



## Reports of Cases

VIEW OF ADVOCATE GENERAL  
WATHELET  
delivered on 3 March 2015<sup>1</sup>

**Case C-417/14 RX-II**

**Livio Missir Mamachi di Lusignano**

**v**

**European Commission**

(Review of the judgment of the General Court of the European Union in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625) — Civil service — Non-contractual liability — Damage suffered by the official before his death — Personal damage suffered by the close relatives of the deceased official — Jurisdiction — General Court — European Union Civil Service Tribunal — Judicial architecture of the European Union)

1. On a proposal from the First Advocate General, the Reviewing Chamber of the Court of Justice has decided, on the basis of Article 193(4) of the Rules of Procedure of the Court, to review the judgment of the General Court of the European Union in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625).<sup>2</sup>

2. In paragraph 2 of the operative part of the aforementioned decision, the Court stated:

‘The review shall concern the question whether the judgment of the General Court ... affects the unity or consistency of EU law in that the General Court, as the court hearing the appeal, held that it had jurisdiction to rule, as the court of first instance, on an action to establish non-contractual liability of the European Union

- alleging failure of an institution in its duty to ensure the protection of its officials,
- brought by third parties, in their capacity as heirs and successors of a deceased official and as a family member of such an official, and
- seeking compensation for the non-material harm suffered by the deceased official himself and the material and non-material harm suffered by those third parties.’

1 — Original language: French.

2 — Decision to review the judgment in *Missir Mamachi di Lusignano v Commission* (C-417/14 RX, EU:C:2014:2219).

## I – Legal framework

### A – *Treaty on the Functioning of the European Union*

3. According to Article 256(1) TFEU, ‘the General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute of the Court of Justice of the European Union for the Court of Justice. The Statute [of the Court of Justice] may provide for the General Court to have jurisdiction for other classes of action or proceeding’.

4. Among the articles listed in Article 256 TFEU, Article 268 TFEU provides that the Court of Justice is to have jurisdiction ‘in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340 [TFEU]’ and Article 270 TFEU provides that it is to have jurisdiction ‘in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union’ (‘the Staff Regulations’).

### B – *The Statute of the Court of Justice*

5. Pursuant to Article 1 of Annex I to the Statute of the Court of Justice, the European Union Civil Service Tribunal ‘shall exercise at first instance jurisdiction in disputes between the Union and its servants referred to in Article 270 [TFEU], including disputes between all bodies or agencies and their servants in respect of which jurisdiction is conferred on the Court of Justice of the European Union’.

6. Any conflicts of jurisdiction that might arise between the different courts of the Court of Justice in civil service cases are governed by Article 8 of Annex I to the Statute of the Court of Justice:

‘1. Where an application or other procedural document addressed to the Civil Service Tribunal is lodged by mistake with the Registrar of the Court of Justice or General Court, it shall be transmitted immediately by that Registrar to the Registrar of the Civil Service Tribunal. Likewise, where an application or other procedural document addressed to the Court of Justice or to the General Court is lodged by mistake with the Registrar of the Civil Service Tribunal, it shall be transmitted immediately by that Registrar to the Registrar of the Court of Justice or General Court.

2. Where the Civil Service Tribunal finds that it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice or the General Court has jurisdiction, it shall refer that action to the Court of Justice or to the General Court. Likewise, where the Court of Justice or the General Court finds that an action falls within the jurisdiction of the Civil Service Tribunal, the Court seised shall refer that action to the Civil Service Tribunal, whereupon that Tribunal may not decline jurisdiction.

3. Where the Civil Service Tribunal and the General Court are seised of cases in which the same issue of interpretation is raised or the validity of the same act is called in question, the Civil Service Tribunal, after hearing the parties, may stay the proceedings until the judgment of the General Court has been delivered.

Where the Civil Service Tribunal and the General Court are seised of cases in which the same relief is sought, the Civil Service Tribunal shall decline jurisdiction so that the General Court may act on those cases.’

## C – Staff Regulations

7. Article 73 of the Staff Regulations provides:

‘1. ... An official is, from the date of his entry into the service, insured against the risk of occupational disease or accidents. ... He shall contribute to the cost of insuring against non-occupational risks up to 0.1% of his basic salary.

Such rules shall specify which risks are not covered.

2. The benefits payable shall be as follows:

(a) in the event of death:

Payment to the persons listed below of a lump sum equal to five times the deceased’s annual basic salary calculated by reference to the monthly amounts of salary received during the 12 months before the accident:

- to the deceased official’s spouse and children in accordance with the law of succession governing the official’s estate; the amount payable to the spouse shall not, however, be less than 25% of the lump sum;
- where there are no persons of the category above, to the other descendants in accordance with the law of succession governing the official’s estate;
- where there are no persons of either of the two categories above, to the ascendants in accordance with the law of succession governing the official’s estate;
- where there are no persons of any of the three categories above, to the institution;

...’

8. According to Article 91(1) of the Staff Regulations: ‘the Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and any person to whom these Staff Regulations apply regarding the legality of an act affecting such person adversely within the meaning of Article 90(2). In disputes of a financial character the Court of Justice shall have unlimited jurisdiction’.

## II – Background to the case for review

9. On 18 September 2008, Alessandro Missir Mamachi di Lusignano, an official of the European Union, died in tragic circumstances while posted to the European Commission’s delegation in Rabat (Morocco).

10. Following the murder, his father, Livio Missir Mamachi di Lusignano, brought before the General Court, in his own name and in his capacity as legal representative of his son’s heirs, an action seeking, on the one hand, the annulment of the Commission decision of 3 February 2009 rejecting his application for compensation for damage resulting from the murder of his son and, on the other hand, an order requiring the Commission to pay him and his son’s children various sums by way of

reparation for the material and non-material damage arising from the murder.<sup>3</sup>

11. That action alleges that the Commission failed to fulfil its obligation to protect its staff and relates to both compensation for the non-material damage suffered by the official himself, which the appellant is claiming on behalf of the children of the deceased official in their capacity as heirs and successors, and compensation for the material and non-material damage suffered by the appellant and the children of the deceased official as members of his family.

12. The General Court considered that the claim for compensation for the damage suffered by the appellant and the children of the deceased official fell within its jurisdiction. It concluded from this that the Civil Service Tribunal should have found that it did not have jurisdiction to hear and determine the claim. Consequently, it should have referred it to the General Court in accordance with Article 8(2) of Annex I to the Statute of the Court of Justice.

13. With regard to the claim for compensation for the damage suffered by the official before his death, the General Court held that, although the Civil Service Court had jurisdiction to hear and determine the matter, it had incorrectly dismissed it as inadmissible in the light of the rule concerning 'correspondence' between the claim and the administrative complaint. Since the state of the proceedings did not permit final judgment to be given on that claim, the General Court took the view that the Civil Service Tribunal, to which that aspect of the appeal should be referred back, would necessarily have to find that the General Court and the Civil Service Tribunal itself were seised of cases in which the same relief is sought.

14. For, following the bringing of the appeal that gave rise to the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625), the parents of Alessandro Missir Mamachi di Lusignano, his children and his brother and sister brought an action before the General Court seeking an order requiring the Commission to compensate them for the non-material damage they consider they have suffered as a result of the murder of Alessandro Missir Mamachi di Lusignano.<sup>4</sup>

15. According to the General Court, the Civil Service Tribunal is therefore required to decline jurisdiction so that the General Court may act on the cases, pursuant to the second paragraph of Article 8(3) of Annex I to the Statute of the Court of Justice.

16. In those circumstances, the General Court, considering that it had jurisdiction to rule on all the claims, decided to refer the whole case to itself as a court of first instance.

3 — The application for compensation does not therefore relate to the reparation paid to the heirs of Alessandro Missir Mamachi di Lusignano on the basis of the Staff Regulations. For, in accordance with the first paragraph of Article 70 of the Staff Regulations, the Commission paid the children of the deceased official the latter's full remuneration from 1 October to 31 December 2006. The Commission also paid them the sum of EUR 414 308.90 by way of a death grant under Article 73 of those regulations, plus EUR 76 628.40 on account of the death of the spouse under Article 25 of Annex X to the Staff Regulations. In addition, the Commission granted the four children, with effect from 1 January 2007, entitlement to the orphan's pension provided for in Article 80 of the Staff Regulations (EUR 4 376.82 per month) and the education allowance referred to in Annex VII to the Staff Regulations (EUR 2 287.19 per month). The deceased official was also granted a posthumous promotion, retroactive to 1 September 2005, which was taken into account in the calculation of the orphan's pension and the death grant. Finally, by decision of 14 May 2007, the Commission awarded each of the children an extraordinary monthly benefit on social grounds equal to a dependent child allowance and payable until the age of 19 (EUR 1 332.76 per month), under Article 76 of the Staff Regulations. By decision of 4 July 2008, the latter sum was doubled with effect from 1 August 2008.

4 — *Missir Mamachi di Lusignano and Others v Commission* (T-494/11). Those proceedings had been stayed by the General Court pending the judgment to be given in Case T-401/11. The Court of Justice having decided to review that judgment, by order of 24 October 2014, the General Court again stayed those proceedings pending the judgment of the Court of Justice.

### III – Assessment

17. In accordance with the framework defined by the Reviewing Chamber in its decision to open proceedings, my analysis will look, in essence, at the question of whether the General Court adversely affected the unity or consistency of EU law in holding that it had jurisdiction to rule, as the court of first instance, on an action to establish non-contractual liability on the part of the European Union that alleges failure of an institution in its duty to ensure the protection of its officials, which is brought by third parties in their capacity as heirs and successors of a deceased official and as members of the family of such an official, and seeks compensation for the non-material harm suffered by the deceased official himself and the material and non-material harm suffered by those third parties.

18. In accordance with the review procedure, it is necessary as a first step to examine whether the judgment of the General Court is vitiated by an error of law.<sup>5</sup> Only if that were found to be the case would it be necessary, as a second step, to address the question of whether the incorrect interpretation by the General Court affects the unity or consistency of EU law.<sup>6</sup>

#### A – Possible error of law by the General Court

##### 1. Preliminary observations

19. As a preliminary point, it is necessary, on the one hand, to determine the different types of damage for which compensation is sought and the capacity in which the appellant is acting in respect of each type and, on the other hand, the provisions applicable.

20. First, as regards the classification of the damage, I concur with the typology adopted by the General Court on the basis of the general principles common to the laws of the Member States concerning non-contractual liability.<sup>7</sup> According to that categorisation, there are three types of damage that can generally be made good by the person responsible, namely:

- *the non-material damage suffered by the victim himself*, consequent upon the physical and/or mental suffering which preceded his death, if it is proved that he was aware of it;
- *the material damage suffered by the victim's close relatives*, which depends on the income which they derived from the deceased, and
- *the non-material damage suffered by the victim's close relatives*, owing to the existence of a special relationship of affection with the deceased.

21. The claims raised by the applicant fall within that classification and the premises on which the General Court decided to rely in paragraph 42 of its judgment would also, therefore, appear to be well founded:

- the *ex haerede* non-material damage, namely the damage suffered by Alessandro Missir Mamachi di Lusignano before he died, is claimed by his heirs and successors in that capacity, and not on their own behalf. It corresponds to the first category of damage identified in the preceding point;

5 — According to Article 193(4) of the Rules of Procedure of the Court of Justice, the reviewing Chamber is to decide 'whether the decision of the General Court is to be reviewed'. However, that provision states that 'the decision to review the decision of the General Court *shall indicate only the questions which are to be reviewed*' (my emphasis). Article 195(4) of those Rules confirms that the reviewing Chamber does not 'rule on the substance of the case, after hearing the Advocate General', until the decision to review has been taken.

6 — See to that effect the judgments in Review of *M v EMEA* (C-197/09 RX-II, EU:C:2009:804, paragraph 25); Review of *Arango Jaramillo and Others v EIB*, C-334/12 RX-II, EU:C:2013:134, paragraph 24), and Review of *Commission v Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 25).

7 — Paragraph 40 of the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625).

— the other two types of damage for which reparation is requested, namely, on the one hand, the material damage suffered by the children and, on the other hand, the non-material damage suffered by the children and father of Alessandro Missir Mamachi di Lusignano, are claimed by the appellant and his grandchildren on their own behalf, independently of their capacity as heirs and successors. They correspond to the second and third categories of damage identified in the preceding point, respectively.

22. Secondly, with regard to the determination of the rules applicable, I shall recall that the Court of Justice and the General Court have both exercised the jurisdiction referred to in Article 270 TFEU at given points in the history of European integration

23. However, since Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Civil Service Tribunal,<sup>8</sup> Article 1 of Annex I to the Statute of the Court of Justice now confers jurisdiction on the Civil Service Tribunal.

24. Article 270 TFEU is of crucial importance inasmuch as it states that jurisdiction in any dispute between the European Union and its servants is to be exercised ‘within the limits and under the conditions laid down in the Staff Regulations’.

25. Under Article 91(1) of the Staff Regulations, the Civil Service Tribunal is to have jurisdiction ‘in any dispute between the Union and any person to whom these Staff Regulations apply regarding the legality of an act affecting such person adversely within the meaning of Article 90(2)’.

26. It follows from those preliminary considerations that the key to the division of powers necessarily lies in the interpretation of those two provisions (Article 270 TFEU and Article 91(1) of the Staff Regulations) in so far as it is inherent in the judicial system of the European Union that ‘the jurisdiction of one court to rule on an action necessarily excludes the jurisdiction of the others’.<sup>9</sup>

## 2. Extent of the jurisdiction of the Civil Service Tribunal

27. The Civil Service Tribunal therefore has jurisdiction ‘in any dispute between the Union and *any person to whom these Staff Regulations apply* regarding the legality of an act affecting such person adversely within the meaning of Article 90(2) [of the Staff Regulations]’.<sup>10</sup>

28. In the event of an official’s death, Article 73(2) of the Staff Regulations guarantees the payment of a lump sum equal to five times his annual basic salary (calculated on the basis of the monthly amounts of salary received during the 12 months before the accident).

29. According to the terms of that provision, the lump sum is to be paid to the deceased official’s spouse and children or, where there are no persons in that category, ‘to the other descendants in accordance with the law of succession governing the official’s estate’. Where there are no ‘descendants’, the provision goes on to state that the lump sum is then payable ‘to the relatives in the ascending line in accordance with the law of succession governing the official’s estate’.<sup>11</sup>

8 — OJ 2004 L 333, p. 7.

9 — Order in *Commission v IAMA Consulting* (C-517/03, EU:C:2004:326, paragraph 15).

10 — Article 91(1) of the Staff Regulations. My emphasis.

11 — Where there are no persons of that category, the sum is then to be paid to the institution itself.

30. As the Court of Justice has already held, the Staff Regulations are intended only ‘to regulate the legal relations between the European institutions and their officials, by establishing a series of reciprocal rights and obligations and by affording *certain members of an official’s family* rights which they may assert in relation to [the European Union]’.<sup>12</sup>

31. It therefore follows indisputably from the wording of Article 73(2) of the Staff Regulations that both the descendants and ascendants of the official are persons to whom those regulations *apply*, which is to say, in the words used by the Commission in its observations, that they are ‘expressly taken into account’ by those regulations.<sup>13</sup>

32. In accordance with Article 91(1) of the Staff Regulations, the Civil Service Tribunal therefore has jurisdiction to rule on ‘any dispute between the Union and any [such] person’ relating to an act on the part of the appointing authority which adversely affects that person (such as a decision on compensation consequent on the death of an official).

33. When it was put to it by the Commission, the General Court none the less rejected that proposition, on two grounds:

- first, that interpretation ‘is tantamount to making the procedural implementation of the general law on the non-contractual liability of the Union subject to the procedural implementation of the specific law on social security of officials as provided for in the Staff Regulations [of officials when] there is no valid reason why the special jurisdiction of the Civil Service Tribunal vis-à-vis officials should also prevail over the general jurisdiction of this Court to hear and determine any dispute involving the liability of the Union’.<sup>14</sup> That finding is reinforced by the fact that what is at issue in the present case ‘is not the Commission’s obligation to pay the benefits guaranteed in the Staff Regulations, ... but its possible obligation to make full reparation for the alleged material and non-material damage’.<sup>15</sup>
- furthermore, ‘even on the assumption that the Commission’s argument did apply in the case of the four children of Alessandro Missir Mamachi di Lusignano, it does not apply in the case of the appellant Livio Missir Mamachi di Lusignano himself, who does not have the capacity of a person entitled to claim, within the meaning of Article 73(2)(a) of the Staff Regulations, when there are children’.<sup>16</sup>

34. It seems to me that, in so doing, the General Court committed an error of law in its interpretation of the provisions applicable.

35. First, the second argument is not relevant to the determination of the competent court. In this instance, the list in Article 73(2) of the Staff Regulations serves not to determine the beneficiary of the right provided for in that provision but only as a *connecting factor* for the criterion determining jurisdiction laid down in Article 91(1) of the Staff Regulations. In that specific context, the fact that the deceased official has children does not mean that ascendants and descendants are not also ‘person[s] to whom [the] Staff Regulations apply’, to use the expression contained in Article 91(1) of those regulations.

12 — Judgment in *Johannes* (C-430/97, EU:C:1999:293, paragraph 19). My emphasis.

13 — See paragraph 17 of the Commission’s written observations.

14 — Paragraph 63 of the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625).

15 — Paragraph 64 of the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625).

16 — Paragraph 62 of the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625).

36. Secondly, the idea is not to ‘mak[e] the procedural implementation of the general law on the non-contractual liability of the Union subject to the procedural implementation of the specific law on social security of officials as provided for in the Staff Regulations’, but merely to determine the court that has jurisdiction to rule on a claim which, being linked to the liability of the Union, is not independent of the compensation provided for in the Staff Regulations.

37. Thus, in accordance with the case-law of the Court of Justice, an official must be able to obtain full compensation.<sup>17</sup> He therefore has the right ‘to seek *additional compensation where the institution is responsible for the accident according to general law and the benefits payable under the staff insurance scheme are insufficient to provide full compensation for the injury suffered*’.<sup>18</sup>

38. The term ‘general law’ as used in that judgment simply refers to the rules of non-contractual liability. It designates ‘that which is residually applicable to all cases not exempt’, that is to say ‘the general rule which, in the absence of a special text or specific derogation, must govern a type of case’.<sup>19</sup> In this instance, the law of non-contractual liability therefore constitutes the *general law* on damages, as opposed to the Staff Regulations, which are a ‘special text’ providing for a specific compensation scheme.

39. Contrary to what the General Court implies in paragraphs 54 to 58 of its judgment, in the judgment in *Leussink v Commission* (169/83 and 136/84, EU:C:1986:371), the Court of Justice simply recognised the right to additional compensation, but provided no basis on which to rest any argument as to the jurisdiction of the European Union Courts. In that case, the question of jurisdiction did not arise, since the judgment was given at a time when the Court of Justice was the only court in existence.

40. That said, although the Civil Service Tribunal did not yet exist at the time of the judgment in *Lucaccioni v Commission* (C-257/98 P, EU:C:1999:402), the rule of jurisdiction may be inferred from the arguments which the Court of Justice devotes to the relationship between compensation under a staff insurance scheme, on the one hand, and additional compensation payable under the ‘general law’ on non-contractual liability.

41. In that judgment, the Court held, first, that the system of flat-rate compensation provided for in Article 73 of the Staff Regulations and the system governed by Article 340 TFEU were not independent.<sup>20</sup> Next, it inferred from that premise and from the need for the official to obtain full compensation that the benefits received under Article 73 of the Staff Regulations must be taken into account by the competent court for the purposes of assessing the harm eligible for reparation in an action for damages brought by an official on the basis of a fault capable of rendering the institution by which he was employed liable.<sup>21</sup>

42. In other words, in accordance with the aforementioned case-law of the Court of Justice, which may be regarded as settled, it is not possible to ‘[deny] to the official and the members of his family the right to seek additional compensation where the institution is responsible for the accident according to general law and the benefits payable under the staff insurance scheme are insufficient to provide full compensation for the injury suffered’.<sup>22</sup>

17 — Judgment in *Lucaccioni v Commission* (C-257/98 P, EU:C:1999:402, paragraph 22).

18 — Judgment in *Leussink v Commission* (169/83 and 136/84, EU:C:1986:371, paragraph 13), my emphasis. See also *Lucaccioni v Commission* (C-257/98 P, EU:C:1999:402, paragraph 22).

19 — Cornu, G. (dir.), *Vocabulaire juridique*, Presses universitaires de France (PUF), 7<sup>th</sup> ed., 1988. The first definition is to be found under ‘commun’ (general) and the second under ‘principe’ (principle). In that dictionary, the entry for ‘droit commun’ (general law) refers to the definition of the word ‘commun’, which itself refers to the definition of ‘principe’. ‘General law’ may also be defined as ‘the rules normally applicable in private law’ (definition in *Lexique de termes juridiques*, Dalloz, 5<sup>th</sup> ed., 1981).

20 — Paragraph 21.

21 — Paragraph 23.

22 — Judgment in *Leussink v Commission* (169/83 and 136/84, EU:C:1986:371, paragraph 13), my emphasis.

43. Given that the benefit in question is ‘additional’ and the two compensation schemes are not independent, inasmuch as the benefits received under the Staff Regulations are to be taken into account in determining the harm eligible for reparation on the basis of Article 340 TFEU, the court with jurisdiction over the priority compensation<sup>23</sup> necessarily has jurisdiction over the additional compensation too.

44. I would point out in this regard that, in his Opinion in Joined Cases *Leussink v Commission* (169/83 and 136/84, EU:C:1986:265), Advocate General Slynn referred even then to ‘a *residual* power to award *further* sums in appropriate cases for damage suffered’.<sup>24</sup>

45. Since it is settled case-law that additional compensation is governed by the general law on non-contractual liability, the priority compensation is necessarily that provided for by the Staff Regulations.

46. That conclusion is reinforced by the fact that the EU legislature has since entrusted priority compensation to a *specialised court* within the meaning of Article 19 TEU whose jurisdiction depends on the capacity of the applicant (the latter having to be referred to in the Staff Regulations).

47. Furthermore, the rule of jurisdiction which I am advocating is not only logical but also in the interests of the procedural economy recognised by the Court of Justice in the order in *Commission v IAMA Consulting*.<sup>25</sup>

48. Just as, ‘in the Community system of legal remedies, jurisdiction to rule on an action in the main proceedings implies jurisdiction to rule on any counter-claim brought in the same proceedings which derives from the same act or the same fact as that forming the subject-matter of the application,’<sup>26</sup> the jurisdiction to rule on a priority claim implies jurisdiction to rule on any additional claim deriving from the same act or the same fact.

49. The fact that the claims raised in the present dispute are concerned only with additional benefits does nothing to alter that line of reasoning. After all, the competent court cannot vary depending on whether the action contains only a flat-rate claim (which I have classified as being a priority claim) or, conversely, only an additional claim, or indeed both. Indeed, the General Court implicitly recognises this, since it accepts that the claim made on behalf of the deceased official, although concerned only with the personal non-material damage caused to him, which, *not being covered by the Staff Regulations*, is governed by the law on non-contractual liability, none the less falls within the jurisdiction of the Civil Service Tribunal.<sup>27</sup>

50. In ruling that, ‘in circumstances such as those of the present case, the legal framework defined by Articles 268 TFEU and 270 TFEU, Article 1 of Annex I to the Statute of the Court of Justice and Articles 90 and 91 of the Staff Regulations, leads of itself to the inevitable conclusion that the close relatives of a deceased official are necessarily required to bring two actions, one before the Civil Service Tribunal and the other before this Court, depending on whether they have succeeded to the rights of the official in question or whether they claim reparation for material or non-material damage that is personal to them’,<sup>28</sup> the General Court committed an error of law in the interpretation and application of the provisions cited.

23 — Priority compensation contrasts with additional compensation. It is these two types of compensation which together guarantee full compensation. I prefer the term ‘priority compensation’ to ‘principal compensation’, since the latter suggests a distinction between the two types of compensation based on amount, which is unnecessary.

24 — My emphasis (ECR 2814). I should point out that that passage refers to the damage suffered by the official himself. Advocate General Slynn none the less regarded as equally admissible the action brought at the same time by the official’s spouse and children (ECR 2818).

25 — C-517/03, EU:C:2004:326.

26 — *Ibid.* (paragraph 17).

27 — Paragraph 65 of the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625).

28 — *Idem.*

51. In the light of the foregoing considerations, there is no need to examine the additional arguments which the General Court devotes to the means of resolving the need for separate proceedings which it felt bound to establish.

52. After all, since the arguments put forward in this regard by the General Court were based on a false premise, inasmuch as the Civil Service Tribunal has jurisdiction to hear and determine all the claims raised by the appellant, they are *ipso facto* vitiated by that error of law.

53. In accordance with Article 256(2) TFEU, it remains to be determined whether that error of law concerning the interpretation and application of Articles 268 TFEU and 270 TFEU, Article 1 of Annex I to the Statute of the Court of Justice and Article 91 of the Staff Regulations affects the unity or consistency of EU law.

## B – *The existence of an effect on the unity or consistency of EU law*

### 1. Assessment criteria

54. From the three review judgments delivered by the Court of Justice to date it is possible to identify four assessment criteria that are relevant to the determination of whether the unity or consistency of EU law is affected:

- the judgment of the General Court may constitute a precedent for future cases;<sup>29</sup>
- the General Court has departed from the established case-law of the Court of Justice;<sup>30</sup>
- the errors of the General Court relate to a concept that does not pertain solely to the law relating to the employment of European Union officials but is applicable regardless of the matter at issue;<sup>31</sup> and
- the rules or principles with which the General Court failed to comply occupy an important position in the European Union legal order.<sup>32</sup>

55. Those criteria, which may be considered ‘as a whole’,<sup>33</sup> are not cumulative and, therefore, do not necessarily all have to be met in order for it to be found that the unity or consistency of EU law is affected.<sup>34</sup> In its judgment in *Review of Commission v Strack*,<sup>35</sup> the Court of Justice itself held that fulfilment of the second and fourth of the criteria listed above was sufficient to constitute an effect on the unity and consistency of EU law.

29 — Judgments in *Review of M v EMEA* (C-197/09 RX-II, EU:C:2009:804, paragraph 62) and *Review of Arango Jaramillo and Others v BEI* (C-334/12 RX-II, EU:C:2013:134, paragraph 50).

30 — Judgments in *Review of M v EMEA* (C-197/09 RX-II, EU:C:2009:804, paragraph 63), and *Review of Arango Jaramillo and Others v BEI* (C-334/12 RX-II, EU:C:2013:134, paragraph 51).

31 — Judgments in *Review of M v EMEA* (C-197/09 RX-II, EU:C:2009:804, paragraph 64) and *Review of Arango Jaramillo and Others v BEI* (C-334/12 RX-II, EU:C:2013:134, paragraph 52).

32 — Judgments in *Review of M v EMEA* (C-197/09 RX-II, EU:C:2009:804, paragraph 65) and *Review of Arango Jaramillo and Others v BEI* (C-334/12 RX-II, EU:C:2013:134, paragraph 53).

33 — Judgment in *Review of M v EMEA* (C-197/09 RX-II, EU:C:2009:804, paragraph 66).

34 — ‘... the four considerations on which the Court of Justice based its finding that the infringement of the two procedural rules at issue in *M v EMEA*, had “affect[ed] the unity and consistency of [European Union] law” are neither minimal nor exhaustive’ (View of Advocate General Mengozzi in *Review of Arango Jaramillo and Others v BEI* (C-334/12 RX-II, EU:C:2012:733, point 70).

35 — C-579/12 RX-II, EU:C:2013:570.

## 2. Assessment

56. In its application and interpretation of the provisions of the Treaty, Annex I to the Statute of the Court of Justice and the Staff Regulations, the General Court disregarded the procedural consequences of the right for an official and the members of his family referred to in the Staff Regulations to seek additional compensation where the institution is liable for the accident under the general law on non-contractual liability and the benefits of the staff insurance scheme are not sufficient to provide full reparation for the damage suffered.

57. More specifically, the General Court did not correctly assess those consequences, in that it held that the close relatives of a deceased official were necessarily required to bring two actions, one before the Civil Service Tribunal and the other before the General Court, depending on whether they succeeded to the rights of the official at issue or sought reparation for damage, material or non-material, that was personal to them. It is my opinion that, in so doing, the General Court affected the unity and consistency of EU law, for the following three reasons:

a) The rules not complied with occupy an important position in the European Union legal order (fourth criterion set out above)

58. The provisions at issue are of particular importance in EU law.

59. As the Court of Justice had already pointed out in the judgment in *Review of M v EMEA*, this is particularly true of ‘the Statute of the Court of Justice and the Annex to the Statute[, which] form part of primary law’.<sup>36</sup>

60. In this instance, the error of law committed by the General Court concerns the interpretation and application of Articles 268 TFEU and 270 TFEU, Article 1 of Annex I to the Statute of the Court of Justice and Article 91 of the Staff Regulations.

61. Those rules not only form part of primary law (with the exception of Article 91 of the Staff Regulations) but, taken together, also help define the judicial architecture of the European Union by delimiting the jurisdiction of the Civil Service Tribunal and, by extension, the jurisdiction of the other courts.

62. The provisions that define that judicial architecture help to create a ‘judicial apparatus that is appropriate to the nature of the European Union, consistent, effective and available to all individuals’,<sup>37</sup> such an apparatus undoubtedly being one of the components of a State based on ‘the rule of law’, itself a fundamental value on which the European Union is based, in accordance with Article 2 TEU and the preamble to the Charter of Fundamental Rights of the European Union.<sup>38</sup>

36 — C-197/09 RX-II, EU:C:2009:804, paragraph 65.

37 — This is the definition of the objective which R. Cover assigned to the reorganisation of the architecture of the European Union judicial system following the Treaty of Nice (‘La réorganisation de l’architecture juridictionnelle de l’Union’, in Dony, M., and Bribosia, E. (ed.), *L’avenir du système juridictionnel de l’Union européenne*, Éditions de l’Université de Bruxelles, Brussels, 2002, pp. 33 to 48, in particular p. 35).

38 — Although this has no bearing on its importance, I would point out that the preamble to the Charter of Fundamental Rights of the European Union regards the rule of law not as a value but as a principle.

63. In this regard, although I took the view, when examining the error of law committed by the General Court, that there was no need to consider the additional arguments which the General Court devoted to the means of resolving the need for separate proceedings consequent upon the conclusion as to the division of powers at which it had arrived, I none the less consider that the rule on the prorogation of its own jurisdiction and the application of that rule in the appeal which it had before it also operate to affect the unity of EU law by aggravating the failure to have regard to the judicial structure of the European Union as conceived by the Treaties.

64. Those arguments, the rule on the prorogation of jurisdiction that flows from them and the inferences that the General Court drew from them for the purposes of the outcome of the appeal infringe rules which are of particular importance in the European Union legal order in that they define the division of powers between the European Union Courts and the specific mechanism of appeal.

b) The General Court departed from the established case-law of the Court of Justice (second criterion set out above)

65. In asserting the principle of separate proceedings, the General Court affected the consistency of EU law by departing from the established case-law of the Court of Justice.

66. As is clear from the case-law cited in my analysis of the extent of the jurisdiction exercised by the Civil Service Tribunal, once a claim for additional compensation ceases to be an administrative matter and becomes a contentious one, it follows not only that the flat-rate compensation scheme provided for in Article 73 of the Staff Regulations and the scheme governed by Article 340 TFEU are no longer independent,<sup>39</sup> but also that the jurisdiction of one court to rule on an action necessarily excludes the jurisdiction of the other.<sup>40</sup>

c) The judgment of the General Court could constitute a precedent for future cases (first criterion set out above)

67. For the sake of completeness, I would submit that the judgment of the General Court could also constitute a precedent for future cases in that it establishes a general rule of jurisdiction in its favour, to the detriment of the jurisdiction of the Civil Service Tribunal.

68. For all those reasons, it is my opinion that, by its judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625), the General Court affected the unity and consistency of EU law.

#### IV – Effects of the review

69. The first paragraph of Article 62b of the Statute of the Court of Justice provides that, if the Court of Justice finds that the decision of the General Court affects the unity or consistency of Community law, it is to refer the case back to the General Court, which is to be bound by the points of law decided by the Court of Justice. In referring the case back, the Court of Justice may also state which of the effects of the decision of the General Court are to be considered definitive in respect of the parties to the litigation. In exceptional cases, the Court of Justice can itself give final judgment if, having regard to the result of the review, the outcome of the proceedings flows from the findings of fact on which the decision of the General Court was based.

39 — Judgment in *Lucaccioni v Commission* (C-257/98 P, EU:C:1999:402, paragraph 21).

40 — Order in *Commission v IAMA Consulting* (C-517/03, EU:C:2004:326, paragraph 15).

70. The question of the effects of a review is never simple. It is still less so in the present case as a second dispute was brought before the General Court following the bringing of the appeal forming the subject of the General Court judgment under review (judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625) but which related to the consequences of the same material fact and some of the applicants in which were the same (Case T-494/11, *Missir Mamachi di Lusignano and Others v Commission*). Although that second case does not concern the review as such, I shall, in the interests of completeness, consider any procedural consequences that may flow from the second case.

#### A – *Effects of the review sensu stricto*

71. According to the Court of Justice, it follows from Article 62b of the Statute of the Court of Justice that the Court ‘cannot confine itself to finding that the unity or consistency of EU law is affected without stating the implications of that finding as regards the dispute in question’.<sup>41</sup>

72. It is therefore appropriate, first of all, to set aside the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625) in so far as the General Court found of its own motion that the Civil Service Tribunal does not have jurisdiction to hear and determine the claim for reparation for the personal damage, both material and non-material, caused to the appellant in person and to the children of Alessandro Missir Mamachi di Lusignano and decided to refer that aspect of the action back to itself in order to hear and determine it as a court of first instance.

73. It is also appropriate to set aside the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625) in so far as the General Court held that, in circumstances such as those of the present case, in which the children of a deceased official or servant claim compensation for various heads of damage caused by the same act, both in their capacity as heirs and successors and personally and *jure proprio*, they were free to join those claims by bringing a single action before the General Court.

74. It is necessary, secondly, to examine the adjudication to be given on the appellant’s appeal.

75. It should be stated in this regard that the appellant based his appeal on three grounds. The first ground concerned the error of law which the Civil Service Tribunal was said to have committed in upholding a plea of inadmissibility raised by the Commission and holding to be inadmissible the claim for compensation for the non-material damage suffered by Alessandro Missir Mamachi di Lusignano and his children. By his second ground of appeal, the appellant accused the Civil Service Tribunal of having limited the Commission’s share of liability for the harmful event to 40%. By the third ground of appeal, the appellant claimed finally that the Civil Service Tribunal had wrongly accepted that, in the light of the staff scheme benefits awarded to Alessandro Missir Mamachi di Lusignano’s children, the Commission had made full reparation for the damage suffered. Accordingly, the General Court confined its examination of the appeal to the sphere of jurisdiction which it had previously recognised as lying with the Civil Service Tribunal (that is to say the claim for compensation for the *ex haerede* non-material damage suffered by Alessandro Missir Mamachi di Lusignano), the other claims having been regarded as falling within its own jurisdiction.<sup>42</sup>

76. In that strictly defined framework, the first ground of appeal was upheld. This means that the judgment of the Civil Service Tribunal was set aside in so far as it upheld the first plea of inadmissibility raised by the Commission.<sup>43</sup>

41 — Judgments in *Review of Arango Jaramillo and others v BEI* (C-334/12 RX-II, EU:C:2013:134, paragraph 57), and *Review of Commission v Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 62).

42 — Paragraph 80 of the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625).

43 — Paragraph 98 of the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625).

77. Taking the view that the state of the proceedings permitted it to give judgment, the General Court, as so authorised by Article 13(1) of Annex I to the Statute of the Court of Justice, proceeded to analyse that first plea of inadmissibility itself and held it to be unfounded.

78. In the absence of any review in this regard, I consider that the quashing and analysis by the General Court of the plea of inadmissibility raised by the Commission before the Civil Service Tribunal must be regarded as being definitive.

79. Next, as regards the other pleas of inadmissibility raised by the Commission, the General Court took the view that the state of the proceedings did not permit it to give judgment.<sup>44</sup>

80. It considered, however, that referral of the case back to the Civil Service Tribunal was not justified in so far as that court would have no option but to decline jurisdiction in favour of the General Court, in accordance with the second paragraph of Article 8(3) of Annex I to the Statute of the Court of Justice (Case F-50/09, *Missir Mamachi di Lusignano v Commission*, and Case T-494/11, *Missir Mamachi di Lusignano and Others v Commission*, being, in its view, cases in which the same relief is sought).<sup>45</sup>

81. If the Court concurs with my analysis of the rules applicable, it will confirm the exclusive jurisdiction of the Civil Service Tribunal to rule on the action brought by the appellant in the main proceedings, in so far as he and the deceased official's children whom he is representing are 'person[s] to whom [the] Staff Regulations apply' within the meaning of Article 91(1) of those regulations.

82. In those circumstances, therefore, it will also be appropriate to set aside the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625) in so far as the General Court held that it was for it, as a court of first instance, to hear and determine the other pleas of non-admissibility raised by the Commission instead of referring that aspect of the case back to the Civil Service Tribunal.

83. Finally, I must address the question of the adjudication to be given on the second and third grounds of appeal raised by the appellant in support of his appeal before the General Court.

84. After all, in the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625) the General Court concludes that the judgment of the Civil Service Tribunal is to be set aside in its entirety, on the sole basis of a question of jurisdiction that it had raised of its own motion and the first ground of appeal, which alleged, in essence, that the Civil Service Tribunal had misapplied the procedural rule on correspondence between the administrative complaint and the contentious action. The other grounds of appeal were not therefore examined.

85. In contrast to the assertion made by Advocate General Kokott in Case C-579/12 RX-II, I am unfortunately unable to say that the examination of those grounds 'does not require either factual findings or additional legal discussions which might justify the case being referred back to the General Court'.<sup>46</sup>

86. Contrary to the last sentence of the first paragraph of Article 62b of the Statute of the Court of Justice, having regard to the result of the review, the outcome of the proceedings does not flow from the findings of fact on which the decision of the General Court was based.

44 — Paragraph 113 of the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625).

45 — Paragraphs 114 to 117 of the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625).

46 — View in Review of *Commission v Strack* (C-579/12 RX-II, EU:C:2013:573, point 79).

87. Despite the particularly painful circumstances surrounding the facts giving rise to this case and the time that has already elapsed since the action was brought, I am forced to propose that the Court refer the case back to the General Court. It is after all for that court, in its appellate jurisdiction, to rule on the second and third grounds of appeal raised by the appellant before itself referring the case back to the Civil Service Tribunal.

88. In accordance with the proposed interpretation of the procedural rules, the Civil Service Tribunal should in any event rule on the other pleas of inadmissibility raised by the Commission *ab initio*, in respect of which the General Court itself did not consider the state of the proceedings to be such as to permit it to give judgment.<sup>47</sup> It should also, if appropriate (in the event that the General Court finds an error of law or errors of law in the examination of the second or third grounds of appeal), review its judgment in the light of the two judgments which the General Court will have given in Case T-401/11 P.

89. None the less, I cannot disregard *Missir Mamachi di Lusignano and Others v Commission* (T-494/11).

*B – Impact, if any, of Missir Mamachi di Lusignano and Others v Commission (T-494/11)*

90. As I have already had occasion to indicate, following the bringing of the appeal that gave rise to the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625), the father of the deceased official and his children — that is to say the applicants in Case F-50/09 — brought, jointly with the mother, brother and sister of the deceased official, another action before the General Court with a view to obtaining compensation for the non-material damage caused by the death of Alessandro Missir Mamachi di Lusignano.

91. Under the rules of jurisdiction at which I have arrived, the General Court does not have jurisdiction to hear and determine claims brought by the children and parents of the deceased official, since the latter are persons to whom the Staff Regulations apply within the meaning of Article 91(1) of those regulations.

92. However, subject to a thorough examination of the application lodged in Case T-494/11, the claims brought by the father and children of the deceased official appear to be similar to the claims for reparation for non-material damage in Case F-50/09, as regards the merits of the application, the relief which it seeks and the act giving rise to it. They should therefore in any event be declared inadmissible on the ground of *lis pendens*.<sup>48</sup> The General Court should, moreover, declare that it does not have jurisdiction to hear and determine the claim brought by the mother of the deceased official, who is herself a ‘person to whom [the] Staff Regulations apply’.

93. On the other hand, the position is different in the case of the claims brought by the brother and sister of the deceased official. Since they are not ‘person[s] to whom [the] Staff Regulations apply’ within the meaning of Article 91(1) of those regulations, jurisdiction to hear and determine their action does indeed lie with the General Court.

47 — Paragraph 113 of the judgment in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625).

48 — On the conditions governing *lis pendens* and its consequences, see in particular the judgments in *Hoogovens Groep v Commission* (172/83 and 226/83, EU:C:1985:355, paragraph 9) and *Diezler and Others v CES* (146/85 et 431/85, EU:C:1987:457, paragraph 12), as well as the Opinion of Advocate General Trstenjak in Joined Cases *Comitato ‘Venezia vuole vivere’ and Others v Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2010:771, point 52). See also Lenaerts, K., Maselis, I., and Gutman, K., *EU Procedural Law*, Oxford University Press, 2014, No 25.44.

94. Although that dissociation of jurisdiction according to the applicant may be regrettable, it is not unprecedented in European Union litigation.<sup>49</sup>

95. However, in the specific set of circumstances at issue, when Case F-50/09 returns to the Civil Service Tribunal after the General Court has ruled on the second and third grounds of the appeal in Case T-401/11, the Civil Service Tribunal will have to refer the case back to the General Court, in accordance with the second subparagraph of Article 8(3) of Annex I to the Statute of the Court of Justice.

96. After all, that provision requires the Civil Service Tribunal to decline jurisdiction and refer the case with which it is seised to the General Court when the two courts are seised with cases in which the same relief is sought. Although the applicants are not the same (the deceased official's father (and mother) and children, on the one hand, and his brother and sister, on the other), I tend to the view that the relief sought in those cases is the same, since they both seek reparation for non-material damage suffered as a result of the death of the same close relative and on account of the same conduct on the part of the institution that 'employed' the victim.

97. It is a legal irony that, because two actions have been brought, it is indeed the General Court, therefore, that will have to hear and determine all of the claims pursued, in both Case F-50/09 and Case T-494/11.

## V – Costs

98. In accordance with Article 195(6) of the Rules of Procedure of the Court of Justice, where the decision of the General Court which is subject to review was given under Article 256(2) TFEU, the Court of Justice is to make a decision as to costs.

99. In the absence of any specific rules governing the allocation of costs in review proceedings, I propose, in the light of the objective nature of review proceedings (which are brought on the initiative of the First Advocate General and not one of the parties to the proceedings), that the parties which have lodged written observations with the Court of Justice on the questions forming the subject of the review bear their own costs in connection with these proceedings.

100. That solution is, moreover, consistent with the decision made by the Court of Justice in its first two review judgments, the difference in the case of the third review judgment being due to the conclusion to which the Court came in that case.<sup>50</sup>

49 — The Court of Justice and the General Court share between them, in particular, actions for annulment based on Article 263 TFEU depending on whether the action is brought by an individual or an institution, for example. Those two courts also share jurisdiction over actions for annulment brought by the Member States depending on which institution adopted the contested act (see in this regard Article 51 of the Statute of the Court of Justice).

50 — In the judgment in *Review of Commission v Strack* (C-579/12 RX-II, EU:C:2013:570), the Court took the view that it could itself examine the pleas raised by the Commission in support of its appeal. With regard to costs, the Court therefore held that, '[s]ince there are no specific rules governing orders for costs in the case of review proceedings and since the Commission, as a result of the setting aside of the judgment of the General Court of 8 November 2012 and the final dismissal of the appeal which it brought against the judgment in *Strack v Commission*, has been unsuccessful in its appeal, it must, in the present case, be ordered to pay the costs incurred by Mr Strack both in the course of the proceedings before the General Court and in the present review proceedings' (paragraph 71).

## VI – Conclusion

101. In the light of the foregoing, I propose that the Court should rule:

- (1) The judgment of the General Court of the European Union in *Missir Mamachi di Lusignano v Commission* (T-401/11 P, EU:T:2014:625) affects the unity and consistency of EU law, in so far as the General Court, in its appellate jurisdiction, held that the close relatives of a deceased official are necessarily required to bring two actions, one before the Civil Service Tribunal of the European Union, the other before the General Court of the European Union, depending on whether they are successors to the rights of the official in question or seek reparation for material or non-material damage that is personal to them.
- (2) The aforementioned judgment of the General Court of the European Union is set aside in so far as the General Court held of its own motion that the Civil Service Tribunal of the European Union does not have jurisdiction to hear and determine the claim for reparation for personal damage, both material and non-material, caused to the appellant in person and to the relatives of Alessandro Missir Mamachi di Lusignano and decided to refer that aspect of the action back to itself so that it might hear and determine it as a court of first instance.
- (3) The aforementioned judgment of the General Court of the European Union is set aside in so far as the General Court held that, in the circumstances of the present case, in which the close relatives of a deceased official of servant are claiming compensation for various heads of damage caused by one and the same act, both in their capacity as heirs and successors and personally and *jure proprio*, they were free to join those claims in a single action before the General Court of the European Union.
- (4) The aforementioned judgment of the General Court of the European Union is set aside in so far as the General Court held that it was for it, as court of first instance, to hear and determine the pleas of inadmissibility raised by the European Commission instead of referring that aspect of the case back to the Civil Service Tribunal of the European Union.
- (5) The case is otherwise referred back to the General Court of the European Union so that it may examine the second and third pleas raised by Livio Missir Mamachi di Lusignano in support of his appeal before referring the case back to the Civil Service Tribunal of the European Union so that that court may rule, at least, on those pleas of non-admissibility raised by the European Commission which have not yet been examined, or, in the event that the relief sought is the same as that sought in Case T-494/11, so that it may decline jurisdiction and refer the matter back to the General Court of the European Union.
- (6) Livio Missir Mamachi di Lusignano and the European Commission are to bear their own costs in connection with the review proceedings.