Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 21 May 2015 [1]

Case C-439/13 P

Elitaliana SpA
v

Eulex Kosovo

(Reopening of the oral procedure — Common Foreign and Security Policy (CFSP) — EU Mission — Jurisdiction of the European Union Courts — Budget of the European Union — Public service contracts — Regulation (EC, Euratom) No 1605/2002 — Call for tenders for helicopter support for the EULEX mission in Kosovo — Review of the legality of a decision awarding a public contract)

I – **Introduction**

1. The present proceedings arise from an action for annulment brought before the General Court of the European Union by the Italian undertaking Elitaliana SpA ('Elitaliana') against a measure adopted in the context of a procedure for the award of a public service contract [2] by Eulex Kosovo, an entity established under Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo. [3] Having dismissed Elitaliana's action as inadmissible on the ground that Eulex Kosovo did not have legal capacity to be a defendant, [4] the General Court held, in the order in *Elitaliana* v *Eulex Kosovo*, [5] that it was not necessary to rule on the matter of its jurisdiction to hear actions directed against acts adopted on the basis of the provisions of the EU Treaty relating to the CFSP.

2. In the first Opinion I delivered with regard to the appeal directed against that order, [6] I concluded that the appeal should be dismissed in the light of Eulex Kosovo's status. In that context, I did not take a view on the matter of the jurisdiction of the Court of Justice.

1 — Original language: French.

2 — In the context of the award of a public contract entitled 'EuropeAid/131516/D/SER/XK — Helicopter support for the EULEX mission in Kosovo (PROC/272/11)'.

3 — OJ 2008 L 42, p. 92.

4 — In the context of the action brought before the General Court, Eulex Kosovo raised an objection of inadmissibility based, first, on the fact that Eulex Kosovo did not have legal capacity to be a defendant in the present case and, secondly, on the General Court's lack of jurisdiction resulting from the fact that the contested acts had been adopted on the basis of the provisions of the EU Treaty relating to the Common Foreign and Security Policy (CFSP).

5 — T-213/12, EU:T:2013:292, the 'order under appeal'.

6 — As to the details of the case, reference is made to the order under appeal and to my first Opinion in this case (C-439/13 P, EU:C:2014:2416).

3. In order to be able to give a decision in the present case, the Court of Justice, however, sought clarification on all the relevant aspects and, by order of 10 February 2015, ordered the reopening of the oral procedure to allow the parties to give their views on the question:

'... [w]hether the General Court of the European Union and the Court of Justice of the European Union have jurisdiction to hear this case, taking into consideration the provisions relating to the [CFSP] which are set out in Section 1 of Chapter 2 of Title V TEU and those in Article 275 TFEU.'

4. In accordance with Article 24 TEU read in conjunction with Article 275 TFEU, the Court of Justice does not have jurisdiction with respect to the provisions relating to the CFSP, other than to monitor compliance with Article 40 TEU and with the second paragraph of Article 275 TFEU.

5. Nonetheless, I would like to make clear at the outset that since the present case concerns public procurement in the context of the European Union's external action, it falls directly within the scope of the budgetary provisions of EU law. Like Elitaliana, the Council of the European Union and the European Commission, which agree on the whole that the Court of Justice has jurisdiction to hear the present case,[7] I intend to argue that the General Court and the Court of Justice have jurisdiction to carry out a review as to the legality of a decision awarding a public contract in the light of the applicable EU budget rules, from the standpoint of both the funding of measures falling within the CFSP and the implementation of the EU budget.

II – **Legal context**

6. Article 41(1) TEU provides:

'Administrative expenditure to which the implementation of this Chapter gives rise for the institutions shall be charged to the Union budget.'

7. Under the first subparagraph of Article 41(2) TEU, operating expenditure to which the implementation of this Chapter gives rise is also to be charged to the Union budget, except for such expenditure arising from operations having military or defence implications and cases where the Council, acting unanimously, decides otherwise.

8. According to Article 310(1) and (3) TFEU:

'1. All items of revenue and expenditure of the Union shall be included in estimates to be drawn up for each financial year and shall be shown in the budget.

The Union's annual budget shall be established by the European Parliament and the Council in accordance with Article 314.

The revenue and expenditure shown in the budget shall be in balance.

…

3. The implementation of expenditure shown in the budget shall require the prior adoption of a legally binding Union act providing a legal basis for its action and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 322, except in cases for which that law provides.'

7 — I note that, while focussing on the application of the rules in question *ratione temporis*, Eulex Kosovo is the only party to maintain that the Court has jurisdiction to rule only on acts adopted by the Council and the Commission, and not on the acts adopted by Eulex Kosovo. I therefore conclude that it is challenging the jurisdiction of the Court in the present case.

9. Article 317 TFEU is worded as follows:

‘The Commission shall implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management. Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management.

…

Within the budget, the Commission may, subject to the limits and conditions laid down in the regulations made pursuant to Article 322, transfer appropriations from one chapter to another or from one subdivision to another.’

10. Article 4(2)(a) 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 [8] provides:

‘The revenue and expenditure of the Communities shall comprise:

(a) the revenue and expenditure of the European Community, including administrative expenditure occasioned for the institutions by the provisions of the Treaty on European Union relating to the [CFSP] and police and judicial cooperation in criminal matters, and the operating expenditure occasioned by implementation of those provisions where this is charged to the budget.’

11. In accordance with Article 162(1) of that regulation, Parts One and Three of Financial Regulation No 1605/2002 are to apply to external actions financed from the budget, save as otherwise provided in that title.

12. According to Article 163 of Financial Regulation No 1605/2002, the actions referred to in that title may be implemented either on a centralised basis by the Commission or on a decentralised basis by the beneficiary third country or countries, or jointly with international organisations.

13. Under Article 166 of Financial Regulation No 1605/2002:

‘1. Actions carried out shall give rise to:

(a) a financing agreement drawn up between the Commission, acting for the Communities, and the beneficiary third country or countries or the bodies they have designated, hereinafter: “the beneficiaries”; or

(b) a contract or grant agreement with national or international public-sector bodies or natural or legal persons responsible for carrying out the actions.

…’

8 — OJ 2002 L 248, p. 1, ‘Financial Regulation No 1605/2002’.

14. Article 167 of Financial Regulation No 1605/2002 provides:

‘1. The provisions of Article 56 and of Chapter 1 of Title V of part one relating to the general provisions on procurement shall be applicable to contracts covered by this Title subject to the special provisions relating to thresholds and the arrangements for awarding external contracts laid down in the implementing rules. The contracting authorities for the purposes of this chapter shall be:

(a) the Commission on behalf of and for the account of one or more beneficiaries;

(b) the beneficiary or beneficiaries;

(c) a national or international public-sector body or natural or legal persons who have signed with the Commission a financing agreement or grant agreement for the implementation of external action.

…’

III – **The procedure before the Court**

15. In response to the invitation which the Court extended to the parties in the order of 10 February 2015 reopening the oral procedure, Elitaliana, Eulex Kosovo, the Council and the Commission submitted their written observations. Eulex Kosovo, the Council and the Commission presented oral argument at the hearing on 25 March 2015.

IV – **The actions of the European Union in the context of external action and the extent of the Court’s jurisdiction in the field of the CFSP**

A – *Introductory remarks regarding the CFSP*

16. Historically, when the Maastricht Treaty was signed, the CFSP, as a common policy of the European Union rooted in intergovernmental cooperation, was the result of a compromise. While the CFSP was intended to be a system separate from Community policies and from cooperation in the field of justice and home affairs, it was incorporated formally, organisationally and substantially into a single structure, the European Union.[9] Accordingly, from its conception, the CFSP has come under a single institutional framework,[10] common across the three pillars.

17. It is established that the European Union’s external action covers many areas, such as security and defence, trade policy, development aid, cooperation with third countries, humanitarian aid, international agreements, relations with international organisations and the application of the solidarity clause within the meaning of Article 222 TFEU.[11]

9 — For a comparison of the unitary and separatist interpretations of the CFSP, see Everling, U., *Reflections on the structure of the European Union*, Common Market Law Review — Volume 29, 1992, pp. 1053 to 1077. For the Court’s holistic interpretation of pre-Lisbon ‘non-Community’ provisions, see the judgment in *Segi and Others* v *Council* (C-355/04 P, EU:C:2007:116).

10 — See the first paragraph of Article C of the Treaty on the European Union, as worded in the Maastricht Treaty (OJ 1992 C 191, p. 1).

11 — As regards the unique ability of the European Union and the Member States, see the Council conclusions of 12 May 2014 on the EU’s comprehensive approach, paragraph 1, available online at: http://www.google.lu/url?sa=t&rct=j&q=&esrc=s&source=web&cd= 2&ved= 0CCkQFjAB&url=http%3A%2F%2Fwww.consilium.europa.eu%2Ffr%2Fworkarea%2Fdownloadasset.aspx%3Fid%3D15788&ei= 8TH0VKrAHcTVPLmygcAE&usg=AFQjCNGNI3D0A7gd1TpvI9RCQ_jx11LqUw&bvm=bv.87269000,d.ZWU.

18. In structural terms, the CFSP contains, inter alia, the Common Security and Defence Policy (CSDP), which has become increasingly established as a self-standing policy since the Treaty of Lisbon, in particular, under Articles 42 TEU and 43 TEU. According to Article 42(1) TEU, the CFSP provides the European Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security. The types of missions are specified in Article 43 TEU.

19. Therefore, the CFSP involves a close and complex interaction between civilian and military aspects. The present case illustrates, however, the extent to which the European Union's external action is fragmented, lacks transparency and makes it difficult to determine the legal liability of its various actors.

20. As regards the procedure for establishing its presence in terms of external action, it is established that the European Union undertakes a significant number of actions and missions throughout the world, [12] since civilian missions are considered to be a key instrument of the CSDP. [13] The main legal instrument enabling the launch of European Union operations consists of a Council decision taken under Article 43 TEU read in conjunction with Article 28 TEU. [14] It is an act of the European Union, and not merely a decision adopted jointly by the Member States. [15]

21. As regards relations with the host country, the European Union usually concludes agreements with host countries under Article 37 TEU (formerly Article 24 TEU) and Article 217 TFEU, which provides that it may conclude agreements with one or more third countries or international organisations in order to implement the CFSP. The interested parties may also extend existing agreements. That was the case of an EU Planning Team (in Kosovo), which was established under the Council Joint Action, [16] and which preceded and prepared for the establishment of Eulex Kosovo. [17]

22. In particular, the status of ESDP operations is set out in agreements [18] which govern the status and the activities of the operations in the host State, including details relating to the exercise of criminal jurisdiction, the privileges and immunities of the operation and its personnel and conflict resolution. [19] In accordance with an interinstitutional agreement of 2003, [20] the military and civilian staff of European Union missions enjoy full immunity from jurisdiction. It is also apparent from the written observations

12 — See web address: http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130712/LDM_BRI(2014)130712_REV2_EN.pdf.

13 — Council document 16927/09 entitled '2009 Annual Report on the identification and implementation of lessons and best practices in civilian ESDP missions', available online at: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016927%202009%20EXT%201.

14 — In accordance with the voting rules under Article 31 TEU.

15 — See Naert, F., *The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement*, KU Leuven Institute for International Law — Working Paper No 151, October 2011.

16 — Council Joint Action 2006/304/CFSP of 10 April 2006 on the establishment of an EU Planning Team (EUPT Kosovo) regarding a possible EU crisis management operation in the field of rule of law and possible other areas in Kosovo (OJ 2006 L 112, p. 19).

17 — The Head of the United Nations Interim Administration Mission in Kosovo (UNMIK) extended the application of UNMIK Regulation No. 2000/47 (UNMIK/Reg/2000/47, accessible online at www.unmikonline.org), which defines the status, privileges and immunities of the North Atlantic Treaty Organisation-led Kosovo Force (KFOR) and UNMIK in the territory of Kosovo, to EUPT Kosovo by way of an executive decision following a request from the High Representative for the CFSP. Executive decision 2006/18, according to the sources cited by Sari, A., *Status of Forces and Status of Mission Agreements under the ESDP*, European Journal of International Law, 2008, Volume 19, Issue 1, p.74. Also see Articles 4 and 5 of Joint Action 2006/304.

18 — SOFA agreements ('Status of Forces Agreements') for military operations and SOMA agreements ('Status of Mission Agreements') for civilian operations. See Sari, A., op. cit.

19 — See the Model Agreement on the status of the European Union-led forces between the European Union and a Host State, Council document 8720/05, available online at: http://data.consilium.europa.eu/doc/document/ST 8720 2005 INIT/en/pdf.

20 — Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA) (OJ 2003 C 321, p. 6).

of Eulex Kosovo that the Head of Mission and the Eulex mission as a whole have diplomatic status and privileges under international law.[21] However, it should be noted that the application of the Vienna Convention on Diplomatic Relations to all staff has already been subject to criticism at an institutional level.[22]

23. Furthermore, having regard to one of the arguments put forward by Eulex Kosovo's representative at the hearing in relation to the immunity of that entity, I would point out that the immunity deriving from Kosovan legislation applies with respect to the bodies and courts of Kosovo and cannot, in any event, preclude a review of the legality of measures falling within the scope of EU law which are subject to the Court's jurisdiction in this field.[23]

B – *The jurisdiction of the Court in the light of the Treaty of Lisbon*

24. It is established that, as EU law now stands, the CFSP remains subject to specific rules and procedures, in accordance with the second subparagraph of Article 24(1) TEU. Accordingly, certain acts adopted within the framework of the CFSP still fall outside the ambit of judicial review by the Court. That situation is inherent in the way in which the Court's powers are structured by the Treaties.[24]

25. Nevertheless, it should be noted that the Treaty of Lisbon developed the scope of the Court's jurisdiction in the field of CFSP.[25]

26. First, the Court was explicitly granted jurisdiction with regard to certain CFSP measures, which put an end to the previous approach whereby judicial review in that field was excluded. Accordingly, the second subparagraph of Article 24(1) TEU provides that, as regards the provisions of the Treaties that govern the CFSP, the Court has jurisdiction only 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. According to the latter provision, the Court is to have jurisdiction, in particular, 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 of the EU Treaty.[26]

21 — In that connection, Eulex Kosovo refers to Law of the Republic of Kosovo No 03/L–033 of 20 February 2008 on immunities and privileges, accessible online at http//www.mfa-ks.net/repository.docs/2008_03-L033_en1.pdf, to the Vienna Convention on Diplomatic Relations of 18 April 1961 and the Vienna Convention on Consular Relations of 24 April 1963, the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 and the Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations of 21 November 1947.

22 — Council document 15711/02, entitled 'Generic Status of Force Agreement for police missions — Immunities and privileges for EU Mission personnel', available online at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015711%202002%20INIT

23 — Nevertheless, it should be noted that the immunity from jurisdiction granted to CFSP missions and their staff can have an impact on the protection of fundamental rights in the host State in the light of Article 6 TEU. In terms of human rights, see, with regard to the lack of jurisdiction of the European Court of Human Rights (ECtHR) to rule on infringements of Articles 2 and 6 of the European Convention for the protection of human rights and fundamental freedoms signed at Rome on 4 November 1950 which are attributable to the United Nations in the territory of Kosovo, judgments of the ECtHR in *Behrami and Behrami v. France*, no. 71412/01, and *Saramati v. France, Germany and Norway*, no. 78166/01. There is a connection between that subject and the current debate as regards the extraterritorial effects of the Charter of Fundamental Rights of the European Union. See Moreno-Lax, V., *The Extraterritorial Application of the EU Charter of Fundamental Rights*, in The EU Charter of Fundamental Rights: a commentary, Hart, Oxford, 2014, pp. 1657-1683. As concerns State responsibility where the State exercises 'effective control' over a territory outside its national territory, see judgments of the ECtHR in *Loizidou v. Turkey*, no. 15318/89, and its strict interpretation arising from the judgment of the ECtHR in *Bankovic v. Belgium*, no. 52207/99. However, the issue of judicial protection has no direct effect on the question raised by the Court in the present case.

24 — Opinion 2/13, EU:C:2014:2454, paragraphs 252 and 253.

25 — See Hillion, C., *A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy*, in The European Court of Justice and External Relations Law, Oxford, 2014, pp. 47 to 73.

26 — That has given rise, first, to particularly extensive case-law of the European Union Courts (see judgments in *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518; *Council* v *Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776; *Bank Melli Iran* v *Council*, T-35/10 and T-7/11, EU:T:2013:397; and *Hassan* v *Council*, T-572/11, EU:T:2014:682) and, secondly, to some amendments to the rules of procedure of the General Court of the European Union (see the Draft Rules of Procedure of the General Court, accessible online at http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/doc-fr-0000.pdf).

27. Secondly, Article 40 TEU can be interpreted as explicitly conferring on the Court the task of ensuring the delimitation between, on the one hand, the CFSP and, on the other hand, the policies and procedures covered by the FEU Treaty, since it provides that the implementation of the CFSP must not affect the application of Articles 3 to 6 TFEU. The novelty of that provision with respect to the former Article 47 TEU (as it was worded prior to the Treaty of Lisbon) lies in the fact that the 'non-interference obligation' works both ways in so far as it is aimed both at 'protecting' European Union policies from any overlap with intergovernmental cooperation mechanisms, and at 'protecting' the CFSP from any similar effects brought about as a result of European Union policies. [27]

28. Thirdly, it is worth noting the importance of the constitutional principles to which the EU institutions must adhere when they act in the field of external action, observance of which must be monitored by the Court. [28] Together with the principle of sincere cooperation now laid down in Article 4(3) TEU, observance of those principles is required for the purpose of attaining European Union objectives, which comprise, inter alia, the CFSP. I would point out in that regard that, in accordance with Article 21(3) TEU, the European Union is to respect the principles which inspired its own creation (set out in paragraphs 1 and 2 of that article) in the development and implementation of its external action.

29. Finally, even before the entry into force of the Treaty of Lisbon, the Court had already addressed the issue of the delimitation of EU policies, in particular in the context of the discussion regarding 'dual-use' products [29] in *Werner*, where it pointed out that 'a measure ... whose effect is to prevent or restrict the export of certain products, cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign policy and security objectives'. [30] However, as concerns measures aiming to combat the proliferation of light weapons, the Court has pointed out that, in the light of Article 47 EU, the European Union could not have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community. [31]

30. Consequently, the Court remains the primary guardian as regards the delimitation of EU powers. It is in the light of those observations that it is necessary to examine whether the measures adopted by a European Union mission in the context of implementing the Union budget are within the jurisdiction of the Court.

V – **The budget of the European Union and its control in the context of external action**

A – *Brief outline of the status of Eulex Kosovo*

31. The Council conclusions cited above [32] rightly recall 'the importance of ensuring the greatest possible coherence between the Union's and Member States' actions to support partner countries and regional organisations … so that they can increasingly prevent or manage crises by themselves'.

27 — See Griller, S., *The Court of Justice and the Common Foreign and Security Policy*, in The Court of Justice and the construction of Europe — La Cour de justice et la construction de l'Europe, 2013, pp. 675 to 692.

28 — To that effect, see judgments in *Council* v *Hautala* (C-353/99 P, EU:C:2001:661, paragraphs 28 to 29), and in *Parliament* v *Council* (C-658/11, EU:C:2014:2025, paragraph 79).

29 — These are products that can be used for both civilian and military purposes.

30 — Judgment in *Werner* (C-70/94, EU:C:1995:328, paragraph 10). That interpretation led the legislature to replace the legal framework initially based on a CFSP joint action and a regulation adopted under the common commercial policy with a regulation based exclusively on commercial policy: see Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology (OJ 2000 L 159, p. 1).

31 — Judgment in *Commission* v *Council* (C-91/05, EU:C:2008:288, paragraph 77). In addition, for an analysis supporting *judicial restraint* in the context of the CFSP, see the Opinion of Advocate General Jacobs in *Commission* v *Greece* (C-120/94, EU:C:1995:109, paragraph 54).

32 — Council conclusions on the EU's comprehensive approach of 12 May 2014, paragraph 11.

32. As is apparent from Article 2 of Joint Action 2008/124, Eulex Kosovo assists Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability, ensuring that these institutions adhere to internationally recognised standards and European best practices.

33. Originating from United Nations Resolution 1244,[33] the Eulex Kosovo mission is the largest civilian mission ever launched under the ESDP. The mission consists mainly of judges, prosecutors, police officers and customs officials, and has 800 international and 800 local staff. The mission budget is EUR 90 million per year and the contributing states comprise most EU Member States as well as Canada, the Kingdom of Norway, the Swiss Confederation, the Republic of Turkey and the United States of America.[34]

34. The file shows that 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.[35] The legislature's intention for missions to be regarded as mere 'operations' actually followed from the provisions of Joint Action 2008/124.[36]

35. Nevertheless, it should be noted that the legislature has amended Joint Action 2008/124[37] several times, in particular, by means of Decision 2014/349 ('Joint Action 2008/124 as amended'). Under Article 15a of Joint Action 2008/124 as amended, Eulex Kosovo is to 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 that joint action. I note, moreover, contrary to what Eulex Kosovo stated at the hearing, that that amendment was not an isolated action concerning only Eulex Kosovo, but was also made in relation to the European Union CSDP mission in Niger.[38]

33 — On 10 June 1999, the United Nations Security Council adopted Resolution 1244, and within this framework, the United Nations Security Council: '[d]ecides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise' (paragraph 19), '[a]uthorises the Secretary-General, with the assistance of relevant international organisations, to establish an international civil presence in Kosovo' (paragraph 10).

34 — For more details, see http://eeas.europa.eu/csdp/missions-and-operations/eulex-kosovo/pdf/factsheet_eulex_kosovo_en.pdf.

35 — Eulex Kosovo is not, therefore, a mission established within the framework of the United Nations, contrary to what the Agent for Eulex Kosovo seemed to be claiming.

36 — See, in particular, Article 10(2) of Joint Action 2008/124. Furthermore, the Head of Mission of Eulex Kosovo entered into a contract with the Commission and thus was recruited not 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.

37 — Council Joint Action 2009/445/CFSP of 9 June 2009 (OJ 2009 L 148, p. 33); Council Decision 2010/322/CFSP of 8 June 2010 (OJ 2010 L 145, p.13); Council Decision 2010/619/CFSP of 15 October 2010 (OJ 2010 L 272, p. 19); Council Decision 2011/687/CFSP of 14 October 2011 (OJ 2011 L 270, p. 31); Council Decision 2011/752/CFSP of 24 November 2011 (OJ 2011 L 310, p. 10); Council Decision 2012/291/CFSP of 5 June 2012 (OJ 2012 L 146, p. 46); Council Decision 2013/241/CFSP of 27 May 2013 (OJ 2013 L 141, p. 47); Council Decision 2014/349/CFSP of 12 June 2014 (OJ 2014 L 174, p. 42); and Council Decision 2014/685/CFSP of 29 September 2014 (OJ 2014 L 284, p. 51).

38 — Council Decision 2014/482/CFSP of 22 July 2014 amending Decision 2012/392/CFSP on the European Union CSDP mission in Niger (EUCAP Sahel Niger) (OJ 2014 L 217, p. 31). The issue of the effects of amended Joint Action 2008/124 will be addressed in the final part of the present Opinion, see points 63 and 64.

B – *The budgetary rules applicable to the CFSP as a starting point for establishing the jurisdiction of the Court*

1. Funding from the budget of the European Union

36. I would like to point out that, when the Maastricht Treaty was signed, a distinction was made between administrative and operating expenditure incurred under the second pillar, administrative expenditure always being charged to the Community budget. That is the reason I maintain that, in reality, the issue of budget expenditure has never constituted, and still does not constitute, a matter falling within the CFSP. Even then it was envisaged that part of the financing for the CFSP should be subject to Community budgetary rules and to the system of supervision applicable to them.

37. However, it was laid down in the Maastricht Treaty that the Council has competence to charge operating expenditure either to the Member States or to the EU budget. The Treaty of Amsterdam assigns operating expenditure to the Community budget, but provides for two exceptions, first, for expenditure arising from military operations and, secondly, for that arising from defence operations, as well as providing for the Council, acting unanimously, to decide otherwise.

38. Under the Treaty of Lisbon, the existing specific arrangements were retained. In accordance with Article 41(1) TEU, administrative expenditure to which the implementation of the CFSP gives rise is to be charged to the EU budget,[39] whereas, under Article 41(2) TEU, operating expenditure is to be covered by the EU budget in accordance with the principle laid down in the Treaty of Amsterdam. Accordingly, depending on their nature, CSDP missions are to be funded by the Member States, in accordance with the gross national product (GNP) scale, if the operations to be funded are of a military nature, whereas civilian and administrative expenditure is to be borne by the European Union.[40] In accordance with the Interinstitutional Agreement of 2013,[41] the total amount of CFSP operating expenditure is to be entered entirely in one budget chapter, entitled CFSP.[42]

39 — The Treaty of Lisbon also introduced two other instruments to finance military operations, on the one hand, in respect of urgent measures and, on the other hand, in respect of a start-up fund to finance preparatory activities (see Article 41(3) TEU).

40 — Carpentier, M., *La coordination des dépenses étatiques par la Commission*, L'exemple de la PESC, Revue française de finances publiques, No 125, February 2014.

41 — Interinstitutional Agreement of 2 December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management (OJ 2013 C 373, p. 1).

42 — I note, incidentally, that where expenditure related to operations having military implications is not shown in the EU budget, that practice lacks transparency, particularly in light of the solidarity clause on matters of common defence set out in Article 222 TFEU and Article 42(7) TEU. In accordance with those articles, the European Union may use its military resources to provide aid and assistance to the United Nations (UN) and the North Atlantic Treaty Organization (NATO), without it being clear whether the related military expenditure is covered by the EU.

39. In the present case, under Article 16 of Joint Action 2008/124,[43] all of Eulex Kosovo's expenditure is to be managed in accordance with the Community rules and procedures applicable to the general budget of the European Union.[44]

40. In that regard, it is indisputable that, since the CFSP measures are covered by the budget lines of the European Union, the management and control of the budget fall within the competence of the EU institutions. In accordance with Article 310(1) TFEU, all items of revenue and expenditure of the European Union are to be shown in the budget. The European Union's annual budget is to be established by the European Parliament and the Council in accordance with Article 314 TFEU. Several parties are involved in the implementation of the budget to finance CFSP measures, including the Council, the Council's Working Party of CFSP Counsellors, the Parliament, the Commission and the Member States.

41. The factor forming the basis of the Court's jurisdiction is, therefore, the commitment of funds from the EU budget and the adoption of decisions whose purpose is to ensure that it is implemented in fulfilment of the functions carried out by entities established in accordance with acts falling within the CFSP. That is without prejudice to the provisions of the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, according to which the Court is not, in principle, to have jurisdiction with respect to the provisions relating to the CFSP or with respect to acts adopted on the basis of those provisions.[45]

42. The acts which involve expenditure from the EU budget referred to in Article 310(3) TFEU, and which relate to management matters concerning the functioning of the entities created within the framework of the CFSP, must be distinguished from acts adopted under Treaty provisions on the CFSP, such as Joint Action 2008/124, and acts adopted by bodies created under provisions which relate to the CFSP and apply to the CFSP.

43. For those reasons, I do not share the view of the Commission, which submits, principally, in its reply to the Court, that, in this case, the plea of illegality alleging infringement of public procurement rules raised before the European Union Courts is a 'legislative factor extraneous to the CFSP' which supports the conclusion that the exclusion of jurisdiction provided for in the first paragraph of Article 275 TFEU is not applicable, there being no need to determine whether or not the act at issue was, itself, adopted on the basis of a CFSP provision.

44. Moreover, the so-called 'centre of gravity' or 'political acts' theory as put forward by the Eulex Kosovo representative — which should lead either to the exclusion in principle of the Court's jurisdiction or to the attribution of that jurisdiction, coupled with an obligation not to exercise it — is not applicable in EU law. It is sufficient to point out that the review of the legality of acts of EU law

43 — Article 16 of the Joint Action is worded as follows:

'1. The financial reference amount intended to cover the expenditure related to a period of 16 months starting from the approval of the OPLAN shall be EUR 205 000 000 .
2. All expenditure shall be managed in accordance with the Community rules and procedures applicable to the general budget of the EU, with the exception that any pre-financing shall not remain the property of the Community.
3. Subject to the Commission's approval, the Head of Mission may conclude technical arrangements with EU Member States, participating third States and other international actors deployed in Kosovo regarding the provision of equipment, services and premises to EULEX KOSOVO. ...
4. The Head of Mission shall report fully to, and be supervised by, the Commission on the activities undertaken in the framework of his contract.
5. The financial arrangements shall respect the operational requirements of EULEX KOSOVO, including compatibility of equipment and interoperability of its teams, and shall take into consideration the deployment of staff in regional offices.

...'

44 — It should be noted that Joint Action 2008/124 has been amended several times in order to adjust and increase the financial reference amount for the Eulex Kosovo mission. See, to that effect, the amendments introduced by Joint Action 2009/445 and Decision 2010/322.

45 — For the conventional form of dispute concerning the choice of legal basis, see judgment in *Parliament* v *Council* (C-658/11, EU:C:2014:2025).

remains a fundamental and established value of the EU legal system. In that community based on the rule of law, neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them comply with the basic constitutional charter, the Treaty. Accordingly, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.[46] The 'right to challenge a measure before the courts is inherent in the rule of law', it is the 'corollary' to it, and both 'a victory over and an instrument' of it.[47]

45. Furthermore, in light of the case-law cited above, and in particular the judgment in *Werner* (C-112/91, EU:C:1993:27), where the EU budget is used to finance CFSP measures, it cannot be exempt from the budgetary rules applicable to the policies and procedures of EU law.

46. In order to delimit the jurisdiction of the Court, the applicable rules should nonetheless be analysed from the perspective of the implementation of the EU budget, in particular, in the field of calls for tender which may be organised in the context of external action.

2. The implementation of expenditure under the CFSP

47. From a historical perspective, it should be noted at the outset that the implementation of the EU budget in the field of external action has been subject to review, which revealed its shortcomings from the start. As early as 1996, the Court of Auditors identified insufficient monitoring and serious irregularities in the context of a procedure relating to the supply of logistic support services.[48] Subsequently, in Opinion No 1/97 on the CFSP, the Court of Auditors pointed out the Commission's lack of involvement in the determination of financial, legal and operational arrangements for the implementation of CFSP measures which have financial implications.[49] The recommendations made by the Court of Auditors in Special Report No 13/2001 included, in particular, the need to adopt clear arrangements with regard to the Commission's role in the implementation of the CFSP and to ensure that the financing of CFSP actions is managed in a transparent manner. In Special Report No 11/2014 on the establishment of the European External Action Service (EEAS),[50] the Court of Auditors made particular reference to a lack of integration of the EU special representatives in the EEAS.[51] Finally, I would observe that, in 2012, the Court of Auditors adopted a report specifically on the Eulex Kosovo mission.[52]

48. As regards particular budgetary rules, Article 317 TFEU provides that the Commission is to implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322 TFEU, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management. That provision constitutes the legal basis of the Financial Regulation, the purpose of which is to lay down the rules for the establishment and implementation of the general budget of the European Union. Therefore, it should be interpreted as being applicable both to budget management acts and budget implementation acts adopted by EU missions in relation to the European Union's external action.

46 — Judgment in *Les Verts* v *Parliament* (294/83, EU:C:1986:166, paragraph 23).

47 — Opinion of Advocate General Mengozzi in *Gestoras Pro Amnistía and Others* v *Council* (C-354/04 P, EU:C:2006:667).

48 — Special Report No 4/96 on the accounts of the European Electoral Unit set up by the Joint Common Foreign and Security Policy Action concerning the observation of the Palestinian elections, accompanied by the replies of the Commission (OJ 1997 C 57, p. 1, paragraph 32).

49 — Opinion No 1/97 has not been published and is set out in Annex 5b of Special Report No 13/2001 of the Court of Auditors on the management of the Common Foreign and Security Policy (CFSP), together with the Council's replies and the Commission's replies (see paragraph 10, footnote on page 2 of that report) (OJ 2001 C 338, p. 1).

50 — Special Report No 11/2014 available online at: http://www.eca.europa.eu/Lists/ECADocuments/SR14_11/SR14_11_EN.pdf

51 — Paragraph 35 et seq. of Special Report No 11/2014 of the Court of Auditors.

52 — Special Report No 18/2012 on European Union assistance to Kosovo related to the rule of law, available online at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cont/dv/eca_sr182012_/eca_sr182012_en.pdf

49. In the present case, when Elitaliana received the letter concerning the contested decision to take no further action dated 29 March 2012,[53] the Financial Regulation applicable to the facts of the case was that adopted in accordance with Article 279 EC (now Article 322 TFEU), namely Financial Regulation No 1605/2002 as amended, in particular, as concerns the EEAS, by Regulation (EU, Euratom) No 1081/2010 of the European Parliament and of the Council of 24 November 2010.[54] Article 4 of Financial Regulation No 1605/2002, which sets out the principles of unity and of budget accuracy, provides *that the revenue and expenditure of the Communities are to comprise inter alia expenditure in the area of the CFSP*. Accordingly, the Commission is to transmit to the budgetary authority, together with the draft budget, a document presenting, inter alia, all administrative and operational expenditure related to the external actions of the European Union, including CFSP tasks, and financed from the EU budget.[55]

50. Furthermore, Financial Regulation No 1605/2002 provides that the budget may be managed either directly by Commission departments or indirectly by delegation to bodies governed by Community law or by national public law.[56] Under Article 54 of that regulation, the Commission may, when implementing the budget by indirect centralised management or by decentralised management,[57] delegate budget implementation tasks to persons entrusted with the implementation of specific actions pursuant to Title V of the TEU concerning the CFSP and identified in the relevant basic act within the meaning of Article 49 of the regulation. Article 49 of Financial Regulation No 1605/2002 includes among the basic acts falling within the CFSP the adoption of joint actions within the meaning of Article 14 TEU.[58] It is common ground that Joint Action 2008/14 establishing Eulex Kosovo was adopted under Article 14 TEU.

51. Therefore, as concerns Eulex Kosovo, in accordance with Article 8(4) of Joint Action 2008/124, the Head of Mission is responsible for the implementation of Eulex Kosovo's budget and, for that purpose, must sign a contract with the Commission. Moreover, in accordance with Article 16 of Joint Action 2008/124 on financial arrangements, 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.

52. Furthermore, in June 2012, the Commission adopted the communication on the financial management of CSDP missions.[59] It requested that the Council endow the missions with legal personality to make them accountable to the Commission for the management of the funds placed at their disposal.[60] Although that document is classified, it seems that the amendments to the Joint Action, in particular the insertion of Article 15a of Joint Action 2008/124 as amended, fulfil that request.[61] Finally, the role played by the Commission's Service for Foreign Policy Instruments (FPI) in the management of the EU budget in the field in question is also noteworthy.[62]

53 — Before the entry into force of Financial Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), on 26 October 2012, applicable as of 1 January 2013.

54 — OJ 2010 L 311, p. 9.

55 — Article 33 of Financial Regulation No 1605/2002.

56 — See recital 16 in the preamble to Financial Regulation No 1605/2002.

57 — In accordance with Article 53a of Financial Regulation No 1605/2002.

58 — In the version following the Treaty of Nice.

59 — C(2012) 4052/F1 Communication from the Commission — Rules for the Financial Management of the CFSP Missions.

60 — See communication C(2012)4052/F1, cited above. That communication, which is not available to the public, is mentioned in Special Report No 18/2012 of the Court of Auditors, cited above.

61 — In addition, I note that Regulation No 966/2012 also takes into account the specific features of the CFSP.

62 — See FPI Annual Report, available in English at the following web address: http://ec.europa.eu/dgs/fpi/documents/fpi_activity_report_2012_en.pdf.

3. Review of public procurement in the context of external action

53. As is apparent from the order under appeal, in the context of the Eulex Kosovo mission, 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. As stated by the Commission, the act at issue consists, therefore, of a letter dated 29 March 2012 in which the Head of the Eulex Kosovo mission notified the appellant of its decision to award the public contract in question to the tenderer whose bid had been placed first, namely, the Irish undertaking Starlite, and, consequently, to reject the bid made by Elitaliana, whose bid had been placed second. [63]

54. Therefore, the service contract awarded gave rise to expenditure from the budget of the European Union. [64]

55. As the Commission has rightly pointed out, the contested decision constitutes an act implementing the EU budget, which cannot fall within the clause excluding the Court's jurisdiction provided for in the second subparagraph of Article 24(1) TEU and in the first paragraph of Article 275 TFEU, even though that decision was adopted by a body established under Title V TEU. Furthermore, the Commission submits that the Head of Mission of Eulex Kosovo has, in the present case, acted within the framework of the Commission's financial competences, and that his actions do not, therefore, come under the CFSP. That approach is in line not only with the aforementioned provisions of the Financial Regulation, both those which are applicable *ratione temporis* and those currently in force, but also with the powers conferred on the Commission by the Treaties (fourth sentence of Article 17(1) TEU), which are also referred to in Article 9(1) of Decision 2010/427. [65]

56. Given the nature of the act at issue, the relevant provisions are those set out in Title V of Financial Regulation No 1605/2002 on procurement. Articles 162 and 167 of that regulation confirm that the general provisions on procurement are applicable to external actions financed from the budget. [66] It is apparent that, for the sake of compliance with the principles of transparency and sound financial management, the bodies to which implementing tasks are delegated on behalf of the Commission should have, inter alia, transparent procurement procedures and effective internal controls. [67] Moreover, Financial Regulation No 1605/2002 dwells on the fact that contracts signed with natural persons must include the general procurement principles laid down in Title V of Part One and Title IV of Part Two of that regulation as regards external actions. [68]

63 — At the hearing, the Agent for Eulex Kosovo claimed, nevertheless, that the choice between Starlite and Elitaliana was a political one, which contradicts his written submissions.

64 — I note that the issue of the review of the legality of public contracts in the context of missions has already been raised before the General Court in case T-511/08 regarding the European Union Police Mission in Afghanistan (EUPOL Afghanistan), established pursuant to Council Joint Action 2007/369/CFSP of 30 May 2007 (OJ 2007 L 139, p. 33). The action was, however, removed from the register following its withdrawal (see Order of the President of the General Court in *Unity OSG FZE* v *Council and EUPOL Afghanistan*, T-511/08, EU:T:2010:138).

65 — Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (OJ 2010 L 201, p. 30).

66 — Furthermore, I note that the Practical Guide to contract procedures for EU external actions (PRAG 2014) relates to the contracting procedures applying to all EU external actions financed from the general budget of the European Union (the EU budget) and the 10th European Development Fund (EDF), http://ec.europa.eu/europeaid/prag/document.do?chapterId= 1.&id= 241. The contract notice at issue, published by Eulex Kosovo, makes reference to the version of that Guide which was in force at the time: see footnote 1 of the contract notice (Service Contract Notice, Helicopter support to EULEX Mission in Kosovo No 2, Pristina Kosovo), OJ/S S200 18/10/2011 No 324817-2011-EN (from the file before the General Court in the case which gave rise to the order under appeal).

67 — Recital 18 in the preamble to Financial Regulation No 1605/2002.

68 — Recital 45 in the preamble to Financial Regulation No 1605/2002.

57. In terms of the method of management, Article 166(1)(b) of Financial Regulation No 1605/2002 provides that the actions carried out within the framework of the CFSP are to give rise to a contract or grant agreement between the Commission and the natural or legal persons responsible for carrying out the actions in question. Financial Regulation No 1605/2002 also defines, in Article 167, the concept of 'contracting authorities' as including 'a national or international public-sector body or *natural or legal persons who are beneficiaries of a grant for the implementation of an external action*'.

58. In the present case, it is apparent from the contract notice that the contract relates to 'helicopter emergency medical services' and 'air ambulance services'. It seems to me that the services sought were therefore, at least primarily, of a civilian nature. Furthermore, the contract notice appointed the Head of Mission as 'contracting authority', with the result that he is covered by the above-mentioned provisions of Articles 166 and 167 of Financial Regulation No 1605/2002. [69]

59. In that regard, I would observe that Article 16 of Joint Action 2008/124, with the exception of paragraph 3 thereof, contains nothing of relevance for the purpose of determining whether the European Union Courts have jurisdiction. That jurisdiction follows from all the provisions relating to the implementation of the EU budget which show that final responsibility rests with the Commission.

60. While the jurisdiction of the General Court and of the Court of Justice in disputes concerning public contracts awarded in the context of the external action of the European Union is thus established, the fact remains that the award of such contracts could nonetheless fall outside the jurisdiction of the European Union Courts if those contracts relate to military actions. As already mentioned, in the light of Article 41 TEU, operations having military or defence implications are to be charged to the budget of the Member States, unless the Council decides otherwise. However, as concerns public contracts of a civilian nature, the Court's jurisdiction is indisputable. [70]

61. Finally, as regards the participation of third countries in the financing of civilian operations, it suffices to refer to the judgment of the General Court in *Nexans France* v *Entreprise commune Fusion for Energy*, [71] according to which, where funds are committed from the budget of third countries, this does not preclude the application of the rules of EU law or the exercise of jurisdiction by the European Union Courts. Moreover, Financial Regulation No 1605/2002 provides that it is possible to obtain funding from external actors, such as third countries, while remaining within the scope of the rules on EU budget implementation. [72]

VI – **Additional observations**

62. In addition, I would like to comment briefly on the appeal which gave rise to the present case.

69 — In any event, even if that was not the case, the Court has already ruled that a functional interpretation must be considered in the case of a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration, see *Beentjes* (31/87, EU:C:1988:422, paragraph 11).

70 — See also, as regards national public contracts in the field of defence and, in particular, material acquired by a contracting authority which is intended for specifically military purposes, but which may also be used for largely similar civilian applications, judgment in *Insinööritoimisto InsTiimi* (C-615/10, EU:C:2012:324).

71 — T-415/10, EU:T:2013:141.

72 — See Articles 162 to 165 of Financial Regulation No 1605/2002.

63. First, as concerns the consequences that Joint Action 2008/124, as amended, has in terms of the review of the order under appeal, it is established that that action confirms in Article 15a that Eulex Kosovo is to have the capacity to be a party to legal proceedings and provides in Article 16 that Eulex Kosovo is to be responsible for any claims and obligations arising from the implementation of its mandate starting from 15 June 2014.[73] Accordingly, as the law now stands, the legal remedies making a review of legality before the General Court possible are clearly established, subject to compliance with the conditions laid down in Article 263 TFEU.

64. Nevertheless, the case now under appeal remains anchored *ratione temporis* in a different legal context, which leads me to confirm my view, first, that the General Court was right not to recognise Eulex Kosovo's legal capacity to be a defendant, so that the action brought by Elitaliana had to be held to be inadmissible and, secondly, that the appeal must be dismissed in its entirety.

65. Joint Action 2008/124 as amended cannot have any effect on the legality of the order under appeal. Moreover, as concerns the exchange of arguments at the hearing on the subject of the order in which the grounds of inadmissibility were examined both by the General Court and the Court of Justice, I am of the opinion that there is no legal basis in EU law for regarding the reasoning of the General Court to be vitiated by an error of law in that it began its analysis by examining a ground of inadmissibility *ratione personae*. On the contrary, I consider that the order of examination chosen by the General Court is fully justified in the light of the principle of procedural economy.[74]

66. In any event, the European Union Courts will in the future be unable to avoid addressing the issue of the inadequacy of the protection of individuals' rights in the context of external action. Therefore, the discussion as to the status of the missions and of their staff, inasmuch as they have privileges and immunities, must go hand in hand with establishing legal remedies, accessible to individuals, against acts adopted by missions which have an impact on the rights and obligations of those individuals.

VII – **Conclusion**

67. In the light of the foregoing considerations, I propose that the Court declare as follows:

In the light of Article 41(1) and (2) TEU, the Courts of the European Union have jurisdiction to rule on the legality of an act implementing the European Union budget which has been adopted by an entity constituted under an act falling within Title V of the EU Treaty, which governs the European Union's external action and the Common Foreign and Security Policy.

73 — In that connection, Eulex Kosovo raised the question, in its observations, as to the retrospective application of Article 15a of Joint Action 2008/124 as amended. In the light of Article 2 of Decision 2014/349, I consider Article 15a to be applicable as of the date of its entry into force, namely, 12 June 2014.

74 — I observe, in that regard, that, contrary to my recommendations in my Opinion in *Switzerland* v *Commission* (C-547/10 P, EU:C:2012:565) and to the Opinion of Advocate General Ruiz-Jarabo Colomer in *Council* v *Boehringer* (C-23/00 P, EU:C:2001:511), the Court of Justice accepted the General Court's practice of refraining from assessing the admissibility of an action which it intended to dismiss on the merits. A maiore ad minus, as regards the order of examination of the grounds of inadmissibility, the Court of Justice cannot condemn the choice made by the General Court.