



## Reports of Cases

### ORDER OF THE GENERAL COURT (Seventh Chamber)

4 June 2013\*

(Action for annulment — Public service contracts — Tender procedure — Helicopter Support to the Eulex Kosovo Mission — Rejection of a tenderer's bid — No legal capacity to be a defendant — Inadmissibility)

In Case T-213/12,

**Elitaliana SpA**, established in Rome (Italy), represented by R. Colagrande, avocat,

applicant,

v

**Eulex Kosovo**, established in Pristina (Kosovo), represented by G. Brosadola Pontotti, solicitor,

defendant,

APPLICATION for the annulment of measures adopted by Eulex Kosovo in the context of the award to another tenderer of the public contract entitled 'EuropeAid/131516/D/SER/XK – Helicopter Support to the EULEX Mission in Kosovo (PROC/272/11)' and an order that Eulex Kosovo pay compensation for the loss suffered as a result of the failure to award that contract to the applicant,

THE GENERAL COURT (Seventh Chamber),

composed of A. Dittrich (Rapporteur), President, I. Wiszniewska-Białicka and M. Prek, Judges,

Registrar: E. Coulon,

makes the following

### Order

#### Background to the dispute

- 1 On 4 February 2008, the Council of the European Union adopted 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). Under the first paragraph of Article 2 of that joint action, Eulex Kosovo is to assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent

\* Language of the case: Italian.

multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.

- 2 On 18 October 2011, 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 in the Supplement to the *Official Journal of the European Union* (OJ 2011/S 200-324817), under the reference EuropeAid/131516/D/SER/XK. That invitation included the following notice: 'Contracting authority: the Head of Eulex Kosovo, Pristina, Kosovo'.
- 3 By letter of 23 December 2011, to which were annexed, in particular, instructions for the tenderers, the head of Eulex Kosovo requested the applicant, Elitaliana SpA, an Italian company operating in the field of helicopter services which it supplies to public bodies, to participate in the restricted tender procedure.
- 4 The applicant submitted a bid in the context of the abovementioned procedure.
- 5 By letter of 29 March 2012, the director of administration and support services of Eulex Kosovo notified the applicant that its bid had been placed second.
- 6 By letter of 2 April 2012, the applicant requested Eulex Kosovo for access to certain documents submitted by the tenderer whose bid had been placed first. By letter of 17 April 2012, the Head of Eulex Kosovo refused to grant access to those documents.
- 7 On 24 April 2012, the Head of Eulex Kosovo awarded the contract at issue to the tenderer whose bid had been placed first.

#### **Procedure and forms of order sought**

- 8 By application lodged at the Registry of the General Court on 23 May 2012, the applicant brought the present action against Eulex Kosovo and Starlite Aviation Operations.
- 9 By separate document, lodged at the Registry of the General Court on that day, the applicant brought an application for interim relief, in which it claimed that the President of the General Court should make an order to suspend the enforcement of the Eulex Kosovo decision to reject the bid it had submitted in the context of the tendering procedure at issue and to award that contract to another tenderer and, consequently, to prohibit Eulex Kosovo from concluding the contract at issue or, where that had already taken place, from commencing performance of the contract and to adopt any other protective measure held to be more appropriate.
- 10 By Order of the General Court of 3 July 2012 in Case T-213/12 *Elitaliana v Eulex Kosovo and Starlite Aviation Operations*, not published in the ECR, the action was dismissed in so far as it was directed against Starlite Aviation Operations.
- 11 By Order of the President of the General Court of 4 September 2012 in Case T-213/12 R *Elitaliana v Eulex Kosovo*, not published in the ECR, the application for interim relief was dismissed and the costs reserved.
- 12 By separate document, lodged at the Registry of the General Court on 14 September 2012, Eulex Kosovo raised an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the General Court.
- 13 On 28 November 2012, the applicant lodged its observations on the objection of inadmissibility.

- 14 In the application, the applicant claims that the Court should:
- annul the measures adopted by Eulex Kosovo in the context of the award to another tenderer of the public contract entitled ‘EuropeAid/131516/D/SER/XK – Helicopter Support to the EULEX Mission in Kosovo (PROC/272/11)’, which was notified to it by Eulex Kosovo by letter of 29 March 2012, and any other connected measure and, in particular, the note of 17 April 2012 by which Eulex Kosovo refused to grant it access to the requested documents;
  - order Eulex Kosovo to pay compensation for the loss suffered as a result of the failure to award that contract to the applicant;
  - order Eulex Kosovo to pay the costs.
- 15 In its objection of inadmissibility, Eulex Kosovo contends that the Court should:
- dismiss the action as inadmissible;
  - order the applicant to pay all the costs of the case.
- 16 In its observations on the objection of inadmissibility, the applicant claims that the Court should:
- reject the objection of inadmissibility;
  - in any event, serve notice of the action on the institution considered to be the defendant.

## Law

- 17 Under Article 114(1) and (4) of the Rules of Procedure, where a party applies to it, the General Court may decide on admissibility without going to the substance of the case. Under Article 114(3), unless the General Court otherwise decides, the remainder of the proceedings shall be oral. The General Court considers, in the present case, that it has sufficient information from the documents in the case-file and that it is not necessary to open the oral procedure.
- 18 In support of its claim, Eulex Kosovo, first, argues that it cannot have legal capacity to be a defendant in the present case on account of the fact that it is not an independent body. Secondly, it contends that the General Court has no jurisdiction with respect to acts adopted on the basis of the provisions of the FEU Treaty relating to the Common Foreign and Security Policy (CFSP).
- 19 In the first place, concerning the question whether Eulex Kosovo has legal capacity to be a defendant, it should be noted that, under the first paragraph of Article 263 TFEU, actions for annulment may be brought against acts originating from certain designated institutions, but also, more generally, against acts adopted by bodies, offices or agencies of the European Union, provided they are acts aimed at producing binding legal effects.
- 20 Moreover, under Article 44(1)(b) of the Rules of Procedure, an application of the kind referred to in Article 21 of the Statute of the Court of Justice of the European Union is to state the designation of the party against whom the application is made.
- 21 According to the applicant, Eulex Kosovo has legal capacity to be a defendant, since it is a body, office or agency of the European Union within the meaning of the first paragraph of Article 263 TFEU.

- 22 In that regard, with respect to the legal status of Eulex Kosovo, it should be noted that, under Article 1(1) of Joint Action 2008/124, Eulex Kosovo was created by the European Union as a ‘Rule of law’ Mission in Kosovo.
- 23 Article 6 of Joint Action 2008/124 establishes the structure of Eulex Kosovo. Thus Article 6(1) provides that it is a unified European Security and Defence Policy (ESDP) Mission across Kosovo. Under Article 6(2), Eulex Kosovo is to establish main headquarters and regional and local offices across Kosovo, a Brussels (Belgium) support element and liaison offices, as required. According to Article 6(3), Eulex Kosovo is to consist of a Head of Mission and staff and police, justice and customs components.
- 24 Under Article 7(1) and (2) of Joint Action 2008/124, the Civilian Planning and Conduct Capability Director is to be the Civilian Operation Commander for Eulex Kosovo, who, under the political control and strategic direction of the Political and Security Committee (PSC) and the overall authority of the High Representative of the Union for Foreign Affairs and Security Policy (HR), is to exercise command and control of Eulex Kosovo at the strategic level. According to Article 7(3), he is to ensure proper and effective implementation of the Council’s decisions as well as the PSC’s decisions, including by issuing instructions at strategic level as required to the Head of Mission and providing him with advice and technical support.
- 25 Article 11 of Joint Action 2008/124 describes the chain of command of Eulex Kosovo. According to Article 11(2), under the responsibility of the Council and the HR, the PSC is to exercise political control and strategic direction of Eulex Kosovo. Under Article 11(3) and (4), the Civilian Operation Commander, who is the commander of Eulex Kosovo at strategic level, is to report to the Council through the HR. Article 11(5) thereof states that the Head of Mission is to exercise command and control of Eulex Kosovo at theatre level and be directly responsible to the Civilian Operation Commander.
- 26 In the light of the abovementioned provisions, Eulex Kosovo does not have legal personality and there is no provision that it can be a party to proceedings before the European Union Courts. On the contrary, it constitutes a mission, that is to say, a simple action, the duration of which was initially limited to 14 June 2010, under Article 20 of Joint Action 2008/124 as amended by Council Joint Action 2009/445/CFSP of 9 June 2009 (OJ 2009 L 148, p. 33), and which was amended and extended, at the time of lodging the application, until 14 June 2012 by Council Decision 2010/322/CFSP of 8 June 2010 (OJ 2010 L 145, p. 13). The General Court has already held that, in such a case, a mission cannot be considered a body, office or agency of the European Union within the meaning of the first paragraph of Article 263 TFEU (Order of the President of the General Court of 22 July 2010 in Case T-271/10 *R H v Council and Others*, not published in the ECR, paragraphs 19 and 20). It follows that Eulex Kosovo is not such a body, office or agency.
- 27 Furthermore, it should be noted that the applicant seeks annulment of measures taken by Eulex Kosovo in the context of the award of the contract at issue, namely, in essence, the measures rejecting the bid which the applicant submitted in the tendering procedure at issue and awarding that contract to another tenderer, and any other connected measure and, in particular, the note of 17 April 2012 refusing to grant access to the documents requested.
- 28 Although those measures were taken by the Head of Eulex Kosovo and by the director of administration and support services of Eulex Kosovo (see paragraphs 5 to 7 above), only the Head of Eulex Kosovo is responsible for them. It is the latter who exercises command and control over personnel and has administrative and logistic responsibility, under Article 8(2) of Joint Action 2008/124.

- 29 It should be noted that the measures taken in the context of the award of the contract at issue, namely, in essence, the rejection of the applicant's bid, the award of the contract to another tenderer and the refusal to grant access to the documents requested, were part of the day-to-day management of the Mission. Under Article 8(3) of Joint Action 2008/124, the Head of Mission is responsible for that management.
- 30 It must be pointed out that the measures taken in the context of the tendering procedure at issue relate to Eulex Kosovo's budget.
- 31 According to Article 16(2) of Joint Action 2008/124, all expenditure must be managed in accordance with the Community rules and procedures applicable to the general budget of the European Union. Under Article 8(5) of that joint action, the Head of Mission is to be responsible for the implementation of Eulex Kosovo's budget and, for that purpose, to sign a contract with the European Commission. According to the case-file, the Head of Eulex Kosovo signed such a contract with the Commission. The Commission therefore delegated certain tasks relating to the implementation of Eulex Kosovo's budget to the Head of Eulex Kosovo, as provided for in Article 54(2)(d) 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 (OJ 2002 L 248, p. 1), as amended.
- 32 Reference to that delegation is, in particular, made in Article 16(3) and (4) of Joint Action 2008/124 relating to financial arrangements. According to Article 16(3), the Head of Mission may conclude technical arrangements regarding the provision of equipment, services and premises to Eulex Kosovo only with the Commission's approval. Article 16(4) provides that 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.
- 33 It should be borne in mind that measures adopted pursuant to delegated powers are normally attributed to the delegating institution, on which it falls to defend the measure in question before the Courts (see Order of the General Court in Case T-395/11 *Elti v Delegation of the European Union to Montenegro* [2012] ECR, paragraph 62 and the case-law cited).
- 34 In those circumstances, it must be held that the measures adopted by the Head of Eulex Kosovo in the context of the procedure for the award of the contract at issue are attributable to the Commission, which has legal capacity to be a defendant under the first paragraph of Article 263 TFEU. Those measures may, therefore, be the subject of judicial review in accordance with the requirements of the general principle, invoked by the applicant, that any measure adopted by an institution, body or agency of the European Union which is intended to have legal effects vis-à-vis third parties, must be subject to review (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 24, and Case T-411/06 *Sogelma v AER* [2008] ECR II-2771, paragraph 37).
- 35 Consequently, Eulex Kosovo does not have legal capacity to be a defendant.
- 36 That finding is not undermined either by Article 8(7) of Joint Action 2008/124, according to which the Head of Mission is to represent Eulex Kosovo in the operations area and ensure appropriate visibility of Eulex Kosovo, or by Article 16(3) of that joint action, according to which, subject to the Commission's approval, the Head of Mission may conclude technical arrangements with Member States, participating third States and other international actors deployed in Kosovo regarding the provision of equipment, services and premises to Eulex Kosovo. Those provisions confer only limited powers on the Head of Mission. While, under Article 8(7) of that joint action, he is authorised to represent that mission in the operations area, Article 16(3) grants him merely a strictly limited legal capacity from a material point of view. Moreover, it should be noted that that latter provision supports the position that the measures adopted by the Head of Eulex Kosovo in the context of the procedure for the award of the contract at issue are attributable to the Commission (see paragraphs 29 to 34 above).



- 37 In that regard, it is also necessary to reject the applicant's argument concerning Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), according to which Eulex Kosovo, as a body governed by public law within the meaning of that provision, is a body, office or agency of the European Union. Under Article 1(9)(b) of that directive, a body governed by public law, for the purpose of that provision, must have legal personality. As has already been pointed out (see paragraph 26 above), Eulex Kosovo does not have legal personality and cannot, therefore, be a body governed by public law within the meaning of Article 1(9) of Directive 2004/18.
- 38 In the second place, the applicant claims in the alternative that, in the event that Eulex Kosovo does not have legal capacity to be a defendant, first, the General Court could identify the party against whom the case could, as a result, be pursued. It refers, in that regard, to the case-law according to which the mistaken designation in the application of a defendant other than the body responsible for adopting the contested measure does not render the application inadmissible, where the latter contains information which makes it possible to identify unambiguously the party against whom it is made, such as the designation of the contested measure and the body responsible for it. According to that case-law, in such a case, the defendant must be considered to be the body responsible for the contested measure, even if not referred to in the introduction to the application (see Order of the General Court of 16 October 2006 in Case T-173/06 *Aisne and Nature v Commission*, not published in the ECR, paragraph 17 and the case-law cited).
- 39 However, that case-law is not, in any event, applicable to the present case. In this case, the designation of Eulex Kosovo in the application does not constitute an error on the part of the applicant. It is clearly apparent from the content of the application that the applicant intended to bring the action expressly against Eulex Kosovo which, according to the applicant, is a body, office or agency of the European Union within the meaning of the first paragraph of Article 263 TFEU, which the applicant, moreover, confirmed in its observations on the objection of inadmissibility. Furthermore, although it is true that the application designates the contested measures, it does not contain any information making it possible to state unambiguously that the action was brought against a body other than Eulex Kosovo. Contrary to what the applicant claims, in such a situation, it is not for the General Court to identify the party against which the action should be directed in order to comply with the requirements of Article 44(1)(b) of the Rules of Procedure.
- 40 Secondly, the applicant claims that the Court should grant it the benefit of excusable error, and invokes in that regard the case-law which recognises the existence of such an error where the conduct of the institution concerned was, either on its own or to a decisive extent, such as to give rise to understandable confusion in the mind of a person acting in good faith and exercising normal care and attention (see, to that effect, Case 25/68 *Schertzer v Parliament* [1977] ECR 1729, paragraph 19, and Case T-514/93 *Cobrecraf and Others v Commission* [1995] ECR II-621, paragraph 40).
- 41 It is true that the contract notice mentioned the Head of Eulex Kosovo as the contracting authority to whom the bid must be submitted. Moreover, it is apparent from the file that, during the procedure for the award of the contract at issue, it was the Head of Eulex Kosovo or the director of administration and support services of Eulex Kosovo who took action vis-à-vis the applicant. Furthermore, it should be observed that neither the contract notice nor the letters sent by the Head of Eulex Kosovo or that director mentioned a party against whom a possible action could be brought against measures taken in the context of the procedure for the award of the contract at issue. In those circumstances, and in the light of the complex legal situation governing the relationship in that procedure between Eulex Kosovo and the Head thereof, on the one hand, and the Commission and the Council, on the other hand, it was without doubt difficult for the applicant to identify the party to whom the contested measures were attributable and who had legal capacity to be a defendant.

- 42 Nevertheless, it should be pointed out that the existence of an excusable error can, according to the case-law invoked by the applicant (see paragraph 40 above), only have the consequence that the action must not be dismissed for being out of time. In the present case, it is not disputed that the applicant complied with the time-limit for bringing an action. Furthermore, it should be noted that at no time did the applicant also bring an action against a party other than Eulex Kosovo, but that it merely requested the General Court to identify the defendant against whom the present action should be brought in order to be admissible.
- 43 Moreover, it is not apparent from the case-file that the applicant was informed that a possible action against measures taken in the context of the procedure for the award of the contract at issue should be brought against Eulex Kosovo. On the contrary, it is clearly apparent from the application that the applicant brought its action against Eulex Kosovo on the assumption that the latter was a body, office or agency of the European Union within the meaning of the first paragraph of Article 263 TFEU. In the light of the fact that the provisions of Joint Action 2008/124 referred to in paragraphs 22 to 36 above are sufficiently clear, and of the case-law existing at the time the application was lodged, the applicant, in spite of the difficulty referred to in paragraph 41 above, would have been able to avoid the error of considering that Eulex Kosovo was such a body, office or agency. That error is therefore not excusable.
- 44 Consequently, the applicant's argument alleging an excusable error must be rejected.
- 45 It follows from all of the foregoing considerations that, because Eulex Kosovo does not have legal capacity to be a defendant, the action brought against the latter by the applicant is inadmissible, both as concerns the application for annulment and the claim for damages, which is closely connected with the claim for annulment (see, to that effect, Case 346/87 *Bossi v Commission* [1989] ECR 303, paragraph 31, and the Order in *Elti v Delegation of the European Union to Montenegro*, cited in paragraph 33 above, paragraph 74 and the case-law cited), without it being necessary to rule on the alleged lack of jurisdiction of the General Court concerning acts adopted on the basis of the provisions of the FEU Treaty relating to the CFSP.
- 46 The present action must, therefore, be dismissed.

### **Costs**

- 47 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including those of the interim proceedings, in accordance with the forms of order sought by Eulex Kosovo in that regard.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby orders:

1. **The action is dismissed.**
2. **Elitaliana SpA is ordered to pay the costs, including those relating to the interlocutory proceedings.**

Luxembourg, 4 June 2013.

E. Coulon  
Registrar

A. Dittrich  
President