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FINANCE COMMITTEE

Hundred and Thirty-eighth Session

Rome, 21 – 25 March 2011

**Information requested by the Finance Committee on Article 12 of the
Statute of the International Civil Service Commission**

Queries on the substantive content of this document may be addressed to:

Mr Antonio Tavares
Chief, General Legal Affairs Service
Tel: +3906 5705 5132

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EXECUTIVE SUMMARY

- At its 137th Session (10-11 February 2011), the Finance Committee examined a document on “*Preliminary anticipated cost increases for 2012-13.*” The Committee opined that General Service staff salary levels in Rome were high compared even with prime employers in Rome and that current salary levels were not compatible with the pressures on multilateral and public sector budgets. The Committee noted that under Article 12 of the Statute of the International Civil Service Committee (ICSC), “*the Commission shall (...) make recommendations as to the salary scales of staff in the General Service and other locally recruited categories*” and these recommendations are presented to the FAO Council. The Committee requested (a) a legal interpretation of Article 12 of the Statute of the ICSC and (b) an opinion on the discretion available to Council concerning the determination of General Service salary adjustments in Rome.
- The document describes the respective roles of the ICSC, the Council and the Director-General. The ICSC has authority to prepare, on the basis of the methodology established by the Commission, and to recommend a salary scale; the Council is required to adopt the salary scale and the Director-General to implement it.
- The words “*(shall) make recommendations*” are to be construed in the light of the overall Common System of Salaries and Benefits, the regulated technical process of preparation of the new salary scale and the tight control over its preparation, adoption and implementation exercised by the Administrative Tribunal of the International Labour Organization. The Organization – both the Council and the Director-General within their respective spheres of authority – is under a legal obligation to give effect to new salary scales for the General Service, as recommended by the ICSC.
- Any discretion available to the Council is residual. The Council could only refuse to approve a recommended salary scale, as well as adjustments thereto, in the event that there should be a breach of applicable rules, or of general principles of law, or any material error on the part of the ICSC or the General Assembly.

GUIDANCE SOUGHT FROM THE FINANCE COMMITTEE

- The Committee is invited to take note of the information provided in this document.

Draft Advice

- **The Finance Committee takes note of the information provided on Article 12 of the Statute of the International Civil Service Commission.**

BACKGROUND

1. At its 137th Session (10-11 February 2011), the Finance Committee examined a document on “Preliminary anticipated cost increases for 2012-13¹.” The Committee “opined that the General Service staff salary levels in Rome were very high compared even with prime employers in Rome and that the current salary levels were not compatible with the pressures on multilateral and public sector budgets. It recalled that this situation had led (a) Rome-based agency to freeze General Service salary increases in November 2010. The Committee was informed that unlike another Rome based agency, the FAO Conference had accepted the Statute of the ICSC in 1975. Consequently, FAO was bound by the salary scales that are recommended by the ICSC. (...) “The Committee noted that under Article 10 of the ICSC statute, ‘the Commission shall make recommendations to the General Assembly on (...) the scales of salaries and post adjustments for staff in the Professional and higher categories’ and it was thus the General Assembly that determines those salary scales.” (...) “As regards the General Service staff salaries under Article 12 of the Statute, ‘the Commission shall (...) make recommendations as to the salary scales of staff in the General Service and other locally recruited categories’. These recommendations are presented to the FAO Council. The Committee noted that the question of whether the FAO Council had authority to change, or not to approve, the salary scales, interim adjustments or the results of cost of living surveys recommended by the ICSC had been raised many times previously and that the conclusion had been that the Council is left with no discretion in the matter” (...) “The Committee was informed that any decision to withdraw from the statute of ICSC lay with the FAO Conference².”

2. **The Committee requested (a) a legal interpretation of Article 12 of the Statute of the ICSC and (b) an opinion on the discretion available to Council concerning the determination of General Service salary adjustments in Rome.**

PRELIMINARY OBSERVATIONS

3. At the outset, it is important to underline the following:
- 3.1. First, as noted by the Finance Committee, the extent of the obligation of FAO to apply new General Service salary scales has been raised on many occasions before Governing Bodies, including the Finance Committee, the Committee on Constitutional and Legal Matters (CCLM), the Council and the Conference, in connection with the outcome of, or matters related to salary surveys in 1984, 1989, 1994, 2000 and 2005. This note draws upon, and reproduces extracts of earlier notes and opinions, with particular reference to a note submitted to the 115th Session of the Finance Committee, in September 2006, and to the Joint Meeting of the Programme and Finance Committees, held at that time.
 - 3.2. Second, beyond the questions raised, an issue of principle arises and this is whether FAO should be a party to the United Nations Common System of Salaries and Benefits. The concept of a unified international civil service is an old one which could not be implemented at the time when the United Nations was established (for reasons such as inherent difficulties in formulating a common system and the fact that some Specialized Agencies, such as ILO and FAO, predated the United Nations). The relationship agreements concluded between the United Nations and the Specialized Agencies under Article 57 of the Charter contain a standard clause whereby, *inter alia*, the organizations recognized that the development of a single unified international civil service was

¹ FC 137/2.1.

² Report of the Hundred and Thirty-seventh Session of the Finance Committee, (10-11 February 2011), CL 141/6, paragraphs 26-32.

desirable from the standpoint of effective administrative co-ordination, and, to this end, agreed to develop common personnel standards, methods and arrangements designed to avoid serious discrepancies in terms and conditions of employment, to avoid competition in recruitment of personnel in order to obtain the maximum benefit from their services, and committed themselves to the establishment of an International Civil Service Commission³.

ACCEPTANCE OF THE STATUTE OF THE ICSC

4. In 1973, following a lengthy inter-agency process of negotiations, the Conference authorized the Director-General to accept the Statute of the International Civil Service Commission (ICSC) and adopted a set of amendments to the General Rules of the Organization (GRO) transferring authority to the ICSC, and to the General Assembly, to intervene on a number of matters, in respect of which the Governing Bodies of FAO and the Director-General are no longer competent⁴. The Statute of the ICSC, as approved by the General Assembly of the United Nations in 1974, was accepted by the Director-General on behalf of FAO in 1975.

AUTHORITY TO PREPARE, RECOMMEND, ADOPT AND IMPLEMENT GENERAL SERVICE SALARY SCALES

5. Under Article 11, paragraph 1 (a) of the Statutes, the Commission shall establish *“the methods by which the principles for determining conditions of service should be applied.”* Article 12, paragraph 1 of the Statutes provides that *“at the headquarters duty stations (...) the Commission shall establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories”* (emphasis added). Article 12, paragraph 3 provides that in exercising its functions under Article 12, paragraph 2, *“the Commission shall (...) consult executive heads and staff representatives.”*

6. The salary survey is conducted in a complex, highly regulated process described in the Compendium of the ICSC. The survey conducted by the ICSC in accordance with a detailed methodology established also by the ICSC. The basis for the determination of the conditions of

³ At each of its sessions, the General Assembly of the United Nations makes, through its Fifth Committee, a detailed review of the work of the ICSC. Through resolution 65/248 of 24 December 2010, the General Assembly emphasized in particularly strong terms the role of the Commission. The General Assembly reaffirmed *“its commitment to a single unified common system as the cornerstone for the regulation and coordination of the conditions of service of the common system”*. The General Assembly encouraged *“the Commission to continue to coordinate and regulate the conditions of service of staff of the organizations of the United Nations common system, bearing in mind the limitations imposed by Member States on their national civil services”*; reaffirmed *“the role of the General Assembly in approving conditions of service and entitlements for all staff serving in the organizations of the United Nations common system, bearing in mind articles 10 and 11 of the statute of the Commission”*; recalled *“articles 10 and 11 of the statute of the Commission”* and *“reaffirmed the central role of the Commission in regulating and coordinating conditions of service and entitlements for all staff serving in the organizations of the United Nations common system”*. Under the ICSC system, a number of matters are approved by the General Assembly on the basis of recommendations of the Commission under article 10 of the Statute (broad principles for the determination of the conditions of service of the staff; the scales of salaries and post adjustments for staff in the Professional and higher categories, allowances and benefits of staff which are determined by the General Assembly, such as dependency allowances and language incentives for staff in the Professional and higher categories, education grant, home leave, repatriation grant and termination indemnity, and staff assessment) whereas other matters are within the direct authority of the ICSC. Under article 11 of the Statute, the Commission establishes the methods by which the principles for determining conditions of service should be applied, rates of allowances and benefits, other than pensions and those referred to in article 10, the conditions of entitlement thereto and standards of travel and the classification of duty stations for purposes of applying post adjustments. Article 12, examined in this document, deals with salary scales for General Service staff and related categories. The General Assembly and the ICSC operate under the overall principles and assumptions set out in the relationship agreements between the United Nations and the Specialized Agencies aimed at the development of a single unified international civil service, through the application of common personnel standards, methods and arrangements.

⁴ CL 61/REP, paragraphs 172-174 and C 73/REP, paragraphs 334-335.

service of the General Service and related categories is “*the Flemming principle*”⁵. The survey process consists of a preparation phase (e.g. establishment of a sample of employers, selection of jobs, development of benchmarks); a data collection phase (e.g. job matching, educational qualifications, handling of disagreements, type of salary data to be collected, cooperation of employers); a data analysis phase (e.g. operation of adjustments to take account of quantification of fringe benefits, social security benefits, incidence of taxation); and a decision phase of construction of a salary scale and formulation of criteria for adjustments thereto. In accordance with the methodology, for the conduct of a number of operations in duty stations, with particular reference to the data collection phase, a “*Local Salary Survey Committee*” is established consisting of members of the administration and staff representatives, who all act on behalf of the ICSC.

7. Once the salary scale is prepared, the ICSC makes a recommendation to the Director-General. The Director-General refers the recommendations of the ICSC to the Finance Committee [Rules XXVII, paragraph 7(r) and XL, paragraph 2 of the GRO]. The Finance Committee reports to the Council, which approves the salary scale under Rule XXIV, paragraph 3 (j) of the GRO. The Director-General promulgates and applies the new salary scale (cf. Rules XXXVIII, paragraph 1 and XL, paragraph 3 of the GRO and Staff Regulation 301.13.4).

8. The respective roles of the ICSC, the Council and the Director-General have been clarified over the years through practice and judgments of the Administrative Tribunal of the International Labour Organization, including, on occasion, judgments concerning FAO.

9. The Administrative Tribunal has clarified that it flows from the very existence of a Common System of Salaries and Benefits placed under the aegis of the ICSC and the General Assembly that the organizations at large must give effect to recommendations and decisions of the ICSC on a range of personnel matters, in respect of which the concerned Governing Bodies of the organizations are no longer competent (including the preparation of the General Service salary scale). Such principles were restated either explicitly or by implication in many judgments of the Administrative Tribunal (cf. *inter alia*, judgment N^{os} 1713, 1915, 2030, 2303, 2476, 2571) revealing an exercise by the Tribunal of tight control over all matters pertaining to salaries and conditions of service. Insofar, as by its very nature, the matter is of importance, staff members supported by staff representatives ensure strict observance of the ICSC methodology⁶.

10. Article 12, paragraph 1 of the Statute of the ICSC must be seen in the context of this jurisprudence. Under this provision, the Commission shall “*make recommendations*” to the organizations regarding the salary scale for General Service staff. This wording cannot be interpreted as implying that the organizations are “*free*” not to apply or to modify the salary scale. This would not be a correct interpretation of this provision for the following reasons.

10.1 First, the words “*(shall) make recommendations*” must be construed in the light of the overall Common System of Salaries and Benefits, under the aegis of the ICSC, and the nature of the process of preparation of a new scale. The process outlined in paragraph 6

⁵ The latest restatement of the Flemming principle, made by the ICSC, and approved by the General Assembly by resolution 47/216 of 23 December 1992 is as follows: “*It is stated under Article 101 of the Charter of the United Nations that ‘the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity’. To comply with the standards established by the Charter as regards the employment of locally recruited staff, the organizations of the United Nations system must be competitive with those employers in the same labour market who recruit staff of equally high calibre and qualifications for work which is similar in nature and equal in value to that of the organizations. Remaining competitive in order to both attract and retain staff of these high standards requires that the conditions of service for the locally recruited staff be determined by reference to the best prevailing conditions of service among other employers in the locality. The conditions of service, including both paid remuneration and other basic elements of compensation, are to be among the best in the locality, without being the absolute best*” Cf. Report of the ICSC for the year 1992, A/47/30, paragraph 231, pages 59 and 60.

⁶ There is thus, in summary, a situation where the ICSC has authority to prepare and recommend a salary scale, the Council is required adopt the scale and the Director-General to implement it.

above results in a recommendation that is a “*mechanical*”, necessary outcome of a complex, technical process aimed at determining a salary scale carried out by the ICSC. Both in practical and legal terms, that process deprives the concerned Governing Bodies of the organizations having accepted the Statute of the ICSC of any meaningful discretion when examining a recommended salary scale. This is, in fact, a situation that is not new and occurs frequently when a given administrative authority is required to take a decision on the basis of advice from a technical or scientific body. In addition, a situation where the Council could change a salary scale could raise intractable issues as to the alternative measures to be recommended or decided upon and, indeed, defeat the very purpose for which a Common System of Salaries and Benefits was established.

- 10.2. Second, it flows from the above case law of the Administrative Tribunal that any authority of the Governing Bodies to deviate from or not to apply recommendations of the ICSC or decisions of the General Assembly is purely residual. Indeed, the Governing Bodies of the organizations having accepted the Statute of the ICSC may only refuse to apply a particular recommendation or decision in the event that there should be a breach of applicable rules, or of general principles of law or a material error on the part of the ICSC, or the General Assembly. In such cases, an organization with particular reference to its executive head should refuse to apply a particular measure⁷. In the absence of any such circumstances, the organizations having accepted the Statute of the ICSC must adopt the new salary scales and any related adjustments.

11. Finally, as a general rule, the executive heads of the organizations, in their capacity as chief executive officers, must give effect to the salary scale adopted by the Council. In judgment N° 323, *in re Connolly-Battisti (N° 5)* the Administrative Tribunal clarified, in the particular case of FAO, that the Director-General must promulgate and give effect to any new salary scale adopted by the Council⁸.

CONCLUSIONS

12. In conclusion:

- 12.1. On the first question: in view of the foregoing observations the words “*(shall) make recommendations*” must be construed in the light of the overall Common System of Salaries and Benefits, the complex nature of the technical process of elaboration of the new salary scale and the tight control over its preparation, adoption and implementation by the Administrative Tribunal of the International Labour Organization. Therefore, the Organization - both the Council and the Director-General within their respective spheres of authority - is under a legal obligation to give effect to new salary scales for the General Service, as recommended by the ICSC.

⁷ This case law leads to difficult situations as the organizations are obliged not to apply particular measures issued by the General Assembly or the ICSC and are, therefore, placed in conflict *vis-à-vis* these institutions.

⁸ In this judgment the Tribunal stated, *inter alia*: “*The only significance of the point is whether in discharging his duty of fixing salary scales under Staff Regulation 301.134 the Director-General is required to act independently as he thinks right as he is for example under Rule XXXIX.4 when appointing, assigning and promoting staff, or whether he is acting as Executive Officer under Rule XXXVII.1 and carrying out the decisions of the Council. The Tribunal considers that the latter is the correct view*”.

- 12.2. On the second question: any discretion available to the Council is purely residual. The Council could only refuse to approve a recommended salary scale, as well as adjustments thereto, in the event that there should be a breach of applicable rules or of general principles of law or any material error on the part of the ICSC or the General Assembly⁹.

⁹ **The Finance Committee may wish to consider a particularly authoritative statement of this position** in judgment N° 2302, *in re Bartorelli, Eldon (N° 2), Pace (N° 2) and Señor Cembellín*, delivered on 4 February 2004, as follows: *"The FAO certainly approved the ICSC's Statute on 20 March 1975 and it is indeed the Commission's responsibility to establish the methodology to be used, but with regard to salary scales the latter can only make recommendations and, under the terms of Article 301.134 of the FAO's Staff Regulations, it is for the Director-General to 'fix the salary scales for staff members in the General Service category, normally on the basis of the best prevailing conditions of employment in the locality of the FAO office concerned". It is therefore up to the competent authority, subject to judicial review, to check whether the rules applied in the chosen methodology and the ensuing results do not breach either the Flemming principle concerning General Service staff or the general principles of law applying to the international civil service. The defendant draws attention to the drawbacks of the system and to the "considerable inconvenience" it faced as a result of Judgment 1713. It even goes so far as to assert that it is virtually impossible for it to depart from the scale recommended by the ICSC, although it recognises explicitly that it "must analyse those recommendations and refrain from applying them if it considers that they are unlawful and if their implementation would have the effect of depriving staff of their legitimate rights", which in fact constitutes a very accurate rendering of its obligations in the light of the Tribunal's case law" (emphasis added, paragraph 7).*