EUROPEAN STABILITY MECHANISM Luxembourg
ADMINISTRATIVE TRIBUNAL

JUDGMENT

of 9 July 2025

In Case ESMAT 1/2024

AC (No. 3), Appellant, former member of staff of the European Stability Mechanism

represented by Héloïse Bajer-Pellet, member of the Paris Bar,

v

European Stability Mechanism, Respondent

represented by João Sousa Gião, General Counsel of the European Stability Mechanism, and Rémi Cèbe, member of the Paris Bar

Concerning the appeal lodged by the Appellant on 13 August 2024 against the "Final Decision of the Managing Director of the European Stability Mechanism (ESM)" of 2 July 2024, and following the written procedure and the oral hearing held on 4 March 2025

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, Haris TAGARAS, Vice-President of the Tribunal, and Kieran BRADLEY, Judge

Renders the present **JUDGMENT.**

Considering that on 20 September 2024 the Appellant made a reasoned request for anonymity pursuant to Article 19(2) of the Rules of Procedure, to which the Tribunal has acceded,

Having examined the written submissions and decided in conformity with Article 8(3) of the Statute to hold an oral hearing *in camera*,

Noting that the delivery of the present judgment has been delayed, first, by the exceedingly limited possibilities offered to the Tribunal of holding a hearing in the early months of 2025, second, by the failure of the Appellant to comply with Article 6(1), 2nd subparagraph of the Statute and, third, in order to accord the parties a sufficient time to examine the possibility of reaching an amicable settlement,

Further noting that no such settlement has been reached,

I. FACTS and PROCEDURE

1. Facts relevant to this case may also be found in the Judgments in Cases ESMAT 2/2022, *AC v European Stability Mechanism* and *AC (No. 2) v European Stability Mechanism*, both of 30 November 2023.

2. At the time of the facts giving rise to the present proceedings, the Appellant was a member of staff of the European Stability Mechanism ("ESM") with a fixed-term contract. On the basis of complaints made informally by the Appellant of harassment by their line manager, including in the Appellant's 2022 PDS Mid-Year Review, the Head of the Human Resources reported the Appellant's allegations to the ESM Compliance Officer on 1 July 2022. On 4 October 2022 the Compliance Officer informed the Head of Human Resources that "the case was closed as one that could not be investigated due to the fact that the victim of the alleged behavioural misconduct did not provide any evidence, nor was available for an interview with the investigator".

3. On 4 November 2022, the Appellant submitted a whistleblowing report to the Compliance Officer. According to the Appellant, the report sought "to denounce a series of serious misconduct [of which the Appellant] had been a victim … including acts of coercion, collusion, obstruction, discrimination, psychological harassment and bullying, and retaliation, involving staff members and external individuals".

4. On 22 December 2022, an external investigator was appointed to investigate the Appellant's whistleblowing report.

5. The Appellant submitted "complementary information and evidence" regarding their allegations on 27 January 2023.

6. On 27 May 2023, the Appellant received the draft investigation report, on which the Appellant provided comments on 14 June 2023. According to the Appellant, these comments "highlighted serious irregularities in the internal investigation process".

7. The Appellant received the investigation report on 22 August 2023 (the "first [investigation] report"). The first report rejected the Appellant's allegations of harassment, concluding that "[i]t could not be said, on the basis of the facts and evidence obtained by the inquiry, that, as alleged by [the Appellant], ESM failed to provide [the Appellant] with an environment free from integrity violations and/or misconduct".

8. The first investigator also observed, however, that the Appellant's line manager had behaved improperly, and that the Appellant's privacy had been breached in relation to an incident referred to as the "Operational Risk episode". In his view, the "ESM should have, but apparently did not, take action in this regard" (sic). He further noted "a few other minor episodes" where the Appellant's line manager's conduct in relation to the Appellant was "questionable"; he found that one episode was "capable of being regarded as harassment if combined with other such episodes," though there was not "a sufficient number of repeated or systematic acts over a period" to justify "a finding of harassment against" the Appellant's line manager.

9. The Managing Director adopted feedback on the first investigation report on 22 November 2023, which was notified to the Appellant on 24 November 2023 (the "Decision of 22 November 2023").

10. In that Decision, the Managing Director concluded that the Appellant's allegations were "not credible and [had not been] substantiated by clear and convincing evidence and that no conclusion of collusion, coercion, obstruction, bullying, discrimination, psychological harassment, including institutional harassment, or retaliation, c[ould] be made" in this case. He added that he had also "decided that no disciplinary proceedings pursuant to Article 23 of the Staff Rules shall be initiated against the [Appellant's line manager] in relation to the alleged misconduct".

11. On 8 January 2024, the Appellant contested the Decision of 22 November 2023 and requested an Advisory Opinion claiming the following remedies:
    - "Appropriate evaluation of the several serious misconducts reported behaviours.
    - Disciplinary measures against the responsible and involved parties.
    - Update of the ESM Grievance procedures, addressing identified flaws.
    - Formal written apology.
    - Compensation for the severe violations of her integrity, years lost (4 and counting) and additional medical and other expenses she incurred on which otherwise would not have happened, unreceived bonuses, and unpursued training, amounting to 1,000,000 EUR."

12. The Advisory Committee delivered its Advisory Opinion to the Managing Director on 21 May 2024. Amongst the findings of the Advisory Committee are the following:

    - "[t]he failure [of the investigator] to hear the two witnesses requested by the [Appellant] during the investigation constituted a breach of due process";

- “[t]he failure of the investigator to seek an interview with the occupational doctor and clarification of the ‘colleague’ the doctor had consulted …and to seek copies of emails and other possible records of communication … constituted a breach of the duty to perform a thorough investigation of the [Appellant’s] allegation of collusion between the ESM and the occupational doctor”;
- “[t]he failure of the investigator to seek clarifications from the [Appellant] on the nature of her allegation of collusion between the ESM and the Mediator and [written evidence of such collusion] … constituted a breach of the duty to perform a thorough investigation of the [Appellant’s] allegation of collusion between the ESM and the Mediator”;
- “[t]he members of staff who were interviewed by the investigator but requested to remain anonymous … were under the obligation to cooperate with the investigation, their interviews should have been used as evidence … and their interview transcripts should have been communicated to the [Appellant]. The failure to do so constituted a breach of the adversarial principle”;
- “[t]he investigation is incomplete with regards to the [Appellant’s] allegations against other members of staff: the CFO, and the Head of HR, and the Complainant’s team lead”;
- “[t]he investigator considered only the definition of Psychological harassment and did not assess the facts, in particular the facts related to the operational risk incident, against all types of [ESM rules of conduct] … and was therefore incomplete”.

13. The Advisory Committee in its conclusions noted that:

> “the investigation of the whistleblowing reports submitted by [the Appellant] … is found by the Panel to be incomplete and not respecting the principle of due process, the adversarial principle, and the duty of the organisation to conduct a prompt and thorough investigation.
>
> As a consequence, the challenged Decision of 22 November 2023, in so far as it was taken on the basis of an incomplete and flawed investigation report, is also flawed and should be set aside. Given the incompleteness of the investigation, neither the M[anaging] D[irector] nor the Panel [is] in a position to decide whether institutional harassment against the [Appellant] is constituted.
>
> Since the ESM has not completely and thoroughly investigated the [Appellant]’s claim for institutional harassment, the case should be remitted to the ESM so that the M[anaging] D[irector] may, within three months of the notification of this advisory opinion, take a new decision, including on whether institutional harassment is constituted, on the basis of the conclusions of a complemented,

objective, impartial and thorough investigation of all alleged misconducts reported by the [Appellant]."

14. The Committee rejected the Appellant's requests seeking respectively disciplinary measures against other members of staff, an update of the ESM grievance procedures, an apology, and the payment of compensation for violation of integrity, missed bonuses and training. The Committee however took the view that "the [Appellant had] suffered moral injury, which should be fairly redressed by the ESM by awarding [the Appellant] compensation in the total amount of [EUR] 4,000."

15. On 29 May 2024, the Appellant submitted comments on the Advisory Opinion.

16. The Managing Director notified his final Decision to the Appellant on 2 July 2024 (the "[contested] Decision"). While noting that he did not "fully shar[e] the view of the Advisory Committee", the Managing Director decided that "the investigation should be complemented by a new independent external expert" who would be instructed "to complete the complementary investigation within three months of their appointment, subject to an eventual extension if required by the investigator on the basis of substantiated reasons".

17. The latter part of the third paragraph of the letter, which starts with the word "**Second**" (emphasis in original), reads as follows:

"[t]he new investigator shall therefore complement the investigation on the following specific points:

i) Hear the two witness you requested and draw any relevant conclusions from their hearing. I however wish to put on record that my decision is without prejudice to the provisions of the ESM Code of Conduct, or the provisions of the relevant termination agreements, to the extent that they are not related to this hearing, and irrespective of the fact that you still have not sufficiently indicated the extent to which those witnesses would provide crucial and exclusive evidence;
ii) Investigate thoroughly the claims of collusion between the ESM and the occupational doctor, and between the ESM and the Mediator by collecting (and being provided with) all possible facts and evidence available;
iii) Consider your allegations against the other members of staff mentioned in your whistleblowing reports; the CFO, the Head of Human Resources and Organisation, and your team lead, as well as 'institutional gaslighting' if deemed appropriate by the new investigator, while taking into account the extent to which the initial investigation already covered those allegations and needs to be complemented. I wish to note that I do not agree to widen the allegations to myself, the former General Counsel, the Head of Internal Unit, and the Compliance Officer, as the scope of your allegations needs to remain within that of your two whistleblowing reports. I also do not agree with your

request that ‘be added the facts that have occurred since, during the investigation and the following proceedings’, as this would lead to an indefinite challenge of the actions and decisions of the ESM, which may be challenged in accordance with the ESM Staff Rules, though, but respecting the prescribed procedure and time limits;

iv) Consider the performance records of your line manager, while being under the obligation to duly justify why this information is needed; [and]

v) Consider any relevant established fact in the context of the above, particularly the facts related to the operational risk incident, against all types of Integrity Violations and Behavioural Misconduct, foreseen in the ESM Code of Conduct and alleged in your whistleblowing reports”.

18. In the paragraph starting “**Third**” (emphasis in original), the Managing Director rejected the other requests of the Appellant concerning respectively the imposition of disciplinary measures on other members of staff, the updating of the ESM grievance procedures, the awarding of compensation for “violation of integrity, for additional expenses, missed bonuses and training” in an amount of EUR 1,000,000. He also rejected the view of the Advisory Committee that the time taken for the first investigation was “excessive”. While he did not “consider that an apology [was] warranted or that moral damages [were] due”, he nonetheless decided that the Appellant should “be compensated with an amount of [EUR] 4,000 for the additional time that will be required to carry out the complementary investigation”.

19. In the paragraphs starting “**Fourth**”, “**Fifth**” and “**Lastly**” (emphasis in original in each case), the Managing Director commented on other aspects of the Advisory Committee proceedings which are not before the Tribunal in the present Appeal.

II. THE APPEAL AND THE PROCEDURAL EXCHANGES

20. On 13 August 2024, the Appellant lodged an Appeal before the Tribunal (the “Appeal”).

21. The Appellant has challenged the contested Decision on a number of substantive grounds in support of the claims that the “new investigator’s mission … not be limited to specific points” and that “[t]he persons subject to those allegations … be excluded from the proceedings, including the Managing Director”. The Appellant claims that, “the impugned decision should be set aside in so far as it limits the new investigator’s mission to specific points and excludes facts related to the institutional harassment and individual misconducts reported in the whistleblowing report, including those which arose in the subsequent proceedings and which form part of the institutional harassment suffered”.

22. In the Appellant’s view, “[i]t is not for the Managing Director to dictate or limit the steps to be taken”. Alternatively, the Appellant argues that the contested decision is unclear in this regard, and that the Managing Director should “clarify his comments”.

23. Second, the Appellant contends that, as the Managing Director is himself the object of certain allegations of misconduct, he should "clearly relinquish his decision-making powers for the subsequent proceedings". The same is true, in the Appellant's contention, as regards "the persons usually in charge of the whistleblowing proceedings who are targeted either individually or as being part of the institutional harassment, namely, the Head of Human Resources and Organisation, the General Counsel, the Head of Internal Audit [and] the Compliance Officer."

24. Third, the Appellant argues that "institutional gaslighting is within the scope of the misconducts denounced", including misconduct the Appellant allegedly suffered during the course of the proceedings which the Advisory Committee took into account in its opinion.

25. The "Conclusions" of the Appeal read as follows:

> "[the Appellant] requests the annulment of the decision of the ESM Managing Director of 2 July 2024.
>
> The Tribunal is requested to rule itself on the reality of the occurrence of serious behavioural misconducts reported in the whistleblowing report of 4 November 2022, completed on 27 January 2023 and the subsequent misconducts that occurred during the related proceedings held by ESM, or, if need be, to adopt any such measure as it deems necessary to that aim.
>
> Alternatively, the Tribunal is requested to judge that:
>
> - The new investigator's mission shall not be limited to specific points but include all relevant acts, including investigations on the facts that arose during the proceedings that are linked to the institutional harassment and individual misconducts reported in the whistleblowing report;
> - The persons subject to those allegations shall be excluded from the proceedings, including the Managing Director.
>
> In any case, the Appellant shall be compensated for … moral damages and be awarded [EUR] 1,000,000;
>
> The Appellant shall be reimbursed in totality of [the] legal costs."

26. On 17 September 2024, the Appellant informed the Tribunal that they had notified the ESM of the filing of the Appeal in accordance with Article 6(1), 2nd subparagraph, of the Statute.

27. The ESM lodged its Reply on 6 November 2024 within the time limit set by Article 14(1) of the Rules of Procedure. The ESM contends in essence that the Appeal is premature

as the Managing Director would take a "final decision" on the Appellant's allegations of misconduct following the conclusion of the second investigation exercise.

28. By letter dated "9 September 2024", which was received at the Tribunal on 9 December 2024, the Appellant requested authorisation to submit a Rebuttal.

29. By letter of 11 December 2024, the Tribunal authorised the Appellant to submit a Rebuttal limited exclusively to the issue of the admissibility of the appeal which had been challenged by the ESM in part 4 of its Reply. The Appellant was instructed not to deal in the Rebuttal with other legal matters or any matters of fact other than those which are directly relevant to the issue of the admissibility of the Appeal.

30. On 26 December 2024, the Appellant submitted a Rebuttal.

31. The ESM submitted a Rejoinder on 17 January 2025 and, on the same date replied to a number of questions put to it by the Tribunal and provided certain information the Tribunal had requested.

32. At its request, the Tribunal was provided on 3 March 2025 with two reports prepared by the second investigators, which the ESM had already received on 20 February 2025, as well as the Appellant's preliminary comments on the reports.

33. The Tribunal held a hearing *in camera* in Luxembourg on 4 March 2025.

III. LEGAL BACKGROUND

34. Article 2(2) of the Statute in relevant part reads as follows:

> "an appeal to the Tribunal shall only be admissible if it is directed against an express or implied decision of the Managing Director pursuant to Article 26(3) of the Staff Rules rejecting, wholly or in part, an internal appeal".

35. Article 24(2)(a) of the Staff Rules reads as follows:

> "The Advisory Committee is competent to … [d]eliver an advisory opinion to the Managing Director on any individual dispute related to an individual decision affecting the Complainant and that the latter considers as adverse to his rights."

36. Article 26(3) of the Staff Rules reads in relevant part as follows:

> "The Managing Director shall notify his or her final decision to the Complainant within 30 days of the advisory opinion".

IV. APPELLANT'S REQUEST FOR AUTHORISATION TO SUBMIT FURTHER WRITTEN EVIDENCE

37. Prior to the hearing, by letter of 19 February 2025 the Appellant requested authorisation to submit three documents for inclusion in the case file, that is:

- an "expert written statement" of 9 February 2025 concerning the so-called "operational risk" incident;
- a psychological report of 17 February 2025 on the Appellant's state of mental health, and
- a medical report, which at the time had not yet been drawn up, on the Appellant's state of general health.

38. The Tribunal authorised the Appellant to submit the first two documents, without prejudice to their admissibility on which it would decide in the present judgment, after giving the parties the opportunity to state their respective positions. It did not authorise the submission of the third, then non-existent, document.

39. Regarding the first document, the Tribunal notes that the Appellant expressly raised the "operational risk" incident in the whistleblowing report of 27 January 2023 and that, in order to be taken into consideration, such a "expert written statement" should in principle have been presented in evidence prior to the conclusion of the first investigation. It is obvious beyond argument that, in a decision dated 2 July 2024, the Managing Director could not have taken account of a statement which was established seven months later. The Appellant has, moreover, not provided any reason for the delay in organising for the preparation of such a statement.

40. The only possible relevance of the expert written statement would be if the Tribunal were to take it upon itself to rule on the merits of the Appellant's misconduct allegations. For reasons set out below, this is not a possibility the Tribunal need entertain in the present case.

41. Regarding the second document, the psychological report concludes that the Appellant was, on 6 February 2025, suffering from "a depressive mood" "[d]ue to the renewed legal proceedings for workplace bullying in Luxembourg", and that a "timely conclusion of the judicial process could help [the Appellant] to better focus on [their] recovery".

42. The initiation of legal proceedings in August 2024 results from a decision of the Appellant, not the ESM, and the reported "depressive mood" of the Appellant on 6 February 2025 is not directly relevant to the validity of the contested Decision.

43. The Tribunal holds both documents to be inadmissible.

V. ADMISSIBILITY OF THE REBUTTAL

44. In its Rejoinder, the ESM has argued that the Rebuttal is inadmissible as having been submitted out of time. In its view, as the Tribunal's authorisation was notified to the Appellant on 11 December 2024, the Rebuttal should, in accordance with Article 15(2) of the Rules of Procedure, have been submitted within 14 days, expiring on 26 December 2024, whereas it was in fact submitted on 31 December 2024.

45. Article 25(2) of the Rules of Procedure provides that "[i]f the last day [of a time limit] is a Saturday, a Sunday or a public holiday observed by the ESM, the relevant time limit shall expire at the end of the next working day of the ESM".

46. According to "General Administrative Order SG/MD/2023/019", 26 December 2024 was a public holiday observed by the ESM, as were 27, 30 and 31 December 2024, while 28 and 29 December were respectively a Saturday and a Sunday. At the hearing, the ESM acknowledged that 1 January 2025 was also a public holiday observed by the ESM.

47. It follows that, far from being late, the Rebuttal was submitted a day earlier than was required under the Rules of Procedure.

48. The ESM's inadmissibility argument is all the more surprising given that, at 16h00 on 11 December 2024, the ESM received a copy of an email from the Appellant's legal representative to the secretariat of the Tribunal seeking confirmation that the time limit for the submission of the Rebuttal was 2 January 2025 and referring to the ESM rule on the calculation of time limits which expire on public holidays. The ESM was therefore put on notice, by means of a written document which is of direct relevance in the present proceedings, of the relevant provisions concerning the calculation of the time limit for the submission of the Rebuttal.

49. At the hearing, the ESM's legal representative informed the Tribunal that he had not raised the tardiness of the Rebuttal in his oral presentation because he had "some deontology" but affirmed, deontology notwithstanding, that "technically speaking, [the Rebuttal] was out of time". He was, however, unable to respond to a question from the Tribunal regarding the rule which applied at the ESM when the last day of a time limit fell on a public holiday: in his own words, "I don't know because I didn't look at this".

50. In so far as the ESM was relying in this context on Article 15(2) of the Rules of Procedure, it beggars belief that the ESM and its legal representatives would not be familiar with a provision located ten articles later, that is, Article 25(2) of the same Rules of Procedure. The ESM is not here relying, for example, on a mistake in calculating the time limit for the submission of the Rebuttal. Instead, its position is tantamount to relying on a complete failure to take the relevant rule of procedure into account, as its legal representative acknowledged in open court.

51. It is no banal matter to challenge the admissibility *ratione temporis* of a written pleading of an opposing party. In the present case, as the ESM had raised the admissibility of the Appeal in its Reply, the Rebuttal provided the Appellant with the only opportunity to respond in writing on an issue on which the outcome of the entire Appeal could, and in the ESM's view should, have depended. Moreover, the ESM had ample opportunity during the preparation of the hearing to verify the soundness of their position and withdraw this argument but failed to do so. The ESM also failed to withdraw the argument during the course of the hearing. The Tribunal was thus obliged to deal with it in the present judgment.

52. In insisting on a legal argument which appears never even to have been properly considered by the persons responsible, the ESM has wasted the time and effort of both the Appellant and the Tribunal in a manner which does no honour to the organisation.

VI. PRELIMINARY REMARKS

53. Exceptionally, the parties are at one in considering that, with regard to the Appellant's allegations of misconduct as set out in the whistleblowing reports, the contested Decision should not have any legal effect and that the Managing Director still needs to take a decision on these allegations.

54. This does not mean that the proceedings are moot. The Appellant argues that the contested Decision should be annulled, while the ESM contends on the contrary that the contested Decision may not be annulled, as it does not comprise the Managing Director's definitive position on these allegations, and that he will in any case take a decision when in possession of the conclusions of the second investigation exercise.

55. Moreover, in the paragraph starting "**Third**" (emphasis in original), the Managing Director rejects several ancillary requests presented by the Appellant, that the Managing Director initiate disciplinary proceedings against certain staff members, update the ESM's grievance procedures, provide the Appellant with a formal written apology and award the Appellant monetary compensation in the amount of one million EUR. In regard to these matters, the contested Decision may prima facie be considered as the final decision of the Managing Director.

VII. ADMISSIBILITY

A. The Appellant's allegations of misconduct

56. The ESM has argued that the present appeal is inadmissible on the grounds that, first, as the Decision of 22 November 2023 has been "*de facto* and *de jure* set aside by the Contested Decision", it does not adversely affect the Appellant and, second, the contested Decision does not either "partly [ ]or wholly reject … the Appellant's requests [which] will be reviewed *de novo* by the Managing Director after receipt of the conclusions of a new independent external investigator … pursuant to the explicit recommendation of the Advisory Committee".

57. Though given the opportunity in the Rebuttal to respond to the ESM's argument that the contested Decision does not constitute the Managing Director's final decision on the Appellant's misconduct complaints within the meaning of Article 26(3) of the Staff Rules, the Appellant has not put forward any convincing arguments to this effect.

58. Instead, the Appellant argues that"[i]t is unfortunate that the Managing Director does not state verbatim that its (sic) initial decision of 22 November 2023 should be set aside … while in practice it is," and that the "Decision significantly extends the timeframe within which the Appellant can expect a decision on the reality of the occurrence of the serious misconducts outlined in the whistleblowing report[s]". The Appellant thereby acknowledges implicitly but clearly that the contested Decision is not the final decision on the misconduct complaints. In the same line of reasoning, the Appellant notes that the Managing Director has indicated that "an external investigator will be appointed", an initiative which would have no sense if the contested Decision were the last word.

59. In effect, the Appellant is challenging a decision of the Managing Director which is a preparatory act in relation to the final decision he has expressly undertaken to adopt once the second investigation exercise has been completed. In particular, with a view to demonstrating that the final decision will necessarily be illegal, the Appellant is relying on alleged breaches of the provisions of ESM law which govern the conduct of such investigations.

60. Even assuming, for the purposes of argument, that the Appellant's contentions are well-founded, this would not necessarily lead to the conclusion that the "final" decision which the Managing Director will adopt will necessarily be invalid. The Managing Director might, for example, reconsider the restrictions he sought to impose on the scope of the second investigation, or independently take the view that the various investigation reports do not provide him with all the information he requires to decide on the Appellant's misconduct allegations, or otherwise adopt a solution or decision which is fully in compliance with his legal obligations.

61. Though not in any way binding on the Tribunal, the reasoning of the Court of Justice of the European Union regarding the Justiciability of preparatory decisions as reflected in its established caselaw in staff disputes is helpful in this regard. In *LU v European Investment Bank*, for example, the General Court held that

> "Only acts producing binding legal effects likely directly and immediately to affect the interests of an applicant by bringing about a distinct change in his or her legal position as an official or staff member may be the subject of an action for annulment …
>
> In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, in

principle, an act is open to review only if it definitively lays down the position of the institution upon the conclusion of that procedure and not if it is an intermediate measure intended to pave the way for the final decision …

Acts preparatory to a decision do not adversely affect officials and it is only when an action is brought against a decision adopted upon the conclusion of a procedure that an applicant may challenge the legality of earlier acts that are closely linked to that decision. Although some purely preparatory measures may adversely affect an official inasmuch as they may influence the content of a subsequent challengeable act, those measures cannot be the subject of a separate action and must be challenged in the context of an action brought against that act" (Case T-536/20, ECLI:EU:T:2022:40, paragraphs 37 to 39).

62. In the present case, the contested Decision does not in and of itself change the Appellant's legal situation, nor does it definitively lay down the Managing Director's position with regard to the Appellant's allegations of misconduct. If, as the Appellant considers, the contested Decision does influence the Managing Director's final decision by illegally truncating the scope of the second investigation, the Appellant would have the possibility of challenging that future "final decision".

63. The Appellant has further argued that the "investigator initially nominated by [the] ESM proved to be partial and incompetent" which casts "doubt on the ESM's ability to appoint a qualified new investigator". On this ground, the Appellant requests that the Tribunal itself investigate the Appellant's misconduct allegations.

64. In the present case, the Managing Director has not yet taken his "final decision" on the Appellant's misconduct allegation, and the Tribunal will not prejudge the validity of that decision, nor the capacity of the organisation to appoint qualified persons to carry out a second investigation, on the basis of the Appellant's criticism of the first investigator which relies on the opinion of the Advisory Committee.

65. It follows that, as regards the matter of the Appellant's misconduct claims, the contested Decision is not the Managing Director's "final decision" and the present appeal is inadmissible in so far as it claims the contrary and seeks the annulment of the contested Decision. It is therefore unnecessary for the Tribunal to rule on the veracity of the Appellant's allegations.

B. Decisions on Appellant's ancillary requests

(i) *Initiation of disciplinary proceedings against other staff members*

66. In the paragraph of the Decision starting with the word "**Third**" (emphasis in original), the Managing Director informs the Appellant of his decision "to Reject [the Appellant's] request 'seeking disciplinary measures'" against certain members of staff of the ESM.

The contested Decision constituted the Managing Director's final decision on the request.

67. It is unclear from his Decision of 22 November 2023 why the Managing Director had raised the possibility of initiating disciplinary proceedings against staff members, particularly as he did so only to dismiss it. The Appellant had not expressly requested such proceedings in either of the two whistleblowing reports and the matter had not been examined in the first investigation report of 4 November 2022. For its part, the Advisory Committee rejected the claim formulated in this regard by the Appellant in the request for an advisory opinion of 8 January 2024 ("Disciplinary measures against the responsible and involved parties") as falling outside the Committee's mandate.

68. The Appellant argues that the Managing Director's discretionary power to initiate disciplinary proceedings is "not unlimited and were the wrongdoings be evidenced … a decision not to initiate disciplinary proceedings would need to be carefully and reasonably justified or would itself amount to institutional harassment".

69. The Appellant thereby acknowledges that, where the Managing Director does not consider "wrongdoings [to] be evidenced", he would be under no obligation to take disciplinary proceedings. This is the case here, as the Managing Director at no time indicated in or prior to the contested Decision that he considered wrongdoing to have been established on the part of any member of staff. By the Appellant's own logic, this request is at the very least premature and the challenge to its rejection inadmissible.

70. In the Appeal, it is further argued that, having been accused of misconduct ("conflicted and directly involved in the allegations of misconducts, some of which are directly aimed at him"), the Managing Director should have recused himself from taking a decision on the question of initiating disciplinary proceedings against the listed staff members.

71. It is clear, however, from the Appellant's request for an advisory opinion of 8 January 2024 that the Appellant had not accused the current Managing Director of any form of misconduct but had made allegations only against four members of ESM staff. The Appellant's request "seeking disciplinary measures against other members of staff", which the Managing Director rejected in the contested Decision, was the one formulated in the request for an Advisory Opinion, and therefore did not concern him.

72. Moreover, in rejecting this request, the Managing Director did not purport to absolve himself from any accusation of misconduct levelled by the Appellant. The Appellant has not shown how such an accusation of misconduct against the Managing Director would create a conflict of interests such that he would be obliged to recuse himself from deciding on the Appellant's request regarding the four named members of staff.

73. The Appellant also acknowledges that the rejection in the contested Decision of this request may be "legally founded *at this stage* of the proceedings [but contends that] this answer lacks solicitude on a moral point of view" (emphasis in original) and

reproaches the Managing Director for failing to "add[ ] to his answer some reassurance to the Appellant that" the ESM would put an end to any misconduct it finds.

74. As the Appellant acknowledges at this stage of the proceedings at least, the Managing Director's position may be "legally founded", there is in fact no reason for the Tribunal to examine its validity. This is *a fortiori* the case given that the Appellant has not contended in respect of this claim that the Managing Director was legally obliged, as opposed to being merely able, to provide the Appellant with "some reassurance" that the ESM would act to put an end to any misconduct, particularly given that, as already noted, the Managing Director considered that none had occurred.

75. It is also obviously not the duty of the Tribunal to review administrative acts "from the moral point of view".

76. In these circumstances, the Tribunal holds that the Appellant's challenge to the decision of the Managing Director to reject the request that he impose disciplinary measures on named members of staff is inadmissible and, in any case, manifestly unfounded.

(ii) *Requests for the updating of the grievance procedures, offer of a formal apology and awarding of monetary compensation*

77. The Contested Decision constituted the Managing Director's final decision on these three requests.

78. As the Appellant acknowledged at the hearing, the Advisory Committee is just as much bound to respect the limits of its own competence as is any other administrative decision-maker. It follows from Article 24(2)(a) of the Staff Rules that the competence of the Committee is to provide an opinion on "any individual dispute related to an individual decision affecting the Complainant [which] the latter considers as adverse to his rights".

79. The Appellant's request for an advisory opinion of 8 January 2024 cites as the "challenged decision" the letter to the Appellant of the Managing Director of 22 November 2023. It is clear from a mere reading of that Decision, which is seven pages long, that at no point did the Managing Director reject requests on the part of the Appellant to update the ESM's grievance procedures, to provide a formal written apology or to grant the Appellant compensation for the alleged "severe violations of [their] integrity, years (4 and counting) lost and additional medical and other expenses [the Appellant] incurred on which otherwise wouldn't have happened" (sic), "bonuses not received and training not pursued, amounting to 1,000,000.00 EUR". While the Managing Director does refer to the updating of the ESM's Information Security Policy, he does not refer to the updating of the rules governing the grievance procedure.

80. In the absence of a decision on the part of the Managing Director rejecting a request to update the ESM grievance procedures or to issue a formal apology, the Advisory

Committee was not validly seised of an "individual dispute related to an individual decision" within the meaning of Article 24(2)(a) of the Staff Rules. The Committee quite correctly refused to issue an opinion on these matters.

81. The Advisory Committee did, however, examine the Appellant's claims for compensation in respect of "alleged financial damage resulting from the claimed medical and other expenses and the missed bonuses and trainings" and from institutional harassment. In an exercise of undue diligence, the Committee found that "alleged financial damage… was not substantiated with evidence" and rejected the institutional harassment claim in the absence of a finding of such misconduct.

82. As with the Appellant's requests concerning the grievance procedures or an apology, however, the Advisory Committee had not been validly seised of an "individual dispute related to an individual decision" with respect to the payment of monetary compensation. The Committee's findings regarding the Appellant's request for compensation was therefore *ultra vires* the Staff Rules.

83. In responding to the Committee's opinion on these three matters in the Contested Decision, the Managing Director was not "rejecting, wholly or in part, an internal appeal" within the meaning of Article 2(2) of the Statute. The Appellant's raising of these three matters was not an "appeal" against a decision previously taken, but requests made for the first time, on which the ESM had not taken a position. The fact that the Managing Director responded to these requests in the contested decision does not convert an original request into an "appeal". The question of the validity of the contested Decision in respect of these three requests is therefore outside the jurisdiction of the Tribunal in the present proceedings, in accordance with Article 2(2) of the Statute. There is no "decision" rejecting the Appellant's requests on these matters which could be the subject of an appeal.

(iii) Role of the Contested Decision in generating the present proceedings

84. While the Tribunal has concluded that none of the Appellant's claims in the present proceedings is admissible, the Tribunal also notes that in certain respects the wording of the contested Decision may, particularly in the context of the fraught relationship between the Appellant and their former employer, have contributed significantly to the Appellant's decision to initiate the present proceedings, rather than await the decision the Managing Director explicitly undertook to adopt following the submission of the investigation reports he had commissioned after the Advisory Opinion.

85. In the first place, as noted above, the contested Decision is described in its opening paragraph as the Managing Director's "final decision". While, according to the ESM's own position before the Tribunal, this description was patently erroneous as regards the Appellant's allegations of misconduct, the Appellant may well have considered obliged to initiate the present proceedings in order to safeguard its legal position should the indication "final decision" have, in fact, transpired to be accurate.

86. Second, while informing the Appellant that he would be commissioning a second investigation, the Managing Director indicated explicitly that he did not "fully shar[e] the view of the Advisory Committee", that his feedback on this occasion was based on "a careful and thoughtful review of the [first] investigation report," and that he was "mindful of the investigator's independence and technical discretion on the extent of the analysis and follow up to the myriad of allegations made in the whistleblowing report". Given in particular that, as the ESM acknowledged at the hearing, the first investigation report had been discredited by the Advisory Opinion, the Managing Director's apparent preference for the findings of the first investigation report over those of the Advisory Opinion may have given the Appellant the impression that its allegations would not be fairly and thoroughly investigated in the second investigation exercise either.

87. Any such impression could easily have been reinforced by the description of the second investigation as "complementary," thereby implying, according to a dictionary definition of this term, that the ESM did not challenge at the hearing, that the second investigation was intended inter alia to "enhance or emphasise the qualities" of the first investigation, notwithstanding the fact that the Advisory Board had found the first investigation report to have few or no "qualities".

88. Potentially even more disturbing for the Appellant were the numerous restrictions on the material scope of the second investigation which the Managing Director had laid down in the contested Decision. While the Tribunal need not examine the legality of such restrictions in the context of the present proceedings, the Appellant has pointed out the absence of an explicit legal basis for such restrictions in the "*Operating procedure Investigations*", while the Tribunal also notes that no explicitly legal basis for these restrictions arises from the "*Terms of Reference for the Investigation of Complaints of Serious Behavioural Misconduct seeks redress as a victim of such behaviour*" either. The imposition of such restrictions without any express or even implicit indication of their legal justification may have induced the Appellant to take the view that the contested Decision was intended, or at least likely in practice, to lead to an illegal second investigation and an illegal final decision.

89. The Tribunal can only conclude that the wording of the contested Decision was instrumental in inducing, even if possibly inadvertently, the Appellant to initiate the present proceedings.

VIII. COSTS

90. In accordance with Article 14(3) of the Statute, the Tribunal may order "reasonable costs incurred in the proceedings by the Appellant, including reasonable fees of the Appellant's counsel, to be borne by the ESM" if it concludes that the Appeal is "founded in whole or in part".

91. In the present case, the Appeal is not founded in whole or in part, and it is therefore not open to the Tribunal to order the ESM to bear the Appellant's costs.

92. The Tribunal notes, however, that the rule on costs set out in Article 14(3) of the Statute is essentially identical to that contained in Article XIV(4) of the Statute of the Administrative Tribunal of the International Monetary Fund ("IMFAT"). The Commentary to Article XIV(4) of the IMFAT Statute mitigates considerably the rigour of the rule, by indicating that in certain circumstances the Tribunal may recommend the Fund to make an *ex gratia* payment to an unsuccessful applicant. In the practice of the IMF, it is expected that any such recommendations would be followed without question.

93. As noted above, it seems more likely that certain elements in the wording and content of the contested Decision contributed to the decision of the Appellant to initiate the present proceedings. In order to compensate, at least in part, the Appellant for the financial and emotional expenditure caused by the present legal proceedings, the Tribunal therefore recommends that the ESM make the Appellant an *ex gratia* payment of EUR 5,000 towards the amount of their legal costs. Any such payment amount could also go some way to compensating the Appellant for the supplementary stress and expenditure occasioned by the ESM's manifestly unfounded contention that the Rebuttal had been submitted out of time.

94. Furthermore, any such payment would be quite distinct from any amount the ESM may award the Appellant by way of compensation for the further duration of the proceedings regarding the investigation of, and decision on, the Appellant's allegations of misconduct.

IX. DECISION

95. In the light of the foregoing, the Tribunal of the European Stability Mechanism unanimously **decides**:

a) The Appeal of 13 August 2024 is rejected as inadmissible.
b) Each party shall bear its own legal costs.
c) The Tribunal **recommends** that the ESM make an *ex gratia* payment to the Appellant of EUR 5,000 in respect of legal costs incurred.

Virginia MELGAR, (President)
(signed)

Haris TAGARAS
(signed)

Kieran BRADLEY
(signed)