

ADMINISTRATIVE TRIBUNAL

ORDER 1/2024

of 2 April 2024

**Application for Interpretation of Judgments in Cases ESMAT 2/2022 and ESMAT 1/2023 and
for Guidance in Implementation of Judgment in Case ESMAT 1/2023**

Concerning the submissions filed by the Appellant AC on 21 February 2024¹ and by the ESM on 1 March 2024

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 Celia GOLDMAN and Gerhard ULLRICH,

Adopts the present **ORDER**

I. FACTS AND PROCEDURE

1. On 30 November 2023, the Tribunal rendered Judgments in Case ESMAT 2/2022 (*AC, Appellant v. European Stability Mechanism*) and Case ESMAT 1/2023 (*AC (No. 2), Appellant v. European Stability Mechanism*).
2. Each Judgment noted that the oral hearing in the two Appeals had been conducted jointly, given that the two cases raised common issues of law and fact. Each Judgment further stated: “The delivery of the judgment in the present appeal has been delayed for reasons beyond the control of the Tribunal.”
3. In Case ESMAT 2/2022, the Tribunal considered the Appellant’s challenge to the 2021 performance appraisal rating. The Judgment ordered that the impugned decision be set aside and that the ESM bear the reasonable costs incurred by the Appellant in the proceedings.

¹ Although the Appellant dates the request as 20 January 2024, it was filed with the Registry on 21 February 2024 and refers to exchanges between the Appellant and the ESM through 20 February 2024.

4. In Case ESMAT 1/2023, the Tribunal considered the Appellant's challenge to the decision that the fixed-term contract would be allowed to expire. The Judgment ordered:

“1. The impugned decision of 30 January 2023 is set aside.

2. The ESM shall pay the Appellant material damages in the amount of one year's salary and allowances.

3. The ESM shall pay the Appellant moral damages in the amount of 50.000 Euros.

4. In accordance with Article 14(3) of the Tribunal's Statute, the ESM must bear the reasonable costs incurred by the Appellant in the proceedings.”

5. On 21 February 2024, following post-Judgment exchanges between the parties in which the Tribunal was not involved, concerning the implementation of the Judgment in Case ESMAT 1/2023, the Appellant filed with the Tribunal a “request for clarification” of the Judgments in both cases. In particular, the Appellant: (1) requests “clarification on what were the reasons that delayed the delivery” of the Judgments; and (2) asserts that the “ESM is contesting the directive to pay one year's salary and allowances” insofar as the Appellant disputes the manner in which the ESM has responded to that element of the Judgment. The Appellant accordingly seeks the Tribunal's “guidance and clarification.” The Appellant does not dispute the ESM's implementation of the other elements of relief prescribed by the Judgment.
6. On 1 March 2024, the ESM filed with the Tribunal a submission stating that the Appellant's first point “relates to a question that is not within the remit of the ESM.” As to the Appellant's second point, the ESM's submission “seeks guidance on the meaning of the terms ‘one year's salary and allowances’ contained in the Judgment in Case ESMAT 1/2023.”
7. Each party, in its covering email to the Registry or in the text of its submission, refers to Article 23 (Interpretation and Implementation of Judgments) of the Tribunal's Rules of Procedure.

II. APPLICABLE LAW

8. Article 10(1) Statute, provides:

“If the Tribunal finds that the decision by the Managing Director, as referred to in Article 2(2) of this Statute, is illegal, wholly or in part, the ESM shall be required to take the necessary measures to comply with the judgment of the Tribunal. If agreed between the Appellant and the ESM, the Tribunal shall indicate these measures.”

9. Article 11(2) Statute, provides:

“Judgments of the Tribunal shall be final and without further appeal.”

10. Article 12(2) Statute, provides:

“The Tribunal may interpret or rectify any judgment whose terms appear obscure or incomplete or which contains a typographical, clerical or arithmetical error.”

11. Article 23 Rules of Procedure, provides:

“1. In accordance with Article 12(2) of the Statute, in the event of a dispute as to the meaning of a judgment whose terms appear obscure or incomplete, any party to the judgment may at any time make a reasoned request for an interpretation by the Tribunal.

2. In accordance with Article 10(1) of the Statute, in the event of a dispute as to the measures necessary to implement a judgment, both parties may agree to submit a reasoned request in that respect to the Tribunal.

3. Any such interpretation or guidance for its implementation shall be given by reasoned order of the Tribunal.”

III. CONSIDERATIONS

12. The judgments of the Tribunal are final and without further appeal (Art. 11 (2), Statute of the Tribunal). They carry the authority of *res judicata*. An application for rectification, for interpretation, implementation or revision is permissible only under very restricted grounds (Art. 22, 23 and 24, Rules of Procedure of the Tribunal). It is widely recognized that the authority granted a tribunal to render an interpretation of judgment is a narrowly drawn exception to the finality of judgments. See *Elkjaer et al. (No. 2), Applicants v. International Monetary Fund, Respondent (Application for Interpretation of Judgment No. 2023-1)*, IMFAT Order No. 2023-1 (August 30, 2023), para. 11.

13. This is the first time that this Tribunal has been presented with a request for interpretation of a judgment or for guidance in the implementation of a judgment. Interpretation of judgment is authorized by Article 12(2) of the Statute when a judgment’s “terms appear obscure or incomplete.” Article 23(1) of the Rules of Procedure elaborates that requests for interpretation may be made “in the event of a dispute as to the meaning of a judgment whose terms appear obscure or incomplete.”

14. Thus, there are two requirements for an admissible request for interpretation of judgment. First, its terms must “appear obscure or incomplete,” and, second, there must be a “dispute as to the meaning” of the judgment.

15. Article 23(2) of the Rules of Procedure addresses the circumstance of a “dispute as to the measures necessary to implement a judgment” and envisages that in the event of such dispute “both parties may agree to submit a reasoned request” to the Tribunal.
16. Turning first to the Appellant’s request for clarification of the Tribunal’s statement, found in each of the Judgments in Cases ESMAT 2/2022 and 1/2023, concerning delay in the delivery of the Judgments, the Tribunal decides that this request must be dismissed as inadmissible. There is no dispute between the parties as to the meaning of the cited terms. Nor are these terms “obscure or incomplete.” Moreover, the Tribunal’s comment in relation to the timing of the delivery of the Judgments has no operative effect; it does not bind the parties in any way. The Appellant’s request is a request to expand on the Judgments, which is not within the authority of the Tribunal to undertake, given the finality of its judgments.
17. Turning next to the requests, which both parties have submitted to the Tribunal, for clarification of the meaning of “one year’s salary and allowances,” as it is used in the relief prescribed by the Judgment in Case 1/2023 (“2. The ESM shall pay the Appellant material damages in the amount of one year’s salary and allowances.”), the Tribunal decides as follows.
18. The parties’ request for clarification of the meaning of “one year’s salary and allowances” is admitted because the argumentation in their respective submissions demonstrates that there is a “dispute as to the measures necessary to implement a judgment” (Rules of Procedure, Article 23(2)) and the Tribunal has authority to resolve such dispute. In this regard, “[t]he ability of the tribunal to interpret its own judgments where the parties are unable to discern the intended meaning would help to ensure that judgments are given effect in accordance with the tribunal’s findings and conclusions.”²
19. The Tribunal recalls that in its Judgment in Case ESMAT 1/2023, it explained:
 - “47. . . . The illegality of the decision of 7 October 2022 does, however, not lead to a postponement of the end of the fixed-term contract on 15 March 2023.
 48. The Appellant had, however, lost by the illegality of the decision of 7 October 2022 a valuable opportunity to improve performance and demonstrate the suitability for a renewal of the contract from 15 March 2023 onwards. . . .
 49. The loss of this opportunity must be fairly redressed by ordering the ESM to pay the Appellant the salary and allowances which the Appellant would have received by

² Reports of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund (1992), and on Amendments to the Statute of IMF Administrative Tribunal (2009 and 2020), p. 42.

granting sufficient time to improve performance. The negative ratings in the performance appraisal report for 2021 and the Mid-year appraisal for 2022 are commensurate to a period of one year to demonstrate the suitability for the post. The ESM is therefore, ordered to pay to the Appellant the amount of one year's salary and allowances."

It was on this basis that the Judgment's Decision included the following order: "2. The ESM shall pay the Appellant material damages in the amount of one year's salary and allowances."

20. The Appellant seeks an interpretation of the terms "one year's salary and allowances" that would encompass—in addition to the already implemented payment of 12 months' salary and expatriation allowance—the payment of: (a) one month of paid holidays; (b) the employer's part of contributions to the health care insurance; and (c) the employer's contributions to the pension plan.
21. The Appellant's employment with the ESM terminated on 15 March 2023. The relief granted by the Tribunal in its Judgment in Case ESMAT 1/2023 does not include either the extension of the former contract or the grant of a new contract of employment for a further year. Rather, it provides for "material damages *in the amount of* one year's salary and allowances." (Emphasis added.) For the reasons set out below, the additional relief that the Appellant seeks is not provided for by the Tribunal's Judgment.
22. The right to grant holidays presupposes the existence of an employment relationship and, in principle, a work performance which could be expected from the employee. Since the 12 months' salary is granted as a damage without any employment relationship, the Appellant is not entitled to the payment of one additional month of salary for holidays not taken.
23. The Appellant further requests the payment of the employer's part of the contributions to the health care insurance and the employer's contributions to the pension plan on the basis of the damages for 12 months' salary and allowances. The ESM is right in finally not deducting the amount of the personal mandatory contributions of the Appellant from the 12 months' salary since there are no employment relations anymore for the payment of health care and social security contributions. The payment of the 12 months' salary is a pure damages payment. The same holds true for the ESM's contributions to these plans. The ESM is not under an obligation to pay any contributions to the health care insurance and the pension plan, as there is no employment contract providing the legal basis for such payments.

Decision

For these reasons:

1. The Appellant's request for interpretation of the Tribunal's Judgments in Case ESMAT 2/2022 and Case ESMAT 1/2023 is dismissed as inadmissible insofar as it requests clarification of the statement concerning delay in the delivery of the Judgments.
2. The parties' request for guidance in the implementation of the Tribunal's Judgment in Case ESMAT 1/2023 is admitted insofar as the parties dispute the meaning of those operative terms of the Judgment that prescribe that the ESM "shall pay the Appellant material damages in the amount of one year's salary and allowances."
3. The additional relief that the Appellant seeks, that is, for one month of paid holidays and the employer's contributions to the health care insurance and pension plan, is not provided for by the Tribunal's Judgment. The Appellant's assertion that the "ESM is contesting the directive to pay one year's salary and allowances" by its implementation of the Judgment in Case ESMAT 1/2023 is accordingly denied as unfounded.

Virginia MELGAR (President)

(signed)

Celia GOLDMAN

(signed)

Gerhard ULLRICH

(signed)