



Organization for Security and Co-operation in Europe

The Secretary General

Vienna, 13 September 2011

To: The Members of the Advisory Committee on Management and Finance

Subject: Note on the Disciplinary Procedure applicable to the Secretary General, the Heads of Institution and the Heads of Mission

Further to the ACMF discussions on Overview of Major Issues and Priorities in Management of Human Resources (PC.ACMF/5/11/Rev.1) and the Draft Decision on Further Improving the Effectiveness and Efficiency of Human Resources in the OSCE (PC.DD.18/11/Corr.1) on 24 May 2011 and 01 June 2011, under the guidance of the Chairperson of the Advisory Committee on Management and Finance, the Secretariat has prepared the attached document “Note on the Disciplinary Procedure applicable to the Secretary General, the Heads of Institution and the Heads of Mission”, for discussion at the ACMF on 20 September 2011.

Note on the Disciplinary Procedure applicable to the Secretary General, the Heads of Institution and the Heads of Mission

Background

1. The Secretary General, heads of institution and heads of mission are “*OSCE officials*” according to the Staff Regulations and Staff Rules (Staff Regulation 1.01).
2. As such, they are subject to the OSCE Staff Regulations and Staff Rules (Staff Regulation 1.03) “*as specified herein and in their letters of appointment or terms of assignment*”.
3. As OSCE officials, the Secretary General, heads of institution and heads of mission are expected to abide by the OSCE Code of Conduct (Staff Regulation 2.01).
4. The Code of Conduct (Appendix 1 to the Staff Regulations and Staff Rules (SRSR)) specifies that “[*t*]he OSCE Code of Conduct shall apply to the Secretary General, heads of institution and heads of mission *mutatis mutandis*, except that they shall report to or seek authorization from the Chairmanship” (paragraph 12 – Applicability of the OSCE Code of Conduct).
5. In short, the Secretary General, heads of institution and heads of mission are bound by the same ethical standards as staff/mission members.
6. Being bound by the same ethical standards as the staff/mission members, the Secretary General, heads of institution and heads of mission may be the subjects of allegations or complaints, like any other OSCE official. For instance, allegations may be made via the Office of Internal Oversight (OIO) hotline that they have used their position for private advantage (OSCE Code of Conduct - paragraph 7) or that they are actively associated with a business that has a contractual relationship with the OSCE, which constitutes a conflict of interest (OSCE Code of Conduct – paragraph 8). Similarly, there may be a complaint filed against them for violation of the OSCE professional working environment (OSCE Code of Conduct - paragraph 6 and STAI 21/2006).
7. Article IX of the SRSR describes the disciplinary procedure to be instituted in case of allegations of misconduct or complaints, but it only applies to staff/mission members. Article IX does apply to deputy heads of mission, who are defined as mission members according to Staff Regulation 1.01. The same holds true for Directors of the Secretariat and of the Institutions, who are also defined as staff members. However, neither the Secretary General nor the heads of institution or mission are included under the definition of staff/mission members.
8. Irrespective of the question of the validity/legitimacy of allegations or complaints raised against the Secretary General, the heads of institution and the heads of mission, an organization like the OSCE, which promotes good governance and rule of law, cannot lack the means to investigate and, if needed, sanction its senior managers, even when they are political appointees. It therefore appears that the current regulations suffer from a regulatory gap that needs to be corrected with a view to enhancing the accountability of senior managers.

9. To close such a gap, in the past Article IX was applied *by analogy* to complaints received against heads of mission, on the basis that heads of mission are explicitly obliged to abide by the provisions of the OSCE Code of Conduct and also Staff Instruction 21/2006 on the Professional Working Environment (both of which apply to “*OSCE officials*”). This empirical solution was challenged, however, since the scope of application of Article IX was clearly limited to staff/mission members. And in fact, the disadvantages of this approach are twofold: on the one hand, because heads of mission are not explicitly subject to Article IX, neither the Secretary General nor the Chairmanship is in a position to apply the range of disciplinary sanctions contained in Staff Regulation 9.03 (although the Chairmanship does have the option of contract termination under Staff Regulation 4.01 (b)); on the other, heads of mission do not enjoy the specific rights, protections and due process guarantees contained in Article IX.
10. The initial proposal to address the regulatory gap (PC.DD/18/11/Corr.1 of 25 May 2011¹) only covered the heads of mission and aimed at regularizing an *ad hoc* approach adopted in past instances, so as to increase the overall transparency of the process and prevent potential challenges from heads of mission in the future.
11. However, this proposal raised two main concerns among participating States:
 - several delegations considered that Article IX should be extended not only to heads of mission, but also to heads of institution and perhaps the Secretary General;
 - its formulation was considered by some participating States too vague, in particular, with respect to the term “*to the extent possible*”.²
12. This note intends to provide several options for the further consideration of participating States, ranging from simple steps to address in the short term an immediate need to the more complex question of revising the whole Article IX procedure with a view to developing a distinct disciplinary system applicable to heads of institution and the Secretary General.
13. For reasons set out in more detail below under 2/, it is suggested that an incremental approach is preferable to a radical – albeit necessary - overhaul of the entire disciplinary procedure.

¹ New Staff Regulation 9.04 “*Any allegations of misconduct against a Head of Mission may be submitted in writing through the Secretary General to the Chairmanship, who will establish a special Disciplinary/ Investigative Committee to examine these allegations and provide a recommendation through the Secretary General to the Chairmanship. To the extent possible, the disciplinary procedure shall follow the principles set forth in the present Article.*”

² The very same terminology was used in the SRSR before (e.g. Appendix 12 Articles V and IX; Appendix 2 Articles VIII) and allows a certain flexibility for the decision maker.

1/ Making the investigative and disciplinary procedure applicable to HoMs

14. As outlined above, Article IX describes the disciplinary procedure applicable to “staff/mission members” subject to allegations of misconduct.³
15. The general principles governing the disciplinary procedure are the following:
- *Due process* (Staff Regulation 9.02): the alleged offender is notified of the allegations and given a reasonable opportunity to respond;
 - *Proportionality of the disciplinary measure to the offence* (Staff Rule 9.03.1); Staff Regulation 9.03 lists the disciplinary measures that can be imposed, some of which are not applicable to seconded staff/mission members as they do not receive a salary from the Organization;
 - *Involvement of a review body* (Disciplinary Committee or Investigative Panel), unless the seriousness of the misconduct warrants immediate separation from service (Staff Rules 9.03.2);
 - *Legal assistance to the alleged offender* against whom disciplinary proceedings are initiated (Staff Rule 9.03.7), i.e. the right for the alleged offender to be assisted by a staff/mission member or, at his/her own costs, by external counsel (lawyer);
 - *Independence and protection* of the members of the Disciplinary Committee or Investigative Panel (Staff Rule 9.03.8).
 - *Right of appeal* of any disciplinary measure taken, pursuant to Art X.
16. There appears to be no obstacle to applying all of these principles *mutatis mutandis* to disciplinary procedures initiated against heads of missions. Indeed, these principles were adhered to in past instances, and have been instrumental in guaranteeing the fairness of the procedure. The only deviation from the regular Article IX provisions would be at the level of the nomination of the respective Disciplinary Committee/Investigative Panel. The Disciplinary Committee/Investigative Panel established in accordance with Staff Rule 9.03.5 would not be composed of regular staff/mission members but would be a body composed of persons of ambassadorial rank and nominated by the Secretary General as the Chief Administrative Officer. If the participating States wished to underscore the particular gravity of disciplinary procedures initiated against heads of mission, they might also encourage or require the Secretary General to exercise this responsibility in close consultation with the Chairmanship.
17. According to this proposal, the new provision would read as follows:

Staff Regulation 9.04

Any allegations of misconduct against heads of mission may be submitted in writing to the Secretary General. The disciplinary procedure, as set out in the present Article applies mutatis mutandis and any report shall be submitted to the Secretary General for his/her final decision [in consultation with the Chairmanship].

³ Such procedure involves a Disciplinary Committee or, in the case of complaints about/allegations of violation of the OSCE professional environment as set out by STAI 21/2006, an Investigative Panel, except when summary dismissal is warranted.

18. Another and more linear option would be to amend Staff Regulation 1.01 by amending the definition of “*mission members*” to include heads of mission. This would require a simple change of one word, as follows:

Staff Regulation 1.01 mission member

OSCE official working within a field operation, ~~excluding~~ including the heads of mission.

19. This is an immediate solution that would formally place heads of mission within the scope of Article IX, which would be consistent with the practice adopted in the past on an *ad hoc* basis. At the same time, it would make the process more transparent, and would provide additional tools to the Secretary General (and the Chairmanship), by making heads of mission subject to a wider range of disciplinary measures. No further amendments to Article IX would be necessary. Another argument in favour of this revision is that there is no apparent reason why heads of mission should be treated differently under the Staff Regulations and Rules from deputy heads of mission or directors in the institutions. Like the heads of mission, the latter are OSCE officials appointed by the Chairmanship (Staff Regulation 3.04 (b) and (c)). The proposed solution also offers the advantage of avoiding a separate disciplinary procedure that “singles out” heads of mission. As stated above, the Disciplinary Committee/Investigative Panel could be composed of “peers”, such as (former) heads of mission and/or Directors but the entire existing process would apply to heads of mission *mutatis mutandis*.
20. These two options do not, however, address another concern expressed by some participating States about the initial proposal, i.e. the continued exclusion of heads of institution and the Secretary General. The next section highlights additional questions to be considered in this regard, and suggests a way forward.

2/ Application of the disciplinary procedure to the Secretary General and the heads of institution

21. Whereas there has not yet been a single case of formal allegations of misconduct against a Secretary General or a head of institution, in principle, there is no obstacle to the an investigative and disciplinary procedure to them, since, as mentioned in the background section, they are OSCE officials and as such are bound by the OSCE Code of Conduct.
22. The practical difficulties, however, in devising an appropriate procedure that would be applicable to them, stem from the lack of clarity as to who has the supervisory authority over the heads of institution and the Secretary General. Normally those exercising supervisory role have the authority to receive the allegations, lead the fact-finding exercise, initiate disciplinary action if appropriate and make the final decision.
23. The heads of institution exercise their responsibility “*through the Secretary General*” (MC.DEC/15/04). It would be for the participating States to clarify whether or not, as a result of the exercise of their responsibility through the Secretary General, the heads of institution are subject to investigation and disciplinary proceedings under the Secretary General’s authority. In addition, it would be necessary to specify who would be the peers serving on the Disciplinary Committee if a decision is made to submit the case to such an advisory body.

24. With regard to the Secretary General, it is unclear what alternative body - higher than the Secretary General - could and should be entrusted with the necessary procedural steps to address the allegations of misconduct or the complaints raised against the Secretary General.
25. With the guidance of the participating States, the Secretariat is ready to work on a paper on the disciplinary procedure applicable to the heads of institution on the one hand and to the Secretary General on the other hand.

3/ Proposal to amend Article IX to address several gaps

26. The disciplinary procedure is an administrative process aimed at investigating and, if necessary, sanctioning staff for substantiated instances of violation of the norms of conduct expected from them as OSCE officials. The disciplinary procedure is not of a criminal nature; therefore the Organization is not required to prove misconduct beyond a reasonable doubt. However, to avoid arbitrariness (or the perception thereof), due process must be afforded to the alleged offender. As indicated in paragraph 15 above, Article IX already contains some guarantees of due process, but there are some missing elements and some steps that need further clarification. Therefore, the Secretariat, taking the opportunity of the discussion on applying the disciplinary procedure to heads of mission, heads of institution and the Secretary General, would recommend that participating States also consider the wider revision of Article IX, with a view to improving the disciplinary procedure in general.
27. “*Disciplinary procedure*” is a generic term, which actually covers several steps and processes:
 - a) the reporting of allegations of misconduct;
 - b) the assessment of the allegations;
 - c) the investigation of the allegations, with due regard for the rights and duties of the subjects of the investigation and of witnesses;
 - d) the assessment of the findings of the investigation;
 - e) the conduct of the disciplinary proceedings, with due regard for the due process rights of the subject of the disciplinary action; and
 - f) the taking of the final decision which can be appealed under Article X.

a) The reporting of allegations of misconduct

28. There are two types of reporting of allegations: (a) a formal complaint by the victim of the alleged misconduct (e.g. allegations of violation of the OSCE professional working environment); or (b) a reporting of allegations of misconduct witnessed by a complainant, who is not the victim of such misconduct (e.g. allegation that a procurement officer has a conflict of interest in the award of a contract).
29. While a formal complaint requires that the alleged victim identify him/herself, it may happen that reporting of allegations is anonymous. The OSCE should make an informed decision as to whether or not anonymous allegations should be investigated.

30. The Secretariat is of the view that the anonymous allegations, as a rule, should not be admissible. However, such a position has a corollary: anonymous reporters/complainants often claim that they fear retaliation and therefore, in order for identified individuals to report allegations of misconduct, the Organization must offer them protection against retaliation.
31. Protection against retaliation (also called '*whistle-blower protection*') guarantees that individuals who have reported allegations of misconduct or co-operated in an audit or an investigation in *good faith* will be protected from any retaliatory action (such as contract non-renewal) that the alleged offender might take as reprisal or retribution for such reporting or co-operation. Similar wording is included in Provisional Financial Administrative Instruction (Prov. FAI) 10 on "*Reporting of inappropriate use of OSCE resources [...]*", however this concept was never included comprehensively into the Staff Regulation and Staff Rules, and Provisional FAI/10 explicitly excludes investigations into allegations of staff misconduct from its scope of application.
32. Article IX and/or the OSCE Code of Conduct should therefore provide that retaliation for reporting allegations of misconduct in good faith constitutes misconduct warranting disciplinary action. In addition, the alleged offender should be advised upon notification of the allegations and throughout the proceedings that he/she is required to abstain from any retaliatory action against OSCE officials who have reported allegations, submitted complaints and/or co-operated in the investigation.
33. At the same time, the OSCE officials reporting allegations or submitting complaints must be advised that knowingly reporting wrongful accusations or making frivolous complaints is inconsistent with the standards of conduct expected of OSCE officials and may also warrant disciplinary action. Additionally, complainants are expected to co-operate in the investigation by providing evidence and testifying as necessary.

b) The assessment of allegations

34. Not all allegations warrant investigation. There is a need to assess their plausibility (not to be confused with their reality, which is what the investigators are expected to determine). Since the reporters are identified, it is possible to revert to them and probe their reporting by asking further questions about circumstances and supporting evidence. One may then determine that the allegations are implausible (e.g., the alleged offender was not present at duty station at the time of the reported incident), or that what was perceived as misconduct was actually fully justified (the reporter/complainant did not have all relevant information and misinterpreted facts, or the allegations, even if fully proven, would not constitute misconduct under the SRSR).
35. The assessment of the allegations is a critical part of the process. Indeed, while no OSCE officials can claim an inherent right to the investigation of their allegations/complaints, the Organization would be remiss and put its reputation at risk if it were made aware of allegations of misconduct and did not take any action to investigate them, only to see those allegations later proven to have merit.
36. Currently, the assessment of the allegations is done by:
 - OIO when the allegations are made through the OIO hotline; and/or

- the Secretary General, supported by DHR and Legal Services, heads of mission or heads of institution.

c) The investigation

37. The general purpose of investigation is to gather facts so that the relevant authority can assess what managerial or disciplinary action is necessary. The UN OIOS Manual defines investigation as “*a legally based and analytical process designed to gather information in order to determine whether wrongdoing occurred and, if so, the persons or entities responsible.*” Professional investigators experienced in questioning techniques and evidence-gathering methods most commonly examine allegations and complaints, and probe evidence (both incriminating and exculpatory).
38. In most other international organizations, this function is conducted by the respective internal oversight services. However, in the OSCE Staff Regulations and Staff Rules, this separate and essential fact-finding step is conflated with the disciplinary proceedings, and conducted by a single body (the Disciplinary Committee/Investigative Panel).
39. This confusion between the investigative stage and the disciplinary proceedings does not facilitate decision-making. It is difficult for the Secretary General or the relevant head of mission or head of institution in consultation with the Secretary General to decide whether or not to initiate disciplinary action, if they have not been provided with evidence that misconduct occurred. Furthermore, a determination has to be made already at the outset of an investigation whether the concerned staff/mission member ought to be suspended from duty (with or without pay) while the investigation is on-going. Such a determination is often discussed with the investigators as they are in a position to advise whether or not there is a risk of evidence being tampered with or of intimidation/subornation of the witnesses if the alleged offender is allowed to remain on duty.
40. Furthermore, distinguishing the investigation from the disciplinary proceedings would address the rights and obligations of those co-operating with the investigation: duty to fully co-operate fully, obligation to maintain confidentiality, etc. Also, those who co-operate with an on-going investigation need to enjoy the same protection as those who in good faith reported the allegations of misconduct or submitted the complaints. In that context, the discussions on the revision of Article IX would offer the opportunity to clarify that OIO is responsible for investigating into all types of allegations, including into the complaints for harassment or discrimination or other staff-related misconduct. Other international organizations usually employ professional investigators to gather the evidence supporting or dismissing any allegations of misconduct, irrespective of their nature or their origin.

d) The assessment of the findings

41. The assessment of the investigation outcome is usually done by the Secretary General, or by the relevant heads of mission or heads of institution (supported by the Secretariat in particular in the case of allegations raised against international staff/mission, where the final decision of heads of mission or institution can only be reached in consultation with the Secretary General).

42. There are three possible courses of action as a result of the investigation being concluded:

- (a) The alleged offender may be exonerated as the allegations are not corroborated by the evidence gathered by the investigators. In that case, the allegations will be formally dismissed and the parties (the complainants and the subject of the investigation) will be informed thereof in writing, which marks the end of the matter. If the staff/mission member was suspended from duty, the suspension will be lifted. Any documents related to the investigation and the complaint/report of the misconduct will be expunged from the personnel file.
- (b) The relevant authority decides to initiate disciplinary action as the allegations of misconduct are corroborated by the evidence. In such a case, a letter of charge must be issued to the alleged offender informing him/her of the formal charges of wrongdoing and notifying him/her of the right to counsel to assist his/her defence.
- (c) The facts corroborated do not amount to misconduct but warrant a non-disciplinary course of action: this could be the issuance of a letter of reprimand or another administrative or managerial action, e.g., mention in the staff/mission member's PAR.

e) The disciplinary proceedings

43. Upon receipt of the response to the charge letter, which may include exculpatory evidence or mitigating factors, the relevant authority may either establish a Disciplinary Committee as set out in Article IX, or given the seriousness of the misconduct decide to summarily dismiss the staff/mission member. He/she also may decide to drop the charges and take an alternative measure (see c), above).

44. If evidence supports a finding that serious misconduct was committed, summary dismissal may be warranted. In such a case, the staff/mission member is immediately separated from service without a termination notice and without the case being first reviewed by a Disciplinary Committee. Summarily dismissed staff/mission members lose their entitlement to a termination indemnity (the same applies to staff/mission members who are separated from service for misconduct) and do not receive any repatriation grant. They are also barred from future employment with the OSCE.

45. As an alternative to summary dismissal, the case may be submitted to a Disciplinary Committee. The procedure to establish a Disciplinary Committee⁴ and the disciplinary proceedings are comprehensively outlined in Article IX.

⁴ There would be no need for an Investigative Panel any longer since under the Secretariat's proposal, the investigation would be carried out by OIO and therefore the mention of the Investigative Panel would be removed from Article IX.

f) Final decision

46. The final decision-making rests with the Secretary General or the respective head of mission or head of institution, who in cases involving international staff/mission members is required to consult with the Secretary General. The decision, including what disciplinary measure to impose among those listed in Staff Regulation 9.03, ranging from a written censure to summary dismissal, must be fully substantiated and reasoned. It must be communicated to the staff/mission member concerned and include the report of the Disciplinary Committee, if established.
47. The staff/mission member upon whom a disciplinary measure has been imposed retains a right of appeal (first through a request for internal review, then through an appeal to the Panel of Adjudicators) under Article X of the Staff Regulations and Staff Rules.
48. As an alternative to a disciplinary measure, when the facts do not constitute misconduct warranting disciplinary action, a letter of reprimand may be issued. Such a letter does not constitute a disciplinary measure (Staff Rule 9.03.10).

4/ Conclusion

49. In summary:
 - In light of the past difficulties, there is a need to provide for an investigative and disciplinary procedure applicable to heads of mission. The simplest way to immediately address the current gap is to apply Article IX to them and/or to consider heads of mission to be mission members. There is no reason to differentiate in this respect between heads of mission on the one hand, and Directors and deputy heads of mission, to whom Article IX procedures fully apply, on the other.
 - Specific guidance from the participating States will be required to develop the separate disciplinary procedure applicable to heads of institution and the Secretary General.
 - The discussion on the disciplinary procedures applicable to senior political appointees offers the opportunity to improve the investigative and disciplinary procedure in general and to revise Article IX accordingly.
50. The Secretariat, in particular the Department for Human Resources, in coordination with the Office of the Secretary General (including Legal Services and OIO), stands ready to assist participating States and draft amendments to the SRSR, in particular Article IX, accordingly.