Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

24 February 2022 *

(Reference for a preliminary ruling – Common Foreign and Security Policy (CFSP) – European Union Rule of Law Mission in Kosovo (Eulex Kosovo) – Joint Action 2008/124/CFSP – Article 8(3) and (5), Article 9(3) and Article 10(3) – Status of employer of the mission staff – Article 16(5) – Subrogation)

In Case C-283/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium), made by decision of 1 October 2019, received at the Court on 25 June 2020, in the proceedings

CO and Others

v

MJ,

European Commission,

European External Action Service (EEAS),

Council of the European Union,

Eulex Kosovo,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, C. Lycourgos, I. Jarukaitis and M. Ilešič, Judges,

Advocate General: E. Tanchev,

Registrar: M. Krausenböck, administrator,

having regard to the written procedure and further to the hearing on 16 June 2021,

* Language of the case: French.

after considering the observations submitted on behalf of:

– CO and Others, by N. de Montigny, avocate,

– the European Commission, by B. Mongin, G. Gattinara and Y. Marinova, acting as Agents,

– the European External Action Service (EEAS), by S. Marquardt, R. Spac and E. Orgován, acting as Agents,

– the Council of the European Union, initially by P. Mahnič and A. Vitro, and subsequently by A. Vitro and K. Kouri, acting as Agents,

– Eulex Kosovo, by E. Raoult and M. Vicente Hernandez, avocates,

– the Spanish Government, initially by S. Jiménez García, and subsequently by M. J. Ruiz Sánchez, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 8(3) and (5), Article 9(3) and Article 10(3) of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, Eulex Kosovo (OJ 2008 L 42, p. 92).

2 The request has been made in proceedings between, on the one hand, CO and Others, that is to say 45 members or former members of the international civilian staff of the Rule of Law Mission in Kosovo, known as 'Eulex Kosovo', referred to in Article 1 of Joint Action 2008/124 ('Eulex Kosovo'), and, on the other, MJ, in his capacity as Head of Mission, the European Commission, the European External Action Service (EEAS) and the Council of the European Union, concerning changes to their working conditions and, for some of them, the non-renewal of their contracts of employment.

Legal context

Joint Action 2008/124

3 Article 1 of Joint Action 2008/124, entitled 'The mission', provides in paragraph 1:

'The EU hereby establishes [a] European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (hereinafter Eulex Kosovo).'

4 Article 2 of that joint action, entitled 'Mission Statement', provides:

'Eulex Kosovo shall 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 service, ensuring

that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.

Eulex Kosovo, in full cooperation with the European Commission Assistance Programmes, shall fulfil its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities.'

5 Article 8 of that joint action, entitled 'Head of Mission', provides:

'1. The Head of Mission shall assume responsibility and exercise command and control of Eulex Kosovo at theatre level.

…

3. The Head of Mission shall issue instructions to all Eulex Kosovo staff, including in this case the support element in Brussels, for the effective conduct of Eulex Kosovo in theatre, assuming its coordination and day-to-day management, and following the instructions at strategic level of the Civilian Operation Commander.

…

5. The Head of Mission shall be responsible for the implementation of the Eulex Kosovo's budget. For this purpose, the Head of Mission shall sign a contract with the Commission.

…

7. The Head of Mission shall represent Eulex Kosovo in the operations area and shall ensure appropriate visibility of Eulex Kosovo.

…'

6 Article 9 of that joint action, entitled 'Staff', provides:

'1. The numbers and competence of the Eulex Kosovo staff shall be consistent with its Mission Statement set out in Article 2, the tasks set out in Article 3 and the structure of Eulex Kosovo set out in Article 6.

2. Eulex Kosovo shall consist primarily of staff seconded by Member States or EU institutions. Each Member State or EU institution shall bear the costs related to any of the staff seconded by it, including travel expenses to and from the place of deployment, salaries, medical coverage and allowances other than daily allowances and applicable risks and hardship allowances.

3. 'Eulex Kosovo may also recruit, as required, international staff and local staff on a contractual basis.

…'

7 Article 10 of Joint Action 2008/124, entitled 'Status of Eulex Kosovo and of its staff', provides in paragraph 3:

'The conditions of employment and the rights and obligations of international and local civilian staff shall be laid down in the contracts between the Head of Mission and the members of staff.'

Joint Action 2008/124, as amended by Decision 2014/349/CFSP

8 Joint Action 2008/124 was amended, inter alia, by Council Decision 2014/349/CFSP of 12 June 2014 (OJ 2014 L 174, p. 42) ('Joint Action 2008/124, as amended') and extended by that decision until 14 June 2016.

9 Recital 6 of Decision 2014/349 states:

'(6) Eulex Kosovo will be conducted in the context of a situation which may deteriorate and could impede the achievement of the objectives of the Union's external action as set out in Article 21 of the [EU] Treaty.'

10 Article 15a of Joint Action 2008/124, as amended, is worded as follows:

'Eulex Kosovo shall have the capacity to procure services and supplies, to enter into contracts and administrative arrangements, to employ staff, to hold bank accounts, to acquire and dispose of assets and to discharge its liabilities, and to be a party to legal proceedings, as required in order to implement this Joint Action.'

11 Article 16(5) of Joint Action 2008/124, as amended, states:

'Eulex Kosovo shall be responsible for any claims and obligations arising from the implementation of the mandate starting from 15 June 2014, with the exception of any claims relating to serious misconduct by the Head of Mission, for which the Head of Mission shall bear the responsibility.'

12 Under Article 20 of Joint Action 2008/124, as amended:

'This Joint Action shall enter into force on the day of its adoption.

It shall expire on 14 June 2016. …'

13 In accordance with Article 2 of Decision 2014/349, that decision entered into force on the day it was adopted, 12 June 2014.

The dispute in the main proceedings and the question referred for a preliminary ruling

14 It is apparent from the order for reference that the applicants in the main proceedings were or still are working for Eulex Kosovo as members of the international civilian staff on the basis of fixed-term employment contracts which were subject to successive renewals. Those contracts contain a clause conferring jurisdiction on the courts of Brussels (Belgium). For some of the contracts concerned, that clause was subsequently replaced by a clause conferring jurisdiction on the Court of Justice of the European Union as of October 2014.

15 MJ served as Head of the mission from 1 February 2013 to 14 October 2014, in accordance with the terms specified, in particular, in the contracts which he concluded with the European Commission on 1 February and 7 June 2013.

16 In the spring of 2012, the various existing duties within Eulex Kosovo were reclassified, which, according to the applicants in the main proceedings, led to a change in their job description and to a significant reduction in their remuneration. That reclassification was followed by three 'waves' of employment contracts not being renewed, that is to say in spring and summer 2013, autumn 2014 and autumn 2016.

17 By application lodged on 6 August 2013, some of the applicants in the main proceedings brought an action before the General Court of the European Union, under Article 263 TFEU, against the Commission, the EEAS and Eulex Kosovo seeking annulment of the decisions taken by MJ in his capacity as Head of Mission not to renew the contracts of employment of those applicants after a certain date.

18 By order of 30 September 2014, *Bitiqi and Others* v *Commission and Others* (T-410/13, not published, EU:T:2014:871), the General Court dismissed that action for lack of jurisdiction on the ground that the legal relationship which was the subject of the dispute was contractual in nature and that it therefore fell within the scope of the clause in the contracts of employment conferring jurisdiction on the courts in Brussels to rule on disputes arising or relating to those contracts.

19 By applications lodged on 11 July, 14 July and 21 October 2014, the applicants in the main proceedings brought actions before the referring court, the tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium), disputing the reclassification of their duties and/or the non-renewal of their employment contracts and the status assigned to them, particularly as regards social security, and seeking damages.

20 Initially, those actions were brought against MJ, as Head of Mission, the Council, the Commission and the EEAS. However, those four defendants in the main proceedings argued that, under Joint Action 2008/124, as amended, only Eulex Kosovo should be responsible for any claims and obligations arising from the implementation of the mandate, both in the future and in the past, in accordance with Article 16(5) of that joint action, as amended.

21 In response, the applicants in the main proceedings lodged applications to join Eulex Kosovo as a third party to the proceedings before the referring court. However, examination of the third party applications was separated by that court from the examination of the preliminary issues of admissibility and procedure raised in the main applications brought by the applicants in the main proceedings against the first four defendants in the main proceedings.

22 By interlocutory decision of 1 June 2018, the referring court held that MJ should not be liable for the period beginning 12 June 2014 given that Decision 2014/349 had been adopted on that date and that, consequently, as of that date, MJ had to be regarded as no longer acting in his own name, but only as a 'representative' of Eulex Kosovo. The referring court also held that the Council, the Commission and the EEAS should not be liable for that period given that Eulex Kosovo had acquired its own legal personality on that date and that the acts at issue had been carried out on its behalf. However, as regards the period prior to 12 June 2014, the referring

court ordered that the proceedings be reopened in order to enable the parties to submit their observations on the existence of the mandate given to MJ and his predecessors during that period in their capacity as Head of Mission.

23 After hearing the parties' observations, the referring court states that it continues to have doubts as to whether MJ acted in his own name or on behalf of one or more institutions.

24 In those circumstances, the tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking)) decided to stay the main proceedings and to refer the following question to the Court for a preliminary ruling:

'Should [Article 8(3)] and [Article 10(3)] of [Joint Action 2008/124], where necessary in combination with any other possibly relevant provisions, be read as conferring on the Head of Mission, personally and on his or her own behalf, the status of employer of the international civilian staff members employed in the service of [Eulex Kosovo] during the period before 12 June 2014 or, having regard, in particular, to [Article 8(5)] and [Article 9(3)] of Joint Action [2008/124], as conferring the status of employer on the European Union and/or an institution of the European Union such as the European Commission, the [EEAS], the Council of the European Union or any other institution on behalf of which the Head of Mission acted until that date by virtue of a mandate, delegation of power or any other form of representation to be determined where necessary?'

Consideration of the question referred

Admissibility

25 The Commission submits that the present request for a preliminary ruling is inadmissible because it has no relevance to the outcome of the dispute in the main proceedings.

26 First, the request concerns provisions of EU law which were no longer in force at the time the applications were lodged before that court. It follows from Article 16(5) of Joint Action 2008/124, as amended, which entered into force on 12 June 2014, that, starting from 15 June 2014, Eulex Kosovo, which has legal capacity, assumes responsibility for any claims and obligations arising from the implementation of the Mission's mandate. Moreover, for that reason, the applicants in the main proceedings brought parallel proceedings before the same national court, based on the same facts, against Eulex Kosovo.

27 Secondly, the Commission calls into question, on the basis of paragraphs 34 to 51 of the judgment of 5 July 2018, *Jenkinson* v *Council and Others* (C-43/17 P, EU:C:2018:531), the distinction drawn by the referring court between the periods before and after 12 June 2014.

28 In that regard, it should, however, be recalled that, according to the Court's settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court of

Justice is, in principle, bound to give a ruling (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 54 and the case-law cited).

29 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 55 and the case-law cited).

30 In the present case, it must be held that it is not obvious from the documents before the Court that the provisions which the Court is asked to interpret do not apply to the dispute in the main proceedings. In particular, the existence of a separate procedural document directed against Eulex Kosovo does not appear to be capable of demonstrating that the referring court's questions concerning those provisions are not real or that their interpretation bears no relation to the actual facts of the main action or its purpose.

31 It is true that in paragraphs 34 to 51 of the judgment of 5 July 2018, *Jenkinson* v *Council and Others* (C-43/17 P, EU:C:2018:531), the Court of Justice held that the jurisdiction of the General Court to rule on a claim that the last employment contract concluded by a member of staff assigned to Eulex Kosovo should be recategorised implied that that court should take account of contracts previously concluded by that member of staff, even though that court did not have jurisdiction *ratione temporis* to rule on those contracts. However, that solution is not such as to render the question referred by the national court hypothetical. Indeed, that question does not concern the jurisdiction *ratione temporis* of that court to rule on the dispute in the main proceedings, but on the identification of the entity responsible for the implementation of the Eulex Kosovo mission and, therefore, of the entity having the status of defendant in the main proceedings.

32 In the light of the foregoing considerations, it must be held that the question referred cannot be regarded as being irrelevant to the outcome of the main proceedings and that it is therefore admissible.

Substance

33 It should be noted as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. Bearing that in mind, the Court should, where necessary, reformulate the questions referred to it. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in the wording of those questions (judgment of 5 December 2019, *Centraal Justitieel Incassobureau (Recognition and enforcement of financial penalties)*, C-671/18, EU:C:2019:1054, paragraph 26 and the case-law cited).

34 In the present case, first, it is apparent from the documents before the Court that, by its question, the referring court seeks to identify the entity responsible for implementing the Eulex Kosovo mission before 12 June 2014 and which, therefore, must be recognised as having standing as a defendant in the action in the main proceedings.

35 Second, it should be noted that, formally, the referring court asks the Court to rule on the interpretation not only of Article 8(3) and (5), Article 9(3) and Article 10(3) of Joint Action 2008/124, but also of 'any other possibly relevant provision' read in conjunction with those provisions. As it is, Article 16(5) of Joint Action 2008/124, as amended, states that, starting from 15 June 2014, Eulex Kosovo is to be responsible for any claims and obligations arising from the implementation of the mission entrusted to it, with the exception of any claims relating to serious misconduct by the Head of Mission.

36 Therefore, in order to provide a useful answer to the question referred, it must be concluded that, by its question, the referring court asks, in essence, whether Article 8(3) and (5), Article 9(3) and Article 10(3) of Joint Action 2008/124 and Article 16(5) of Joint Action 2008/124, as amended, must be interpreted as meaning that they designate, as employer of the staff of Eulex Kosovo for the period before 12 June 2014, the Head of Mission, acting personally and on his or her own behalf, and/or the Commission, the EEAS, the Council or any other entity.

37 In the present case, as regards the scope of Article 16(5) of Joint Action 2008/124, as amended, the referring court considers that there is ambiguity as to the temporal scope of that provision, in so far as, in essence, the phrase 'starting from 15 June 2014' could be understood as referring to the date on which Eulex Kosovo became responsible for any claims and obligations arising from the implementation of its mandate, including claims and obligations arising from acts committed previously, or, alternatively, as attributing to Eulex Kosovo responsibility only for legal situations that arose from that date onwards.

38 According to the settled case-law of the Court, in interpreting a provision of EU law, account must be taken of its terms, its context and the aims pursued by the legislation of which it forms part (see, to that effect, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, EU:C:2021:339, paragraph 69 and the case-law cited).

39 As regards the wording of Article 16(5) of Joint Action 2008/124, as amended, it provides that Eulex Kosovo is to be responsible for any claims and obligations arising from the implementation of the mandate starting from 15 June 2014, with the exception of any claims relating to serious misconduct by the Head of Mission, for which the Head of Mission is to bear the responsibility.

40 It follows that that provision seeks to specify who is responsible for the claims and obligations relating to the implementation of the mission entrusted to Eulex Kosovo, which means that it seeks to determine not who must be regarded as the author of the acts falling within that mission starting from 15 June 2014, but who must be responsible for those acts starting from that date.

41 Consequently, the words 'starting from 15 June 2014' must be understood as specifying not the date when any acts must have occurred or any obligations or claims must have arisen in order to fall within the responsibility of Eulex Kosovo, but the date from which the latter must be regarded as assuming responsibility for any harm and any obligation which arose or which may arise from the implementation of the mission entrusted to it, and therefore, starting from that date, as being subrogated to the rights and obligations of the person or persons previously responsible for the implementation of that mission, with the exception of obligations arising from serious misconduct by the Head of Mission, for which the Head of Mission is to bear the responsibility.

42 That interpretation is borne out both by the context of Article 16(5) of Joint Action 2008/124, as amended, and by the aims pursued by that legislation.

43 As regards the context of that provision, it should be noted that, following the entry into force on 12 June 2014 of Article 15a of Joint Action 2008/124, as amended, Eulex Kosovo was granted the capacity to procure services and supplies, to enter into contracts and administrative arrangements, to employ staff, to hold bank accounts, to acquire and dispose of assets and to discharge its liabilities, and to be a party to legal proceedings, as required in order to implement the joint action.

44 It follows from the legal capacity conferred on Eulex Kosovo by Article 15a of Joint Action 2008/124, as amended, which includes the capacity to be a party to court proceedings, that, even before 15 June 2014, that entity was responsible for the implementation of the mission entrusted to it. In those circumstances, Article 16(5) of that joint action, as amended, cannot be interpreted as meaning that the responsibility imputed by that joint action to Eulex Kosovo concerns only acts, obligations or claims which occurred or arose on or after 15 June 2014.

45 As regards the aims pursued by Joint Action 2008/124, as amended, it is apparent from recital 6 of Decision 2014/349 that that decision was adopted in order to deal with a situation which may deteriorate and could impede the achievement of the objectives of the European Union's external action as set out in Article 21 of the Treaty. The interpretation provided in the present judgment, according to which Article 16(5) of Joint Action 2008/124, as amended, subrogated Eulex Kosovo to the rights and obligations of the person or persons previously responsible for the implementation of the mission is consistent with the purpose of Decision 2014/349 to strengthen the mission entrusted to Eulex Kosovo.

46 In the light of the foregoing, Article 16(5) of Joint Action 2008/124, as amended, must be interpreted as meaning that, starting from 15 June 2014, it generally transfers to Eulex Kosovo responsibility for any claims and obligations which have already arisen or which may arise in respect of the implementation of the mandate entrusted to Eulex Kosovo and, therefore, starting from that date, as subrogating Eulex Kosovo to the rights and obligations of the person or persons or institutions previously responsible for the implementation of that mission, including ongoing litigation.

47 Consequently, the answer to the question referred is that Article 16(5) of Joint Action 2008/124, as amended, must be interpreted as meaning that, starting from 15 June 2014, it designates Eulex Kosovo as responsible and therefore as defendant in any action relating to the consequences of the implementation of the mission entrusted to it, irrespective of whether the facts underlying such an action occurred before 12 June 2014, the date when Decision 2014/349 entered into force.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 16(5) of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, Eulex Kosovo, as amended by Council Decision 2014/349/CFSP of 12 June 2014, must be interpreted as meaning that, starting from 15 June 2014, it designates the Rule of Law Mission in Kosovo, known as 'Eulex Kosovo',

referred to in Article 1 of that joint action, as responsible and therefore as defendant in any action relating to the consequences of the implementation of the mission entrusted to it, irrespective of whether the facts underlying such an action occurred before 12 June 2014, the date when Decision 2014/349 entered into force.

[Signatures]