Case C-238/24 [Tartisai] [i]

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

Date lodged:

2 April 2024

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

2 April 2024

Appellant:

NR

Respondents:

Ministero della Difesa

Comando Generale dell'Arma dei Carabinieri

Comando Generale Carabinieri – Centro Nazionale Amministrativo – Chieti

Centro Amministrativo d'Intendenza Interforze del Contingente delle Forze Armate Italiane in Afghanistan

Centro Nazionale Amministrativo dell'Arma dei Carabinieri

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Subject matter of the main proceedings

1 The appellant asks the Consiglio di Stato (Council of State), on appeal, to reverse a judgment of the Tribunale Amministrativo Regionale per il Piemonte (Regional Administrative Court, Piedmont) ('the TAR'), which had dismissed his action against an administrative decision to recover certain allowances received by the appellant for a mission abroad.

[i] The name of the present case is fictitious. It does not correspond to the real name of any of the parties to the proceedings.

Subject matter and legal basis of the request

Interpretation of Article 7(3) of the decision of the Council of the European Union 2010/279/CFSP of 18 May 2010.

Questions referred for a preliminary ruling

(1) What is the correct interpretation of Article 7(3) of Council Decision 2010/279/CFSP of 18 May 2010, that is to say, was the intention behind that provision to provide that allowances paid by a Member State were to be received cumulatively with those granted by EUPOL?

(2) In the event that that interpretation leads to the conclusion that the allowances described above can be received cumulatively, according to the interpretation provided by the Court referred to above, does Article 7(3) of Council Decision 2010/279/CFSP of 18 May 2010 preclude a national rule, such as the rule resulting from the provisions of Article 3(1) of legge n. 108/2009 (Law No 108/2009), in so far as it provides that '… the staff involved in the international missions referred to in this law shall be paid, after tax and social security deductions, throughout the period, in addition to salary or pay and other fixed and continuous allowances, the mission allowance provided for by regio decreto n. 941 (Royal Decree No 941) of 3 June 1926, … less any allowances and contributions paid on the same basis directly to the persons concerned by international bodies', and by Article 1(b) of Royal Decree No 941 of 3 June 1926 and Article 3 of legge n. 642 (Law No 642) of 8 July 1961 and Article 4(1)(a) of legge n. 838 (Law No 838) of 27 December 1973, the purpose of that rule being to prohibit the cumulation of allowances?

Provisions of European Union law and case-law relied on

Council Joint Action 2007/369/CFSP of 30 May 2007 on the establishment of the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN).

Council Decision 2010/279/CFSP of 18 May 2010 on the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN), which extended the mission from 31 May 2010 until 31 May 2013. Article 7(3) concerns the rules governing the pay conditions applied to staff:

English language version: '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 applicable per diems as well as hardship and risk allowances'.

Italian language version: 'Ciascuno Stato membro o istituzione dell'UE sostiene i costi connessi con ogni membro del personale da esso distaccato, incluse le spese di viaggio per e dal luogo di schieramento, gli stipendi, la copertura sanitaria, le

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indennità, diverse da quelle giornaliere, le indennità di sede disagiata e di rischio applicabili'.

Articles 2, 19, 21, 23, 24, 28 and 40 TEU.

Articles 263, 275 and 342 TFEU.

Regulation No 1/1958.

Judgments of the Court in Cases C-296/95, C-437/97, C-161/06, C-511/08 and C-455/14 and the case-law cited in those judgments.

Provisions of national law and case-law relied on

Regio decreto n. 941 (Royal Decree No 941) of 3 June 1926 governing, in particular, allowances for missions abroad

Legge n. 642 (Law No 642) of 8 July 1961

Legge n. 838 (Law No 838) of 27 December 1973, in particular, Article 4(1)(a)

Decreto-legge del 30 dicembre 2005, n. 273, convertito in legge 23 febbraio 2006, n. 51 (Decree-Law No 273 of 30 December 2005, converted into Law No 51 of 23 February 2006), in particular, Article 39(21)(39), which establishes that the provisions described above are to be interpreted as meaning that the pay terms provided for therein are of an ancillary nature and are made available in order to compensate for the hardship and risks associated with the job, the obligations to remain on call and to be available to work at inconvenient times, and to substitute overtime pay.

Legge n. 108 (Law No 108) of 3 August 2009 on the extension of Italian participation in international missions, in particular Article 3(1), which provides that the staff involved in the international missions referred to in that law are to be paid, after tax and social security deductions, throughout the period, in addition to salary or pay and other fixed and continuous allowances, the mission allowance provided for by Royal Decree No 941 of 3 June 1926, less any allowances and contributions paid on the same basis directly to the persons concerned by international bodies.

Legge n. 145 – Disposizioni concernenti la partecipazione dell'Italia alle missioni internazionali (Law No 145 – Provisions concerning Italy's participation in international missions) of 21 July 2016

Judgments of the Council of State

Council of State, Section II, No 140/2022 and No 139/2022: 1) the allowance for missions abroad is all-encompassing, compensating in cash for the hardship, risks and constraints connected with the particular job concerned, and 2) the legislature

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intervened, by introducing a clear legislative provision (Law No 108 of 3 August 2009), which provided for the deduction of allowances paid by international bodies, precisely in order to prevent the staff in question from being overpaid and otherwise being compensated twice for the same type of hardship.

Council of State, Section IV, No 6374/2018; Section II, No 309/2023, No 4809/2022, No 4654/2022; Section IV, No 2407/2020; Section I, No 482/2022: the broad and all-encompassing reference to job-related hardship and risks precludes the conclusion that the allowance for missions abroad is different in nature from that of the 'per diem, hardship and risk allowance'. It follows that receipt of that 'per diem, hardship and risk allowance' absorbs and excludes entitlement to the allowance for missions abroad.

Council of Section IV, No 2407/2020: all the successive legislative provisions from 2008 to 2016 provide that any allowances or contributions paid, on the same basis, directly to the persons concerned by international bodies, must be deducted from the amount of the allowance in question. The expression 'on the same basis' refers to the objective fact that work is extended abroad.

Succinct presentation of the facts and procedure in the main proceedings

2 The appellant, belonging to the Arma dei Carabinieri police force, took part, in June 2011, in the international mission referred to as 'EUPOL' (European Police Mission in Afghanistan). He was paid, at national level, a per diem (daily) allowance provided for in Article 3 of Law No 108/2009 and also received three types of 'allowance' from the EU mission structure, known respectively as 'per diem allowance', 'hardship allowance' and 'risk allowance'. In March 2012, the administration took steps to recover from the appellant amounts he had received as a mission allowance under Royal Decree No 941/1926, in application of Law No 108/2009, which provides that any sums paid on the same basis directly by international bodies should be deducted from the mission allowance to be paid to the participant in international missions.

3 The amount to be recovered was assessed by the administration at EUR 25 131.80, in a decision of 3 December 2020, contested at first instance before the TAR.

4 In particular, the appellant claimed that the EUPOL document of 11 August 2011, in its description of the pay conditions applying to staff assigned to the mission, had provided that each Member State was to bear the costs of seconded staff, including travel expenses, medical coverage, other than applicable 'per diems as well as hardship and risk allowances' ('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 applicable per diems as well as hardship and risk allowances').

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5 The appellant argues that the rule, derived from EU law, was binding and took precedence over any conflicting national provisions; according to the appellant, this means that he ought to receive the allowances paid by the Member State and those provided for under Italian law.

6 The TAR dismissed the action, taking the view, specifically with regard to the question of him receiving the allowance cumulatively, that the appellant's argument stems from an incorrect translation of the mission regulations, namely the expression 'other than applicable per diems as well as hardship and risk allowances' which, according to the appellant, means 'besides applicable per diems as well as hardship and risk allowances' and which, on the contrary, according to the TAR, means 'apart from applicable per diems as well as hardship and risk allowances'.

7 Since it took the view that there was no contradiction between the national legislation and the mission regulations, the TAR applied the principles laid down in national case-law concerning allowances for missions abroad and, taking the view that the cumulation of those allowances with those provided in parallel for missions covered by the European Union was therefore inadmissible, it upheld the application solely in respect of the appellant's claim for expenses for meals, but dismissed the remainder of the application.

8 The appellant lodged an appeal against the decision at first instance before the Council of State.

9 In the first place, he points out that, in order to determine which allowances should have been awarded to EUPOL staff seconded to Afghanistan, the legally relevant contractual document is the document originating from the European Union called 'Annex 1 – European Union Police Mission in Afghanistan (EUPOL Afghanistan) – Advertisement for EU seconded/contracted staff members', a sworn translation of which, with regard to the part dealing with the administrative conditions applying to seconded staff, had already been produced at first instance.

10 He claims that the TAR's interpretation of the expression 'other than' in English is incorrect, in so far as the sworn translation that he filed indicates that the expression 'other than applicable per diems as well as hardship and risk allowances' means 'besides applicable per diems as well as hardship and risk allowances' and not 'apart from applicable per diems as well as hardship and risk allowances', as held by the TAR.

11 In addition, he argues that, in a letter of 11 August 2011, the legal adviser to the Head of Mission of EUPOL-A had stated that the rule under EU law on allowances applicable to seconded staff of the EUPOL-A mission was Article 7 of Joint Action 2007/369/CFSP, the text of which had been reproduced in its entirety in Article 7 of Council Decision 2010/279/CFSP, which is binding on the Member States.

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12 That provision had laid down that Member States were to bear various types of costs related to the mission and pay the allowances provided for by each State for missions abroad, besides those applicable by the European Union, which would be covered by the EUPOL-Afghanistan Mission.

13 Consequently, Italy, as a Member State, was required to pay the mission allowance provided for by Royal Decree No 941/1926, whereas the European Union allowances would be paid autonomously, since they were provided for by a Joint Action.

The essential arguments of the parties in the main proceedings

14 Contrary to what emerges from the official Italian text, the appellant, basing his argument on the English language version of Council Decision 2010/279/CFSP of 18 May 2010, translates Article 7(3) as follows: 'Ciascuno Stato membro o istituzione dell'UE sostiene i costi connessi con ogni membro del personale da esso distaccato, incluse le spese di viaggio per e dal luogo di schieramento, gli stipendi, la copertura sanitaria, le indennità, oltre che quelle giornaliere, le indennità di sede disagiata e di rischio applicabili' ('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, besides applicable per diems as well as hardship and risk allowances'). On that basis, he concludes that the Member States must pay their allowances in addition to those paid by the international body.

15 In support of his argument, the appellant produces the EUPOL note of 8 November 2011, in which the legal adviser to the Head of Mission of EUPOL writes to the Italian military administration as follows: '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 applicable per diems as well as hardship and risk allowances. Consequently, the per diems, hardship and risk allowances are mission internal issues and independent from the seconding nations'. The second sentence seems to corroborate the translation proposed by the appellant, but is at odds with the English language version of the provision in question, which does not appear to be fully aligned with the Italian, French and Spanish versions.

16 Arriving at the opposite conclusion, the TAR – basing its conclusion on the Italian language version, from which it can be inferred that, unlike those to be paid by international bodies, the allowances to be paid by the Member States are those provided for under national laws – concludes that the national legislation rightly prohibits such allowances being payable cumulatively with those paid by international bodies.

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Succinct presentation of the reasoning in the request for a preliminary ruling

17 Under both national law and the settled case-law of the Council of State, the recovery ordered by the administration is lawful.

18 However, according to the referring court, there is uncertainty as to the meaning to be given to the expression 'other than' in the English version of Article 7(3) of the decision of the Council of the European Union 2010/279/CFSP of 18 May 2010.

19 In the French version, the expression used is 'à l'exclusion des', which corresponds exactly to the Italian version 'diverse da'. The Larousse French-English dictionary states as an English translation of 'à l'exclusion de' the expressions 'apart from, with the exception of'. In that sense, the purpose of the expression is to exclude all that follows.

20 By contrast, the English expression 'other than' has several meanings, at least two of which may be used in the relevant sentence: (i) other than – besides, in addition to; (ii) other than – except, excluding.

21 In the present case, the appellant – instead of using the Italian version, which is unambiguous, of the decision at issue – used the English version, on the basis of which he puts forward a translation which has regard for only one of the possible meanings of the expression 'other than' (namely: besides, in addition to).

22 The question therefore arises as to the precise meaning of Article 7(3) of the decision at issue, that is to say, whether or not it intended to provide that allowances paid by a Member State could be received cumulatively with those granted by EUPOL. While the Italian version leaves no doubt that receiving the allowances cumulatively is not permissible, the English version appears to be ambiguous, given that the expression 'other than' has several meanings.

23 Regulation No 1/1958 enshrines the principle of multilingualism and equality of the official languages of the European Union. This is based on the fundamental principle of legal certainty, which requires that EU legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies (judgment in Case C-161/06). Where a legislative provision has the same meaning in a number of official languages and (due to a grammatical error or even the inevitable diversity of terminology) a different meaning in one or more of the others, there is no official comparative language that prevails. Indeed, the Court expressly excluded the prevalence of one language version over others (judgment in Case C-296/95).

24 Thus, where there is divergence in the interpretation of a multilingual text, the text of a provision must be interpreted in the light of the texts drawn up in other official languages. Furthermore, the Court has held that, where a provision of EU

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law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness and the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (judgment in Case C-437/97).

25 It is therefore necessary for the Court to intervene in order to clarify the exact meaning of the provision in question.

26 Finally, as regards the Court's jurisdiction to rule on this reference for a preliminary ruling, the referring court observes, in the first place, that, under Article 24 TEU, the Court does not have jurisdiction with respect to matters of common foreign and security policy (CFSP), with the exception of its jurisdiction to monitor compliance with Article 40 TEU and to review the legality of certain decisions, as provided for by the second paragraph of Article 275 TFEU. Under Article 275 TFEU, the Court does not have jurisdiction with respect to the provisions relating to the CFSP, nor with respect to acts adopted on the basis of those provisions. However, the Court is to have jurisdiction to monitor compliance with Article 40 TEU and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V TEU.

27 On the basis of the exceptions described in Article 275 TFEU, the Court defined the scope of its jurisdiction under the CFSP in the judgment in Case C-455/14, ruling as follows: 'In the present case, the contested decisions are admittedly set in the context of the CFSP … . However, such a circumstance does not necessarily lead to the jurisdiction of the EU judicature being excluded … . While the decisions adopted by the competent authorities of that mission relating to the allocation of the human resources assigned to it by the Member States and the EU institutions for the purpose of performing activities undertaken at theatre level have an operational aspect falling within the CFSP, they also constitute, by their very essence, acts of staff management, just like all similar decisions adopted by the EU institutions in the exercise of their competences. In those circumstances, the scope of the limitation, by way of derogation, on the Court's jurisdiction, which is laid down in the final sentence of the second subparagraph of Article 24(1) TEU and in the first paragraph of Article 275 TFEU, cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions … . In the present case, it should be observed that the contested decisions … constitute acts of staff management whose purpose is the redeployment of members of the mission at theatre level … . Accordingly, those decisions, although adopted in the context of the CFSP … fall within the jurisdiction of the EU judicature under the general provisions of the FEU Treaty referred to ….'

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28 Thus, the referring court takes the view that, a fortiori, the general jurisdiction of the Court to rule on the interpretation of acts of the European Union governing aspects of the economic management of staff assigned to missions may not be disregarded.

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