CONSEIL DE L'EUROPE
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TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeals Nos. 661/2020 and 662/2020
Ulrich BOHNER (VII) and Antonella CAGNOLATI v. Secretary General

The Administrative Tribunal, composed of:

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

assisted by:

Ms Christina OLSEN, Registrar,
Mr Dmytro TRETYAKOV, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The Tribunal received two appeals (No. 661/2020 and No. 662/2020), lodged and registered on 11 May 2020 by Mr Ulrich BOHNER (VII) and by Ms Antonella CAGNOLATI, respectively.

2. On 26 May 2020, the two appellants filed joint further pleadings.

3. On 27 July 2020, the Secretary General submitted her observations on the two appeals. The appellants responded to these by filing a joint memorial in reply on 2 October 2020.

4. Owing to the precautionary measures implemented in Europe because of the pandemic, the hearing in these appeals took place by videoconference rather than physically, on 10 December 2020. The appellants were represented by Mr Giovanni Palmieri, legal adviser on international civil service law. The Secretary General was represented by Ms Sania Ivedi, administrative officer in the Legal Advice and Litigation Department.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

5. The appellants in appeals Nos. 661/2020 and 662/2020 are former staff members of the Organisation who left on 1 November 2009 and 1 August 2013, respectively. They are resident for tax purposes in France and are subject to French tax law. They are affiliated to the Co-ordinated Pension Scheme (CPS) governed by the Pension Scheme Rules set out in Appendix V to the Staff Regulations (hereinafter "the Co-ordinated Pension Scheme Rules" or "CPSR").

6. Unlike serving staff of the Organisation, former staff members' pensions are subject to income tax as levied by their country of residence. Every year, therefore, pensioners receive, under Article 42 CPSR, a tax adjustment equal to 50% of the amount by which the recipient's pension would theoretically need to be increased were the balance remaining after deduction of national income tax to correspond to the amount of the pension under the Pension Scheme Rules.

7. On 4 October 2019, the International Service for Remunerations and Pensions (ISRP), a technical support service that provides assistance with managing pensions and remuneration, wrote to the appellants to inform them about the arrangements for clawing back the 2018 tax adjustment in France, following the introduction of deduction of income tax at source on 1 January 2019. The circular read as follows:

> "On 5 September 2019, the French tax authorities confirmed the final tables of equivalence for the year 2018, which accordingly provide for zero tax adjustment amounts. As a consequence, an adjustment concerning the totality of the tax adjustment that you received in 2018 must be implemented.
>
> (...) Considering the amounts at stake, this rectification will only be implemented beginning in January 2020, in twelve successive monthly instalments, deducted directly from your monthly benefits."

8. Up until 2019, then, pensioners who come under the Co-ordinated Pension Scheme and live in France paid income tax in year N+1 but received the tax adjustment for year N0. As a result, in 2018, the appellants paid tax on their 2017 income but received the tax adjustment based on their tax liability for the year 2018. The ISRP therefore informed them that, owing to the changeover in France to deduction of income tax at source, any tax due for 2018 was being cancelled, with 2018 to be treated as a "blank year", and that in 2019 they would be liable to pay tax on their 2019 income. The aforementioned circular dated 4 October 2019 accordingly explained to the appellants that the tax adjustment for 2018 would be clawed back in twelve monthly instalments starting in January 2020.

9. On 6 and 17 February 2020, after receiving their respective pension slips for January 2020, the appellants submitted administrative complaints to the Secretary General, contesting the repayment of the tax adjustment paid in 2018. In their complaints, the appellants stated that they considered the deduction which appeared in their pension

slips, pursuant to the new French tax legislation, and which was equivalent to one twelfth of the amount of the tax adjustment paid in 2018, to be unfair.

10. On 11 March 2020, the Secretary General dismissed the appellants' administrative complaints as inadmissible and, in the alternative, ill-founded.

11. On 11 May 2020, the appellants lodged the present appeals against the dismissal of their administrative complaints.

II. RELEVANT LAW

12. Under Article 59, paragraphs 2 and 3, of the Staff Regulations which concerns the filing of administrative complaints:

> "2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression "administrative act" shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General.
>
> 3. The complaint must be made in writing and lodged via the Director of Human Resources:
>
> a) within thirty days from the date of publication of the act concerned, in the case of a general measure; or
>
> b) within thirty days of the date of notification of the act to the person concerned, in the case of an individual measure; (…)"

13. Article 60, paragraph 1, of the Staff Regulations states that:

> "1. In the event of either explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59, the complainant may appeal to the Administrative Tribunal set up by the Committee of Ministers."

14. Section 60 of the French Finance Act No. 2016-1917, which prepared the ground for the move to deduction of income tax at source, and which is applicable in the instant case, states *inter alia* that:

> "6. The publicity campaigns conducted by the Government concerning the introduction of deduction of income tax at source shall provide information, in particular, about the possibility for married couples or those in a civil partnership who are taxed jointly to opt for the application of an individualised withholding tax rate.
>
> II.A. Taxpayers shall benefit, in respect of non-exceptional income which falls within the scope of the withholding tax system mentioned in Article 204 A of the General Tax Code, as it results from the present law, received or realised in 2017, from a "payment system modernisation" tax credit designed to ensure that taxpayers do not pay income tax on this income twice in 2018.
>
> B. The tax credit provided for above in A shall be equal to the amount of income tax payable in respect of 2017 resulting from the application of the rules provided for in 1 to 4 of I of Article 197 of the General Tax Code or, where appropriate, in Article 197 A of the same code multiplied by the

ratio between the net taxable amounts of the non-exceptional income mentioned in 1 of Article 204 A of the said code, with deficits being recognised at nil value, and the net income taxable determined according to the progressive income tax scale, excluding deficits, charges and abatements deductible from overall income. The amount obtained shall be reduced by the tax credits provided for by international tax treaties relating to the income mentioned in 1 of the same Article 204 A."

15. The appellants maintain, as the main ground for their appeal, that there has been a violation of Article 42 CPSR on the adjustment paid to pensioners. Paragraphs 1 and 2 of this article read as follows:

"1. The recipient of a pension under these Rules shall be entitled to the adjustment applying to the Member Country of the Organisation in which the pension and adjustment relating thereto are chargeable to income tax under the tax legislation in force in that country.

2. The adjustment shall equal 50% of the amount by which the recipient's pension would theoretically need to be increased, were the balance remaining after deduction of the amount of national income tax or taxes on the total to correspond to the amount of the pension calculated in accordance with these Rules.

For such purpose, there shall be drawn up, for each Member country, in accordance with the Implementing Instructions referred to in paragraph 6, tables of equivalence specifying, for each amount of pension, the amount of the adjustment to be added thereto. The said tables shall determine the rights of the recipients."

16. The procedures for implementing the provisions of the CPSR concerning the tax adjustment are laid down *inter alia* in Instruction 42/2 on the establishment of tables of equivalence for payment of the adjustment, which reads:

"1. Tables of equivalence for payment of the adjustment shall be established for each tax year by the International Service for Remunerations and Pensions, hereinafter referred to as "the Service".

2. The tax authorities of Member countries shall provide the Service, at its request, with the details of legislation and regulations necessary for establishing the tables. The tables shall be checked and confirmed by the tax authorities of the Member country concerned. In the event of disagreement between such authorities and the Service on the content of the tables, the Secretaries-General and the Co-ordinating Committee shall consider the matter on the basis of Article 42 of the Pension Scheme Rules and of these Implementing Instructions.

3. Provisional tables of equivalence shall be drawn up prior to the commencement of the period to which they refer. They shall show, for rounded pension figures and in respect of each Member country, an amount equivalent to 90% of the monthly adjustment calculated according to the distinctions contained in Article 42.3 of the Pension Scheme Rules and on the basis of the tax legislation in force at the time of drawing up the tables.

4. The provisional tables shall be revised whenever amendments to tax legislation involve a change in the amount of the adjustment. The Secretaries General and the Co-ordinating Committee may however decide by mutual agreement to dispense with the up-dating of tables in cases where the balance of gain or loss is minimal.

5. As soon as the authorities in Member countries have finally adopted the tax legislation applicable to income for the period covered by the provisional tables, these latter shall be replaced by final tables establishing the rights of recipients in accordance with Article 42.2 of the Pension

Scheme Rules. These final tables shall show the amount of the adjustment for the whole of the period which they cover, as well as the monthly amount of the adjustment. (…)"

17. Article 38 of the Staff Regulations on recovery of overpayments states that:

" 1. Any sum overpaid shall be recovered if the recipient was aware, or should have been aware, that there was no due reason for the payment.

2. The Secretary General may waive recovery of all or part of the amount on social grounds."

18. Article 34 CPSR states the following on the subject of undue payments made to pensioners:

"1. Benefits may be re-assessed at any time in the event of error or omission of any kind. Any undue payments must be reimbursed; they may be deducted from the benefits payable to the person concerned or to the persons entitled under him or from the amounts due to his estate. The reimbursement may be spread over a period.

2. Benefits shall be subject to modification or cancellation if their award was contrary to the provisions of these Rules."

19. Instruction 35.1/2 CPSR on the refund of amounts incorrectly received states:

"All amounts incorrectly received shall be refunded pursuant to Articles 34 and 35, in the manner prescribed in the Rules and Regulations applicable to staff serving in the Organisation, without prejudice to the special provisions laid down for implementing Article 42 with regard to taxation."

20. Article 41 of the Charter of Fundamental Rights of the European Union reads:

"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union."

THE LAW

21. The appellants seek annulment of the Secretary General's decision rejecting their administrative complaints and aimed at recovering in 2020 the sums paid to each of the appellants in 2019 by way of the 2018 tax adjustment.

22. They also seek restitution of all the sums deducted by way of compensation for the financial loss incurred and reimbursement of the costs of the present proceedings in the amount of €7 000 each.

23. For her part, the Secretary General asks the Tribunal to declare appeals Nos. 661 and 662/2020 inadmissible and, in the alternative, ill-founded and to dismiss them in their entirety, including as regards the award of €7 000 each in costs.

I. JOINDER OF APPEALS

24. As the two appeals are closely interconnected, the Administrative Tribunal orders their joinder pursuant to Rule 14 of its Rules of Procedure.

II. SUBMISSIONS OF THE PARTIES

A. Admissibility

1. *The Secretary General*

25. The Secretary General submits that both appeals Nos. 661 and 662/2020 are inadmissible on the ground of being out of time, pursuant to Article 59, paragraph 3, of the Staff Regulations, which requires complaints to be submitted within 30 days from the date of publication of the act concerned, in the case of a general measure. In this particular instance, the appellants were informed about the arrangements for clawing back the tax adjustment paid in 2018 via a circular from the ISRP dated 4 October 2019.

26. Consequently, the Secretary General submits that it is the date of 4 October 2019 that must be taken as the starting point and the appellants therefore had a period of 30 days expiring on 4 November 2019 in which to lodge their administrative complaints. They did not do so, however, until 6 and 17 February 2020.

27. The Secretary General concludes that the appellants' complaints were out of time and that, consequently, their appeals are inadmissible on that ground.

2. *The appellants*

28. The appellants submit that their appeals are admissible, their administrative complaints having been lodged within 30 days after the date on which they received the documents, namely their January 2020 pension slips, containing the first tangible evidence of the individual decision to recover, as announced in the letter of 4 October 2019, the tax adjustment paid in 2018 through twelve monthly instalments in 2020.

29. The appellants do not regard the circular dated 4 October 2019 as the starting point of the time limit for lodging their administrative complaints. They point out that this circular has neither the appearance nor the substance of an administrative act adversely affecting them and originated not from the Secretary General but rather from the Head of the ISRP, who is not a Council of Europe staff member, and who was not in any way acting by delegation from the Secretary General. The appellants further refer to international case law on the subject (International Labour Organisation Administrative Tribunal (ILOAT), Judgments Nos. 1039, Merritt case (1990), paragraph 2, 1506, Delos (1996), paragraphs 5 to 9, and 1674, Gosselin (1998), paragraph 6a), according to which an administrative act cannot be deemed to adversely affect an appellant if he or she can expect a subsequent decision which he or she will be able to challenge.

30. The appellants are therefore of the view that the Secretary General's objection regarding late submission should be dismissed.

B. The merits

1. *The appellants*

31. As regards the merits of the case, the appellants consider that the respondent infringed several provisions of Article 42 of the CPSR, thereby depriving them – unlawfully – through monthly deductions from their pensions starting in January 2020 – of the sums paid in 2018 by way of the tax adjustment. They further maintain that the respondent failed to comply with Article 38 of the Staff Regulations and violated, to their detriment, the right to good administration.

i) Violation of Article 42 of the CPSR

32. The appellants point out that, by introducing a tax credit to avoid double taxation in 2019 during the transition to the so-called "contemporary" system of collecting income tax, Section 60 of Finance Act No. 2016-1917 provided for a so-called "blank" tax year, i.e. one in which no tax would be levied on income received in 2018.

33. As a result, argue the appellants, the decision to retroactively deduct the amount of the tax adjustment paid in 2018 contravenes the purpose pursued by French lawmakers on the ground that it prevented them from benefiting from a "blank year", i.e. one in which no taxation would be levied on their 2018 income.

34. The question of whether in 2018 the pensioners paid income tax for that tax year is irrelevant in the appellants' view, as the main issue here is whether or not they paid any income tax in 2018 and whether or not they benefited from a year in which no tax was collected. The appellants contend that they did not as they never stopped paying income tax.

35. For that reason, they consider that the Organisation acted contrary to the spirit of the French legislation, given that Article 42, paragraph 1, of the CPSR requires that the tax adjustment be determined on the basis of the tax legislation in force in the country of residence. They also consider that clawing back the 2018 tax adjustment deprives them of part of their pension amount, thereby causing them to suffer impoverishment, contrary to the intention of French lawmakers.

36. The appellants challenge the view that the adjustment is payable only if the pension with which it is paid is taxed. As they see it, this interpretation contravenes the spirit of Article 42, paragraph 1, of the CPSR and the purpose of the tax adjustment, which implies that continuity in the tax adjustment system needs to match the continuity in the pensioners' tax effort.

37. The impugned decision also violates, in the view of the appellants, Instruction 42/2 (Establishment of tables of equivalence for payment of the adjustment), paragraph 4 of which states that whenever there are "amendments to tax legislation", the provisional tables of equivalence are to be "revised". The appellants complain that the ISRP did not amend the equivalence tables when the new French tax legislation was enacted; instead, the ISRP left its provisional tables unchanged until September 2019 and only then did it eventually revise them. The appellants point out that the French tax legislation concerning deduction of income tax at source dates from 2017.

38. The applicants are therefore of the view that the above-mentioned provisions have been infringed and that they have been unlawfully deprived of the tax adjustment due to them in 2018.

ii) Failure to treat pensioners residing in different countries equally

39. The appellants draw attention to the purpose of the tax adjustment paid to the Organisation's pensioners: it is intended to ensure equality between the Organisation's pensioners, even though they do not all reside in the same countries and are therefore subject to different tax systems.

40. They point out that, in the context of the tax adjustment, there has been a breach of the principle of equality between pensioners as regards the 2018 adjustment since the impugned decision deprived pensioners residing in France of a tax adjustment, unlike pensioners residing outside France.

iii) Violation of Article 38, paragraph 1, of the Staff Regulations

41. The appellants note that when the respondent Organisation decided to recover the tax adjustment paid in 2019, it relied solely on Instruction 42/2 (see paragraph 16 above). They consider that, instead, the Organisation ought to have relied on Article 38 of the Staff Regulations on recovery of overpayments, the conditions for which have not been met in the present case. According to this provision, overpayments may be recovered only if the recipients were aware that there was no due reason for the payment. The appellants, however, maintain that not only were they unaware that the adjustment had been paid in error, but also they believed that they were entitled to the tax adjustment in question.

iv) Violation of the right to good administration

42. The appellants argue that the decision concerning the 2018 tax adjustment was taken belatedly, on the basis of an unstable interpretation by the Organisation of the amendment to the tax legislation introduced by the Finance Act. That interpretation came several months after the equivalence tables had been used, on the ground that the Organisation had had to wait for information from the French authorities on the subject, information which was itself slow to arrive.

43. According to the appellants, the documents in the case file clearly show that, on this point, the Organisation should have taken steps to clarify the issue of the contested

adjustment back in 2018. By adopting the impugned decision in October 2019, the Organisation failed to act within a reasonable time in breach of the principle of good administration.

44. Furthermore, the steps taken by the ISRP to obtain a reply from the French authorities about the adjustment in question clearly show that the matter was mishandled. The appellants believe that it is clear from the procedural documents that the Organisation failed in its duty to inform pensioners of the impact and scope of the new legislative amendment even though it had long been aware of the issue.

45. Lastly, the appellants submit that the ISRP employed language which suggested that the reform would not affect their right to retain the tax adjustment, something that was further confirmed by the provisional tables of equivalence.

46. For all these reasons, the appellants ask the Tribunal to declare the Secretary General's impugned decision null and void and request the return of the sums deducted by way of compensation for the financial loss incurred, as well as reimbursement of the costs relating to the present proceedings in the amount of €7 000 each.

2. *The Secretary General*

i) Violation of Article 42 of the CPSR

47. The Secretary General does not dispute the fact that the pensioners paid taxes uninterruptedly, since in 2018 they paid income tax on their 2017 incomes and in 2019 – with the move to the new system – they paid tax on their 2019 incomes, with the 2018 income tax being covered by a tax credit.

48. That said, in response to the appellants' argument that deducting the adjustment received in 2018 is contrary to Article 42 of the CPSR because they did not benefit from a "blank year", the Secretary General notes that the relevant provisions specify that the tax adjustment is applicable only if the pension in question is subject to national tax and is actually taxed. Accordingly, Instruction 42/1 on the scope and calculation of the adjustment provides that:

> "1. Article 42 of the Pension Scheme Rules shall apply only if the pension and the adjustment relating to it are subject to taxes on income levied in a Member Country of the Organisation (…)."

49. The Secretary General contends that entitlement to the tax adjustment is conditional on the pension and the attendant adjustment being taxable and to national income tax actually being levied. In this case, however, the 2018 income tax was cancelled on account of the move to deduction of income tax at source.

50. The mere fact that the applicants did actually pay tax in 2018, namely tax on their 2017 income, is no reason, in the Secretary General's view, for the appellants to claim that they suffered impoverishment as a result of the recovery of the tax adjustment relating to 2018 income on which no tax was levied.

51. With regard to the tables of equivalence, the Secretary General wishes to point out that the tables approved by the French tax authorities on 5 September 2019 do in fact correspond to the pensioners' entitlements concerning the tax adjustment for 2018.

52. With regard to the publication of the provisional tables which, according to the appellants, were not revised after the French tax legislation was amended, the Secretary General wishes to point out that, even though the ISRP asked the French tax authorities several times, information on this subject, including information on how the tax reform would affect pensions paid by the Co-ordinated Organisations, was not forthcoming. As a result, it was not possible, according to the Secretary General, to update the tables as provided for in the aforementioned Instruction 42/2. The Secretary General also points to the uncertainty that existed at the time as to whether the reform would in fact go ahead as planned on 1 January 2019, given that it had already been postponed.

53. In this context, the Secretary General maintains that the tables were not revised because of the uncertainty over whether the measure would be put in place on the date indicated and argues that it would not have been prudent to revise the provisional tables without official, definitive information from the French tax authorities.

54. Based on the information in its possession, the ISRP drew up provisional tables providing for payment of the adjustment by way of an advance, at which stage it did not yet have the relevant details of the implications of the reform. Later, it did eventually compile final tables, reflecting the French tax legislation in force, and these were confirmed by the French tax authorities on 5 September 2019. It was on this basis that the clawback of the tax adjustment was able to be carried out.

55. In the view of the Secretary General, therefore, due process was fully observed and no grievance can be raised against the ISRP or the Council of Europe.

56. The Secretary General adds that it follows from all of the foregoing that the appellants have not suffered unjust impoverishment as a result of the recovery of the tax adjustment paid in 2018, since the tax to which this adjustment relates was not actually paid by the appellants, having been cancelled by the French tax authorities.

ii) Violation of the principle of equal treatment of pensioners residing in different countries

57. The Secretary General emphasises that the principle of equal treatment requires that persons in similar situations, in fact and in law, be treated in a comparable manner.

58. She then points out that it appears from the CPSR that a pensioner's entitlement to the tax adjustment hinges, irrespective of their country of residence, on the pension being subject to income tax and actually taxed. If the pension paid by the Organisation is not subject to income tax or is not actually taxed, the pensioner is not entitled to the tax adjustment.

59. The Secretary General points out that, insofar as no tax was levied on the income of pensioners residing in France in 2018, allowing the appellants to keep the tax adjustment paid by way of an advance in 2018 to offset any future tax payable on the income attached thereto, when no such tax was actually levied, would have created an inequality of treatment to the exclusive advantage of pensioners residing in France, effectively causing them to be unjustly enriched.

iii) Violation of Article 38, paragraph 1, of the Staff Regulations

60. With regard to the appellants' claim that the impugned act violates Article 38 of the Staff Regulations on recovery of overpayments, in that they neither were nor could have been aware that there was no due reason for the payment of the tax adjustment, the Secretary General observes that Article 38 is irrelevant in this context. She notes that the general provisions of the Staff Regulations are not applicable in matters relating to the tax adjustment, since Article 42 of the CPSR and its implementing instructions provide for a specific mechanism for advance payment and rectification of the tax adjustment.

61. According to the Secretary General, this mechanism provided for in Article 42 must be considered as falling into the category of lex specialis in relation to the general provisions of the Staff Regulations concerning the recovery of overpayments.

62. The Secretary General then refers to the definition of a sum incorrectly paid, as provided in Article 34, paragraph 1, of the CPSR, namely an irregular payment made in error or as a result of an omission and thus contrary to the rules of the Organisation.

63. The Secretary General then refutes the claim that the tax adjustments received by the appellants in 2018 were "incorrectly paid", since the sums paid by way of the adjustment are calculated and paid in accordance with Article 42 of the CPSR and its implementing instruments, and, in addition, these sums are meant to be adjusted when the provisional tables become final, as indeed they were here.

64. The Secretary General therefore concludes that Article 38 of the Staff Regulations does not apply in this instance.

iv) Violation of the right to good administration

65. In response to the appellants' claim that they were belatedly informed about the French tax reform and the effect it would have on their pensions, the Secretary General points to the high-profile nature of the reform, in the light of which the appellants could not have been unaware that such a reform was going to take place and that it was likely to have implications for the way their taxes were collected and, more specifically, for the 2018 income tax.

66. With regard to the time limits in question, the Secretary General wishes to point out that the ISRP sent several letters to the French tax authorities in an effort to obtain the

relevant information about how the reform would affect the retirement pensions of former staff members of the Co-ordinated Organisations, that these requests, four in number, went unanswered by the service concerned and that it was not until September 2019 that the French tax authorities set out their position.

67. Given the attempts made by the ISRP, starting in January 2017, to anticipate the issue of the 2018 adjustment, and which failed to elicit a response until 5 September 2019, the Secretary General considers that neither the ISRP nor the Organisation can be accused of any failure to exercise due diligence.

68. In view of the foregoing, the Secretary General asks the Tribunal to declare the present appeals inadmissible and, in the alternative, to dismiss them in their entirety as ill-founded.

III. THE TRIBUNAL'S ASSESSMENT

A. Admissibility

69. As to the objection that the present appeals were lodged out of time, the Tribunal reiterates the importance of compliance with the prescribed time-limits when lodging an administrative complaint, in order to ensure observance of the principle of legal certainty inherent in the Council of Europe system, in the interests of both the Organisation and its staff (see the Administrative Tribunal decision of 24 June 2009 in appeal No. 416/2008, *Švarca v/ Secretary General*, paragraph 33).

70. The Tribunal likewise notes, with reference to the principles laid down by the European Court of Human Rights, that the main purpose of the 30-day time-limit provided for in Article 59, paragraph 3, of the Staff Regulations (and the 60-day time-limit provided for in Article 60, paragraph 3, of the Staff Regulations) is to maintain legal certainty. This is to ensure that cases which raise general questions of law or concern the regulations of an international organisation are examined within a reasonable time, and to avoid the authorities of the Organisation and other persons concerned being kept in a state of uncertainty for a long period (see, *mutatis mutandis*, ECHR, *Sabri Güneş v. Turkey* [GC], no. 27396/06, paragraph 39, 29 June 2012). These time-limits also afford the prospective applicant time to consider whether to lodge an administrative complaint and, if necessary, an appeal with the Tribunal and, if so, to decide on the specific arguments to be raised.

71. In this context, the Tribunal also reiterates that it can hear a case only once a final internal decision of the Organisation has been adopted. It considers that the dates of final decisions for the purposes of Article 59, paragraph 3, of the Staff Regulations (and, in parallel, of Article 60, paragraph 3, of the Staff Regulations) should be established with due regard being had to the subject-matter of the case and the essential purpose which the applicant wished to achieve (see, *mutatis mutandis*, ECHR, *Wiśniewska v. Poland*, application no. 9072/02, paragraph 71, with further references, 29 November 2011).

72. The Tribunal notes that the central issue in this case is the recovery, as from 1 January 2020 and via twelve monthly payments, of the tax adjustment paid to the appellants in 2018 following the move, on 1 January 2019, to deduction of income tax at source in France.

73. The Tribunal observes that in the circular sent on 4 October 2019 to pensioners, including the appellants, the ISRP informed them that, from 1 January 2020, they would start to pay back the tax adjustment received in 2018, because of the introduction of deduction of income tax at source from 1 January 2019. Alongside this new method of collecting tax, arrangements had been put in place regarding the 2018 taxation so that taxpayers, including pensioners, would not have to pay tax twice in 2019 (i.e. the 2018 tax contribution under the old system of taxation and the 2019 contribution under the new, so-called "contemporary" system). In order to avoid this double taxation, Section 60 of the Finance Act No. 2016-1917 for 2017 provided for the introduction of a "tax credit for the modernisation of tax collection" (CIMR). The CIMR thus had the effect of cancelling the tax on non-exceptional income earned in 2018.

74. That being the case, the Tribunal notes, with reference to its case law on the subject (see decisions of 21 September 1989 of the Appeals Board in appeals Nos. 154/1988 and 155/1989, Canales and Andrei v Secretary General; and the Tribunal's decision of 25 November 1994, appeal No. 191/1994, Eissen v Secretary General), that the decision to claw back the 2018 adjustment announced by the ISRP on 4 October 2019 was not reflected in the appellants' pension slips until January 2020.

75. Consequently, the Tribunal considers that the dates of notification of the pension slips are the appropriate dates for the start of the 30-day period for lodging administrative complaints. Consequently, the present appeals cannot be regarded as having been lodged out of time and the Secretary General's objections concerning admissibility must therefore be rejected.

B. The merits

76. In their appeals, the appellants make claims for annulment and claims for compensation.

1. Claims for annulment

a. Ground of appeal alleging a violation of Article 42 of the CPSR

77. Under the terms of Article 42 of the CPSR, the recipient of a pension is entitled to the adjustment applying to the Member Country of the Organisation in which the pension and adjustment relating thereto are chargeable to income tax under the tax legislation in force in that country.

78. It follows from this article that the pension and the adjustment are chargeable to income tax under the tax legislation in force in the member state concerned, in this case France.

79. In this regard, the appellants submit that the change made under Section 60 of the Finance Act No. 2016-1917, with the provision of a tax credit for 2019, introduced a "blank" tax year for 2018 and that therefore no retroactive levy can be applied with respect to the adjustment paid for 2018. On this point, the appellants argue that the adjustment paid in 2018 does not in actual fact correspond to a given taxation year but relates, in a general manner, to the pensioner's income.

80. The appellants' allegation is based on an erroneous premise. The adjustment paid in respect of any given year is intended to offset the income tax for that same year, and cannot be regarded as a stand-alone payment that is made to the pensioner without reference to the income tax applicable under national law.

81. This view is also corroborated by Instruction 42/2, the first paragraph of which states that payment of the adjustment is to be made on the basis of the tables of equivalence "established for each tax year". The appellants' argument that this payment is made without reference to any given taxation period is incorrect, therefore.

82. The Tribunal further notes that, under Article 42 of the CPSR, the method applicable to the taxation of the pensions and the adjustment in question is determined in accordance with the applicable national legislation and is not within the discretion of the Organisation's bodies. In this respect, the Tribunal observes that, in the context of Instruction 42/2, which establishes the tables of equivalence for payment of the adjustment and which implements the specific rules applicable at the level of the Organisation, the tax authorities of the member state concerned play a preponderant role in determining the amount of the tax adjustment.

83. The Tribunal concludes here that there is nothing in the change introduced by the Finance Act to indicate that the lawmakers' intention was to treat the tax adjustment paid for 2018 as an advance, irrespective of any taxation in relation to a particular reference year, and that in those circumstances, clawing back the advance in question is unlawful.

84. As to the argument that the pensioners consistently paid their taxes without interruption until the new system came into force, this must be dismissed as irrelevant. It is not disputed in the present case that the appellants paid tax for the tax years prior to 2018, nor that they benefitted from the tax adjustment for those tax years. This fact has no bearing, therefore, on the lawfulness of the impugned decision.

85. The appellants further argue that clawing back the tax adjustment paid in 2018 deprives them of part of their pension, causing them to suffer unjust impoverishment.

86. In the Tribunal's view, it is not apparent from the change introduced through the Finance Act that the adjustment paid to pensioners for 2018 should be regarded as an income stream in its own right, one, furthermore, that is not taxable.

87. In that regard, the Tribunal notes that, on the basis of that change, the French tax authorities granted pensioners a tax credit in respect of their 2018 income, so that pensioners residing in France would not be taxed twice in 2019, on their income for 2018 and 2019.

88. The Tribunal therefore concludes that clawing back the tax adjustment for 2018 does not contravene Article 42 of the CPSR and the Secretary General's decision is not unlawful in that respect.

89. Accordingly, this ground of appeal must be dismissed as unfounded.

b. Ground of appeal alleging a breach of the principle of equal treatment

90. The Tribunal points out that a breach of the principle of equal treatment is deemed to have occurred when two categories of persons whose situations in fact and in law display no essential differences are treated differently and there is no objective justification for such difference in treatment. In this respect, differences in treatment, justified according to an objective and reasonable criterion, and proportionate to the aim sought by the differentiation in question, do not constitute a breach of the principle of equal treatment.

91. The appellants submit that there has been a breach of the principle of equal treatment in the present case in that there has been inequality between pensioners in respect of the year 2019 and that that inequality is not due to the introduction of the new rules but to a misinterpretation of the existing rules. It thus appears that pensioners residing in several different countries, but all subject to national tax - pensioners who are thus in identical circumstances - have been treated differently.

92. The Tribunal notes firstly, without this being in dispute, that the tax adjustment at issue is paid to pensioners residing in France by reason of the fact that the pensioners in question are liable to income tax under national tax legislation, to which Article 42 of the CPSR refers.

93. Such a situation does not, however, create any discrimination in relation to pensioners residing in another member state of the Organisation where those pensioners are not liable to tax under their national legislation. On the contrary, the purpose of providing for this adjustment is to ensure equality in the provision of pensions to former staff members of the Organisation.

94. If, for a specific tax year, as in this case for the year 2018, pensioners residing in France received the tax adjustment for the purpose of paying income tax but did not pay that tax due to a change in the applicable tax legislation, this situation constitutes an

objective one created by law. In that context, if pensioners residing in France were to keep their tax adjustment, this situation would benefit them financially and place them at an advantage in relation to other pensioners who do not pay tax and are not entitled to the tax adjustment in question.

95. The Tribunal concludes that the appellants have not established that, in this particular case, there are unjustified differences in treatment within the meaning of the conditions set out in paragraph 90 hereof.

96. It follows that no ground of appeal alleging a breach of the principle of equal treatment can be usefully relied upon to set aside the impugned decision; that being so, this ground of appeal must also be dismissed.

c. Ground of appeal alleging a violation of Article 38, paragraph 1, of the Staff Regulations

97. In this ground of appeal, the appellants submit that the decision to claw back the tax adjustment paid for 2018 should have been adopted pursuant to Article 38, paragraph 1, of the Staff Regulations, which provides that any sum overpaid shall be recovered if the recipient was aware, or should have been aware, that there was no due reason for the payment. According to the appellants, the conditions for the implementation of that provision imply that no such recovery is possible with respect to the adjustment paid for 2018, since the appellants were not aware that there was no due reason for the payment.

98. The Tribunal notes that, with regard to pensions, Article 34 of the CPSR states that benefits may be re-assessed at any time in the event of error or omission and that any undue payments must be reimbursed or deducted from the benefits payable to the person concerned. In this respect, Instruction 35.1/2 on the refund of amounts incorrectly received provides that all amounts incorrectly received are to be refunded pursuant to Articles 34 and 35 of the CPSR, without prejudice to the special provisions laid down for implementing Article 42 with regard to taxation.

99. It follows from the above-mentioned provisions of the CPSR and the relevant instructions that, in matters relating to pensions, there is, firstly, a specific arrangement for the recovery of undue payments and, secondly, special rules when the benefits in question are related to direct taxation. In the first case, Article 34 of the CPSR applies and in the second case, the provisions of Article 42 apply.

100. In the instant case, there is no question as far as the Tribunal is concerned that the matter at issue concerns taxation in the field of pensions and that the provisions of Article 42 of the CPSR apply. On the basis of that finding, therefore, the appellants' argument as to the application of Article 38, paragraph 1, of the Staff Regulations must be dismissed.

101. As to the claim that the change made cannot be seen as a mere "corrective" change which falls outside the scope of Article 42 of the CPSR, the Tribunal considers that this

argument is without merit. There is no question that the decision at issue here is a tax-related one for which specific provisions exist in the CPSR.

102. In their arguments, the appellants attempt to show that there was no justification for clawing back overpayments through the impugned decision because they neither were aware, nor ought to have been aware, of any irregularity on the part of the Administration. It is for that reason that the appellants refer to Article 38, paragraph 1, of the Staff Regulations, under which any recovery of overpayments is conditional on the recipient being aware of the irregularity. According to the appellants, that condition was not met in the instant case, as they had no knowledge of any alleged irregularity in the matter.

103. The Tribunal notes firstly that the appellants' argument is based on an erroneous premise. In this case, there has been no irregularity in the payment of the adjustment in question or any omission on the part of the Administration that might lead to the recovery of overpayments, in respect of which it would be appropriate to consider whether the persons concerned were aware of that situation. Nor has there been any irregularity relating to the amount of the adjustment paid or any failure to correct that amount, which might justify a claim that the taxable person was or was not aware of the irregularity committed by the Administration.

104. The Tribunal considers that, as regards the taxation of pensions of former Council of Europe staff members residing in France, the adjustment is paid, under the applicable legislation, by way of an advance to cover the amount of income tax payable to the French tax authorities for the tax year in question (in this case 2018). The amount of the adjustment in question is calculated definitively, based on the tables of equivalence (Instruction 42/2).

105. What prompted the recovery of the tax adjustment in this case was not an irregularity or some omission but rather the change in the applicable national tax legislation. Since for the year 2018 there was no income tax to pay, the advance to cover this tax liability had to be clawed back. It was for this reason, and pursuant to the combined provisions of Articles 34 and 42 of the CPSR, that the overpayments were refunded.

106. It follows from the foregoing that the ground of appeal alleging that the impugned decision infringed Article 38, paragraph 1, of the Staff Regulations cannot be sustained; this ground of appeal must therefore be dismissed as unfounded.

d. Violation of the principles of good administration

107. In this ground of appeal, the appellants argue in essence that the Administration did not act within a reasonable time to inform the pensioners of the change in the application of the tax adjustment. It was very slow to do so despite being aware that a new tax mechanism was being introduced which was liable to affect the pensioners' entitlement to the tax adjustment. The mishandling of the matter, the lack of information for the persons concerned and the assurances given – to the effect that the forthcoming tax

change would not affect the pensioners' entitlement to keep the tax adjustment in question – are, in the appellants' view, clear indications that the principle of good administration was not complied with.

108. First of all, as regards the delay in taking action and the allegedly futile efforts by the Administration to obtain information from the French authorities, the Tribunal notes that, certainly, those efforts were initially unsuccessful and the Organisation did not act until October 2019 when the French authorities set out their position on the matter.

109. No blame, however, can be attached to the Organisation for having acted as it did in order to obtain the relevant information from the competent national authorities. The delay on the part of the national authorities in answering the query, considerable though it was, does not negate the Organisation's efforts to take appropriate action when faced with a totally new situation following the introduction of the new tax system.

110. The Tribunal accordingly notes that from January 2017 onwards, the Organisation, through the ISRP, sought specific information on the applicable procedures regarding income tax from the national authorities in France, and repeated its requests twice in 2018 and one last time in early 2019.

111. The Tribunal concludes here that the aforementioned steps and efforts cannot be considered an indication that the matter was mishandled by the Organisation, which, according to the appellants, failed to consider the interests of the pensioners, in breach of the principle of good administration.

112. Next, as regards the appellants' complaint concerning the failure to pass on information concerning the recovery of the adjustment paid in 2018 and the unreasonable time taken by the Organisation to act, the Tribunal points out that, as stated in the previous paragraph, the competent authorities having failed to make it known where they stood, the Organisation was not in a position to act in the matter.

113. The Tribunal does nevertheless observe that the Organisation did not hesitate to warn the persons concerned in June 2018 that it had received no information on this subject from the national authorities, the only authorities competent to rule on the matter, and that, consequently, the pensioners were to continue filing tax returns with those authorities as before. This clearly shows that the Organisation could not encroach on the competences of the national authorities and that it did not act against the interests of the appellants by failing to keep them informed about the situation.

114. In these circumstances, it cannot reasonably be argued that the Organisation failed to inform pensioners about the impact of the new tax system on the tax adjustment paid for 2018.

115. The same applies to the claim that the Organisation breached its obligation to act within a reasonable time. In the circumstances described above, the Tribunal notes that the Organisation, acting via the ISRP, could not revise the final tables of equivalence

without confirmation from the French tax authorities on the subject, confirmation that did not arrive until 5 September 2019. The steps taken by the Organisation after that date cannot therefore be deemed to constitute evidence of failure to act within a reasonable time of the date on which the new tax system was introduced in France.

116. Lastly, as regards the assurances given to the pensioners concerning the fact that the new tax reform would not affect the tax adjustment paid for 2018, it should be noted firstly that, contrary to what the appellants allege, the Organisation does not have the power to decide how a national tax rule is to be implemented. At no time, therefore, did the Organisation provide precise, unconditional and concordant assurances concerning the maintenance of the tax adjustment paid for 2018.

117. Accordingly, in the absence of such assurances, no legitimate expectation could have arisen in the minds of the appellants as to the maintenance of the tax adjustment in question. The recovery of the tax adjustment was a subject on which the Organisation was unable to comment until the national authorities had stated their position on the matter.

118. On the basis of the foregoing, therefore, the appellants' combined allegations that there has been a violation of the principles of sound administration and legitimate expectation cannot be sustained.

119. This ground of appeal must therefore be rejected, as must the appellants' claims for annulment *in toto*.

2. Claims for damages

120. In their claims for damages, the appellants maintain that they have incurred financial loss as a result of the tax adjustment for 2018 being clawed back, following the impugned decision.

121. The Tribunal notes that where the loss on which the appellants rely arises from the adoption of a decision whose annulment is sought, as in the present case, the rejection of the claim for annulment entails, as a matter of principle, the dismissal of the claim for damages, as those claims are closely linked.

122. Such is the case here. Since the appellants' claims for annulment have been rejected as a whole, the claims for damages and the appeals must be dismissed in their entirety.

For these reasons, the Administrative Tribunal:

Declares appeals Nos. 661/2020 and 662/2020 admissible;

Declares the said appeals to be unfounded and dismisses them;

Orders that each party shall bear its own costs.

Adopted by the Tribunal by videoconference on 26 April 2021 and delivered in writing pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 27 April 2021, the French text being authentic.

The Registrar of the Administrative Tribunal	The Deputy Chair of the Administrative Tribunal
Christina OLSEN	András BAKA