

Case C-283/20

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

25 June 2020

Referring court:

Tribunal du travail francophone de Bruxelles (Belgium)

Date of the decision to refer:

1 October 2019

Applicants:

CO

ME

GC

and 42 Others

Defendants:

MJ

European Commission

European External Action Service (EEAS)

Council of the European Union

Eulex Kosovo

I. Subject matter of the dispute and the relevant facts

- 1 The EULEX KOSOVO Mission was created by 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) ('Joint Action 2008/124').

Originally established for a period of 28 months, that mission has been extended several times.

- 2 The EULEX KOSOVO Mission initially had no legal personality and acted through its Head of Mission who was responsible, in particular, for the mission on the ground, for issuing instructions to all staff members and for the implementation of the mission's budget in accordance with the terms of a contract signed with the Commission; the Head of Mission was also responsible for entering into contracts with international and local civilian staff members.
- 3 The EULEX KOSOVO Mission was given legal personality and the capacity to be a party in legal proceedings by Council Decision 2014/349/CFSP of 12 June 2014 amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (OJ 2014 L 174, p. 42) ('Decision 2014/349').
- 4 MJ served as the Head of 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 Commission on 1 February and 7 June 2013.
- 5 The applicants were, or still are for some, employed in Kosovo in the service of the EULEX KOSOVO Mission as international civilian staff members, under fixed-term employment contracts concluded for one or several months (at most one year), covered by a series of renewals.
- 6 The contracts concluded and renewed before the EULEX KOSOVO had legal personality were drawn up and signed by the Head of Mission in his own name. By contrast, with regard to the contracts drawn up and signed between 12 June 2014 and 14 October 2014 — the period during which the mission had legal personality — MJ, then Head of Mission, acted as the 'representative' of the mission under a fully representative mandate or even as the representative body of that mission.
- 7 In 2012, a reclassification of various functions led, according to the applicants, to an amendment of the description of their duties and to a significant reduction in their pay. That was followed by three 'waves' of contracts not being renewed in spring and summer 2013 and autumn 2014 and 2016.
- 8 The applicants dispute the reclassification of their duties (and the resulting changes to their working conditions) and/or the non-renewal of their contracts, as well as the 'status' assigned to them, in particular as regards social security.
- 9 The reclassification of duties and the first wave of contracts not being renewed took place when the EULEX KOSOVO Mission did not yet have legal personality, and thus was carried out by the Head of Mission, acting on his own behalf.
- 10 The applicants initially brought proceedings against only the first four defendants:

- MJ, as head of the EULEX KOSOVO Mission ‘*which does not have legal personality*’ and signatory to their contracts on his own behalf;
 - the Commission, as delegating authority, responsible for supervising the Head of Mission and for implementing the mission’s budget;
 - the European External Action Service, responsible for exercising command of civilian operations in general and decisions taken under Joint Action 2008/124 in particular;
 - the Council, as the institution which appointed MJ as Head of Mission, accountable for acts attributable to MJ.
- 11 Those four defendants contested the nature and scope of the jurisdiction of the tribunal [du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium)] to hear and determine the respective proceedings brought against them. MJ also contested the admissibility of the actions brought against him, claiming that, at the time when the EULEX KOSOVO Mission had no legal personality, he was, at most, acting in the capacity of agent of the European Union when signing the contracts of employment of the applicants and, as such, could not be held accountable on his own behalf; he relied, *inter alia*, on a judgment of the Cour de travail de Bruxelles (4^e chambre) (Higher Labour Court, Brussels (4th Chamber), Belgium) of 12 December 2017 concerning proceedings between a former employee of the EULEX KOSOVO Mission and a former Head of Mission and the EULEX KOSOVO Mission itself when it did not yet have legal personality.
- 12 The EU institutions disputed that heads of the EULEX KOSOVO Mission were ever agents of the European Union, since, before the mission had been given legal personality, they were expressly authorised to act on their own behalf. Moreover, they argued that, initially, the Heads of Mission acted ‘*es qualité*’, that is to say in their capacity as agents of the EULEX KOSOVO Mission, notwithstanding the fact that the mission did not (yet) have legal personality, in the same way as agents of an unincorporated association or the representatives of a trade union.
- 13 MJ and the European institutions also disputed the admissibility of the actions brought against them, arguing that since the EULEX KOSOVO Mission was given legal personality and the capacity to be a party in legal proceedings, it was responsible for any claims and obligations arising from the implementation of the mandate, both in the future and in the past, in accordance with the new Article 16(a) inserted in Joint Action 2008/124 by Decision 2014/349. Following that challenge, the applicants took the initiative to join the EULEX KOSOVO Mission to the proceedings as a third party.
- 14 By a judgment of 1 June 2018, by which the Head of Mission and the European institutions were found not to be liable for the period beginning 12 June 2014, the referring court ordered the reopening of the proceedings in order for the parties to

examine the existence of the ‘mandate’ of the Head of Mission for the period prior to 12 June 2014.

II. Relevant provisions

- 15 The only provisions which may be applicable in the present case are the following provisions of European law.

Joint Action 2008/124 (before it was amended on 12 June 2014)

Article 8

‘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’.

Article 9(3)

‘EULEX KOSOVO may also recruit, as required, international staff and local staff on a contractual basis’.

Article 10(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.’

Commission Communication on Specific Rules of Special Advisers entrusted with the implementation of operational CFSP actions and contracted international staff of 30 November 2009

- 16 That communication provides that ‘the contract shall foresee that the CFSP Special Adviser shall conclude contracts of employment on his/her own behalf applying the rules for staff employed by ... CFSP Special Advisers’, that ‘a CFSP

Special Adviser shall conclude on his/her own behalf an employment contract employing a person as International Staff’ and that ‘the employment contract employing a person as International Staff of a CFSP Special [Adviser] shall be signed by the CFSP Special Adviser’;

III. Relevant case-law

- 17 The tribunal [du travail francophone de Bruxelles (Brussels Labour Court (French-speaking))] refers to two judgments of the Cour du travail de Bruxelles (Higher Labour Court, Brussels):
- a judgment of 12 December 2017 by which the Cour du travail held that the employer of an international staff member employed in the service of the EULEX KOSOVO Mission before it acquired legal personality was not the Head of Mission but rather the European Union, in respect of which the Head of Mission was merely an agent;
 - a judgment of 8 January 2019 by which the same chamber of the same court, sitting in a different formation, ruled to the same effect in respect of a different CFSP mission by finding that the employer was ‘the European Union, represented by the Commission’.

IV. Findings of the tribunal [du travail francophone de Bruxelles (Brussels Labour Court (French-speaking))] and reopening of the proceedings

- 18 With regard to the contracts concluded between MJ and the Commission on 1 February 2013 and 7 June 2013, the tribunal [du travail francophone de Bruxelles (Brussels Labour Court (French-speaking))] notes the following:
- it was on his own behalf that MJ signed the contracts he concluded with the Commission on 1 February 2013 and 7 June 2013 and under which certain budgets were effectively allocated to him for the operational needs of the mission, in particular to cover the remuneration of staff (Article 4 of the contract of 7 June 2013), a budget for which he has, moreover, undertaken to assume full responsibility, going so far as to commit to reimbursing to the Commission any amounts which were wrongly paid to him or spent inappropriately by him (Article 9 of that contract) and to take out special insurance in order to cover his financial responsibility in that regard and any damage caused by himself to the Commission or any third parties in connection with the implementation of his mandate, including to parties with whom he may be required to conclude contracts in that context (Article 12.3 of that contract);
 - Article 11.1 of the contract concluded on 7 June 2013 also provides that the Special Adviser is to conclude contracts of employment with staff members on his/her own behalf.

- 19 The tribunal [du travail francophone de Bruxelles (Brussels Labour Court (French-speaking))] also notes that the contracts of employment concluded with MJ before June 2014 expressly present him not only in his personal capacity but also as an ‘employer’ and also expressly refer to Article 11.1 of the contract of 7 June 2013, stating that it allows MJ ‘in his capacity as Special Adviser to enter into contracts of employment on his own behalf’ (point II of the preamble to the contracts).
- 20 So far as concerns the period prior to 12 June 2014, the tribunal [du travail francophone de Bruxelles (Brussels Labour Court (French-speaking))] considered, in the light of the applicable provisions and contracts, that the applicants were entitled to bring proceedings against MJ personally and, that being so, that it was necessary to retain those proceedings, notwithstanding the judgment of the Cour du travail de Bruxelles (Higher Labour Court, Brussels) of 12 December 2017.
- 21 The tribunal [du travail francophone de Bruxelles (Brussels Labour Court (French-speaking))] considers that it cannot be claimed, a fortiori without any qualification, reservation, or further analysis, that the Head of the EULEX KOSOVO Mission was ‘only the agent of the European Union for the implementation of its mandate’ in the absence of the EULEX KOSOVO Mission having, at that time, its own legal personality or, in particular, decided that the action brought against him is inadmissible on the sole ground that ‘as a rule, the action can be brought only against the principal, not the agent’ since, in particular there are various cases in which an ‘agent’ is personally responsible for the acts carried out on behalf of the ‘principal’ and/or legal proceedings may be brought against the agent instead of the principal, if only *qualitate qua*. That is particularly true:
- in the case of so-called ‘imperfect’ representation or a so-called ‘non-representative’ mandate, that is to say where the agent acts in his/her own name on behalf of the principal. In that case, the contractual relationship is established, in principle, between the agent personally and the other party to the contract without the possibility of direct actions between the principal and the other party to the contract or vice versa;
 - or in the case of representation *ad agendum* (as opposed to representation *ad litem* for the purpose of representing a non-personalised group) where the agent may be formally a party to proceedings, in his or her own name but on behalf of the principal, merely by indicating his or her status.
- 22 The tribunal [du travail francophone de Bruxelles (Brussels Labour Court (French-speaking))] considered that it was necessary to analyse further the existence of the ‘mandate’ granted to MJ in his capacity as Head of Mission and, where appropriate, the exact nature of that mandate and the effects arising therefrom before ruling definitively on whether legal proceedings may/must be brought against MJ or whether he must be held not liable on the ground that, at the material time, he effectively acted only in the name and on behalf of the European

Union (through one and/or other of its institutions which are parties to the proceedings) under a fully representative mandate. It therefore ordered the reopening of the proceedings.

V. Position of the parties

- 23 The applicants claim that the actions brought against the European institutions should be declared admissible, in so far as they concern any act, action or omission of a Head of Mission. In the alternative, they request that the proceedings be stayed pending the judgment in Case T-602/15 RENV and, in the further alternative, they claim that their actions should be declared admissible in so far as they are directed against MJ.
- 24 MJ contends that the tribunal [du travail francophone de Bruxelles (Brussels Labour Court (French-speaking))] should declare the actions directed against him inadmissible. He regards the EULEX KOSOVO Mission as the employer of the applicants with regard to all the contracts concerned.
- 25 The EU institutions are of the view that they do not have the status of employers of the applicants and contend that the actions brought against them in connection with an employment contract should be declared inadmissible or at least unfounded.
- 26 At a hearing on 4 June 2019, the parties agreed that the question of the existence of the mandate of the Head of Mission and the nature and effects of such a mandate should be referred to the Court of Justice of the European Union for a preliminary ruling, in so far as it involves the interpretation of acts of the institutions, bodies, offices and agencies of the European Union within the meaning of Article 267 TFEU. The tribunal [du travail francophone de Bruxelles (Brussels Labour Court (French-speaking))] agreed with that suggestion.

VI. Background to the request for a preliminary ruling

- 27 The General Court and Court of Justice of the European Union have already heard and determined various cases involving the EULEX KOSOVO Mission, or other similar missions, brought by international civilian staff members employed to meet the needs of the mission.
- 28 However, they have not yet had the opportunity to address the question of the identification of the employer of those staff members and/or its representation for the period before the mission acquired legal personality, notwithstanding the fact that the mission was already able to employ staff members on a contractual basis through the Head of Mission who signed the contracts of employment on his or her own behalf and although staff members were already effectively employed in the service of the mission.

- 29 That identification is essential in the present case to enable an examination of the admissibility and/or the substance of some of the claims made against MJ and the EU institutions, in so far as they concern the period prior to 12 June 2014.

VII. The question referred for a preliminary ruling

- 30 In the light of all the foregoing, the Tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking)) refers the following question to the Court of Justice for a preliminary ruling:

‘Should Articles 8.3 and 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, before its amendment by Council Decision 2014/349/CFSP of 12 June 2014, 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 the EULEX KOSOVO Mission during the period before 12 June 2014 or, having regard, in particular, to Articles 8.5 and 9.3 of Joint Action 2008/124/CFSP before its amendment on 12 June 2014, as conferring the status of employer on the European Union and/or an institution of the European Union such as the European Commission, the European External Action Service, 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?’