CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeals Nos. 595-601/2018 (Gianfranco ALBERELLI (III) and others v. Secretary General)

The Administrative Tribunal, composed of:

Mr András BAKA, Deputy Chair,
Ms Françoise TULKENS,
Mr Christos VASSILOPOULOS, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The Tribunal received seven appeals, lodged and registered on the following dates, by:

- Mr Gianfranco ALBERELLI (III),	Appeal No. 595/2018, submitted and registered on 13 November 2018;
- Mr James BRANNAN (III),	Appeal No. 596/2018, submitted and registered on 13 November 2018;
- Mr John PARSONS (III),	Appeal No. 597/2018, submitted and registered on 13 November 2018;
- Mr Alfonso ZARDI (III),	Appeal No. 598/2018, submitted and registered on 13 November 2018;
- Mr Ulrich BOHNER (III),	Appeal No. 599/2018, posted on 19 November and registered on 20 November 2018;
- Mr David PARROTT (II),	Appeal No. 600/2018, submitted and registered on 22 November 2018;
- Ms Penelope DENU (III)	Appeal No. 601/2018, submitted and registered on 23 November 2018;

2. On 10 December 2018, the seven appellants filed further pleadings.

3. On 15 February 2019, the Secretary General submitted his observations (one document for the seven appeals).

4. On 11 March 2019, the seven appellants submitted observations in reply (one document for the seven appellants).

5. The public hearing on the seven appeals was held in the Administrative Tribunal's hearing room in Strasbourg on 27 March 2019. The seven appellants were represented by Mr Giovanni M. Palmieri, legal adviser on international civil service law, while the Secretary General was represented by Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law (Jurisconsult), assisted by Ms Sania Ivedi and Ms Léa Boucard, respectively lawyer and assistant lawyer in the Legal Advice Department.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The five appellants in appeals Nos. 595/2018, 596/2018 and 599-601/2018 are Council of Europe staff members working at the Organisation's headquarters. They are all permanent members of staff assigned to various departments of the Council. The two appellants in appeals Nos. 597-598/2018 are former staff members of the organisation in receipt of retirement pensions from it.

7. The seven appellants are challenging the decisions reflected in January 2018 in either their payslips or their pension slips, as applicable, not to grant them the salary adjustment for 2018 and to defer until 2019 the entry into force of the salary moderation clause.

8. Adjustments in salaries and pensions are currently governed by the rules set out in paragraph 20 below.

9. The relevant facts may be summarised as follows.

10. On 3 July 2017, the Minister of Foreign Affairs of the Russian Federation informed the Chair of the Committee of Ministers of the Council of Europe of the Russian Federation's decision to suspend payment of its contributions to the budget of the Council of Europe for 2017 until the credentials of the delegation of the Federal Assembly of the Russian Federation within the Parliamentary Assembly of the Council of Europe were restored. At the same time, the Russian Federation stated that it would continue to fulfil its commitments within the Organisation. The letter was worded as follows (original version):

> "The Russian Federation expresses deep concern about the aggravating crisis within the Parliamentary Assembly of the Council of Europe (PACE). The statement of the Russian Foreign Ministry dated 30 June 2017 contains a detailed assessment of the crisis by the Russian side. In order to prevent the situation from developing according to this dangerous scenario, the Russian Federation decided to suspend payment of its contributions to the budget of the Council of Europe for 2017 until full and unconditional restoration of the credentials of the delegation of the Federal Assembly of the Russian Federation within the Parliamentary Assembly of the Council of Europe. At the same time, the Russian Federation continues to fulfil its commitments within the Organisation. Without any interference with PACE's

substantive working issues, we consider it unacceptable to apply sanctions against the members of parliaments elected by the people. We strongly believe that the PACE rules of procedure need to be reformed in such a way as to better accommodate the views of all the PACE members and the Europeans they represent."

11. At its 1300th meeting (Budget) from 21 to 23 November 2017, the Committee of Ministers of the Council of Europe adopted the following decision:

"The Deputies, having regard to the Co-ordinating Committee on Remuneration's (CCR) recommendations with regard to the 2018 adjustment of remuneration for staff of the Council of Europe and the corresponding monthly basic salary scales as set out in document CM(2017)123-add2,

1. decided, in application of Article 6 – Affordability of the Rules on the remuneration adjustment method, not to award the annual salary adjustment recommended by the CCR due to the default of payment of 2017 obligatory contributions which produced a significant reduction in the Organisation's budget;

2. noted that, in pursuance of Article 36 of the 132nd report (CM(2001)170-rev), the above decision not to award the annual adjustment will apply to pensions payable under Appendix V of the Staff Regulations;

3. noted that, in accordance with the interpretation given to paragraph 3 of the 34th report by the CCG (CCG(65)5) dated 25 October 1965, at its 77th session on 29 June 1966 (cf. CCG/M(66)6), the above decision will apply to salaries of temporary staff serving in the Council of Europe;

4. noted that under the terms of Article 3 of Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights, the above decision will apply to the annual remuneration of judges and of the Commissioner for Human Rights;

5. approved, with effect at 1 January 2018, the amounts of allowances/supplements expressed in absolute value, set out in Annex to the 251st report of the CCR (document CM(2017)124);

6. agreed that, should the application of the method result in a negative adjustment, they would consider the Secretary General's proposal not to apply that negative adjustment up to a maximum of 1.1% in total."

12. At the end of January 2018, the appellants received their payslips or pension slips, as applicable, for January 2018. Pursuant to the Committee of Ministers' decision, these documents did not include the increases which should have taken place in application of the salary adjustment method in force and the moderation clause.

13. On various dates from 20 to 23 February 2018, the appellants and 10 other staff members or retired staff members of the Organisation lodged administrative complaints (Article 59, paragraph 2, of the Staff Regulations).

14. In accordance with Article 59, paragraph 5, of the Staff Regulations, the appellants requested in their administrative complaint that it be referred to the Advisory Committee on Disputes.

15. On 28 August 2018, the Advisory Committee on Disputes gave its opinion. Its unanimous conclusions were as follows:

"The Advisory Committee on Disputes

1. Believes that there are compelling arguments in favour of the Administration's view that the legal conditions for applying the affordability clause in 2018 were met;
2. Regrets the lack of measures capable of smoothing out, mitigating or offsetting the negative effects for staff members resulting from application of the affordability clause;
3. Believes that fairness would dictate that staff members should be afforded compensatory measures and the back-payment of the salary adjustment in the event of the Russian Federation settling its debt to the organisation;
4. The Advisory Committee on Disputes invites the Secretary General and the appellants to keep it informed of the follow-up to its proposals."

16. The parties have not informed the Tribunal as to whether they acted on the Advisory Committee on Dispute's invitation cited in point 4 above.

17. On 27 September 2018, the Secretary General rejected the said administrative complaints, declaring them unfounded.

18. On the dates indicated in paragraph 1 above, the seven appellants lodged their appeals in accordance with Article 60 of the Staff Regulations.

II. RELEVANT LAW

A. Co-ordination

19. The Council of Europe is a member of a network of international organisations which apply a joint system for calculating salaries and pensions, while nevertheless allowing each organisation to decide whether to apply the results of the calculations. In his observations (paragraph 3 above), the Secretary General summed up the system as follows:

> "10. Firstly, it should be noted that the Council of Europe is one of the Co-ordinated Organisations, which share a co-ordinated remuneration and allowances system. The legal framework defining the operation of the co-ordination system is set out in the Regulations concerning the co-ordinated system adopted by the Committee of Ministers of the Council of Europe on 8 July 2004 (document CM(2004)14).
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> 11. Under these regulations, the purpose of the co-ordination system is to make recommendations to the governing bodies of the Co-ordinated Organisations concerning basic salary scales, and the method of their adjustment, for all categories of staff and for all countries where there are active staff or recipients of a pension.
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> 12. It falls to the Co-ordinating Committee on Remuneration (CCR) to make relevant recommendations to the Co-ordinated Organisations, in accordance with the salary adjustment method in force. It then falls to the governing bodies of the Co-ordinated Organisations – the Committee of Ministers in the case of the Council of Europe – acting as sovereign bodies to take decisions on the recommendations made by the CCR.
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> 13. On 18 October 2016, the Committee of Ministers adopted the Rules on the remuneration adjustment method as set out in the 244th CCR report, for the period from 1 January 2017 to 31 December 2020 (document CM(2016)128). At the time of adopting the method, the Committee of Ministers noted that an addendum to the 244th report proposing a moderation clause would be adopted by the CCR at the latest by 30 June 2017 for implementation as of 1 January 2018 (CM/Del/Dec(2016)1268/11.5).
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> 14. To understand the present case properly, it is necessary to go over the relevant provisions of the Rules on the remuneration adjustment method for staff of the Co-ordinated Organisations set out in the annex to the 244th CCR report:

"Article 5: Annual adjustments of basic salaries
(…)

5.2 Scales for other countries

5.2.1 Subject to the provisions of Article 6, the basic salaries for categories A, L, B and C or the basic salary levels as set out in a single spine, for staff posted in the other countries, shall be adjusted at 1 January following the reference period by the salary adjustment resulting from the product of the final reference index referred to in Article 4.1.6.2 above, and the relevant consumer price index, corrected if necessary by the PPP as set out in Appendix 2, in order to guarantee a relative equivalency in purchasing power between the scales of the countries concerned.

5.2.2 These percentage adjustments shall apply to basic salaries in force at 31 December of the preceding year.

Article 6: Affordability

6.1 The Committee of Ministers reserves the sovereign right to take special measures concerning the implementation of the adjustment resulting from the application of this salary method, if specific budgetary and/or economic circumstances so warrant, in particular:

to decide that the annual adjustment recommended by the CCR be awarded in part or not at all, and to decide also on the timing for the payment of any adjustment.

6.2 The objective conditions which could define those specific budgetary and/or economic circumstances allowing for action under Article 6.1 to be taken include, but are not limited to, the withdrawal of, or default of payment by, one or more member countries of the Organisation, producing a significant reduction in its budget; or an unforeseen event entailing exceptional financial damage, among others, following an international economic crisis; or a prolonged incapacity to function for the Organisation; or where the financial impact of a CCR recommendation would cause a variation in the total staff expenditure of such magnitude that it would jeopardise the function or mission of the Organisation.

6.3 The Committee of Ministers also reserves the right to determine whether, in the context of the annual adjustment, any other measures should be taken.

6.4 Action under this article shall be taken in accordance with the applicable general legal principles.'"

B. The disputed salary and pension adjustment

20. On the subject of the disputed salary adjustment, the Secretary General stated the following in his aforementioned observations:

"15. With regard to the annual adjustment of the remuneration of the staff of the Co-ordinated Organisations as on 1 January 2018, the CCR made the following recommendation to the governing bodies of the Co-ordinated Organisations in its 250th report (document CM(2017)123):

4. Recommendation
The Co-ordinating Committee on Remuneration recommends that Governing bodies:
(a) approve, subject to the provisions of Article 6 of the 244th Report by the CCR, as adopted by each of the Co-ordinated Organisations, the salary scales at 1 January 2018 resulting from the application of the adjustment indices set out in Annex 1 (cf. salary scales per country found in Annex 4 to this report); (…).

16. The 250th CCR report was accompanied by an addendum concerning annual adjustment of remuneration for staff of the Council of Europe as on 1 January 2018 without application of the moderation clause, which set out the salary scales applicable at the Council of Europe (document CM(2017)123-add2).

17. On 22 November 2017, the Committee of Ministers considered the recommendations made in the 250th report and the addendum thereto, and decided as follows:

> The Deputies, having regard to the Co-ordinating Committee on Remuneration's (CCR) recommendations with regard to the 2018 adjustment of remuneration for staff of the Council of Europe and the corresponding monthly basic salary scales as set out in document CM(2017)123-add2,
>
> 1. decided, in application of Article 6 – Affordability of the Rules on the remuneration adjustment method, not to award the annual salary adjustment recommended by the CCR due to the default of payment of 2017 obligatory contributions which produced a significant reduction in the Organisation's budget;
>
> 2. noted that, in pursuance of Article 36 of the 132nd report (CM(2001)170-rev), the above decision not to award the annual adjustment will apply to pensions payable under Appendix V of the Staff Regulations; (…).

18. By a decision of 22 November 2018, the Committee of Ministers adopted the amendments to Article 4.1.6.2 of the Rules on the remuneration adjustment method, as set out in Annex 1 of the addendum to the 244th CCR report (document CM(2017)120), with effect from 1 January 2019. The amendments in question consisted in inserting in the remuneration adjustment method the moderation clause proposed by the CCR. In this connection, reference should be made to the recommendation by the CCR, which merely recommended that the governing bodies adopt the amendments in question without mentioning a recommended implementation date."

THE LAW

I. JOINDER OF APPEALS

21. As the seven appeals are closely interconnected, the Administrative Tribunal orders their joinder under Rule 14 of its Rules of Procedure.

II. EXAMINATION OF THE APPEALS

22. The appellants are asking the Tribunal to annul the Secretary General's decision to implement the Committee of Ministers' decisions on the salary freeze in 2018 and the deferral of the date of implementation of the moderation clause. They are also seeking payment of a sum of 1 200 euros for each appellant in respect of the costs of the present proceedings.

23. For his part, the Secretary General asks the Tribunal to declare the appeals unfounded and dismiss them.

A. Lawfulness of the application of the affordability clause

1) The appellants

24. The appellants advance four grounds of appeal: contravention of the remuneration adjustment method because of the misapplication of Article 6 and breach of three general legal principles: *Tu patere legem quam ipse fecisti*, proportionality and legitimate expectations.

a) Misapplication of Article 6 (affordability clause) of the method

25. The appellants first point out that the Co-ordinated Organisations, which include the Council of Europe, introduced objective mathematical salary calculation methods in 1958. Since 1976, in particular, the successive methods had been based on the principle of parallelism between the real trend in national civil service salaries (in the "reference" countries) and those of the staff of the Co-ordinated Organisations.

26. They add that since the beginning of the 1990s, the member countries of the Co-ordinated Organisations have shown some reluctance to automatically apply the results of the method. This led to the introduction – in the 22nd Report of the Co-ordinating Committee on Remuneration (CCR) in 1993 – of the concept of "affordability". This concept has evolved significantly since then. It was initially seen as a "macroeconomic" clause, the application of which was linked to assessment of the overall economic situation in the "reference" countries. Over the years, the understanding of the clause has evolved and become more "microeconomic" in content and justification. Application of the clause and hence interference with the results produced by the method have therefore gradually been linked to the budgetary problems specific to each individual Co-ordinated Organisation. A kind of "de-co-ordination" has accordingly been regarded as the inevitable and hence, acceptable, consequence of the operation of the affordability clauses. Moreover, after several unsuccessful drafting attempts, the CCR chose to leave it up to each individual organisation to draw up its own affordability clause. The result has been a range of somewhat disparate texts in the individual organisations.

27. The appellants therefore maintain that in adopting the affordability clause, the Committee of Ministers circumscribed and therefore limited its power to depart from the results of the method. The clause was inserted in the normative context of the method, of which it therefore forms an integral part.

28. The appellants point out that the international administrative courts supervise compliance by the organisations with the salary adjustment methods.

29. In the Council of Europe's case, the appellants refer to the decision of 26 January 1996 in appeals Nos. 182-185/1994 (Auer and others v. Secretary General, paragraph 76) and the decision in Fuchs and others v. Secretary General (appeals Nos. 231-238/1997, decision of 29 January 1998, paragraph 64), in which the Tribunal annulled decisions applying the affordability clause on the grounds that insufficient reasons had been given.

30. In order to have a clearer picture of the constraints which international case-law imposes on the Committee of Ministers' exercise of its powers to depart from the method, the appellants also refer to the case-law of the ILOAT, which sets out "the principles governing the limits on the discretion of international organisations to set adjustments in staff pay" (Judgment No. 1821 of 28 January 1999, in Allaert & Warmels No. 3, consideration 7).

31. The appellants maintain that these principles must be taken into consideration not only when a method is adopted by the governing body but also when it comes to assessing the lawfulness of the application of a method and, in particular, interpreting to that end Article 6 of the method in force, namely the possibility of departing from the results produced by the method because of considerations involving affordability.

32. With regard to the interpretation of one of the provisions of the method, they maintain that it is necessary to bear in mind the Tribunal's established case-law in terms of interpretation of statutory and regulatory provisions, namely that the interpretation criteria laid down in the United Nations Convention on the Law of Treaties of 23 May 1969 (Vienna Convention) should be applied in the legal system of the Council of Europe. In particular, Article 31, paragraph 1, of the Convention lays down a general rule of interpretation, under which a "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (cf. ATCE, decision No. 226/96 of 24 April 1997, Zimmerman v. Secretary General, paragraph 24, and decision No. 251/99 of 22 October 1999, Baechel v. Secretary General, paragraph 30).

33. In the appellants' view, in accordance with the aforementioned Article 6, it is not enough for there to be a "default of payment" by a member country. Such default must also have led to a reduction in the Organisation's budget.

34. In the instant case, they maintain that at the time when the decision was taken, the "default" was merely a "late payment" on the part of the Russian Federation. Such late payments were so frequent in the life of international organisations that if they were to result in the freezing of the remuneration of international civil servants, there was a real danger that pay freezes would become the rule, if not permanent. They argue that the Secretary General was wrong to claim that the objective condition referred to by the governing body had been met because there had been no actual reduction in the budget. The Secretary General was assigning a meaning to the term "budget" which disregarded the definitions set out in the Statute of the Council of Europe and in the Financial Regulations. Article 3, paragraph 2, of the latter clearly states – in application of Article 20 d) of the Statute – that "the Programme and Budget shall be an integrated document. (...) The Budget authorises the budgetary receipts and budgetary expenditure of the Organisation for the implementation of the Programme for each of the financial years of the biennium".

35. Given that the "budget" was an accounting document of the Council of Europe, the condition of a reduction in the budget provided for in Article 6 meant that the Committee of Ministers had to adopt either a new budget or at least an addendum or corrigendum to the document already adopted for 2018. However, the condition had not been met because it had still been hoped that the Russian Federation would pay its contribution in full during 2018.

36. The appellants go on to make a number of comments regarding the decisions to dismiss the administrative complaints and points made by the Advisory Committee on Disputes. These comments concern the situation which obtained at the time when the decision to apply the affordability clause was taken, the Committee of Ministers' discretionary power in this area, the Advisory Committee on Disputes' position on the points to be taken into consideration and, lastly, lawfulness, which must be assessed in the light of the legal and factual circumstances that applied at the time when the decision was taken.

37. On the latter point, the appellants object to the view which they maintain the Secretary General began to develop in his decisions dismissing the administrative complaints, namely that a decision on the application of the affordability clause could be justified in the light of developments which occurred after the adoption of the said decision. The appellants maintain that if the Secretary General were to continue with that argument, he would be contradicting himself and they would seek application of the general legal principle set out in the Latin expression "*contraria allegans non auditor"* and make a plea of estoppel.

38. In conclusion, the appellants believe that the Committee of Ministers and the Secretary General breached Article 6 of the method and that the Secretary General's arguments defending the application of the affordability clause are fallacious.

b) Violation of general principles of law

39. After pointing out that Article 6.4 of the method confirms the commitment of the Committee of Ministers to comply with the applicable general legal principles (paragraph 19, last point, above), the appellants assert that there has been violation of three general legal principles: *tu patere legem quam ipse fecisti*, proportionality and, lastly, legitimate expectations.

1. Tu patere legem quam ipse fecisti

40. The appellants maintain, on the basis of this general principle, that the Committee of Ministers was required strictly to apply the method which it had adopted and, within the method, Article 6, which it had drafted itself.

2. Principle of proportionality

41. The appellants argue that being faced with a late payment, the Committee of Ministers took its decision without knowing whether this would subsequently result in an actual default of payment. They argue that it could have waited for a few months before deciding on staff remuneration, as had been done several times in the history of the organisation or could have explored other possibilities to enable the organisation to tackle the temporary difficulties without harming staff excessively. They believe that doing so was necessary in law so as to ensure that the solution adopted complied with the principle of proportionality.

3. Legitimate expectations

42. In accordance with this principle, international administrations are required to honour the commitments which they have made to staff members. The existence and application of this principle have been confirmed by the case-law of international administrative courts. Given its abruptness and lack of objective justification, they maintain that the Committee of Ministers' decision shook staff members' confidence in the organisation's decision-making body and undermined the spirit of co-operation on which the relations between staff and the organisation employing them should be based, as indicated in the points made by the Tribunal in the aforementioned decision in *Auer* (paragraph 29 above).

2) The Secretary General

43. The Secretary General begins by making the point that, having regard to all the relevant legal factors and in the light of the major financial difficulties which the organisation is currently facing, the Committee of Ministers' decision not to apply the annual adjustment recommended by the CCR for 2018 and, hence, the implementing decisions taken by the Secretary General as a result, were adopted entirely lawfully, in accordance with the remuneration adjustment method in force.

44. He draws attention to the fact that Article 6 on affordability expressly states that the Council of Ministers may decide "that the annual adjustment recommended by the CCR be awarded in part or not at all" and may decide "also on the timing for the payment of any adjustment." The circumstances under which the measures envisaged in this article may be implemented include "the withdrawal of, or default of payment by, one or more member countries of the Organisation, producing a significant reduction in its budget".

45. In this respect, the Secretary General notes that since mid-2017, the Council of Europe has been experiencing severe and unprecedented budgetary problems which, at the very least, equate to circumstances allowing for action to be taken under the affordability clause.

46. These difficulties stem, *inter alia*, from the decision by the Russian Federation – which is among the five "major contributor" states that each contribute 11% of the Council of Europe's budget – to suspend payment of its contributions until the credentials of its delegation within the Parliamentary Assembly of the Council of Europe were restored. No payment has been received since that date.

47. At the time of the Committee of Ministers' decision on the salary adjustment for 2018, 22 November 2017, the amount owed by the Russian Federation stood at 22.26 million euros, representing a significant reduction in the organisation's receipts and hence, effectively, its budget.

48. In the Secretary General's view, the Committee of Ministers thus exercised the discretion available to it in matters relating to the salary adjustment. In the light of the organisation's budgetary difficulties, the Committee of Ministers considered that it was best not to aggravate the situation by increasing salaries from 1 January 2018 based on the results obtained by application of the remuneration adjustment method.

49. After referring to the Tribunal's case-law (ATCE, formerly the Appeals Board of the Council of Europe, appeals Nos. 133 to 145/1986 - Ausems and others v. Secretary General, decision of 3 August 1987), the Secretary General contends that the Committee of Ministers' only obligation was to comply with the remuneration adjustment method it adopted when it approved the 244th CCR report. In deciding not to apply the annual adjustment recommended by the CCR under the affordability clause contained in the remuneration adjustment method, the Committee of Ministers, acting pursuant to the authority conferred on it by the Staff Regulations (Article 41), entered into obligations which it is bound to respect for the period defined by it.

50. The Secretary General goes on to state that, in any event, the Committee of Minsters has a wide margin of discretion as regards salary adjustments and he refers here to the Tribunal's case-law (ATCE, formerly the Appeals Board of the Council of Europe, appeals Nos. 163-164/90 Jeannin and Bigaignon, decision of 26 June 1992, paragraphs 43-44).

51. He concludes from this that it is for the Committee of Ministers to determine how the results obtained by application of the remuneration adjustment method are to be taken into account. In the case in point, the Committee of Ministers was perfectly entitled to apply the affordability clause, the only condition being that it must state the reasons for its decision not to apply the annual adjustment recommended by the CCR, in keeping with the criteria set forth in the affordability clause. As it happens, these conditions were met in full.

52. The Secretary General refutes the appellants' contention that the consequence of the Russian Federation's failure to pay its obligatory contribution to the Council of Europe budget cannot be considered a "significant reduction" in the organisation's budget within the meaning of Article 6 of the Rules on the remuneration adjustment method, on affordability.

53. Firstly, he argues that the Russian Federation's decision to suspend payment of its obligatory contributions pending restoration of the credentials of its delegation within the Parliamentary Assembly of the Council of Europe cannot be regarded as a mere delay in the payment of its contribution, given the conditions laid down for payment to resume. The decision is a reflection of a profound political crisis that persists to this day.

54. The Secretary General acknowledges that the unpaid contributions constitute a financial obligation on the part of the Russian Federation towards the organisation and are considered a debt. It is unclear, however, how long this financial obligation will remain outstanding, whether and when a political solution will be found, and whether the unpaid contributions will eventually be recovered. The Secretary General adds that there is a real risk that the current political process will fail to produce a solution that is acceptable to all the parties concerned. Consequently, the Russian Federation risks being suspended under Article 9 of the Council of Europe Statute or could even itself decide to withdraw from the Council of Europe. In such an event, there would be a real danger that the outstanding contributions would never be paid.

55. Secondly, each member state has an obligation to contribute to the Organisation's budgets (Articles 38 and 39 of the Statute of the Council of Europe). Obligatory contributions from member states are payable only if they are reflected in the Organisation's budget as approved by the Committee of Ministers, which determines the amounts of the obligatory contributions due by each member state. It is on the basis of the amounts thus defined in the budget adopted by the Committee of Ministers that the obligatory contributions then become payable and constitute financial obligations on the part of States towards the Organisation.

56. As long as the Russian Federation is a member State of the Council of Europe, its obligatory contributions to the Council's budgets must be included in the budget adopted by the Committee of Ministers. To speculate, as the appellants do, that the default should have led to the adoption of an amending budget that did not include the Russian Federation's obligatory contributions, the only circumstance, in their view, under which the budgetary feasibility clause could legitimately have been invoked, is futile. For had such a budget been adopted, the Russian

Federation's financial obligations and hence its debt to the organisation would have been wiped out and that is clearly not an option.

57. The Secretary General notes that a text must be interpreted in accordance with the ordinary meaning to be given to the terms employed in their context and in the light of the object and purpose of the text in question. In the context of the Rules on the remuneration adjustment method, the object and purpose of Article 6 on affordability is to set out, in a non-exhaustive manner, the budgetary and/or economic circumstances in which the Committee of Ministers may refuse the annual adjustment recommended by the CCR. The Secretary General states that, among these circumstances, the withdrawal of, or default of payment by, one or more member countries of the organisation, producing a "significant reduction in its budget" are mentioned as non-exhaustive examples.

58. He concludes from this that the affordability clause was applied in accordance with its terms, in the light of its object and purpose. The Secretary General goes on to point out that the withdrawal of a member state and default of payment by a member state are two separate circumstances, which have different ramifications for the status of that country within the organisation. For example, if the state withdraws, it is no longer a member of the organisation, and the organisation's budget as adopted by the Committee of Ministers is automatically and formally reduced by the amount of the state's contribution. In the event of default, on the other hand, the state remains a member of the organisation, at least initially, and the budget adopted by the Committee of Ministers is not, by definition, formally reduced, since the receipts part of the document adopted includes the contributions due in respect of the state in question. The budget is certainly reduced in practice, however, since failure by a member state to pay its contribution results in a decrease in revenue which then has to be compensated for, including notably by reducing expenditure in the short, medium or long term if the contribution is not recovered.

59. Lastly, the Secretary General points out that Article 6 on affordability provides, above all, that the amount of the unpaid contributions, in the event that a State should withdraw or fail to pay, must be significant.

60. Furthermore, insofar as the decision on the salary adjustment is taken before the start of the calendar year in which the adjustment is to occur, the only reference point available when deciding whether or not to apply the affordability clause is the budgetary situation as it stands at the time the decision is taken. In other words, the member state must already be in default at the time when the Committee of Ministers takes a decision on the annual adjustment recommended by the CCR.

61. The Council of Europe's budget was thus reduced by €22.26 million in 2017 because of the Russian Federation's failure to pay its contribution and by €32.78 million in 2018. Compounding these difficulties was Turkey's decision, communicated on 12 December 2017, to cease being a major contributor and to reduce its contributions to the 2018-2019 programme and budget with effect from 1 January 2018. In total, this decision resulted in a €19.6 million reduction in Turkey's contributions to the relevant budgets.

62. Against this general backdrop, the Secretary General argues that it is difficult to deny the real budgetary difficulties currently facing the Council of Europe and to claim that the decision to

apply the affordability clause to the salary adjustment for 2018 contravened the principles of proportionality and legitimate expectations.

63. The Secretary General adds that the situation remains very worrying and steps are still being taken to manage the Organisation's resources as effectively as possible so that it can carry out its activities and fulfil its mission as best as possible in these challenging times.

64. In his view, an increase in remuneration and pensions was clearly not an option in these circumstances. It follows from all of the foregoing that the Committee of Ministers' decision not to apply the salary adjustment for 2018 was wholly justified and that it was taken in strict compliance with the remuneration adjustment method in force.

B. On the deferral of the date of entry into force of the "moderation clause"

1) The appellants

65. The appellants point out that the discussions which took place at Co-ordination level with a view to adopting the new salary adjustment method centred on a new mechanism known as the "moderation clause" whose purpose, according to paragraph 2.3 of the narrative section of the 244th report, was to "address the concerns expressed by these CCR delegations that have difficulty in justifying in their capital the results of the application of the remuneration adjustment method, when their own NCS (National Civil Service) salaries have been either frozen or cut in real terms".

66. The appellants note that, at first, the CCR stipulated that the new adjustment method would enter into force on 1 January 2017 only if the said clause were adopted. An initial proposal by the CCR met with both legal and political objections from the Committee of Representatives of Secretaries General (CRSG) and the Committee of Staff Representatives (CRP). In these circumstances, the CCR agreed to adopt the new method without the moderation clause on condition that a timetable be set so that the moderation clause could be adopted by the CCR in June 2017 at the latest.

67. The Committee of Ministers of the Council of Europe adopted the 244th report by means of a decision, paragraph 4 of which reads as follows: "the Deputies note that an addendum to the 244th report will be adopted by the CCR at the latest by 30 June 2017 for implementation as of 1 January 2018" (see paragraph 17 above).

68. The appellants point out that the "moderation clause" was meant to produce results that would limit any possible increase in pay. It was nevertheless a mathematical and objective clause which, as such, on 1 January 2018 would have produced a 0.3% increase in the results obtained by application of the method.

69. The appellants add that the governing bodies of the other Co-ordinated Organisations have adopted the moderation clause. The Committee of Ministers of the Council of Europe, however, decided to defer the clause's entry into force without giving any reasons.

70. The appellants believe that there has been a violation on two counts.

71. Firstly, they note that the Secretary General refrained in his decision to dismiss the administrative complaints from providing any kind of statement of reasons. While it is true that the Tribunal in its decision on the Fuchs and others appeals pointed out that the obligation to give reasons does not mean "that the reasons for an administrative decision must always be given in detail and in full" (aforementioned decision, paragraph 65), the fact remains that, in this case, reasons were not provided in any way or at any stage of the proceedings, either before the Advisory Committee on Disputes or in the decision to dismiss the administrative complaints. Accordingly, the appellants note the importance, in the international civil service, of the obligation to give reasons for administrative decisions, along with the relevant case-law of the Tribunal and the European Court of Human Rights.

72. Secondly, the appellants contend that there has also been a violation here of the general legal principle *tu patere legem quam ipse fecisti*. In effect, in paragraph 2.4 of the decision by which the Committee of Ministers adopted the 244th report (see paragraph 17 above), it is stated that the CCR *addendum* containing the moderation clause would come into effect on 1 January 2018.

73. By noting certain points, in the total absence of any explanation for this decision, the appellants finally understood that the Secretary General's decision not to apply a clause that had been deemed justified by the three bodies which make up the Co-ordination was prompted by economic or even accounting considerations, with no regard for the law.

74. The appellants accordingly submit that the decision is also tainted by an abuse of authority.

75. As to the plea of inadmissibility raised by the Secretary General at the hearing on 27 March 2019 (see paragraph 5 above), the appellants note that this was raised for the first time at the hearing and that in any event it is unfounded because they are seeking application of the results of the moderation clause which was appended to the method and which modifies the results obtained using the method.

76. In conclusion, the appellants believe that the decision to defer the implementation of the moderation clause is unlawful and should be set aside by the Tribunal.

2) The Secretary General

77. In the Secretary General's view, the Committee of Ministers exercised its sovereign decision-making power and discretion in determining the date from which this clause would be inserted in the current remuneration adjustment method, in line with the CCR's recommendation.

78. He goes on to make the point that, when adopting the remuneration adjustment method as set out in the 244th CCR report, the Committee of Ministers merely noted that an addendum to the 244th report would be adopted by the CCR by 30 June 2017 at the latest and enter into force on 1 January 2018.

79. According to the Secretary General, the Committee of Ministers did not undertake to insert any subsequent recommended changes to the remuneration adjustment method, or to give effect to them from 1 January 2018. In his view, the Committee of Ministers retained the right to make decisions about the implementation of the CCR recommendation, including about the date of entry into force of the amendments to be made to the remuneration adjustment method, as the Committee of Ministers was under no obligation to adopt these amendments with effect from 1 January 2018.

80. In any event, in view of the decision not to apply the salary adjustment recommended by the CCR for 2018, the question of whether the moderation clause should apply from 1 January 2018 instead of 1 January 2019 is, argues the Secretary General, irrelevant and requires no discussion.

81. Lastly, at the hearing on 27 March 2019 (see paragraph 5 above), the Secretary General stressed that the decision complained of by the appellants has not been implemented by the Secretary General. There has been no administrative act that could adversely affect the appellants. He adds that the appeal is directed here against a Committee of Ministers decision which is regulatory/legislative in nature and, as such, not subject to judicial review within the meaning of Articles 59 and 60 of the Staff Regulations.

III. THE TRIBUNAL'S ASSESSMENT

A. Preliminary remarks

82. The Tribunal considers that two points need to be clarified from the outset.

83. Firstly, it notes that in the proceedings before the Tribunal, the Secretary General justified the organisation's use of the affordability clause not only on the ground of the Russian Federation's failure to pay, within the prescribed time, the contribution which it is legally required to make to the organisation on the basis of a freely contracted international commitment (membership of the Council of Europe) but also on the ground of the organisation's budgetary difficulties, which have not been elaborated on before the Tribunal. In that context, he also referred to the fact that Turkey had decided - at short notice and after agreeing to the 2018-2019 budget - to reduce its financial contribution and to cease to be a major contributor.

84. The fact is, however, that in the Committee of Ministers' decision which gave rise to the administrative acts complained of by the appellants, the only factor considered is the above-mentioned failure to pay within the prescribed time.

85. It is inappropriate therefore for the Secretary General to introduce reasons which were not cited in the said Committee of Ministers' decision in an attempt to demonstrate *a posteriori* the legality of implementing that decision. As the appellants have correctly pointed out, the Secretary General cannot justify a decision using arguments which the Committee of Ministers has not raised. Still less use those arguments to assert, by extension, that the recourse to the affordability clause was lawful.

86. Accordingly, the Tribunal will consider the Secretary General's arguments only to the extent indicated above.

87. Secondly, the Tribunal notes that, even though, in their conclusions, the appellants seek annulment of the Secretary General's decision, as reflected in their pay slips, in their arguments they criticise the Committee of Ministers' decision. The Secretary General, for his part, has likewise made comments to show that the Committee of Ministers' decision was lawful.

88. As it has already ruled in a similar appeal, however, the Tribunal "in the exercise of its statutory jurisdiction, has to deal with the objections raised against the individual measures taken by the Secretary General, in application of the decision of the Committee of Ministers" (ATCE, formerly the Appeals Board, appeals Nos. 101-113/184 - Stevens and Others v. Secretary General, decision of 15 May 1985, paragraph 54, subparagraph 4). In examining these objections, however, the Tribunal may examine the regularity of the Committee of Ministers' decision in order to rule on the legality of the implementing acts carried out by the Secretary General (ibid., paragraphs 69-70).

B. On the lawfulness of the application of the affordability clause

1) Misapplication of Article 6 (affordability clause) of the method

89. The Tribunal has already recognised that the organisation has discretion in setting salaries (Auer and others, cited above, paragraph 56). This power must be exercised in accordance with the rules, however. The Tribunal has a responsibility to verify, therefore, that the existing rules have been complied with.

90. Having regard to the wording of Article 6, the Tribunal notes that the first task is to establish whether what has occurred amounts to late payment on the part of the Russian Federation, as the appellants maintain, or to default, as the Secretary General claims. Under the terms of the affordability clause itself, only in this second instance may the clause be invoked.

91. It is clear that, in the present case, at the time when the Committee of Ministers' decision was adopted, the matter was one of late payment. In the Tribunal's view, this is evident from the terms of the statement made by the Russian Federation (see paragraph 10 above) that it was suspending payment of contributions "*until full and unconditional restoration of the credentials of the delegation of the Federal Assembly of the Russian Federation within the Parliamentary Assembly of the Council of Europe*" and that, at the same time, it was continuing "*to fulfil its commitments within the Organization*". As a result, the Russian Federation continued to participate in the work of the Committee of Ministers and in the organisation's intergovernmental activities.

92. At present, the term "late payment" undoubtedly still applies, as, to the best of the Tribunal's knowledge, there have been no further developments.

93. In addition, the general legal principle *pacta sunt servanda*, codified, *inter alia*, in Article 26 of the Vienna Convention on the Law of Treaties of 1969 and in Article 26 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, requires that any treaty in force be binding on the parties and

must be performed by them in good faith. There is no question that the Russian Federation's membership of the Council of Europe entails compliance with this obligation for both 2017 and 2018.

94. It must be noted, however, that this delay is not comparable to the usual delays in the payment of member states' contributions, which are regularly documented by the Committee of Ministers. Its political nature, and the uncertainties surrounding it, led the Tribunal to conclude that it constitutes a default – albeit, for now, a temporary one – within the meaning of the aforementioned Article 6.

95. It is true, moreover, that the amount of unpaid contributions is relatively high, even if their impact on the organisation is also a result of the action of the other 46 member states which were able to mitigate the situation created by the Russian Federation's decision.

96. In the present case and as indicated in paragraphs 94 and 95 above, therefore, it was not unreasonable and contrary to the spirit of the text - which could have been drafted more clearly - to treat this delay as a default of payment.

97. The Tribunal further notes that the main condition for applying the affordability clause is given in paragraph 1 of Article 6 and is "if specific budgetary and/or economic circumstances so warrant".

98. The reference to "default of payment" on which the appellants rely in support of their claims is found in paragraph 2, which defines the "the objective conditions which could define those specific budgetary and/or economic circumstances allowing for action under Article 6.1 to be taken", but it is clearly stated that the listed conditions "include, but are not limited to", thereby implying that they are not exhaustive.

99. The Tribunal further notes that the organisation did not necessarily have to amend the 2018 budget to reflect this non-payment as it was able to draw on its cash reserves to deal with any problems that might arise.

100. The Tribunal further notes that even though, in its decision, the Committee of Ministers mentioned, in a rather summary and probably inaccurate manner, only the 2017 non-payment, the fact remains that it had the 2018 situation in mind because no short-term solution was in sight. The issue of good faith does not arise, therefore.

101. In conclusion, the ground of appeal is unfounded, and the Tribunal must reject it.

102. The Tribunal must point out, however, that this decision does not cover the question of what should be done if the Russian Federation eventually honours its obligations for 2017 and 2018.

103. Indeed, the Secretary General has argued that the decision to proceed retroactively with the adjustment for 2018 belongs to the Committee of Ministers, if the Russian Federation pays its contributions. However, in the view of the Tribunal, this aspect of the dispute is not "existing"

within the meaning of Article 59, paragraph 2, of the Staff Regulations and, consequently, there is no need for the Tribunal to rule on it.

104. Accordingly, if the Russian Federation pays its contributions for 2017 and 2018 and if the organisation does not reverse its decision to apply the budgetary feasibility clause, on the basis of the "rebus sic stantibus" principle (fundamental change of circumstances), which is also codified in the two Vienna Conventions mentioned above (in Article 62 of each text), it will be for any Council of Europe staff members who so wish to contest this new decision in the manner and within the time-limits prescribed in Article 59 of the Staff Regulations.

105. The Tribunal believes it is worth pointing out here that in the dispute which has just come before it on the similar question of the non-adjustment of remuneration for 2019 (appeals Nos. 607-615/2019 - Alberelli (IV) and Others v. Secretary General of the Council of Europe), reference was made to the Committee of Ministers' decision of 28 November 2018, which prompted the administrative decisions challenged in these new appeals, to examine a proposal by the Secretary General to apply the salary adjustment if the obligatory contributions are paid in 2019.

2) Violation of general principles of law

106. The Tribunal considers that the arguments put forward by the appellants are not such as to demonstrate that there has been a breach of the three general principles of law to which they refer.

107. In particular, the Tribunal notes that in applying the affordability clause, the organisation has remained within the framework of the remuneration adjustment method as approved by it, for the affordability clause is an integral part of that method.

108. Secondly, even if it were possible for the organisation to find a way out of the difficulties engendered by the Russian Federation's decision to suspend payment of its contributions, by acting as it did, the organisation did not manifestly exceed the limits of its discretionary power.

109. Lastly, despite the Secretary General's argument before the Tribunal that there is no need to return to the issue of salary adjustments for 2018, there is no evidence that the principle of legitimate expectations has been breached.

110. Accordingly, this part of the ground of appeal must also be dismissed.

C. On the deferral of the date of entry into force of the "moderation clause"

111. The Tribunal notes firstly that, at the hearing, the Secretary General raised for the first time the issue of the admissibility of this complaint (see paragraph 81 above).

112. In accordance with the Tribunal's case-law, the Secretary General should have entered this plea at the latest in his first act before the Tribunal, namely his written observations (see paragraph 3 above). Consequently, having failed to do so in the present case, the Secretary General is estopped from entering any such pleas at the hearing.

113. Since the plea concerns the jurisdiction of the Tribunal, it may be raised by the Tribunal ex officio, as such questions are a matter of public policy. The Tribunal does not consider it necessary to do so, however, because the plea would in any event be unfounded.

114. The Tribunal recognises that it is open to question whether the deferral by the Committee of Ministers of the date of entry into force of the moderation clause constitutes a regulatory/legislative decision or an administrative one. Whatever the case, however, it is clear that the act whereby the Secretary General implemented this decision was an administrative act and as such may be challenged before the Tribunal.

115. As to the merits of the ground of appeal, the Tribunal notes that the moderation clause is a secondary adjustment to the annual remuneration adjustment. However, even though, as the appellants have indicated, it may evolve in a different direction (positive or negative), the fact remains that it is now part of the method as applicable within the organisation and may be covered by the affordability clause in the same way as the "main" adjustment. Consequently, the points made in respect of the main adjustment apply to this ground of appeal as well.

116. Accordingly, the Tribunal concludes that, here again, there has been no unlawful act and that therefore the ground of appeal must be dismissed.

D. Conclusion

117. The Tribunal concludes that the appeals are unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Orders the joinder of the appeals;

Declares that the Secretary General is estopped from raising an objection as to the inadmissibility of the second ground of appeal;

Declares appeals Nos. 595-601/2018 unfounded and dismisses them;

Orders that each party shall bear its own costs.

Adopted by the Tribunal in Strasbourg, on 13 June 2019, delivered in writing pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure, on 20 June 2019, the French text being authentic.

The Registrar of the Administrative Tribunal	The Deputy Chair of the Administrative Tribunal
S. SANSOTTA	A. BAKA