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ALLIANCE OF FREE TRADE UNIONS

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The alliance protects colleagues' interests in negotiations on the application of the principle of staff's financial liability

The ALLIANCE has negotiated a framework for applying Article 22 of the Staff Regulations on the financial liability of officials and other servants, with a view to defending colleagues' interests and the Institution's credibility.

For those who would allow the Appointing Authority to have a completely free hand in running any "witch hunts" in cases of delib-

erate misconduct, and for those who, as a result of their unfortunate proposals, risked giving known fraudsters a bonus, the ALLIANCE has managed to draw up an application framework that will help colleagues to understand how this Article is to be applied, and which will provide them with greater legal security. In order to inform and assist staff, the ALLIANCE will organise a question-and-answer information session as soon

as possible in order to give a detailed explanation of the outcomes of the negotiations, and will immediately set up a group of specialists that will be at staff's disposal to assist them if they have any doubts about the interpretation of these rules.

Summary of the outcomes of the negotiations

The financial liability of an official or other servant may be invoked

... **only** if he/she commits "*gross negligence*" which ought never to be committed by an official in the same grade exercising normal care in comparable circumstances" **AND** if the official concerned is aware (or is regarded as being aware) that his/her conduct is extremely likely to cause damage to the Communities.

2) Staff's financial liability is NEVER invoked

... if it is a matter of **ordinary or slight negligence**, simple errors, minor and occasional instances of negligence, or where the misconduct arises mainly out of the **working environment** in which the official has to work, or from **his/her lack of training**. In such cases, Article 22 might be applied to one or more senior managers of this working environment providing they have committed serious personal misconduct.

3) Sanctions: a maximum of one year's salary for gross negligence

In cases of gross negligence, the sanction is limited to a year's salary (instead of five years as demanded in the initial draft). Payment may be made in instalments to take account of the individual's family circumstances. However, in the case of maliciously-minded officials who have deliberately caused damage to the Communities (e.g. by fraud, theft or corruption), they will be asked to compensate for the damage in full.

4) The rules to be followed are clear: examples, training, information etc

Concrete examples will be published to clarify the scope of these provisions, and so that staff can act in full knowledge of the facts. The ALLIANCE has also won the right to have clear and precise training/information sessions organised.

5) Insurance

Although the Commission has refused to take out an insurance policy on behalf of financial operators, the ALLIANCE **considered this refusal to be unjustified** and immediately carried out a market sur-

vey to check on conditions that could be offered to staff. On that basis, it undertakes to take appropriate steps to ensure that the problem is looked at again. **6) Recognition of financial operators**

In the course of the public consultation, the ALLIANCE reminded Mr Kinnock that was an **urgent need** to put in place **positive measures designed to recognise the true value of the work** of financial operators, and to **encourage colleagues** to put in for work of this kind that have become increasingly unappealing.

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Detailed explanations

1) Will it be necessary to draw up an implementing text for Article 22 of the Staff Regulations?

Article 22 of the Staff Regulations¹ constitutes the legal basis enabling the Communities to obtain damages caused to them by officials and servants. This basic principle is operated in all public administrations, and is confirmed by the Declaration of the Rights of Man and of the Citizen² and the EC Treaty³. However, as an official is only the agent whereby the public authority intervenes, it is right that liability **should be shared** between him/her and the public body.

Article 22 has never been previously applied by the Commission. Some trade unions and DGs have therefore wondered whether it was really necessary to draw up an implementing text for this Article. The ALLIANCE's response was clear and unequivocal: **YES**, and for two very clear reasons:

- a) to limit and structure the Appointing Authority's sweeping powers in applying Article 22 of the Staff Regulations;
- b) to guarantee that financial operators **have advance knowledge** of the scope and limits of their financial liabilities, thereby enabling them to act in full knowledge of the facts.

It must not be forgotten that, particularly when under pressure from the budgetary authorities, the Commission has confirmed its political will henceforth to make use of Article 22 of the Staff Regulations. It also made a formal undertaking to this effect when restructuring the Financial Regulation.

Furthermore, the Charter of tasks and responsibilities, which all authorising officers by delegation or sub delegation must sign, explicitly states that Article 22 applies to them in cases of serious professional misconduct, despite the fact that there is no im-

plementing rule or detailed information to enable these colleagues to understand the extent of the responsibility placed on them.

So without any provisions concerning application, and with no case law on the matter from the Court of First Instance (CFI), the AIPN have almost has "carte blanche", **in the absence of clear rules and limits**, to challenge staff members' financial liabilities. Sanctions would be imposed immediately, and colleagues thus incriminated could only contest the legality of these decisions before the CFI, which would not hand down its Judgement for two years.

Worse still, staff would not have **advance knowledge** of the scope and limits of this liability, and that would prevent them from acting in full knowledge of the facts.

To have an idea of who the "beneficiaries" of this absence of clear rules would be, everyone knows perfectly well that responsibility and blame within our Institution **descend very rapidly to the lowest level of the services**. On the contrary, in cases of dysfunctioning, it is extremely for this responsibility to climb the steps of the hierarchy because often "the upper hierarchy is not directly responsible" and "the public authorities are not always well informed".

In this way, the absence of rules and principles for applying Article 22 of the Staff Regulations would have placed staff and financial operators **in a position of quite unacceptable uncertainty, even of concern**, as they are already obliged to apply a wide range of new and increasingly complex rules without necessarily having had appropriate training in services, which in turn are not sufficiently equipped in terms of human resources in relation to the duties they have to perform.

Detailed analysis of the outcomes of the negotiations

During negotiations on these rules, the ALLIANCE fought for, and achieved, the following two objectives: 1) definition of the concepts and fixing the limits, and 2) account to be taken of the context in which officials have to work.

1) Defining the concepts precisely, establishing the limits on negligence capable of invoking an official's financial liability and fixing a maximum ceiling on financial sanctions.

DEFINITION: Under the terms of Article 22 of the Staff Regulations, negligence has

been limited solely to **gross negligence**, which is defined as "**negligence which ought never to be committed by an official in the same grade exercising normal care in comparable circumstances**" and targeting "**only the most serious types of negligence which are totally inadmissible on the part of an official exercising normal care**".

Furthermore, it was acknowledged that it is not possible to reduce the content of the notion of serious misconduct to a finding of gross negligence⁴. The official concerned

In the light of the foregoing, and in order to protect and assure staff, the ALLIANCE considers it **essential:**

- a) that **clear rules and concrete examples** should be drawn up to structure the AIPN's discretionary powers;
- b) that appropriate **information and training** should be made available to ensure that all financial operators are suitably trained and informed.

As for the legal form that will have to be adopted, the ALLIANCE argues that the **guidelines** format is appropriate, given that, as a result of their didactic nature, they could operate in a more pronounced pedagogical manner than a more abstract, decision-bound text – which could, depending on the circumstances, replace the *guidelines* after they have been in force for a few years.

¹ "An official may be required to make good, in whole or in part, any damage suffered by the Communities as a result of serious misconduct on his part in the course of or in connection with the performance of his duties."

² Article 15 of the Declaration of the Rights of Man and of the Citizen: "Society has the right to require of every public agent an account of his administration."

³ Article 288 (4) of the EC Treaty: "The personal liability of its servants towards the Community shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of employment applicable to them."

should also have an element of awareness of the consequences of his/her negligence (predictable damage). The official must be aware (or is regarded as being aware) that his/her conduct is very likely to cause damage to the Communities.

LIMITS: The ALLIANCE has argued that the *guidelines* should **clearly identify gross negligence:**

- "**upwards**", **deliberate misconduct** where an official has **deliberately caused damage to the Communities** (e.g. fraud or theft), and

for which total reimbursement will be sought;

- "**downwards**", ordinary or slight negligence, simple errors, and small occasional instances of negligence that could not invoke an official's financial liability, and which has been limited solely to the most serious types of negligence, which are in turn quite unacceptable in respect of an official exercising normal care.

For staff to be able to understand the scope of these definitions precisely, concrete examples based on the day-to-day experience of services will be published so that they can comprehend the scope of the limits laid down, and take them into account in their work.

SANCTIONS: Although the initial proposal was to establish a ceiling of five years' salary, trade union pressure resulted in a maximum ceiling of one year's salary in cases of gross negligence. Arrangements were also agreed for payment in instalments in order to take account of the official's family circumstances.

INSURANCE: The Commission rejected the trade unions' demand that it should take out an insurance policy in respect of financial operators both because it did not want to "relieve the official of his/her liability" and because the market seemed unlikely to bear such a risk. **The ALLIANCE considers this rejection to be totally unjustified.** Far from being discouraged by this take-it-or-leave-it attitude of the Commission, the ALLIANCE immediately carried out a market survey to check out the conditions that might be offered to officials, and on this basis promises to take appropriate steps to ensure that the problem is looked at again.

Pointless arguments and misunderstanding the issue

Shortly before the negotiations came to a conclusion, it was surprising to read in a recent flyer that Article 22 of the Staff Regulations was to be limited to cases "*serious and deliberate misconduct such as theft, fraud, corruption, misappropriation of funds, acts of destruction and sabotage*". Suffice it to say that this interpretation is clearly contradicted by other implementing rules on the subject, and particularly by the Financial Regulation, which expressly refers to an authorising officer's **negligence** as constituting "*serious professional misconduct*" invoking his/her financial liability⁵. However, all they had to do was talk to any authorising officer to know that the Charter of tasks and responsibilities⁶ that **all authorising officers have signed for the last two years** refers quite explicitly to "*grave negli-*

gence" as being capable of invoking financial liability under Article 22 of the Staff Regulations.

Moreover, under the proposed interpretation, financial liability in such cases as fraud, theft and corruption would be limited to one year's salary (!), which would undoubtedly have been criticised as being a completely unacceptable "bonus" for people who have been responsible for such serious offences. In practice, under the proposed system, someone who deliberately embezzles a million euros would only be fined one year's salary! This can't be serious! Obviously, in cases of fraud and theft, any administration managing public moneys is under an obligation to pursue the perpetrators, and must seek **full compensation** for the damage.

Lastly, if we just imagined for a moment that the proposed interpretation is reasonable, *quod non*, the authors of the flyer would have had to devote at least one of the 1532 days of negotiation on the Reform to amending Article 22 of the Staff Regulations in order to establish a legal basis in support of the interpretation defended in the flyer. This would undoubtedly have had the Council and the European Parliament in stitches...

2) Taking account of the context in which officials have to work, particularly in respect of their workload and level of training.

After limiting cases that can invoke an official's financial liability to gross negligence, restrictively defining them and, with the help of concrete examples, clarifying them, and after establishing a ceiling for the reimbursement that may be demanded, the ALLIANCE asked, and successfully argued, that the context in which officials have to work should be duly taken into account, not simply as an extenuating circumstance of the liability, but as a **genuine liability exclusion clause** for officials where the observed facts arise mainly from the context in which he/she has to work.

On the one hand, there is no doubt that the annual budget and the eternal myth of "100% implementation of the budget" (which is far from being replaced by sound financial management) often impose a workload that is incompatible with the normal functioning of a service, and can trigger mistakes that are sometimes serious, but which, in the circumstances, cannot be blamed on the financial operators. For example, the *guidelines* clearly state as follows:

"The context in which the official carries out his/her duties thus plays a major role.

*Article 22 will be applied only if the negligence does not occur mainly as a result of that context. Where this requirement is satisfied, **article 22 might be invoked against the person or persons responsible for that working environment if they are guilty of inexcusable behaviour.**"*

On the other hand, the difficulty interesting staff with experience in the financial field often obliges services to allocate duties to new recruits who do not necessarily have **the training** needed to perform such complex tasks. Again, the *guidelines* clearly state that an official's financial liability is not invoked in these circumstances:

*"Where an act or failure to act causes damage to the European communities and the official concerned has received all the training needed to carry out his or her duties. By contrast, **officials newly arrived in their units who have not been given the training they need to carry out their tasks cannot be held liable for the gross negligence likely to be characteristic of personal misconduct within the meaning of article 22 of the staff regulations.**"*

Given that evaluation of conduct that takes account of the circumstances in which it takes place (i.e. the working environment) must be conducted by specialists in the field, it is planned that this task should be assigned to **the specialised financial irregularities panel** referred to in Article 66(4) of the Financial Regulation. So that staff interests are appropriately taken into account, **a member of this body will be appointed by the Central Staff Committee.**

Moreover, as for taking rights of defence into account, we must not forget that Article 22 provides for **the same procedure as is used for disciplinary matters.**

Lastly, given that, in the final analysis, it will fall to the CFI to decide on legal claims, and to determine the unjustified or arbitrary nature of any decision taken, it is absolutely essential for staff to be able to present cases to the Court in reasonable circumstances. In this respect, the ALLIANCE repeated its firm opposition to the Commission's plan to amend the system of costs whereby, if the appeal was rejected by the CFI, the official would have to bear the Commission's costs as well as his/her own. Given the amounts of money involved, such a plan would significantly limit, not to say deny, staff's access to the law, and that would be completely unacceptable.

⁴ See Article 24 (2) of the Staff Regulations, which uses the term “grave negligence”. In cases of serious misconduct arising out of gross negligence, the term “serious misconduct” implies more than a finding that the negligence was “gross”.

⁵ See, for example, Article 66 of the Financial Regulation: “The authorising officer shall be liable to payment of compensation as laid down in the Staff Regulations, which specify that an official may be required to make good, in whole or in part, any damage suffered by the Commission as a result of serious misconduct on his/her part in the course or in connection with the performance of his/her duties, in partia-

lar if he/she determines entitlements to be recovered or issues recovery orders, commits expenditure or signs a payment order without complying with this Financial Regulation and its implementing rules. The same shall apply where, through serious misconduct, he/she omits to draw up a document establishing a debt or if he/she neglects to issue a recovery order or is, without justification, late in issuing it, as the issuing of a payment order may involve third-party liability of the institution”

⁶ See, for example, 5.1 of the Charter of tasks and responsibilities of accounting officers by subdelegation:

in conformity with article 22 of the staff regulations, in case of serious misconduct on his part, an authorising officer by subdelegation may be held responsible for making good in whole or in part the amount of any damage he may have caused to the communities. The responsibility of the authorising officer by subdelegation may be engaged through serious negligence, particularly when his misconduct has been permitted by a failure to follow the systems and procedures, laid down by the authorising officer by delegation for management and internal control purposes.

Conclusion

As the Commission has now clearly confirmed its commitment to applying Article 22 of the Staff Regulations, it is vital to establish clear implementing rules **both to limit and to structure** the AIPN’s sweeping powers, **and to reassure staff** and head off a climate of fear and suspicion in services.

The *guidelines* that came out of the negotiations establish gross negligence as being capable of invoking an official’s financial liability very restrictively, fix a maximum ceiling of a year’s salary in such cases, are accompanied by concrete examples based on services’ day-to-day experience, oblige the AIPN to

take account of (and even rule out any responsibility in respect of the official) the context in which he/she has to work, and will be addressed in intensive ad hoc training and information sessions.

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