Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 4 December 2014[1]

Case C-439/13 P

Elitaliana SpA
v

Eulex Kosovo

(Appeals — Joint Action 2008/124/CFSP — Call for tenders for helicopter support for the Eulex mission in Kosovo — Decision to award the contract to a tenderer other than the applicant — Action for annulment and claim for compensation for the damage alleged to have been suffered — 'Bodies, offices and agencies of the Union' within the meaning of the first paragraph of Article 263 TFEU — Identification of the correct defendant in respect of decisions taken by the Head of Mission — Inadmissibility of the action before the General Court of the European Union — Excusable error — Article 47 of the Charter of Fundamental Rights of the European Union — Principle of effective judicial protection)

I – **Introduction**

1. On 4 February 2008, the Council of the European Union adopted Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, Eulex Kosovo.[2]

2. As part of that mission, by a restricted procedure, an invitation for tenders was published which concerned a project entitled 'Helicopter support to the Eulex mission in Kosovo', and contemplated the making of a service contract. Elitaliana SpA ('Elitaliana') participated in the tender process. Its tender was placed second. The Eulex Kosovo Head of Mission awarded the contract at issue to the tenderer which had been placed first.

3. Elitaliana brought an action against Eulex Kosovo before the General Court of the European Union.

4. During the proceedings before the General Court, Eulex Kosovo raised an objection of inadmissibility on the basis, first, that Eulex Kosovo did not have legal capacity to be a defendant, and, secondly, that the General Court had no jurisdiction in respect of measures relating to the common foreign and security policy (CFSP).

5. By order of the General Court in *Elitaliana* v *Eulex Kosovo*[3] (the 'order under appeal'), the action was dismissed as inadmissible.

6. By the present appeal, Elitaliana asks the Court of Justice to set aside the order under appeal.

1 — Original language: French.
2 — OJ 2008 L 42, p. 92.
3 — (T-213/12, EU:T:2013:292).

7. In this appeal, the Court is called on to consider the question of whether Eulex Kosovo is legally responsible for the decisions taken by the head of that mission, and more specifically whether an action for annulment pursuant to Article 263 TFEU may be brought against Eulex Kosovo, an issue which does not seem to have arisen previously. The Court must also make a determination on Elitaliana's arguments concerning infringement of the fundamental right to an effective remedy, and the existence of an excusable error on Elitaliana's part in relation to the identification of the defendant in the proceedings before the General Court.

II – **The legal framework**

8. By Article 1(1) of Joint Action 2008/124, Eulex Kosovo was established by the European Union as a Rule of Law Mission in Kosovo.

9. It is apparent from the first paragraph of Article 2 of Joint Action 2008/124 that Eulex Kosovo is to assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs services, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.

10. Article 6 of Joint Action 2008/124 lays down the structure of Eulex Kosovo. Paragraph 1 provides that it is a unified European Security and Defence (ESDP) mission across Kosovo. Paragraph 2 provides for it to establish its main Headquarters and regional and local offices in Kosovo, a support element in Brussels (Belgium) and liaison offices as required. According to paragraph 3 of the same article, Eulex Kosovo is comprised of the Head of Mission and staff, together with police, justice and customs components.

11. Pursuant to Article 7(1) and (2) of Joint Action 2008/124, the Civilian Planning and Conduct Capability Director is the Civilian Operation Commander for Eulex Kosovo who, under the political control and strategic direction of the Political and Security Committee (PSC) and the overall authority of the High Representative of the Union for Foreign Affairs and Security Policy (HR), exercises command and control of Eulex Kosovo at the strategic level. According to Article 7(3), the Civilian Operation Commander is to ensure proper and effective implementation of the Council's decisions as well as the PSC's decisions, including by issuing instructions at strategic level as required to the Head of Mission and providing him with advice and technical support.

12. Article 11 of Joint Action 2008/124 set outs the chain of command of Eulex Kosovo. According to paragraph 2, the PSC exercises political control and strategic direction of Eulex Kosovo, under the responsibility of the Council and the HR. Paragraphs 3 and 4 provide that the Civilian Operation Commander, who is the commander of Eulex Kosovo at strategic level, shall report to the Council through the HR. Paragraph 5 provides that the Head of Mission shall exercise command and control of Eulex Kosovo at theatre level and is directly responsible to the Civilian Operation Commander.

13. Finally, according to Article 12(1) of Joint Action 2008/124, the PSC is to exercise, under the responsibility of the Council, political control and strategic direction of the mission.

III – **The 'measures at issue', the proceedings before the General Court, the order under appeal and the proceedings before the Court of Justice**

A – *The measures at issue*

14. The adoption of the measures at issue is described as follows in the order under appeal:

'2. On 18 October 2011, by a restricted procedure, an invitation for tenders for a public service contract concerning a project entitled "Helicopter Support to the Eulex mission in Kosovo" was published in the Supplement to the *Official Journal of the European Union* (OJ 2011/S 200-324817), under the reference EuropeAid/131516/D/SER/XK. That invitation included the following notice: "Contracting authority: the Head of Eulex Kosovo, Pristina, Kosovo".

3. By letter of 23 December 2011, to which were annexed, in particular, instructions for the tenderers, the head of Eulex Kosovo requested the applicant, Elitaliana ..., an Italian company operating in the field of helicopter services which it supplies to public bodies, to participate in the restricted tender procedure.

4. The applicant submitted a bid in the context of the abovementioned procedure.

5. By letter of 29 March 2012, the director of administration and support services of Eulex Kosovo notified the applicant that its bid had been placed second.

6. By letter of 2 April 2012, the applicant requested Eulex Kosovo for access to certain documents submitted by the tenderer whose bid had been placed first. By letter of 17 April 2012, the Head of Eulex Kosovo refused to grant access to those documents.

7. On 24 April 2012, the Head of Eulex Kosovo awarded the contract at issue to the tenderer whose bid had been placed first.'

B – *The proceedings before the General Court*

15. The proceedings before the General Court, in so far as relevant to this appeal, can be summarised as follows:

16. By application lodged at the Registry of the General Court on 23 May 2012, Elitaliana brought an action against Eulex Kosovo claiming that the Court should:

— annul the measures adopted by Eulex Kosovo in the context of the award to another tenderer of the public contract entitled 'EuropeAid/131516/D/SER/XK — Helicopter support to the EULEX Mission in Kosovo (PROC/272/11)', which was notified to Elitaliana by Eulex Kosovo by letter of 29 March 2012, and any other connected measure and, in particular, the note of 17 April 2012 by which Eulex Kosovo refused to grant it access to documents it had requested;

— order Eulex Kosovo to pay compensation for the loss suffered as a result of the failure to award that contract to Elitaliana, and

— order Eulex Kosovo to pay the costs.

17. By separate document, lodged at the Registry of the General Court on 14 September 2012, Eulex Kosovo raised an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the General Court. Eulex Kosovo contended that the Court should dismiss the action as inadmissible and order Elitaliana to pay the entirety of the costs of the proceedings.

18. On 28 November 2012, Elitaliana lodged its observations on the objection of inadmissibility, contending that the General Court should reject the objection and, in any event, serve notice of the action on the institution considered to be the defendant.

C – *The order under appeal*

19. By the order under appeal, the General Court held the action to be inadmissible on the basis of the first plea of inadmissibility raised by the defendant.

20. The General Court first analysed the objection raised by Eulex Kosovo on the basis 'that it cannot have legal capacity to be a defendant in the present case on account of the fact that it is not an independent body' (order under appeal, paragraphs 18 to 37).

21. The General Court began its analysis with the question of whether Eulex Kosovo had capacity to be a defendant, or more precisely whether it constituted a body, office or agency of the Union within the meaning of the first paragraph of Article 263 TFEU (order under appeal, paragraphs 19 to 21).

22. Having analysed the wording of Articles 1(1), 6, 7(1) and (2) and 11 of Joint Action 2008/124, the General Court came to the following conclusion (order under appeal, paragraph 26):

'In the light of the abovementioned provisions, Eulex Kosovo does not have legal personality and there is no provision that it can be a party to proceedings before the European Union Courts.'

23. Next, having noted that Elitaliana was seeking annulment of the measures taken by Eulex Kosovo in the context of the award of a contract, the General Court considered who the decision at issue should be attributed to, concluding as follows (order under appeal, paragraph 34): 'In those circumstances, it must be held that the measures adopted by the Head of Eulex Kosovo in the context of the procedure for the award of the contract at issue are attributable to the Commission, which has legal capacity to be a defendant under the first paragraph of Article 263 TFEU. Those measures may, therefore, be the subject of judicial review in accordance with the requirements of the general principle, invoked by the applicant, that any measure adopted by an institution, body or agency of the European Union which is intended to have legal effects vis-à-vis third parties, must be subject to review'. The General Court added (order under appeal, paragraph 35): 'Consequently, Eulex Kosovo does not have legal capacity to be a defendant'.

24. In the second place, Elitaliana maintained in the alternative that, if Eulex Kosovo did not have legal capacity to be a defendant, the General Court could, first, identify the party against whom the case could, as a result, be pursued (order under appeal, paragraph 38).

25. However, the General Court held that, in the circumstances, the designation of Eulex Kosovo in the application did not constitute an error on the part of Elitaliana. On the contrary, it was clearly apparent from the content of the application that Elitaliana intended to bring the action expressly against Eulex Kosovo which, according to Elitaliana, is a body, office or agency of the Union within the meaning of the first paragraph of Article 263 TFEU. Elitaliana confirmed this, moreover, in its observations on the objection of inadmissibility (order under appeal, paragraph 39).

26. Secondly, Elitaliana requested that the General Court grant it the benefit of excusable error, and invoked in that regard the case-law which recognises the existence of such an error where the conduct of the institution concerned was, either on its own or to a decisive extent, such as to give rise to understandable confusion in the mind of a person acting in good faith and exercising normal care and attention (order under appeal, paragraph 40).

27. In this regard the General Court pointed out that the existence of an excusable error can, according to the case-law invoked by Elitaliana, only have the consequence that the action must not be dismissed for being out of time. In the present case, it is not disputed that Elitaliana complied with the time-limit for bringing an action (order under appeal, paragraph 42).

28. The General Court also noted that at no time did Elitaliana bring an action against a party other than Eulex Kosovo, but that it merely requested the General Court to identify the defendant against whom the present action should be brought in order to be admissible (order under appeal, paragraph 42).

29. The General Court concluded its analysis as follows at paragraph 45 of the order under appeal:

'It follows from all of the foregoing considerations that, because Eulex Kosovo does not have legal capacity to be a defendant, the action brought against the latter by the applicant is inadmissible, both as concerns the application for annulment and the claim for damages, which is closely connected with the claim for annulment (see, to that effect, [judgment of the Court of Justice in] *Bossi* v *Commission*, 346/87, [EU:C:1989:59], paragraph 31, and order in *Elti* v *Delegation of the European Union to Montenegro*, [T-395/11, EU:T:2012:274], paragraph 74 and the case-law cited), without it being necessary to rule on the alleged lack of jurisdiction of the General Court concerning acts adopted on the basis of the provisions of the [EU] Treaty relating to the CFSP.'

D – *The proceedings before the Court of Justice*

30. By its appeal, Elitaliana claims that the Court should set aside the order under appeal and grant the relief sought at first instance or, if the Court considers that the state of the proceedings does not permit a decision, refer the case back to the General Court.

31. Eulex Kosovo contends that the appeal should be dismissed and Elitaliana ordered to pay the costs.

IV – **Grounds of appeal**

32. In support of its appeal Elitaliana puts forward three pleas in law, as follows:

'(1) Error of judgment in not recognising [Eulex Kosovo] as a body, office or agency within the meaning of Article 263 TFEU. Infringement of the principle of effective judicial protection, understood as the complete fulfilment of the rights of defence, which are corollaries of the more general principle of equality';[4]

'(2) Error of judgment in equating [Eulex Kosovo] with a delegation. Infringement of the principle of effective judicial protection, understood as the complete fulfilment of the rights of defence, which are corollaries of the more general principle of equality',[5] and

4 — Paragraphs 19 to 32 of the appeal.

5 — Paragraphs 33 to 39 of the appeal.

‘(3) Error of judgment in holding that there was no excusable error. Infringement of the principle of effective judicial protection, understood as the complete fulfilment of the rights of defence, which are corollaries of the more general principle of equality’. [6]

33. The three pleas are preceded by a section entitled ‘Premiss’[7] which makes reference to the ‘principle of effective judicial protection ... now enshrined in Articles 6 and 13 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the “ECHR”)]’, which the Court is called on to recognise ‘in upholding the grounds set out below’.

34. It is appropriate to begin the analysis with this premiss.

A – *The ‘premiss’*

1. Arguments of the parties

35. Elitaliana introduces the principle in the following terms:

‘17 The principle of effective judicial protection now constitutes a guiding principle of the legal system of the European Union. It is now enshrined in Articles 6 and 13 of the ECHR, which guarantee everyone the right to a hearing by a tribunal having jurisdiction to determine any issue as to his rights or obligations, on the basis that access to a tribunal, if it is to be effective, requires that everyone has a clear and effective opportunity to challenge acts that have adversely affected his legal situation. Limitations on that right are compatible with the provisions in question only if they do not hinder access in such a way as to compromise the substance of the right.

18 In upholding the contention that Eulex did not have legal personality (a matter that was far from obvious and, above all, could not have been discovered by a diligent person, as it had never been disclosed) and also in rejecting excusable error (although the General Court had found that the conditions for excusable error were fulfilled), the order under appeal made it impossible for Elitaliana to operate the legal mechanism in use, and thus denied it its rights of defence, rights which we hope the Court will recognise in accepting the pleas set out below.’

36. Eulex Kosovo maintains that this is an alternative argument put forward by Elitaliana in the event that the Court considers that it has jurisdiction, which Eulex Kosovo claims is not the case. In any event, the defendant considers that the General Court did not infringe Articles 6 and 13 of the ECHR.

2. Assessment

37. Elitaliana maintains that the General Court infringed Articles 6 and 13 of the ECHR in finding that Eulex Kosovo had no legal personality and in finding that there was no excusable error as to the identity of the defendant.

6 — Paragraphs 40 to 47 of the appeal.

7 — Paragraphs 16 to 18 of the appeal.

38. It should first be pointed out that the principles set out in Articles 6 and 13 of the ECHR correspond to those which now appear in Article 47 of the Charter of Fundamental Rights of the European Union (the 'Charter'), which, in principle, was applicable in this case. However, an infringement of Article 47 of the Charter can be relied on in the present case only if the actions brought against the institutions which might reasonably be regarded as competent are held to be inadmissible for non-procedural reasons, and the claimant, in such circumstances, has no effective legal remedy. [8]

39. The action brought before the General Court was brought against a party which the General Court found not to be the proper defendant. It is apparent from the appeal that Elitaliana considers that this finding amounts to an infringement of its fundamental rights, as protected by Article 47 of the Charter.

40. I note that the finding that Eulex Kosovo is not the proper defendant, either because it does not have the capacity to be a party to proceedings, or for other reasons, does not lead to the conclusion that there was a lack of judicial protection.

41. Indeed, the argument concerning Article 47 of the Charter is clearly premature. If the action has been brought against a party who is not the proper defendant, there cannot be, on that basis, an infringement of Article 47. Elitaliana's situation can be analysed by reference to this provision only where an action against the proper defendant has been brought before the court or tribunal with jurisdiction and the latter finds that is no remedy.

42. On that basis Elitaliana's argument is ineffective. I will return to the argument that it was excessively difficult for Elitaliana to identify the defendant against whom to bring an action before the General Court when I come to deal with the third plea.

B – *The first plea, concerning the non-recognition of Eulex Kosovo as a body, office or agency of the Union within the meaning of the first paragraph of Article 263 TFEU*

1. Arguments of the parties

43. By its first plea, Elitaliana maintains that the General Court made an error of law in concluding that 'Eulex Kosovo does not have legal personality and there is no provision that it can be a party to proceedings before the European Union Courts' (order under appeal, paragraph 26). Elitaliana maintains that Eulex Kosovo possesses all the characteristics necessary to be considered a body, office or agency of the Union within the meaning of the first paragraph of Article 263 TFEU.

44. Eulex Kosovo contends that this plea should be rejected.

8 — I note that in *H* v *Council and Others* (T-271/10, EU:T:2014:702) the General Court was of the opinion that there was a remedy, in that case before the national authorities.

2. Assessment

45. It should be noted that, according to the case-law of the Court, the judicial review mechanism provided for by Article 263 TFEU applies to the bodies, offices and agencies established by the EU legislature which have been given powers to adopt measures that are legally binding on natural or legal persons in specific areas, such as the European Aviation Safety Agency (EASA), the European Medicines Agency (EMA), the European Chemicals Agency (ECHA), the Community Plant Variety Office (CPVO), or the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM). [9]

46. In order to assess whether a body, office or agency falls within the definition in the first paragraph of Article 263 TFEU, it is necessary to examine the instrument which created the entity in question. In this regard, at least two criteria can be identified in the case-law [10] which Eulex Kosovo does not seem to meet.

47. First, Joint Action 2008/124 does not provide for Eulex Kosovo to have legal personality, as is often the case, for example, in acts creating agencies, [11] or even for it to have capacity to be a party to proceedings before the EU courts. [12]

48. Secondly, acts establishing bodies, offices or agencies of the Union frequently contain a provision referring to the relevant article of the Treaty and also defining the scope of the actions. [13] No such provision is to be found in Joint Action 2008/124, however.

49. In support of its contentions Elitaliana relies on the judgment of the General Court in *Sogelma* v *EAR*. [14] In that case the General Court considered its jurisdiction to determine an action brought under the fourth paragraph of Article 230 EC (now Article 263 TFEU) against an act of the European Agency for Reconstruction (EAR). That judgment was given in a completely different context, however. The General Court specifically observed that the EAR was a Community body with legal personality and that the regulation establishing it expressly provided that the Court had jurisdiction. [15]

50. The fact that the establishing instrument expressly provides for a remedy before the Court confirms the link with Article 263 TFEU. However, in my view the absence of such a provision does not, in itself, establish that there is no such link.

9 — See judgments in *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18, paragraph 81) and *Liivimaa Lihaveis* (C-562/12, EU:C:2014:2229, paragraph 46).

10 — See my Opinion in *Liivimaa Lihaveis* (C-562/12, EU:C:2014:155, points 34 to 36).

11 — See, for example, Article 100(1) of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1, and corrigendum OJ 2007, L 136. p. 3, the 'REACH Regulation'), providing that that agency is a body of the European Community and has legal personality. Furthermore, offices or bodies created by the EU and endowed with legal personality are dealt with separately in the EU budget. In this regard, see COM(2012) 300 of 25 May 2012, entitled 'Draft General Budget of the European Commission for the Financial Year 2013. Working Document Part III. Bodies set up by the European Union and having legal personality'.

12 — It is entirely possible, in private and in public law, for an entity without legal personality to be endowed with the procedural capacity to be a party to proceedings before the courts. As to the capacity to be a party to legal proceedings, see *Überseering* (C-208/00, EU:C:2002:632) and my Opinion in *VALE Építési* (C-378/10, EU:C:2011:841, point 37).

13 — See, for example, Article 94(1) of the REACH Regulation, which provides that an action may be brought before the General Court or the Court of Justice, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal of the ECHA or, in cases where no right of appeal lies before the Board, by the ECHA.

14 — T-411/06, EU:T:2008:419.

15 — Judgment in *Sogelma* v *EAR* (EU:T:2008:419, paragraphs 34 and 50).

51. Indeed, even in the absence of an express provision endowing the entity in question with legal personality, I consider that the wording of the fifth paragraph of Article 263 TFEU creates a very strong presumption to the effect that if the institutions create an entity which is capable of taking decisions affecting individuals, a remedy must none the less exist. In such a situation it is possible, subject to very strict conditions, to presume that a remedy exists. An entity endowed with a distinct identity, which has legal competence of its own and is assigned tasks of a particular nature, may be presumed to have the capacity to bring or defend proceedings before the EU courts even in the absence of an express provision. [16]

52. An examination of Joint Action 2008/124 shows that it is concerned with a joint mission of the Council and the Commission. The joint action does not create any distinct legal personality for Eulex Kosovo. Under Articles 11 and 12, the Council and the PSC exercise political control and determine strategic direction. Furthermore, Article 16 makes the financial aspect of the mission subject to the Commission's control.

53. Those factors lead me to conclude, with reference to the first paragraph of Article 263 TFEU, that Eulex Kosovo is not a body, office or agency within the meaning of that article. It is a joint mission of two institutions. Nevertheless, in my view it would be possible, in principle, to ascribe legal personality to the mission on the basis of a functional assessment. [17] The mission was established by a legislative act and is capable, for instance, of taking decisions which have legal effects on third parties. However, the scheme of Joint Action 2008/124 demonstrates an intention to make the mission organisationally dependent on the two institutions mentioned above. [18] A similar situation, concerning the Commission and the Centre for Nuclear Research, was considered by Advocate General Roemer in his opinion in *Ufficio Imposte Consumo* v *Commission*. [19] Thus, in the present circumstances, the Court is dealing with a temporary interinstitutional cooperative structure and not a body with a legal existence of its own.

54. In those circumstances I am of the opinion that Eulex Kosovo cannot be considered to be an entity against which an action can be brought under the first paragraph of Article 263 TFEU. Accordingly the General Court was right to hold that Eulex Kosovo was not a body, office or agency within the meaning of that provision.

55. Consequently I suggest that the first plea should be rejected as unfounded.

16 — The point should nevertheless be made that the present case is to be distinguished from *Les Verts* v *Parliament* (294/83, EU:C:1986:166, paragraphs 23 and 24).

17 — Concerning the functional approach, see Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service (OJ 2010 L 201, p. 30), which provides in Article 1 that the European External Action Service (EEAS) 'shall be a functionally autonomous body of the European Union, separate from the General Secretariat of the Council [of the European Union] and from the [European] Commission *with the legal capacity necessary to perform its tasks and attain its objectives*' (my emphasis). See also, Gatti, M., 'Diplomats at the Bar: The European External Action Service before EU Courts', *European Law Review*, 2014, p. 664.

18 — Eulex Kosovo does not have the same characteristics as the EEAS, which, under Article 1(2) of Decision 2010/427, is a functionally autonomous body and which has the capacity to be sued. The factors referred to by Eulex Kosovo in its response can be summarised as follows. First, the status of Eulex Kosovo is that of a crisis management operation under the authority of the Council, which established it and which exercises political control and strategic direction. Secondly, the legislature's intention for missions to be regarded as mere 'operations', and not bodies, is underlined by the fact that staff are seconded by the Member States to 'exercise command' at the mission, but that '[t]he State or EU institution having seconded a member of staff [to Eulex Kosovo] shall be responsible for answering any claims linked to the secondment, from or concerning the member of staff. The State or EU institution in question shall be responsible for bringing any action against the seconded person' (see Article 10(2) of Joint Action 2008/124). Thirdly, third countries take part in the activities of Eulex Kosovo. Fourthly, the Head of Mission of Eulex Kosovo entered into a contract with the Commission under which 'the Commission procures the services of Mr Xavier Bout de Marnhac as special adviser'. Thus the special adviser was not recruited on the basis of a competition in accordance with the procedure for bodies of the EU institutions, but as an independent adviser for a fixed term.

19 — 2/68-IMM, EU:C:1968:45, page 444.

C – The second plea, maintaining that the Eulex Kosovo mission was wrongly equated with an EU delegation

1. Arguments of the parties

56. By its second plea, Elitaliana maintains that the General Court was wrong to hold that Eulex Kosovo was to be treated as a delegation of the Commission, in accordance with the case-law of the General Court relating to the Delegation of the European Union to Montenegro, and therefore that the Commission was the institution to which it fell to defend the act at issue before the EU courts, under the first paragraph of Article 263 TFEU (order under appeal, paragraphs 27 to 35).

57. Eulex Kosovo contends that this plea should be rejected.

2. Assessment

a) The distinction between delegations and missions

58. As to the distinction between a delegation and a mission, it is appropriate to begin by noting two aspects of the presence of the European Union outside EU territory.

59. The first aspect concerns external presence and action under the EC Treaty. *Delegations* to third countries and international organisations fall within this category. The case-law, deriving mainly from the General Court, is relatively clear and, in my view, correct. The jurisdiction of the Court is based on the usual provisions of the Treaty, such as those relating to actions for annulment and actions for damages. It is apparent from the case-law of the General Court, which predates the entry into force of the Treaty of Lisbon and the creation of the EEAS,[20] that in such circumstances, the proper defendant is indeed the Commission. Delegations are attached to the Commission and all actions must be brought against the Commission.[21] Accordingly, the General Court has held an action brought solely against a delegation to be inadmissible.[22]

60. The second aspect concerns external action within the framework of the CFSP. This includes, in particular, action creating CFSP *missions* in third countries. The case-law, emanating once again from the General Court, is relatively scant. Only a few actions have been brought, and they have subsequently been discontinued and therefore removed from the register.[23] Among the few cases which have given rise to a decision of the General Court, that of *H* v *Council and Others* should be mentioned. In the order under appeal, the General Court also refers to the order of the President of the General Court in related proceedings for interim measures.[24] In the main proceedings, *H* v *Council and Others*, the General Court dismissed the action as inadmissible, although an appeal is pending.[25] The matter related to the European Union Police Mission in Bosnia and Herzegovina.[26] Given the paucity of decisions of the General Court relating to CFSP missions, it is important to observe that the case-law in this field is far from settled.

20 — See footnote 17.

21 — Judgment in *IDT Biologika* v *Commission* (T-503/10, EU:T:2012:575).

22 — Order in *Tecnoprocess* v *Commission and EU Delegation to the Kingdom of Morocco* (T-264/09, EU:T:2011:319).

23 — See, by way of example, the orders in *Fucci* v *MINUK* (T-51/05, EU:T:2005:175), and *Unity OSG FZE* v *Council and EUPOL Afghanistan* (T-511/08, EU:T:2010:138).

24 — See the order in *H* v *Council and Others* (T-271/10 R, EU:T:2010:315) and the order under appeal, paragraph 26.

25 — See the order in *H* v *Council and Others* (EU:T:2014:702), and *H* v *Council and Others* (C-455/14 P), pending before the Court.

26 — See Council Joint Action 2002/210/CFSP of 11 March 2002 on the European Union Police Mission (OJ 2002 L 70, p. 1) and Council Decision 2009/906/CFSP of 8 December 2009 on the European Union Police Mission (EUPM) in Bosnia and Herzegovina (OJ 2009 L 322, p. 22).

61. In my view, the case-law of the General Court relating to EU delegations is not applicable to missions established by the EU, even though these two types of structure have similar characteristics such as the lack of any legal personality of their own. Accordingly, in the absence of express provisions, the actual nature of the relationship between the missions and the institutions must be investigated.

62. It should be emphasised that in the order under appeal the General Court does not base its reasoning on a perfect analogy between the position of a delegation and that of a mission. The General Court certainly mentioned an order relating to the European Union Delegation to Montenegro,[27] but it did so in order to point out 'that measures adopted pursuant to delegated powers are normally attributed to the delegating institution, on which it falls to defend the measure in question before the Courts' (order under appeal, paragraph 33). Having made that observation it went on to hold as follows, at paragraph 34 of the order under appeal:

'In those circumstances, it must be held that the measures adopted by the Head of Eulex Kosovo in the context of the procedure for the award of the contract at issue are attributable to the Commission, which has legal capacity to be a defendant under the first paragraph of Article 263 TFEU. Those measures may, therefore, be the subject of judicial review in accordance with the requirements of the general principle, invoked by the applicant, that any measure adopted by an institution, body or agency of the European Union which is intended to have legal effects vis-à-vis third parties, must be subject to review.'

63. Thus, contrary to Elitaliana's submissions, the General Court did not equate CFSP missions with Commission delegations.

b) The relationship between missions and institutions

64. In relation to the first plea, I have just observed that Eulex Kosovo does not have all of the characteristics required to be considered as having its own capacity to defend proceedings brought before the Court under the first paragraph of Article 263 TFEU. I have also pointed out that the Eulex Kosovo mission is not attached to the Commission as a delegation. It is appropriate therefore to consider the relationship between this mission and the institutions.

65. It is apparent from Joint Action 2008/124 that Eulex Kosovo was created as a separate entity of the Council and the Commission. In particular, it is apparent from elements of Joint Action 2008/124 and the contract entered into between the Head of Mission and the Commission that, in so far as administration and finance are concerned, the relationship with the Commission is particularly close. The General Court considered that the elements, taken together, constituted a delegation of powers normally exercised by the Commission to Eulex Kosovo and its Head of Mission. It therefore concluded that the acts adopted by Eulex Kosovo, or by its Head of Mission, were ultimately attributable to the Commission (order under appeal, paragraph 34). The General Court's reasoning runs as follows:

'30 It must be pointed out that the measures taken in the context of the tendering procedure at issue relate to Eulex Kosovo's budget.

31 According to Article 16(2) of Joint Action 2008/124, all expenditure must be managed in accordance with the Community rules and procedures applicable to the general budget of the European Union. Under Article 8(5) of that joint action, the Head of Mission is to be responsible for the implementation of Eulex Kosovo's budget and, for that purpose, to sign a contract with the European Commission. According to the case-file, the Head of Eulex Kosovo

27 — Order in *Elti* v *European Union Delegation to Montenegro* (T-395/11, EU:T:2012:274).

signed such a contract with the Commission. The Commission therefore delegated certain tasks relating to the implementation of Eulex Kosovo's budget to the Head of Eulex Kosovo, as provided for in Article 54(2)(d) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as amended.

32 Reference to that delegation is, in particular, made in Article 16(3) and (4) of Joint Action 2008/124 relating to financial arrangements. According to Article 16(3), the Head of Mission may conclude technical arrangements regarding the provision of equipment, services and premises to Eulex Kosovo only with the Commission's approval. Article 16(4) provides that the Head of Mission is to report fully to, and be supervised by, the Commission on the activities undertaken in the framework of his contract.'

66. This reasoning, which I agree with, involves no error of law. The General Court was right to hold that in the absence of any legal capacity of the entity's own, it is necessary to look for a link with the functions in question, specifically, as regards the measures taken in the context of the procedure for the award of the public contract in question, with budgetary issues. Contrary to Elitaliana's submissions, the reasoning of the General Court does not proceed on the basis of equating the Eulex Kosovo mission with a European Union delegation, but rather on the basis of a functional approach with respect to the tasks in question.

67. That being so, the second plea should be rejected in its entirety.

D – *The third plea, concerning the alleged lack of excusable error*

1. Arguments of the parties

68. By its third plea, Elitaliana maintains that the General Court wrongly held that there was no excusable error as to the identification of the defendant, the General Court having held that 'the existence of an excusable error can ... only have the consequence that the action must not be dismissed for being out of time' (order under appeal, paragraphs 41 and 43). Elitaliana considers that the case-law relating to excusable error can also apply to the identity of the defendant and asks the Court to identify, in so far as relevant, the proper defendant.

69. Eulex Kosovo contends that this plea should be rejected.

2. Assessment

70. I begin by pointing out that the General Court held that, in the circumstances, the designation of Eulex Kosovo in the application before it did not constitute an error on the part of Elitaliana (order under appeal, paragraph 39). However, in the order under appeal the General Court did accept that 'it was without doubt difficult for [Elitaliana] to identify the party to whom the contested measures were attributable and who had legal capacity to be a defendant' (paragraph 41).

71. This finding, which seems to me to be entirely justified, is based on the premiss that, as the General Court held, the action ought to have been brought against the Commission.

72. I agree with the General Court's analysis that the case-law relating to excusable error does not provide any basis for Elitaliana's claims. This case-law relates to procedural time-limits [28] and cannot be invoked in a situation where the applicant has made a mistake as to the identity of the defendant.

73. Even if such an error were considered to have been made, the defendant against which the action had been brought still could not be regarded as having the legal capacity to defend it. Thus, excusable error cannot be relied on in this way. Excusable error could only be applicable in other proceedings, brought against another party, and relied on as a justification for any lateness in bringing an action for annulment and/or compensation.

74. Finally, I note that the General Court did not take a view on its alleged lack of jurisdiction, [29] and in its appeal Elitaliana has not challenged the order under appeal in that respect. This issue may arise in another action, and once the General Court has given a decision in that regard, the Court will be able to consider, on appeal, whether the General Court's decision is correct. Nevertheless, in the present case the General Court has not given a decision in that regard, and consequently it is not appropriate for the Court to rule on the point either.

75. The General Court therefore did not make any error of law when it concluded, in the order under appeal, that Elitaliana's plea of excusable error should be rejected.

76. Since none of the grounds are well founded, the appeal should be dismissed in its entirety.

V – **Conclusion**

77. For those reasons, I suggest that the Court should dismiss the action and order Elitaliana SpA to pay the costs.

28 — See order under appeal, paragraph 40.

29 — See paragraph 45 of the order under appeal, cited in point 29 of this Opinion. It seems to me, moreover, that there is a typographical error in paragraph 45 of the order under appeal. Instead of reading 'acts adopted on the basis of the provisions of the FEU Treaty relating to the CFSP', it should probably read 'acts adopted on the basis of the provisions of the EU Treaty relating to the CFSP'. The same is true of paragraph 18 of the order under appeal.