Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 7 April 2016 [1]

Case C-455/14 P

H
v
Council of the European Union

European Commission

(Appeal — Common Foreign and Security Policy — National expert seconded to the European Union Police Mission in Bosnia and Herzegovina — Decision to redeploy — Article 24(1) TEU — Article 275 TFEU — Jurisdiction of the Court of Justice of the European Union — Powers of national courts — Categories of CFSP acts — Notion of 'restrictive measures')

1. The Treaty of Lisbon has done away with the three-pillar structure of the European Union and brought the provisions on the Common Foreign and Security Policy ('the CFSP') within the general EU framework. This has not led, however, to a full 'communitarisation' of the CFSP, since that policy is still 'subject to specific rules and procedures'. [2]

2. One of the notable features of the special framework devised for the CSFP by the drafters of the Treaties is the limited powers granted to the Court of Justice of the European Union ('the CJEU'), in its capacity as institution of the Union, in that area. It is safe to say that, despite a relative broadening of its jurisdiction, the CJEU's exercise of judicial review with regard to CFSP matters arises only in exceptional circumstances. Nevertheless, the precise contours of that jurisdiction are not fully clear.

3. The present case offers to the Court of Justice ('the Court') one of the first opportunities to determine the scope of its jurisdiction with regard to the CFSP. The key issue in these proceedings is, in fact, whether the General Court had jurisdiction to hear an action for annulment directed against decisions taken by the Head of an EU mission established under the CFSP. The complexity and sensitivity of the issue at stake is also reflected in the fact that the positions defended by the three parties to these proceedings differ substantially. Interestingly, all those parties are of the view that the reasons given in the order under appeal are erroneous, although for different reasons.

1 — Original language: English.
2 — See Article 24(1)(2) TEU.

I – **Legal framework**

4. The European Union Police Mission ('EUPM') in Bosnia and Herzegovina was first set up by Council Joint Action 2002/210/CFSP of 11 March 2002[3] for a period of one year, and was subsequently prolonged several times, most recently by Council Decision 2009/906/CFSP of 8 December 2009 on EUPM in Bosnia and Herzegovina ('Decision 2009/906').[4] The relevant provisions of Decision 2009/906 are the following.

5. Article 5 ('Civilian Operation Commander'), states:

'1. The Civilian Planning and Conduct Capability (CPCC) Director shall be the Civilian Operation Commander for EUPM.

2. The Civilian Operation Commander, 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), shall exercise command and control of EUPM at the strategic level.

3. The Civilian Operation Commander shall ensure proper and effective implementation of the Council's decisions as well as the PSC's decisions, including by issuing instructions at the strategic level as required to the Head of Mission and providing him with advice and technical support.

4. All seconded staff shall remain under the full command of the national authorities of the seconding State or EU institution concerned. National authorities shall transfer Operational Control (OPCON) of their personnel, teams and units to the Civilian Operation Commander.'

6. Article 6 ('Head of Mission') provides:

'1. The Head of Mission shall assume responsibility for and exercise command and control of EUPM at theatre level.

2. The Head of Mission shall exercise command and control over personnel, teams and units from contributing States as assigned by the Civilian Operation Commander together with administrative and logistic responsibility including over assets, resources and information placed at the disposal of EUPM.

3. The Head of Mission shall issue instructions to all EUPM staff for the effective conduct of EUPM in theatre, assuming its coordination and day-to-day management, and following the instructions at the strategic level of the Civilian Operation Commander.

…

5. The Head of Mission shall be responsible for disciplinary control over the staff. For seconded staff, disciplinary action shall be exercised by the national or EU authority concerned.

…'

7. Article 7(2), in the relevant part, provides that 'EUPM shall consist primarily of staff seconded by Member States or EU institutions'.

3 — OJ 2002 L 70, p. 1.

4 — OJ 2009 L 322, p. 22.

8. Article 8(2) ('Status of the Mission and EUPM staff') reads:

'The State or EU institution having seconded a staff member shall be responsible for answering any claims linked to the secondment, from or concerning the staff member. The State or EU institution in question shall be responsible for bringing any action against the seconded person.'

9. Article 9 ('Chain of command') states:

'1. EUPM shall have a unified chain of command, as a crisis management operation.

2. Under the responsibility of the Council, the PSC shall exercise political control and strategic direction of EUPM.

3. The Civilian Operation Commander, under the political control and strategic direction of the PSC and the overall authority of the HR, shall be the commander of EUPM at the strategic level and, as such, shall issue instructions to the Head of Mission and provide him with advice and technical support.

4. The Civilian Operation Commander shall report to the Council through the HR.

5. The Head of Mission shall exercise command and control of EUPM at theatre level and shall be directly responsible to the Civilian Operation Commander.'

10. Lastly, Article 10 ('Political control and strategic direction') provides:

'1. The PSC shall exercise, under the responsibility of the Council, political control and strategic direction of EUPM. The Council hereby authorises the PSC to take the relevant decisions in accordance with the third paragraph of Article 38 of the [EU] Treaty. … The powers of decision with respect to the objectives and termination of EUPM shall remain vested in the Council.

2. The PSC shall report to the Council at regular intervals.

3. The PSC shall receive, on a regular basis and as required, reports by the Civilian Operation Commander and the Head of Mission on issues within their areas of responsibility.'

II – **Background to the proceedings**

11. The appellant in this case is H, an Italian magistrate who was seconded to the EUPM in Sarajevo by decree of the Italian Ministry of Justice of 16 October 2008, in order to perform the duties of 'Criminal Justice Unit Adviser' as of 14 November 2008. Her secondment was extended until 31 December 2009, in order for her to perform the duties of 'Chief Legal Officer', and then further extended until 31 December 2010.

12. By decision of 7 April 2010, signed by the Chief of Personnel of the EUPM, the appellant was redeployed for operational reasons to the post of 'Criminal Justice Adviser — Prosecutor' in the Banja Luka (Bosnia and Herzegovina) regional office, from 19 April 2010.

13. After receiving the decision of 7 April 2010, the appellant lodged a complaint with the Italian authorities, considering that decision to be unlawful for a number of reasons. By email of 15 April 2010, an official in the Permanent Representation of the Italian Republic to the European Union informed the appellant that the decision of 7 April 2010 had been suspended.

14. By decision of 30 April 2010, the Head of Mission replied to the appellant's complaint by confirming the decision of 7 April 2010 and explaining that he himself had taken it because of the need for prosecutorial advice in the Banja Luka office.

15. On 4 June 2010, the appellant brought an action against the EUPM before the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court, Lazio) for annulment of the decision of 7 April 2010 and compensation for the harm suffered.

III – **Procedure before the General Court and order under appeal**

16. By application lodged on 16 June 2010, the appellant brought an action for annulment of the decision of 7 April 2010 and, where necessary, of the decision of 30 April 2010 ('the contested decisions'). In addition, H asked the General Court to order the Council, the Commission and the EUPM to pay damages as compensation for the harm suffered.

17. By application lodged on 17 July 2010, the appellant requested the suspension of the contested decisions. By order of 22 July 2010, the President of the General Court rejected this request ('the order for interim measures'). [5]

18. By order delivered on 10 July 2014 ('the order under appeal'), [6] the General Court dismissed the action as inadmissible and ordered H to bear her own costs and those incurred by the Council and the Commission.

IV – **Procedure before the Court and forms of order sought**

19. By an appeal lodged on 19 September 2014, the appellant requests the Court to:

— set aside the order under appeal;

— refer the case back to the General Court;

— order the defendants at first instance to pay the costs.

20. The Council submits that the Court should:

— dismiss the appeal;

— replace the legal arguments of the General Court relating to the delegation of powers;

— order the appellant to pay the costs.

21. The Commission submits that the Court should:

— set aside the order under appeal;

— dismiss the application as inadmissible;

— in the alternative, dismiss the application as inadmissible insofar as it is addressed to the Commission, and refer the case back to the General Court for a judgment as to the remainder;

5 — Order in *H* v *Council and Others*, T-271/10 R, EU:T:2010:315.

6 — Order in *H* v *Council and Others*, T-271/10, EU:T:2014:702.

— order the appellant to pay the costs.

22. H, the Council and the Commission presented oral argument at the hearing held on 18 January 2016.

V – **Assessment of the grounds of appeal**

A –*The first ground of appeal*

1. Arguments of the parties

23. By her first ground of appeal, the appellant claims that, by dismissing her action as inadmissible without holding a hearing, the General Court infringed her rights of defence and Article 114 of the Rules of Procedure of the General Court ('the Rules of Procedure').

24. The Council and the Commission request the Court to dismiss this ground of appeal.

2. Analysis

25. I too believe that this ground of appeal is ill founded.

26. Article 114 of the Rules of Procedure does not oblige the General Court to hold a hearing where a party applies for a decision on the admissibility of an action without going into the substance of the case. According to the third paragraph of that provision 'the remainder of the proceedings on the plea of inadmissibility are to be oral *unless the Court decides otherwise*'.[7] It therefore expressly provides that the General Court may, in those cases, rule without an oral hearing.

27. The Court has on numerous occasions confirmed that Article 114 of the Rules of Procedure does not give the parties a right to an oral hearing before the General Court,[8] and that the parties' rights of defence are not infringed by the mere fact that the General Court rules on a case without holding an oral hearing.[9] In the present proceedings, the appellant has not offered any evidence in support of the alleged breach of her rights of defence.

28. In that context, it is scarcely necessary to point out that, contrary to what the appellant argues, the order for interim measures does not amount to recognising the General Court's jurisdiction to hear the case. Indeed, in that order, the President of the General Court considered it unnecessary to rule on the issue of the admissibility of the action.[10]

29. That being so, the General Court was entitled to rule that it had sufficient information to proceed with the case without an oral hearing. The first ground of appeal should, therefore, be dismissed.

7 — Emphasis added.

8 — See, among others, order in *Regione Puglia* v *Commission*, C-586/11 P, EU:C:2013:459, paragraph 19.

9 — See to that effect, judgment in *Regione Siciliana* v *Commission*, C-417/04 P, EU:C:2006:282, paragraphs 35 and 37.

10 — Order in *H* v *Council and Others*, T-271/10 R, EU:T:2010:315, paragraph 26.

B – *The second ground of appeal*

1. Argument of the parties

30. The second ground of appeal is directed against points 29 to 48 of the order under appeal in which the General Court considered that, in the light of Articles 24(1) TEU and 275 TFEU, it lacked jurisdiction to hear the action. The General Court took the view that the appellant's situation did not fall under one of the exceptions to the general rule that EU Courts do not have jurisdiction in CFSP matters. The General Court considered that the contested decisions were adopted by the Head of Mission pursuant to powers that had been delegated to him by the Italian authorities. It thus concluded that it was for Italian courts to review the legality of the contested decisions and to hear the action for damages. It finally added that, should the Italian court having jurisdiction consider the contested decisions unlawful, it could make that finding and draw the necessary conclusions, even with respect to the very existence of those decisions.

31. The appellant criticises those findings mainly for two reasons. First, she submits that the CJEU's jurisdiction is excluded only with regard to acts adopted for the purposes referred to in Article 25 TEU, in accordance with the procedures set out in Article 31 TEU. A decision on the redeployment of a member of staff would be a mere administrative decision and not a CFSP act for the purposes of Articles 24(1) TEU and 275 TFEU. Second, the appellant argues that the concept of 'restrictive measures' in Article 275 TFEU encompasses all EU acts which adversely affect the interests of individuals, including the contested decisions. This position is supported, in her view, by the judgment of the General Court in *Sogelma*.[11]

32. The Council considers those arguments unfounded: the General Court was correct in declining jurisdiction. However, the Council is of the view that the statement of reasons in the order under appeal does contain two legal errors. First, in deciding to relocate H, the Head of Mission did not exercise powers delegated to him by the Member State of origin, but by the competent EU institution (the Council itself). Second, the national court hearing the case does not have the power to annul the act challenged. Nevertheless, those errors do not — in the opinion of the Council — invalidate the conclusion reached by the General Court.

33. The Commission, for its part, agrees with some of the criticism levelled by the appellant against the order under appeal, despite considering the action inadmissible. In the Commission's view, the jurisdiction granted to the CJEU to review CFSP acts is not as limited as the General Court has held. The Commission considers that Articles 24(1) TEU and 275 TFEU should be read as excluding the jurisdiction of the CJEU only with regard to CFSP acts which are an expression of sovereign foreign policy ('*actes de Gouvernement*'), and not acts merely implementing that policy. In the alternative, the Commission takes the view that Articles 24(1) TEU and 275 TFEU exclude the CJEU's review of alleged breaches of CSFP provisions alone, but not of alleged breaches of other EU provisions. Thus, the CJEU would be empowered to review the lawfulness of acts adopted in the framework of the CFSP when the alleged invalidity stems from a possible infringement of non-CFSP provisions. Nonetheless, the present appeal is, according to the Commission, inadmissible for the following reasons: first, the contested decisions cannot be considered mere acts of implementation, since they are of an operational nature; second, the grounds for annulment submitted by the appellant at first instance either required the General Court to interpret Decision 2009/906 (for which that court lacked jurisdiction) or had to be directed against the Italian authorities (and thus submitted in the context of an action lodged before the Italian courts).

11 — Judgment in *Sogelma* v *EAR*, T-411/06, EU:T:2008:419.

2. Assessment

34. In order to assess the merit of the arguments put forward by the appellant, I find it useful to place them first in their proper legal context. To that end, I shall briefly illustrate some key aspects of the system of judicial review of CFSP matters established with the Treaty of Lisbon. I shall subsequently deal with each of those arguments, before drawing the appropriate conclusions as regards the alleged errors in the order under appeal.

a) Introduction: on the CJEU's jurisdiction in CFSP matters

35. According to settled case-law, the Treaties have established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of EU acts, and have entrusted such review to the CJEU. As a result, natural or legal persons who cannot, by reason of the conditions of admissibility stated in Article 263(4) TFEU, directly challenge EU acts of general application are protected against those acts being applied to them. Where responsibility for the implementation of those acts lies with the EU institutions, those persons are entitled to bring a direct action before the EU Courts against the implementing measures under the conditions stated in Article 263(4) TFEU, and to plead, pursuant to Article 277 TFEU, in support of that action, the illegality of the general act at issue. Where that implementation is, conversely, a matter for the Member States, such persons may plead the invalidity of the EU act at issue before the national courts and cause the latter to request a preliminary ruling from the Court, pursuant to Article 267 TFEU. [12]

36. These principles are, however, not fully applicable as regards EU acts adopted in the field of the CFSP. In point of fact, Articles 24(1) TEU and 275 TFEU state, in essence, that the CJEU is not to have jurisdiction with respect to the provisions relating to the CFSP or acts adopted on the basis of those provisions, save for in two specific situations. First, the CJEU may monitor compliance with Article 40 TEU which establishes a mutual non-encroachment rule between the CFSP and the other EU competences. Second, the CJEU has jurisdiction to rule in actions for annulment lodged by natural or legal persons against decisions providing for 'restrictive measures' adopted by the Council under the CFSP.

37. To my mind, it has to be acknowledged that, in the field of the CFSP, the Union has the power to adopt acts that are legally binding not only on its institutions, but also on the Member States. The wording of Articles 24(3) [13] and 31(1) [14] TEU is particularly informative in that regard. On the other hand, the Union is not meant, in the field of the CFSP, to adopt acts that lay down general abstract rules creating rights and obligations for individuals. [15]

38. That explains why, in essence, the CFSP has been conceived, since its creation with the Treaty of Maastricht, as a set of rules which I would define as *lex imperfecta*, [16] and that from a double angle.

12 — See judgment in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 92 and 93 and the case-law cited.

13 — This provision, in the relevant part, reads: 'The Member States shall support the Union's external and security policy *actively and unreservedly* in a spirit of loyalty and mutual solidarity and *shall comply* with the Union's action in this area … They *shall refrain* from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council and the High Representative *shall ensure compliance* with these principles' (emphasis added).

14 — That provision reads: 'When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. *In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union*. In a spirit of mutual solidarity, the Member State concerned *shall refrain* from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position' (emphasis added).

15 — That is how I understand the prohibition for the Union to adopt 'legislative acts' in the field of the CFSP, stated in Articles 24(1) and 31(1) TEU.

16 — This is an ancient term, deriving from Roman law, generally used to describe a law that imposes a duty or prohibits a behaviour but does not provide for any penalty for its infringement.

39. In the first place, no judicial procedure for enforcement and penalties in case of breaches is expressly provided for in the Treaties. Accordingly, there is hardly any way to ensure compliance with those rules by recalcitrant Member States [17] or by non-conforming EU institutions. [18]

40. In the second place, only limited remedies are available to individuals whose rights may be breached by acts adopted in the framework of the CFSP. Indeed, access to the CJEU — either directly by means of direct actions, or indirectly through references for preliminary rulings — is severely limited.

41. In that regard, it is to be noted that individuals can obtain certain forms of protection by having recourse to the judicial procedures available before their domestic courts. Indeed, according to settled case-law, the principle of effective judicial protection is a general principle of EU law which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union. [19] Importantly, Article 19(1) TEU states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. [20] In turn, Article 274 TFEU provides that 'save where jurisdiction is conferred on the [CJEU] by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States'.

42. As the Court has repeatedly stated, national courts, in collaboration with the CJEU, fulfil a duty entrusted to them too of ensuring that in the interpretation and application of the Treaties the law is observed. [21] Member States are thus to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. [22]

43. There being no EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. The procedural rules governing such actions before national courts must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). [23]

44. Notwithstanding the above, it is clear to me that the powers conferred upon national courts, in cases where the CJEU has no jurisdiction under the Treaties, are necessarily limited. I will explain this in detail in points 101 to 103 of this Opinion.

17 — I believe that it may be reasonable to take the view that the procedures set out in Article 7 TEU for serious breaches of the EU values should be applicable with regard to Member States' actions (or inaction) also in the framework of the CFSP. On the other hand, infringement proceedings under Articles 258 to 260 TFEU seem to be altogether excluded for simple breaches of CFSP rules. Nonetheless, it has been suggested that those proceedings might be available when a systematic and enduring infringement of CFSP rules (alongside, possibly, an infringement of other EU rules) might amount to a breach of the general provisions on EU external action, or of the principle of sincere cooperation enshrined in Article 4(3) TEU and which is of special significance in the CFSP (see, in particular, Article 24(3) TEU). See, for example, Hillion, C., 'A powerless court? The European Court of Justice and the Common Foreign and Security Policy', *The ECJ and External Relations: Constitutional Challenges*, Hart Publishing, Oxford, 2014, pp. 24 to 28. This issue need not, however, be addressed in the present case.

18 — For example, there seems to be no procedure to review whether the institutions' actions (or inaction) in the field of the CFSP is compliant with the provisions of Chapter 2, Title V, of the TEU.

19 — See, judgment in *Unibet*, C-432/05, EU:C:2007:163, paragraph 37 and the case-law cited.

20 — According to Articles 4(1) and 5(2) TEU, competences not conferred upon the Union remain with the Member States. Accordingly, national courts ought to retain jurisdiction where the drafters of the Treaties did not grant jurisdiction to the CJEU. See Opinion of Advocate General Mengozzi in *Gestoras Pro Amnistía and Others* v *Council* (C-354/04 P, EU:C:2006:667), point 104; and View of Advocate General Kokott in Opinion procedure 2/13, EU:C:2014:2475, point 96.

21 — Opinion 1/09, EU:C:2011:123, paragraph 69 and the case-law cited.

22 — Judgment in *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraph 49 and the case-law cited.

23 — Judgment in *Unibet*, C-432/05, EU:C:2007:163, paragraphs 39 and 43 and the case-law cited.

45. The nature of *lex imperfecta* of the CFSP set of rules is clearly a legacy of the *sui generis* nature of the second pillar created with the Treaty of Maastricht: a hybrid system which amalgamated features of the (then) Community law and public international law. [24] The absence of a binding dispute resolution mechanism of a judicial nature is obviously a feature which belongs to the intergovernmental side of the CFSP. Besides, in most (if not all) EU Member States, national courts traditionally practise certain forms of restraint when it comes to the justiciability of acts of the State in the sphere of foreign policy. [25]

46. However, the CFSP is now part and parcel of the EU legal order, even if it retains certain particular features. As a consequence, the usual mechanisms of enforcement and sanctioning which exist in the framework of public international law cannot be applicable to it.

47. First, unlike States acting under the rules of public international law, EU Member States cannot freely choose how they wish to settle a dispute which has arisen between them. [26] The terms of Article 344 TFEU are unambiguous on this point [27] and the Court's recent case-law confirms a rather rigorous interpretation of that provision. [28] Therefore, in spite of the limited jurisdiction conferred upon the CJEU (and the national courts) in the area of the CFSP, no other judicial body can be given the exclusive task, in this field, of ensuring that 'in the interpretation and application of the Treaties the law is observed'. [29]

48. Second, no form of retaliation or any other State-imposed penalty is acceptable in the EU system, [30] including in the CFSP field. As the Court has held, a Member State may in no circumstances unilaterally adopt, on its own authority, corrective or protective measures 'designed to prevent any failure on the part of another Member State to comply with the rules laid down by the Treaty', [31] or 'designed to obviate any breach by an institution of rules of [EU] law'. [32]

49. Those considerations highlight still more the limitations inherent in the system of judicial review established by the Treaties with regard to the CFSP. Whether such a system is compatible with the principle that the EU is founded on the rule of law is, in the context of the present proceedings, of no relevance. That system is, in fact, the result of a conscious choice made by the drafters of the Treaties, which decided not to grant the CJEU general and absolute jurisdiction over the whole of the EU Treaties. The Court may not, accordingly, interpret the rules set out in the Treaties to widen its jurisdiction beyond the letter of those rules or to create new remedies not provided therein. [33] As any other EU institution, the Court too has to observe the principle of conferral of powers. In particular, pursuant to Article 13(2) TEU, the Court is to 'act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'. Therefore, it is for the Member States, if necessary, to reform the system currently in force, in accordance with Article 48 TEU. [34]

24 — See judgment in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 202.

25 — See, generally, Crawford, J., *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, Oxford, 2008, pp. 88 and 103 et seq.

26 — Regarding public international law, see the Permanent Court of International Justice, Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23), at 27. See also Shaw, M.N., *International Law*, 6th ed., Cambridge University Press, Cambridge, 2008, p. 1014.

27 — That provision reads: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'.

28 — See, in particular, Opinion 2/13, EU:C:2014:2454, paragraphs 201 to 214.

29 — See Article 19(1) TEU.

30 — See, to that effect, Opinion of Advocate General Léger in *Hedley Lomas*, C-5/94, EU:C:1995:193, point 27.

31 — Judgment in *Commission* v *France*, 232/78, EU:C:1979:215, paragraph 9.

32 — Judgment in *Commission* v *Greece*, C-45/07, EU:C:2009:81, paragraph 26.

33 — See, to that effect, judgment in *Unión de Pequeños Agricultores* v *Council*, C-50/00 P, EU:C:2002:462, paragraph 44.

34 — Judgment in *Unión de Pequeños Agricultores* v *Council*, C-50/00 P, EU:C:2002:462, paragraph 45.

50. That said, the jurisdiction granted by the Treaties to the CJEU in this field, albeit limited, should not be overlooked. In that regard, the Court has stated that the provisions excluding its jurisdiction to rule on the validity and interpretation of EU acts are exceptions and, as such, should be interpreted narrowly. [35] Accordingly, the Court has accepted jurisdiction with regard to acts that, despite being adopted in the context of the CFSP, were based on horizontal or non-CFSP legal bases, either substantive [36] or procedural. [37] Furthermore, the CJEU is empowered to check, on the one hand, whether a CSFP act should have been adopted on the basis of a non-CFSP provision [38] and, on the other hand, whether a CFSP act on which its jurisdiction appears excluded should have, because of its nature, scope and effects, been adopted in the form of a CFSP act on which, exceptionally, it does have jurisdiction. [39]

51. It is against that background that I shall now assess the various arguments, put forward in the context of the appellant's second ground of appeal, in support of her contention that the General Court had jurisdiction to hear her action.

b) First part: on the provisions and acts excluded from the CJEU's jurisdiction

52. The first part of the second ground of appeal raises an issue of a constitutional nature, which concerns the boundaries of the area of law where the CJEU's jurisdiction is excluded. The main question could be framed as follows: does the exclusion from the CJEU's jurisdiction cover, in principle, all CFSP acts or only certain categories of CFSP acts?

53. On this issue, I agree with the Council that, save for specific exceptions expressly provided for in the Treaties, the CJEU has no jurisdiction to hear actions which concern CFSP acts.

54. At the outset, I must emphasise that Article 24(1) TEU is one of the central provisions as regards the CFSP. In fact, it follows the provision which opens Chapter 2 ('Specific provisions on the common foreign and security policy'), Section 1 ('Common provisions') of Title V of the TEU. Whereas Article 23 TEU defines the CFSP objectives, Article 24 TEU sets out the scope of the CFSP, its basic institutional framework, and the guiding principles.

55. In particular, Article 24(1) TEU starts off by defining the scope of the CFSP: it covers 'all areas of foreign policy and all questions relating to the Union's security'. It then lays down the basic institutional framework, making it clear that the CFSP is 'subject to specific rules and procedures', and outlining the key roles played in this field by the European Council, the Council and the High Representative. Finally, Article 24(1) TEU states that, subject to certain exceptions, the CJEU 'shall not have jurisdiction with respect to these provisions'.

56. Accordingly, when read in context, the term 'these provisions' cannot but refer to all the provisions laid down in the TEU for the CFSP: that is, the whole of Chapter 2 of Title V of the TEU. This interpretation is also borne out by the text of Article 275 TFEU which expressly excludes the CJEU's jurisdiction with respect to the provisions relating to the CFSP.

57. Therefore, neither a literal nor a systematic reading of the relevant Treaty provisions supports the arguments put forward by the appellant and the Commission, which suggest distinguishing between different categories of CFSP acts, depending on their nature and content.

35 — See, to that effect, judgments in *Segi and Others* v *Council*, C-355/04 P, EU:C:2007:116, paragraph 53; and *Gestoras Pro Amnistía and Others* v *Council*, C-354/04 P, EU:C:2007:115, paragraph 53.

36 — Judgment in *Elitaliana* v *Eulex Kosovo*, C-439/13 P, EU:C:2015:753, paragraphs 41 to 50.

37 — Judgment in *Parliament* v *Council*, C-658/11, EU:C:2014:2025, paragraphs 69 to 74.

38 — Article 40 TEU.

39 — See, to that effect and by analogy, judgments in *Segi and Others* v *Council*, C-355/04 P, EU:C:2007:116; and *Gestoras Pro Amnistía and Others* v *Council*, C-354/04 P, EU:C:2007:115.

58. More specifically, as concerns the appellant's arguments, I observe that Chapter 2 of Title V of the TEU includes not only, on the one hand, provisions such as Articles 25 and 31 TEU which concern the adoption of the main policy decisions in this field by the European Council and the Council; but also, on the other hand, provisions that regulate the adoption, through different procedures, of a variety of acts (of an executive, operational or implementational nature) by other bodies: namely, the High Representative,[40] the Member States[41] and the PSC.[42] Moreover, the CJEU's jurisdiction must also be considered excluded with regard to CFSP acts issued by any other EU body, established on the basis of CFSP provisions, to which the institutions and bodies referred to in Chapter 2 of Title V of the TEU may have delegated statutory powers. Article 275 TFEU, in fact, adds that the CJEU has no jurisdiction with respect to 'acts adopted on the basis of the [CFSP] provisions'.

59. In any event, it seems to me that most of the acts envisaged in Chapter 2, Title V, of the TEU could be regarded as 'administrative', if by that is meant that they regulate the conduct of the EU or national administrations. As mentioned above, the Union lacks the power to adopt legislative acts in this field and, consequently, the CFSP provisions are necessarily concerned with the dos and don'ts of those administrations. By its very nature, the CFSP appears to be an operational policy: one by means of which the Union pursues its (broadly defined) objectives through a set of (broadly defined) actions, mainly of an executive and political nature. The broad interpretation of the concept of 'administrative act' advocated by the appellant would, however, reduce the scope of the exceptions laid down in Articles 24(1) TEU and 275 TFEU to such an extent that it would hardly be reconcilable with the broad formulation of those provisions.

60. As regards, next, the arguments put forward by the Commission, I must state that I do not find convincing the proposed distinction between acts of sovereign foreign policy (or *actes de gouvernement*) and acts of implementation.

61. To begin with, in the absence of any reference in the Treaties or in the relevant case-law of the CJEU, and failing any detailed explanation from the Commission, it is not entirely clear to me how those two concepts should be understood. Indeed, even when asked to elaborate on this issue at the hearing, the Commission was at pains to provide some criteria or principles which could be used to distinguish between those two categories of acts. The Commission also seemed to struggle with the request to provide concrete examples of acts of implementation, adopted in a context similar to that of the present proceedings, and which do not involve any genuine foreign policy element.

62. Be that as it may, I must point out that there are several provisions in Chapter 2, Title V, of the TEU which constitute the legal basis for the adoption of acts of implementation.[43] I have the impression that, given the nature and functioning of the CFSP,[44] those acts may often be of great political significance and sensitivity. More generally, even when dealing with aspects of an executive or organisational nature, acts of implementation seem an integral component of the CFSP action in the context of which they are adopted. I find it difficult to determine the administrative element of the act without taking into account the underlying foreign policy objective pursued.

40 — See, in particular, Articles 27 and 34(4) TEU.

41 — See especially Articles 24(3), 28(2) to (5), 32, 34 and 35 TEU.

42 — See Article 38 TEU.

43 — See, notably, the provisions referred to above in footnotes 40 to 42.

44 — Supra, point 59 of this Opinion.

63. The Commission, however, argues that the exclusion from the CJEU's jurisdiction of acts of sovereign foreign policy alone corresponds to the intention of the drafters of the Treaties. Nevertheless, as the Council points out, the Commission does not offer any evidence to corroborate its assertion. Actually, the drafting history of the Treaty of Lisbon does not seem to support the restrictive interpretation of Articles 24(1) TEU and 275 TFEU suggested by the Commission. [45]

64. To my mind, had the drafters of the Treaties had the intention of introducing an exception of a more limited scope to the CJEU's jurisdiction — essentially confining it to the acts of sovereign foreign policy — they would have drafted Articles 24(1) TEU and 275 TFEU differently. Indeed, the broad formulation of those provisions stands in stark contrast to the more limited wording of Article 276 TFEU which provides for an exception to the CJEU's jurisdiction with regard to the area of freedom, security and justice. [46]

65. At this juncture, I believe that the alternative interpretation of Articles 24(1) TEU and 275 TFEU proposed by the Commission should also be addressed. The Commission suggests that those provisions may be interpreted as limiting the CJEU's jurisdiction not with regard to acts of a certain nature and content, but only with regard to certain *pleas* submitted to the CJEU. In other words, they would bar the CJEU from interpreting provisions relating to the CFSP, but arguably they would not prevent the CJEU from reviewing the legality of an act of the EU (including where adopted in the context of the CFSP) when the grounds of invalidity invoked relate to non-CFSP provisions.

66. I find this alternative interpretation of Articles 24(1) TEU and 275 TFEU unpersuasive too. Again, the Commission appears to disregard the very wording of those provisions and their broad formulation. As stressed above, Article 275 TFEU excludes the CJEU's jurisdiction with respect to 'acts adopted on the basis of the [CFSP] provisions'. Therefore, unless one of the exceptions expressly mentioned therein applies, the CJEU has no power to interpret or review the validity of an act adopted on the basis of CFSP provisions, regardless of the alleged grounds of invalidity. Accordingly, I see no textual basis for a distinction based on the nature of the pleas, as proposed by the Commission.

67. That does not mean, however, that the validity of CFSP acts may never be reviewed when they enter into conflict with non-CFSP rules. Indeed, the CJEU is competent to monitor compliance with the mutual non-encroachment clause laid down in Article 40 TEU. [47]

68. Before the Treaty of Lisbon entered into force, the Court repeatedly stated that the former Article 47 EU gave the EU judicature the powers to ensure that acts which had been adopted in the framework of the CFSP did not encroach upon the powers conferred by the EC Treaty upon the Community. [48] With the Treaty of Lisbon, that provision has been repealed and replaced, in substance, by Article 40 TEU. Despite the not insignificant amendments made to that provision, it seems to me that the heart of that case-law remains valid: [49] the CJEU may check whether CFSP acts ought to have

45 — See especially Convention documents CONV 734/03, *Articles on the Court of Justice and the High Court*; and CONV 689/1/03 REV1, *Supplementary report on the question of judicial control relating to the common foreign and security policy*. These documents concern the drafting of Article III-282 of the draft Treaty establishing a Constitution for Europe which is, in substance, equivalent to current Article 275 TFEU. On this issue, see View of Advocate General Kokott in Opinion procedure 2/13, EU:C:2014:2475, point 90.

46 — That provision reads: '*In exercising its powers regarding the provisions …* relating to the area of freedom, security and justice, the [CJEU] *shall have no jurisdiction to review the validity or proportionality* of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security' (emphasis added).

47 — That provision reads: 'The implementation of the [CFSP] shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the [TFEU]. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under [the Chapter relating to the CFSP].'

48 — See judgment in *Commission* v *Council* ('ECOWAS'), C-91/05, EU:C:2008:288, paragraph 33 and the case-law cited.

49 — Conversely, it is debatable whether the presumption according to which the non-CFSP provisions must generally prevail in case of conflict with CFSP provisions is still good law. That is, however, irrelevant in the present proceedings.

been adopted on the basis of provisions of the Treaties which concern other policies. The CJEU is, thus, to apply a 'centre of gravity' test in order to determine the appropriate legal basis of an act adopted in the context of the CFSP, but which allegedly was to be adopted on the basis of a non-CFSP substantive provision. [50]

69. Moreover, at the risk of allowing the scope and significance of Article 40 TEU to be severely reduced, it seems to me that the CJEU should also be competent to verify that a CFSP act does not surreptitiously amend an act adopted on the basis of non-CFSP provisions. If it were to do that, clearly the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of other Union competences would be affected. [51]

70. In that regard, I would point out that the Court has, so far, not yet taken a definitive position on whether an EU act may have dual or multiple substantive legal bases combining CFSP and non-CFSP provisions. [52] It would seem to me that, at least in most cases, a CFSP provision and a non-CFSP provision would not be compatible, as the procedures provided for their adoption are too different to be reconciled. In those circumstances, a CFSP act which includes non-CFSP components which are not ancillary to the main CFSP component, or which may produce effects on other areas of EU law which are not merely incidental, is arguably unlawful since two separate acts should have been adopted in its place.

71. Thus, Article 40 TEU, when properly construed, permits the CJEU to review *certain* pleas alleging the invalidity of a CFSP act because of a possible conflict with non-CFSP acts or provisions. [53] But the general rule that, save where this is explicitly authorised, the CJEU lacks jurisdiction in the field of CFSP may not be overlooked. I do not believe that Articles 24(1) TEU and 275 TFEU can be interpreted as allowing any alleged infringement of a non-CFSP provision by a CFSP act to be heard by the CJEU.

72. In conclusion, I see no basis in the Treaties for operating a distinction between different categories of CFSP acts, according to whether, depending on their nature or content, they do or do not fall within the CJEU's jurisdiction. Nor can I see any basis in the argument that CFSP acts could be reviewed by the CJEU every time there may be a breach of a non-CFSP provision.

c) Second part: on the concept of 'restrictive measures'

73. The second part of the second ground of appeal raises another important issue, which concerns the concept of 'restrictive measures' under Article 275 TFEU.

74. I do not believe that the concept of 'restrictive measures', although nowhere expressly defined in the Treaties, may, as the applicant suggests, be considered to cover all EU acts which adversely affect the interests of individuals. A textual, systematic and historical interpretation of Article 275 TFEU, in fact, reveals that concept to be of more limited scope.

75. The term 'restrictive measures' can also be found in Article 215 TFEU which, in paragraph 2, refers precisely to such measures being adopted 'against natural or legal persons and groups or non-State entities'. Importantly, both Article 215 TFEU and Article 275 TFEU make reference to EU decisions adopted under the CFSP rules. The two provisions obviously refer to the same category of measures.

50 — Arguably, the Court is now empowered to also check the reverse situation: whether an act that was adopted in the context of a non-CFSP policy should have been adopted on the basis of a CFSP provision.

51 — That would particularly be the case, were the Union to adopt, in violation of the prohibition laid down in Articles 24(1) and 31(1) TEU, acts which, because of their effects, are in substance of a legislative nature and may affect other EU policies.

52 — That issue has arisen in *Parliament* v *Council*, C-263/14, currently pending.

53 — However, as the Commission states in its written observations, Article 40 TEU is not applicable in the present proceedings. In fact, the applicant has not invoked that provision either.

76. These measures are, in all evidence, those commonly referred to as 'sanctions'. They are instruments belonging to the area of the EU's external action which are adopted as a reaction to the conduct of a country, entity or individual which the EU considers unlawful. That may be the case, for example, of a breach of an international agreement to which the EU is party or of a breach of customary rules of public international law. It may also be the case of a conduct which threatens international peace or security. Over the past years, sanctions have been imposed, among others, on countries responsible for repeated violations of fundamental rights, or entities and individuals linked to terrorist organisations.

77. The nature of those measures is akin to that of a penalty: restraining the exercise of certain rights which the target would otherwise enjoy. Their purpose is primarily to induce or force the author of the reprehensible conduct to stop or alter that conduct. [54]

78. Against that background, the concept of 'restrictive measures' is relatively broad: it includes financial and economic sanctions (such as freezing of assets or limitations on investments), travel measures (inter alia, travel or entry bans), trade measures (such as total embargoes, restrictions on the import or exports of certain goods or services, suspension or denunciation of trade agreements or of programmes of aid), and diplomatic measures (for example, severing diplomatic relations). [55] Nevertheless, that concept cannot be extended even further, as contended by the applicant, to cover EU acts which do not have the characteristics of a 'sanction' and the purpose to induce or force compliance with a rule or principle allegedly breached.

79. The genesis of the new provisions in the Treaties confirms this interpretation. With the inclusion of 'restrictive measures' among the reviewable acts in Article 275 TFEU, the drafters of the Lisbon Treaty intended to remedy an anomaly of the old Treaty regime which allowed judicial review of the EU sanctions which, after having been decided in the context of the CFSP, were implemented by means of Community measures, [56] but not of the sanctions which were decided and executed only through CFSP acts. [57] Accordingly, under the current Treaties, the CJEU has jurisdiction to review the legality of all EU sanctions decided in the context of the CFSP, targeting natural or legal persons, regardless of how they are implemented. Sanctions implemented through CSFP acts are reviewable only under the conditions laid down in Article 275 TFEU, whereas sanctions implemented by means of non-CFSP acts are subject to a standard review of legality on the basis of the ordinary rules on the CJEU's jurisdiction.

80. Therefore, Article 275 TFEU is not intended to permit judicial review of all CFSP acts that may have restrictive effects on individuals, but only of 'sanctions' against individuals decided and implemented in the context of the CFSP.

81. Nor can the appellant find any support for her allegations in the judgment of the General Court in *Sogelma*. As the General Court correctly held in paragraphs 36 to 38 of the order under appeal, the act which that court considered reviewable in *Sogelma* was an act issued by an EU body which had been established in the then Community pillar, [58] and not in the context of the then second pillar. Consequently, the General Court interpreted (extensively but, in my view, correctly) former

54 — See, to that effect, judgment in *National Iranian Oil Company* v *Council*, C-440/14 P, EU:C:2016:128, paragraph 82.

55 — For a more detailed overview, see Beaucillon, C., *Les mesures restrictives de l'Union européenne*, Bruylant, Brussels, 2013, pp. 25 and 26.

56 — Those measures were based on then Article 301 EC (now Article 215 TFEU) and, where targeting individuals, then Article 308 EC (now Article 352 TFEU). Regarding the CJEU's jurisdiction on those measures: see judgment in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461.

57 — See the Convention documents CONV 734/03 (pp. 27 and 28); and CONV 689/1/03 REV1 (pp. 3, 5 and 6) referred to above in footnote 45.

58 — That body was the European Agency for Reconstruction (EAR), established by Council Regulation (EC) No 2454/1999 of 15 November 1999 amending Regulation (EC) No 1628/96 relating to aid for Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia, in particular by the setting up of an EAR (OJ 1999 L 299, p. 1).

Article 230 EC which gave the EU Courts general jurisdiction to review the validity of Community acts intended to produce legal effects. In the present case, since the EUPM has been set up and operates in the field of the CFSP, the arguments of the appellant would lead to an interpretation *contra legem* of current Articles 24(1) TEU and 275 TFEU.

d) The case under consideration

82. In the light of the considerations developed above, I am of the view that the second ground of appeal put forward by the appellant too is ill founded.

83. In the first place, there is no doubt that the contested decisions fall squarely within the concept of acts adopted on the basis of the provisions relating to the CFSP, within the meaning of Articles 24 TEU and 275 TFEU. With those decisions, the Head of Mission of the EUPM exercised the powers entrusted to him by Decision 2009/906, an act adopted pursuant to Article 43(2) TEU.

84. I have explained above why I consider unfounded the arguments that the exclusion from the CJEU's jurisdiction of CFSP acts does not cover acts of administration or acts of implementation, even if based on CFSP provisions. Consequently, the contested decisions do not constitute acts that, because of their nature or content, fall within the CJEU's jurisdiction.

85. In any event, even if the Court were to follow the arguments put forward by the appellant and by the Commission, I do not believe that the contested decisions could be regarded as mere acts of administration or acts of implementation. As the Council and the Commission point out, the decision — taken by the Head of Mission of the EUPM — to fill a position of prosecutor in a regional office of the mission, instead of having a legal officer in its headquarters, is an operational decision and not a purely administrative matter. That decision has, indeed, significant consequences on the manner in which the EUPM discharges its tasks and the effectiveness of its action. The administrative element in the contested decisions (the allocation of human resources) is thus only secondary to the main foreign policy element, which concerns the reorganisation of EUPM's operations at theatre level. In this context, it may not be futile to point out that the legal or economic status of the appellant was, in substance, not altered by the decision to relocate her to the regional office of Banja Luka. In particular, neither her occupational grade nor her remuneration was affected by that decision. What is more, the appellant had explicitly agreed to serve in a position in the EUPM other than that applied for, when submitting her formal application for the secondment. [59]

86. In her appeal, the appellant alleges, however, that the real motives behind her redeployment were not of an operational nature, but of a disciplinary character. Clearly, if the contested decisions were to be regarded as the result of a disciplinary action, their lawfulness could be put into question, given that the Head of Mission may not exercise disciplinary power in respect of seconded staff. [60] However, the alleged lack of competence of the Head of Mission to adopt the contested decisions constitutes only a ground of annulment, [61] to be invoked before the court with jurisdiction to review those decisions. In other words, the mere fact that the body which issued the contested decisions might have lacked the competence to adopt them cannot justify conferring jurisdiction upon the CJEU contrary to the wording of the Treaties.

59 — See the application form 'European Union Police Mission (EUPM)' signed by H on 10 November 2008. See also Section 2.6 ('Redeployments) of Chapter VI ('Personnel Management') of the Standard Operating Procedures, providing that 'the EUPM International Seconded Staff members are expected to remain in their positions for their normal one year term of duty. However, should any specified operational, personal or/and medical reasons exist, they can be re-deployed to another position within the EUPM upon the decision taken by the [Head of Mission]'.

60 — See Article 6(5) of Decision 2009/906.

61 — See Article 263 TFEU.

87. In the second place, neither of the two specific exceptions from the principle that CFSP acts are excluded from the jurisdiction of the CJEU seems applicable with regard to the contested decisions. To begin with, no party has claimed — to use the terminology employed in Article 40 TEU — that those decisions may affect the application of the procedures and the extent of the powers of the institutions provided for under the non-CFSP areas of competence of the Union. Secondly, and more importantly, a decision to redeploy staff of a mission cannot be considered a 'restrictive measure' within the meaning of Article 275 TFEU.

88. The second ground of appeal should, accordingly, be dismissed.

VI – **Consequences of the assessment**

89. In view of the above, the General Court was correct to conclude that it did not have jurisdiction to review the validity of the contested decisions and, therefore, that it was for the national courts of the seconding Member State (Italy) to examine the lawfulness of the contested decisions and rule on the related claim for damages.[62] The appeal should consequently be rejected.

90. That being said, it cannot be excluded that the competent national courts may have doubts as to the extent of their review of the contested decisions as well as on the possible consequences of that review.

91. Should that be the case, I would remind those courts that they are at liberty — and they may sometimes be obliged — to submit a request for a preliminary ruling to the Court under Article 267 TFEU. In that connection, the Court may still be able to assist those courts in deciding the case before them, while remaining within the boundaries established by Articles 24(1) TEU and 275 TFEU. It occurs to me that such requests for a preliminary ruling ought to be welcomed, as they would entail two immediately discernible advantages. First, they would permit the Court to determine whether, in the context of a procedure for a preliminary ruling, it has jurisdiction to interpret the act challenged before the national court or the relevant provisions of CFSP invoked by the applicant.[63] Indeed, it may not be clear to the national court whether the EU act or provisions at issue in the main proceedings are excluded from the Court's jurisdiction under the general rule provided for in Articles 24(1) TEU and 275 TFEU or, conversely, may fall within one of the exceptions to that rule (for example, because Article 40 TEU applies). Second, and more importantly, the Court would be able to interpret EU provisions of a horizontal nature (of substance or of procedure)[64] or general principles of EU law (such as the principle of sincere cooperation or the duty of care)[65] which might also be applicable in the main proceedings.[66] In particular, the Court could clarify the limits to national procedural autonomy, by explaining the legal consequences stemming from the national court's duty to provide, in conformity with Article 19(1) TEU, remedies sufficient to ensure effective legal protection of the individuals.

92. Be that as it may, in order to address one of the criticisms made by the Council against the order under appeal, and to express my views on certain issues which have been discussed at length during the hearing, I would linger on three additional aspects of the national proceedings: (i) the applicable legal rules; (ii) the identity of the defendant; and (iii) the powers of the national courts.

62 — This conclusion is also consistent with the principle underlying Article 8(2) of Decision 2009/906, which, in the relevant part, provides that 'the State or EU institution having seconded a staff member shall be responsible for answering any claims linked to the secondment, from or concerning the staff member'.

63 — See, by analogy, judgments in *Segi and Others* v *Council*, C-355/04 P, EU:C:2007:116; and *Gestoras Pro Amnistía and Others* v *Council*, C-354/04 P, EU:C:2007:115.

64 — Among which, most notably, the Charter of Fundamental Rights of the European Union.

65 — See Opinion of Advocate General Jääskinen in *Elitaliana* v *Eulex Kosovo*, C-439/13 P, EU:C:2015:341, point 28.

66 — See, by analogy, judgment in *Pupino*, C-105/03, EU:C:2005:386.

93. First, with regard to the rules which are applicable in the main proceedings, I would observe the following. As concerns the procedural rules, I have explained above that national rules are of application, subject to observance of the principles of equivalence and effectiveness. As regards substantive rules, instead, I must emphasise that the lawfulness of a CFSP act may be examined only in the light of the provisions and general principles of EU law which apply to the situation. In that context, the national court must also take into account the margin of discretion which the EU institutions must be allowed in the field of the CFSP. [67] Conversely, the validity of an EU act can never be checked against provisions or principles of national law.

94. Second, it seems to me important to clarify who is to defend the CFSP measures challenged before a national court. I take the view that this would depend on the nature of the powers exercised under the act challenged. If the powers exercised in that act were *directly* delegated by the Member State's authorities, to which that body reports and over which they retain some powers of control, the defendant ought to be that Member State. Contrariwise, where the powers exercised by that body find their origin in the powers which the Treaties confer upon the Union, the defendant ought to be the Union.

95. As concerns the present case, I agree with the Council that the General Court erred in law when, in paragraphs 50 and 51 of the order under appeal, it stated that the Head of Mission had acted pursuant to powers delegated to him by the Member State of origin of the appellant.

96. The EUPM, a Civilian Crisis Management mission, constitutes an operational action of the Union established pursuant to Article 43(2) TEU. In accordance with Article 38 TEU, it is the PSC that exercises, under the responsibility of the Council and of the High Representative, the political control and strategic direction of the mission. Moreover, the Council may authorise the PSC to take the relevant decisions concerning the political control and strategic direction of the mission.

97. The actual conduct and day-to-day management of a mission such as the EUPM is, however, a matter for the mission's chain of command: headed by the Civilian Operations Commander at the strategic level and the Head of Mission at theatre level. [68] Both are appointed, and entrusted with their respective powers, by the Council and/or the PSC. They also report, directly or indirectly, to the Council and the PSC. [69]

98. It is true that operational control over the personnel seconded by Member States to the EUPM was transferred from the seconding States to the Civilian Operation Commander who, in turn, assigned it to the Head of Mission. [70] That does not constitute, however, a true or direct delegation of powers, at least for the purposes referred to in paragraph 51 of the order under appeal.

99. By means of the contested decisions, the Head of Mission acted as an EU body, by virtue of powers entrusted to him by the Council or the PSC, on the basis of provisions of EU law. Those decisions cannot therefore, be attributable to the Italian authorities, as the General Court stated in paragraph 50 of the order under appeal: they were not taken on behalf or in the name of that Member State, but on behalf of the Union. It is, accordingly, against the Union that the appellant should bring proceedings before the national court having jurisdiction, requesting a declaration of inapplicability of the contested decisions and/or reparation of the damages.

100. Before national courts the Union shall be represented in accordance with the provisions of Article 335 TFEU.

67 — See, to that effect, by analogy, judgment in *Atlanta Fruchthandelsgesellschaft and Others (I)*, C-465/93, EU:C:1995:369, paragraph 37.

68 — See, respectively, Articles 5(2) and 6(1) of Decision 2009/906.

69 — See, in particular, Articles 9 and 10 of Decision 2009/906.

70 — See Articles 5(4) and 6(2) of Decision 2009/906.

101. Third, as regards the powers of national courts, I again agree with the Council that — contrary to what the General Court held in paragraph 53 of the order under appeal — those courts may not annul an act adopted by an institution of the EU, or by a body set up by the EU, unless that act has been adopted on the basis of powers delegated by the Member State in question.

102. Recently, in *Schrems*,[71] the Court has reaffirmed the key principle, stemming from *Foto-frost*,[72] that national courts are entitled to consider the validity of an EU act, but they are not endowed with the power to declare such an act invalid themselves. This principle is, to my mind, applicable also with regard to the field of CFSP, in spite of the fact that there is no EU Court that can exercise that power. National procedures — with their own rules on standing, admissibility, legal representation, statute of limitation, evidence, confidentiality and so forth — might not be suitable for ruling on the validity of EU acts. Those are procedures conceived for other purposes and might not guarantee EU institutions and Member States procedural rights comparable to those that they enjoy before the CJEU.[73] The impossibility or difficulty for those parties of submitting observations in the context of procedures reviewing the validity of an EU act would, in turn, impair the national court's ability to rule in full knowledge of all the relevant legal and factual circumstances. This is without mentioning the potential grave repercussions on the Union's and Member States' security and foreign policy which the annulment by a national court of a CFSP act could entail.

103. Therefore, when a national court before which an EU act is challenged comes to the conclusion that that act is indeed unlawful, because it breaches higher ranking EU rules, it can at most suspend the applicability of the act vis-à-vis the applicant and, where appropriate, award him damages. In this context, it should be called to mind that the Court has consistently stated that national courts may adopt suspension measures with regard to EU acts when the conditions laid down in the *Zuckerfabrik* case-law are met.[74] Where the CJEU has no jurisdiction to hear a reference from the national court, it would then be for the EU institution responsible for the act to draw the necessary inferences from the decision of the national court; by repealing or amending the act whose application vis-à-vis the applicant has been suspended. To be clear: the decision of the national court on the lawfulness of an EU act does not, conversely, have effects *erga omnes*.

104. In conclusion, the two legal errors contained in the statement of reasons of the order under appeal do not affect the validity of the conclusions reached in that order by the General Court: in accordance with Articles 19(1) TEU, 24(1) TEU and 275 TFEU, the CJEU lacks jurisdiction to hear the case lodged by the appellant, since that jurisdiction lies with the Italian courts.

VII – **Costs**

105. Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party.

106. If the Court agrees with my assessment of the appeal, then, in accordance with Articles 137, 138 and 184 of the Rules of Procedure, H should pay the costs of these proceedings, both at first instance and on appeal.

71 — Judgment in *Schrems*, C-362/14, EU:C:2015:650, paragraph 62.

72 — Judgment in *Foto-Frost*, 314/85, EU:C:1987:452, paragraphs 15 to 20.

73 — See, especially Articles 23, 40, 42 and 56 of the Statute of the Court and Articles 37(1), 38(4), 76(3) and 96 of the Court's Rules of Procedure.

74 — Those conditions are, in essence, as follows: (i) the national court must entertain serious doubts as to the validity of the EU measure and, if the validity of the contested measure is not already in issue before the Court, that court must itself refer the question to the Court; (ii) there must be urgency, in that the interim relief must be necessary to avoid serious and irreparable damage being caused to the party seeking the relief; (iii) the national court must take due account of the interests of the European Union; and (iv) in its assessment of all those conditions, the national court must comply with any decisions of the EU Courts on the lawfulness of the EU measure or on an application for provisional measures seeking similar interim relief at EU level. See judgments in *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, C-143/88 and C-92/89, EU:C:1991:65; and *Atlanta Fruchthandelsgesellschaft and Others (I)*, C-465/93, EU:C:1995:369.

VIII – **Conclusion**

107. Having regard to all the above considerations, I propose that the Court:

— dismiss the appeal;

— order H to pay the costs both at first instance and on appeal.