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Judgment of the Court in Joined Cases C-29/22 P | KS and KD v Council and Others and C-44/22 P | Commission v KS and Others

Common foreign and security policy (CFSP): the Court of Justice clarifies the scope of the jurisdiction of the Courts of the European Union

The Court of Justice has jurisdiction, in that context, to assess the legality of acts or omissions which are not directly linked to political or strategic choices coming under that policy or to interpret them

KS and KD, close family members of individuals who disappeared or were killed in Kosovo in 1999, brought a case before the General Court of the European Union. The case concerns the European Union's civilian mission in Kosovo (Eulex), which was deployed in the framework of the CFSP. The General Court dismissed that action on the ground that it manifestly lacked jurisdiction to hear and determine it. On appeal, the Court of Justice explains that the Courts of the European Union in fact have jurisdiction to assess the legality of acts or omissions coming under the CFSP that are not directly related to political or strategic choices or to interpret them. That thus applies, in particular, to decisions taken by Eulex Kosovo as to the choice of personnel or the establishment of review measures or remedies.

In 2008, the European Union created a Rule of Law civilian mission, named Eulex Kosovo, which was made responsible inter alia for carrying out investigations into the crimes and the people who disappeared or were killed in Kosovo in 1999 during the conflict in that country. In 2009, the European Union established a Human Rights Review Panel, with responsibility for examining complaints of human rights breaches committed by Eulex Kosovo in the implementation of its mandate.

Following complaints filed by KS and KD, the review panel concluded, in November 2015 and October 2016, that there had been a breach of several fundamental rights. In March 2017, the panel closed the cases concerned, albeit while finding that the head of Eulex Kosovo had only implemented in part the recommendations it had made to him. KS brought an action for non-contractual liability against the Council of the European Union, the European Commission and the European External Action Service (EEAS) for, inter alia, violation of several provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'). In December 2017 the General Court found that it manifestly lacked jurisdiction to hear and determine that action ¹.

KS and KD subsequently brought a new legal action before the General Court against the Council, the Commission and the EEAS. They seek compensation for the damage they claim to have suffered owing to various acts and omissions related, in particular, to investigations carried out during the Eulex Kosovo mission. In June 2021, KS and KD also applied for measures of inquiry, seeking the production of the full version of Eulex's operation plan. In November 2021, the General Court dismissed that action on the same grounds ².

Ruling on appeal, the Court of Justice today sets aside in part that latter order of the General Court and otherwise refers the case back to it.

The Court of Justice observes that the inclusion of the CFSP in the EU constitutional framework means that the basic

principles of the EU legal order also apply to that policy. Those include, in particular, respect for the rule of law and fundamental rights, values which require that EU authorities be subject to judicial review.

It is true that neither the articles of the Treaties and of the Charter of Fundamental Rights of the European Union establishing the right to an effective remedy, nor the pleading of breaches of fundamental rights justify, in themselves, a finding by the Courts of the European Union that they have jurisdiction. Indeed, the limitation placed on the jurisdiction of the Court of Justice with respect to the CFSP provided for by the Treaties **is not incompatible with the right to an effective remedy guaranteed by the ECHR**, the European Court of Human Rights having already accepted constitutional limitations of the jurisdiction of the courts of a State as regards acts that cannot be detached from the conduct by that State of its international relations.

Interpreting the Treaties in the light in particular of the right to an effective remedy and the principles of the rule of law, **the Court of Justice finds nevertheless that it has jurisdiction to assess the legality of acts and omissions coming under the CFSP that are not directly related to political or strategic choices, or to interpret those acts.**

In the present case, the capacity of the Eulex Kosovo mission to employ staff constitutes an act of day-to-day management forming part of the performance of that mission's mandate. Accordingly, **the decisions taken by Eulex Kosovo as to the choice of personnel employed by that mission are not directly linked to the political or strategic choices made by it in the context of the CFSP.**

The Court of Justice arrives at the same conclusion as regards the absence of provisions for **legal aid in proceedings before the review panel**. Likewise, as regards the lack of **enforcement powers** conferred on the review panel or of **remedies** for breaches found by that panel, the Court considers that the decision whether or not to make the acts and omissions of that mission subject to a review mechanism concerns only an aspect of its administrative management.

Further, the Court of Justice states, in the same vein, that the **absence of both remedial action** to remedy the breaches of fundamental rights found by the review panel and of a **legally sound review** of KD's case concern the failure to adopt individual measures and are not directly related to the political or strategic choices made in the context of the CFSP.

By contrast, the **resources made available to Eulex Kosovo** and the decision **to remove the executive mandate** of that mission are directly related to such political or strategic choices, with the result that the General Court did not err in finding that it lacked jurisdiction to hear and determine that part of the action brought by KS and KD.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text and, as the case may be, the abstract](#) of the judgment is published on the CURIA website on the day of delivery.

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¹ Order of 14 December 2017, *KS v Council and Others* ([T-840/16](#)).

² Order of 10 November 2021, *KS and KD v Council and Others* ([T-771/20](#)).