

**EUROPEAN STABILITY MECHANISM
ADMINISTRATIVE TRIBUNAL**

Luxembourg

JUDGMENT

of 30 January 2026

In Case ESMAT 1/2025,

Thomas Ritter, Appellant,

represented initially by Me François Moyses, Member of the Luxembourg Bar, and assuming subsequently his defence alone

v

European Stability Mechanism, Respondent,

represented by João Sousa Gião, General Counsel of the European Stability Mechanism

Concerning the appeal lodged by the Appellant on 7 April 2025 and following the written procedure

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

Renders the present **JUDGMENT**

I. FACTS AND PROCEDURE

1. The Appellant has been a staff member of the ESM since 2013, in the Asset Liability Management and Financial Structuring Division (ALM and FS – hereafter “ALM”), having returned to work on 1 May 2024 after a 20 months’ absence, mainly due to medical leave. As from 25 August 2025 he is again on medical leave.
2. It results from the Appellant’s 2024 Mid-Year and Year-End Reviews, as well as from e-mail exchanges, that a number of problems occurred with regard to his reintegration, in May 2024, related both to the substance of the work and to behavioural aspects.
3. As a consequence, and following an e-mail dated 9 September 2024, sent by the ALM Head to the Chief Financial Officer (hereafter “CFO”) with allegations of misconduct against the Appellant, namely insubordination and lack of cooperativeness, and with the suggestion to follow “possibly the disciplinary route”, the CFO, by e-mail of 11 December 2024, informed the sender, as well as the Head of Human Resources, of his agreement that “in those circumstances a disciplinary measure could be envisaged”.
4. In this context, and in order to establish the relevant facts and to determine whether the Appellant had failed to fulfil his obligations towards the ESM, an “assessment of allegations” was conducted between 12-19 December 2024 by Human Resources (hereafter “HR”), for which four (4) witnesses, as well as the AML Head and the CFO were heard.
5. The resultant report was submitted to the Managing Director (hereafter “MD”) on 10 January 2025, annexing anonymised testimonies under letters A to D.
6. The conclusion of the report reads as follows :

[...] it is established that Mr. Ritter adopted an insubordinate behaviour with his line management undermining the authority of his line management and adopting an inappropriate attitude towards colleagues, despite several oral and written feedback from his line manager, which led to disruption of the functioning of the team. As a result, the overall team's dynamics have lost the high level of trust and openness needed to obtain the best outcome for the ESM. Mr. Ritter's uncollaborative attitude towards his team colleagues, undermining their work and skills, adopting interrogative and patronising tone, and creating mistrust and lack of respect is also established.

It is further established that Mr. Ritter's acts of insubordination, such as refusal to comply with his duties, questioning the assigned tasks, unacceptable tone in certain instances, and not accepting feedback from his line manager, is in

breach of his obligations to the ESM, his conditions of employment, the ESM Code of Conduct, and values of the ESM and the general hierarchical principle.

*As a result, while the situation does not appear, at this stage, to qualify as a Serious Misconduct which would require reporting to the Compliance Office under the Code of Conduct, it is nonetheless constitutive of insubordination and misconduct vis-a-vis colleagues. Consequently, it is recommended that the Managing Director considers imposing a disciplinary measure. While such conduct falls below the standards expected of an international civil servant and could be subject to a higher sanction than a written warning, in order to ensure that the ESM remains within the required proportionality between the failure by a staff member to fulfil his/her obligations to the ESM and the sanction imposed, imposing a **written warning** is recommended.*

7. The report was communicated to the Appellant on 27 January 2025, together with an invitation to a hearing with the MD. According to the invitation, the purpose of the hearing was to offer to the Appellant the “opportunity to respond to the allegations and present [his] case and perspective”.
8. The hearing took place on 11 February 2025. The MD explained that, in view of the Head of HR’s consideration that the Appellant had indeed engaged insubordinate behaviour and had displayed an inappropriate attitude towards colleagues (the consideration being based on the “allegations of misconduct” and on the “conducted interviews”), he envisaged imposing on the Appellant a written warning and that it was therefore important that the Appellant brought to his attention all relevant points.
9. In response, and after his counsel denied the existence of any legal basis for the report and complained about the anonymity of the witnesses, the Appellant read to the MD a summary of his views. In essence, he denied the reproaches made against him and complained of a conflict of interest, in that the AML Head and the CFO were involved both in his disciplinary procedure and in the procedure for the appointment of the AML Deputy Head, a position for which the Appellant was candidate. This summary was included in the meeting’s minutes.
10. On 24 February 2025, the MD communicated to the Appellant his decision on the matter. Explicitly referring to, and endorsing, the conclusions of the report, including with regard to the finding of insubordinate behaviour towards his line management, undermining their authority, and of inappropriate behaviour towards colleagues, which led to disruption in the functioning of the team, he imposed on the Appellant a written warning. According to the warning, the Appellant was

expected to correct [his] conduct towards [his] line management, follow their instructions and feedback, and to improve [his] conduct towards [his] team

colleagues to foster a collaborative, open respectful and constructive environment, in line with the ESM values
and further he was warned that
[f]ailure to correct [his] behaviour and repeated misconduct may result in more serious disciplinary actions in the future.

II. THE APPEAL AND PROCEDURAL EXCHANGES

11. By Appeal, which the Appellant declared lodging pursuant to Article 7 of the Tribunal's Statute and Article 24 of the Staff Rules, the date of lodging being the 7 April 2025, the Appellant requested the annulment of the MD's decision imposing the written warning. The *petitum* of the Appeal reads as follows :

Therefore, Mr. RITTER respectfully submits that the Tribunal should:

- 1. Accept the present appeal in form, declare it well-founded and justified;*
- 2. Before ruling on the merits, order the transmission of the verbatim records of witness interviews and the list of candidates for the position of Deputy Head of ALM and FS;*
- 3. Consequently, annul the decision of 24 February 2025 by the Managing Director imposing a disciplinary sanction on Mr. RITTER in the form of a written warning due to the violation of Mr RITTER's right to be heard and the manifest conflict of interest in the testimonies upon which the report is based;*
- 4. In any case, annul the decision as manifestly unfounded;*
- 5. Award the Appellant the amount of 20,000 euros as compensation for moral damage;*
- 6. Order the ESM to pay the costs.*

12. The ESM filed its Reply on 27 June 2025. In the Reply, before dealing with the merits, the ESM addressed point 2 of the above-stated *petitum*. They contended that they were not under any legal obligation to submit the requested records and list of candidates, adding nevertheless that they would accept to provide both of them "by separate correspondence" to the Tribunal, but only "for its review *in camera*". As to the merits, the ESM rejected all grounds and arguments put forward by the Appellant.
13. By letter of 24 July 2025, the Tribunal, acting on the basis of Article 16 of its Rules of Procedure (hereafter "RoP") with regard to the ESM submissions to the Tribunal "for its review *in camera*" only, asked the ESM, whether they had "*any reasoned objection to the disclosure by the Tribunal to the Appellant of the identification by letter (A, B,C or D) of those witnesses who were also candidates for the position of the ALM Deputy Head*". The ESM was also asked to provide relevant information for the various steps and dates of the procedure for the fulfilment of the ALM Deputy Head position.

14. The ESM replied to the above letter on 30 July 2025. With regard in particular to the issue of “identification by letter [of the] candidates for the [ALM position]”, the ESM contended that the relevant information should only be disclosed if its usefulness for the Appeal prevailed over the witnesses’ rights, adding that the ESM did not consider that this was the case, but it would nevertheless fully respect a different view of the Tribunal.
15. The Tribunal decided not to proceed to a second exchange of written pleadings and by letter of 30 July 2025 informed the parties that it scheduled the oral hearing for 18 September 2025.
16. By letter of 31 July 2025, the Appellant’s lawyer asked for the rescheduling of the hearing, because of “prior professional commitments”. The Tribunal rejected this request.
17. On 4 August 2025, the Appellant’s lawyer reiterated the request, adding that, in the event of the confirmation of the above hearing date, he “should have [his] partner replacing [him] at the scheduled hearing”.
18. Following confirmation of the rejection of the request for rescheduling, the Appellant’s lawyer, by letter of 13 August 2025, asked for the suspension of the proceedings, “pending the conclusion of related internal proceedings” (before the Advisory Committee and the MD) in another case involving the Appellant.
19. The suspension request, which would have necessarily implied adjournment of the hearing, was also rejected by the Tribunal. By letter of 27 August 2025, the Tribunal informed the parties of such rejection and confirmed the scheduling of the hearing at the initial date of 18 September 2025.
20. On 4 September 2025, the Appellant’s lawyer informed the Tribunal that the Appellant had revoked his power of attorney and that, therefore, he did not represent him any longer and all communications concerning the disputed case should be addressed directly to the Appellant.
21. By reply sent to the Appellant the same day, the Tribunal asked to be informed, by 8 September 2025 at the latest, whether he would assume his defence alone or whether he would instruct a different lawyer to represent him, including at the hearing.
22. The following day, 5 September 2025, the ESM informed the Tribunal that on 25 August 2025 the Appellant had submitted a sick leave certificate valid until 24 September 2025.
23. On 8 September 2025, while in certified sick leave, as above, the Appellant submitted two requests to the Tribunal, firstly, a request for a three-day extension of the

deadline expiring on that day, i.e. an extension until 11 September 2025, concerning the question of his representation (above para.21), and, secondly, a request for joinder of case ESMAT 1/2025 with another dispute involving him, and which had been brought before the Tribunal that same day under the case number ESMAT 3/2025. By letters of 10 and 11 September, respectively, the Tribunal granted the request for extension but rejected the request for joinder.

24. On 11 September 2025, the Appellant informed the Tribunal that he would not instruct any lawyer to represent him, but rather he would be “self-represented”, and he reiterated the request for joinder.
25. By letter of 12 September 2025, the Tribunal acknowledged receipt of the Appellant’s declaration that he would be representing himself in the proceedings without the aid of a lawyer and asked him to ensure his timely arrival at the hearing, scheduled to be held at the ESM premises in Luxembourg.
26. On 15 September 2025, the Appellant sent to the Tribunal a letter, in which, *inter alia*, he complained about the venue of the hearing, namely that it was going to take place at the ESM premises, and he also stated that, for medical reasons (supported by an attached certificate of a different type to those submitted to the ESM for his sick leave), he was “*unfit to participate in any court hearing or formal proceedings, whether in person or via remote means [...] until further notice*”. He also raised again the issue of joinder. In conclusion, the Appellant requested the postponement of the hearing and its relocation, giving a sort of warning that, if the Tribunal maintained the “current arrangements”, he would have recourse to a number of actions, including claims and proceedings for breach of the principle of due process.
27. The above Appellant’s letter, addressed to the President of the Tribunal, reads as follows :

*I only recently became aware that the hearing in Case 1/2025, scheduled for **18 September 2025**, is to be held at the premises of the European Stability Mechanism (ESM), the Defendant in this matter.*

Holding the hearing at the Defendant's offices raises serious concerns regarding neutrality, intimidation, and the perception of independence. Such an arrangement risks undermining equality of arms, contrary to fundamental principles of due process in international administrative law.

*I am currently on certified sick leave and medically unfit to participate in any hearings or formal proceedings, whether in person or remotely, from **15 September 2025** until further notice. I attach a medical certificate confirming this incapacity.*

While I had confirmed my intention to represent myself, my current incapacity

combined with the unexpected venue arrangements makes it impossible for me to participate effectively in the scheduled hearing.

*I further note that the Tribunal has thus far declined to join this case with my appeal concerning the 2024 PDS evaluation (**ESMAT 3/2025**). Proceeding in isolation, particularly under the current circumstances, risks inconsistent findings and procedural prejudice.*

For the avoidance of doubt, I expressly reserve all rights to pursue other formal claims, complaints, or proceedings against the ESM or before the Tribunal, irrespective of my current incapacity to participate in this hearing.

In light of the above, I respectfully request that:

- *The hearing scheduled for **18 September 2025** be **postponed** until I am medically fit to participate; and*
- *The venue be relocated to Tribunal premises or another neutral and independent location, in order to preserve the appearance and reality of impartiality.*

*Should the Tribunal nevertheless decide to proceed under the current arrangements, I hereby place on record my **formal objection and non-consent**. I reserve the right to:*

- *challenge any decision rendered under circumstances inconsistent with procedural fairness;*
- *notify oversight bodies, including the Board of Governors and Board of Auditors, as well as invoke applicable principles of international administrative law (including relevant ILOAT jurisprudence); and*
- *file and pursue other claims or proceedings arising from any breach of due process.*

I thank the Tribunal for its urgent and fair consideration of this matter.

28. In mid-September 2025, new versions of the Statute of the Tribunal and of its RoP entered into force, the former as from 15 September and the latter as from the following date, 16 September 2025.

29. By letter of 16 September 2025, the Tribunal informed the parties that the hearing of the 18 September 2025 was cancelled due to the medical reasons invoked by the Appellant.

30. After acknowledging receipt of this letter, the Appellant, by letter of 17 September 2025, addressed again to the President of the Tribunal, “placed on record” the following :

I am currently on certified sick leave and therefore not in a position to participate in oral proceedings at this time.

My present incapacity should in no way be construed as a waiver of my right to participate fully in the proceedings once I am medically fit.

- *I expressly reserve all procedural and substantive rights, including the right to: attend and be heard at any oral hearing once my health allows,*
- *raise objections concerning the fairness, conduct, or venue of proceedings,*
- and*
- *challenge any adverse decision if taken in circumstances where I was unable to participate.*

31. On 22 September 2025, acting on the basis of Rule 16(1)(a) of its RoP, the Tribunal addressed the parties as follows :

In section II.B of his appeal, the Appellant has relied on EU Law to argue that his right to be heard has not been respected. In the event that the Tribunal were to consider this plea to be well founded, the parties are invited to take position on whether such a breach should necessarily and automatically lead to the annulment of the contested decision or whether annulment would only be justified if, in the absence of the breach, a different outcome of the procedure would have been possible.

The time-limit for the reply was set on 10 October 2025, provided, with regard to the Appellant, that “he [was] not prevented by his medical condition” from complying with it.

32. The following day, 23 September 2025, the Appellant addressed the Tribunal recalling his medical condition and the fact that he was self-represented and stating that he wished to reserve his right to submit observations on the above question “*in due course within the deadline set by the Tribunal*”, while in a subsequent letter, sent to the Tribunal on 5 October 2025, the Appellant, after referring to a number of issues, other than the Tribunal’s question of 22 September 2025 , announced, with regard to this latter question, that he would “*complete observations and evidence once [his] health allows*”. In this same letter, the Appellant reiterated the complaints related to the scheduling of the hearing at the ESM premises, alleging that such arrangement “*undermine[d] both the substance and the appearance of [the Tribunal’s] independence and impartiality*”, and he expressed “*serious concerns regarding the Tribunal’s commitment to fairness, due process and functional independence*” .

33. On its part, the ESM replied to the Tribunal’s question by letter of 10 October 2025, submitting that, even if the Tribunal were to consider that there was an infringement of the Appellant's right to be heard, such an infringement should not result in an

annulment of the contested decision due to the specific factual and legal circumstances of the case, in particular that

- at no stage of the procedure did the Appellant deny the accuracy of the alleged facts supporting the imposed disciplinary measure, nor did he submit relevant arguments or testimonies in that respect;
- in accordance with the internal law of the ESM and its consistent interpretation by the ESM, the MD could not possibly have taken any other decision, since the facts were established, the alleged misconduct characterized, and the imposed disciplinary measure, the lowest possible sanction, was far from being disproportionate when considering those facts;
- it was not established by the Appellant, even before the Tribunal in his Appeal, that, had it not been for such an irregularity, the outcome of the procedure might have been different;
- it was not established by the Appellant that the relevant Staff Rules of the ESM are illegal.

34. On 14 October 2025, the Tribunal, acting on its own motion, extended to 3 November 2025 the time-limit for the Appellant's reply to its question of 22 September 2025.

35. By letter of the following day, 15 October 2025, the Appellant replied to the said question. He contended in essence that annulment "must follow automatically" upon establishment of a violation of the right to be heard, since the legality of a decision must depend on procedural compliance and not on speculations.

36. On 3 November 2025, the Tribunal, acting on the basis of Rule 10(1) RoP, consulted the parties as to the possibility of adjudicating the case without oral hearing. The Appellant objected to that possibility, while the ESM agreed.

37. Taking also into account the positions of the parties, the Tribunal decided to make use of the possibility offered by the above provision and to adjudicate the case without oral hearing.

III. LEGAL BACKGROUND

38. Part VI of the Staff Rules, on *Disciplinary Measures and Settlement of Disputes*, comprises Article 23 to 28. Article 23, entitled *Disciplinary Measures*, provides :

1. The Managing Director may take the following disciplinary measures against members of staff who fail to fulfil their obligations to the ESM:

a) a written warning;

(b) a written reprimand;

(c) a temporary reduction of compensation;

(d) a permanent reduction of compensation;
(e) dismissal with or without giving advance notice of termination.
Any disciplinary measure shall be proportional to the seriousness of the breach of the obligations to the ESM. In the case of a dismissal pursuant to paragraph 1(e), subparagraph 1 of Article 7(7) shall apply accordingly.

2. For the disciplinary measures referred to in paragraph 1(a) to (b), the Managing Director shall hear the member of staff concerned before such a disciplinary measure is imposed. For the disciplinary measures referred to in paragraph 1(c) to (e), the Managing Director shall initiate disciplinary proceedings by notifying to the member of staff an introductory report (the "Introductory Report") stating the alleged facts, to what extent the said facts amount to a breach of the obligations of the member of staff to the ESM, and the envisaged disciplinary measure. Within 15 working days of the notification of the Introductory Report, the member of staff may request from the Managing Director that the advisory committee referred to in Article 24 be convened in its capacity as disciplinary committee (the "Disciplinary Committee") in order to review the alleged breach of his or her obligations and provide the Managing Director with an advisory opinion, provided that no such opinion shall be required when the member of staff concerned has been found guilty by a court of law of a criminal offence or of an attempt to commit such an offence. Articles 25 and 26 shall apply accordingly

3. [...]

4. For the disciplinary measures foreseen in Article 23 (1) (c) to (e), the member of staff may, and, if he or she so requests, must, be heard by the Disciplinary Committee. He or she may enlist the aid of a counsel of his or her own choosing when appearing before the Disciplinary Committee.

The Disciplinary Committee may hold any necessary enquiry and hear witnesses. The ESM or the member of staff shall also be entitled to call witnesses.

In the event of disciplinary measures foreseen in Article 23 (1) (c) to (e) to be taken in respect of a member of staff who is a serving or former staff representative [...].

39. Article 24 of the Staff Rules reads as follows :

1. Members or former members of staff and their respective successors in interest (each, a "Complainant") may challenge any individual decision of the ESM that adversely affects their rights. The Complainant shall submit to the Head of Human Resources and Organisation a request for an advisory opinion of an advisory committee (the "Advisory Committee"). [...]

2. [...]

3. [...]

4. [...]

40. With regard to the powers of the Advisory Committee, a General Administrative Order issued by the MD on 12 December 2023 adopting the "Terms of Reference and Rules of Procedure of the Advisory Committee" (SG/MD/2023/024), states that :

In accordance with the Statute of the ESM Administrative Tribunal (ESMAT), an appeal against a decision by the Managing Director of the ESM in the context of disciplinary proceedings can be brought directly to the ESMAT without needing to file a request for an advisory opinion of the Advisory Committee.

41. Article 3(2) of the Tribunal's Statute, concerning the qualifications required for the appointment of Judges, provides, *inter alia*, that they should have "expertise in matters relevant to the determination of cases under international administrative law".

42. Article 9 of the Tribunal's Statute, entitled *Applicable Principles*, reads as follows, both in its version applicable up to the 14 September 2025 and in its currently applicable version :

1. The Tribunal shall apply the internal law of the ESM which reflects the exceptional nature of the ESM as a crisis resolution mechanism which needs to act rapidly and with limited human resources adapted to swift and time-critical intervention and decision making in accordance with its strict mandate under the ESM Treaty. The internal law of the ESM is designed to facilitate the proper functioning of the ESM which includes, amongst other things, the rapid and effective adoption and implementation of decisions related to staff matters.

2. The internal law of the ESM is to be interpreted bona fide and while taking into account the customs and practices of the ESM, its architecture as a small and efficient organisation, the particular environment in which the ESM is operating, and the particularities of its internal law as specified in the previous paragraph.

43. Article 16 of the Tribunal's RoP, entitled *Evidence and Measures of Investigation and Instruction*, contained the following up to 15 September 2025 :

1. *At any time in the course of the proceedings, the Tribunal may, on its own motion or on the reasoned request of a party, order such measures of investigation as it deems appropriate, including:*
 - (a) *requiring the parties to produce any documents or answer any question that the Tribunal considers necessary to deciding the Appeal;*
 - (b) *the personal appearance of the parties before it;*
 - (c) *the taking of evidence, in writing or orally, of experts, witnesses and any competent authority; and*

(d) *inspection of the place or thing in question.*

2. *If the ESM considers that certain information is secret or confidential, or its disclosure might harm the operations of the ESM or its relations with a Member State of the European Union or an international or an Institution of the European Union, or would infringe on the reputation or right of privacy of other individuals, the ESM may, subject to the Tribunal's acceptance, delete such information from the document to be produced or produce a summary or redacted version of that document. Such production shall be accompanied by written explanation of the underlying reasons.*

The Tribunal shall promptly ascertain whether it accepts the document as produced by the ESM. If the Tribunal does not accept such document, it may order the production of the original document in camera, whereby the original document shall be disclosed in a room only to the Tribunal, the parties and their counsel, which can take notes but cannot make copies thereof, or take other measures so as to ensure the secrecy or confidentiality of such information.

3. *Without prejudice to paragraph 2, the ESM may withhold information or documents if it determines that the production of that information or document might harm the operations of the ESM because of the secret or confidential nature of that information. Such a determination shall be binding on the Tribunal. The Appellant's allegations concerning the contents of any information or document so withheld shall constitute prima facie evidence as to that information or document and shall create a rebuttable presumption as to the accuracy of the allegations, so long as there is no other evidence presented to contradict the allegations. In case there is such other probative evidence presented, the Tribunal shall have to weigh all of the evidence before it in order to make as appropriate finding.*

4. *The Tribunal may examine experts, witnesses and any competent authority subject to the same qualifications as specified in paragraphs 2 and 3.*

5. *The parties shall be under no obligation to disclose any legal advice provided by or through their advisers or counsel in relation to the case under consideration.*

44. As of 16 September 2025, the above provision, renamed *Rule 16*, is entitled *Measures of Investigation and Instruction* and its contents have been modified as follows :

1. *At any time in the course of the proceedings, the Tribunal may, of its own motion or in response to a reasoned request of a party, adopt such measures of investigation or instruction as it deems appropriate, including:*

(a) *requiring the parties to produce any document or answer any question*

that the Tribunal considers necessary to deciding the appeal;

- (b) *the personal appearance of the parties before it;*
 - (c) *the taking of evidence, in writing or orally, of experts, witnesses and any competent authority, subject to the conditions specified in paragraphs 2 and 3; and*
 - (d) *inspection of places or things.*
2. *If the ESM considers that certain information is secret or confidential, or its disclosure might harm the operations of the ESM or its relations with a Member State or an Institution of the European Union or an international organisation, or would infringe the reputation or right of privacy of individuals, the ESM may, subject to the agreement of the Tribunal, delete such information from the document to be produced or produce a summary or redacted version of that document. Such production shall be accompanied by a written explanation of the reasons justifying the non-disclosure in whole or in part of the document.*

The Tribunal shall promptly ascertain whether it accepts the version of the document produced. If the Tribunal does not accept such version, it may order the production of the original document in camera, whereby the original document shall be disclosed in a room only to the Tribunal, the parties, and their counsel, who may only take notes, but may not make copies of, or otherwise reproduce the document. The Tribunal may take other measures so ensure the secrecy or confidentiality of such information.

3. *Without prejudice to paragraph 2, the ESM may withhold information or documents if it determines that the production of that information or document might harm the operations of the ESM because of the secret or confidential nature of that information. Such a determination shall be binding on the Tribunal. The Appellant's allegations concerning the contents of any information or document so withheld shall constitute prima facie evidence as to that information or document and shall create a presumption as to the accuracy of the allegations, so long as there is no other evidence presented to contradict the allegations.*
4. *The parties shall be under no obligation to disclose any legal advice provided by or through their internal or external legal advisors or counsel.*

IV. GROUNDS OF APPEAL AND FINDINGS OF THE TRIBUNAL

45. The Appellant invokes two grounds for annulment (point 3 of the *petitum*), namely, violation of the right to be heard, on the one hand, and manifest conflict of interest

“in the testimonies upon which the report is based”, on the other hand, both preceded by the request (point 2 of the *petitum*) that, before the Tribunal rules on the merits, it order the transmission of the *verbatim* records of the witnesses’ interviews and of the list of the candidates for the position of Deputy Head of ALM.

46. The Tribunal understands that the above request aims at supporting the second ground of annulment. It will therefore refer to this request when dealing with the said ground.

47. As to the point 4 of the *petitum*, formulated in very vague and general terms, it manifestly falls short of constituting a genuine plea of law (see below, para.76).

As to the first ground of annulment

Arguments of the parties

48. The Appellant stresses the importance of the right to be heard in the European Union (hereafter “EU”) legal order and recalls the case-law of the European Court of Justice (hereafter “ECJ”), insisting on the requirement that the staff members concerned be offered the opportunity to “effectively” present their point of view. He contends that the said right was violated, since he was never heard prior the report being drafted and finalised, but only by the MD, at the very end of the procedure.

49. The Respondent argues that the Appellant’s hearing with the MD gave to the former the full opportunity to present his position, adding that his comments were taken into account and his objections were considered and responded to.

50. As to the question addressed by the Tribunal to the parties on the basis of Rule 16(1)(a) RoP (see above para.31), it is recalled that, according to the Appellant, a finding of a violation should necessarily and automatically lead to the annulment of the contested decision, while the ESM had contended that, due to the specific factual and legal circumstances of the case (and in view of the ECJ case-law in the matter), the contested decision would remain valid even in the event of finding of a violation of the right to be heard (above paras.32-35).

Findings of the Tribunal

51. According to Article 9 of the Tribunal’s Statute, entitled *Applicable Principles*, the law applied by the Tribunal is the “internal law” of the ESM.

52. However, this provision does not preclude the Tribunal, when interpreting its own rules, from having interpretative recourse to the staff law, including in particular staff

case-law, of other international organisations, provided that the equivalent rules and principles of the other organisations show relevant commonalities. It goes without saying that such recourse is by no means binding on the Tribunal, but rather it may serve as a simple interpretative tool, offering the Tribunal possible sources of inspiration as to the way in which it might apply the internal ESM law, with the obvious exclusion of any *contra legem* interpretation.

53. The Tribunal has already availed itself of such possibility in its first cases (e.g. paras.19 and 35-36 of Case ESMAT 1/2022 and paras.31 and 33-35 of Case ESMAT 2/2022) and there is no reason to deviate from this practice in subsequent cases, all the more since in its very first case it admitted, implicitly yet clearly, the applicability in its legal order of the "*basic principle of administrative law in relations between international organisations and their staff*" which constitutes the right to be heard (Case ESMAT 1/2022, para.27).
54. The above considerations are corroborated by the Statute's provision in Article 3(2) according to which one of the criteria for the selection of the ESMAT judges is their "*expertise in matters relevant to the determination of cases under international administrative law*". It would make little sense to require such expertise in the selection criteria for the judges, only to disallow the Tribunal to seek interpretative assistance in rules and principles of international administrative law.
55. Furthermore, the above described interpretative approach (paras.52-54) cannot be set aside by the mere fact that, as indicated, Article 9 of the Tribunal's Statute refers solely to the ESM's "internal law", contrary to the statutory texts of other international administrative tribunals, which, in addition to the internal law of the organisation concerned, mention other sources of law, in particular general principles. On the contrary, the formulation used in some of those texts may be interpreted as suggesting that, as a matter of principle, the "internal law" of an international organisation may not be conceived in an isolated manner, ignoring the general principles of international administrative law, but comprises the latter. To cite an organisation vested with the same type of competences as the ESM, the Tribunal observes that Article III of the IMFAT Statute provides that the Tribunal applies the IMF internal law, "including" general principles; clearly, for the drafters of this text, internal law and general principles are not two different concepts, but the former includes the latter.
56. Concerning in particular the right to be heard, it results clearly from the case-law of most international administrative tribunals, as well as of the ECJ when dealing with staff cases, that it constitutes the cornerstone of the fundamental principle of the right of defence. It requires that, before issuance of an act adversely affecting a staff member, the latter should be given the possibility to fully express his/her position, i.e. both with regard to the relevant facts and with regard to the consequences that the competent authority intends to draw from these facts (e.g. ILOAT 4781, consideration

3, EU General Court case T-573/16, *PT v. BEI*, para.266, Council of Europe AT 737/23, paras.38-40).

57. It is also constant case-law that, in order for the right to be heard to be effective, the hearing of the person concerned, far from functioning as a formality, should give him/her the possibility to “influence” the upcoming decision, in other words to “really” defend him/herself (EU General Court case T-692/16, *CJ v. ECDC*, para.80, Council of Europe AT 353/05, paras.36, 40 and 44).
58. This may only mean that, in procedures where the final decision is taken on the basis of a report, the staff member concerned should be heard by the report’s authors before the report is drafted and finalised, so that the report also reflects the staff member’s views on the litigious matters, whether or not the report’s authors share (and take position on) the said views. This requirement should be considered binding on the Administration irrespective of a possible hearing of the person concerned by the authority vested with the right to take the final decision.
59. The specific conclusion drawn in the preceding paragraph is also in line with the dominant understanding of the right to be heard in the EU Civil Service Law, as demonstrated both by the rules applicable to the Commission administrative inquiries in disciplinary cases (see e.g. Article 17 of the relevant General Implementing Provisions, COM[2019] 4231 final, which requires the hearing of the person concerned before the report is drawn up and before any conclusion referring to the said person by name, adding that the inquiry’s conclusions should be drawn also “on the basis” of this person’s comments) and by the ECJ case-law (see in this sense EU General Court case T-537/17, *De Loecker v. SEAE*, paras.59-65, and case T-748/16, *QH v. European Parliament*, paras.55-65, with reference also to the Charter). The ECJ has even explicitly held that the defect resulting from the absence of a hearing foreseen to take place in the beginning of the proceedings, i.e. for the establishment of the preparatory report which would serve as basis for the disciplinary decision, could not be remedied by the subsequent hearing of the staff member concerned by the competent authority for the imposition of the sanction (EU General Court case T-270/16 P, *Kerstens v. Commission*, para.78).
60. This understanding of the right to be heard reflects its very essence as a major component of the wider right of defence. As a matter of fact, the views, and arguments, of the staff member concerned are more likely to influence the competent authority through the medium of a report (and if incorporated, even partly, in it), than when expressed as a response to the report, and in contesting it. More generally speaking, the earlier the position of the person concerned is expressed (and incorporated in a preparatory report), the higher are the chances that account be taken of such position.

61. The above apply *a fortiori* when the report is based on testimonies, all of which, to a greater or lesser extent, are critical of the person concerned.
62. The question as to whether, according to the applicable rules, the preparatory report concerned was, or was not, a compulsory prerequisite for the subsequent adoption of the litigious act, is deprived of relevance. In so far as the organisation decided to proceed to the establishment of a report, so as to facilitate the task of the authority which was to take the final disciplinary decision (in this case the MD), the organisation was under the obligation to ensure that the drawing up of the report would have respected fundamental principles, among which the right to be heard.
63. In the present case, it is clear that the Appellant was given the possibility to express his views to the MD, before the latter took the contested decision. The Appellant did so in particular during the abovementioned hearing of 11 February 2025 (see above, para.8).
64. However, the fact that the MD, satisfying the requirement laid down in Article 23 of the Staff Rules, offered the Appellant the possibility to express his position (and the latter made use of this possibility), does not constitute full respect by the ESM of the obligations arising out of the rights of defence and of the right to be heard. Such a hearing might have ensured respect of the Appellant's said rights, if no report had previously been drawn up and submitted to the MD. In so far as, when hearing the Appellant on the reproaches of which the latter was the subject, the MD had already (some time before) been provided with a report benefitting from a presumption of objectiveness and intended to give a comprehensive view of the situation, negative for the Appellant, the Tribunal fails to see how the positions expressed by the Appellant in the meeting of 11 February 2025, could have influenced the MD and thus constituted a genuine exercise of the right to be heard.
65. The strong doubts as to whether the holding of the abovementioned meeting (during which it is not contested that the Appellant was offered the possibility to freely express himself on the envisaged sanction) sufficiently ensured the respect of the Appellant's right to be heard are reinforced in view of the case-law according to which this right is binding on the employer even in the absence of explicit provisions in the applicable texts (e.g. EU General Court case T-571/16, *PT v. EIB*, para.164, and ILOAT 2475, consideration 20), and, what is more, even where contrary provisions exist (ILOAT 203, consideration 1). It should be *a fortiori* admitted that if this right is indeed foreseen and regulated, but in a restrictive manner, in the framework of the organisation in question, nothing prevents the staff member concerned from seeking the wider protection conferred by the said principle, as interpreted by courts and tribunals (a sort of "direct effect" of the rights of defence and of the right to be heard, i.e irrespective of the specific provisions intended to implement these rights). In the present case, such wider protection would have consisted in the Appellant being

heard in the framework of the inquiry that led to the report on the basis of which the MD imposed the contested sanction.

66. Nothing in Article 9 of the Statute opposes this kind of interpretation. In particular, neither the objective of rapid and effective adoption and implementation of decisions related to staff matters nor the particular architecture of the ESM (see 1st and 2nd paras., respectively, of the above provision) would have been affected by the Appellant being heard in the framework of the inquiry. On the contrary, such early hearing, would have ensured that the hearing by the MD would have been a genuine “hearing”, satisfying the requirements of the fundamental principle of the rights of defence and not a simple formality, as the Appellants now argues.
67. Furthermore, it is recalled (and not contested) that, at the moment of this hearing, the MD was already, and since 10 January 2025, in the possession of the report drawn up for the purpose of the disciplinary procedure (and suggesting the imposition of a sanction) and that the Appellant not only was never heard in the framework of the inquiry leading to the report, but it also seems that, before being informed of the existence of the report, he was even unaware that the inquiry was taking place.
68. The Tribunal also observes that, to a greater or lesser extent, all witnesses heard for the purpose of drafting the report expressed critical views on the Appellant’s overall conduct, sharing in substance the grievances formulated by the ALM Head and the CFO (who were at the origin of the disciplinary procedure and were also heard as witnesses) and that the MD explicitly endorsed the report’s conclusions as his own (“... I agree with the conclusions of the Report...”), i.e. as the conclusions in the light of which he decided to impose the contested sanction. These circumstances prove the particular importance that would have had for the Appellant to have been heard prior to the finalisation of the report.
69. In view of the above, the Tribunal concludes that, in adopting the contested decision, the ESM has failed to respect the Appellant’s right to be heard. The legal flaw concerns the establishment of the report (mainly of the facts) through the inquiry and could have not been remedied at the stage of the adoption of the decision by the MD, other than by referral back to the inquirers with the specific request to hear also the Appellant, all the more since the MD is not the appropriate authority for fact-finding.
70. Having established the violation of the Appellant’s right to be heard, the Tribunal needs now to determine whether such violation leads automatically to the annulment of the contested decision or whether, by analogy with the relevant ECJ case-law, annulment depends, as the ESM suggests, on whether, in absence of the violation, the outcome of the dispute might have been different.
71. The Tribunal considers that the first view is correct. To the extent that in most legal systems the “normal” sanction of a major procedural violation should be the

annulment of the contested decision (*a fortiori* if the violation affects a fundamental right) and that the exception introduced by the ECJ case-law in the matter (above paras.33 third bullet-point, 50 *in fine* and 70 *in fine*) is far from reflecting a dominant trend of international administrative law, the Tribunal does not see sufficient reason to follow the said ECJ case-law, in particular in the sensitive area of disciplinary disputes. In addition, the Tribunal observes that, in the vast majority of cases, even the application of the above ECJ case-law would not prevent the annulment of the contested act, since in practice it would be extremely difficult to establish that in absence of the violation a different outcome would be, or not, “entirely excluded”, as it is required by the ECJ in order for the vitiated act to escape annulment (EU General Court case T-650/20, *KD v. EUIPO*, para.70), in particular in cases, as here, where the contested decision “*is based on subjective value-judgments, which are therefore by their very nature liable to be changed, if the [person concerned] had been heard before the decision was drawn up [and had been therefore able] to make his views known and thus perhaps alter the assessments made*” (EU Civil Service Tribunal case F-96/13, *Pipiliagkas v. Commission*, para.66).

As to the second ground of annulment

Arguments of the parties

72. Although one of the two grounds of annulment in the *petitum* of his Appeal is clearly the conflict of interest, the Tribunal notes that, in the relevant part of the Appeal, the Appellant does not directly complain of biased testimonies on the part of the witnesses who were at the same time his co-candidates for the position of the ALM Deputy Head. He only raises the issue, stating that such risk existed and, implicitly but clearly, making his final position dependent on the contents of the testimonies. Given however that the Appellant had already in his possession the anonymised versions of the testimonies and given, also, that he does not ask for the disclosure of the name of each witness (he confirms that explicitly), the relevant parts of his Appeal may only be interpreted as seeking to know the letters (A to D) identifying those witnesses who were at the same time candidates, possibly to compare their testimonies with those of the witnesses - non-candidates.
73. Clearly, the departure point of the Appellant’s reasoning is that, if some testimonies are flawed due to conflict of interest, the decision based also on such testimonies may on its turn be illegal, again for reasons of conflict of interest.
74. In the Respondent’s Reply there is no specific chapter responding to the ground of annulment based on the conflict of interest. It is only in the chapter dealing with the 2nd branch of the Appeal’s *petitum*, i.e with the procedural request concerning the records and the list of candidates for the ALM Deputy Head position, that the Respondent addresses and rejects the allegation of conflict of interest, without however using the term, but stating that “*there is no evidence ... that witnesses would*

have been biased and would have submitted false allegations ...” and characterizing as “arbitrary speculation” that “any applicant to a position would be biased when testifying about the behaviour of another applicant to the same position”.

Position of the Tribunal

75. In view of the conclusion reached with regard to the first ground for annulment, i.e. that a violation of the right to be heard was occurred and that this violation suffices for annulling the contested decision, there is no need for the Tribunal to adjudicate on the second ground (including on the request of the 2nd branch of the *petitum*) or to resolve the questions raised by those ESM submissions which were made for the exclusive use of the Tribunal (*in camera* only).

As to paragraphs 66 to 70 of the Appeal

76. Even if these paragraphs are not to be seen as expounding the 4th branch of the *petitum*, they totally lack the precision, clarity and completeness required from any legal plea. The Tribunal rejects therefore as inadmissible both the allegations and requests contained in the said paragraphs and the *petitum* based on them, i.e. the 4th branch of the Appeal’s *petitum*.

On the Appellant’s procedural conduct

77. For the Tribunal, it is a very striking coincidence that after the rejection of all the Appellant’s attempts to have the hearing of 18 September 2025 adjourned (see above paras.16 sequ.), the latter suddenly fell ill, given that such unfortunate circumstance, combined with the Appellant’s decision to revoke his lawyer’s power of attorney and to undertake his defence personally, was by necessity to lead to the adjournment of the hearing, i.e. to the Appellant’s objective from the very beginning. It was clearly the Appellant’s right to renounce to assistance by a lawyer and to be “self-represented”; however, when this right is exercised at a moment in which the Appellant was not only on sick leave for a period beyond the scheduled date for the hearing, but, furthermore, specifically judged as medically unfit for any form of participation in judicial proceedings (above para.26), including therefore obviously the hearing in question, the Tribunal, unless it would have concluded that there was an abuse of right situation, was left with little possibility of holding of a hearing in absence of both the Appellant and of any counsel representing him.
78. In addition to the above “striking coincidence”, the Tribunal does not fail to note the selective way in which the Appellant made use of the medical certificates attesting to his supposed incapacity, in particular the fact that he invoked them to obtain an adjournment of the hearing, while otherwise actively participating in the proceedings, by means of numerous written submissions, which one would normally not expect from a person medically unfit for judicial proceedings.

79. This is also the case for the written submissions of the Appellant in his pending dispute with the ESM bearing the number ESMAT 3/2025 (above para.23), in periods of time during which he was supposedly “self-represented” and, simultaneously, medically unfit to participate in any legal proceedings.
80. It is not the Tribunal’s task to question the validity of the Appellant’s medical certificates or to censure his procedural choices as to whether he is represented by a lawyer. It is however the Tribunal’s task to ensure the application of the law in all cases falling under its jurisdiction, including respect not only of the rights of defence, in particular of people with medical problems, but also of the requirements of the good administration of justice and of adjudicating cases within a reasonable time, establishing the right balance between the above *desiderata*, along the lines of the ECJ case-law. For those reasons, the Tribunal, taking also into account Article 8(6) of its Statute, will proceed to the rendering of its judgment without any further delay, assessing the above facts and circumstances, and drawing conclusions therefrom, only with regard to the burden of the legal costs (below, paras.84-85) and irrespective of other question which may arise.
81. Regardless, the Tribunal considers it regrettable that an ESM agent, in particular a candidate to a relatively high position (such as the one of the ALM Deputy Head), combines his/her procedural requests with implicit threats of various actions against not only the ESM, but also against the Tribunal itself, in the event of rejection by the latter of the said requests, and questions openly and repetitively the independence and impartiality of the Tribunal (see above, paras.26-27 and 32 *in fine*). Unless this is due to his medical condition and he withdraws the above after his recovery.

As to the request for compensation

82. The Appellant’s allegations that “the investigation [...] conducted against him also tainted the selection process” for the position of the ALM Deputy Head and, therefore, caused him material damage, are unsubstantiated and purely speculative. Concerning his purported moral damage (which he quantifies at 20.000 euros), it is clear that the vague reference to the alleged “stress” is manifestly insufficient, irrespective of the question whether, and to what extent, the finding of the illegality and the subsequent annulment of the contested decision could have compensated the moral damage alleged.
83. Nevertheless, in view of the nature of the illegality found with regard to the right to be heard, i.e. that the Appellant not only was not heard in the course of the inquiry which led to his disciplinary sanction, but he also ignored the very conduct of this inquiry until it was concluded, the Tribunal invites the ESM to make an *ex gratia* payment to the Appellant, as in the previous case ESMAT 1/2024 and despite the significant differences in the factual and legal circumstances justifying such payment

in the two cases. The amount of the recommended *ex gratia* payment in the present case is set at 1.000 euros.

V. COSTS

84. According to Article 14(3) of the Statute, “[i]f the Tribunal concludes that an appeal is founded in whole or in part, it may order that the reasonable costs incurred in the proceedings by the Appellant, including reasonable fees of the Appellant’s counsel, be totally or partially borne by the ESM”.
85. In the present case, and in view of the procedural conduct of the Appellant, as described above, in particular his refusal to accept the initially scheduled date of the hearing (asking firstly for a postponement due to supposed other obligations of his counsel, then for a suspension of the proceedings and then for a joinder with another case) and his repetitive requests aiming at its adjournment, in spite of the rejection by the Tribunal of the previous requests, mainly for the joinder with another case (currently ESMAT 3/2025), the Tribunal decides that the Appellant will only be reimbursed for the 50% of his “reasonable costs” within the meaning of the above provision and only for the period from the lodging of the Appeal to the revocation of the power of attorney to his lawyers.

For these reasons the Tribunal DECIDES TO :

- Uphold the Appeal and annul the contested decision
- Conclude that there is no need to adjudicate on the 2nd branch of the *petitum*
- Recommend the Respondent to make an *ex gratia* payment to the Appellant of an amount of 1.000 euros
- Order the Respondent to pay 50% of Appellant’s legal costs, as specified in para.85 *in fine*

Done in Luxembourg, on 30 January 2026

Virginia MELGAR, President
(signed)

Harissios TAGARAS
(signed)

Kieran BRADLEY
(signed)