The CFSP derogation before the Court – ongoing developments

Op-Ed

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As noted in an earlier piece on EU Law Live, staff cases are often overlooked, but may at times have important ramifications for other areas of EU law. *SatCen v KF* and SC v Eulex Kosovo which were ruled on last week, on appeal from the General Court, by separate Chambers of the Court of Justice, are such cases and fit in the line of CFSP staff cases that touch on three broader issues:

- The procedural question of the relationship between the annulment procedure (Article 263 TFEU) and the arbitration clause (Article 272 TFEU)
- The question pertaining to the EU Courts’ jurisdiction in CFSP matters (see generally on this, Chapter V of Graham Butler’s ‘Constitutional Law of the EU’s CFSP’).
- The possibility to exclude the EU Court’s jurisdiction by granting jurisdiction on an internal review body.

While the Court of Justice had the opportunity to clarify these issues in depth, it really only seized the opportunity to do so in *SatCen v KF*. In *SC v Eulex Kosovo*, on the other hand, it set aside the order of the General Court without providing much further guidance.

Factual and procedural background of the cases

In *SatCen v KF*, KF was a member of the contract staff of SatCen (an EU agency established under the CFSP). KF had been dismissed but had successfully challenged the decision before the General Court that had accepted jurisdiction on foot of Article 19(1) TEU and Article 47 of the Charter. SatCen then appealed before the Court of Justice.

In *SC v Eulex Kosovo*, SC was a member of the contract staff of the civilian CSDP mission ‘Eulex Kosovo’. Her contract was not renewed. Since it contained an Article 272 TFEU arbitration clause, SC launched proceedings before the General Court. However, the General Court ruled the dispute was not contractual in nature, and dismissed the case. SC then appealed before the Court of Justice.

Reliance on Article 272 TFEU to confer jurisdiction on the Court

To recall, Article 272 TFEU provides that the Court of Justice of the European Union (CJEU)

'shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union'. It is normally not used for staff cases however, as they fall under Article 270 TFEU. Yet, given the pluralisation of the EU executive, the number of employed persons at EU level that do not *a priori* come under the general regulations is increasing. Agencies established on a CFSP legal basis have their own separate Staff Regulations which grant (for example, the European Defence Agency) or do not grant (for example, SatCen) jurisdiction to the CJEU. For CSDP missions, like Eulex Kosovo, there are no Staff Regulations, and employment rules are dealt with on an ad hoc basis. Originally, the employment contracts concluded by these missions granted jurisdiction to Belgian courts in case of disputes, but around 2014, a practice was consolidated for many CSDP missions whereby an Article 272 TFEU arbitration clause was inserted into these contracts.

When is a dispute contractual in nature?

The issue of the contractual nature of the dispute played a role in both *SatCen v KF* and *SC v Eulex Kosovo* but in the latter case the Court of Justice did not provide any further clarification.

While Article 272 TFEU was not at issue as such in *SatCen v KF*, the scope of Article 272 TFEU could still have been further clarified given that Advocate General (AG) Bobek had insisted in his Opinion that the dispute was not contractual. The AG's view is that the employment contract between KF and SatCen did not reflect the free will of both parties, as SatCen was restricted in what it could do pursuant to the Council's Decisions (point 99). In contrast, the Court of Justice found the dispute to be contractual in nature. But given that Article 270 TFEU on the general Staff Regulations was not applicable, and the SatCen's own Staff Regulations did not confer jurisdiction on either the EU Courts or national courts, SatCen's decisions would be exempt from any judicial review. As this would be unacceptable in a Union based on the rule of law, the Court of Justice affirmed the jurisdiction of the EU Courts (paragraphs 76-85).

Turning to *SC v Eulex Kosovo*, was the General Court right to hold that the dispute was not contractual in nature given that *administrative* decisions partially governed the dispute? AG Tanchev thought not since SC's contract contained a reference to those administrative decisions, thereby making them part of the applicable law. The Court of Justice itself did not take a clear position on this, but merely remarked that the General Court incompletely described the legal framework (paragraphs 36-42). Unfortunately, the Court of Justice did not really clarify what the General Court is now to look for to determine the nature of the dispute.

Last week's judgments therefore did not fully clarify this issue. While the Court of Justice in *SatCen v KF* clearly did not follow AG Bobek in his assertion that the dispute was not contractual, the AG's suggestion was still interesting, and seemed to clash with that of AG Tanchev in *SC v Eulex Kosovo*. While AG Bobek relied on the existence of administrative documents limiting SatCen's margin of manoeuvre (paragraph 99) to reject the contractual nature of the dispute, AG Tanchev relied on the cross-reference to such administrative documents in the contract to argue that the dispute remained contractual. When the General Court examines *SC v Eulex Kosovo* again, it may thus find that the dispute is contractual in

nature, allowing it to accept jurisdiction pursuant to the Article 272 TFEU clause in the employment contract.

'Remedying' the lacuna resulting from the CFSP derogation through Article 272 TFEU

In *SC v Eulex Kosovo*, unlike in *SatCen v KF*, Article 272 TFEU was at issue. Reliance on Article 272 TFEU in a CFSP context raises rather intricate questions of interpretation. As is well known, the exception to the CJEU's mandatory and exclusive jurisdiction for CFSP (the CFSP derogation) is to be interpreted restrictively (see *Rosneft*, paragraph 74). However, Article 272 TFEU also provides for an exception to the rule that contractual disputes come under the national courts' jurisdiction and should thus be interpreted restrictively (see *Commission v Systran SA*, paragraph 58). Under established case law, it therefore only applies (i) when an arbitration clause in a contract explicitly confers jurisdiction on the CJEU; (ii) when the dispute falls within the contractual relationship and (iii) when the EU institution, body, office or agency is not exercising its prerogatives as a public authority (*Lito Maieftiko*, paragraphs 19-20). When the latter case law is applied in a CFSP context, the conundrum to be solved is glaring: the two exceptions that need to be interpreted restrictively pull in opposing directions. It may be expected that in a CFSP context, the Court of Justice will interpret Article 272 TFEU more generously in order to be able to accept jurisdiction. Yet again, given the Court of Justice's minimalist ruling in *SC v Eulex Kosovo*, further guidance on this remains necessary.

Failed attempts at keeping the Court out of the CFSP

A first way to keep the Court as far away as possible from anything CFSP-related is to advance a broad interpretation of the CFSP derogation. A second way is to draft CFSP acts in such a way that the hidden horizontal pillar under the Treaty of Lisbon remains detached from the supranational EU legal order. In *SatCen v KF*, the Council walked both paths to no avail.

Generalising H v Council

SatCen v KF concerned a contract agent employed by an EU agency established under the CFSP. The parties disagreed on the relevance of applying *H v Council* to some length, with SatCen arguing against that ruling's relevance (paragraph 114). However as AG Bobek argued, if the CJEU has jurisdiction over seconded national staff, it *a fortiori* should have jurisdiction over contract staff. AG Bobek further presented the bold claim that the test to be met for a measure to 'benefit' from the CFSP derogation is that it must be a CFSP act in both a formal (legal basis) and substantive (content) sense (paragraph 61). The Court of Justice in its ruling in *SatCen v KF*, naturally, did not confirm AG Bobek's general test, but still generalised its finding in *H v Council* to all staff cases, since the CFSP derogation 'cannot be considered so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management' (paragraph 66).

Whether Article 263(5) TFEU allows the Council to remove disputes from the EU Courts' jurisdiction

A final interesting question in *SatCen v KF* was whether the Council, by adopting SatCen's own

Staff Regulations, could prescribe the mandatory and exclusive jurisdiction of an internal Appeals Board, precluding parties from commencing an action before the General Court. This is, of course, a question that is relevant to all EU agencies, notably agencies not established on a CFSP-legal basis, that have internal administrative review bodies and which are the subject of increasing attention (see for example Maastricht University's upcoming workshop on Boards of Appeal). Unlike the General Court, the AG was adamant on applying constitutional avoidance and interpreted Article 28(6) of the SatCen Staff Regulations as only applying to administrative (but not judicial) remedies, without precluding recourse to the EU Courts. In contrast, the Court of Justice referred to its established case law in relation to the EU's 'complete system of legal remedies and procedures designed to ensure judicial review' to find that, despite the Council's obvious intention when drafting those staff regulations, Article 28(6) did not bar access to the EU Courts.

Take home message

Although the rulings in question were decided by chambers of five and three judges respectively, they contain interesting takeaways. *SatCen v KF* in particular confirms a general approach of the Court of Justice to assert jurisdiction in CFSP cases. The general picture that seems to emerge from both cases is that the Court would prefer to accept jurisdiction through a broad interpretation of what constitutes a contractual dispute, thereby opting for a broad scope of Article 272 TFEU. After all, in cases involving an Article 272 TFEU clause (such as *SC v Eulex Kosovo*), its jurisdiction depends on the will of the parties to the contract and there is no question of circumventing the CFSP derogation. Alternatively, if the Court cannot *accept* jurisdiction pursuant to a generously interpreted arbitration clause, it will step in and *assert* jurisdiction if there would otherwise be a lacuna in the EU's system of legal protection. The result is that, unless the pre-2014 practice of conferring jurisdiction on Belgian courts is returned to, the CJEU from now on can enjoy full jurisdiction in CFSP staff cases.

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