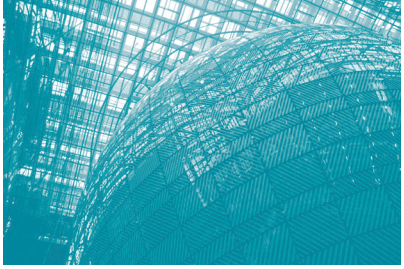

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EDITO

Dear readers,

This last issue of the OFFICI@L of 2021 is published at the beginning of January. We take this opportunity to wish you all the best for the New Year. In what remains a heavy period, we all share the hope that 2022 will be the year of a return to a less restrictive and lighter life. In any case, the pandemic will largely affect the way we work and the functioning of the EU institutions. In this newsletter, we will continue to be attentive observers and, if necessary, to inform you of your rights in these respects.
We also hope that this year we will be able to resume our traditional 'Official Day', which gathers representatives of the institutions and our specialist lawyers for a full day of discussions.
Keep in mind that this is your newsletter and we would welcome your feedback on the topics you would like to see addressed. Do not hesitate to write to us (*theofficial@daldewolf.com*).

In this new issue, we take a look at the right to be heard of EU officials and agents and provide some practical examples.
As regards the case-law, the General Court of the European Union has recently handed down an interesting judgement on the conditions for recognising the status of dependent child for the children of officials who have gone abroad to study (T-408/20). We propose a brief comment on it.
In the "Human Rights – An Insight" section, we are interested in a recent ECHR ruling, condemning Norway for a decision concerning adoption against the mother's wishes.
Finally, in the "Day to day in Belgium" section, we look at the conditions for setting up an ASBL for those of you are interested in legally structuring some of your undertakings and projects.

We wish you an excellent reading!

The DALDEWOLF team

FOCUS

The right to be heard of EU officials and agents: some practical examples

According to Article 41(2)(a) of the Charter of Fundamental Rights of the EU, every person has the right to be heard, before any individual measure which would affect him/her adversely is taken. This right must be respected even though the legislation applicable, e.g. the Staff Regulations, the Conditions of Employment of Other Servants (CEOS) and the General Implementing Provisons (GPI), does not expressly provide for such a procedural requirement (judgment of the EU Court of Justice, 3 July 2014, C-129/13 and C-130/13).

The right to be heard is intended to ensure that any decision adversely affecting the person concerned is adopted in full knowledge of the facts. It is intended, in particular, to enable the competent authority to correct an error and the person concerned to put forward information relating to his or her personal situation which militate in favour of the decision being adopted, not being adopted or having a particular content (judgment of the EU General Court, 13 December 2017, T-592/16).

The nature of the act that the Administration intends to adopt is decisive. The act must adversely affect the staff member, meaning that it must produce binding legal effects such as to affect directly and individually the interests of the official or agent by bringing about a distinct change in his legal position as a staff member. Otherwise, the Administration is not required to hear the staff member concerned.

The right to be heard requires the Administration to disclose at least the grounds on which it intends to rely to adopt the decision so that the staff member concerned can make know his/her views on these grounds (judgment of the EU General Court, 14 July 2021, T-119/20).

As the field of application of this right is very broad, we will focus below on some examples of situations in which the Administration must hear, in writing or orally, the staff members before adopting an adverse decision.

– The conduct of disciplinary proceedings (Annex IX to the Staff Regulations)

A staff member against whom pre-disciplinary or disciplinary proceedings have been initiated must be heard at all stages, namely:

- before the Appointing Authority decides on the opening of a disciplinary procedure (Article 3 of Annex IX): this hearing is very important and should not be overlooked as it allows the person to express his or her views to the Appointing Authority on the facts concerning him or her and/or to question the validity of certain aspects of the investigation report;
- before the Disciplinary Board delivers its reasoned opinion: the person concerned must be heard and may also submit written observations and call witnesses (Article 16(1) of Annex IX);
- before the Appointing Authority decides on the sanction (Articles 11 and 22§1 of Annex IX).

The Appointing Authority must also hear the staff member if it intends to suspend him/her from his/her duties during the disciplinary proceedings (Article 23 of Annex IX to the Staff Regulations).

– The decision of the Appointing Authority rejecting a request for assistance (example a harassment complaint)

The decision not to pursue a complaint of harassment certainly affects the applicant adversely. The EU courts have clarified the scope of the right to be heard in this situation. To be heard effectively, the Appointing Authority must disclose to the applicant the grounds on which it intends to reject the request for assistance. The Court of justice recently confirmed that when an administrative inquiry has been opened, the Appointing Authority must disclose to the person who lodged the complaint a summary, at the very least, of the statements made by the person accused of harassment and the various witnesses heard during the investigation procedure if it intends to use them to base the decision at issue (judgment of the EU Court of Justice, 25 June 2020, C-570/18P). The Appointing Authority must nevertheless respect, where appropriate, the confidentiality of the testimonies, for example by anonymising them, disclosing only the substance in the form of a summary, or redacting some of their content.

FOCUS

– The careers of officials and agents

One example is the obligation of the Administration to hear an agent before terminating his contract, even if it intends to terminate his contract on the basis of a breakdown of the relationship of trust (judgment of the EU Civil Service Tribunal, 8 October 2015, F-106/13 and F-25/14). Moreover, the General Court has recently ruled that the staff member must also be heard with regard to the terms implementing the notice, in particular where the Administration is considering a dispensation from service during the notice period (judgement of the EU General Court, 16 June 2021, T-355/19).

The Administration must also, for example, respect the right to be heard of officials before deciding on a secondment in the interest of the service (Article 38 of the Staff Regulations) but also when deciding on the renewal of a secondment (judgment of the EU General Court, 2 September 2020, T-131/20).

– Rejection of an application for recognition of an occupational disease

The Appointing Authority must hear the member staff who lodged an application for recognition of an occupational disease before adopting an unfavourable decision. The EU judges thus annulled a decision of the Administration which, before rejecting the application, neither disclosed the draft decision and the doctor's findings nor gave the applicant the opportunity to express her point of view on these grounds (judgement of the EU General Court, 23 September 2020, T-338/19).

While the right to be heard is becoming more widespread, a violation of this right does not mean that the decision in question is annulled. This will only apply when the official claiming a violation of his or her right to be heard demonstrates that had it not been for that irregularity, the outcome might have been different since he/she could have provided relevant explanations or alternatives to the envisaged decision (judgments of the EU General Court, 14 July 2021, T-253/19; 16 June 2021, T-355/19).

CASE LAW

The PMO refuses to grant dependent child status to a student receiving a scholarship

In a judgement of 17 November 2021 (T-408/20), the General Court of the European Union looked at the conditions for the recognition of the status of dependent children for student children, and more particularly the notion of effective maintenance by their parents.

In this case, the applicant is an official at the Commission whose son has gone to Canada to study. He applied for a dependent child status for his son, but the PMO rejected his application on the grounds that his son was receiving a scholarship.

In support of his application, the applicant puts forward a single plea in law, alleging infringement of Article 2 of Annex VII to the Staff Regulations, which deals with the status of dependent children recognised for children between 18 and 26 who are receiving educational or vocational training

When it receives an application on this basis, the Administration has circumscribed powers and must recognise the status of dependent child if the conditions are met.

Entitlement to the allowance is subject to three conditions, namely that the official was actually maintaining his child, that the child was between 18 and 26 of age and that the child was receiving educational or vocational training. The PMO considered that the first condition was not met, while the applicant argued in substance that a child is presumed, solely on the basis of his status as a student, to be actually dependent on the official.

Firstly, the General Court points out that, according to settled case law, the dependent child allowance has an objective of a social nature justified by the costs arising from a present and certain need connected with the child and his/her effective maintenance. Thus, the granting of this allowance may be refused when, for example, the expenses arising from a present and certain need connected to the effective maintenance of the child are lacking.

The Court then recalls the concept of effective maintenance, defined by the case law as the actual provision by the official of all or part of the essential needs of his child, in particular as regards accommodation, food, clothing, education and medical care. It is for the official to provide proof of such support.

The Administration is responsible for verifying that the official fulfils the conditions.

In the present case, the General Court notes that the official's argument is ambiguous. The purpose of the scholarship received is to cover the student's essential needs and thus pursues the same objective as the allowance. The purpose is a decisive criterion in the qualification of an allowance of the same nature. Finally, the scholarship received constitutes an education allowance as it also exempts the student from paying school fees.

Secondly, the applicant argued that given the nature and extent of the health insurance provided by the university to his son, the latter should be considered to be dependent on him in accordance with the Commission's internal rules (conclusion 223/04). As to the nature of the insurance, the General Court considers that the fact that the insurance body is private (and not public insurance) is irrelevant. With regard to the extent of the medical coverage, the judges noted that the medical coverage was complete in the province where he was studying, even though it only covered emergencies outside that territory. The judges concluded that the health insurance taken out by the host university ensured that the child's basic needs for medical care and expenses were covered, without the need for any form of contribution from the applicant.

Thus, the General Court concludes that there are no particular circumstances in the case that should have been taken into account by the Commission in order to recognise that the applicant continued to support his child's essential needs so that he could continue to be granted the dependent child allowance.

Consequently, the General Court dismisses the official's action.

HUMAN RIGHTS: AN INSIGHT

Adoption against the mother's wishes: Norway condemned

In the case of Abdi Ibrahim v. Norway, 10 December 2021 (application no. 15379/16), the European Court of Human Rights condemned Norway for not taking into account the wishes of a mother in the context of the adoption of her child, in violation of Article 8 of the Convention (right to respect for private life).

The case concerns the decision of the Norwegian authorities to allow the adoption of a child by a foster family without respecting the mother's wishes. The mother, a Somali national, had moved to Norway. She did not ask for her son's return to her, as the child had spent a long time with his foster parents, nor did she object to the adoption process. However, she wished for him to maintain his cultural and religious roots.

The Court decided to examine the applicant's wish to have her son brought up in accordance with her Muslim faith as an integral part of her complaint under Article 8, as interpreted and applied in the light of Article 9 (freedom of religion).

The Court noted in its judgement that, in order to respect the rights of the applicant, but also of the child, various interests had been taken into account when placing her son in foster care, and not only whether the foster home would correspond to the mother's cultural and religious background.

However, the ensuing contact arrangements for contact between the mother and her son, which have been very limited and had culminated in the adoption of the child, had failed to take into account the applicant's interest in allowing her son to maintain at least some ties to his cultural and religious roots. There had been shortcomings in the overall decision-making process leading to the adoption, which had not given sufficient weight to the mutual interest of the mother and child in maintaining ties. Indeed, in 2013, the Norwegian authorities applied to allow the foster family to adopt the child, which would lead to the applicant's parental rights to be removed. The mother filed an appeal in which she did not ask for the child's return, as he had already spent a long time with his foster parents and he had become attached to them, but sought contact so that, amongst other things, the child could maintain a tie with his cultural and religious roots. In May 2015, the Norwegian Court of Appeal dismissed the applicant's appeal and allowed the adoption. The decision was based on the child's attachment to his foster family and his negative reaction to the visits of his biological mother. Furthermore, the child was vulnerable and needed stability. Adoption provided that stability. It appears that the Court of Appeal gave more importance to the foster parents' opposition to an open adoption which would have allowed contact, than to the applicant's interest in continuing to have a family life with her child. The Court considers that it has not been shown that the circumstances were so exceptional as to justify a complete and definitive severance of the ties between the child and the applicant or that the decision to do so was justified by an overriding requirement affecting the best interests of the child.

The Court therefore found a violation of Article 8. It decided, however, not to indicate any individual or general measures to the Norwegian Government, as such measures could entail an interference with the child's current family life with his adoptive parents and lead to new issues on the merits. Instead, it awarded the applicant just satisfaction of €30,000.

DAY-TO-DAY IN BELGIUM

How to set up a non-profit association (ASBL)?

Do you have a passion, a cultural, sport or humanitarian project that you would like to structure legally? Creating a non-profit association is not complicated, but the responsibilities involved should not be overlooked.

Since the law of 23 March 2019, the non-profit association ('ASBL' for short) has been governed by the 'Code des sociétés et des associations'.

The ASBL is established in the form of a contract, thus requiring at least two founders. It may carry out commercial and industrial activities like companies but differs from the latter in that it is prohibited from distributing (directly or indirectly) any income or other financial benefits to its founders, members, directors or third parties other than those for whose benefit it was set up.

This prohibition does not apply to services provided by the ASBL from which the persons mentioned could benefit. Nor does it preclude the provision of services or the sale of goods by them to the ASBL provided that the consideration is in line with the market price.

The formalities for setting up a non-profit association are simple, and the costs are limited. A private deed setting out the association's operating rules in the form of articles of association is sufficient.

The deed will have to be published in the official journal (the annexes to the *Moniteur belge*) in order to ensure that it is made public to third parties. The first appointed directors must also be published.

A minimum number of three directors is required (which may be reduced to two if the number of founders is less than three).

The liability of directors of ASBLs has been harmonised with that of company directors, who may be held liable for faults committed in the performance of their duties, although the code specifies that only decisions, acts or behaviour that manifestly exceed *"the margin within which normally prudent and diligent directors placed in the same circumstances may reasonably have a different opinion"*.

OUR TEAM

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