Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 12 January 2023 [1]

Case C-513/21 P

DI
v

European Central Bank

(Appeal – Staff of the European Central Bank (ECB) – Conditions of employment – Competent authority – Delegation – Disciplinary proceedings – Termination of the appellant's employment contract – Action for annulment and for damages)

I. Introduction

1. By his appeal, DI asks the Court of Justice to set aside the judgment of the General Court of the European Union of 9 June 2021, *DI* v *ECB* (T-514/19, EU:T:2021:332; 'the judgment under appeal'), dismissing his action under Article 270 TFEU and Article 50a of the Statute of the Court of Justice of the European Union, by which DI sought, in the first place, annulment of the decision of the European Central Bank (ECB) of 7 May 2019 dismissing him without notice on disciplinary grounds ('the dismissal decision') and of the ECB's decision of 25 June 2019 refusing to reopen the proceedings (taken together with the dismissal decision, 'the decisions at issue'), in the second place, an order that he be reinstated as from 11 May 2019 and, in the third place, compensation for the non-material damage which he allegedly suffered as a result of the decisions at issue and of the length of the disciplinary proceedings.

2. As requested by the Court, I shall restrict my analysis in this Opinion to the first ground of appeal. That ground of appeal alleges that the General Court erred in law by rejecting one of the pleas in law in the action for annulment, relating to the lack of competence of the author of the decisions at issue.

3. In essence, by his first ground of appeal, the appellant submits that, according to the rules applicable in the present case, the decisions at issue should have been taken by a delegatee acting on behalf of a delegator, whereas in the present case those decisions were taken by the delegator itself. That ground of appeal provides the Court with the opportunity to examine the system of delegation of authority implemented within the ECB and, more generally, the issue of the delegation of powers within an institution in matters of staff management.

[1] Original language: French.

II. Legal context

A. The Statute of the ESCB

4. Protocol (No 4) on the Statute of the European System of Central Banks (ESCB) and of the ECB annexed to the TEU and the TFEU ('the Statute of the ESCB') provides, in Article 12.3 thereof:

'The Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies.'

5. Article 36.1 of the Statute of the ESCB provides:

'The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.'

B. The Conditions of Employment

6. On the basis of Article 36.1 of the Statute of the ESCB, the Governing Council adopted the Decision of 9 June 1998 on the adoption of the Conditions of Employment for Staff of the European Central Bank as amended on 31 March 1999.[2] Article 44 of the Conditions of Employment, in the version applicable to the facts at issue ('the Conditions of Employment'), provides:

'The following disciplinary measures may be taken, as appropriate, against members of staff or former members of staff to whom these Conditions of Employment apply who, whether intentionally or through their negligence, breach their professional duties:

…

(ii) in addition, the Executive Board may impose any of the following:

…

– dismissal with or without notice …,

– where a member of staff is in receipt of a retirement pension or disability allowance, withdrawal in whole or in part either temporarily or permanently of entitlement to a retirement pension or disability allowance …'

C. The Rules of Procedure

7. On the basis of Article 12.3 of the Statute of the ESCB, the Governing Council adopted the Rules of Procedure of the ECB ('the Rules of Procedure').

8. Article 10.2 of those Rules of Procedure provides that all work units of the ECB are to be placed under the managing direction of the Executive Board.

[2] OJ 1999 L 125, p. 32.

9. Under the heading 'Conditions of Employment', Article 21 of the Rules of Procedure, in the version applicable until 2004, which has not been amended since that time in a way that could affect the reasoning set out in this Opinion, provided:

'21.1. The employment relationship between the ECB and its staff shall be determined by the Conditions of Employment and the Staff Rules.

21.2. The Conditions of Employment shall be approved and amended by the Governing Council upon a proposal from the Executive Board. The General Council shall be consulted under the procedure laid down in these Rules of Procedure.

21.3. The Conditions of Employment shall be implemented by Staff Rules, which shall be adopted and amended by the Executive Board.

21.4. The Staff Committee shall be consulted before the adoption of new Conditions of Employment or Staff Rules. Its opinion shall be submitted, respectively, to the Governing Council or the Executive Board.'

D. The Staff Rules

10. On the basis of Article 21.3 of the Rules of Procedure and Article 9(a) of the Conditions of Employment, the Executive Board of the ECB adopted the European Central Bank Staff Rules ('the Staff Rules'), Article 8.3.17 of which provides:

'The Chief Services Officer, on behalf of the Executive Board, for members of staff at salary band I or below, or the Executive Board, for members of staff above salary band I, shall decide on the most appropriate disciplinary measure …'

III. Background to the dispute

11. The background to the dispute was set out in paragraphs 1 to 26 of the judgment under appeal, which are worded as follows:

'1. The [appellant], DI, joined the [ECB] as a member of staff in 1999 …

2. By several notes dated from 13 December 2013 to 23 November 2015, the company managing the ECB's health insurance scheme ("Company A") informed it of two sets of facts. First, the [appellant] allegedly unlawfully submitted to it physiotherapy invoices for reimbursement, even though those invoices had been provided by B, a beautician, and, second, he allegedly claimed reimbursement of fake receipts for pharmacy expenses.

…

4. By decision of 21 October 2014, the ECB's Executive Board decided to suspend the [appellant] from his functions and to deduct 30% of his basic salary for a maximum period of four months as from November 2014. That decision was based on the information provided by Company A and by the need to safeguard the criminal investigation and the disciplinary follow-up.

…

6. After hearing the [appellant] on 3 February 2016, the Directorate-General (DG) for "Human Resources, Budget and Organisation" of the ECB drew up, on 8 September 2016, a "report on a possible breach of professional duties" ("Report No 1"), pursuant to Article 8.3.2 of the [Staff Rules]. That report found two sets of facts against the [appellant]. In the first place, from 12 November 2009 to 29 September 2014, the [appellant] submitted to Company A 86 invoices relating to physiotherapy sessions provided by B to his wife, their children, and himself in the amount of EUR 61 490, for which he obtained reimbursement in the amount of EUR 56 041.09, although B is not a physiotherapist but a beautician. In the second place, between February 2009 and September 2013, the [appellant] also submitted fraudulently to Company A handwritten pharmacy receipts for a total amount of EUR 21 289.08, of which Company A reimbursed EUR 19 427.86.

…

8. On 18 November 2016, the ECB's Chief Services Officer "acting on behalf of the Executive Board" initiated disciplinary proceedings against the [appellant] for an alleged breach of his professional duties requiring the involvement of the Disciplinary Committee and requested the latter to deliver an opinion in accordance with Article 8.3.15 of the Staff Rules. Initiated in the light of Report No 1, those proceedings concerned the facts relating to the physiotherapy invoices and the pharmacy receipts.

9. The Disciplinary Committee exchanged several letters with the [appellant] and interviewed him on 13 February 2017.

10. On 5 September 2017, DG "Human Resources, Budget and Organisation" of the ECB drew up a second "report on a possible breach of professional duties" within the meaning of Article 8.3.2 of the Staff Rules ("Report No 2"). That report concerned learning support invoices for the [appellant]'s two children, for which he had claimed reimbursement under Article 3.8.4 of the Staff Rules in 2010, 2012 and 2014 and again in January 2017. According to that report, there was a reasonable suspicion that the invoices issued by Tutor C for learning support were not genuine and authentic.

11. In the light of Report No 2, the Chief Services Officer, "acting on behalf of the Executive Board", decided on 19 September 2017 to extend the mandate of the Disciplinary Committee to those facts.

…

13. The Disciplinary Committee interviewed the [appellant] and his wife on 17 October 2017.

…

15. On 11 April 2018, the Disciplinary Committee delivered its opinion. First of all, it considered that the inauthenticity of the physiotherapy invoices had not been sufficiently established, but that the [appellant] knew that B was a beautician, not a physiotherapist, or that he should at the very least have questioned her qualifications. Next, the Disciplinary Committee considered that the facts giving rise to the complaints concerning the submission of the pharmacy receipts and learning support invoices were also not sufficiently established and that it was appropriate to close the proceedings in that regard, subject to re-opening them if

new evidence were to be produced. In the light of the foregoing, the Disciplinary Committee recommended that a penalty be imposed on the [appellant] consisting of a temporary salary reduction of EUR 400 per month over a period of 12 months.

16. After the [appellant] had submitted his observations on the Disciplinary Committee's opinion of 11 April 2018, the Chief Services Officer notified to him a decision of 10 July 2018 by which the Executive Board decided to exercise itself the disciplinary power in this case ("the decision of 10 July 2018").

17. The Chief Services Officer subsequently notified to the [appellant] a draft decision of the Executive Board seeking to dismiss him without notice. An exchange of correspondence followed.

18. On 7 May 2019, the Executive Board decided to dismiss the [appellant] without notice [by the dismissal decision].

…

25. By letter of 12 June 2019, the [appellant] informed the Chief Services Officer of the outcome of the proceedings brought by the Public Prosecutor's Office concerning the learning support invoices and requested that the ECB reconsider its dismissal decision.

26. By letter of 26 June 2019, the Chief Services Officer informed the [appellant] of the decision of the Executive Board of previous 25 June refusing to reopen the disciplinary proceedings …'

IV. The procedure before the General Court and the judgment under appeal

12. By application lodged at the Registry of the General Court on 18 July 2019, the appellant brought an action seeking annulment of the decisions at issue, his reinstatement and compensation for non-material damage.

13. In support of his claim for annulment, the appellant relied on nine pleas in law, which the General Court counted as ten. The first plea alleged lack of competence of the author of the decisions at issue.

14. In essence, as the General Court summarises in paragraphs 43, 44 and 47 of the judgment under appeal, the appellant argued that the withdrawal of the delegation from the Chief Services Officer, resulting from the decision of 10 July 2018, required the prior consultation of the Staff Committee. In the absence of such consultation, that decision was unlawful, with the result that the dismissal decision was taken by the Executive Board instead of the legally competent authority.

15. More specifically, in the first place, the appellant argued that the decision of 10 July 2018 constituted a modification of the Staff Rules and that such a modification required consultation of the Staff Committee, in accordance with Article 21 of the Rules of Procedure and the principle of parallel proceedings. In the second place, the appellant argued that, even if he was the only person concerned by the decision of 10 July 2018, the possibility for the Executive Board to deal with individual cases means that Article 8.3.17 of those rules cannot be regarded as a definitive

provision, but as a provision which can be varied at will by the ECB. In disciplinary matters, legal certainty and publicity are essential. In those circumstances, the appellant considers that consultation of the Staff Committee would have been useful.

16. For the reasons set out in paragraphs 44 to 52 of the judgment under appeal, the General Court rejected that plea as unfounded. Indeed, the General Court found, first of all, that the decision of 10 July 2018 had only individual application and did not lead to a modification of the Staff Rules which would have required the Staff Committee to have been consulted in the interests of legal certainty and publicity. Subsequently, the General Court found, first, that by entrusting to the Chief Services Officer the task of adopting individual dismissal decisions 'on behalf of the Executive Board', Article 8.3.17 of those rules fell within the wide discretion which the EU institutions enjoy to organise themselves internally, and that the principle of legal certainty did not preclude the relevant decisions of the Chief Services Officer from expressing those of the Executive Board, which fully assumes responsibility for them and to which they are legally attributable. Next, the General Court found that that article was published and that the ECB had justified the decision not to publish the decision of 10 July 2018 in the interest of the appellant, who had been notified of it. Lastly, the General Court added that, in any event, the appellant had not been deprived of any guarantee, as the collegiate exercise of a power offers, in principle, more protection.

V. The procedure before the Court of Justice and the forms of order sought

17. The appellant claims that the Court should set aside the judgment under appeal and annul the decisions at issue and, in any event, order the ECB to pay compensation for his non-material damage assessed at EUR 20 000, and order the ECB to pay the costs incurred before the General Court and the Court of Justice.

18. The ECB contends that the Court should dismiss the appeal in its entirety and order the appellant to pay the costs.

VI. Analysis

19. By his first ground of appeal, the appellant criticises the General Court's findings set out in paragraphs 44 to 52 of the judgment under appeal.

20. In essence, the General Court found that, under Article 8.3.17 of the Staff Rules, the Executive Board was competent to adopt the decisions at issue. The appellant asserts that that is not the case since, having been adopted without prior consultation of the Staff Committee, the decision of 10 July 2018 did not affect the division of powers within the ECB and that, consequently, only the Chief Services Officer was competent to adopt the decisions at issue.

21. In its response and rejoinder, the ECB expresses doubts as to the admissibility of the first ground of appeal and contends that, in any event, that ground of appeal is unfounded.

A. Admissibility

22. According to the ECB, the first ground of appeal does not identify with sufficient precision the paragraphs in the grounds of the judgment under appeal which are disputed, and merely repeats the view put forward by the appellant before the General Court.

23. Furthermore, the ECB states that it is not clear from the appellant's argument that the decision of 10 July 2018 modified the Staff Rules whether that argument refers to a point of law or a point of fact.

24. More specifically, the ECB observes that the General Court found, in paragraphs 45 and 51 of the judgment under appeal, that 'the decision of 10 July 2018 did not repeal Article 8.3.17 of the Staff Rules' and that '[that decision] does not lead to a modification of the Staff Rules'. In that regard, the ECB contends that the appellant states in his appeal that those findings of the General Court are points of fact. In so doing, the ECB refers to a passage of the appeal according to which 'it is *a fact* that the 10 July 2018 decision modified article 8.3.17 of the Staff Rules'.[3] The ECB declares that it agrees with that assertion and states that the appellant's argument that the Staff Rules were modified therefore appears to be inadmissible.

25. However, it should be noted first of all that the appellant identifies, in his first ground of appeal, the paragraphs of the judgment under appeal which are disputed, and sets out the reasons why, in his view, they are vitiated by an error of law. As the following analysis of the substance of the case will illustrate, those two aspects are sufficiently clear and precise to enable the Court to rule on the appeal.

26. Next, the first ground of appeal alleges that the General Court erred in law when interpreting and applying EU law, and that this error led the General Court to find that the Executive Board was competent to adopt the decisions at issue, and dismiss one of the pleas in law in the action for annulment, relating to the lack of competence of the author of those decisions. It is settled case-law that, in such a case, the points of law examined at first instance may be argued again in the course of an appeal. Indeed, if an appellant could not thus base its appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose.[4]

27. Lastly, contrary to what the ECB appears to suggest, the identification of the legal nature of an act of the administration and the determination of the effects produced by it is a matter of law. That applies a fortiori where the act is liable to lead, as the appellant alleges, to a modification of the rules applicable to the case in question.

28. It follows that the first ground of appeal is admissible.

3 Italicised to reflect the emphasis added by the ECB in its response.

4 See judgment of 23 November 2021, *Council* v *Hamas* (C-833/19 P, EU:C:2021:950, paragraph 53 and the case-law cited).

B. Substance

1. Arguments of the parties

29. In support of his first ground of appeal, the appellant puts forward three substantive arguments, the merits of which the ECB disputes.

30. To put the arguments of those parties in context, I would observe that, as is apparent from the decision of 10 July 2018, the Executive Board decided to intervene in the proceedings which gave rise to the decisions at issue in view of, first, the previous involvement of that decision-making body in those proceedings when the decision of 21 October 2014 was adopted [5] and, second, the sensitivity of the matter.

31. In that regard, the appellant submits, in the first place, that the decision of 10 July 2018 modified Article 8.3.17 of the Staff Rules. The appellant claims that, by that decision, the Executive Board sought to withdraw the delegation conferred on the Chief Services Officer for the purpose of the appellant's disciplinary proceedings. He admits that that modification was limited to him and, in that respect, can be regarded as an individual act. However, the appellant submits that it was, at the same time, a modification of a general act, namely the Staff Rules. The double nature of the decision of 10 July 2018 implies the obligation to consult the Staff Committee.

32. According to the ECB, the appellant is wrong to interpret Article 8.3.17 of the Staff Rules as transferring the power finally and irrevocably from the Executive Board to the Chief Services Officer, so that the Executive Board would need to amend that provision if it wished to exercise that power itself. That provision does not provide a 'delegation of power' requiring recovery of the delegated power, but rather a 'delegation of authority', [6] and it is clear from its wording that the Executive Board did not confer on the Chief Services Officer a personal, and thus exclusive, competence. The Executive Board did not modify that provision, but merely applied what is inherent to it by exercising its own competence in a particular case.

33. In the second place, the appellant states that the consideration that the Executive Board can modify the rule laid down in Article 8.3.17 of the Staff Rules on an individual basis and withdraw the powers conferred on the Chief Services Officer means that the division of powers within the ECB is not clearly defined, and therefore that the principle of legal certainty and the rules of good administration were not observed. According to the appellant, the fact that he was informed of the decision of 10 July 2018 does not suffice to remedy that situation. The appellant observes that the judgment in *Kuchta* v *ECB*, [7] referred to in paragraph 50 of the judgment under appeal, imposes a dual requirement, namely that the division of powers within the ECB must be clearly defined and duly published.

[5] That decision was adopted prior to the creation of the position of Chief Services Officer at the ECB. Indeed, as the appellant observed in his application to the General Court, the position of Chief Services Officer was created on the basis of the decision of the Executive Board of 4 August 2015 (Decision of the European Central Bank of 4 August 2015 amending the European Central Bank Staff Rules as regards the selection and appointment of the Chief Services Officer (ECB/2015/NP18)). According to Article 2 of that decision, it did not enter into force until 1 September 2015.

[6] The ECB refers, in that regard, to the judgment of 26 May 2005 (C-301/02 P, EU:C:2005:306, paragraph 60; 'the judgment in *Tralli* v *ECB*'), and to the judgment of 22 November 2018, *Janssen-Cases* v *Commission* (T-688/16, EU:T:2018:822, paragraph 31). It concludes that a delegation of power constitutes an act which divests the delegating authority of the power delegated to the authority receiving the delegation, whereas a 'delegation of authority' does not produce such an effect.

[7] Judgment of 9 July 2008 (F-89/07, EU:F:2008:97).

34. In that regard, the ECB argues that, having regard to the wording and purpose of Article 8.3.17 of the Staff Rules, it is not an unforeseeable event that the Executive Board decides, in a given case, to exercise power. In the present case, that decision is explained by the Executive Board's involvement in the appellant's suspension and the sensitivity of the matter. Such a decision would also be necessary in the event that the Chief Services Officer was absent, incapacitated or could have a conflict of interests. The appellant's view runs counter to the need to ensure administrative continuity in general.

35. In the third place, the appellant submits that the judgment under appeal is vitiated by an error of law in that the General Court found that the appellant had not been deprived of any guarantee. He accepts that collegiality is a guarantee of impartiality, 'but not of all guarantees'. In so doing, the appellant states, in paragraph 14 of the appeal, that he has already explained why consultation of the Staff Committee 'could have had an influence' on his situation, without, however, setting out those reasons in the appeal. [8]

36. In its rejoinder, the ECB observes that the appellant did not state that the Executive Board had provided him with fewer guarantees by adopting the dismissal decision and that, even assuming that the Executive Board was not competent to adopt that decision, this would not lead to the automatic annulment of that decision. In that regard, the ECB refers to the case-law of the General Court according to which a decision taken by an authority without competence to do so because of infringement of the rules for allocation of the powers conferred upon it may be annulled only if the failure to comply with those rules adversely affects one of the guarantees given to officials by the Staff Regulations of Officials of the European Union or the principles of good administration in staff management. [9]

2. Assessment

37. In order to rule on the first ground of appeal, it must in the first place be determined whether, under the Staff Rules, the Executive Board was competent to decide on disciplinary measures for staff at salary band I and below. To that end, it must be ascertained whether, as the appellant claims in his first argument, under Article 8.3.17 of those rules, the Executive Board relinquished part of its decision-making power to the Chief Services Officer or whether, as the ECB maintains, the Executive Board itself could take the decisions at issue without the involvement of the Chief Services Officer. In so doing, I shall address the question whether the division of powers within the ECB meets the requirements established by the case-law as to clarity (being 'clearly defined') and transparency (being 'duly published'), since that question was raised by the appellant in his second argument in support of the first ground of appeal.

[8] In that regard I would observe that the appellant merely argues in paragraph 10 of his appeal that a 'legal assessment' according to which the Executive Board was not obliged to consult the Staff Committee renders the obligation to consult meaningless and is likely to lead to abuses and misuse of process. Furthermore, it appears that paragraph 14 of the appeal must be read in conjunction with paragraph 7 thereof, in which the appellant states that he has explained why he had an interest in the Staff Committee being consulted. The appellant also refers, in paragraph 7 of the appeal, to paragraph 18 of his reply before the General Court, in which he argued that he had an interest in the Staff Committee being consulted prior to a 'change of the delegation'.

[9] In its rejoinder, the ECB relies on the judgments of 7 February 2007, *Caló* v *Commission* (T-118/04 and T-134/04, EU:T:2007:37, paragraphs 67 and 68); of 17 November 2017, *Teeäär* v *ECB* (T-555/16, not published, EU:T:2017:817, paragraph 52); and of 19 December 2019, *XG* v *Commission* (T-504/18, EU:T:2019:883, paragraph 93).

38. Only if it should be held that the Executive Board was not competent to adopt the decisions at issue would it be necessary to examine, in the second place, whether the decision of 10 July 2018, taken without prior consultation of the Staff Committee, legitimately affected the division of powers within the ECB as regards the taking of a disciplinary measure against a staff member by the Executive Board without the involvement of the Chief Services Officer.

39. If not, in the third place, it would be appropriate to examine whether, in the light of the case-law referred to in point 36 of this Opinion, the decisions at issue which are vitiated by a lack of competence should necessarily be annulled.

(a) Preliminary remarks on delegation within an institution

40. In the EU legal order, the issue of the 'delegation' of powers or competences, in the broad sense of the term,[10] has a long history and has given rise to a considerable body of case-law, accompanied by a vast body of academic writings. The case-law and legal literature focused initially on situations concerning a 'delegation' of powers between EU institutions or by an EU institution to an external entity.[11]

41. However, the present case does not concern a delegation of powers between institutions or to an entity which is external to the ECB. Indeed, the 'delegation' referred to in the first ground of appeal is intra-institutional in nature and concerns decision-making relating to the staff of the institution concerned. Consequently, the question arises whether, and if so to what extent, the case-law on delegation between institutions may be transposed to delegation within an institution.

42. Academic writers observe that, as regards delegation within the EU institutions, the Court of Justice has adopted a less strict approach than that adopted with regard to the delegation of powers between institutions,[12] so that delegation within institutions is only partially subject to the limitations and principles applicable to delegation between institutions.[13]

43. This is due, on the one hand, to the fact that, in the context of its institutional autonomy, the ECB, like other EU institutions, has a wide discretion to organise its departments to suit the responsibilities entrusted to it.[14] On the other hand, as the Court of Justice has clarified, the division of powers within the ECB does not fall within the scope of the principle of institutional balance.[15]

44. The provision which lies at the heart of this case, namely Article 8.3.17 of the Staff Rules, falls within that context.

[10] The EU legal order does not define the concept of 'delegation' as regards competence or powers. That task has been assumed by the legal literature. See, to that effect, Lenaerts, K., 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community', *European Law Review*, 1993, 18(1), p. 24. Since such delegation may take various forms and serve different purposes, its definition must, in order to be able to cover all cases, be sufficiently broad and general.

[11] See, inter alia, judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

[12] See Tridimas, T., 'Community Agencies, Competition Law, and ECSB Initiatives on Securities Clearing and Settlement', *Yearbook of European Law*, 2009, p. 255.

[13] See Volpato, A., *Delegation of Powers in the EU Legal System*, Routledge, London, 2022, p. 31.

[14] See judgment of 14 October 2004, *Pflugradt* v *ECB* (C-409/02 P, EU:C:2004:625, paragraph 43).

[15] See, to that effect, the judgment in *Tralli* v *ECB* (paragraph 46).

45. Indeed, it follows from Article 21.3 of the Rules of Procedure, which are adopted by the Governing Council, that the Conditions of Employment, which are also determined with the involvement of the Governing Council, are to be implemented by the Staff Rules adopted by the Executive Board.

46. The division of powers within the ECB with regard to disciplinary measures, as laid down in Article 8.3.17 of the Staff Rules, is based on a choice made by the Executive Board itself. The appellant does not deny that the Executive Board has the right to delegate its powers to the Chief Services Officer. He does, however, criticise the General Court's interpretation of that provision and, more specifically, the effects which the General Court attributed to that provision as regards the Executive Board's competence to decide, in the presence of a 'delegation' to the Chief Services Officer, on a disciplinary measure.

47. I should point out that, in support of their arguments, the appellant and the ECB refer, inter alia, to the case-law of the General Court which draws a distinction between a delegation of power and a delegation of signature.

48. In the judgments which form part of that case-law, the General Court found that the delegation in question was a delegation of signature, which, according to that court, differs from a delegation of power in that the delegator does not transfer competence to the delegatee, who was simply entrusted with the power to draw up and sign, on behalf of and under the responsibility of the delegator, the formal document of a decision 'the substance of which has been defined by the latter'.[16] The General Court also regarded as a delegation of signature the situation where servants or officials are authorised to take, 'on behalf of the administration and under its responsibility', clearly defined management or administrative measures.[17] Furthermore, the case-law of the Court of Justice on which those General Court judgments are based concerned situations where the signatory 'did no more than sign the notice of objections … which the [competent authority] had previously approved'[18] and was 'provided with instructions'.[19]

[16] See judgment of 13 July 2006, *Vounakis* v *Commission* (T-165/04, EU:T:2006:213, paragraph 45). See also the Opinion of Advocate General Cosmas in *Le Canne* v *Commission* (C-10/98 P, EU:C:1999:159, points 34 and 35).

[17] See judgment of 8 September 2021, *AH* v *Eurofound* (T-52/19, EU:T:2021:537, paragraph 55).

[18] See judgment of 14 July 1972, *Geigy* v *Commission* (52/69, EU:C:1972:73, paragraph 5). See also judgments of 14 July 1972, *Imperial Chemical Industries* v *Commission* (48/69, EU:C:1972:70, paragraphs 12 and 13), and of 17 October 1972, *Vereeniging van Cementhandelaren* v *Commission* (8/72, EU:C:1972:84, paragraphs 11 and 12). See also, with regard to that case-law, Hofmann, H.C.H., Rowe, G.C. and Türk, A.H., 'Delegation and the European Union Constitutional Framework', in *Administrative Law and Policy of the European Union*, Hofmann, H.C.H. (ed.), Oxford University Press, Oxford, 2011, p. 255.

[19] See judgment of 17 January 1984, *VBVB and VBBB* v *Commission* (43/82 and 63/82, EU:C:1984:9, paragraph 13).

49. However, in the EU legal order, not every delegation can necessarily be regarded as a delegation of power or a delegation of signature corresponding perfectly to the characteristics described in the case-law of the General Court mentioned in point 48 of this Opinion.[20] While there is certainly some convergence between the approaches adopted in each case, the EU institutions enjoy a wide discretion to organise themselves internally according to their needs.[21]

50. That observation is supported by the judgment in *Tralli* v *ECB*[22] in which the Court of Justice stated that, without relinquishing its rule-making power, the Executive Board may authorise its Members to adopt certain decisions on its behalf, such as individual decisions relating to the extension of the probationary period of a newly recruited member of staff.

51. Admittedly, it could be inferred from the considerations of the Court of Justice in relation to the system of delegation of authority examined in the judgment in *Tralli* v *ECB* that the delegator (the Executive Board) did not relinquish its decision-making power despite the fact that it had authorised the delegatee to exercise a certain discretion. However, unlike the decisions at issue in the present case, the decision whose lawfulness was examined by the EU judicature in that judgment had been taken not by the delegator but by the delegatee (the Vice-President of the ECB).

52. Even more importantly, the considerations of the Court of Justice in the judgment in *Tralli* v *ECB* concerned a situation in which the delegating authority (the Executive Board) delegated power to a member of that authority (the Vice-President of the ECB).[23] That may explain why the Court of Justice relied on its case-law arising from the judgment in *AKZO Chemie and AKZO Chemie UK* v *Commission*,[24] regarding the Commission's delegation of authority to its members to take certain decisions on its behalf. However, the Chief Services Officer is not a member of the Executive Board.

53. That being said, the judgment in *Tralli* v *ECB* illustrates that, in order to determine the effects produced by a system of delegation of authority implemented within the ECB, it is necessary to examine the context in which that system operates and the way it works.

[20] In that connection, it is certainly true that the approaches adopted in the EU legal order are, at least in part, inspired by those employed in the legal orders of the Member States. However, I do not think that, at this stage in the development of EU law and in view of the wide discretion available to the EU institutions, whose tasks have become specialised and specific, it would be necessary or even appropriate to refer to national law in order to classify the system of delegation of authority established by Article 8.3.17 of the Staff Rules. In the first place, some academic writers (see, in particular, Volpato, A., *Delegation of Powers in the EU Legal System*, Routledge, London, 2022, p. 11) argue that, as far as the legal orders of the Member States are concerned, first, the delegator often retains competence to take decisions covered by the delegation (which is the effect attributed by the General Court in its case-law not to a delegation of power, but rather to its view of a delegation of signature) and, second, the delegatee acts in its own name and not on behalf of the delegator (which, in turn, corresponds not to a delegation of signature, as described in the case-law of the General Court, but rather to the delegation of power). I would note, by way of illustration, that in French law the traditional distinction between a delegation of power and a delegation of signature has been called into question, and therefore it may be considered, in some cases, that, despite a delegation of disciplinary power, the delegator may adopt decisions covered by that delegation. See Tusseau, G., 'Le juge administratif et la délégation du pouvoir de suspension d'un fonctionnaire : à propos de l'arrêt du Conseil d'État du 22 novembre 2004, Ministre de la jeunesse, de l'éducation nationale et de la recherche c/ M.A., req. No 244515', *Revue française de droit administratif*, 2005, p. 4 et seq. In the second place, it should be noted that, in the context of its functional autonomy, the ECB is not dependent on the laws of the Member States. See, to that effect, judgment of 22 October 2002, *Pflugradt* v *ECB* (T-178/00 and T-341/00, EU:T:2002:253, paragraph 48).

[21] This applies a fortiori as regards the ECB, which enjoys functional autonomy as regards the body of rules applicable to its staff, which is distinct from the rules applicable to officials and other servants of the European Union.

[22] Paragraphs 59 and 60 of that judgment.

[23] Under Article 11.1 of the Statute of the ESCB, the Executive Board is to comprise the President, the Vice-President and four other persons appointed by the European Council.

[24] Judgment of 23 September 1986 (5/85, EU:C:1986:328, paragraph 39).

54. Accordingly, I consider that the judgment in *Tralli* v *ECB* provides useful lessons as to the characteristics of a 'system of delegation of authority' which does not have the effect of divesting the Executive Board of its power. In that judgment, without referring to the concept of 'delegation of signature' or specifying that the decision in question was previously approved by the delegator or adopted on its instructions, the Court of Justice pointed out that that 'system of delegation of authority' did not have the effect of divesting the Executive Board of its rule-making power, that the decisions were taken on its behalf, that it was fully responsible for them and that such authority was limited to individual decisions and did not concern decisions of a general nature.

55. It is in the light of those lessons that I propose to analyse the first argument put forward by the appellant in support of the first ground of appeal.

(b) The decision-making power of the Executive Board as delegator

56. Article 8.3.17 of the Staff Rules provides that the Executive Board is to decide on the disciplinary measures for members of staff above salary band I, while 'the Chief Services Officer, on behalf of the Executive Board' is to decide on the disciplinary measures for members of staff at salary band I or below.

57. Indeed, almost all of the provisions of the Staff Rules which mention the Chief Services Officer state that the latter acts on behalf of the Executive Board. [25]

58. In that regard, it should be observed, in the first place, that, under Article 8.3.17 of the Staff Rules, the Chief Services Officer is to exercise discretion when deciding on the 'most appropriate' disciplinary measure, to use the wording of that provision. However, in doing so, he or she is acting on behalf of the Executive Board, which must then assume responsibility for such decisions. Although, under the system of delegation of authority established by the Executive Board individual decisions on disciplinary measures remain the responsibility of the Executive Board, it cannot be considered, in the light of the lessons learned from the judgment in *Tralli* v *ECB*, that, by adopting that provision, the Executive Board has relinquished its decision-making power as regards such disciplinary measures.

59. In the second place, Article 8.3.2 of the Staff Rules provides that the Executive Board (for members of staff above salary band L) or the Chief Services Officer acting on behalf of the Executive Board (for members of staff at salary band L or below), may decide to initiate disciplinary proceedings. It is important to note that, according to that provision, where the proceedings are initiated by the Chief Services Officer, the Executive Board must be informed immediately.

60. I infer from the above that where the Chief Services Officer acts 'on behalf of the Executive Board', he or she does not merely carry out the will of the Executive Board, but decides himself or herself what action to take. Otherwise, the obligation to inform the Executive Board, laid down in Article 8.3.2 of the Staff Rules, would be meaningless.

[25] Of course, it is also possible to identify, among the provisions of the Staff Rules which refer to the Chief Services Officer, those which concern the actions undertaken by the latter, without mentioning the fact that he or she acts on behalf of the Executive Board. However, the actions covered by those provisions are different from those covered by Article 8.3.17 of the Staff Rules and do not concern decisions taken in respect of members of staff. Article 0.4bis.7.7 of the Staff Rules, in their current version, provides that, where the responsible persons have differing opinions with regard to a conflict of interest, they must refer the matter to the Chief Services Officer to decide which of them is competent to examine a request for protection against retaliation. In that connection, without mentioning the Executive Board, Articles 2a.11.6.3 and 2a.11.6.4 of those rules provide that the Chief Services Officer is competent to designate the person responsible for preparing the readiness report.

61. It is true that the obligation to inform the Executive Board of the action taken by the Chief Services Officer on behalf of the Executive Board is not provided for in other provisions of the Staff Rules. In particular, such an obligation is not expressly set out in Article 8.3.17 of those rules.

62. In my view, the reason why only Article 8.3.2 of the Staff Rules provides that the Executive Board is to be informed immediately of the decision of the Chief Services Officer corresponds to the nature of the system of delegation of authority set out in Article 8.3.17 of those rules. Having been informed of the initiation of disciplinary proceedings against a member of staff at salary band L or below, the Executive Board may choose to intervene in those proceedings in order to decide on the disciplinary measure. Like the obligation to inform the Executive Board of the initiation of proceedings, which applies to any proceedings initiated by the Chief Services Officer, the power to intervene in disciplinary proceedings initiated by the Chief Services Officer is thus inherent in Article 8.3.17 of those rules. Therefore, in order to exercise that power, the Executive Board does not need to modify those rules.

63. Lastly, in the third place, the context of Article 8.3.17 of the Staff Rules also appears to support the interpretation that the adoption of that provision did not have the effect of completely divesting the Executive Board of its power, given that a provision of higher rank, namely Article 44(ii) of the Conditions of Employment, provides that only that collegiate authority may impose the most serious disciplinary measures.[26] Furthermore, I note that the logic that the severity of the disciplinary measure may, where appropriate, have an influence on which body actually intervenes for the purposes of disciplinary proceedings, without requiring the modification of those rules, has been adopted by the Executive Board and reflected in provisions other than Article 8.3.17. In accordance with Article 8.3.2 of those rules, if the disciplinary measure likely to be imposed is one of the two least serious measures, the decision to initiate disciplinary proceedings may be taken by the Director-General Human Resources or the member of the Executive Board, depending on the salary band of the member of staff concerned, rather than by the Executive Board or the Chief Services Officer.[27]

64. To conclude this section, I consider that the system of delegation of authority implemented by Article 8.3.17 of the Staff Rules did not have the effect of divesting the Executive Board of any decision-making power as regards disciplinary measures imposed on members of staff in salary band I or below. Thus, the General Court was right to hold, in paragraph 48 of the judgment under appeal, that the decision of 10 July 2018 did not affect the division of powers established by the Staff Rules. Accordingly, the first argument put forward by the appellant in support of the first ground of appeal cannot succeed.

65. In those circumstances, it is now necessary to analyse the appellant's second argument, according to which the division of powers within the ECB, thus defined, is incompatible with the principle of legal certainty and the rules of good administration.

[26] In accordance with Article 44(i) of the Conditions of Employment, only the two least serious disciplinary measures may be taken by one person, the Director-General Human Resources or a member of the Executive Board, depending on the salary band of the member of staff concerned.

[27] In accordance with that provision, if the disciplinary measure likely to be imposed is a written warning or written reprimand, the Director-General Human Resources or their Deputy (for members of staff in salary bands A to J), or the member of the Executive Board to whom the Directorate-General Human Resources reports (for members of staff in salary bands K or L), may take a decision on the initiation of disciplinary proceedings.

(c) The clarity of the division of powers within the ECB

66. By his second argument, put forward in the event that the Court of Justice upholds the General Court's interpretation that Article 8.3.17 of the Staff Rules did not have the effect of divesting the Executive Board of its decision-making power in respect of the decisions at issue, the appellant claims the General Court erred in holding, in paragraphs 49 to 51 of the judgment under appeal, that that interpretation is not incompatible with the principle of legal certainty or the rules of good administration.

67. In support of that argument, the appellant submits that the fact that he was informed of the decision of 10 July 2018 is not sufficient to comply with the principle of legal certainty and the rules of good administration. In so doing, he states that the Court of Justice, in the judgment in *Kuchta* v *ECB*,[28] imposes two conditions, namely that the division of powers within the ECB must be clearly defined and duly published.

68. As a preliminary point, I note that it has been consistently held that, as submitted by the appellant, the principle of good administration requires that the division of powers and authority to sign within the institutions be published and clearly defined.[29] Although the appellant mentions those two requirements, he appears to do so to make the point that the General Court has ruled only on the first requirement, that the division of powers be published,[30] without addressing the second, that the division of powers be defined.

69. By way of further preliminary remarks, I would note that the judgment in *Teeäär* v *ECB*,[31] to which the ECB refers, may suggest that it is not necessary to examine those two requirements in order to rule on the lawfulness of the division of powers and hence on the question of whether a contested decision was taken by a competent decision-making body.

70. Indeed, a cursory reading of that judgment may give the impression that those requirements are to be taken into account only once it has been established that the contested decision is vitiated by lack of competence. To that end, they would be applied to determine whether that decision should be annulled, having regard to the case-law, referred to in point 36 of this Opinion, according to which failure to comply with the rules on the division of powers leads to the annulment of a decision only if that failure adversely affects one of the guarantees given to officials by the Staff Regulations of Officials of the European Union or the principles of good administration in staff management.[32]

[28] Judgment of 9 July 2008 (F-89/07, EU:F:2008:97).

[29] See, inter alia, judgments of 12 March 2020, *QB* v *ECB* (T-215/18, not published, EU:T:2020:92, paragraph 142), and of 8 September 2021, *AH* v *Eurofound* (T-52/19, EU:T:2021:537, paragraph 59).

[30] In any event, it is sufficient to note in that regard that, as the General Court stated in paragraph 50 of the judgment under appeal, Article 8.3.17 of the Staff Rules is published and that the ECB justified the decision not to publish the decision of 10 July 2018 in the interest of the appellant, in order to preserve his reputation at a time when the final outcome of the disciplinary proceedings could not be prejudged, and did not fail to notify the appellant of that decision. Furthermore, in the judgment of 23 September 1986, *AKZO Chemie and AKZO Chemie UK* v *Commission* (5/85, EU:C:1986:328, paragraph 39), in response to an argument based on the failure to publish the decision delegating authority to the Commission, the Court of Justice stated that the failure to publish the decision delegating authority to a member of the Commission had not deprived the applicants of the opportunity to challenge the lawfulness either of that decision or of the decision adopted under the delegation of authority.

[31] Judgment of 17 November 2017 (T-555/16, not published, EU:T:2017:817, paragraph 52).

[32] See judgment of 17 November 2017, *Teeäär* v *ECB* (T-555/16, not published, EU:T:2017:817, paragraph 52).

71. However, first, in the case which gave rise to the judgment in *Teeäär* v *ECB*,[33] the General Court was faced with a specific situation in which there was uncertainty regarding the author of the contested decision. The General Court did not therefore have the opportunity to examine the clarity of the rules on the competence of the author of that decision. Second, in the present case, the appellant submits that the division of powers established by Article 8.3.17 of the Staff Rules, as interpreted by the General Court, is incompatible with both the rules of good administration and the principle of legal certainty, which is a general principle of EU law, infringement of which may render a rule of law void.

72. As regards the principle of legal certainty and the clarity of Article 8.3.17 of the Staff Rules, the General Court stated, in paragraph 49 of the judgment under appeal, that that principle does not preclude that provision from being interpreted as meaning that the relevant decisions of the Chief Services Officer express those of the Executive Board, which fully assumes responsibility for them and to which they are legally attributable.

73. For the reasons I have given for rejecting the appellant's first argument,[34] I consider that Article 8.3.17 of the Staff Rules is sufficiently clear to enable members of staff to understand that disciplinary measures are always imposed on behalf of the Executive Board, which assumes responsibility for them, and that, where appropriate, the Executive Board may intervene in disciplinary proceedings in order to impose such a measure.[35] It is important to note in that regard that those reasons are based on conventional guidance on interpretation, which is to say, on a literal and systematic interpretation of that provision.

74. It is true that, according to the General Court's interpretation of Article 8.3.17 of the Staff Rules, the Executive Board has a discretion as to whether it should intervene in disciplinary proceedings initiated against a member of staff in salary band I or below. However, as the General Court observed in paragraph 49 of the judgment under appeal, the principle of legal certainty does not require the ECB to limit its discretion to organise itself internally in matters of liability to disciplinary action.

75. In addition, I note, as regards the present case, that the decision of the Executive Board to intervene in disciplinary proceedings was discretionary, but not arbitrary.

76. In the present case, by its decision of 10 July 2018, the Executive Board informed the appellant, before adopting the decisions at issue in 2019, of its intervention in the proceedings, setting out the reasons which led to it.

77. It should be recalled that the Executive Board's decision to intervene in the disciplinary proceedings against the appellant was based on the fact that the Executive Board had been involved in the appellant's suspension and on the sensitivity of the matter. That decision is in line with the rationale underlying the provisions on disciplinary proceedings established both by the Conditions of Employment and the Staff Rules, according to which the severity of the

[33] Judgment of 17 November 2017 (T-555/16, not published, EU:T:2017:817, paragraph 47).

[34] See points 58 to 63 of this Opinion.

[35] In that regard, I note that in his reply before the General Court and in his appeal, the appellant himself acknowledges that the decisions of the Chief Services Officer, adopted under Article 8.3.17 of the Staff Rules, are 'legally attributable' to the Executive Board and that the Executive Board is fully responsible for those decisions. See paragraph 11 of the appeal and paragraph 11 of the reply before the General Court, where the appellant even states that such decisions are taken 'on behalf' of the Executive Board.

disciplinary measure in question may, where appropriate, have an influence on a decision-making body, without requiring any modification of the Staff Rules. [36] That decision was therefore entirely foreseeable for the appellant.

78. In those circumstances, the appellant's second argument, according to which the system of delegation of authority implemented within the ECB under Article 8.3.17 of the Staff Rules is incompatible with the principle of legal certainty and does not define the division of powers within that institution with sufficient clarity, must be rejected.

79. Consequently, there is no need to examine the appellant's third argument, by which he submits that, since he has already explained why consultation of the Staff Committee could have had an influence on his situation, the judgment under appeal is vitiated by an error of law in so far as the General Court held, in paragraph 52 of that judgment, that the appellant had not been deprived of any guarantees. The appellant's criticism of that paragraph must be declared ineffective in so far as it is directed against considerations that were included for the sake of completeness. First, as is clear from my examination of the appellant's first argument, the General Court was fully entitled to hold, in paragraphs 44, 45 and 51 of that judgment, that the Executive Board was not required to consult the Staff Committee prior to the adoption of the decision of 10 July 2018 and the decisions at issue. Second, I do not exclude that the appellant should put forward his third argument in the event that the Court of Justice should hold that the decisions at issue are vitiated by lack of competence and that it is appropriate to examine whether, in the light of the case-law referred to in point 36 of this Opinion, the decisions at issue should be annulled. However, as my analysis shows, that is not the case.

80. In the light of the foregoing, it follows that the first ground of appeal is unfounded and must be rejected in its entirety.

VII. Conclusion

81. In the light of the foregoing considerations, I propose that the Court reject the appellant's first ground of appeal, in its entirety, as unfounded.

[36] See point 63 of this Opinion.