



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

5 July 2018 *

(Appeal — Arbitration clause — Staff of international missions of the European Union — Jurisdiction to rule on disputes concerning employment contracts — Consecutive fixed-term contracts — Arbitration clauses conferring jurisdiction, in the final contract, on the Courts of the European Union, and, in the previous contracts, on the Brussels (Belgium) courts — Decision not to renew the final contract — Claim that all the contractual relationships should be recategorised as a ‘contract of indefinite duration’ — Claims for compensation for unfair dismissal — Contractual relationships prior to the final contract to be taken into account — Jurisdiction of the General Court of the European Union)

In Case C-43/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 January 2017,

Liam Jenkinson, residing in Killarney (Ireland), represented by N. de Montigny and J.-N. Louis, avocats,

appellant,

the other parties to the proceedings being:

Council of the European Union, represented by A. Vitro and M. Bishop, acting as Agents,

European Commission, represented initially by G. Gattinara, L. Radu Bouyon and S. Bartelt, acting as Agents, and subsequently by G. Gattinara, A. Aresu and L. Radu Bouyon, acting as Agents,

European External Action Service (EEAS), represented by S. Marquardt, R. Spac and E. Orgován, acting as Agents,

Eulex Kosovo, established in Pristina (Kosovo), represented by M. Vicente Hernandez, avocate, and subsequently by E. Raoult, avocate,

defendants at first instance,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and E. Regan, Judges,

Advocate General: M. Szpunar,

* Language of the case: French.

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 17 January 2018,

after hearing the Opinion of the Advocate General at the sitting on 11 April 2018,

gives the following

Judgment

- 1 By his appeal, Mr Liam Jenkinson seeks to have set aside the order of the General Court of the European Union of 9 November 2016, *Jenkinson v Council and Others* (T-602/15, ‘the order under appeal’, EU:T:2016:660), by which that court rejected his action, involving, as its principal claim, an application based on Article 272 TFEU seeking (i) recategorisation of all Mr Jenkinson’s contractual relationships as an ‘employment contract of an indefinite duration’ and compensation for the loss allegedly suffered by him as a result of the abusive use of consecutive fixed-term contracts and unfair dismissal, and (ii) a declaration that the Council of the European Union, the European Commission and the European External Action Service (EEAS) discriminated against him and, as a consequence, an order that they pay him compensation, and, in the alternative, a claim based on the non-contractual liability of the European institutions.

Background to the dispute

- 2 The background to the dispute is set out as follows in paragraphs 1 to 6 of the order under appeal:
 - ‘1 The applicant, Mr Liam Jenkinson, an Irish national, was first employed from 20 August 1994 to 5 June 2002, under a series of fixed-term contracts (FTCs), by the European Union Monitoring Mission, which was created by Council Joint Action 2000/811/CFSP of 22 December 2000 on the European Union Monitoring Mission (OJ 2000 L 328, p. 53).
 - 2 He was then employed from 17 June 2002 to 31 December 2009, under a series of FTCs, by the European Union Police Mission, which was created by Council Joint Action 2002/210/CFSP of 11 March 2002 on the European Union Police Mission (OJ 2002 L 70, p. 1).
 - 3 Finally, the applicant was employed by the Eulex Kosovo Mission, from 5 April 2010 to 14 November 2014, by way of 11 consecutive FTCs. The Eulex Kosovo Mission was created by Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, Eulex Kosovo (OJ 2008 L 42, p. 92). The Joint Action has been extended several times. It was extended until 14 June 2016 by Council Decision 2014/349/CFSP of 12 June 2014 amending Joint Action 2008/124 (OJ 2014 L 174, p. 42), applicable to the facts of the present case.
 - 4 Most recently, the Joint Action was extended until 14 June 2018 by Council Decision (CFSP) 2016/947 of 14 June 2016, amending Joint Action 2008/124 (OJ 2016 L 157, p. 26).
 - 5 During the course of his employment contract covering the period 15 June to 14 October 2014, the applicant was informed by letter of 26 June 2014 from the Head of the Eulex Kosovo Mission that his assignment would end and his contract not be renewed after 14 November 2014.
 - 6 A final FTC was entered into between [the] Eulex Kosovo [Mission] and the applicant for the period from 15 October to 14 November 2014 (‘the final FTC’) and was not renewed. Article 21 of the final FTC provides for the Court of Justice of the European Union to have jurisdiction over any dispute relating to the contract, on the basis of Article 272 TFEU.’

The procedure before the General Court and the order under appeal

- 3 By application lodged at the Registry of the General Court on 23 October 2015, the appellant brought an action against the Council, the Commission, the EEAS and the Eulex Kosovo Mission, by which he claimed that that court should:
- as a principal claim, recategorise his contractual relationship as an ‘employment contract of an indefinite duration’, find that the defendants had infringed their contractual obligations, in particular, the obligation to give prior notice of termination of a contract of indefinite duration, find that his dismissal was unfair, and, in consequence, order the defendants to pay compensation for the loss suffered as a result of the abusive use of consecutive FTCs, the infringement of the obligation to give prior notice, and unfair dismissal;
 - as a principal claim, declare that the Council, the Commission and the EEAS discriminated against him during the period when he was engaged to work for the international missions of the European Union (‘the Missions’), in so far as concerns his remuneration, his pension rights and other benefits, declare that he should have been recruited as a member of the temporary staff of one of the institutions and, in consequence, order them to pay compensation, and
 - in the alternative, order the defendants, on the basis of non-contractual liability, to compensate the appellant for the harm resulting from their failure to comply with their obligations.
- 4 By the order under appeal, the General Court found that it manifestly lacked jurisdiction to rule on the two principal heads of claim and rejected the head of claim put forward in the alternative as manifestly inadmissible. It therefore dismissed the action in its entirety and ordered Mr Jenkinson to pay the costs.

Forms of order sought by the parties

- 5 Mr Jenkinson claims that the Court should:
- set aside the order under appeal;
 - uphold the application, and
 - order the defendants to pay the costs of the proceedings at first instance and on appeal.
- 6 The Council and Commission contend that the appeal should be dismissed and Mr Jenkins ordered to pay the costs.
- 7 The EEAS and the Eulex Kosovo Mission contend that the Court should:
- declare that it does not have jurisdiction to rule on the appeal;
 - in the alternative, dismiss the appeal, and
 - order Mr Jenkinson to pay the costs.
- 8 Moreover, the Council and the EEAS contend that, in the event that the appeal is considered well founded, the Court should dismiss the appeal and the main action as inadmissible, in so far as they are concerned.

The appeal

- 9 By his appeal, Mr Jenkinson requests the Court, in his first head of claim, to set aside the order under appeal and, in his second head of claim, to uphold his application.
- 10 The EEAS and the Eulex Kosovo Mission contend that the Court does not have jurisdiction to examine the appeal. Furthermore, the Eulex Kosovo Mission submits that the appeal is inadmissible in its entirety, whereas the Commission claims that only the second head of claim in the appeal is inadmissible.

The jurisdiction of the Court

- 11 The EEAS and the Eulex Kosovo Mission submit, in essence, that the Court does not have jurisdiction to examine the appeal, as Mr Jenkinson bases his arguments on employment contracts prior to the final FTC and, under the arbitration clauses in those contracts, only the Brussels courts have jurisdiction to adjudicate on such a dispute. Moreover, it is claimed, Mr Jenkinson has, in the meantime, brought an action that is essentially the same before the tribunal du travail francophone de Bruxelles (Labour Court (French-speaking), Brussels) (Belgium).
- 12 It should be noted in that regard that the second subparagraph of Article 256(1) TFEU and Article 56 of the Statute of the Court of Justice of the European Union provide that the latter has jurisdiction to hear appeals against the decisions given by the General Court referred to in the first subparagraph of that Article 256(1) TFEU. It is common ground that the order under appeal is one of the decisions referred to in the latter provision.
- 13 Furthermore, it is clear that the question as to whether the Courts of the European Union have jurisdiction to determine whether the claims put forward by Mr Jenkinson at first instance are well founded is, in the light of the content of the order under appeal and the claims made by Mr Jenkinson before the Court of Justice, one of the substantive issues arising in the present appeal.
- 14 In those circumstances, the Court has jurisdiction to hear and determine the present appeal.

The first head of claim in the appeal

- 15 In support of his first head of claim, which seeks to have the order under appeal set aside, Mr Jenkinson puts forward, in essence, four pleas, the first of which concerns the General Court's assessment of the extent of the jurisdiction enjoyed by the European Courts to adjudicate on the contractual aspect of the case. By his second plea, Mr Jenkinson contends that there are contractual links between himself, on the one hand, and the Council, the Commission and the EEAS on the other. The third and fourth pleas allege that the General Court erred in law in its assessment of the claims relating, respectively, to the non-contractual liability of the institutions and the apportionment of costs.
- 16 The Council, the EEAS and the Eulex Kosovo Mission claim, inter alia, that the arguments put forward in support of the first head of claim are inadmissible.

Admissibility of the first head of claim

- 17 The EEAS and the Council are of the view that the appeal is inadmissible in so far as it concerns them. First, they were not parties to the final FTC and cannot otherwise be classified as ‘employers’ of Mr Jenkinson, as the General Court found in paragraph 40 of the order under appeal and is not disputed in the present appeal proceedings. Second, Mr Jenkinson has failed to identify any act which would have caused them to incur non-contractual liability.
- 18 Furthermore, the Eulex Kosovo Mission submits that the appeal is not sufficiently clear or precise to enable it to prepare its defence or the Court to rule on the appeal.
- 19 As regards the objections raised by the Council and the EEAS, it should be noted that, under Article 171 of the Court’s Rules of Procedure, the appeal is to be served on the other parties to the relevant case before the General Court. It is common ground that the Council and the EEAS were parties to the proceedings before the General Court.
- 20 Moreover, it is clear that the submissions made by the Council and the EEAS to demonstrate that the appeal is inadmissible in so far as they are concerned are based on arguments which go to the substance of the case, namely whether the General Court has jurisdiction to adjudicate on the claims made by Mr Jenkinson in their regard, not the admissibility of the present appeal.
- 21 With regard to the Eulex Kosovo Mission’s argument based on the objection of *obscuri libelli*, it should be noted that, while that Mission provides a specific set of arguments in that regard in response to Mr Jenkinson’s arguments relating to the second head of claim in the appeal, the same does not apply as regards the arguments put forward in support of the first head of claim in the appeal.
- 22 Furthermore, it is clear that, in the four pleas put forward in support of the first head of claim in the appeal, Mr Jenkinson identifies precisely the paragraphs and grounds of the order under appeal which he disputes, so that the arguments he puts forward in that connection are sufficiently clear and precise to enable the defendants to prepare their defence, as is apparent from their responses. As a consequence, the Court is in a position to rule on the four pleas put forward in support of the first head of claim.
- 23 It follows that the objections made by the Council, the EEAS and the Eulex Kosovo Mission that the first head of claim is inadmissible must be rejected as unfounded.

The first and second pleas

- 24 The first plea is divided into four parts, and it will be appropriate to examine the third part together with the second plea.

– Arguments of the parties

- 25 In the third part of the first plea in the appeal, Mr Jenkinson notes that, in paragraph 39 of the order under appeal, the General Court considered that, as it had jurisdiction only in respect of the final FTC, it could not rule on the effects of the employment contracts concluded prior to that. However, he argues that the recategorisation of all his contractual relationships with the defendants as a contract of indefinite duration cannot, in any event, be considered in isolation from the existence of the final FTC and the termination of that contract. Indeed, it would not be possible for Mr Jenkinson to obtain the recategorisation of his contractual relationships partly before the Brussels courts and partly before the Courts of the European Union. The General Court thus, *inter alia*, vitiated the order under appeal with an error of law.

- 26 By his second plea, Mr Jenkinson submits, *inter alia*, that the General Court erred in law by declining, in paragraph 40 of the order under appeal, jurisdiction to rule on his claim that it should find that the Council, the Commission and the EEAS were responsible for the discrimination he suffered in terms of remuneration, pension rights and other benefits. In that regard, Mr Jenkinson states that his contractual relationships with Missions other than the Eulex Kosovo Mission were terminated by decisions of the institutions in question — at the very least the Council — and infers from this that those institutions therefore succeeded to the rights and obligations of those Missions. They are, as a result, accountable for the consequences of the contractual agreements which the Missions have entered into with their staff.
- 27 The Commission maintains, in connection with the arguments put forward, *inter alia*, in the third part of the first plea, that a court that does not have jurisdiction cannot examine the subject matter of the dispute, as the issue of jurisdiction must be settled before the substance of the case can be considered.
- 28 As regards the second plea, the Commission maintains that Mr Jenkinson's arguments are ineffective, in so far as he does not dispute paragraphs 30, 31 and 35 of the order under appeal, in which the General Court stated that the final FTC was concluded solely with the Eulex Kosovo Mission 'as employer', so that only the latter, which has legal capacity to conclude such contracts, may be regarded as the employer. The arguments concerning the alleged subrogation of the three institutions in question to the Missions with which the appellant worked cannot call into question the reasoning of the General Court in that regard.
- 29 With regard to the third part of the first plea, the Council observes that the duration of the final FTC cannot alter the appellant's rights to seek to have his situation recategorised before the Belgian courts and contends that Mr Jenkinson has failed to show that the jurisdiction clause in the final FTC renders the clauses contained in the previous contracts, which conferred jurisdiction on the Belgian courts, inoperative, or that that was the intention of the contracting parties.
- 30 As regards the second plea, the Council submits that it was not a party to any of the contracts concluded by Mr Jenkinson and states that the decisions establishing the Missions and the strategic direction for which it is responsible make no reference to specific contracts concluded with staff allocated to the Missions. Admittedly, the Council has competence to decide whether to reduce the size of a crisis management Mission, whether to wind it down and to make decisions concerning the organigramme of a Mission. Nevertheless, the contractual conditions of employment and the way in which those conditions are implemented are not matters decided on by the Council. Therefore, any decision concerning the specific treatment alleged was not taken by the Council and no action taken by the Council may be called into question. It is common ground that the Eulex Kosovo Mission has legal capacity and is liable for any claims or obligation arising in connection with the implementation of its mandate.
- 31 With regard to the third part of the first plea, the EEAS considers that it is apparent from the application and the arguments raised by Mr Jenkinson in that document that he bases his claims on his employment relationship with the Eulex Kosovo Mission in its entirety and, in particular, the decision not to continue to employ him, which he was told of in the course of the contract preceding the final FTC. As a consequence, it is alleged, the dispute relates, not to the final FTC, but to the earlier contractual relationship. As it is not disputed that all the earlier employment contracts contained a clause conferring jurisdiction on the Belgian courts, the General Court did not err in law. Moreover, Mr Jenkinson has failed to explain the basis on which he claims that the final FTC might alter his earlier contracts.
- 32 As regards the second plea, the EEAS contends that the General Court was entitled to find that it was not a party to the final FTC.

- 33 With regard to the third part of the first plea, the Eulex Kosovo Mission argues that, as only the final FTC contained an arbitration clause conferring jurisdiction on the Courts of the European Union and such clauses must be interpreted strictly, the General Court did not err in law in finding that it did not have jurisdiction to hear Mr Jenkinson's claims based on the contracts prior to the final FTC. There is nothing to call into question *ex post* Mr Jenkinson's agreement to the clauses attributing jurisdiction to the Belgian courts in the earlier contracts.

– Findings of the Court

- 34 As, by the arguments put forward in the third part of the first plea and in the second plea, Mr Jenkinson disputes, in essence, the General Court's finding that its jurisdiction did not cover the contracts prior to the final FTC, it is appropriate to recall that the General Court found, in particular, in paragraphs 23, 26 and 38 to 40 of the order under appeal, as follows:

'23 ... [s]ince the present action was brought on the basis of Article 272 TFEU, the Court has jurisdiction only in respect of the final FTC under the arbitration clause contained therein. The Court manifestly lacks jurisdiction to deal with disputes that may arise from the performance of the applicant's contracts of employment prior to the final FTC, which expressly give jurisdiction to the Belgian courts and, therefore, to hear the present action in so far as it relates to the effects of those contracts.

...

- 26 The scope of the clause giving jurisdiction to the Court of Justice of the European Union is expressly limited to disputes relating to the final FTC and cannot be extended to previous contracts providing for other courts to have jurisdiction.

...

- 38 The Court has jurisdiction on the basis of Article 272 TFEU only in relation to the final FTC entered into between the applicant and [the] Eulex Kosovo [Mission].

- 39 First, it is clear from the above that the Court manifestly lacks the jurisdiction to rule on the first part of the principal heads of claim. The first head of claim, seeking the recategorisation of the whole of the applicant's contractual relationship with the various missions who were his consecutive employers as a contract of indeterminate duration, assumes that the effects of the previous employment contracts entered into by those missions and the applicant, which expressly give jurisdiction to the Belgian courts, can be taken into account. As the Court's jurisdiction is limited to the final FTC, the Court is not permitted to rule on this head of claim. The Court also manifestly lacks jurisdiction in respect of the ancillary claims for a declaration that the defendants infringed the obligation to give notice of termination of a contract of an indeterminate duration and that the applicant's dismissal was unfair. Therefore, the Court also manifestly has no jurisdiction to rule on the compensation claims ancillary to those claims, seeking compensation for the loss arising from the abusive use of consecutive FTCs, from the infringement of the obligation to give notice of termination and from an unfair dismissal.

- 40 Secondly, the Court manifestly lacks jurisdiction to rule on the second part of the principal heads of claim, in that they seek a declaration that the EEAS, the Council and the Commission treated the applicant in a discriminatory manner during his employment on the missions as regards his remuneration, pension rights and other benefits, that the applicant ought to have been recruited as a member of the temporary staff of one of them and that compensation should be paid for the

resulting loss. Those claims are directed against the Council, the Commission and the EEAS, which are not parties to the final FTC, and therefore relate to the earlier contractual relationship over which the Court has no jurisdiction.'

- 35 Article 274 TFEU provides that disputes to which the European Union is a party are not, on that ground, to be excluded from the jurisdiction of national courts or tribunals, save where jurisdiction is conferred on the Court of Justice by the Treaties.
- 36 Under Article 272 TFEU, the Court of Justice has jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.
- 37 In accordance with Article 256(1) TFEU, the General Court has the jurisdiction to hear and determine at first instance actions or proceedings referred to, *inter alia*, in Article 272 TFEU.
- 38 In the light of those provisions, the jurisdiction of the General Court, which is based on an arbitration clause, derogates from the ordinary rules of law and must, therefore, be given a restrictive interpretation (judgment of 18 December 1986, *Commission v Zoubek*, 426/85, EU:C:1986:501, paragraph 11).
- 39 Furthermore, while, under an arbitration clause entered into pursuant to Article 272 TFEU, the General Court may be called on to decide a dispute on the basis of the national law governing the contract, its jurisdiction to hear a dispute concerning that contract falls to be determined solely with regard to Article 272 TFEU and the terms of the arbitration clause, and this cannot be affected by provisions of national law which allegedly exclude its jurisdiction (judgment of 26 February 2015, *Planet v Commission*, C-564/13 P, EU:C:2015:124,, paragraph 21 and the case-law cited).
- 40 It follows that the General Court may hear and determine only claims arising from the contract concluded with the European Union which contains the arbitration clause, or claims that are directly connected with the obligations arising from that contract (see, to that effect, judgment of 18 December 1986, *Commission v Zoubek*, 426/85, EU:C:1986:501, paragraph 11)
- 41 As a consequence, it is necessary to determine whether, contrary to the findings of the General Court, the arbitration clauses included in the employment contracts at issue confer jurisdiction on the General Court to hear and determine the claims made by Mr Jenkinson in the action he brought before the General Court.
- 42 In that regard, as the General Court observed in paragraphs 21 and 22 of the order under appeal, it is common ground that all the previous employment contracts concluded between the Missions and the appellant contain a clause that expressly provides that disputes arising from, or relating to, those contracts will be subject to the jurisdiction of the courts of Brussels and that only the final FTC expressly provides, in Article 21, that disputes arising from, or relating, that contract will be subject to the jurisdiction of the Court of Justice under Article 272 TFEU.
- 43 It is clear that, as the application was lodged on the basis of Article 272 TFEU, the General Court has jurisdiction, in principle, to hear and determine only the claims arising from the final FTC or which are directly connected with that contract.
- 44 However, as the Advocate General observed in points 45 and 46 of his Opinion, in connection with an employment relationship similar to that in the present case, in that it concerned a series of consecutive employment contracts concluded over a period of 15 years, only the last four of which contained an arbitration clause conferring jurisdiction on the Court of Justice to rule on all disputes concerning the validity, interpretation or implementation of those contracts, the Court found that the fact that the previous contracts did not contain such a clause and that, as regards the first years, there were not

even any written contracts, does not preclude the Court having regard, in its assessment of the relationship between the parties, to all the contracts concluded (judgment of 1 July 1982, *Porta v Commission*, 109/81, EU:C:1982:253, paragraph 10).

- 45 It follows that, contrary to the findings of the General Court in paragraphs 23, 26 and 38 to 40 of the order under appeal, its jurisdiction may extend to the previous employment contracts conferring jurisdiction on the Brussels courts, on condition that the application brought by Mr Jenkinson contains claims arising under the final FTC or which are directly connected with the obligations arising from that contract.
- 46 In that regard, as is apparent from paragraph 10 of the order under appeal, by his principal heads of claim, Mr Jenkinson requested the General Court, in essence, to recategorise all his contractual relationships as a contract of indefinite duration and to grant him the rights which, in his view, may follow as a result of such recategorisation.
- 47 As the Advocate General observed in point 47 of his Opinion, as Mr Jenkinson's claims are linked to the existence of a single, continuous employment relationship based on a series of consecutive FTCs, they are directed at the recategorisation of all the contracts concluded and are based on all of those contracts, including the final FTC.
- 48 As a consequence, the Court finds that the action brought by Mr Jenkinson contains claims which also arise under the final FTC.
- 49 It follows from the foregoing considerations that the General Court erred in law, in paragraphs 39 and 40 of the order under appeal, by stating that it manifestly lacked jurisdiction to rule on the principal heads of claim, because the claims made by Mr Jenkinson require account to be taken of the effects of the previous employment contracts.
- 50 Indeed, in the light of the case-law cited in paragraph 44 above, in the present case the General Court should have verified whether and, if so, to what extent, it was entitled to take account of the previous employment contracts in assessing Mr Jenkinson's claims.
- 51 Having regard to the foregoing considerations, the Court must uphold the third part of the first plea and the second plea put forward in support of the first head of claim and, therefore, set aside the order under appeal, without there being any need to examine the other parts of the first plea or the third and fourth pleas raised in support of the head of claim seeking, respectively, the General Court's assessment of the arguments put forward in the alternative and the apportionment of the costs incurred at first instance.

The second head of claim in the appeal

- 52 By his second head of claim, Mr Jenkinson claims that the Court should grant the application he brought before the General Court.
- 53 In that regard, it should be noted that, according to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the latter may, where the decision of the General Court has been set aside, itself give final judgment in the matter, where the state of the proceedings so permits.
- 54 However, contrary to the submissions made by Mr Jenkinson, the case is not ready for final judgment to be given.

- 55 The General Court having simply decided whether it had jurisdiction and whether the action was admissible, but not addressed the substance of the case, it should be noted that, according to the Court's settled case-law, as a rule, the state of the proceedings does not permit final judgment to be given on the substance of an action brought before the General Court where that court dismissed the action as inadmissible by upholding a plea of inadmissibility and did not reserve a decision on that plea for the final judgment (judgment of 17 December 2009, Review *M v EMEA*, C-197/09 RX-II, EU:C:2009:804, paragraph 29 and the case-law cited).
- 56 Admittedly, it is possible, in certain circumstances, for a ruling to be given on the substance of an action even though the proceedings at first instance were confined to consideration of a plea of inadmissibility which the General Court upheld. That may be so where, first, the setting aside of the judgment or order under appeal necessarily brings about a definitive resolution of the substance of the action in question or, second, the examination of the substance of the application for annulment is based on arguments exchanged by the parties in the appeal proceedings following the reasoning adopted by the court at first instance (judgment of 17 December 2009, Review *M v EMEA*, C-197/09 RX-II, EU:C:2009:804, paragraph 30 and the case-law cited).
- 57 However, in the present case, as the Commission was correct to observe, there are no such special circumstances in the present case that would allow the Court to rule itself on the substance of the action.
- 58 It follows that the present case must be referred back to the General Court and that the second head of claim must be rejected.

Costs

- 59 Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

On those grounds, the Court (First Chamber) hereby:

- 1. Sets aside the order of the General Court of the European Union of 9 November 2016, *Jenkinson v Council and Others* (T-602/15, EU:T:2016:660);**
- 2. Refers the case back to the General Court of the European Union;**
- 3. Reserves the costs.**

[Signatures]