



FINANCIAL LIABILITY OF EU OFFICIALS AND OTHER SERVANTS

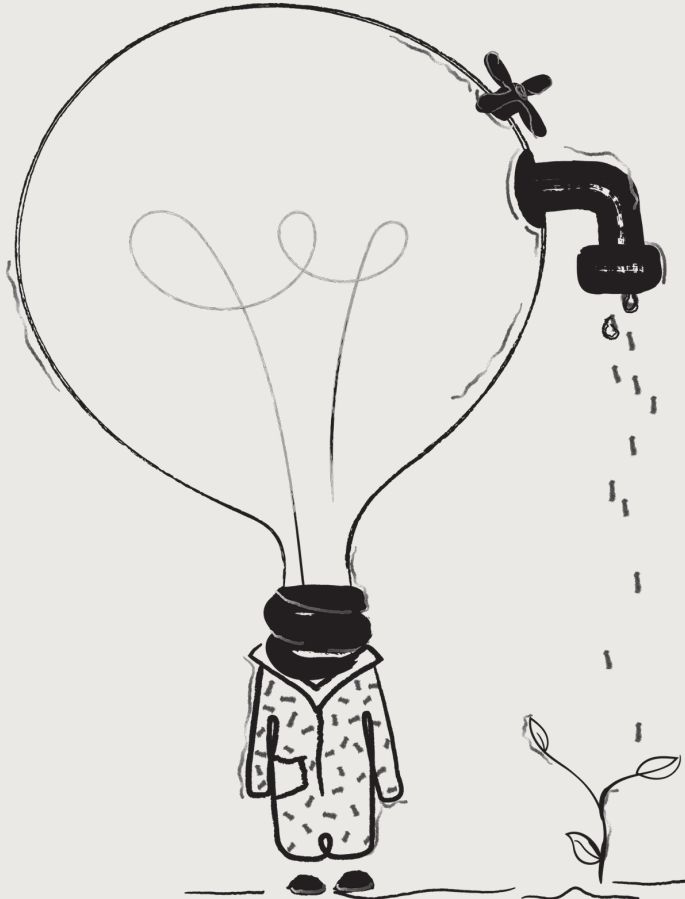
Recent developments

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Today

1)

2)

3)

4)



Article 340 para 4 TFEU

"The personal liability of its servants towards the Union shall be governed by the provisions laid down in their SR/CEOS applicable to them".

Article 22 SR (Applies by analogy to TA/CA - Article 11, first indent CEOS)

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

A reasoned decision shall be given by the appointing authority in accordance with the procedure laid down in regard to disciplinary matters.

The Court of Justice of the European Union shall have unlimited jurisdiction in disputes arising under this provision".

EC Guidelines for applying Article 22 SR (Financial Liability of Officials) SEC-2004-730-5-EN

- They state that "[t]he Commissioner responsible for personnel will ensure the implementation of these guidelines and will invite the other institutions to study the possibility of extending the system of application of the rules of the Staff Regulations to all officials [of the Union]".
- Institutions/Agencies that never approved these guidelines/did not adopt similar guidelines, nor announce that these guidelines would be applied are "*not obliged*" to apply them (T-3/23, UA v EUAA, 26.06.2024, para 91.)



FINANCIAL LIABILITY V. RECOVERY OF OVERPAYMENTS

Financial liability under Article 22 SR

1. An official **MAY** be required ("*peut être tenu de*") : No obligation for the damage to be made good, even where serious personal misconduct is established. AA/AECE has wide **discretionary powers**.
2. AA/AECE must give a **reasoned decision** in accordance with the procedure laid down regarding **disciplinary matters**.
3. **Unlimited jurisdiction** of the court when deciding on the substance of a case.
4. **No legal limitation period** for the adoption of a decision (the Institution is required to adopt the decision within a **reasonable time** - legal certainty).

Recovery of overpayments under Article 85 SR

1. Any sum overpaid **SHALL** be recovered if the recipient was aware that there where no due reason for the payment or if the overpayment was patently such that he could not have been unaware of it : **No discretion** on the AA/AECE whether to recover the overpayment.
2. No disciplinary proceedings.
3. **Limited jurisdiction** of the court.
4. Statutory limitation period of **5 years as of the payment**. Recovery decisions may be issued **before** investigations by the recovery Institution, by OLAF, audits, etc., are completed (case-law on the uninterrupted running of limitation periods).



JUDGMENT OF
15.12.2021
T-693/16
P-RENV-RX
HG V EC

"...la responsabilité financière du requérant n'a pas été établie par l'AIPN sur le fondement de l'article 85 du Statut concernant la répétition de l'indu sur la base de la constatation d'un avantage indu, mais sur le fondement de l'article 22 du Statut concernant la réparation des préjudices subis par l'Union en raison de fautes personnelles graves commises par ses fonctionnaires dans l'exercice ou à l'occasion de l'exercice de leurs fonctions, sur la base de l'identification d'un préjudice causé à l'Union du fait d'une faute personnelle grave du requérant".

Para 111

"Il doit être souligné que les conditions de recours à l'article 85 et à l'article 22 du Statut sont nettement différentes, de même que leur contexte... Ces différences dans la nature et dans les conditions de fond et d'adoption des décisions en question justifient que l'AIPN puisse, en fonction des circonstances, agir au titre de l'article 22 du Statut alors qu'elle aurait pu agir au titre de l'article 85 du Statut, même si les règles ou les principes en matière de délais ne sont pas identiques dans les deux cas, ce qui peut au demeurant aussi se justifier par ces différences..."

Para 112

"Il en ressort qu'en l'état du droit applicable à la présente affaire, la prescription invoquée par le requérant, fondée sur l'article 81 du Règlement no 966/2012, ne peut concerner qu'une phase postérieure à la constatation de la créance, commençant plus précisément à la date limite de paiement mentionnée dans la note de débit envoyée au tiers débiteur et ne peut donc pas être opposée en ce qui concerne les phases précédentes aboutissant à la constatation de la créance (voir, par analogie, arrêt du 14 juin 2016, Marchiani/Parlement, C-566/14 P, EU:C:2016:437, points 86 à 89)..."

Para 129

"Il ressort de la jurisprudence que, lorsque le législateur n'a pas prévu de délai de prescription, l'exigence de sécurité juridique requiert que les institutions de l'union exercent leurs pouvoirs dans un délai raisonnable (voir arrêt du 14 juin 2016, Marchiani/Parlement, C-566/14 P, EU:C:2016:437, point 96 et jurisprudence citée)".

Para 308

CONDITIONS FOR APPLICATION OF ARTICLE 22 SR

- **Three conditions must be met simultaneously :**
 - **Serious personal misconduct;**
 - **The damage suffered by the Union; and**
 - **Causal link between the act of the official concerned and the damage suffered by the Union.**
- **Burden of proof that conditions are met lies with the Administration.**

CONDITIONS : SERIOUS PERSONAL MISCONDUCT

- The wording of Article 22 SR requires that a damage occurred because of a '*serious misconduct*' of the official.
- Article 22 SR does not distinguish between the deliberate or negligent nature of the misconduct. Only the provisions of the EC Guidelines contain such a distinction:
 - No obligation to classify the staff member's serious personal misconduct as deliberate misconduct or gross negligence and, where appropriate, to comply with the indications provided in those guidelines, as to the purposes of such deliberate misconduct. (Judgment of 26.06.2024, T-3/23, *UA v EUAA*, para 111-112)
- To qualify, in the context of the application of Article 22 SR, the conduct of an official as constituting serious personal misconduct, the AA/AECE must consider the circumstances and cannot simply find that the official concerned has disregarded the rules imposed on him, or in other words, cannot simply find that he has failed to fulfil some of his obligations. (Judgment of 15.12.2021, T-693/16 P-RENV-RX, *HG v Commission*, para 99)
- Full jurisdiction of the court : "*...le juge du fond peut lui-même tenir compte de toutes les circonstances de l'affaire et, donc, apporter à cet égard sa propre appréciation ou motivation pour justifier le paiement d'une somme par une partie à l'autre partie*" (judgment of 15. 12. 2021, T-693/16 P-RENV-RX, *HG v Commission*, para 102 citing judgments of 27 October 1987, *Houyoux and Guery v Commission*, 176/86 and 177/86, para 16, and of 20 May 2010, *Gogos v Commission*, C-583/08 P, para 44 and case-law cited).

SERIOUS PERSONAL MISCONDUCT IN THE EC GUIDELINES

- Invoking personal liability of an official must remain the exception.
- Serious misconduct must be assessed in association with Article 21 SR: responsibility of subordinates does not release superiors from their own responsibilities, notably in terms of carrying out the necessary supervisions.
- While disciplinary action may be taken in any case of misconduct, Article 22 is applicable only in cases of:
 - Deliberate misconduct: Any breach of an unambiguous provision (whose meaning is clear) inherently implies the existence of serious misconduct if the party concerned has intentionally caused damage to the Union (personal gain and/or an intention to cause damage to the Union).
 - Gross negligence (not intentional): Negligence is measured against the standard of an "*official exercising normal care*" in a "*comparable situation*". The level of care required depends on the degree of responsibility exercised and the person's experience and training (awareness of duties).
 - Gross negligence is a very restrictive concept. It does not cover simple errors, slight negligence, or occasional ordinary negligence. To establish gross negligence, there must be an element of awareness by the official of the implications of the negligence. Officials newly arrived in their units who lack necessary training cannot be held liable for gross negligence. If the negligence is likely to be committed by any "*new recruit*," the person will not be financially liable.
 - Gross negligence may be found where an act or failure to act causes damage and the official had the required training, or where an official disregards repeated instructions from a superior or fails to act despite such instructions. However, the assessment must consider the official's working environment, including personal difficulties, workload, and the clarity of the rules. Article 22 SR will only apply if the negligence does not mainly result from the official's context.
 - Account should be taken of repetitive/persistent nature of the act of negligence.



CONDITIONS : DAMAGE SUFFERED BY THE UNION AND CAUSAL LINK

- Damage may arise in all situations where Union resources are managed, e.g.:
 - Human resources (staff of the institutions), movable property (financial resources, computers, telephones, furniture, vehicles, etc.), or immovable property (premises, etc.).
 - Management of EU funds, e.g., unlawful management of contracts (calls for tender, co-financing of programmes, failure to recover funds for the benefit of the Union.)
- The personal serious misconduct must have caused actual and quantifiable financial damage to the Union and must have caused by the serious personal misconduct of the official concerned.



JUDGMENT OF
26.06.2024
T-3/23
UA V. AUEA

« L'AHCC a estimé que, en concluant l'accord de règlement amiable avec A, le requérant avait violé le RAA, le principe de bonne gestion financière et les articles 11 et 21 du statut, qui imposent respectivement à l'agent concerné de « s'acquitter de ses fonctions et régler sa conduite en ayant uniquement en vue les intérêts de l'Union » et d'être « responsable de l'exécution des tâches qui lui sont confiées » . »

Para 94

“ L'AUEA n'étant pas tenue d'appliquer les lignes directrices pour l'article 22 du statut (voir point 91 ci-dessus), celle-ci n'était donc pas dans l'obligation de qualifier la faute personnelle grave du requérant de faute intentionnelle ou de négligence grossière et, le cas échéant, de respecter les indications fournies dans ces lignes directrices quant aux finalités d'une telle faute intentionnelle.”

Para 112

“ Dans ce contexte, l'AHCC a légitimement pu prendre en compte, dans la décision attaquée, les raisons qui sous-tendaient la conclusion de l'accord de règlement amiable. Dans ces conditions, il y a lieu de conclure à l'existence d'un lien de causalité entre, d'une part, la conclusion, par le requérant, de cet accord et les raisons majoritairement personnelles, en violation de ses obligations, sous-tendant cette conclusion et, d'autre part, le préjudice de 30 000 euros subi par l'AUEA.”

Para 122

“À cet égard, il convient de noter que l'absence d'évaluation ex ante dûment documentée des coûts et des avantages devant découler de la conclusion de l'accord de règlement amiable avec A est précisément un des motifs retenus par l'AHCC dans la décision attaquée pour engager la responsabilité financière du requérant et déterminer le montant du préjudice subi par l'AUEA. Le requérant ne peut pas tirer parti de l'absence d'une telle évaluation, à laquelle il lui incombait, selon l'AHCC, de procéder, pour arguer de l'absence totale de préjudice subi par l'AUEA.”

Para 126

WHICH **PROCEDURE** FOR INVOKING THE FINANCIAL LIABILITY OF A STAFF MEMBER?

- Article 22, para 2, SR refers to "*the procedure laid down in regard to disciplinary matters*", i.e., procedure laid down in Title VI SR and Annex IX to SR.
- Article 86 SR is worded as follows:
 - '1. Any failure by an official or former official to comply with his obligations under these Staff Regulations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action.
 - 2. Where the Appointing Authority or [the European Anti-Fraud Office (OLAF)] becomes aware of evidence of failure within the meaning of paragraph 1, they may launch administrative investigations to verify whether such failure has occurred.
 - 3. Disciplinary rules, procedures and measures and the rules and procedures covering administrative investigations are laid down in Annex IX.'
- Procedure under Article 22 SR can be initiated based on a report from OLAF/administrative inquiry.
- The Institution does retain the right to refer the matter to the competent national court seeking compensation under national law (judgment of 10.09.2019, *DK v Commission*, T-217/18, para 42).
 - Article 25 of Annex IX to SR provides: '*Where the official is prosecuted for those same acts, a final decision shall be taken only after a final judgment has been handed down by the court hearing the case.*'

DECISIONS UNDER ARTICLE 22 SR

- AA/AECE must examine disciplinary responsibility and financial liability separately, even if both aspects are dealt with based on a single disciplinary procedure/single opinion of Disciplinary board.
 - Decisions can impose on the official a disciplinary penalty and financial liability or only one of them.
- Deviations from Disciplinary Board by the AA/AECE must be reasoned.
- Charter of fundamental rights, in particular, the right to good administration under Article 41 must be respected.
- Decisions under Article 22 SR can be challenged under Article 90(2) SR.
- General Court has full jurisdiction : qualified to check the assessment of the facts by AA/AECE, annul the decision, fix a different amount, decide not to apply Article 22 SR, order to stay the execution of the implementation of the decision.
- Enforcement involving the competent national authorities could be carried out in accordance with Article 299 TFEU.



REDRESS: COMPENSATION OF THE DAMAGE

- Article 22 SR aims at **recovering the damage** as a result of the serious misconduct with the purpose of **restoring the situation prior to said misconduct** but does not make it obligatory for the damage to be made good, even where serious personal misconduct is established (wide discretionary power of AA/AECE).
- The reasoned decision based on Article 22 SR will specify the amount the staff member has to pay the Union in compensation for the damage caused. It may deviate from the recommended amount established by OLAF, considering the evidence at hand (E.g., in case T-3/23, *UA v EUAA*, OLAF recommended to recover an amount of 141.180.05 Euro and the procedure under Article 22 SR was opened for the same amount, while the final decision reduced the compensation of damages to 30.000 Euro).
- Duty of care: *"the Commission must take into account its duty to have regard for that official's welfare. That duty reflects the balance of the reciprocal rights and obligations established by the Staff Regulations in the relationship between civil servants and their administration. Together with the principle of sound administration, it implies in particular that when the authority takes a decision concerning the situation of an official, it should take into consideration all the factors which may affect its decision and that when doing so it should take into account not only the interests of the service but also those of the official concerned"* (judgment 10.06.2021, *Commission v De Esteban Alonso*, C-591/19 P, paragraph 61 and the case-law cited, T-3/23, *UA v EUAA*, judgment of 26.06.2024, para 134).
- The decision under Article 22 SR is implemented in accordance with the procedures and deadlines of the financial rules applicable to the general budget of the Union. Article 98(2) FR imposes a deadline of 5 years between the establishment of the debt and for executing it.



REDRESS: DISCIPLINARY PENALTY

- A disciplinary procedure (Article 86 SR) and the subsequent disciplinary penalty under Article 9 Annex IX to the SR have the purpose to **sanction** a misconduct of a staff member, taking account of aggravating or extenuating circumstances in the choice of the penalty.
- Article 9 of Annex IX to the SR provides for a distinction of the penalty depending on the link between the staff member and the institution:
 - Article 9(1) of Annex IX to the SR provides disciplinary penalties for staff in active service.
 - Article 9(2) of Annex IX to the SR maintains an option to penalise staff that are not in active service anymore. It refers to a decision “*to withhold an amount from the pension **or** the invalidity allowance for a given period*”.
 - A penalty under Article 9(2) of Annex IX to the SR can only be imposed following the consultation of a disciplinary board.
- Under Article 10 of Annex IX to the SR: “*The severity of the disciplinary penalties imposed shall be commensurate with the seriousness of the misconduct*”. Non-exhaustive number of factors that should be considered to determine the seriousness of the misconduct and to decide upon the disciplinary penalty to be imposed are listed in this article.





JUDGMENT
OF
15.07.2021
C-851/19 P
DK V EEAS

"...Pursuant to the first sentence of Article 10 of Annex IX to the Staff Regulations, the severity of the disciplinary penalties imposed must be commensurate with the seriousness of the misconduct. The second sentence of Article 10 of that Annex sets out, in a non-exhaustive manner, in points (a) to (i), a number of factors which, 'in particular', are to be taken into account in order to determine the seriousness of the misconduct and to decide upon the disciplinary penalty to be imposed. Those factors include, according to Article 10, second sentence, point (b), of that Annex, 'the extent to which the misconduct adversely affects the integrity, reputation or interests of the Institutions'".

Para 39

"In addition, it must be recalled that, in accordance with Article 25 of Annex IX to the Staff Regulations, where the official concerned is prosecuted for the same acts as those in respect of which he or she is the subject of disciplinary proceedings, a final decision is to be taken only after a final judgment has been handed down by the court hearing the case. That provision, first, addresses the concern not to affect the situation of the official in question in the context of the criminal proceedings brought against him or her for acts which are also the subject of disciplinary proceedings within his or her institution and, second, allows the findings of fact of the national criminal court to be taken into consideration in those disciplinary proceedings once that court's decision has become final".

Para 40

"That provision does not specify whether the findings of fact made by the national criminal court are capable of binding the appointing authority in the context of those disciplinary proceedings. In any event, the legal characterisation of the facts in the light of the relevant provisions of EU law, such as Article 10 of Annex IX to the Staff Regulations, is a matter for the competent EU authorities alone. Those authorities cannot be bound by any characterisation of those facts made in the context of the national criminal proceedings (see, by analogy, as regards disciplinary proceedings concerning a member of the Commission, judgment of 11 July 2006, Commission v Cresson, C-432/04, EU:C:2006:455, paragraph 121). Since Article 10 does not expressly refer to the law of the Member States for the purpose of determining its meaning and scope, it must be given an autonomous and uniform interpretation within the EU legal order, in order to ensure the equal treatment of officials when applying the provisions of the Staff Regulations (see, by analogy, as regards article 85a of the Staff Regulations, judgment of 15 October 2015, Axa Belgium, C-494/14, EU:C:2015:692, paragraphs 21 and 23 to 25)."

Para 41



C-851/19 P
DK V EEAS
15.07.2021

"...the determination, by those criminal courts, in the context of the national law, of the extent of the non-material damage suffered by the European Union and the resulting compensation does not in any way prejudice the taking into consideration of that damage and any potential compensation thereof for the purpose of determining the seriousness of the disciplinary misconduct on the part of the person concerned, since such an exercise does not constitute a point of fact, but falls within the legal characterisation of the facts which it is for appointing authority to make in the light of the provisions of article 10 of annex IX to the Staff Regulations, without the appointing authority being bound, in that regard, by any characterisation made in the context of the criminal proceedings at national level".

Para 43

" [...] in disciplinary proceedings under Article 10 of annex IX [...], it is irrelevant that the damage has given rise, in whole or in part, to compensation, such a circumstance being immaterial, as the purpose of the provision is not to arrange compensation, but to impose a penalty. In any event, [...] it cannot be inferred from Article 25 of Annex IX [...] that the civil-law principle of a Member State according to which damage which has given rise to compensation in full is deemed never to have existed may be applied mutatis mutandis in disciplinary proceedings".

Para 44

"...it follows from the very wording of that Article 10 that the subject matter of the disciplinary penalties provided therein is the sanctioning of misconduct. In accordance with Article 86(1) of the Staff Regulations, such misconduct results from any failure by the official concerned to comply with his or her obligations under the Staff Regulations. therefore, as the advocate general observed in point 58 of his opinion, the Staff Regulations seek to ensure compliance with the rules and obligations intended to guarantee the proper working of an EU institution, through the imposition of disciplinary penalties".

Para 50

"... the subject matter and aim, on the one hand, of the disciplinary penalty [...] and, on the other, of the compensation for damage caused to the European Union [...], are different.

... the imposition of a disciplinary penalty and the compensation for damage caused to the European Union are independent of one another.

...when determining the seriousness of the disciplinary misconduct of an official and the disciplinary penalty to be imposed on him or her on the basis of that provision, it is irrelevant that the damage caused to the European Union has already given rise, in whole or in part, to compensation".

Para 52, 53, 55

COMPENSATION OF THE DAMAGE IN THE EC GUIDELINES

- The EC takes the view that *restitutio in integrum*, i.e., full redress, should be sought in the case of serious deliberate misconduct (e.g., theft, misappropriation of EU funds, fraud, bribery, corruption). Personal gain resulting from misconduct is a seriously aggravating circumstance.
- In cases of gross negligence (not deliberate) the staff member should be asked to make good only part of the damage suffered by the Union (only exceptionally full redress). The compensation under Article 22 SR should be reasonably limited to a maximum one-year basic salary, irrespective of the amount of the damage.
 - Higher compensation can be justified in exceptional cases, in particular, in case of serious and deliberate misconduct (F-149/15, *HG v Commission*, 19.07.2016, par 163).
 - To also consider whether other persons/entities and working procedures (or lack thereof), including the review of superiors, contributed to the damage. (Average internal control standards).
 - Also, solvency and family situation of the person concerned and his dependents, and a reduction of salary/pension/invalidity should not go below the minimum subsistence figure provided for in Article 6 of Annex VIII to the SR.
- Reasonable time to pay the sum required in compensation for the damage caused/sum to be repaid in instalments.
- If a criminal court orders to pay a sum which exceeds the max amount provided in the Guidelines, the AA/AAEC may waive payment of the sum in excess of that max amount.





**THOUGHTS?
QUESTIONS?**

**THANK YOU
FOR YOUR
ATTENTION!**