



# The Offici@l

LEGAL NEWSLETTER ON EUROPEAN CIVIL SERVICE LAW

**DALDEWOLF**

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## Edito

Dear readers,

After the holiday season, the beginning of the year goes hand in hand with the annual appraisal and promotion exercise. To be well prepared, we propose to study together the recent case law regarding promotion and to focus on the assessment criteria for promotion and the seniority requirement.

Regarding private life, an update on the Brussels general tariff for immovable property donation is provided.

We wish you a wonderful New Year 2017.

*The DALDEWOLF team*

## Case law

### Consideration by “extrapolation” of the merits of candidates for promotion and role of the ACPs

In its judgement Pohjanmäki / EU Council of September 13<sup>th</sup> 2016, the EU Tribunal notably confirmed that, under certain circumstances, the Advisory Committee on Promotion (“ACP”) and the appointing authority can “extrapolate” the merits of the candidates for promotion and recalled the role of the ACPs.

In the present case, an official, who had been in the grade AD 12 for 8 years, challenged her lack of promotion invoking notably, on the one hand, the lack of consideration of her situation due to several staff reports being missing and, on the other hand, the lack of examination by the ACP of all the staff reports.

Firstly, the Tribunal recalls that the appointing authority possesses, for the purpose of considering the comparative qualifications and merits of officials who are candidates for promotion, a wide discretion, which is nonetheless constrained by the necessity to conduct an examination with care and impartiality, in the interest of the service and in conformity with the principle of equal treatment. In practice, this consideration must be carried out on a basis of equality and using comparable sources of information and indications.

In the present case, the Tribunal notes that both periods during which the applicant’s performance was not appraised cover a total of 7 months, which is very short compared with the period of 8 years spent in the grade AD 12. In addition, the Tribunal observes that the applicant has failed to establish that the responsibilities and duties she exercised during both short periods were not identical to those she performed during the periods immediately preceding and following which were effectively covered by a staff report. Indeed, regarding the 1st period, the applicant was assigned to a post which her, immediately preceding, staff report covered. Regarding the 2nd period, she was assigned to another post which her, immediately following, staff report covered.

Furthermore, according to the Tribunal, the applicant failed to demonstrate that her merits during those seven months were so significant that the outcome of the consideration of comparative merits of candidates for promotion to AD 13 might have been different if those merits had been taken into account. Therefore, the EU Tribunal concludes that the competent ACP and the appointing authority could validly by “extrapolation” evaluate the applicant’s merits.

Secondly, regarding the irregularity flowing from the lack of consultation by the ACP of certain staff reports of the applicant, the Tribunal recalls that the role of ACPs is to advise the appointing authority in considering the comparative merits of officials eligible for promotion as well as their staff reports, but that nothing prevents the appointing authority to examine itself certain files or to supplement itself the comparative assessment of the merits carried out by the ACP.

In that regard, in the present case, at the stage of the complaint, the appointing authority carried out a reexamination of the applicant situation and relied on all her staff reports as well as those of the other officials eligible for promotion in the same grade. Therefore, the Tribunal concludes that such reexamination amounted to an adequate response to the irregularity resulting from the lack of consultation by the ACP of certain staff reports of the applicant.

## Focus

### Assessment criteria for promotion and seniority requirement

Pursuant to article 45 of the Staff Regulations, promotion shall be exclusively by selection from among officials who have completed a minimum of 2 years in their grade after consideration of the comparative merits of the officials eligible for promotion.

Concerning the minimum seniority requirement, only the experience gained in a grade as an official can be taken into account with as its starting point, as regards to the hypothesis of the first promotion after recruitment, the date of establishment. EU judges consider that there is no legal continuity in the career of a temporary agent who became an official, insofar as the first is bound to the EU through a contractual link while for the latter the bound is statutory.

In that regard, by a judgement of December 14<sup>th</sup> 2016, Todorova Androva / EU Council, the EU Tribunal confirmed that a temporary agent recruited in the grade AD 5 who, in the meantime had successfully passed a competition, and was nominated as an official in the same grade 5 years later while performing the exact same duties, was not eligible for promotion. In the present case, the Tribunal held that the notion of « career », which underpins the right to promotion, has a meaning only as regards to officials, temporary agents being only able to claim a right to a reclassification in a grade corresponding to the duties they are called to perform during their contract.

Concerning the requirement for the appointing authority to consider the comparative merits of the officials eligible for promotion, this obligation is an embodiment of both the principle of equal treatment of officials and the principle that they are entitled to reasonable career prospects. When considering comparative merits, the appointing authority shall in particular take account of (i) the reports on the officials, (ii) the use of languages in the execution of their duties other than the language for which they have produced evidence of thorough knowledge and (iii) the level of responsibilities exercised by them.

The appointing authority may, as a secondary factor, where the merits of the officials eligible for promotion are equal, take into consideration candidates’ age and seniority in grade or service, those additional criteria may even constitute a decisive factor in its choice.

In this context, the appointing authority can also take into account the criterion of long-term consistency of merits which is based on the staff reports on officials. Such criterion enables the appointing authority to strike a fair balance between the aim of ensuring rapid career progression for outstanding officials with an exceptionally high performance level, and the aim of ensuring a normal career for officials who have performed consistently well over a long period.

In that regard, in the abovementioned Pohjanmäki / EU Council case, in light of this criterion and based on the level of responsibilities performed, an official with a seniority in the grade AD 12 of 2 years was promoted contrary to the applicant, who had been in the same grade for 8 years, considering notably the average of the applicant analytical assessments which had been consistently lower than those of all the other officials in the grade AD 12 within the Council general secretariat.

## Day to Day in Belgium

### Reduction and simplification of the Brussels general tariff for immovable property donation

The provisions of the « ordonnance du 18 décembre 2015 portant la première partie de la réforme fiscale » which modify the taxes of the Brussels agglomeration regarding donations of immovable property will come into force on January 1st 2017. By this ordonnance, the Brussels Government reduced the general tariff on gift taxes for immovable property and adopted a simplified grid (2 rate ranges with 4 taxable portions)..

| New General Tariff for Brussels                     |  |                           |
|---|--|---------------------------|
| Taxable portions of the immovable property donation | In direct line, between spouses, between legal cohabitants | Between all other persons |
| Up to € 150.000                                     | 3%   | 10%                       |
| From € 150.000 to € 250.000                         | 9%   | 20%                       |
| From € 250.000 to € 450.000                         | 18%  | 30%                       |
| Above € 450.000                                     | 27%  | 40%                       |

## Our team

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