to take measures to ensure that the scheme would remain financially balanced in the long term. It examines the actual or

potential impact of each of the measures on the complainants individually and concludes that the changes which affect them, some of which remain hypothetical, “will not have any catastrophic economic effect on the contract of employment which they each signed on being appointed”.

With regard to the introduction of country weightings, the Agency notes that none of the complainants is currently affected by this change. It emphasises that the purpose of cost-of-living weightings is to ensure that pensioners will have comparable purchasing power whatever their country of residence, and not to guarantee strict equality of purchasing power between pensioners residing in different places within the same country. The system of capital weightings was open to abuse, since pensioners could designate a main residence in a country with a high capital weighting but live most of the time in a secondary residence situated in another part of the country where the cost of living was in fact considerably lower, or even in another country. This system was no longer serving its original purpose and, in view of its adverse effect on the budget of the pension scheme, had to be reviewed. The complainants had no acquired right to benefit from the previous method of calculating the cost-of-living weightings.

Eurocontrol considers the complainants’ allegation regarding the consultation process with the unions to be flippant, and recalls that the unions participated on a regular basis in the proceedings of the various working groups which examined the pension scheme between 1997 and 2005. Their argument that the contested measures are morally reprehensible is described by the Agency as “excessive and border[ing] on the ridiculous”; far from being immoral and repugnant, the measures taken were designed to preserve a sound pension scheme for the future, without imposing an undue or excessive burden on serving staff.

The Organisation regrets the delay in the processing of the internal complaints, but denies that its intention was to avoid the internal appeals procedure. It adds that the complainants are at liberty to challenge before the Tribunal the express replies that were sent to them on 13 June 2006.

D. In their rejoinder the complainants acknowledge that one of the complaints could be considered time-barred, but they ask the Tribunal to show indulgence towards the person concerned, who missed the deadline by one day. They recognise that not all of the disputed measures affect them at this time, but point out that one of the measures, namely the increase in contribution rates, already affects all of them since the contributions that they make now will finance the benefits that they will receive in the future. Thus, they argue, through the contributions, all the measures affect all staff immediately. They press their arguments on the merits.

E. In its surrejoinder the Agency maintains its objection to the receivability of eight of the complaints and likewise its position on the merits.

CONSIDERATIONS

1. The ten complainants have filed identical complaints in which they state that they are challenging the measures introduced with effect from 1 July 2005 in the context of a reform of Eurocontrol’s pension scheme, except for the creation of a pension fund. These measures form a whole, but the decisions by which they were implemented were taken by the Organisation on various dates and under different procedures. Applications to intervene have been filed by nine serving officials and by one retired official.

2. Since the complaints raise the same issues of fact and law and seek the same redress, they shall be joined to form the subject of a single judgment.

3. Before examining the merits of the case, it is convenient to deal with the objection to receivability raised by the Agency, according to which eight of the ten complaints are time-barred. Although the complainants refer to “the 1 July 2005 measures” as constituting the impugned decision, they are in fact challenging the implied decisions rejecting the internal complaints submitted on 20 September 2005 by eight of them, including Mr W., on 26 September 2005 by Mr V., and on 17 October 2005 by Ms M.

Article 92(2) of the Staff Regulations relevantly provides:

“The Director General shall notify the person concerned of his reasoned decision within four months from the date on which the [internal] complaint was lodged. If at the end of that period, no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it […]”

For eight of the complainants, including Mr W., the four-month period mentioned in Article 92(2) expired on 21 January 2006. For Mr V., it expired on 27 January 2006, and for Ms M. on 18 February 2006. Only Mr W. and Ms M. filed their complaints before the Tribunal within ninety days of the date on which the said four-month period expired. Consequently, theirs are the only complaints that are receivable. The remaining eight complaints are time-barred under Article VII of the Statute of the Tribunal and are therefore irreceivable.

4. The Organisation also raises the question of whether the complainants have a cause of action. It points out that they have not shown how they are currently affected by any of the general measures that they challenge, and that some of those measures may never affect them at all. However, as the Tribunal stated in Judgment 1712, there may be a cause of action even if there is no present injury: time may go by before the impugned decision causes actual injury. The necessary, yet sufficient condition of a cause of action is a reasonable presumption that the decision will bring injury. Furthermore, the Tribunal considers that the challenged measures, such as the increased contribution rate, do affect the complainants directly, and that "staff members have an obvious interest in ascertaining the value of their pension rights as soon as possible, even if they are still serving: the receivability of their action does not depend on proving actual and certain injury, but on their having an interest in obtaining recognition of their future rights, regardless of whether their pleadings are well founded" (see Judgment 2583, under 7).

5. The complainants assert that the challenged measures were decided on the basis of false information, violate acquired rights and have discriminatory effects. They also contend that the procedure of formal consultation with the trade unions was not properly conducted, that the challenged measures are deeply immoral and that the Agency violated its appeal procedure. In their rejoinder they expand on their plea regarding the violation of acquired rights by referring to the retroactive effect of the measures taken.

6. The first plea must be dismissed, since there is no proof that the challenged measures are based on the contested 2002 actuarial study; this study was linked to the "global solution" which was not adopted.

7. The plea based on a breach of acquired rights likewise fails, because the complainants have not established that the contested measures have altered fundamental and essential conditions of their employment. In this connection, it may be recalled that "whereas [the] right to a pension is no doubt inviolable, a pension contribution is by its very nature subject to variation […]. Far from infringing any acquired right a rise in contribution that is warranted for sound actuarial reasons […] actually affords the best safeguard against the threat that lack of foresight may pose to the future value of pension benefits" (see Judgment 1392, under 34). Where a decision to introduce a new pension scheme is taken on grounds of financial necessity, such as the need to address the rising cost of pensions, the Tribunal cannot consider it to be invalid merely because it leads to a situation that is less favourable to employees. Furthermore, the challenged measures cannot be judged as violating the rule against retroactivity, since they affect the future and do not eliminate previously-established effects of the complainants' employment contracts.

8. To support their plea that the contested measures are discriminatory, the complainants refer to the fact that the change from capital weightings to country weightings has a "drastic" effect on pensioners residing in France whereas it has no effect on pensioners in Belgium and Luxembourg. In the Tribunal's view, this measure is not discriminatory as it does not treat identical situations in diverse manners. Pensioners residing in France are not in the same situation as pensioners residing in other countries; consequently, they cannot claim to be discriminated against on the grounds that pensioners in Belgium and Luxembourg are treated differently from them.

9. Regarding the alleged violation of the formal consultation procedure with the trade unions, the Tribunal notes that the unions participated in numerous meetings with representatives of the Organisation and of the Member States to discuss the reform of the pension scheme, and that minutes of these meetings were drawn up. The complainants acknowledge that such minutes were available but argue that, at the time when it decided on the contested measures, the Permanent Commission would have been guided by the information presented in the working document of 21 October 2004 submitted to it by the Director General, which, according to the complainants, did not properly reflect the opinions of the trade unions. However, there is no evidence to support this assertion.

10. As the complainants themselves concede, the plea that the challenged measures are "deeply immoral" is not a legal argument. In this connection the complainants refer only to the impact of the measures on pensioners but

not to an injury suffered by them personally.

11. Lastly, regarding the plea of breach by the Agency of its appeal procedure, the complainants have not shown that they suffered injury as a result of the fact that their internal complaints were not examined by an internal appeal body within the prescribed four-month period. Furthermore, this circumstance has not prevented them from exercising their right of appeal, since they have availed themselves of the possibility of challenging before the Tribunal the implied decision to reject those complaints. They could also have challenged the express decision of 13 June 2006 dismissing their appeal.

12. Since none of the complainants' pleas succeeds, the complaints must be dismissed.

DECISION

For the above reasons,

The complaints are dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 10 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet

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