JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (Second Chamber)

18 September 2014 (*)

(Civil service — ECB staff — Access of ECB staff to documents connected with their employment relationship — Rules applicable to requests from ECB staff — Pre-litigation procedure — Rule of correspondence — Plea of illegality raised for the first time in the action — Admissibility — Right to effective judicial protection — Consultation of the Staff Committee for the purpose of adopting rules applicable to requests from ECB staff for access to documents connected with their employment relationship)

In Case F□26/12,

ACTION under Article 36.2 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union,

Maria Concetta Cerafogli, a member of the staff of the European Central Bank, residing in Frankfurt am Main (Germany), represented by S. Pappas, lawyer,

applicant,

v

European Central Bank (ECB), represented by A. Sáinz de Vicuña Barroso, E. Carlini and S. Lambrinoc, acting as Agents, assisted by B. Wägenbaur, lawyer,

defendant,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

composed of M.I. Rofes i Pujol, President, K. Bradley (Rapporteur) and J. Svenningsen, Judges,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 17 October 2013,

gives the following

Judgment

1 By application received at the Registry of the Civil Service Tribunal on 23 February 2012, Ms Cerafogli brought the present action seeking, in essence, annulment of the decision of the European Central Bank (ECB) refusing to grant her access to certain documents and compensation for the non-material damage which she claims to have suffered as a result of that decision.

Legal context

2 Article 23.2 of the Rules of Procedure of the European Central Bank (OJ 2004 L 80, p. 33) provides that public access to documents drawn up or held by the ECB is to be governed by a decision of the Governing Council. On 4 March 2004, the Governing Council adopted Decision ECB/2004/3 on public access to European Central Bank documents (OJ 2004 L 80, p. 42, 'Decision ECB/2004/3').

3 Paragraph 7 of the Conditions of Employment for Staff of the European Central Bank ('the Conditions of Employment') and Article 1.1.3 of the ECB Staff Rules ('the Staff Rules') govern the access of ECB staff to their personal files. In particular, the latter provision establishes that '[a] member of staff has the right, even after leaving the service of the ECB, to be made aware of all the contents of his file'.

4 On 1 August 2006, the Executive Board adopted rules on the access of ECB staff to documents connected with their employment relationship: some amendments were made to those rules and were approved by the Executive Board on 30 September 2008 ('the rules applicable to requests from ECB staff'). Under those rules, all requests for access to documents not covered by Decision ECB/2004/3 are to be processed by the Director-General of the DG (Directorate General) for Human Resources, Budget and Organisation ('DG "Human Resources"'). In addition, those rules include a certain number of exceptions to the right of access to documents which cover, in particular, preparatory documents, internal legal advice, and decisions adopted by the Governing Council regarding the Conditions of Employment for Staff of the ECB.

Facts

5 On 28 October 2010, the General Court delivered judgment in three disputes between the applicant and the ECB (*Cerafogli* v *ECB*, F□84/08, EU:F:2010:134; *Cerafogli* v *ECB*, F□96/08, EU:F:2010:135; and *Cerafogli* v *ECB*, F□23/09, EU:F:2010:138, 'the judgments of 28 October 2010').

6 By letter of 20 May 2011 ('the request of 20 May 2011'), the applicant asked the ECB to send her the following documents, pursuant to Decision ECB/2004/3:

'I) [a]ll the Executive Board Decisions — and the documents submitted to the Board — related to the [judgments of the] Tribunal ... in [C]ase F□96/08 and [C]ase F□84/08 including any related internal documents, memo[randa] and/or minutes;

II) [t]he Executive Board decisions — and the documents submitted to the Board — of allocating to [the applicant] a new [annual salary and bonus review] for the years 2005 and 2006, including any related internal documents, memo[randa] and minutes;

III) [a]ll the Executive Board Decisions — and the documents submitted to the Board — related to the Tribunal [C]ases F□96/08, F□84/08 and ... F□23/09 prior to the [judgments of the] Tribunal ... of 28 October 2010 including any related internal documents, memo[randa] and/or minutes.'

7 According to the nature of the documents requested by the applicant, the ECB examined the request of 20 May 2011 either in the light of Decision ECB/2004/3 or in the light of the rules applicable to requests from ECB staff and, thus, made two separate decisions on 21 June 2011.

8 The first decision, signed by the Director-General of the DG for Secretariat and Language Services and the head of the Secretariat Division within that Directorate General, was made on the basis of Decision ECB/2004/3 ('the decision based on Decision ECB/2004/3'). By that decision, the ECB sent the applicant three documents relating to the Executive Board's decision of 24 May 2011 concerning the wage policy for 2008. However, the ECB refused to send her the preparatory documents connected with that decision, citing Article 4(3) of Decision ECB/2004/3, which prohibits access 'to a document containing opinions for internal use as part of

deliberations and preliminary consultations within the ECB ... even after the decision has been taken, unless there is an overriding public interest in disclosure'. It also refused to produce the minutes of the relevant meetings of the Executive Board on the basis of Article 4(1)(a) of Decision ECB/2004/3, which protects 'the public interest as regards ... the confidentiality of the proceedings of the ECB's decision-making bodies'. Lastly, the ECB stated that the request of 20 May 2011 was connected with Decision ECB/2004/3 only in so far as it concerned the Executive Board's decision of 24 May 2011 as mentioned above, with the rest falling within the scope of the rules applicable to requests from ECB staff, and that DG 'Human Resources' would provide a separate response based on those rules.

9 The second decision was made by the Deputy Director-General of DG 'Human Resources' on the basis of the rules applicable to requests from ECB staff ('the decision based on the rules applicable to requests from ECB staff'). By that decision, the ECB sent the applicant the most recent decisions concerning her annual salary and bonus reviews for 2005 and 2006, along with a note from the Director-General of the DG for Secretariat and Language Services addressed to the Director-General of DG 'Human Resources' showing that, at its meetings of 23 November 2010 and 19 April 2011, the Executive Board had given its verdict on the decision not to bring an appeal against the judgments of 28 October 2010 and on the applicant's annual salary and bonus reviews for 2005 and 2006. However, the ECB refused to send the applicant any preparatory documents relating to the positions taken by the ECB's decision-making bodies or to internal legal advice, relying on the confidentiality of such documents.

10 By letter of 15 July 2011, the applicant submitted a 'confirmatory application' on the basis of Article 7(2) of Decision ECB/2004/3, contesting the analysis of her request of 20 May 2011 under the two systems and repeating that request.

11 By letter of 5 August 2011, the President of the ECB replied to the confirmatory application, essentially confirming the decision based on Decision ECB/2004/3, but also providing the applicant with several other documents.

12 By letter of 12 August 2011 ('the decision of 12 August 2011'), the Director-General of DG 'Human Resources' informed the applicant that her confirmatory application of

15 July 2011 had been examined as an administrative appeal against the decision based on the rules applicable to requests from ECB staff. By that letter, he sent the applicant several documents, but stated that some of them had been only partially disclosed, pursuant to the confidentiality rules governing access to opinions of the ECB's Legal Service.

13 On 10 October 2011, the applicant filed a complaint with the President of the ECB against the decision of 12 August 2011, pursuant to paragraph 41 of the Conditions of Employment, in so far as that decision refused to grant her access to all of the documents requested or granted her only partial access to certain documents.

14 The ECB provided two responses to that complaint.

15 First, the President of the ECB rejected the complaint by decision of 12 December 2011 ('the decision rejecting the complaint'), although he did send the applicant additional information and documents concerning, inter alia, the ECB's wage policy and the judgments of 28 October 2010. However, some of those documents were only partially disclosed pursuant to the confidentiality rules governing access to internal legal advice, in accordance with the rules applicable to requests from ECB staff, and to the personal data of ECB staff, pursuant to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

16 Second, by letter of 12 December 2011, the Deputy Director-General of DG 'Human Resources' informed the applicant that the part of the complaint in which she stated that the request for access to documents submitted to the Executive Board should have been regarded as referring to all documents sent to one or more members of the Executive Board had been deemed to be a new request pursuant to the rules applicable to requests from ECB staff.

Forms of order sought and procedure

17 The applicant claims that the Tribunal should:

– annul the ECB's decisions rejecting her requests for access to documents, namely, 'the decision of 21 June 2011', the decision of 12 August 2011 and the decision

rejecting her complaint;

– fix the amount of compensation for the non-material damage suffered at EUR 10 000;

– order the ECB to pay the costs.

18 The applicant also claims that the Tribunal should ask the ECB, by way of measures of organisation of the procedure, to send her all the documents to which she has been denied access.

19 At the hearing, the applicant clarified her claim for annulment by stating that in requesting the annulment of 'the decision of 21 June 2011' she is referring only to the decision based on the rules applicable to requests from ECB staff and not to the decision based on Decision ECB/2004/3.

20 The ECB contends that the Tribunal should:

– dismiss the action;

– order the applicant to pay the costs.

21 By order of 15 January 2014, the Tribunal reopened the oral procedure in order to allow the parties to submit observations on the admissibility of the various pleas raised by the applicant and of the plea of illegality directed against the rules applicable to requests from ECB staff with regard to the rule of correspondence between the complaint and the legal action, in particular in the light of the judgment in *Commission* v *Moschonaki* (T□476/11 P, EU:T:2013:557), as well as the judgment in *Reali* v *Commission* (F□136/06, EU:F:2008:168, paragraphs 47 to 51), and the judgment in *Mandt* v *Parliament* (F□45/07, EU:F:2010:72, paragraph 121). The defendant and the applicant submitted their observations on 5 and 6 February 2014 respectively.

Law

The claims directed against the decision of 12 August 2011 and against the decision rejecting the complaint

22 The claim directed against the decision of 12 August 2011 need not be examined separately since, according to case-law, the only effect of such claims is to bring before the

Tribunal the act adversely affecting the applicant in respect of which the request for pre-litigation review was submitted, which, in the present case, is the decision based on the rules applicable to requests from ECB staff (judgment in *Bowles and Others* v *ECB*, F□114/10, EU:F:2011:173, paragraph 43 and the case-law cited).

23 So far as the claim directed against the decision rejecting the complaint is concerned, it follows from case-law that claims for annulment formally directed against a decision rejecting a complaint have the effect of bringing before the Tribunal the act against which the complaint was submitted when they, as such, lack any independent content (judgment in *Andres and Others* v *ECB*, F□15/10, EU:F:2013:194, paragraph 130 and the case-law cited, currently the subject of an appeal pending before the General Court in Case T□129/14 P).

24 In the present case, the Tribunal finds that, by the decision of 12 August 2011 and the decision rejecting the complaint, the ECB agreed to send the applicant certain documents which it had initially refused to disclose and in all other respects confirmed the decision based on the rules applicable to requests from ECB staff, although it did supplement the grounds for that decision.

25 In those circumstances, it must be concluded that the present action has the effect of bringing before the Tribunal the decision based on the rules applicable to requests from ECB staff, the grounds for which were clarified by the decision of 12 August 2011 and the decision rejecting the complaint.

Application for the adoption of measures of organisation of the procedure

26 Regarding Ms Cerafogli's application for the adoption of measures of organisation of the procedure, the Tribunal finds that it is, in essence, attempting to obtain the documents referred to in the request of 20 May 2011 and is thus covered by the rule prohibiting the Courts of the European Union from addressing injunctions to the administration (judgment in *X* v *ECB*, T□333/99, EU:T:2001:251, paragraph 48). That application must therefore be dismissed as manifestly inadmissible.

Claim for annulment of the decision based on the rules applicable to requests from ECB staff

27 Taking into account the fact that, at the hearing, the applicant withdrew her plea alleging that the adoption of the rules applicable to requests from ECB staff is a misuse of powers, her action must be interpreted as raising five pleas in support of her claim for annulment of the decision based on the rules applicable to requests from ECB staff, alleging (i) illegality of the rules applicable to requests from ECB staff, (ii) breach of the principles of sound administration and transparency, (iii) infringement of the rights of the defence, (iv) breach of the duty to state reasons and (v) lack of competence on the part of the author of the decision based on the rules applicable to requests from ECB staff.

28 In the circumstances of the present case and in the interests of procedural economy, the Tribunal will first examine the plea — raised as an objection — alleging that the rules applicable to requests from ECB staff are illegal.

Admissibility of the plea of illegality

29 As a preliminary point, the Tribunal notes that the plea alleging, as an objection, that the rules applicable to requests from ECB staff are illegal was not referred to in any way in the complaint.

30 In that regard, the Tribunal points out that paragraph 41 of the Conditions of Employment and Article 8.1 of the Staff Rules state that ECB staff may bring legal proceedings only after exhausting the pre-litigation procedure, which is in two stages: a request for pre-litigation review and a preliminary complaint.

31 In line with what has been held with regard to Article 91 of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), a rule of correspondence between the complaint and the application which follows it requires a plea raised before the Courts of the European Union to have been raised during the pre-litigation procedure, so that the administration has already been made aware of the criticisms levelled by the person concerned against the contested decision, failing which the application will be inadmissible (see, regarding Article 91 of the Staff Regulations, the judgment in *Commission* v *Moschonaki*, EU:T:2013:557, paragraph 71, and, regarding ECB staff disputes, the judgment in *Cerafogli* v *ECB*, F□43/10, EU:F:2012:184, paragraph 61, currently the subject of an appeal pending before the General Court in Case T□114/13 P).

32 The rule of correspondence is justified inter alia by the purpose of the pre-litigation procedure, which is to permit an amicable settlement of disputes which have arisen between ECB staff and the administration (see, to that effect, the judgment in *Commission* v *Moschonaki*, EU:T:2013:557, paragraph 72 and the case-law cited, and the judgment in *CR* v *Parliament*, F□128/12, EU:F:2014:38, paragraph 26, currently the subject of an appeal pending before the General Court in Case T□342/14 P). Moreover, the implementation of the rule of correspondence between the application and the complaint and its review by the Courts of the European Union must ensure compliance with both the principle of effective judicial protection, which is a general principle of EU law expressed in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), so that the person concerned may be in a position properly to challenge a decision of the administration which adversely affects him, and the principle of legal certainty, so that the administration may be aware, from the complaint stage, of the criticisms levelled by the person concerned against the contested decision (see, in the context of Article 91 of the Staff Regulations, the judgment in *Commission* v *Moschonaki*, EU:T:2013:557, paragraph 82, and the judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 27).

33 It follows that the claims submitted in the proceedings before the Courts of the European Union may include only heads of claim based on the same cause of action as that of the heads of claim in the complaint, while those heads of claim may be developed before the Courts of the European Union by means of pleas and arguments which did not necessarily appear in the complaint but are closely linked to it (judgment in *Commission* v *Moschonaki*, EU:T:2013:557, paragraph 73 and the case-law cited).

34 In particular, in order that the purpose of the pre-litigation procedure provided for in paragraph 41 of the Conditions of Employment and Article 8.1 of the Staff Rules may be fulfilled, it is necessary for the administration to be in a position to know in sufficient detail the criticisms levelled by the person concerned against the contested decision (see, in the context of Article 91(2) of the Staff Regulations, the judgment in *Commission* v *Moschonaki*, EU:T:2013:557, paragraph 77 and the case-law cited).

35 When ruling in the context of Article 91 of the Staff Regulations, the Courts of the European Union have applied

the rule of correspondence to a plea of illegality in stating that, in order to be admissible, a plea of that kind had to have been raised in the complaint (judgment in *Reali* v *Commission*, EU:F:2008:168, paragraphs 44 to 51, confirmed by judgment in *Reali* v *Commission*, T□65/09 P, EU:T:2010:454, paragraphs 46 to 49).

36 However, the Tribunal considers that the case-law relating to the principle of effective judicial protection in the light of Article 47 of the Charter (judgment in *Otis and Others*, C□199/11, EU:C:2012:684, paragraphs 54 to 63, and judgment in *Koninklijke Grolsch* v *Commission*, T□234/07, EU:T:2011:476, paragraphs 39 and 40) has developed in a way which warrants a reassessment by the Tribunal as to whether it is appropriate to apply the rule of correspondence when a plea of illegality has been raised for the first time in the action (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 29).

37 In particular, in paragraphs 37, 39 and 40 of the judgment in *Koninklijke Grolsch* v *Commission* (EU:T:2011:476) the General Court, having found that no provision of EU law requires the addressee of a statement of objections relating to an infringement of the competition rules to contest the individual matters of fact or of law set out therein during the administrative procedure, failing which it will not be able to do so during the subsequent judicial proceedings, rejected the European Commission's argument contesting the admissibility of a plea on the ground that it had not been raised clearly and precisely during the administrative phase. The General Court found that, in the circumstances described, an argument of that kind was tantamount to restricting the applicant's access to justice and, more specifically, its right that its case be heard before a court or tribunal. As the General Court pointed out, the right to an effective remedy and the right of access to an impartial tribunal are guaranteed by Article 47 of the Charter.

38 Although it is true that the case-law mentioned above was developed in a different field from that of disputes between EU institutions and their staff, the judgment in *Koninklijke Grolsch* v *Commission* (EU:T:2011:476) concerns the issue of whether a restriction on access to justice which was not expressly provided for by the legislature is compatible with Article 47 of the Charter. In the field of civil service disputes, the rule of correspondence between the pleas raised during the pre-litigation procedure and those raised in the

application, although having a legislative basis in Article 91(1) of the Staff Regulations and, as regards ECB staff, in paragraph 41 of the Conditions of Employment and Article 8.1 of the Staff Rules, is a rule which originated in case-law.

39 The Tribunal is of the view that there are three arguments against the idea that a plea of illegality raised for the first time in an action should be declared inadmissible solely on the ground that it has not been raised in the complaint preceding that action. Those arguments are connected with (i) the purpose of the pre-litigation procedure, (ii) the nature of a plea of illegality, and (iii) the principle of effective judicial protection.

40 First, regarding the purpose of the pre-litigation procedure, which is the same in the context of Article 91 of the Staff Regulations as in the context of ECB staff disputes, it is settled case-law that the pre-litigation procedure serves no purpose if complaints are made against a decision which cannot be altered by the administration. Thus, in the context of Article 91 of the Staff Regulations, case-law has ruled out the need to submit complaints against decisions made by selection boards or against staff reports (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 33 and the case-law cited).

41 By the same token, the obligation to raise a plea of illegality in the complaint, failing which the action will be inadmissible, does not fulfil the purpose of the pre-litigation procedure as set out in paragraph 32 above.

42 Indeed, taking account of the principle of the presumption of legality regarding acts of the institutions of the European Union, according to which EU legislation remains fully effective as long as it has not been found to be unlawful by a competent court, an administration cannot leave unenforced an act of general application in force which, in its opinion, conflicts with a higher-ranking rule of law, with the sole aim of allowing for an out-of-court settlement of the dispute (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 35 and the case-law cited).

43 Such a course of action must *a fortiori* be excluded if the administration concerned is acting in a situation of circumscribed powers, since, in a situation of that kind, it is not in a position to withdraw or to amend the decision contested by the member of staff concerned, however well-

founded it might consider a plea of illegality against the provision on the basis of which that decision was adopted (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 36).

44 Furthermore, the fact that a plea of illegality is being raised for the first time in the action cannot affect the principle of legal certainty since, even if the person concerned had raised a plea of that kind at the complaint stage, the administration could not have taken advantage of that fact to resolve the dispute with that person through an amicable settlement.

45 Secondly, regarding the nature of a plea of illegality, according to settled case-law, Article 277 TFEU gives expression to a general principle conferring upon any party to proceedings the right to challenge incidentally, for the purpose of obtaining the annulment of a measure against which it is capable of bringing proceedings, the validity of an act of general application adopted by an institution of the European Union which constitutes the legal basis of the contested measure, if that party was not entitled to bring a direct action challenging the act which thus affected him without his having been in a position to seek its annulment (judgment in *Simmenthal* v *Commission*, 92/78, EU:C:1979:53, paragraph 39; judgment in *Andersen and Others* v *Parliament*, 262/80, EU:C:1984:18, paragraph 6; and judgment in *Sina Bank* v *Council*, T□15/11, EU:T:2012:661, paragraph 43). Article 277 TFEU thus aims to protect the litigant against the application of an unlawful legislative act, on the basis that the effects of a judgment containing a declaration of inapplicability are limited to the parties to the dispute alone, and that that judgment does not affect the act itself, which has become unchallengeable (judgment in *Carius* v *Commission*, T□173/04, EU:T:2006:333, paragraph 45 and the case-law cited, and judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 38).

46 Even assuming that the obligation to raise a plea of illegality in the complaint, failing which the action will be inadmissible, can fulfil the purpose of the pre-litigation procedure, the Tribunal considers that it is in the nature of such a plea to reconcile the principle of legality with the principle of legal certainty (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 39).

47 Moreover, it can be seen from the wording of Article 277 TFEU that the possibility of challenging an act of general application after the expiry of the period for bringing

proceedings is not open to a party except in proceedings before one of the Courts of the European Union. A plea of that kind cannot therefore be fully effective in the context of an administrative appeal procedure (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 40).

48 Thirdly and lastly, the Tribunal points out that the principle of effective judicial protection is a general principle of EU law to which expression is now given by the second paragraph of Article 47 of the Charter, pursuant to which '[e]veryone is entitled to a ... hearing ... by an independent and impartial tribunal ... established by law ...'. That paragraph corresponds to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') (review judgment in *Arango Jaramillo and Others* v *EIB*, C□334/12 RX-II, EU:C:2013:134, paragraphs 40 and 42).

49 According to the case-law of the European Court of Human Rights on the interpretation of Article 6(1) of the ECHR, to which reference must be made in accordance with Article 52(3) of the Charter, the exercise of the right to a tribunal may be subject to limitations, inter alia as to the conditions for the admissibility of an action. While the persons concerned should expect the rules establishing those limitations to be applied, the application of such rules should nevertheless not prevent litigants from taking advantage of an available legal remedy (see, to that effect, the judgment of the European Court of Human Rights in *Anastasakis v. Greece*, no. 41959/08, § 24, 6 December 2011; the review judgment in *Arango Jaramillo and Others* v *EIB*, EU:C:2013:134, paragraph 43; the order in *Internationale Fruchtimport Gesellschaft Weichert* v *Commission*, C□73/10 P, EU:C:2010:684, paragraph 53; and the judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 42).

50 In particular, the European Court of Human Rights has stated that the limitations on the right to a tribunal relating to the conditions of admissibility of an action must not restrict or reduce a litigant's access in such a way or to such an extent that the very essence of that right is impaired. Such limitations are not compatible with Article 6(1) ECHR unless they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued (see the judgments of the European Court of Human Rights in *Liakopoulou v. Greece*, no. 20627/04, § 17, 24 May 2006; *Kemp and Others v.*

Luxembourg, no. 17140/05, § 47, 24 April 2008; and *Viard v. France*, no. 71658/10, § 29, 9 January 2014). The right of access to a tribunal is impaired when its rules cease to pursue the aims of legal certainty and the proper administration of justice and instead become a sort of barrier preventing a litigant from having his dispute settled on the merits by the competent court (view of Advocate General Mengozzi in the review judgment in *Arango Jaramillo and Others* v *EIB*, EU:C:2013:134, paragraphs 58 to 60; judgment of the European Court of Human Rights in *L'Erablière A.S.B.L. v. Belgium*, no. 49230/07, § 35, ECHR 2009 (extracts); judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 43).

51 Penalising the act of raising a plea of illegality for the first time in the application by declaring that plea inadmissible constitutes a restriction on the right to effective judicial protection which is not proportionate to the aim pursued by the rule of correspondence, which is to permit an amicable settlement of the dispute between the official concerned and the administration and to comply with the principle of legal certainty (judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 44 and the case-law cited).

52 In that regard, the Tribunal recalls that, according to case-law, any official exercising ordinary care is deemed to be familiar with the Staff Rules (concerning the rules governing the remuneration of ECB staff, see the judgment in *BM* v *ECB*, F□106/11, EU:F:2013:91, paragraph 45; concerning the Staff Regulations, see the judgment in *CR* v *Parliament*, EU:F:2014:38, paragraph 45 and the case-law cited). However, a plea of illegality is likely to lead the Tribunal to examine the legality of those rules in the light of general principles or higher-ranking rules of law which may go beyond the framework of the rules which directly apply to staff. Owing to the nature of a plea of illegality and to the reasoning which leads the person concerned to search for and invoke such illegality, a member of staff of the ECB who submits a complaint and does not necessarily have the appropriate legal expertise cannot be required to raise such a plea at the pre-litigation stage, failing which a plea of that kind raised at a later stage will be declared inadmissible. Accordingly, a declaration of inadmissibility in those circumstances is a disproportionate penalty for the member of staff concerned and is unjustified.

53 Moreover, making the possibility of raising a plea of illegality at the application stage conditional upon applying a rule of

correspondence with the complaint may unduly favour a single category of officials and members of staff — namely, those who have legal expertise — over all other categories of officials and members of staff.

54 In the light of all of the foregoing, the plea of illegality which has been raised for the first time in the application must be declared admissible.

Substance of the plea of illegality

– Arguments of the parties

55 In her application, the applicant divides her plea of illegality into three complaints, alleging that (i) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) and the general principles concerning access to documents were infringed, (ii) the authority which adopted the rules applicable to requests from ECB staff lacked the competence to do so, and (iii) the Staff Committee was not consulted prior to the adoption of the rules applicable to requests from ECB staff. In addition, at the hearing, the applicant put forward a fourth complaint alleging that the rules applicable to requests from ECB staff had not been published.

56 In the interests of the proper administration of justice and procedural economy, the Tribunal will start by examining the third complaint, by which the applicant maintains that, in having failed to consult the Staff Committee before adopting the rules applicable to requests from ECB staff, the ECB infringed paragraphs 45 and 46 of the Conditions of Employment, the Memorandum of Understanding on Relations between the Executive Board and the Staff Committee, and the principles of sound administration and good faith.

57 By contrast, the ECB contends that, having regard to the purpose of the rules applicable to requests from ECB staff, there was no need to consult the Staff Committee. In particular, according to the ECB, in adopting those rules, the Executive Board did not alter the Conditions of Employment, the rules applicable to requests from staff, or any other related provision. In addition, it maintains that those rules do not constitute ‘service rules’ as referred to in the judgment delivered by the Court of First Instance in *Cerafogli and Poloni*

v *ECB* (T□63/02, EU:T:2003:308), since they merely lay down procedural rules guaranteeing ECB staff access to documents connected with their employment relationship. At the hearing, the ECB clarified that argument by stating that the rules applicable to requests from ECB staff are simply a set of administrative instructions from the Executive Board to the administration, designed to explain the procedure for requesting access to a document and the procedural arrangements relating to such requests, specifying inter alia the boundaries within which the administration may send documents to a member of its staff. Lastly, the ECB observes that the Staff Committee never asked to be consulted.

– Findings of the Tribunal

58 It should be understood from the outset that the applicant, in maintaining that the Staff Committee was not consulted, in breach of paragraphs 45 and 46 of the Conditions of Employment — provisions which, at the time of this dispute, no longer relate to staff representation but to disciplinary measures — intended to raise a complaint alleging infringement of paragraphs 48 and 49 of the Conditions of Employment.

59 That being the case, the Tribunal observes as a preliminary point that, according to paragraph 48 of the Conditions of Employment, the 'Staff Committee ... shall represent the general interests of all members of staff in relation to contracts of employment; staff regulations and remuneration; employment, working, health and safety conditions at the ECB; social security cover; and pension schemes'. Paragraph 49 of the Conditions of Employment provides that the 'Staff Committee shall be consulted prior to changes in these Conditions of Employment, the Staff Rules and related matters as defined under paragraph 48 above'.

60 Paragraph 49 of the Conditions of Employment therefore imposes an obligation on the administration to consult the Staff Committee before adopting any act of general application concerning either the service rules themselves or matters relating to those rules and connected with any of the areas referred to in paragraph 48 of those Conditions of Employment (see, to that effect, the judgment in *Cerafogli and Poloni* v *ECB*, EU:T:2003:308, paragraphs 21 and 22, and the judgment in *Cerafogli* v *ECB*, EU:F:2010:135, paragraph 47).

61 The above-mentioned consultation obligation only amounts to a right of the Staff Committee to be heard. It is therefore a modest form of participation in a decision-making process, since it does not involve any obligation for the administration to act upon the observations made by the Staff Committee in the course of the consultation. That being so, unless it is to undermine the effectiveness of the obligation to consult, the administration must comply fully with that obligation whenever consultation of the Staff Committee is liable to have an influence on the substance of the measure to be adopted (judgment in *Cerafogli* v *ECB*, EU:F:2010:135, paragraph 49, and judgment in *Andres and Others* v *ECB*, EU:F:2013:194, paragraph 191).

62 Moreover, the scope of the obligation to consult the Staff Committee, as imposed by the legislature, must be assessed in the light of its objectives. First, that consultation is intended to afford all members of staff, through that committee (as the representative of their shared interests), the opportunity to be heard prior to the adoption or amendment of acts of general application which concern them. Second, compliance with that obligation is in the interests both of the various members of staff and of the administration in that it serves to avoid the need for each member of staff to raise, by way of an individual administrative procedure, the existence of possible errors. By the same token, such consultation, being such as to prevent the submission of a series of individual applications pursuing the same grievance, also serves the principle of sound administration (judgment in *Cerafogli and Poloni* v *ECB*, EU:T:2003:308, paragraph 24).

63 In the present case, as the ECB explains in its defence, the Executive Board adopted the rules applicable to requests from ECB staff owing to the fact that Decision ECB/2004/3 was not a legal basis enabling members of staff to have access to internal documents directly connected with their employment relationship with the ECB and it was therefore necessary to adopt rules in that regard. Those rules form part of the staff regulations referred to in paragraphs 48 and 49 of the Conditions of Employment and thus fall within the scope of those provisions. Consequently, the Staff Committee should have been heard before the rules applicable to requests from ECB staff were adopted. Moreover, it cannot be excluded that, following consultation of the Staff Committee, the ECB might have adopted different rules containing — for example — fewer exceptions to the right of access to

documents.

64 In those circumstances, the applicant is justified in maintaining that the rules applicable to requests from ECB staff were adopted following an unlawful procedure.

65 The ECB's arguments that the rules applicable to requests from ECB staff merely lay down the procedural rules for exercising the right of access to documents connected with the employment relationship of ECB staff and are simply 'a set of administrative instructions' from the Executive Board to the administration cannot be upheld.

66 First, paragraph 49 of the Conditions of Employment makes no distinction between procedural rules and substantive rules, the only relevant criterion for the purposes of defining cases in which the Staff Committee must be consulted being that the rules adopted amend '[the] Conditions of Employment, the Staff Rules and related matters as defined under paragraph 48 [of the Conditions of Employment]'. It follows that, when the ECB adopts procedural rules which fall within the scope of paragraphs 48 and 49 of the Conditions of Employment, it is required to comply with the obligation to hear the Staff Committee as imposed by those provisions.

67 Secondly, assuming that the distinction drawn by the ECB between substantive and procedural rules is relevant, it is clear that the rules applicable to requests from ECB staff do not constitute mere procedural rules or, as the ECB contends, a 'set of administrative instructions', since they also establish substantive rules. Indeed, as the ECB acknowledged in its defence, those rules provide a legal basis allowing its members of staff to have access to internal documents directly connected with their employment relationship, which they were not able to do under Decision ECB/2004/3. There are no circumstances in which a provision creating a legal basis for the exercise of a right may be regarded as a 'procedural rule' or a 'set of administrative instructions'.

68 Moreover, the rules applicable to requests from ECB staff include exceptions to the right of access, in particular as regards internal documents, such as preparatory documents submitted to the decision-making bodies for approval and opinions issued by the ECB's Legal Service. In that regard, the ECB acknowledged at the hearing that the rules applicable to requests from ECB staff specify the limits within which the administration may send documents to a member of its staff.

Such exceptions and limits are obviously substantive rules which define the very substance of the right of ECB staff to access ECB documents in establishing that certain documents, by their nature, are withheld from the exercise of that right.

69 Thirdly, the argument that the Staff Committee never asked to be consulted is irrelevant, since the obligation to consult the Staff Committee is not conditional upon receiving a request to that effect from that body.

70 It must therefore be found that, in failing to consult the Staff Committee prior to the adoption of the rules applicable to requests from ECB staff, the ECB infringed paragraphs 48 and 49 of the Conditions of Employment and that the third complaint put forward in the plea of illegality is well founded, without it being necessary for the Tribunal to examine the other complaints put forward in that plea.

71 Accordingly, it must be declared that the decision of 21 June 2011 based on the rules applicable to requests from ECB staff is also illegal, without there being any need to examine the other pleas in law.

Claim for damages

Arguments of the parties

72 The applicant claims to have suffered non-material damage as a result of the ECB's refusal to send her certain documents and information and asks for compensation for that damage in the amount of EUR 10 000.

73 According to the ECB, since the decision based on the rules applicable to requests from ECB staff is not unlawful in any way, the applicant has no right to compensation. In addition, the ECB points out that costs incurred in the context of the pre-litigation procedure are not recoverable.

Findings of the Tribunal

74 The Tribunal observes at the outset that, in the scheme of legal remedies provided for in paragraphs 41 and 42 of the ECB Conditions of Employment, a claim for damages which has a direct link with a claim for annulment is admissible even if it is made for the first time before the Tribunal,

although the preliminary administrative complaint sought only the annulment of the decision by which the applicant claimed to have been adversely affected, since a request for annulment may imply a request for compensation for the damage allegedly suffered (judgment in *Esch-Leonhardt and Others* v *ECB*, T□320/02, EU:T:2004:45, paragraph 47). In the present case, the claim for compensation in respect of the non-material damage which the applicant claims to have suffered is closely linked to the claim for the annulment of the decision based on the rules applicable to requests from ECB staff and must therefore be declared admissible even though the applicant did not submit such a claim during the pre-litigation procedure.

75 According to case-law, the annulment of an unlawful measure may in itself constitute appropriate and, in principle, sufficient compensation for any non-material damage that measure may have caused, unless the applicant shows that he has suffered non-material damage which is separable from the unlawfulness justifying the annulment and which is not capable of being entirely remedied by that annulment (judgment in *Cerafogli* v *ECB*, EU:F:2010:135, paragraph 75).

76 In the present case, as a result of the annulment of the decision based on the rules applicable to requests from ECB staff, the applicant is once again awaiting the ECB's final decision regarding her request of 20 May 2011. Such a continuation of that situation of waiting and uncertainty, caused by the unlawfulness of the decision in question, constitutes non-material damage which cannot be entirely remedied by the annulment of that decision. In view of those circumstances and, in particular, the seriousness of the defect by which that decision is vitiated as a result of the failure to consult the Staff Committee beforehand, tempered by the fact that the ECB has already provided the applicant with several documents, fair compensation for that non-material damage will be afforded by the Tribunal ordering the ECB to pay the applicant EUR 1 000.

Costs

77 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title 2 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(2), the Tribunal may, if equity so requires, decide that an unsuccessful party is to pay only part

of the costs or even that he is not to be ordered to pay any.

78 It can be seen from the grounds of this judgment that the ECB has been unsuccessful. Furthermore, in her pleadings the applicant has expressly requested that the ECB be ordered to pay the costs. Since the circumstances of the present case do not warrant the application of Article 87(2) of the Rules of Procedure, the ECB must bear its own costs and be ordered to pay the costs incurred by the applicant.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

1. Annuls the decision of 21 June 2011 whereby the Deputy Director-General of the Directorate General for Human Resources, Budget and Organisation of the European Central Bank partially rejected the request for access to certain documents submitted by Ms Cerafogli on 20 May 2011;

2. Orders the European Central Bank to pay Ms Cerafogli EUR 1 000;

3. Dismisses the action as to the remainder;

4. Declares that the European Central Bank is to bear its own costs and orders it to pay the costs incurred by Ms Cerafogli.

Rofes i Pujol

Delivered in open court in Luxembourg on 18 September 2014.

W. Hakenberg

Registrar

* Language of the case: English.