EUROPEAN STABILITY MECHANISM Luxembourg

ADMINISTRATIVE TRIBUNAL

JUDGMENT

of 24 March 2023

In Case ESMAT 1/2022

Thomas Ritter, Appellant,

represented by Annabel Champetier and Laure Levi, Members of the Brussels Bar

v

European Stability Mechanism

represented by David Eatough, General Counsel of the European Stability Mechanism

Concerning the Appeal lodged by the Appellant on 3 August 2022, following the written procedure and the oral hearing, held on 24 January 2023

The Administrative Tribunal of the European Stability Mechanism

Composed, in accordance with Article 8(1) of the Statute, of Virginia MELGAR, President of the Tribunal, and members Harissios TAGARAS and Kieran BRADLEY,

Renders the present JUDGMENT

I. FACTS AND PROCEDURE

1. The Appellant is a staff member of the ESM, working in its ALM team since 2013.

2. His Year-End Review (hereinafter "YER") for 2021 attributes him the overall rating "Good Performance". At the same time, it contains a number of remarks, which the Appellant considers to be critical of his performance. Thus, according to the *Overall Feedback*, the Appellant needs "to listen, trust, lower his defences and share knowledge more"; similarly, with regard to the *Performance goal* "Early Repayment guidelines, Market Presence and Financial Structuring, holistic balance sheet management (shorter duration; understanding

the BMSs). Cyprus engagement/ CTC – financial optimization", in the framework of a specific working group the Appellant is said to have insisted on working on a methodology "deviating from the consensus … causing tensions" and having as a result that the work "took longer than planned". The above remarks were in substance reproduced in the *ESM values and behaviours* part of the YER.

3. In his comments to the Managing Director on the said YER, the Appellant expressed disagreement with "some assessments related to the ESM values and behaviour" and asked for the launch of a mediation process with his line manager, drafter of the YER. It seems resulting from these comments that there was a tense atmosphere between the Appellant and the latter (who took up her functions in September 2021), while the Appellant's comments describe her as being guilty of *inter alia*, "disrespectful, unprofessional, impulsive and aggressive behaviour".

4. Considering the "deterioration" of the relationship between the Appellant and his line manager, and in order to "defuse" the situation, the ESM proceeded on 16 March 2022 to a temporary reassignment of the Appellant, ordering him, for a renewable period of three months, starting on 21 March 2022, to report directly to the Chief Financial Officer (hereinafter "the reassignment decision").

5. The Appellant challenged the above decision on 13 April 2022, by submitting a request for an advisory opinion, pursuant to Article 24 of the Staff Rules (hereinafter "SR"). Prior to the said request, the Appellant had asked, and been granted, a parental leave, as from 1 May 2022 (and for a period ending on 31 August 2022); given the granting of the parental leave, the ESM, on 25 April 2022, suspended the Appellant's temporary reassignment until the end of such leave.

6. In the abovementioned request for an advisory opinion, the Appellant put forward three grounds for annulment of the reassignment decision, namely misuse of Article 5 bis(3) of SR, breach of the right to be heard and misuse of power, explaining in detail why, according to him, each one of these grounds was well-founded and concluding that "[g]iven all these elements, the contested decision to reassign [him] to a different role is illegal and should be annulled".

7. After presenting this conclusion, the Appellant added:
   "In addition, I request that
   - *my evaluation in my PDS for 2021 related to the ESM values be correctly reflected*
   - *my performance award for 2021 be reviewed and the calculation be disclosed*
   - *my objectives for 2021 be agreed on, which let me continue to grow and development my skills for ESM*
   - *a respectful work environment that does not lead to constructive dismissal be created*
   - *the misconduct behaviour of my line manager, [XX], supported by the CFO, [YY] towards me be stopped*
   - *a professional mediation to resolve the dispute with my line manager, [XX], be provided."*

8. In its advisory opinion, issued on 27 May 2022, the Advisory Committee rejected the two allegations of misuse, but concluded that the Appellant's right to be heard had been breached

and, as a result, recommended to the Managing Director that he set aside the contested decision of reassignment. On the other hand, the Committee rejected, as inadmissible, both the additional requests related to the Appellant's YER, on the ground that such requests constituted "specific decisions" and could only be challenged" via distinct request for advisory opinion", and, on the same ground, it also rejected the additional request on objectives.

9. On the basis of the above advisory opinion, the Managing Director decided to set aside retroactively, as from 21 March 2022, the reassignment decision. He informed the Appellant of his decision by letter of 22 June 2022.

10. The present Appeal was filed with the Tribunal on 3 August 2022. After presenting his version of the *Facts and Procedure* of the case (part I), the Appellant, in part II, *Merits*, complains of a "Breach of Article 25 (1) of the Staff Rules / Manifest errors of assessment", raising in the same context the issue of the Managing Director's responsibilities for the "illegal" decision of his temporary reassignment, while in part III, *On the requests for compensation*, the Applicant alleges that he suffered moral and material prejudice as a result of this decision and asks for compensation of such prejudice.

11. The *petitum* of the Appeal reads as follows:

    For all these reasons, the Appellant respectfully requests

    - *The annulment of the ESM managing director* (sic) *dated 22 June 2022 insofar as it implicitly rejects his request to have the evaluation in his PDS for 2021 related to the ESM values be independently assessed and corrected*
    - *Disciplinary measures for the illegal action of the Managing Director*
    - *The financial reparation of his moral prejudice evaluated* ex aequo et bono *to the amount of 30.000*
    - *The financial reparation of the Appellant material prejudice of the amount of 38.700 euros (calculation as explained above)*
    - *The reimbursement of all legal costs incurred and fees of the retained legal counsels*

12. After the verifications and regularisations provided in Article 13 of the Tribunal's Rules of Procedure, the Appeal was notified, on 10 October 2022, to the ESM, which requested an extension of the time-limit for the filing of the Reply, partially granted by the Tribunal. The Reply was received by the Tribunal on 14 November 2022, within the extended time-limit.

13. In the Reply, after the introductory part and the presentation of the facts and procedure of the case, the ESM raised inadmissibility pleas in respect of each of the claims in the Appeal. With regard to the first branch of the *petitum*, aiming at the correction of the 2021 YER, the ESM claims, firstly, that the preliminary procedure before the Advisory Committee was not followed correctly, given that the request for an advisory opinion did not in reality challenge the YER (but only the temporary reassignment), secondly, that, in view of the "Good Performance" rating in the YER, the latter could not be considered as an act "adversely affecting the Appellant" (and therefore could not be challenged by an Appeal), thirdly, that the challenge to the YER in the Advisory Opinion would in any event have been time-barred. As to the second branch of the *petitum*, the ESM claimed that the Tribunal lacks jurisdiction, while the inadmissibility plea in respect of the third and the fourth branches of the *petitum* relies in essence on the same reasoning as its inadmissibility plea regarding the first branch of the *petitum*, i.e. that the preliminary procedure was not properly followed. Concerning, lastly,

the claim for payment of legal costs, the ground of inadmissibility resides, for the ESM, in its "incidental" character in comparison with the "main claim".

14. The Tribunal decided not to ask for a second exchange of written pleadings, but invited the Appellant, on the basis of Article 16(1)(a) of its Rules of Procedure, to answer, by 29 November 2022, the admissibility questions raised by the ESM. The Appellant complied with the invitation within the time-limit set. His arguments may be summarised as follows.
    a) Correction of the 2021 YER (first branch of the *petitum*) : while admitting that the "main focus" of the request for an advisory opinion appeared to be the temporary reassignment decision, the Appellant pointed out that the said request encompassed also the issue of his 2021 YER, since it contained, at the end of the text, an explicit claim for the correction of the 2021 YER; for the Appellant, the mere fact that such claim was "listed" in the request for an advisory opinion, "albeit not in a more elaborate manner" and "even though this reference appeared as subsidiary", was sufficient to establish admissibility of the claim in question. In this same context, the Appellant also submits that there is no provision in the applicable rules, which limits a request for an advisory opinion to one decision. Furthermore, and with regard in particular to his "Good performance" rating in the 2021 YER, the Appellant claims that the said YER contains also negative remarks and, therefore, affects clearly his interests.
    b) Imposition of disciplinary measures and request for an official apology (second branch of the *petitum*): the Applicant refers in particular to the "specificities" of his case, in relation to his rights as a whistleblower, stressing that it is extremely unlikely that appropriate sanctions will be imposed on the former Managing Director and wondering to what extent the final decision to be taken on the "Whistleblowing" report could be free of bias.
    c) Moral and material damages (third and fourth branches of the *petitum*) : For the Appellant, the claims for damages have a clear connection both with the 2021 YER and with the "unjust, disproportional and disrespectful" temporary reassignment decision and therefore he "should be admissible in requesting compensation for the prejudice created by this reassignment", in spite of the fact that the latter decision remained in force for a limited period of time and was eventually "cancelled".

15. By letter of 2 January 2023, the Appellant enquired about, among other things, the possibility of submitting to the Tribunal "new written elements". By Order No 2 of 5 January 2023, the Tribunal ordered the Appellant to produce before it by 9 January 2023 the new written elements, without prejudice to the admissibility of these documents or their pertinence to the proceedings, and to provide reasons for the delay in their production. A response and a number of annexes were filed by the Appellant within the time limit set; the Appellant produced in particular two witness statements, submitted a request to provide further witness statements and filed numerous documents, concerning mainly whistleblowing and transparency issues. By Order No 5 of 16 January 2023, the Tribunal rejected the two witness statements as inadmissible, on the ground that no justification had been given for the failure to produce them at the time of the submission of the Appeal, and rejected the request for further testimonies, for absence of sufficient information regarding the identity of the purported witness or the capacity in which they would be testifying. As to the issues of whistleblowing and transparency (and related actions) the Tribunal reserved for the judgment its decision on the admissibility, allowing the parties to address these matters at the hearing.

16. The hearing was held on 24 January 2023. In the course of it, the parties further developed their arguments, both with regard to the admissibility (along the lines of the above paras.13 and 14) and to the merits of the case.

II. LAW

As to the first branch of the *petitum*

17. In the event of an individual ESM act or decision adversely affecting a person for whom the Tribunal has jurisdiction (pursuant to Article 2 of ESMAT Statute), Article 24 of ESM SR makes the admissibility of an Appeal against such act or decision subject, *inter* alia, to the launching by the person concerned of a pre-contentious procedure, starting with a request for an advisory opinion, submitted by the said person to the Managing Director.

18. It is in the light of the opinion, delivered by the Advisory Committee foreseen in the same Article, that the Managing Director will adopt his/her "final", implicit or explicit, decision, which can thereafter be challenged before the Tribunal by means of an Appeal.

19. Clearly, the *rationale* of this pre-contentious procedure is to allow the parties to have thorough knowledge of their respective positions and to facilitate a possible extra-judicial settlement of the dispute. As the Administrative Tribunal of the Inter-American Bank Group noted in a similar context, the pre-contentious procedure "seeks to provide the [organisation] with the opportunity, at different stages in the procedure, to resolve the dispute between it and the employee in a mutually acceptable manner … It is only if [the pre-contentious procedure] has failed that the employee may approach the Tribunal" (Case 104, *Vélez Grajales v IDB*, judgment of 9 September 2022, paragraph 65).

20. It results from the above that, in order for the pre-contentious procedure to fulfil its purpose, it is imperative that the Complainant describe with sufficient clarity and completeness in their request for an advisory opinion the grievances against the initial act or decision adversely affecting them.

21. In the present case, however, it is manifest that, with respect to the first branch of the *petitum*, the Appellant's request for an advisory opinion does not comply with the said requirement.

22. Indeed, the Appellant's request for an advisory opinion of 13 April 2022 pertains almost exclusively to the reassignment decision (which is the "contested decision", as per the terms of the request), exposing in length the grounds on which it is challenged and concluding that "the contested decision…is illegal and should be annulled". In particular, the opening paragraph of the request expresses the Appellant's intention "respectfully [to] request[ ] an advisory opinion … in relation to the decision of 16 March 2022 to temporarily reassign me to a different role on the basis of Article 5 bis(3) (hereinafter the 'contested decision')" and the request goes on to explain at length the grounds on which the reassignment is being

challenged, that is, misuse of Article 5 bis(3) SR, breach of his right to be heard and misuse of power in that the reassignment decision was taken for a purpose other than that stated.

23. It is only after the above conclusion seeking the annulment of the reassignment decision, that the Complainant formulates the six additional requests cited above (para.7), without however providing any analysis whatever of any of them. With regard to the 2021 YER in particular, it is simply requested that his "evaluation…related to ESM values be correctly reflected" (first additional request) and that his "performance award...be reviewed and the calculation be disclosed" (second additional request). It is manifest that such vague and extremely brief references cannot qualify as "request[s] for an advisory opinion" within the meaning of Article 24 of ESM SR.

24. It is true that in the part *Facts* of the Request, the Appellant declares his disagreement with his YER and reproduces a seven-line extract of his comments on the latter, where he reproaches his line manager for being biased against him. However, this can by no means put in question the conclusion reached in the previous paragraph. Suffice it to make a comparison with the thorough presentation of facts and legal grounds/arguments related to the reassignment issue (for which there can be no doubt that the Appellant's document constitutes a genuine request for an advisory opinion) in the same document or with the contents of the Appeal, where the Appellant contradicts in concrete terms and in detail the negative appreciations contained in his YER.

25. It is, therefore, clear that the arguments relied upon by the Appellant in his request for an advisory opinion refer exclusively to the reassignment decision, and cannot be interpreted as referring also, or instead, to a challenge to the Appellant's YER.

26. Furthermore, invited during the hearing to identify the particular parts of the request for an advisory opinion where he challenges the YER, the Appellant admitted that (with the exception of the *petitum*) his request does not make any explicit link with the YER. Instead, the Appellant sought to rely on an "implicit" link consisting of the seven-line extract mentioned in the above para.24, which, for the reasons explained there, is not sufficient.

27. Also at the hearing, the ESM confirmed the view expressed by the Managing Director in his letter to the Appellant of 22 June 2022, that Article 5 bis(3) SR does not grant the staff member "ample time to prepare their arguments or defence, or even consult a lawyer". While a ruling on the question is not strictly speaking necessary in the present case, this view appears to the Tribunal to contradict the right to be heard, which is generally accepted to be a basic principle of administrative law in relations between international organisations and their staff. It is difficult to conceive of a situation in which this principle would be respected by affording a staff member an insufficient amount of time to prepare their arguments and denying them any possibility of taking expert advice.

28. It results from the above that the first branch of the *petitum* is inadmissible.

<u>As to the second branch of the *petitum*</u>

29. As this branch of the <u>*petitum*</u> is introduced by the words "…the Appellant respectfully requests", and given that all the other requests of the Appeal are manifestly addressed to the

Tribunal, this second branch, formulated as "Disciplinary proceedings for the illegal action of the Managing Director", must also be interpreted as requesting the Tribunal itself to initiate disciplinary procedures against the Managing Director.

30. Given however that the jurisdiction of the Tribunal is clearly described in Article 2 of its Statute and that the launching of disciplinary proceedings falls manifestly outside such jurisdiction, it is obvious that the second branch of the *petitum* is manifestly inadmissible. In this context, the Tribunal also notes that, invited during the hearing to identify the legal basis of this branch of his *petitum* concerning the launching of the disciplinary proceedings against the Managing Director, the Appellant only replied that he was leaving the question of the admissibility of the said branch of the *petitum* "to the wisdom of the Tribunal".

31. In addition, contrary to the Appellant's complaints against his YER, which were briefly mentioned in his request for an advisory opinion (albeit, as explained above, in paras. 17-26, in a non-admissible manner), the said request does not contain anything which could be interpreted as implying a claim for the initiation of disciplinary proceedings against the Managing Director. Therefore, the second branch of the *petitum* does not satisfy the requirement of the exhaustion of the pre-contentious procedure before the Advisory Committee and this failure to satisfy to the said requirement constitutes an additional ground of inadmissibility.

32. As a result, the second branch of the *petitum* is also inadmissible.

<u>As to the third and fourth branches of the *petitum*</u>

33. Notwithstanding the withdrawal of the reassignment decision by the Managing Director, the Appellant seeks compensation for moral damages of an amount of 30.000 euros and for material damages of an amount of 38.700 euros. He explains how these amounts are calculated.

34. However, these two branches of the *petitum* are also inadmissible for the failure of the Appellant to comply with the requirement of prior request for an advisory opinion. Not only does the request of 13 April 2022 not contain anything on compensation, for the hypothesis of a future finding of illegality of the contested decision, but even after its withdrawal by the Managing Director, the Appellant omitted to bring his demands before the ESM prior to having recourse to the Tribunal.

35. At the hearing, the Appellant, relying on the recent judgment by the EU General Court in case T-296/21 *SU v. AEAPP* (EU:T:2022:808), claimed that, as, firstly, the legality of the temporary reassignment decision had been brought before, and decided by, the Advisory Committee, and, secondly, his pecuniary claims aimed at redressing damages arising precisely from the said decision, he was admissible in bringing those claims directly before the Tribunal.

36. It is true that there exists in EU staff law a number of rulings (often referred to as "Oberthür case-law", C-24/79), according to which the EU jurisdictions may award compensation of their own motion, i.e. without requirement for the interested party to make the claim in their applications and pleadings, let alone in the pre-contentious procedure; and it is also true that the abovementioned *SU v. AEAPP* case, explicitly mentioning the need of a "complete

solution" of disputes brought before the competent judge, seems to follow this line, albeit with regard to the specific question of the damages for loss of chances.

37. However, and without prejudice to the question as to what extent the EU case-law may serve as a source of inspiration for the adjudication of cases by this Tribunal, it results from the judgments of the so-called "Oberthür case-law" that the award of compensation accompanies the finding of illegality of a supposed harmful act, made in the same judgment. Clearly this is not the case here, since the reassignment decision is not litigious before the Tribunal but was withdrawn by the ESM long before the filing of the Appeal.

38. In addition, and irrespective of this particular aspect of the present case, the Appellant's argument not only fails to correctly apprehend the particular importance attached by the ESM legislature to the procedure before the Advisory Committee, as a prerequisite for the seizure of the Tribunal, but also ignores the significant difference between this latter ESM staff law procedure and the pre-contentious procedure of Article 90(2) of the EU Staff Regulations.

39. Indeed, by recently modifying the rules applicable to the adjudication of ESM staff cases, so as to make recourse to Tribunal dependent on the exhaustion of a preliminary procedure before an internal ESM organ, competent to deliver to the Managing Director opinions from which the latter can only deviate by providing reasons, the ESM legislature clearly indicated its strong desire that no case be brought before the Tribunal without the prior exhaustion of such preliminary procedure. It is *a fortiori* so, since the ESM legislature did not limit themselves to providing, in general terms, an internal procedure, but chose to regulate extensively the composition and operation of the Advisory Committee, both in the Staff Rules and in an *ad hoc* detailed text, that is the "Terms of Reference and Rules of Procedure of the Advisory Committee".

40. In addition, in opting for a "joint" committee, with equal participation of members designated by the Managing Director and by staff representatives, the legislature sought to guarantee that the procedure and the decisions taken would be objective in character. In this context, the Tribunal notes that the Advisory Opinion delivered in the present case contains a thorough examination of the dispute, with regard both to the facts and to the legal considerations and reaches a conclusion which led the ESM to withdraw the contested decision.

41. In view of the above, and as the request for an advisory opinion was intended solely to cause the temporary reassignment decision to be set aside, without formulating any pecuniary claims, the presentation of such claims for the first time before the Tribunal is inadmissible.

42. At the hearing, the Appellant also argued that his claim in damages was "inherently included'' in his request for an advisory opinion.

43. This is an arbitrary allegation, not supported by any element of the file and, in particular, of the request for an advisory opinion. Furthermore, it runs contrary to the principle of fair trial and to the ESM rules on the procedure before the Advisory Committee; indeed, accepting that a claim may be formulated only ''inherently'', compromises for obvious reasons the rights of defence of the Respondent party and makes it impossible for the Advisory Committee to fulfil its function, since it will be unable to correctly assess the possible validity of the supposed claim.

44. The third and fourth branches of the *petitum* are, therefore, also inadmissible.

45. In the light of its above decisions on all the branches of the Appeal's *petitum*, it is not necessary for the Tribunal to rule on the admissibility of the written elements provided by the Appellant concerning issues of whistleblowing and transparency and related matters on which it had previously reserved judgment.

As to the fifth branch of the *petitum* – legal costs

46. The Appellant requests reimbursement of all the legal costs incurred and of his counsels' fees. However, as the Appeal is rejected, Article 14 of the ESMAT Statute does not allow the Tribunal to award the costs requested and it would therefore be appropriate for the Tribunal to order each party to bear its own costs.

For these reasons, the Tribunal

Rejects the Appeal as inadmissible.

Orders each party to bear its own costs.

Virginia MELGAR, President
(signed)

Harissios TAGARAS
(signed)

Kieran BRADLEY
(signed)