DALDEWOLF

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EDITO

Dear readers,

In this second Newsletter of the year, we propose a focus on the freedom of expression of the civil servants and agents as well as the analysis of a judgment dealing with the question of the limitation of the second language in a competition notice, to only three official languages of the European Union.

In our "Fundamental Rights" section, we will discuss a recent case of the European Court of Human Rights on freedom of expression and whistleblowers.

If you would like us to address specific topics in future issues of the OFFICI@L, please send us your questions or suggestions (*theofficial@daldewolf.com*). We look forward to hearing from you.

We wish you an excellent reading!

The DALDEWOLF team

FOCUS

FREEDOM OF EXPRESSION, LET'S TALK ABOUT IT!

Freedom of expression is a right recognized to officials and agents, including in areas covered by the activity of the institutions. This freedom includes the right to express, verbally or in writing, opinions that differ from or are in the minority of those held at official level. Admitting that the freedom of expression can be limited solely on the grounds that the opinion in question differs from the position adopted by the institutions would deprive this fundamental right of its purpose.

However, freedom of expression is not an absolute right. It entails duties and responsibilities for the civil servant or agent who claims it, so that it may be subject to certain conditions or restrictions. In this respect, there are two more or less organized frameworks, as set out in Article 17a of the Staff Regulations.

– Specific arrangements: publication concerning the activity of the institution.

The second paragraph of Article 17a, first indent, of the Staff Regulations provides that officials and other servants are required to inform the Appointing Authority in advance if they intend to publish or have published a text relating to the activities of the Union. The Appointing Authority may, within 30 working days following the receipt of this information by the official, inform him that this publication is likely to harm the legitimate interests of the Union. The Appointing Authority could refuse to grant authorization only if the publication is likely to cause serious harm to the interests of the Union.

This system of authorization is finally understood in a rather limited way because it only concerns the writings (i.) relating to the activity of the Union (ii.). Moreover, the possibility for the Appointing Authority to refuse the authorization is also limited.

– General regime: balance between freedom of expression and duties of loyalty and cooperation

The first paragraph of Article 17a, first indent, of the Staff Regulations provides that "An official has the right to freedom of expression, with due respect to the principles of loyalty and impartiality". This general duty of loyalty implies that the respect due by the official to the dignity of his function is not limited to the particular moment when he or she performs a specific task but is imposed on him or her in all circumstances (Gomes Moreira / ECDC, F-80/11). It therefore also applies when the official or other servant expresses himself, even verbally, concerning matters which do not strictly speaking come under the activities of the Union but which are likely to expose the latter. The duty of loyalty limits the freedom of expression of the official or other servant when his statements are likely to affect the image and dignity of the European institutions in a grave and seriously negative way (Skareby / EEAS, T-585/16).

Moreover, the freedom of expression of an official is restricted by the protection of the rights of others (Skareby / EEAS, T-585/16). Freedom of expression cannot justify that an official or an agent may make unfounded allegations against his or her superiors, which are likely to discredit the latter's reputation (Sequeira Wandschneider / Commission, F-28/06).

All the interest of the question of the freedom of expression of the civil servant or agent crystallizes when a disciplinary sanction is adopted or is likely to be adopted against him/her, in particular because of the violation of his/her duty of loyalty. It should be emphasized from the outset that the finding of a breach of the duty of loyalty is not subject to the condition that the official or agent concerned has

caused damage to the Union, nor to the existence of a complaint from a person or a Member State which considers itself to have been harmed by the attitude of the official (Gomes Moreira / ECDC), even though such a circumstance may be taken into account in the examination of the proportionality of the disciplinary measure envisaged.

In order to determine whether a disciplinary sanction is justified and proportionate, case law indicates that it is important to establish whether the civil servant or official concerned, in disclosing information, acted in good faith and with the belief that the information was genuine, whether the disclosure was in the public interest and whether or not the author had more discreet means of disclosing the information. In addition, the underlying motivation of the civil servant or agent is a key factor in determining whether or not his or her actions should be protected. For example, an act motivated by personal grievance or animosity, or by the prospect of an advantage, including monetary gain, does not justify a particularly high level of protection.

For example, the EU courts have ruled that sending an e-mail to all the members of a unit does not constitute an appropriate means of expression, with regard to the principle of loyalty, for constructive criticism of the hierarchy, even though a procedure was specifically set up and available for transmitting such information. Furthermore, the judges took into account the fact that the content of the electronic mailings contained serious accusations that could affect the dignity or professional reputation of other officials (Z / Court of Justice, joined cases F-88/09 and F-48-10).

Ultimately, the question of the freedom of expression of civil servants and agents is a question of circumstances and must be analysed on a case-by-case basis. There is no doubt that with the multiplication of (social) media allowing civil servants and agents to communicate opinions on a wide variety of subjects, EU courts will have to examine this delicate balance between individual freedom of expression and the rights of the institutions entrusted with missions of general interest, on the proper performance of which citizens must be able to rely.

RESTRICTING THE SECOND LANGUAGE TO THREE OFFICIAL LANGUAGES IN A COMPETITION NOTICE

In a judgment rendered on February 16, 2023 (European Commission / Italian Republic, C-623/20 P), the Court of Justice of the European Union confirmed the illegality of two EPSO notices imposing the choice of the second language to English, French or German. These two notices concerned the constitution of reserve lists of administrators in the field of auditing (notice 1) and the constitution of reserve lists of investigators and chief investigators in certain fields of the Union, including the fight against corruption (notice 2)

In these notices of competition, it was mentioned that the candidates required:

- a minimum level of C1 in one of the 24 official languages of the Union (language 1)
- a minimum level B2 in German, English or French (language 2).

These two languages did not have to be the same.

According to the Commission, the choice of these three languages is due to the fact that they are the main working languages of the Union institutions and that it is essential that the new recruits be "immediately operational and able to communicate effectively in at least one of these languages in their daily work".

The Court of Justice has recalled that the institutions of the Union have a margin of discretion in the organization of their services and, in particular, in the determination of the criteria of ability required by the posts to be filled and in the conditions and procedures for organizing competitions (Commission / Italy, C-621/16 P). The institutions must, in accordance with the article 1 quinquies of the Staff Regulations, ensure that there is no discrimination based on language. Limitations are possible only if they are objectively and reasonably justified and if they meet two legitimate objectives of general interest in the context of personnel policy (Commission v. Italy, C-621/16 P).

In the present case, the difference in treatment based on language resulting from a limitation of the language regime of a competition to a limited number of official languages, can only be admitted if such a limitation is objectively justified and proportionate to the needs of the service. Furthermore, the Court adds that any condition relating to language knowledge must be based on clear, objective and foreseeable criteria (Commission / Italy, C-623/20 P).

According to the high court, the General Court has correctly analysed this issue and, by rejecting the appeal, agrees. The latter, in its judgment of September 9, 2020, had shown that the limitation of the second language was not justified by the interest of the service, based on the ability of these newly recruited people to be immediately operational. Indeed, the inclusion of the knowledge of one of the three languages in the competition notice cannot be justified by the fact that the successful candidate will be immediately operational, since he or she will be able to perform his or her tasks and communicate effectively from the moment he or she takes up his or her duties.

Furthermore, the General Court stressed that all the texts provided by the Commission in its defence cannot justify limiting the languages to French or German as a second language and not to other official languages of the Union, in view of the specific functional characteristics of the posts referred to in the notice. Only knowledge of English could be considered to confer an advantage on successful candidates.

Finally, the Court of Justice stated that the languages of the decision-making process within the Commission do not justify the limitation of the three languages, in view of the functional specificities of the posts referred to in the competition notice. According to the Court, no necessary link could exist between these procedures and the functions of the future officials.

WHISTLEBLOWERS AND FREEDOM OF EXPRESSION

In a judgment of February 14, 2023 (Halet / Luxembourg, no. 21884/18), the European Court of Human Rights affirmed the violation of the freedom of expression of a former employee of a Luxembourg company, having disclosed confidential information of the latter, and grants him the status of whistleblower.

In this case, Mr. Halet, a former employee of PwC, had made public fourteen tax returns of multinational companies and two accompanying letters. As a result, he was dismissed and convicted by national courts.

According to the Court, this conviction constitutes an interference with the exercise of the applicant's right to freedom of expression (art. 10 of the European Convention on Human Rights), which is provided by law and pursues a legitimate aim, namely the protection of the reputation and rights of PwC. The question remains whether this interference is "necessary in a democratic society".

The Court recalls that freedom of expression also extends to the professional sphere (Koudechkina / Russia, 29492/05), when the relationship between employer and employee is governed by public or private law. Moreover, it recalls that the protection of freedom of expression in the workplace is a well-established case law which has established a special protection requirement for civil servants or employees who disclose, in violation of the rules applicable to them, confidential information obtained in their workplace. It is in this way that the jurisprudence protecting "whistleblowers" was built.

The protection of whistleblowers is based on the consideration, on the one hand of the duty of loyalty, reserve and discretion as well as the obligation to respect a secret provided by the law and, on the other hand, the position of vulnerability with respect to the employer on whom the employees depend for their work. In order to find the right balance, the duty of loyalty, reserve and discretion of employees leads to the need to take into consideration the limits of the right to freedom of expression and the reciprocal rights and obligations specific to employment contracts and the professional environment.

Without giving a definition to the notion of "whistleblower", the Court, based on the criteria given by the Guja judgment [1] (Guja / Moldova, no. 14277/04) defined whether and to what extent the author of a disclosure of confidential information, obtained in the workplace, could invoke the protection of article 10 of the Convention. To this end, the Strasbourg court analysed whether the Luxembourg Court of Appeal diligently applied these criteria in the present case, with a view to determining whether or not the applicant's criminal conviction could constitute a disproportionate interference with his right to freedom of expression.

According to the EU Court, the balancing of the harmful effects of the disclosure and the public interest in the information disclosed did not meet the requirements set by the court. Indeed, the Court of Appeal made an extremely restrictive interpretation of the public interest of the information disclosed. Moreover, it did not consider all the harmful effects of the disclosure in question, limiting itself solely to the damage suffered by the employer.

Finally, in view of the sanctions imposed (criminal prosecution as well as a fine of 1,000 euros) and taking into account the result of the balancing exercise carried out by the national Court of Appeal, the European Court of Human Rights considered that the criminal sentence suffered by the applicant was not proportionate to the legitimate aim pursued. As a result, the High Court concluded that the interference with the applicant's right to freedom of expression was "not necessary in a democratic society", which would infringe on the applicant's freedom of expression under article 10 of the European Convention on Human Rights.

[1] *These criteria are: the means used to make the disclosure, the authenticity of the information disclosed, the good faith of the employee, the public interest in the information disclosed, the harm caused and the severity of the sanction.*

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