CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 406/2008 – Staff Committee (X) v. Secretary General

The Administrative Tribunal, composed of:

Ms Elisabeth PALM, Chair,
Mr Angelo CLARIZIA,
Mr Hans G.KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has given the following decision after due deliberation.

THE PROCEEDINGS

1. The Staff Committee of the Council of Europe lodged its appeal on 6 March 2008. It was registered the same day under No. 406/2008.

2. On 9 April 2008, the appellant lodged further pleadings.

3. On 30 May 2008, the Secretary General submitted his observations concerning the appeal. The appellant submitted observations in reply on 3 July 2008.

4. The public hearing in the present appeal was held in Strasbourg on 22 September 2008. The appellant was represented by Mr J.-P. Cuny, and the Secretary General by Ms Bridget O'Loughlin, Deputy Head of the Legal Advice Department, Directorate of Legal Advice and Public International Law, assisted by Ms Christina Olsen and Ms Maija Junker-Schreckenberg, from the same department.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. Council of Europe staff have medical and social coverage which was introduced in 1998. This coverage is based on an insurance contract which is renewed at regular intervals.

The present dispute concerns the renewal of the insurance contract which came into force on 1 January 2008 and stems from the appellant's (CdP's) claim to have certain rights during the discussion phase of the said renewal process.

6. On 18 October 2007, the Chair of the Staff Committee sent a memorandum to the Director General of Administration and Logistics concerning decisions taken on the financial implications of the ongoing revision of the collective insurance contract. She concluded by stating as follows:

> "The Chair of the Supervisory Board has forwarded to the Staff Committee your reply to the staff representatives' request to reconsider the decisions taken on the financial implications of the ongoing revision of the collective insurance contract.
>
> The Staff Committee also wishes to take this opportunity to express its regret at the refusal to grant the request made by staff representatives on the Supervisory Board to be consulted about the text of the draft contract. To the extent that the terms of this contract, along with the Staff Regulations and Appendix XII thereto, are destined to form the basis of the social protection scheme for serving and retired staff, such refusal is neither comprehensible nor acceptable. The arguments put forward by members of the Supervisory Board, to the effect that this would mean a departure from past practice and that there is no provision for such consultation in Instruction No. 38, do not stand up. There is nothing in Instruction No. 38 to prohibit such consultation.
>
> In any event, should the staff representatives on the Supervisory Board be denied this right to be consulted, the Staff Committee itself is entitled to be consulted under Article 5 of Appendix I to the Staff Regulations. It accordingly requests that the draft be submitted to it before signing."

7. On 12 November 2007, the Director General of Administration and Logistics replied as follows:

> "Thank you for your comments dated 18 October 2007.
>
> I would like to clarify two points, namely:
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> (…)
>
> Contract with AGF/Vanbreda: this contract is not in itself a provision for the implementation of the Staff Regulations. The implementing provisions of the Regulations (in this case Article 43 and Appendix XII to the Regulations) are the rules specifying the level of premiums payable by staff, Instruction No. 38 establishing the Supervisory Board, etc. The contract with AGF/Vanbreda is simply the means by which the Organisation meets its obligations. Under no circumstances can the contract as such have the slightest impact on staff's rights. In the opinion of the Legal Adviser, there is therefore no legal obligation to consult the CdP about the terms of the contract."

8. On 11 December 2007, the appellant lodged an administrative complaint with the Secretary General under Article 59 of the Staff Regulations. The complaint read as follows:

> "The Staff Committee (CdP) hereby requests that you annul the decision set out in the memorandum of 12 November 2007 from the Director General of Administration. The Director General holds that there is no legal obligation to consult the CdP about the terms of the contract. In particular, he maintains that "Under no circumstances can the contract as such have the slightest impact on staff's rights".
>
> In actual fact, the decision in question directly affects the powers of the CdP, powers which, as the Administrative Tribunal of the Council of Europe (ATCE) has highlighted in its case-law, constitute "individual rights" of the CdP. As clearly stipulated by the ATCE in its decisions of 5 September 2006, on appeals Nos. 349/2005 and 350/2005 respectively, the Secretary General does not have the right to "interfere with the very role of the CdP". In the present case, it is precisely this role that is being seriously undermined. For the signing by the Council of Europe of a contract with Assurances

Générales de France (AGF) chronologically and logically precedes the draft rule on staff contributions towards collective insurance premiums, yet only this last was submitted to the CdP for consultation.

According to case-law and legal theory, consultation is a "substantive formality". It is a formality, of course, insofar as consultation represents a stage in a procedure, but it is also "substantive" in that it affords the CdP an opportunity to have a "say" in the final decision, i.e. to put forward arguments which the Secretary General can take into account when exercising his discretionary authority. Once the Council of Europe has entered into contractual commitments, it is impossible for the Secretary General to lay down a rule that runs counter to the contractual provisions, or even modifies them. In this context, it is clear that the CdP was consulted about the draft rule in a purely mechanical fashion, and that it had no chance of bringing about a change in the terms of the contract incorporated in the draft rule. Only consultations on the draft contract could have constituted a substantive formality, in that they would have afforded the CdP an opportunity to "influence" the decision. As it was, the CdP had to decline to comment on the draft rule on premiums, since it had no way of knowing what these premiums related to (see appendix).

To conclude this point, the decision in question runs counter to the very spirit of the texts and also the general principles of law concerning the role of the CdP.

There is, however, a further point to consider. Under Appendix 12 to the Staff Regulations, it is for the Secretary General to determine "by rule the nature of the expenses", i.e. the benefits. The fact is, however, that no rule has ever been made on this subject. What rules there are deal solely with the premiums, i.e. the contributions. The CdP's powers have thus been infringed and the statutory obligation to consult the CdP on the benefits utterly evaded."

9. On 9 January 2008, the Secretary General dismissed the administrative complaint. The decision was worded as follows:

"You ask that the decision contained in the memorandum issued on 12 December 2007 by the Director General of Administration be set aside to the extent that it claims there is no legal obligation to consult the Staff Committee about the terms of a health insurance contract with Assurances Générales de France (hereafter "AGF")/Vanbreda. You submit that the act in question directly affects the powers of the Staff Committee.

With regard to the circumstances in which the Staff Committee is entitled to lodge an administrative complaint, it will be recalled that Article 59, paragraph 6 c), of the Staff Regulations reads as follows:

"The complaints procedure set up by this article shall be open on the same conditions mutatis mutandis

(...)

c. to the Staff Committee, where the complaint relates to an act of which it is subject or to an act directly affecting its powers under the Staff Regulations; (...)"

In other words, the Staff Committee may use the complaints procedure only in order to challenge an act of which it is the subject or an act directly affecting the powers conferred on it by the Staff Regulations.

In the present case, the complaint concerns an alleged infringement of the Staff Committee's right to be consulted.

The Secretary General wishes to point out firstly that, in his view, the events which gave rise to this dispute, namely the conclusion of the contract with AGF/Vanbreda, do not fall within the scope of the CdP's powers as regards consultation. The arguments in support of this view will be presented later, as they relate to the merits of the complaint. In the meantime, however, the Secretary General notes that insofar as the complaint does not remotely concern the powers of the Staff Committee, the latter has no interest in bringing proceedings and its administrative complaint is therefore inadmissible.

Without prejudice to the inadmissibility objection raised, the merits of the complaint concerning the alleged infringement of the Staff Committee's powers will be dealt with below.

Such powers, and in particular those relating to the Staff Committee's right to be consulted on matters within the competence of the Secretary General, are set out in detail in Article 5 of the Regulations on Staff Participation (Appendix I to the Staff Regulations). In particular, paragraph 3 of the said article stipulates:

"The Secretary General shall consult the Staff Committee on any draft provision for the implementation of the Staff Regulations. He or she may consult it on any other measure of a general kind concerning the staff."

As regards staff's medical and social coverage, the relevant provisions of the Staff Regulations are Article 43 and Appendix XII to the Staff Regulations, the Regulations on the medical and social insurance scheme, so only provisions for the implementation of this article and these Regulations require consultation with the Staff Committee, i.e. possible rules and instructions.

Such provisions deal with the Council of Europe's obligations towards its staff and staff members' duties towards the Organisation, so it is clear, and indeed stipulated in the Regulations, that the Staff Committee must be consulted on the content of these documents.

In this particular case, the Staff Committee was consulted about draft Rule No. 1288 on staff contributions towards collective insurance premiums.

A contract which falls within the competence of the Secretary General, still less a draft contract, cannot, however, be considered a "provision for the implementation of the Staff Regulations".

In the case of the contract with AGF/Vanbreda, the fact is that this is the means by which the Council of Europe meets its obligations to provide its staff with medical and social protection. Such a contract has effect only between the parties thereto, namely the Council of Europe and AGF/Vanbreda: it cannot, in itself, have any legal effects vis-à-vis staff. In order for it to produce effects vis-à-vis staff, therefore, the Secretary General needs to adopt an implementing measure, in accordance with Article 4 of the Regulations on the medical and social insurance scheme, which states:

"The Secretary General shall determine by rule the nature of the expenses covered by the Organisation's Medical and Social Insurance Scheme, and also the rates of cover, exceptions and restrictions which apply, depending on the nature or cause of the benefits."

It is with regard to this implementing measure, therefore, specifically the aforementioned Rule No. 1288 that the Staff Committee is entitled to be consulted, Rule No. 1288 being the act designed to produce legal effects vis-à-vis staff.

As regards any other general measure concerning staff, the Secretary General certainly has the option of consulting the Staff Committee but on no account is he obliged to do so, according to the second sentence of paragraph 3 of Article 5 of Appendix I to the aforementioned Regulations.

The Secretary General therefore considers that the decision referred to in the present complaint complies with the relevant rules, in that no obligation to consult the Staff Committee about the said draft contract follows from these rules.

The Secretary General further notes that when drawing up the said contract, a special procedure is followed during which, although there is no provision for formal consultations with the Staff Committee, staff representatives are nevertheless closely involved in the Administration's decisions.

For when it comes to staff's social and medical protection, the Secretary General is required to consult the Supervisory Board for the collective insurance contract, under Instruction No. 38 of 19 May 1998.

It should be noted here that, although there is no mention of it in the Staff Regulations, the practice of consulting the Supervisory Board was introduced by the Secretary General as an additional means of involving staff representatives, intended to complement, but not replace, the consultations with the Staff Committee provided for in the Regulations. Staff representatives thus have more opportunities to express their views on any measures being considered by the Secretary General, on the understanding, however, that the Secretary General retains sole authority to make decisions in such matters. There was,

then, never any question of allowing staff representatives to become in any way parties to the negotiations begun with the insurer: the Secretary General alone has the power to decide the final content of the contract and takes full responsibility for it.

In this particular instance, the Supervisory Board was involved in several stages of the procedure that led to the signing of the contract with AGF/Vanbreda:

- first, it helped draw up the specifications that were used to issue the international call for tenders with a view to choosing a contractor;

- second, it also had a say in the decision as to which tender to accept, recommending that the contract be awarded to AGF/Vanbreda.

Thanks to the presence on the Supervisory Board of members appointed by the Staff Committee, not only, therefore, was the Staff Committee informed of the manner in which the negotiations over the contract with AGF/Vanbreda were conducted, but it also played an indirect part in deciding the terms of that contract.

The Staff Committee cannot reasonably claim, then, that it was "consulted about the draft rule [No. 1288] in a purely mechanical fashion, and that it had no chance of bringing about a change in the terms of the contract incorporated in the draft rule".

Far from it, the Staff Committee, through its participation in the Supervisory Board, was in a position to influence the contractual terms that were finally adopted and, hence too, the decisions that were taken when concluding the contract.

The prescribed procedure fully complied with by the Secretary General who, beyond the requirement to consult the Supervisory Board, did not have to consult the Staff Committee about the draft contract. Once the procedure was over, however, the Secretary General did have an obligation to consult the Staff Committee about the draft rule enabling the arrangements agreed with the insurer to be implemented, in terms of staff contributions towards the collective insurance premiums.

While it is certainly the case that by the time the consultations on draft rule No. 1288 took place, the contract with AGF/Vanbreda had already been signed, that does not mean the consultations were redundant. For it is still entirely open to the Secretary General, if he so wishes, to take account of the Staff Committee's opinion and to adopt such measures as might be necessary for that purpose, such as proposing amendments to the signed contract, for example. That is not the only possibility, however, as the Secretary General could find other ways of implementing the Staff Committee's proposals, where appropriate.

In the light of the above, the Secretary General cannot be held to have committed a breach of the procedures which he was required to follow.

In conclusion, your administrative complaint must be dismissed as inadmissible and/or ill-founded. Under Article 60 of the Staff Regulations, you have the right to lodge an appeal against this decision with the Administrative Tribunal, in writing within sixty days from the date of notification."

10. In the meantime, on 17 December 2007, the Secretary General had adopted Rule No. 1288 on staff contributions towards collective insurance premiums.

11. On 6 March 2008, the Staff Committee lodged the present appeal.

II. CURRENT REGULATIONS

1. *The provisions relating to social and medical protection (Staff Regulations and other texts)*

12. Under Article 43 of the Staff Regulations,

Article 43 – Social security

"1. Staff members shall be properly covered against the risks of accident, illness, old age, disability and death and for maternity expenses.

2. a. Except as provided under paragraph b), all staff members shall be affiliated to the Pension Scheme and shall be subject to the provisions of the Pension Scheme Rules and Instructions as set out in Appendix V.

b. All staff members recruited on or after 1 January 2003 and who have never contributed to the Pension Scheme referred to in paragraph a) above; or benefited, during their last appointment with one of the Organisations referred to in Article 1 of Appendix V, from the provisions of Article 11 of Appendix V and have not repaid the amounts provided for under that Article, shall be affiliated to the Pension Scheme and shall be subject to the provisions of the Pension Scheme Rules and Instructions as set out in Appendix V bis.

c. The pensionable age for receiving a retirement pension referred to in Article 8 of the Pension Scheme Rules set out in Appendix V bis shall be 63 years.

3. For cover in the event of sickness, maternity, accident at work, disability or death, the Medical and Social Insurance Scheme applicable to staff from 1 March 1999 is set out in Appendix XII to the Staff Regulations.

4. However, for staff members in service on 22 December 1998 and affiliated at that date to the French Social Security scheme, the Scheme set out in Appendix XII to the Staff Regulations shall apply only to those members of staff who have opted for the said Scheme, the others remaining affiliated to the French Social Security scheme and a compulsory complementary insurance scheme. In the latter case staff members shall pay the employee's contribution to the French Social Security scheme as applicable under the Agreement between the Council of Europe and France and one-third of the cost of their affiliation to the compulsory complementary insurance scheme.

5. Whatever the health insurance scheme to which the staff member is affiliated, contributions in respect of the risk of accidents at work and industrial disease shall be wholly borne by the Council of Europe."

13. Appendix XII to the Staff Regulations contains the Regulations on the medical and social insurance scheme. In this particular case, the relevant provisions are as follows:

PART I: Affiliation of serving permanent staff

Article 4 – Definition of benefits and risks covered – Interpretation

"1. The Secretary General shall determine by rule the nature of the expenses covered by the Organisation's Medical and Social Insurance Scheme, and also the rates of cover, exceptions and restrictions which apply, depending on the nature or cause of the benefits.

2. If doubts or disputes arise concerning application of the Regulations on the Organisation's Medical and Social Insurance Scheme, reference shall be made to the French Social Security legislation in force at the time when the event giving rise to a claim for benefits occurs.

3. The text of insurance policies taken out by the Organisation relating to cover for health care expenses or provident cover shall be made available to staff members."

PART II: Affiliation of pensioners and former staff

Article 19 – Definition of benefits and risks covered

"The Secretary General shall determine by rule the nature of the expenses covered by the Organisation's Medical and Social Insurance Scheme, and also the rates of cover, exceptions and restrictions which apply, depending on the nature or cause of the benefits.

If doubts or disputes arise concerning application of the Regulations on the Organisation's Medical and Social Insurance Scheme, reference shall be made to the French Social Security legislation in force at the time when the event giving rise to a claim for benefits occurs.

The text of insurance policies taken out by the Organisation relating to cover for health care expenses or provident cover shall be made available to affiliated persons.

14. By Instruction No. 38 of 19 May 1998, the Secretary General established a Supervisory Board. This Instruction reads as follows:

1. The purpose of this instruction is to establish a Supervisory Board to advise the Secretary General on matters relating to the medical and social protection offered to staff members. The composition and rules of operation of the Supervisory Board are as follows:

2. There shall be established a Supervisory Board, entrusted with the following tasks:

- review of the Council of Europe's collective insurance cover for medical and social protection of staff members, both active and retired;

- monitoring of the accounts presented by the insurer and the insurance manager;

- advising the Director of Administration as to possible improvements in medical and social protection.

The Supervisory Board shall be consulted on any amendment of the Staff Regulations, Rules or Instructions affecting the medical and social protection of staff members, both active and retired, and their families. Such consultation shall not replace any for consultation of the Staff Committee that is required by statute.

The Supervisory Board shall be kept informed of trends in the cost of benefits.

3. The Supervisory Board shall be chaired by a person so nominated by the Secretary General and shall otherwise comprise:

- five members appointed by the Director of Administration;

- five members representing staff members, of whom:

- three members appointed by the Staff Committee taking into account the need to ensure the representation of all staff members, active and retired; they shall include at least one member who is a retired staff member;

- one member appointed by the Council of Europe's Trade Union (SACE);

- one member appointed by the Council of Europe Committee of the Fédération de la Fonction Publique Européenne (FFPE).

The Supervisory Board shall adopt its rules of procedure. The Director of Administration shall appoint the secretary of the Supervisory Board. The President of the Supervisory Board shall not vote except on questions of procedure.

4. The Supervisory Board shall meet twice a year:

- in the spring to consider, *interalia*, the accounts prepared by the insurance manager concerning the system of medical and social protection of the previous year;

- in the autumn, to consider, *interalia*, a report prepared by the Administration regarding adjustments, if any, recommended for the following year, any renewal or amendment of contracts with the insurer and manager and probable trends in contributions.

The Supervisory Board shall hold additional meetings at the request either of the Director of Administration or of one half of its members.

5. The Supervisory Board shall endeavour to provide the Director of Administration with opinions reflecting consensus among it members; when consensus cannot be reached, it shall adopt majority opinions and set out the different positions of its members.

15. Rule No. 1288 introduced by the Secretary General on 17 December 2007 concerns staff contributions towards collective insurance premiums. Articles 1 to 8 set out the contribution rates for the different categories of staff members and for former staff members covered by the Organisation's Pension Scheme, together with the contribution rates for optional medical insurance. The last three articles read as follows:

> Article 8
>
> "Contributions are deducted from: total salary for serving staff members; the amount of the pension (household allowance included) for beneficiaries of the pension scheme; the total salary the person concerned would receive if still serving for beneficiaries of the early pension scheme and staff on unpaid leave; the termination-of-service allowance for beneficiaries of Resolution (92)28.
>
> Article 9
>
> The contributions of serving staff members and beneficiaries of the pension scheme shall be deducted monthly from the salary or pension of the persons concerned.
>
> Optional insurance premiums paid for family members, and premiums due by permanent staff members on unpaid leave shall be paid monthly by the staff and concerned to the Organisation, which shall be responsible for transferring them to the insurer.
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> Article 10
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> The present Rule repeals Rule No. 1203 of 16 November 2004. It shall enter into force on 1 January 2008.

2. *Provisions for implementation of the Staff Regulations*

16. Article 62 of the Staff Regulations, on the provisions for implementation of the Staff Regulations, reads as follows:

> "1. The Secretary General shall issue rules, instructions or office circulars laying down the provisions for implementation of these Regulations.
>
> 2. Implementing provisions entailing a financial commitment shall be subject to approval by the Committee of Ministers."

3. *Powers of the Staff Committee*

17. Under Article 59, paragraph 6.c, of the Staff Regulations,

> "6. The complaints procedure set up by this article shall be open on the same conditions mutatis mutandis:
>
> (…)
>
> c. to the Staff Committee, where the complaint relates to an act of which it is subject or to an act directly affecting its powers under the Staff Regulations;

18. Appendix I to the Staff Regulations contains the Regulations on staff participation. Part II of these Regulations deals with the Staff Committee, while Part IV concerns time-limits. The relevant provisions in this case are Articles 5 (Part II) and 11 (Part IV) which read as follows:

"Article 5 – Matters within the competence of the Secretary General

1. The Staff Committee shall bring to the notice of the Secretary General any difficulty having general implications that concerns the interpretation and application of the Staff Regulations. It may be consulted on any difficulties of this kind.

2. The Staff Committee may propose to the Secretary General any draft implementing provisions relating to the Staff Regulations, as well as any measures of a general nature to be taken by him or her concerning the staff.

3. The Secretary General shall consult the Staff Committee on any draft provision for the implementation of the Staff Regulations. He or she may consult it on any other measure of a general kind concerning the staff.

Article 11

The Secretary General or the Committee of Ministers, as the case may be, shall lay down the time-limits within which the Staff Committee or the Joint Committee must deliver opinions requested of them, which shall be not less than fifteen working days. The time-limit may, however, be shortened by mutual agreement. If no opinion has been delivered within the period laid down, the Secretary General or the Committee of Ministers, as the case may be, shall proceed."

THE LAW

19. In its appeal, the appellant challenges the decision set out in the memorandum issued on 12 November 2007 by the Director General of Administration and Logistics.

It asks the Tribunal to "set aside the Secretary General's decision not to consult it on the collective insurance contracts concluded between the Organisation and AGF/Vanbreda and the decision not to fully implement Articles 4(1) and 19(1) of Appendix XII to the Staff Regulations; consequently, to annul the contract between the Organisation and AGF/Vanbreda or, failing that, to annul all the acts for the implementation of this contract in respect of the active and retired staff of the Organisation".

The appellant also asks to be awarded a sum of 7,000 euros in respect of expenses incurred for the present appeal.

20. The Secretary General asks the Tribunal to declare the appeal inadmissible, in whole or in part, and/or ill-founded and to dismiss it.

I. SUBMISSIONS OF THE PARTIES

A. ON THE ADMISSIBILITY OF THE APPEAL

1. The Secretary General

21. The Secretary General notes that, under Article 59, paragraph 6 c., of the Staff Regulations, the appellant may avail itself of the appeals procedure only if the complaint relates to an act of which it is the subject or to an act directly affecting its powers under the

Staff Regulations. In this instance, the appeal concerns the alleged infringement of the appellant's right to be consulted. The Secretary General maintains, however, that the events which gave rise to the present dispute, namely the conclusion of the contract with AGF/Vanbreda, do not fall within the scope of the appellant's powers with regard to consultation. The appellant therefore has no interest in bringing proceedings and its appeal is inadmissible.

22. With regard more specifically to the argument that the Secretary General's decision not to fully implement Articles 4(1) and 19(1) of Appendix XII to the Staff Regulations should be annulled, the Secretary General submits that the present appeal is unwarranted and/or premature, as so far, strictly speaking, no decision amounting to a refusal to adopt such a rule has been taken. What the appellant ought to have done was to first make a request under Article 59(1) *in fine* of the Staff Regulations and then respond, if necessary, either to the decision refusing to grant that request or to the failure to reply, implying rejection. The Secretary General submits that the appeal is therefore inadmissible on this point for lack of interest in bringing proceedings.

23. As to the request to annul the contract with the insurer, the Secretary General submits that the appellant has no standing to seek the annulment of an agreement which is neither an act of which it is the subject nor an act directly affecting its powers under the Staff Regulations. To prove his point, he cites judgment No. 1062 of the Administrative Tribunal of the International Labour Organization.

In any event, the Secretary General considers that it is not within the competence of the Tribunal to rule on the validity of an agreement which cannot be considered an "administrative act" under Article 59(1) of the Regulations, and which, furthermore, contains detailed rules on disputes relating thereto (disputes between the contracting parties or between the beneficiaries and the insurer). The Secretary General submits that, as far as this request is concerned, the present appeal is thus inadmissible on the ground of lack of interest in bringing proceedings and/or on the ground that the Tribunal is not competent to deal with this matter.

24. As to the request to annul the acts for the implementation of the contract with the insurer, the Secretary General submits that the appeal is inadmissible for the further reason that the appellant has no interest in bringing proceedings in respect of acts the subjects of which are "active and retired staff of the Organisation" and which, in any case, should apply as long as the contract with the insurer remains in force. The Secretary General further maintains that the appellant has no authority to act in lieu of the subjects of the said acts, who are the only ones who could, in theory, claim to have a direct, personal interest in challenging such acts, assuming that the other conditions for lodging an appeal had been met. In the present case, the appellant claims to be defending the interests of others, when in fact it is not permitted to bring an *actio popularis* before the Tribunal.

2. The appellant

25. The appellant, for its part, begins by pointing out that under Article 59, paragraph 6.c., of the Staff Regulations, complaints lodged by the appellant are admissible *ratione personae* if one of two conditions is met: the complaint must either "relate[s] to an act" of which the Staff Committee "is subject" or relate "to an act directly affecting its powers under the Staff Regulations". The appellant goes on to state that it is clear from the letter of this provision

that the two conditions are not cumulative, not least because of the drafters' use of the preposition "or".

26. The appellant submits that its complaint lodged on 11 December 2007 related to the memorandum issued by the Director General of Administration on 12 November 2007. This memorandum, in which the Director General declined to consult the Staff Committee on the contract with AGF/Vanbreda, is an act of the Secretary General of which the Staff Committee is the subject. The appellant concludes that, for this reason alone, its complaint should be considered admissible and the inadmissibility argument dismissed as ill-founded, based as it is on a selective and simplistic reading of the Staff Regulations.

B. ON THE MERITS OF THE APPEAL

1. The appellant

27. The appellant relies on two grounds of appeal: breach of Article 5(3) of Appendix I to the Staff Regulations and breach of Article 11 of the same Appendix. In connection with this last ground, it further submits that there has been a breach of Articles 4 and 19 of Appendix XII to the Staff Regulations.

28. As regards the first ground, the appellant complains that it was not consulted about the contract between the Council of Europe and AGF/Vanbreda. It argues in particular that the draft contract constitutes a "draft provision for the implementation of the Staff Regulations" and that it therefore follows that the Secretary General committed an infringement of the Staff Committee's powers in this area. The decision in question thus directly relates to the implementation of the Staff Regulations. The appellant further submits that, as the Secretary General has confirmed, the provisions for the implementation of Article 43 and Appendix XII to the Staff Regulations govern the Council of Europe's obligations towards its staff and staff members' duties towards the Organisation. It concludes from this that there is thus an obvious need for the CdP to be consulted about the content of the documents in question.

The appellant goes on to present a series of arguments concerning the legal nature of the contract concluded between the Council and AGF/Vanbreda to support its contention that the contract is an "implementing provision(s) relating to the Staff Regulations" (Article 5(2) of Appendix I) and not "any other measure of a general kind concerning the staff" (Article 5(3) of the same Appendix). It arrives at this conclusion by holding that "the expression medical and social insurance scheme" also includes any contract which the Council of Europe may conclude with private insurers to give practical and tangible effect to staff's medical and social protection. The opposite argument put by the Secretary General is, it maintains, purely formalistic and not accurate.

29. As to the question of consulting the Staff Committee, the appellant disputes the assertion that it was consulted through its members' involvement in the work of the Supervisory Board. It goes on to point out that, while it is the case that the Secretary General is required to consult the Supervisory Board for the collective insurance contract on matters relating to staff's social and medical protection, for one thing, consultations with the Supervisory Board cannot be deemed to be consultations with the CdP and for another, the consultations with the Supervisory Board on the draft contract were, to say the least, procedurally dubious and certainly not fully satisfactory from a substantive point of view.

30. The appellant further argues that it cannot in any case be claimed that consulting the Supervisory Board necessarily implies that the Staff Committee has been consulted as well, for two reasons, one theoretical, the other practical. Firstly, the members of the Supervisory Board are not the legal representatives of the CdP but are there to represent the interests of the staff. That is the conclusion that emerges from a study of the letter of the rule establishing the Supervisory Board. Secondly, on a more practical note, a great many documents were marked confidential, and so accessible only to members of the Supervisory Board. In other words, the members of the Supervisory Board representing the staff were not permitted to disclose much of the material in their possession (not even to other members of the Staff Committee).

31. The appellant complains that, above all, the Secretary General chose to ignore, even though it could hardly have been clearer, the wording of Instruction No. 28 of 19 May 1999, which he himself had issued: "Such consultation shall not replace any for consultation of the Staff Committee that is required by statute" (Article 2 *in fine*). The appellant submits that in these circumstances, any further discussion on this point is entirely redundant.

32. As regards the second ground, the appellant notes firstly that the Administration never sought to comply with the time-limits stipulated in Article 11 of Appendix I ("the Secretary General (…) [shall lay down] the time-limits within which the Staff Committee (…) [must] deliver opinions requested [of them], which shall be not less than fifteen working days"). It observes that never at any point in its dealings with the Supervisory Board did the Administration seek to comply with the time-limits set in this provision. From this it infers that the difference between consulting the appellant and consulting the Supervisory Board was in all probability fully apparent to the Administration.

33. The appellant contends that in failing to consult the CdP, the Secretary General committed a simultaneous breach of Article 5(3) and, by extension, of Article 11.

34. In connection with this second ground, the appellant argues that, even supposing the Secretary General's thesis was correct, something that it does not accept, the fact remains that under Articles 4(1) and 19(1) of Appendix XII to the Staff Regulations, a statutory text, the Secretary General is required to determine "by rule the nature of the expenses covered by the Organisation's Medical and Social Insurance Scheme, and also the rates of cover, exceptions and restrictions which apply, depending on the nature or cause of the benefits". In the appellant's view, there can be no question that the Secretary General presented only a rule on staff's contributions to the scheme. He thus violated both of the above-mentioned provisions of Appendix XII and in so doing, i.e. in failing to adopt a rule on the benefits, prevented the CdP from considering and commenting on it.

35. The appellant contends that, even if the Secretary General had issued a rule on the benefits after the contract with AGF/Vanbreda was concluded, which was not the case, the objection raised by it in its administrative complaint would still stand. For if the appellant is to have any "say" in the final decision, the draft rule would need to be submitted to it before the contract is concluded and not afterwards, or, as it has always maintained, the draft contract would need to be submitted to it for opinion as well. The appellant goes on to say that while it is true that in his decision dismissing the administrative complaint, the Secretary General points out that it is always open to him to "propose amendments to the signed contract or find "other ways of implementing the Staff Committee's proposals, where appropriate", such an approach is neither realistic nor practical. It is not realistic in that it is much easier to insert a

clause in a contract that has not yet been signed than to renegotiate the contract to include clauses suggested by the Staff Committee. Any such negotiation would, moreover, require the consent of the insurer. The Secretary General's suggestion is also impractical in that he fails to provide any examples of proposals that could be implemented without having to contact the private insurer and obtain its consent.

36. The appellant concludes by also drawing attention to the breach of Articles 4 and 19 of Appendix XII, observing that although it mentioned this breach in its administrative complaint, the decision dismissing the complaint makes not the slightest attempt to address this point.

2. The Secretary General

37. The Secretary General asks the Tribunal to declare the appeal unfounded.

38. With regard to the first ground of appeal, the Secretary General points out, firstly, that it is clear from a literal reading of the aforementioned Article 5(3) that the contract with AGF/Vanbreda does not fall within the scope of the first part of this provision. For as constant practice in this area has confirmed, the expression "draft provision for the implementation of the Staff Regulations" refers to the steps taken by the Secretary General in the exercise of his powers to adopt any regulation of a "secondary" nature necessary for the implementation of the Staff Regulations. The expression "draft provision for the implementation of the Staff Regulation" is thus strictly identical to that which appears in Article 62 of the Regulations under the heading "Implementing provisions" and which reads as follows:

> "1. The Secretary General shall issue rules, instructions or office circulars laying down the provisions for implementation of these Regulations.
>
> 2. Implementing provisions entailing a financial commitment shall be subject to approval by the Committee of Ministers".

39. In the Secretary General's view, it is clear from this article that "provisions for the implementation of the Regulations" refers to rules, instructions or office circulars drawn up by the Secretary General, i.e. the statutory provisions that make up all the legal rules applicable to staff.

40. As regards measures that may affect the staff in general other than statutory provisions, the Secretary General maintains that under the second part of Article 5(3) of the Regulations on staff participation, the Staff Committee may, but need not necessarily, be consulted about these.

41. As regards the legal nature of the contract, the Secretary General argues that the contract is the means by which he meets his obligations to provide his staff with medical and social protection. Also, given the nature of the contract between the Secretary General and AGR/Vanbreda, it is difficult to see how any putative right to be consulted could have usefully been exercised without it becoming more akin to a right of negotiation.

42. As to the second ground of appeal, the Secretary General argues that, with regard to the rule on benefits, this is something which the Council has never adopted, with no complaints from the appellant on that score. That such a rule has not been adopted is mainly due to lack of resources and not – as the appellant suggests – to some desire on the part of the

Secretary General to bypass its right to be consulted. In the Secretary General's view, there was therefore no urgent need to adopt such an instrument before the new collective insurance contract came into force since, in its absence, staff continued to be covered by the legal arrangements enshrined in Article 43 of the Staff Regulations, as supplemented by Appendix XII to the Regulations.

43. As regards the allegedly inadequate nature of the consultations with the COS, the Secretary General refers mainly to his decision to dismiss the administrative complaint (paragraph 9 above). He adds that it is precisely because of the distinction between the two procedures (on the one hand, consultation with the COS and, on the other, consultation with the Staff Committee) that any alleged irregularity in terms of the former could have no effect on the latter, in that it could not justify the request to rectify it by widening the scope of the appellant's right to be consulted. The appellant itself, however, seems to have wrongly conflated the two procedures when in its application of 18 October 2007 (the reply to which is the decision complained of in the present appeal), it stated: "In any event, should the staff representatives on the Supervisory Board be denied this right to be consulted [about the terms of the contract], the Staff Committee itself is entitled to be consulted under Article 5 of Appendix I to the Staff Regulations. It accordingly requests that the draft be submitted to it before signing."

II. TRIBUNAL'S ASSESSMENT

A) Preliminary consideration

44. Before examining the various issues before it concerning the admissibility and merits of the appeal, the Tribunal believes it is worth pointing out that the appeal relates only to the failure to consult the Staff Committee about the Council's draft contract with AGF/Vanbreda. Proof of this can be seen in the wording of the final paragraph of the memorandum of 18 October 2007, sent by the appellant to the Director General of Administration and Logistics (paragraph 6 above), and in the first paragraph of the administrative complaint (paragraph 8 above). This was later confirmed when lodging the appeal with the Tribunal: in the section entitled "Object of the appeal" (part 7 of the form for lodging an appeal), the appellant stated that it wished to "obtain the annulment of the contract (…) or, failing that, obtain the annulment of all the implementing acts or clauses of the contract in respect of the active and retired staff of the Organisation." This request was repeated in the further pleadings lodged by the appellant (paragraph 51 below).

45. Consequently, the Tribunal should not consider any issues other than that mentioned above, such as the manner in which the Secretary General chose to proceed, i.e. the fact that he did not adopt a rule which, under Articles 4 and 19 of the Appendix to the Staff Regulations, would determine "the nature of the expenses covered by the Organisation's Medical and Social Insurance Scheme, and also the rates of cover, exceptions and restrictions which apply, depending on the nature or cause of the benefits". The Tribunal arrives at this conclusion even though in the aforementioned requests in the further pleadings, the appellant also asks the Tribunal to set aside the Secretary General's decision not to fully implement the aforementioned Articles 4 and 19.

B) On admissibility

46. The Tribunal notes that the Secretary General raises three objections to admissibility: one relating to the appeal as a whole, another concerning the complaint based on Article 4(1) and Article 19(1) of Appendix XII to the Staff Regulations, and a third concerning the power of the Tribunal to annul the contract with AGF/Vanbreda and any acts for the implementation of that contract.

47. The Tribunal must consider each of the Secretary General's objections individually.

48. With regard to the first objection, the Tribunal notes that it relates to the appeal as a whole and is based on the appellant's alleged lack of interest in bringing proceedings. The Tribunal observes that the appellant claims it is entitled to be consulted under the terms of the statutory texts. The Secretary General, however, denies that he should have consulted the appellant in the present case. In the view of the Tribunal, the question raised by this objection clearly relates to the merits of the appeal and cannot properly be considered at the admissibility stage. In its appeal, moreover, the appellant alleges an infringement of its right to be consulted. It follows that this objection must be dismissed.

49. As to the second objection concerning the complaint relating to Articles 4 and 19 of Appendix XII to the Staff Regulations, the Tribunal notes that the appellant made this complaint at the admissibility stage but that it has never formally requested, under Article 59(1) *in fine* of the Staff Regulations, that the Secretary General give a decision on the matter. The fact is that the Secretary General never said that he would not adopt a rule but merely stated that he would do so as soon as possible. So far, however, no such instrument has been adopted. The appellant, therefore, should have given formal notice under the terms of the aforementioned Article 59 in order to obtain either a decision granting the request, or an explicit rejection or, after a period of 60 days, an implicit rejection. It follows that this objection must be accepted.

50. As to the third objection, this concerns the scope of the Tribunal's power of annulment and is thus to be considered not at the admissibility stage, but only at the merits stage and in the event that the Tribunal should find that there has been a violation. This objection must therefore be dismissed.

C) On the merits

51. The Tribunal notes that the appellant relies on two grounds of appeal, notably a breach of Article 5(3) of Appendix I to the Staff Regulations and a breach of Article 11 of the same Appendix. In connection with this last ground, the appellant also claims that there has been a breach of Articles 4 and 19 of Appendix XII to the Staff Regulations. Since, however, the Tribunal has found this branch of the appellant's second complaint to be inadmissible, the Tribunal must consider only the part of the complaint which relates to the breach of Article 11 of Appendix I.

In its submissions, the appellant asks the Tribunal to "set aside the Secretary General's decision not to consult it on the collective insurance contracts concluded between the Organisation and AGF/Vanbreda and the decision not to fully implement Articles 4(1) and 19(1) of Appendix XII to the Staff Regulations; consequently, to annul the contract between

the Organisation and AGF/Vanbreda or, failing that, to annul all the acts for the implementation of this contract in respect of the active and retired staff of the Organisation".

52. The Tribunal notes that the appellant's main complaint concerns a failure by the Secretary General to consult it when drawing up a new contract – more innovative than previous ones – between the Council of Europe and AGF/Vanbreda concerning the social and medical protection of serving, retired and former staff of the Organisation for the period 2008-2010.

53. The Tribunal notes that under Article 5(3) of the Regulations on Staff Participation, the Secretary General is required to consult the Staff Committee on any draft provision for the implementation of the Staff Regulations.

54. The question for the Tribunal, then, is whether the contract is essentially a provision for the implementation of the Staff Regulations, as the appellant maintains, or whether, as the Secretary General contends, it is clear from a literal reading of the said Article 5(3) that the contract falls outside the scope of this provision.

55. The Tribunal notes that Article 62 of the Staff Regulations states that "the Secretary General shall issue rules, instructions or office circulars laying down the provisions for implementation of these Regulations". It is clear from this article that "provisions for implementation" refers to rules, instructions or office circulars, or any other standard-setting instruments that are adopted by the Secretary General in the exercise of his administrative power to regulate the Organisation. The Tribunal notes that the contract in question is a private agreement between the Organisation and a service provider. Accordingly, a contract concluded with an insurer as an external provider cannot be considered a "provision for implementation". By its nature, such a contract is not meant to be treated as a "draft provision for the implementation of the Staff Regulations" (Article 5(3) of Appendix I), a description that could only properly apply to the rule which the Secretary General was supposed to have adopted.

56. The Tribunal is aware that the current system provides for the drawing up of a private contract between the Organisation and the chosen insurer and for the adoption of a rule establishing "the nature of the expenses covered by the Organisation's Medical and Social Insurance Scheme, and also the rates of cover, exceptions and restrictions which apply, depending on the nature or cause of the benefits" (Article 19 of Appendix XII).

57. When renewing the contract, however, the Secretary General failed to adopt such a rule and although, throughout the procedure, he reiterated his intention of doing so, he was very vague about when that might happen.

58. It is thus apparent that the arrangements that were actually applied did not follow the pattern originally intended owing to the failure to adopt this rule. This clearly prevented the appellant from taking a stand on the various issues that would have been dealt with in such a rule and on which it has a statutory right to give its opinion. Admittedly, under Article 5(3) of Appendix I to the Staff Regulations, such opinions, although mandatory, are not binding, but it is plainly important that the Staff Committee should at least be consulted about the matters discussed.

59. The Tribunal must therefore consider whether, in the instant case, the appellant was entitled to demand, in the light of the failure to implement the statutory texts in full, that it be consulted about the draft contract with AGF/Vanbreda.

60. The Tribunal considers, however, that it should first point out that, in the context of this assessment, while it concludes that the appellant did have a legitimate claim to be consulted, the Tribunal could not in any event exercise its power to annul the contract signed with AGF/Vanbreda. Whatever rights the appellant might have claimed at the preparatory stage of the contract, these rights are not such as to effectively change the legal nature of that contract, which remains a private agreement between the Organisation and external partners. Under Article 59 of the Staff Regulations, to be read in conjunction with Article 60(2) of the same text, under no circumstances could the contract with AGF/Vanbreda be considered an "administrative act" amenable to the exercise of the Tribunal's power of annulment. In so ruling, the Tribunal has answered the question that was raised by the Secretary General in his third objection of inadmissibility.

61. In the view of the Tribunal, the correct procedure would have been for the Secretary General to adopt a rule on which the Staff Committee could have given its opinion following the consultations provided for in Article 5 of Appendix I to the Staff Regulations. Such a rule would unquestionably constitute a provision for implementation of the Staff Regulations within the meaning of Article 62 of the Staff Regulations (paragraph 16 above).

In the event, the Secretary General did not proceed in that manner. Yet despite this omission, the Tribunal cannot at present consider the contract with AGF/Vanbreda to be an "implementing provision" under the aforementioned Article 62. For the terms of this article are clear and they cannot be altered by reinterpreting them through case-law following a failure to act on the part of the Secretary General.

62. The Secretary General stated on several occasions that he was in the process of preparing such a rule. As at the date of this decision, however, the Tribunal has no knowledge of any such rule having been adopted. The Tribunal is surprised at this delay which is clearly preventing the Staff Committee from taking a statutory position on matters of vital importance for staff. Contrary to what the appellant maintains, however, this delay, which is largely connected with the present dispute, is not sufficient at present to justify treating the contract as a provision for the implementation of the Staff Regulations, with the result that the appellant should have been consulted before signing it. In this regard, and in view of the fears expressed by the appellant, the Tribunal considers that the future consultations concerning the adoption of the rule should be not merely a formality because the contract has already been signed, but rather substantive consultations to which the Secretary General must have regard when making any amendments to the existing contract. The Tribunal has no doubts as to the feasibility of such an approach because, although it was not stated in the present proceedings, staff have been informed, via an announcement on the Council's intranet site, that the Council and the provider have already adopted amendments to the contract, although they have no connection with the present dispute.

63. The Tribunal notes that from the time it lodged its administrative complaint on 11 December 2007 (paragraph 8 above, last paragraph of the quotation), the appellant has pointed to the absence of a rule and drawn conclusions from this with regard to the present appeal. However, it has not asked the Secretary General, under Article 59(1) *in fine* of the Staff Regulations, to adopt such a rule and, accordingly, to consult it at the preparatory stage.

The Tribunal has already drawn conclusions as to the admissibility of the relevant complaint and there is no need to repeat them here. The Tribunal is, however, surprised to see from the information in its possession that no request to this effect has yet been made, in the face of the Secretary General's continuing failure to act.

64. Having reached this conclusion, the Tribunal considers that there has been no breach of Articles 5 and 11 of Appendix I to the Staff Regulations.

It follows that the two complaints made by the appellant are unfounded.

CONCLUSION

65. In conclusion, the appeal must be dismissed.

On the costs

66. Under Article 11(3) of the Statute of the Tribunal,

> "In cases where it has rejected an appeal, the Tribunal may, if it considers there are exceptional circumstances justifying such an order, decide that the Council shall reimburse in whole or in part properly vouched expenses incurred by the appellant. The Tribunal shall indicate the exceptional circumstances on which the decision is based."

The appellant, having employed the services of a lawyer, has requested 7,000 euros to meet the costs and expenses of the present appeal. The Tribunal considers that the Secretary General's continuing delay in adopting the rule in question, and hence in consulting the Staff Committee on matters of fundamental importance for the staff as a whole, constitutes an exceptional circumstance, justifying the application of Article 11(3) of the Statute of the Tribunal.

The Tribunal considers it reasonable that the Secretary General should reimburse the sum of 7,000 euros.

For these reasons, the Administrative Tribunal:

Dismisses the first and the third objection of inadmissibility raised by the Secretary General;

Accepts the second objection of inadmissibility relating to Articles 5(1) and 12(1) of Appendix XII to the Staff Regulations and declares the relevant complaints inadmissible;

Declares the remainder of the appeal unfounded;

Orders the Secretary General to pay the sum of 7,000 euros in costs.

Adopted by the Tribunal in Strasbourg on 29 January 2009, and delivered in writing according to Rule 35, paragraph 1, of the Rules of Procedure of the Tribunal on 30 January 2009, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	E. PALM