



## EDITO

Dear readers,

This month in the focus section, we propose to take stock of the motivation of the annual appraisal report.

On the case law side, we will comment on the recent judgment of the Court of Justice concerning the notion of irregular absence.

Finally, in the day-to-day life in Belgium, we will deal with the acquisition of works of art and the rights arising from this.

We wish you an excellent reading!

The **DALDEWOLF** team

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## FOCUS

### THE MOTIVATION OF THE APPRAISAL/EVALUATION REPORT

The annual appraisal exercise took place and is coming to an end. The staff appraisal/evaluation report plays a fundamental role in the career of EU officials or other staff members: its role must not be underestimated and the official or other staff member must pay attention to its content.

For an EU official, the report, which takes the form of a periodic assessment, enables him or her to obtain regular and comprehensive feedback in order to improve his or her performance and professional development. For the Administration, the appraisal report is rather a human resources management tool. Its primary function is to provide periodic information on the conditions in which staff members perform their service (AQ v. Commission, F-66/10). It is also on this basis that the Appointing Authority will take decisions relating to the career development of officials: promotions and certification, but also professional incompetence.

According to Article 43 of the Staff Regulations, the ability, efficiency and conduct in the service of each official shall be the subject of an annual report as provided for by the Appointing Authority of each institution. The Administration has wide discretionary powers in drawing up the staff report. Compliance with the procedural framework and the reasons given by the Administration are therefore essential to enable EU officials to make comments and thus guarantee the legality of the annual report.

This follows both from the principle of good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union and from established case law, which require the Administration to give sufficiently detailed reasons for the annual report so that the person concerned can comment on these reasons.

The assessments must be sufficiently precise and argued. In concrete terms, the reporting officer must extract the salient features of the official's performance in terms of ability, efficiency and conduct in the service and evaluate them (AJ v. Commission, F-80/10). The reporting officer does not necessarily have to give concrete examples to support his or her judgments, provided that the assessment is clearly individualized and not impersonal (TA v. Parliament, T-314/21).

Furthermore, the comments must be consistent with the marks awarded, which is a numerical or analytical transcription of the comments (Wahlström v. Frontex, T-591/16).

Compliance with these requirements is reinforced when the situation is out of the ordinary, for instance when the rating is downgraded, provided that there is a sufficiently difference with the previous annual reports (US v. ECB, T-780/17). The report must then indicate in what way the official has not shown the necessary qualities in the field of the unit to which he or she is assigned and in the duties performed, taking into account his or her grade, or in what way this conduct does not coincide with the working methods of the service (see Mellone v Commission, T-187/01). The same applies when the reporting officer decides not to follow the recommendations of the Reports Committee: special reasons must be given (Morgan v. OHIM, T-683/14 P).

## CASE LAW

### DOES A REFUSAL TO WORK CONSTITUTE AN UNAUTHORISED ABSENCE?

The Court of Justice of the European Union issued a judgment on appeal on March 3, 2022 (WV v. European External Action Service (EEAS) C-162/20 P) in which it annulled the order of the General Court in the same case. The latter had ruled that the EEAS had lawfully withheld 72 days of salary from an official who no longer fulfilled her professional obligations.

The applicant is an official working for the EEAS, in conflict with her hierarchy following her transfer to a new division. She contested the transfer by adopting a passive attitude, and stopped fulfilling her professional obligations, while continuing to go to her place of work. In response, the EEAS decided to consider her as being unauthorised absent and to apply Article 60 of the Staff Regulations to her. All the days during which she did not carry out the tasks required of her were deducted from her salary, even though she was present at work. To that end, the applicant's head of unit had sent her a note setting out the conditions to be met in order to be considered "present" at work.

At first instance, the General Court held that, by expressing her intention not to work, the applicant had breached her obligations under Articles 21 and 55 of the Staff Regulations to make herself available to the service and to perform the tasks assigned to her. The General Court then held that the EEAS could legitimately consider that she was in a situation of unjustified absence within the meaning of Article 60.

The applicant appealed this decision before the Court of Justice by claiming that the General Court misapplied Article 60, and that she could not be accused of being unjustifiably absent since she was physically present at her place of work.

The question before the Court is the following: can a civil servant who is present at work but who does not comply with his professional obligations under Articles 21 and 55 be qualified as irregularly absent within the meaning of Article 60, and thus have his days of leave, or even his remuneration, withheld?

The Court first recalls that it is not clear from the wording of Article 60 that irregular absence can be inferred from a failure to comply with professional obligations, irrespective of whether or not the official is physically present at his place of work.

It then notes that Article 60 refers to situations of unauthorized absence, as opposed to regular and authorized absences such as annual leave or sick leave, all of which presuppose a physical absence from work.

Finally, unlike a situation in which the official is physically absent for a number of working days, the Court considers that it is not possible to quantify a breach of the official's professional obligations, and concludes that Article 60 only covers situations in which the official is physically absent from the workplace.

Consequently, by considering that an official who is present at work but performs his duties poorly, or is even guilty of insubordination, is in a situation of irregular absence within the meaning of Article 60 of the Staff Regulations, the Administration would misuse the disciplinary procedure. Indeed, such erroneous classification would impose a financial penalty on the official which is not provided for in the Staff Regulations, and without applying the guarantees of the disciplinary procedure for the person concerned (i.e. right to be heard).

The Court therefore considered that the General Court erred in law and annulled its order as well as all the decisions taken by the EEAS. It also ordered the EEAS to reimburse the amounts wrongly deducted from the applicant's remuneration, with interest at the rate of 5% per annum from the date of their deduction.

This is an interesting judgment because the Court of Justice reminds us of the importance of respecting the procedures provided for by the Staff Regulations and the corresponding rights of officials and other servants: a breach of duty is not punished the same way as an unjustified absence.

## DAY-TO-DAY IN BELGIUM

### BUYING A WORK OF ART DOES NOT GIVE ALL THE RIGHTS

Buying a work of art does not give the buyer all the rights.

Copyright is not transferred at the time of the sale. It remains with the author of the work (and his/her successors for a period of 70 years after the author's death). The author may thus (and in particular) claim the right to photograph the work for which the property

rights have been transferred or act against the restorer who, in his opinion, has not restored it correctly.

Under these same rights, the purchaser of the work may not profit commercially from its purchase by selling reproductions (at least without having first obtained the agreement of the author of the work).

However, he may consent, without having to refer to the author, to the work being presented in exhibitions.

You should also be aware that when you buy a work of art from a professional intermediary, you will be asked for proof of identification. Intermediaries involved in transactions relating works of art and antiques are in fact required to meet certain obligations under anti-money laundering legislation (Law of 18.09.2017 on the prevention of money laundering, the financing of terrorism and the restriction of the use of cash).