Brexit, CSDP and the Arbitration Clause

Analysis

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Suggested citation: Merijn Chamon, “Brexit, CSDP and the Arbitration Clause”, EU Law Live, 18 June 2020

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Sometimes cases come along in which several unusual suspects come together. *JF v EUCAP Somalia* (T-194/20), for which notification was published last Monday in the Official Journal, is one of them. In this case, a British national’s contract with the Common Security and Defence Policy (CSDP) mission, EUCAP Somalia, was terminated in January 2020 by the Head of Mission citing the UK’s imminent withdrawal from the EU. JF, the British national, challenges that decision arguing that, at least during the transition period, he should be treated like all other nationals of EU Member States. In contrast, CSDP missions other than EUCAP Somalia seem to have retained their contract staff of British nationality during the transition period.

This case will allow the General Court to address three questions:

- The jurisdictional question pertaining to the EU Courts’ jurisdiction in CFSP matters.
- The procedural question of the relationship between the annulment procedure (Article 263 TFEU) and the arbitration clause (Article 272 TFEU).
- The substantive question of the rights enjoyed by British nationals during the transition period under the Withdrawal Agreement.

As a rule, the CJEU does not have jurisdiction over CFSP matters (the CFSP derogation). This is foreseen in Article 24(1) TEU which also provides for the only two exceptions to the rule (see also Chapter V of Graham Butler’s ‘Constitutional Law of the EU’s CFSP’). Since Opinion 2/13 (paragraphs 249-252) the Court’s own discontent with the incomplete nature of its jurisdiction has been plain to see. The Court therefore has sought to chip away at the rule and to broaden the exceptions. *Mauritius*, *Tanzania*, *Elitaliana*, *Rosneft*, and *H v Council* are just the first of these cases, as more are pending. For instance, last week Advocate General (AG) Hogan proposed that the Court accept jurisdiction in a case regarding the award of compensation for restrictive measures adopted pursuant to a CFSP legal basis. Next week, in two unconnected cases, but apparently represented by the same legal team, the Court will rule on cases against Eulex Kosovo (a CSDP mission established on a CFSP legal basis) and the EU SatCen (an agency established on a CFSP legal basis, inherited from the Western European Union). In the second of these cases, AG Bobek gave a useful overview of how the Court’s jurisprudence has developed in this field (paragraphs 52-63). In his Opinion, he also synthesised the jurisprudence, finding that in order to ‘benefit’ from the CFSP derogation (excluding

CJEU jurisdiction), an act must be a CFSP act in both a formal (legal basis) and substantive (content) sense (paragraph 61). If this is indeed the threshold, the General Court in *JF v EUCAP Somalia* will have to accept jurisdiction since the contested decision is an administrative decision that does not deal with foreign policy questions.

However, even if the Court would not confirm the view of AG Bobek and the General Court could not accept jurisdiction to hear the case under Article 263 TFEU, that would not mean that it lacks jurisdiction altogether. This brings us to the second issue: the use of the arbitration clause in Article 272 TFEU to confer jurisdiction on the CJEU in the framework of a contract. One of its uses has been to give the CJEU jurisdiction in employment disputes which do not come under the General EU Staff Regulations. 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 indeed increasing. The establishing acts of regular decentralised agencies contain an explicit provision making the General EU Staff Regulations applicable also to the EU agency in question. The agencies established on a CFSP legal basis, on the other hand, have their own separate Staff Regulations which grant or do not grant jurisdiction to the CJEU, although it may be doubted whether the Council (when adopting those Staff Regulations) could actually exclude CJEU jurisdiction. For CSDP missions, there are no Staff Regulations and employment regulations 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 whereby an Article 272 TFEU arbitration clause was inserted into these contracts. The question remains however (assuming the view of AG Bobek is not followed) in how far the CFSP derogation can be circumvented by granting jurisdiction to the CJEU through Article 272 TFEU. Alternatively, and as suggested by AG Tanchev in *SC v Eulex Kosovo* (paras 56-57), circumvention might not be at issue as an arbitration clause is only included following the voluntary and express intention to this end by both parties to the agreement (one of which (is acting on behalf of) the EU).

In *JF v EUCAP Somalia*, the applicant asks the General Court to hear the case pursuant to Article 263 TFEU or, alternatively, pursuant to Article 272 TFEU (if the Court finds that it lacks jurisdiction pursuant to Article 263 TFEU). At least in theory however, these are not two different paths to the same outcome. Under Article 263 TFEU the Court is asked to apply EU law in order to find an illegality; whereas under Article 272 TFEU, the Court is asked to apply the terms of the contract and (depending on the applicable law as defined in the contract) any relevant (national) law in order to find a violation of the contract's terms. As *PY v EUCAP Sahel Niger* illustrates, that may be more problematic for the Court (paragraphs 61-67) and it seems natural that the judges are more comfortable ruling on actions for annulment under Article 263 TFEU.

Finally, the substantive issue offers the EU Courts the first opportunity to apply the Withdrawal Agreement in a direct action. Does the Withdrawal Agreement preclude differential treatment of a British national during the transition period? The Withdrawal Agreement is not explicit on this question but inter alia provides in its Article 129(7) that during the transition period, CFSP missions and operations cannot be headed by

British nationals. *A contrario*, this latter provision might imply that British nationals can still be employed in those missions and operations (although not in a leading capacity). On the other hand, Article 127(7)(c) of the Withdrawal Agreement foresees an exception to the rule, laid down in Article 127(6), that during the transition period, references in EU law shall be understood as including the UK. Article 127(7)(c) prescribes that references to 'Member States' in the provisions on recruitment of personnel (such as Article 12 of the general 'Conditions of Employment of Other Servants of the European Union') shall not include the UK. One could again argue that this only applies to recruitment and not to continued employment. However, under the general Conditions of Employment, 'the employment of temporary staff shall cease …. where the servant no longer satisfies the conditions laid down in point (a) of Article 12(2)'. Since that Article 12(2)(a) cannot be read, according to the Withdrawal Agreement, in a way that allows the UK to be regarded as a Member State, the contract agent could be said to 'no longer satisfy the nationality condition' and hence could indeed be dismissed.

By the time the hearings take place in *JF v EUCAP Somalia*, the Court of Justice will have ruled in the cases concerning *Eulex Kosovo* and *EU SatCen*. Since these last two cases were assigned to two different chambers, it is not guaranteed that the implications of the Grand Chamber's ruling in *H v Council* will be sufficiently coherently developed. For that, a follow up Grand Chamber ruling might be needed.

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