



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 19 March 2020¹

Case C-14/19 P

European Union Satellite Centre (SatCen)

v

KF

(Jurisdiction of the EU judicature — Common foreign and security policy — Articles 19 and 24 TEU — Articles 263, 268, 270 and 275 TFEU — Article 47 of the Charter of Fundamental Rights of the European Union — Council Decisions 2009/747/CFSP and 2014/401/CFSP — SatCen Staff Regulations — Staff members — Principle of equality — Effective judicial protection — SatCen's Appeals Board — Plea of illegality — Suspension — Disciplinary proceedings — Removal — Right to be heard — Access to the file)

I. Introduction

1. There are, in my view, two points of general legal importance in the present case that reach beyond the confines of this appeal: first, what is the scope of the jurisdiction of the Court of Justice of the European Union in the field of the Common Foreign and Security Policy ('the CFSP') with regard to what could be referred to as common acts of staff management? Are such acts excluded from review by this Court by virtue of Article 24(1) TEU and Article 275 TFEU?

2. Second, assuming that the Court of Justice of the European Union retains some jurisdiction with regard to such acts, what does the existence of that jurisdiction imply for special and dedicated staff dispute settlement mechanisms established within various EU bodies and agencies, such as the Appeals Board of the European Union Satellite Centre (SatCen)?

II. Factual and legal background

3. The facts and the legal background of the present case, as stated in the judgment under appeal,² can be summarised as follows.

¹ Original language: English.

² Judgment of 25 October 2018, *KF v SatCen* (T-286/15, EU:T:2018:718).

A. *European Union Satellite Centre*

4. SatCen, the appellant, has its origins in the decision of the Council of Ministers of the Western European Union ('the WEU') of 27 June 1991 setting up a satellite data operating centre and adopted on the basis of the decision of the Council of 10 December 1990 on space cooperation within the WEU.³

5. By Council Joint Action 2001/555/CFSP of 20 July 2001,⁴ SatCen was set up in the form of an agency within the European Union, incorporating the structures of the existing WEU satellite data operating centre. SatCen became operational as of 1 January 2002.

6. Subsequently, the Council adopted Decision 2014/401/CFSP of 26 June 2014 on the European Union Satellite Centre and repealing Joint Action 2001/555 on the establishment of a European Union Satellite Centre,⁵ which thence constituted the legal framework applicable to SatCen. It is apparent from recital 2 and from Article 5 of that decision that SatCen functions as a 'European autonomous capability' and that it has the legal personality necessary to perform its functions and attain its objectives. According to Article 2(1) and (3) of that decision, SatCen's core tasks are to support the decision-making and actions of the Union in the field of the CFSP and in particular the common security and defence policy, by providing, at the request of the Council or the High Representative of the Union for Foreign Affairs and Security Policy ('the High Representative'), products and services resulting from the exploitation of relevant space assets and collateral data, including satellite and aerial imagery, and related services.

7. Under Article 7(3), (4) and (6)(e) of Decision 2014/401, the Director of SatCen is the legal representative of that body, and is (i) responsible for recruiting all other SatCen staff and (ii) responsible for all personnel matters.

8. As provided in Article 8(1) and (3) of Decision 2014/401, SatCen's staff is composed of contract staff, appointed by the Director of SatCen, and of seconded experts. On the basis of Article 8(5) of that decision, the Council, within the framework of Joint Action 2001/555, adopted Decision 2009/747/CFSP of 14 September 2009 concerning the Staff Regulations of [SatCen] ('the SatCen Staff Regulations').⁶

9. As regards disputes between SatCen and its staff members in respect of matters covered by the SatCen Staff Regulations, Article 28(5) of the SatCen Staff Regulations provides as follows:

'Having exhausted the possibilities of the first resort (an internal administrative appeal), staff members shall be at liberty to seek a settlement before [the SatCen] Appeals Board.

The composition, operation and specific procedures of that body are given in Annex X.'

10. Article 28(6) of the SatCen Staff Regulations states:

'Decisions of the Appeals Board shall be binding on both parties. There shall be no appeal from them. The Appeals Board may:

(a) annul, or confirm, the decisions complained of;

³ On 30 March 2010, by joint declaration, the Member States of the WEU officially dissolved that organisation with effect from 30 June 2011, on account in particular of the fact that 'with the entry into force of the Lisbon Treaty, a new phase in European security and defence [had begun]'.
⁴ OJ 2001 L 200, p. 5.
⁵ OJ 2014 L 188, p. 73.
⁶ OJ 2009 L 276, p. 1. Those regulations, which are applicable in the present case *ratione temporis*, were subsequently replaced, with effect from 1 June 2017, by Council Decision (CFSP) 2017/824 of 15 May 2017 concerning the Staff Regulations of the European Union Satellite Centre (OJ 2017 L 123, p. 7).

- (b) order [SatCen] incidentally to compensate any material damage sustained by the staff member starting from the day the annulled decision began to have effect;
- (c) rule further that [SatCen] shall reimburse, within limits to be fixed by the Appeals Board, justified expenses incurred by the claimant ...'

11. Article 1 of Annex X to the SatCen Staff Regulations provides:

'... The Appeals Board shall have authority to settle disputes arising out of violations of these Staff Regulations or of the contracts provided for in Article 7 of the Staff Regulations. To that end it shall have jurisdiction with regard to appeals brought by serving or former staff members, or by their heirs and/or their representatives, against a decision of the Director.'

B. The facts giving rise to the dispute and the contested decisions

12. The respondent in the present appeal was recruited by SatCen as a member of the contract staff from 1 August 2009, for a period of three years, to occupy the position of Head of the Administration Division. At the end of her probationary period, on 31 January 2010, the respondent's position was confirmed by the Director of SatCen, who noted in that regard that the respondent 'work[ed] with tact and diplomacy, yet using firmness in communicating her decisions'.

13. As part of the annual appraisal for 2010, the respondent was the subject of an appraisal report, dated 28 March 2011, by the Deputy Director of SatCen, in which her overall performance was deemed insufficient. She was awarded the lowest rating. The respondent challenged that conclusion and the manner in which the appraisal was conducted.

14. On 27 March 2012, as part of the annual appraisal for 2011, the Deputy Director of SatCen noted the respondent's positive development as compared to the previous year, and took the view that her overall performance was good, in view of the efforts she had undertaken. On 24 May 2012, the respondent's contract was extended for a term of four years, until 31 July 2016.

15. As part of the annual appraisal for 2012, the Director of SatCen, by internal memorandum of 17 October 2012, instructed the Deputy Director to gather information from staff on propriety and human relations within SatCen, in particular in relation to staff with management responsibilities, especially Heads of Division, by identifying, if applicable, potential situations involving psychological pressure or bullying which could lead to anxiety, a loss of self-esteem, a loss of motivation and even crying among their subordinates.

16. On 14 November 2012, 12 members of SatCen staff lodged a complaint with the Director and Deputy Director, condemning 'the difficult situation [to] which [they had] been subject for more than the last three years to carry out [their] professional activity in a normal way', stating that that situation 'stem[med] from the behaviour and conduct of the Head of Administration Division, [the respondent]'.

17. At the beginning of 2013, the Deputy Director of SatCen followed up on the abovementioned internal memorandum by sending 40 members of staff, from several divisions, a questionnaire asking them, using multiple-choice questions, to evaluate human relations with their Head of Division. By internal memorandum dated 7 March 2013, the Deputy Director of SatCen informed the Director of SatCen that, in the light of the responses to the questionnaire, 'it clearly appear[ed] that there [was] a real problem of human relations with the Head of Administration Division, [the respondent], with a negative general feedback from the Administration Division personnel'.

18. By internal memorandum dated 8 March 2013, the Director of SatCen asked the Deputy Director of SatCen, on the basis of Article 27 of the SatCen Staff Regulations, to launch an administrative investigation against the respondent.

19. The administrative investigation consisted in sending a multiple-choice questionnaire to 24 members of SatCen staff on 12 June 2013, aimed at ascertaining whether or not they had experienced certain types of behaviour by the respondent and whether they had witnessed any effects on themselves or other staff members as a result of the behaviour in question. The questionnaires also asked staff to provide any testimonies or evidence to corroborate their responses. Of the 24 staff members questioned, 6 did not reply.

20. In the meantime, in response to her annual appraisal for 2012, in which her overall performance was again considered to be insufficient, by letter of 20 March 2013, the respondent first challenged that appraisal and, secondly, asked the Director of SatCen to take the necessary measures to put an end to her harassment.

21. On 2 July 2013, the Deputy Director of SatCen finalised his investigation. According to the investigation report, the respondent engaged in ‘intentional, repetitive, sustained or systematic’ behaviour ‘intended to discredit or undermine the people concerned’, and ‘[since this behaviour alleged against the respondent was] confirmed and [in view of] its nature, frequency and effect on certain staff members, [it] constitute[d] moral harassment’. On 3 July 2013, the Director of SatCen informed the respondent of the conclusions of the administrative investigation report and invited her to an interview, on 5 July 2013.

22. On 5 July 2013, the Director of SatCen noted that, following his investigation, the Deputy Director of SatCen had reached the conclusion that the respondent’s alleged behaviour was confirmed and constituted psychological harassment. On those grounds and after hearing the respondent on the same day, the Director decided, first, to initiate disciplinary proceedings against the respondent before the Disciplinary Board (‘the decision to initiate disciplinary proceedings’) and, secondly, to suspend the respondent from her duties while granting her continued payment of her remuneration (‘the suspension decision’).

23. On 28 August 2013, the respondent lodged an administrative complaint with the Director of SatCen against, *inter alia*, the decision to initiate disciplinary proceedings, the suspension decision, and the decision by which the Director of SatCen, by implication, rejected her request for assistance in respect of alleged psychological harassment.

24. By letter of 4 October 2013, the Director of SatCen rejected the administrative complaint lodged by the respondent on 28 August 2013.

25. On 25 October 2013, the Director of SatCen sent the Disciplinary Board a report, which he also sent to the respondent, in accordance with Article 10 of Annex IX to the SatCen Staff Regulations.

26. On 1 November 2013, the respondent sent a letter to the Chair of the Disciplinary Board, asking him to allow her a period of at least 45 days to prepare her defence. She also requested copies of all the documents used during the administrative investigation, that the 12 members of staff who signed the complaint against her on 14 November 2012 as well as the 18 members of staff who filled out the multiple-choice questionnaire in the context of the administrative investigation be heard as witnesses before the Disciplinary Committee, and, lastly, that the identities of the 6 members of staff who declined to fill out that questionnaire be disclosed.

27. By letter of 21 November 2013, SatCen’s Head of Administration refused the respondent access to her emails and other documents from her computer as well as her professional mobile telephone.

28. By letter of 28 November 2013, the Chair of the Disciplinary Board informed the respondent that a hearing would be held before the Disciplinary Board on 13 or 14 January 2014. In that same letter, the respondent was asked to submit her written observations to the Disciplinary Board at least one week before the date of the hearing. The respondent sent her written observations on 21 December 2013.

29. On 2 December 2013, the respondent lodged an appeal before the Appeals Board, first, against the decision of the Director of SatCen of 4 October 2013 rejecting her complaint against the suspension decision, the decision to initiate disciplinary proceedings and the decision to reject the request for assistance and, second, against the decision of 21 November 2013 referred to in point 27 above.

30. By letter of 9 December 2013, the respondent requested the Chair of the Disciplinary Board to postpone the hearing. She also indicated the names of the 13 witnesses whom she requested be heard. By letter of 16 December 2013, the Chair of the Disciplinary Board maintained the date of the hearing on 13 or on 14 January 2014 and informed the respondent of his decision to hear two of the witnesses whom she had requested be heard.

31. On 17 December 2013, the respondent sent the Director of SatCen a complaint against the decision of the Disciplinary Board of 16 December 2013.

32. Following the hearing held on 13 January 2014, the Disciplinary Board gave a reasoned opinion on 4 February 2014 in which it, first, considered unanimously that the respondent had failed to comply with her professional obligations and, secondly, recommended that she be demoted by at least two grades, so that she would no longer hold a position with managerial responsibilities.

33. After the respondent's hearing on 25 February 2014, on 28 February 2014 the Director of SatCen removed her from her post for disciplinary reasons, the decision taking effect one month after that date ('the removal decision'), stating:

'Due to the seriousness of your misconduct as exposed in the Director's Report to the Disciplinary Board, confirmed by the Disciplinary Board's Opinion, the impossibility to reallocate you at the level and responsibility proposed in the Disciplinary Board's Opinion and your negative [*sic*] to recognise that your conduct was inappropriate, I decide, in accordance with [*sic*] Annex IX Art. 7 [of the SatCen Staff Regulations] to impose the following penalty to you:

- removal from post, involving the termination of your contract with the EU SatCen.

[Your] contract shall be terminated, according to Art. 7. 3 (a).vii of [the SatCen Staff Regulations], with one month notice from this decision.'

34. The removal decision was the subject of an administrative complaint by the respondent, on 17 April 2014, which was rejected by decision of the Director of SatCen of 4 June 2014. On 12 June 2014, the respondent contested the removal decision before the Appeals Board.

35. By decision of 26 January 2015 ('the decision of the Appeals Board'), notified to the respondent on 23 March 2015, the Appeals Board rejected the respondent's application seeking the annulment of the decision to initiate disciplinary proceedings and of the suspension decision. Moreover, after rejecting all the respondent's submissions raised against the removal decision, the Appeals Board annulled that decision only to the extent that its effective date had been set as 31 March 2014 and not 4 April 2014.

III. The judgment under appeal and the proceedings before the Court

36. On 28 May 2015, the respondent brought an action before the General Court consisting of an application for annulment and a claim for compensation. Pursuant to Article 263 TFEU, the respondent requested (i) the annulment of the decision to initiate disciplinary proceedings, the suspension decision, the removal decision, the decision by which the Director of SatCen, by implication, rejected her request for assistance in respect of alleged psychological harassment, and the decision of the Appeals Board (together, ‘the contested decisions’); (ii) so far as necessary, the annulment of the decision of the Director of SatCen of 4 October 2013 rejecting her complaint against the decision to reject her request for assistance, the decision to initiate disciplinary proceedings and the suspension decision, and of the decision of the Director of SatCen of 4 June 2014 rejecting her complaint against the removal decision. Pursuant to Article 268 TFEU, the respondent sought compensation for the damage that she allegedly suffered. She also claimed that SatCen should be ordered to pay the costs plus interest.

37. In the judgment under appeal, first, the General Court found that it had jurisdiction to rule on the dispute. That jurisdiction stemmed, respectively, as regards the review of the legality of the contested decisions, from Article 263 TFEU and, as regards claims for the non-contractual liability of the European Union, from Article 268 TFEU, read in conjunction with the second paragraph of Article 340 TFEU, taking into account Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).⁷ Next, the General Court dismissed SatCen’s plea of inadmissibility based on the existence of an employment relationship of a contractual nature between the respondent and SatCen.⁸ The General Court then upheld SatCen’s pleas of inadmissibility concerning the claim for annulment of the decision to reject the request for assistance (as the respondent had failed to observe the prior administrative procedure) and of the decision to initiate disciplinary proceedings (being merely a preparatory act).⁹ Lastly, the General Court held the arguments alleging the illegality of the proceedings before the Disciplinary Board to be admissible.¹⁰

38. As to the substance of the dispute, first, the General Court upheld the plea of illegality submitted by the respondent against Article 28(6) of the SatCen Staff Regulations, declaring that provision inapplicable to the case at hand. On that basis, the General Court ruled that ‘the decision of the Appeals Board, adopted on the basis of the powers conferred on it by that provision, has no legal basis, and it must therefore be annulled, without there being any need to adjudicate on the other pleas relied on by the applicant against the decision of the Appeals Board’.¹¹ The General Court went on to also annul the removal decision¹² and the suspension decision,¹³ because it found that, in its conduct of the administrative investigation concerning the respondent, SatCen had (i) infringed the obligation to conduct the investigation with care and impartiality, and (ii) infringed the respondent’s right to be heard and right of access to the file.

⁷ Judgment under appeal, paragraphs 80 to 114.

⁸ Judgment under appeal, paragraphs 118 to 132.

⁹ Judgment under appeal, paragraphs 133 to 138 and 139 to 143, respectively.

¹⁰ Judgment under appeal, paragraphs 144 to 150.

¹¹ Judgment under appeal, especially paragraphs 160 and 161.

¹² Judgment under appeal, paragraphs 168 to 231.

¹³ Judgment under appeal, especially paragraphs 232 to 241.

39. The General Court then turned to the claims for compensation submitted by the respondent. First, the General Court declared itself unable to award compensation for the material harm allegedly suffered by the respondent, as it would be premature to do so ‘without knowing the measures adopted by SatCen to comply with [the General Court’s] judgment’. Second, the General Court decided to award, *ex æquo et bono*, compensation of EUR 10 000 for the non-material harm that the respondent had sustained because of the state of uncertainty as regards the facts alleged against her and from an attack on her good repute and her professional reputation.¹⁴

40. On that basis, the judgment under appeal: (i) annulled the decision of the Appeals Board; (ii) annulled the suspension decision; (iii) annulled the removal decision; (iv) ordered SatCen to pay the respondent the sum of EUR 10 000 as compensation for the non-material harm sustained by her; (v) dismissed the action as to the remainder; (vi) ordered SatCen to bear its own costs and to pay those incurred by the respondent; and (vii) ordered the Council to bear its own costs.

41. In its appeal before the Court, lodged on 10 January 2019, SatCen asks the Court to set aside the judgment under appeal, dismiss the actions brought by the respondent, and order the respondent to pay the costs of the proceedings. The Council intervened in support of the form of order sought by SatCen.

42. For her part, the respondent asks the Court to dismiss the appeal and order SatCen to pay the costs.

43. The parties presented their views at the hearing before the Court that was held on 4 December 2019.

IV. Assessment

44. SatCen puts forward four grounds of appeal. The first and second grounds are directed against the General Court’s findings regarding its jurisdiction to hear the case and the admissibility of the respondent’s claims. The third and fourth grounds concern the substantive findings of the General Court.

45. I shall commence my analysis with SatCen’s first and second grounds of appeal. Those grounds can, in my view, best be dealt with together since they are intertwined. They both purport to show — using arguments that largely overlap — that there is no basis, in the EU Treaties, for the General Court’s findings with regard to its jurisdiction to rule on the claims submitted by the respondent.

A. First and second grounds of appeal

1. Arguments of the parties

46. First, SatCen criticises the judgment under appeal for concluding, in paragraphs 80 to 114, that the General Court has jurisdiction to rule on all the heads of claim submitted by the respondent. SatCen argues, on the one hand, that in the light of the principle of conferral, for the Court of Justice of the European Union to have jurisdiction, there must be an express provision to that effect. However, no such provision exists in this case. On the other hand, as the Court held in *Elitaliana*,¹⁵ the Court of

¹⁴ Judgment under appeal, paragraphs 242 to 261.

¹⁵ Judgment of 12 November 2015, *Elitaliana v Eulex Kosovo* (C-439/13 P, EU:C:2015:753) (*‘Elitaliana’*).

Justice of the European Union has jurisdiction when the challenged decision affects the EU budget. SatCen's budget, however, is made up only of contributions from the Member States. Nor, according to SatCen, can the General Court assume that it has jurisdiction solely on the basis of the principle of equal treatment, by likening staff members to other categories of staff.

47. Second, SatCen alleges that the General Court erred in law in concluding, in paragraphs 118 to 123 of the judgment under appeal, that the respondent's action for annulment falls within the scope of Article 263 TFEU, and that her claim for non-contractual liability falls within that of Article 268 TFEU. In particular, SatCen contends that the respondent, as a member of staff of SatCen, cannot be considered a 'third party' within the meaning of the first paragraph of Article 263 TFEU. In addition, the judgment in *H v Council and Others*¹⁶ cannot, in SatCen's view, be applied by analogy, as the case at hand concerns a contractual agent, rather than an agent seconded by a Member State or an EU institution.

48. Third, SatCen argues that the General Court erred in law in paragraphs 124 to 132 of the judgment under appeal, in dismissing its plea of inadmissibility based on the contractual nature of the dispute. Because of the contractual nature of the relationship between the respondent and SatCen, and in so far as Article 270 TFEU is not applicable in the present case, the Court of Justice of the European Union's jurisdiction could — in SatCen's view — only derive from an arbitration clause contained in the contract, in accordance with Article 272 TFEU. However, no such arbitration clause was included in the respondent's contract with SatCen.

49. The Council supports SatCen's arguments.

50. Conversely, the respondent considers those arguments to be ill founded. In her view, the General Court has correctly affirmed its jurisdiction to rule on all claims submitted by her, and the admissibility of those claims.

2. Jurisdiction (No 1): the scope of the CFSP derogation

51. In order to examine the arguments put forward by SatCen, I find it useful to begin with some general remarks on the scope of the jurisdiction of the Court of Justice of the European Union in the field of the CFSP, in the light of Article 24(1) TEU and Article 275 TFEU.

(a) The story so far

52. Article 24(1) TEU and Article 275 TFEU exclude the jurisdiction of the Court of Justice of the European Union with respect to the provisions relating to the CFSP and with respect to acts adopted on the basis of those provisions, with two exceptions. Both provisions have been the object of several judgments of the Court. In the context of the present proceedings, the following judgments are of particular significance.

53. In *Mauritius*¹⁷ and *Tanzania*,¹⁸ the Court decided, inter alia, that it could check whether an international agreement relating to the CFSP was negotiated and concluded in compliance with the procedure laid down in Article 218 TFEU. Indeed, in so far as that procedure is set out in a non-CFSP provision, the Court has the power to rule on alleged procedural errors leading to a breach thereof.

¹⁶ Judgment of 19 July 2016 (C-455/14 P, EU:C:2016:569) (*H v Council and Others*).

¹⁷ Judgment of 24 June 2014, *Parliament v Council* (C-658/11, EU:C:2014:2025).

¹⁸ Judgment of 14 June 2016, *Parliament v Council* (C-263/14, EU:C:2016:435).

54. In *Elitaliana*, the Court affirmed its jurisdiction with regard to an action for annulment brought against a decision taken by a CFSP civilian mission on the award of a public contract which gave rise to expenditure to be charged to the EU budget, based on an alleged infringement of the rules of EU public procurement law. The contract was governed by the Financial Regulation,¹⁹ a non-CFSP legal instrument.

55. In *Rosneft*,²⁰ the Court held that Articles 19, 24 and 40 TEU, Article 275 TFEU, and Article 47 of the Charter must be interpreted as meaning that the Court of Justice of the European Union has jurisdiction to give preliminary rulings, under Article 267 TFEU, on the validity of an act adopted on the basis of provisions relating to the CFSP concerning restrictive measures, provided that the request for a preliminary ruling relates either to the monitoring of that decision's compliance with Article 40 TEU, or to reviewing the legality of restrictive measures against natural or legal persons.

56. Finally, in *H v Council and Others*, the Court decided that the Court of Justice of the European Union had jurisdiction to hear an action for annulment directed against decisions taken by the Head of a CFSP mission, concerning the transfer of a member of staff, on secondment from a Member State, from one office of the mission to another. Importantly, the Court made clear that jurisdiction also exists in respect of acts which have both non-CFSP and CFSP-related content ('dual-content decisions').²¹

57. The main principles flowing from those cases are the following.

58. First, in so far as Article 24(1) TEU and Article 275 TFEU introduce a derogation ('the CFSP derogation') from the rule of general jurisdiction, whereby Article 19 TEU confers jurisdiction on the Court of Justice of the European Union to ensure that, in the interpretation and application of the Treaties, the law is observed, those provisions must be interpreted narrowly.

59. Second, although an EU act may relate to the CFSP, or even be adopted in a 'CFSP context', as long as the act is based on a (substantive or procedural) non-CFSP legal basis, the EU judicature has jurisdiction to review compliance with the relevant non-CFSP provisions.

60. Third, acts adopted by EU institutions or bodies, such as acts of staff management, are not excluded from the jurisdiction of Court of Justice of the European Union merely because they are adopted on the basis of CFSP provisions.

61. Thus, when read together, those principles indicate that, in order to fall within the CFSP derogation, an EU act must fulfil two requirements. First, it must be *formally* based on CFSP provisions. Secondly, the act must also correspond, as to its *content* or *substantively*, to a CFSP measure.

62. The first of those requirements stems from the wording of Article 24(1) TEU and Article 275 TFEU. Admittedly, the second requirement is not expressly referred to in those provisions. It is also true that the gradual introduction of such an additional requirement by judicial fiat has meant that the scope of the CFSP derogation has narrowed, with acts that would seem to fall within the derogation, at least on a more formal reading of the Treaties, being made subject to review.

19 Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

20 Judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236) ('*Rosneft*').

21 See *H v Council and Others*, paragraphs 54 and 55.

63. However, I believe that evolution to be entirely correct. Before describing the criteria for the interpretation of that second requirement, I shall explain why a systemic, historical and teleological interpretation of Article 24(1) TEU and Article 275 TFEU supports the direction that the Court has taken.

(b) The elements relevant for the proper construction of Article 24(1) TEU and Article 275 TFEU

64. When examined in the light of the European Union's constitutional landscape, it is by no means anomalous that Article 24(1) TEU and Article 275 TFEU are subject to a restrictive interpretation.

65. First, it must not be overlooked that, although the CFSP is an area subject to 'specific rules and procedures',²² it is also an integral part of EU law. Absence of jurisdiction in the field of the CFSP does not mean the absence of any substantive criteria. To begin with, the Union's external action, whether in the context of the CFSP or of other policies, is guided by the same set of principles and objectives.²³ The Union is required to 'ensure consistency between the different areas of its external action *and* between these and its other policies'.²⁴

66. More importantly, the acts adopted under the CFSP must, arguably, comply with the general principles of EU law, including the fundamental rights enshrined in the Charter. Indeed, Article 51(1) of the Charter adopts an *institutional definition* of the scope of that instrument with regard to EU action: the Charter applies any time an institution, body, office or agency of the Union acts. Article 24(1) TEU and Article 275 TFEU do not call that statement into question: they introduce an exclusion from review by the Court of Justice of the European Union, but they do not exclude the applicability of the Charter, or other primary law provisions for that matter. Thus, despite the significant limitations with regard to the justiciability of CFSP measures — which led Advocate General Wahl to refer to the CFSP as *lex imperfecta*²⁵ — the fact remains that, even for such acts, rules apply. *Lex imperfecta* does not mean *absentia legis*.

67. Second, starting from the seminal judgment in *Les Verts I*,²⁶ the Court has consistently stated that the (now) European Union is a community based on the rule of law, and that the Treaties have established a complete system of legal remedies and procedures designed to permit the Court of Justice of the European Union to review the legality of measures adopted by the institutions. Nowadays, the rule of law is not only included among the founding values of the Union enounced in Article 2 TEU but, in accordance with Articles 21 and 23 TEU, it is also referred to as one of the guiding principles of the Union's external action, including in the specific field of the CFSP.

68. As the Court has regularly emphasised, the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law.²⁷ In particular, the general scheme of the Treaties is to make a direct action available against *all measures* adopted by the institutions which are intended to have legal effects.²⁸

²² Article 24(1) TEU.

²³ See Article 21(1) and (2) TEU. See, more generally, Article 7 TFEU.

²⁴ Article 21(3) TEU (emphasis added).

²⁵ See Opinion in *H v Council and Others* (C-455/14 P, EU:C:2016:212, point 45).

²⁶ Judgment of 23 April 1986, *Les Verts v Parliament* (294/83, EU:C:1986:166, paragraph 23) ('*Les Verts I*'). More recently, see judgment of 5 November 2019, *ECB and Others v Trasta Komerbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 54 and the case-law cited).

²⁷ See judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650, paragraph 95 and the case-law cited).

²⁸ See, *inter alia*, *Les Verts I*, paragraph 24, and *Elitaliana*, paragraph 67.

69. That said, it is certainly true, as SatCen argues, that — in the light of Article 13(2) TEU and Article 51(2) of the Charter — Article 47 of the Charter cannot confer jurisdiction on the Court of Justice of the European Union where the Treaties exclude it.²⁹ However, as the General Court correctly emphasised in paragraph 85 of the judgment under appeal, the principle of effective judicial protection implies that the exclusion of the Court's jurisdiction with regard to acts that may affect individuals should be interpreted strictly.³⁰ Put simply, Article 47 of the Charter does not allow the Court to rewrite the Treaties, but it does require the Court to interpret the existing provisions so that they can achieve their full potential to provide judicial protection to anyone concerned by acts of EU institutions or bodies.

70. Third, the Court's recent case-law confirms very clearly that, regardless of the legal regime in which they operate, EU institutions are in principle subject to judicial review. In conformity with Article 19 TEU, it is generally for the Court of Justice of the European Union to carry out that task, to ensure that in the interpretation and application of the Treaties the law is observed.

71. Thus, for example, in *Florescu*,³¹ the Court found that a Memorandum of Understanding concluded, in 2009, by the European Commission (on behalf of the then European Community) and Romania had to be regarded as an act of the institutions for the purposes of Article 267 TFEU despite its *sui generis* nature. In *James Elliot Construction*,³² the Court came to the conclusion that it had jurisdiction to give a preliminary ruling on the interpretation of harmonised technical standards ('HTS'), notwithstanding the fact that HTS are not binding acts but documents for voluntary use, and that they are formally adopted by private bodies. The Court found that HTS produce legal effects, and the Commission was involved in the process of their adoption and implementation. Further, in *Ledra*,³³ the Court found that unlawful conduct by the EU institutions acting outside the EU framework could give rise to an action for compensation for non-contractual liability under Articles 268 and 340 TFEU.

72. Fourth, an historical examination of Article 24(1) TEU and Article 275 TFEU does not support an interpretation of those provisions that would go beyond what is strictly necessary to preserve the specificities of the CFSP. The CFSP derogation is primarily meant to safeguard the distinctive '*institutional balance*' sought by the drafters of the Treaties with regard to that policy.³⁴ Because of its highly political nature, it was decided that it would be mainly for the European Council and the Council to define and implement the CFSP, and for the High Representative and the Member States to put it into effect.³⁵ In addition, it was also considered that the new CFSP provisions, although formally integrated within the TEU Treaties, should not 'affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy'.³⁶

73. In the light of those considerations, the narrow scope given to the CFSP derogation is consistent with a number of key constitutional principles of the European Union. I now turn to the issue of what those principles might mean in practical terms.

²⁹ See, to that effect, judgment of 25 July 2002, *Unión de Pequeños Agricultores v Council* (C-50/00 P, EU:C:2002:462, paragraph 44). See, more recently, *Rosneft*, paragraph 74.

³⁰ To that effect, see also *Rosneft*, paragraph 74.

³¹ Judgment of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448).

³² Judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821).

³³ Judgment of 20 September 2016, *Ledra Advertising and Others v Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701).

³⁴ See, for example, European Convention, Discussion Circle on the Court of Justice, 'Supplementary report on the question of judicial control relating to the common foreign and security policy' (CONV689/1/03REV1), point 5. More generally, on the genesis of those provisions, with references to the relevant preparatory acts, see Denza, E., *The Intergovernmental Pillars of the European Union*, Oxford University Press, Oxford, 2002, pp. 311 to 322; or Heliskoski, J., 'Made in Luxembourg: The fabrication of the law on jurisdiction of the court of justice of the European Union in the field of the Common Foreign and Security Policy', *Europe and the World: A law review*, vol. 2(1):3, UCL Press, 2018, pp. 2 to 5.

³⁵ Article 24(1) and Article 26 TEU.

³⁶ See Declaration No 13 ('Declaration concerning the common foreign and security policy') annexed to the Treaty of Lisbon.

(c) *Genuine CFSP content?*

74. Article 24(1) TEU and Article 275 TFEU are expressions of a ‘content-based exceptionalism’: the drafters of the Treaties took the view that CFSP matters are inherently political and, consequently, are not amenable to judicial review. It should not be overlooked, in that context, that the CFSP is, by its very nature, 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.³⁷

75. As appears rather clearly from the provisions in Title V, Chapter 2 of the Treaty on European Union (and especially Article 25 TEU), CFSP rules and acts are mainly intended to govern the conduct of EU institutions and bodies, on the one hand, and of the Member States, on the other. The ‘typical’ CFSP measure is not intended to create rights and obligations for individuals.³⁸

76. On that basis, the drafters of the Treaties decided that any dispute with regard to the application of those provisions should be resolved at political level, without involving the courts. Seen from that perspective, the fact that individuals cannot challenge the lawfulness of CFSP measures before the Court of Justice of the European Union should not create a significant gap in the EU legal system.

77. The determination of whether the Court is ‘in or out’ on a given matter should, therefore, closely follow the logic underpinning the choices just outlined made by the drafters of the Treaties. Consistent with that approach, the CFSP derogation cannot be understood as covering acts that, despite relating to, or even formally being adopted within, the CFSP, are not immediately or directly concerned with the definition, implementation or execution of that policy. In other words, where the link between an EU act and an action or operation relating to the Union’s foreign policy or the Union’s security is merely indirect, it would be hard to justify excluding the jurisdiction of the Court of Justice of the European Union. Any intervention of the EU Courts would, in those cases, be incapable of constraining (or at least very unlikely to constrain) the room for manoeuvre that the EU institutions and Member States are meant to enjoy when acting in the field of the CFSP.

78. Moreover, I may add that the (limited) powers of the Court of Justice of the European Union to review the lawfulness of certain acts formally adopted within the CFSP by no means implies that the EU judicature is capable of reviewing (or, for that matter, willing to review) choices of foreign policy or security that are eminently political. Regardless of whether Article 24(1) TEU and Article 275 TFEU codify a form of ‘political question doctrine’, the Court has shown that it is very mindful of the limits imposed on its constitutional role by the Treaties³⁹ and, in particular, by the principle of the separation of powers.⁴⁰ The Court has also repeatedly stated that where the EU institutions enjoy broad discretion and, in particular, when they are required to make choices that are, in particular, of a political nature and to undertake complex assessments, the assessments that underpin the exercise of that discretion are subject to limited judicial review.⁴¹

79. For those reasons, it is rather clear that the fact that an act is *formally* based on CFSP provisions or adopted in that context simply is not enough to trigger the CFSP derogation. The act must also have genuine CFSP *content*.

³⁷ For this expression, see Opinion of Advocate General Wahl in *H v Council and Others* (C-455/14 P, EU:C:2016:212, point 59).

³⁸ See, for example, Article 24(1) TFEU: ‘The adoption of legislative acts shall be excluded’.

³⁹ See, for example, judgment of 1 March 2016, *National Iranian Oil Company v Council* (C-440/14 P, EU:C:2016:128, paragraph 77 and the case-law cited). Regarding the Court’s self-restraint, in legal scholarship see, with further references, Koutrakos, P., ‘Judicial Review in the EU’s Common Foreign and Security Policy’, *International and Comparative Law Quarterly*, vol. 67, Cambridge University Press, 2017, p. 13.

⁴⁰ As the Supreme Court of the United States stated, ‘the nonjusticiability of a political question is primarily a function of the separation of powers’ (see *Baker v. Carr*, 369 U.S. 186 (1962)). See also Opinion of Advocate General Wathelet in *Rosneft* (C-72/15, EU:C:2016:381, point 52).

⁴¹ See most recently, judgment of 19 December 2019, *Puppinck and Others v Commission* (C-418/18 P, EU:C:2019:1113, paragraphs 95 and 96 and the case-law cited).

80. That naturally begs the question: what is genuine CFSP content? I recognise that it is impossible to envisage an ironclad test that would serve to draw a bright line between CFSP content and non-CFSP content. That delineation will necessarily involve a case-by-case assessment, which will be heavily context-dependent.

81. Nevertheless, from existing case-law⁴² it would appear that *normal administrative acts* — that is, acts of the EU administration that are not inextricably linked to the pursuit of the CFSP — do not display (sufficient) CFSP content to be excluded from judicial review. Those acts typically include, for example (and in particular), decisions on staff management; decisions relating to the budget and spending; or decisions in normal and ordinary procurement procedures.

82. I stress the qualifying terms ‘typically’ and ‘normal’ or ‘ordinary’: the yardstick is that the content of the decision is common, as opposed to specific to the CFSP. In the abstract, that idea is perhaps best captured by a thought experiment on content parallelism: could the challenged act, which is formally based on a CFSP provision, be adopted in another, non-CFSP, context? If so, would its content and the considerations leading to its adoption be similar, or even the same, if adopted in a non-CFSP context? If the answer to both of these questions is affirmative, it is likely that the act does not have genuine CFSP content.

83. Indeed, common administrative acts normally do not have any political or strategic connotations. Despite being adopted in the context of the CFSP, they concern the normal running of the EU administration. In addition, they may well affect the position of specific individuals or entities. In those circumstances, the right to an effective remedy, enshrined in Article 47 of the Charter, cannot but apply in full. Those acts must be amenable to review by a court, regardless of their formal designation.

84. Finally, as mentioned above,⁴³ the Court recently stated that the above considerations also apply in respect of dual-content decisions. I would not, however, read that statement as meaning that the EU judicature is to review any breach or error alleged in relation to such decisions. It can certainly be difficult to sever the dual content of such acts. Once a dual-content decision becomes open to review based on its non-CFSP content, there might be some ancillary trespassing on the CFSP content as well.

85. For exactly those reasons, I would suggest understanding the jurisdiction of the Court of Justice of the European Union in those matters as a scale or gradual continuum, and not as a matter of all-or-nothing extremes, whereby the mere existence of dual content automatically renders everything open to review. At one end of the spectrum, there are decisions that, although formally based on a CFSP provision, have as to their content very little to do with the CFSP. At the other end, there are decisions that would clearly fall fully within the CFSP derogation. Then, in the grey zone in the middle, there are the dual- or multiple-content decisions, in relation to which caution and self-restraint are advised.⁴⁴ If the non-CFSP content of an act is merely ancillary to its CFSP content, the latter may prevail and thus limit or even exclude judicial review.

(d) The present case

86. In the light of the foregoing considerations, I take the view that the General Court did not err in affirming its jurisdiction to hear the case.

⁴² See the case-law referred to supra, in points 54 and 56 of this Opinion.

⁴³ See point 56 of this Opinion.

⁴⁴ See also above, point 78 of this Opinion. Even if jurisdiction is perhaps seized reluctantly with regard to some elements of a decision in such situations, the intensity of review is likely to be notably light.

87. The contested decisions are acts of normal staff management, which do not include, certainly as far as the case presented and argued before this Court is concerned, any specific CFSP content. The challenged decisions are, as a matter of fact, undistinguishable from decisions that could, in a similar situation, be adopted with regard to any staff hired by an EU body or agency set up in the context of any other EU policy.

88. In addition, contrary to the arguments advanced by SatCen, the fact that the EU rules allegedly breached by the contested decisions do not concern the EU budget is, in my view, immaterial. It cannot be inferred from the judgment of the Court in *Elitaliana* that EU acts adopted in the context of the CFSP are amenable to review only when they breach rules governing the EU budget. The element in that case that rendered the act open to challenge before the EU Courts was the fact that, despite having emanated from an entity created under the CFSP (and thus potentially under the provisions relating to the CFSP), the challenged decision was (i) adopted on the basis of non-CFSP provisions, and (ii) the applicant alleged breaches of non-CFSP provisions.

89. Thus, the budget element in *Elitaliana* was, in my view, a specific example of the more general rule that I sought to outline in the previous section of this Opinion: the procurement decisions at stake in that case were instances of normal administrative acts that were not inextricably linked to the pursuit of the CFSP, and thus not excluded from judicial review.

3. Jurisdiction (No 2): the contractual nature of the employment relationship and the absence of an arbitration clause

90. In the following, I shall explain why I take the view that the General Court also did not err in law in accepting jurisdiction in spite of two further elements invoked by SatCen: the fact that the employment relationship was based on a contract between the respondent and SatCen, and the absence of a specific arbitration clause in that employment contract in favour of the jurisdiction of the Court of Justice of the European Union.

(a) Preliminary remarks on staff matters

91. The relationship between the European Union and its staff is mainly governed by the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community ('General Staff Regulations').⁴⁵ Pursuant to Article 270 TFEU, the Court of Justice of the European Union has a 'monopoly' over disputes between the Union and its staff, 'within the limits and under the conditions laid down in the [General Staff Regulations]'.⁴⁶

92. Agencies and other bodies of the European Union, however, often have their own staff regulations, which may or may not be similar to the General Staff Regulations.⁴⁶ As mentioned in point 8 above, SatCen does have its own staff regulations. For what is relevant in the context of the present proceedings, the SatCen Staff Regulations were adopted by means of a Council decision of 14 September 2009.⁴⁷

93. According to Article 1(1) of the SatCen Staff Regulations, the rules provided for therein apply, save for exceptions, to 'employees recruited under contract by [SatCen]'.

⁴⁵ Regulation No 31 (EEC), 11 (EAEC) (JO 1962 P 045, p. 1385), as amended.

⁴⁶ There are also agencies, missions and other bodies of the European Union that do not have their own staff regulations and hire their staff by means of contracts of a different nature. Depending on the legal framework applicable to those contracts, the considerations developed in this Opinion with regard to the situation of the respondent may or may not be relevant in respect of the staff of those agencies, missions and other bodies of the European Union. See, in that regard, Case C-730/18 P, *SC v Eulex Kosovo*, currently pending.

⁴⁷ That decision repealed the previous SatCen Staff Regulations, adopted by the Council on 21 December 2001 (OJ 2002 L 39, p. 44), as subsequently amended.

94. In turn, Article 1(2) of the SatCen Staff Regulations defines the term ‘employee’ as covering two distinct categories of staff:

- ‘(a) staff members, who hold contracts with [SatCen] and occupy budget posts listed in the table of staff members annexed each year to [SatCen’s] budget;
- (b) local staff, who hold contracts with [SatCen] under the local national legislation.’

95. Therefore, the SatCen Staff Regulations essentially create a two-track system for the recruitment of staff.⁴⁸ SatCen can, on the one hand, recruit its staff as ‘staff members’, in which case the contractual relationship between the staff and the Agency will essentially be governed by the provisions of the SatCen Staff Regulations. On the other hand, SatCen can recruit staff as ‘local staff’, with contracts that are governed by national law.

96. From a contractual point of view, the two categories of staff are thus not analogous. Inevitably, that difference has repercussions on the proper judicial forum for any work-related dispute between the employee and the employer.

97. With regard to *local staff*, both SatCen and the individual being hired have wider discretion to negotiate the various aspects of their future professional relationship. The essential features of that relationship are set out in the contract itself which is complemented, where appropriate, by the relevant national laws. Unlike for staff members, the relevance of the SatCen Staff Regulations (or of any similar act of the EU institutions) in that context is far more limited. Thus, the professional relationship between the employer and its employees can properly be defined as contractual.

98. Accordingly, with respect to local staff, the Agency’s contractual liability is governed, in accordance with Article 340, first paragraph, TFEU, ‘by the law applicable to the contract in question’. The contract may thus include an arbitration clause or special arrangements giving jurisdiction, for example, to local courts or to other national courts. Other forms of arbitration are also not precluded. Moreover, pursuant to Article 272 TFEU, jurisdiction may also be given to the Court of Justice of the European Union. Indeed, in such cases, the Court of Justice of the European Union cannot be considered to have sole jurisdiction since that would run counter to the provisions of Articles 272 and 274 TFEU.⁴⁹

99. By contrast, when hiring *staff members*, SatCen has less room for manoeuvre. It is true that the professional relationship between the staff member and the EU agency is initiated by a contract. However, it would be inaccurate to consider that relationship as only contract-based. The employment contract is essentially the basis for acceding to a position the main features of which are not freely determined by the parties to the contract. The professional relationship between the staff member and the Agency is, in fact, largely governed by an EU act of public law: the SatCen Staff Regulations. Thus, the procedure followed for the recruitment, the definition of the contract in question, and the legal framework in which that contract is agreed upon, involve the exercise of prerogatives that are conferred on the Agency by an EU act of general application.⁵⁰

⁴⁸ In the following, I shall focus on the staff hired directly by SatCen, thus leaving aside staff that could potentially be seconded from the Member States and the EU institutions.

⁴⁹ Article 274 TFEU provides that ‘save where jurisdiction is conferred on the [Court of Justice of the European Union], 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’. On this point, see by analogy judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirurgiko Kentro v Commission* (C-506/13 P, EU:C:2015:562, paragraph 19).

⁵⁰ See, to that effect, judgment of 14 October 2004, *Pflugradt v ECB* (C-409/02 P, EU:C:2004:625, paragraph 33 et seq.), referred to in paragraph 129 of the judgment under appeal. Similarly, Opinion of Advocate General Léger in *Pflugradt v ECB* (EU:C:2004:416, points 32 to 36).

100. In other words, the contract is essentially a means of adhering to the regime compulsorily set out in the SatCen Staff Regulations. The same also holds true for the choice (or, more precisely, the absence thereof) of proper settlement forum for work-related disputes. Those elements are set out in compulsory terms in the SatCen Staff Regulations. In that sense, the Agency in question does not act like any other (private) employer.

101. Against that background, any decision as to the contractual liability of the Agency in question arising from a breach of the employment contract will invariably involve the interpretation of provisions which are set out in an act of public law, adopted by the EU institutions in accordance with the procedures laid down in the EU Treaties, and published in the *Official Journal of the European Union* ('L' series). In that regard, it must be borne in mind that, according to Article 19(1) TEU, it is for the Court of Justice of the European Union to 'ensure that in the interpretation and application of the Treaties the law is observed'.⁵¹

102. That leads me to the specific situation of the respondent and the manner in which that situation was assessed in the judgment under appeal.

(b) The present case

103. It is common ground that SatCen recruited the respondent as a staff member within the meaning of Article 1(2)(a) of the SatCen Staff Regulations. Both the offer made by SatCen to the respondent and the contract entered into by the parties make that abundantly clear. The letters of 7 and 8 July 2009 from SatCen's Director to the respondent even refer to the 'appointment' of the respondent to the post offered.

104. It is not disputed that the *General* Staff Regulations are not applicable in the case at hand and, consequently, that the Court of Justice of the European Union has no (exclusive) jurisdiction to review the contested decisions and the claim for damages under Article 270 TFEU.⁵²

105. In paragraphs 99, 120 and 123 of the judgment under appeal, the General Court found, nonetheless, that the Court of Justice of the European Union has jurisdiction in the case, pursuant to Articles 263 and 268 TFEU.

106. In the light of the legal framework illustrated above, I agree with that analysis. The arguments put forward by SatCen and the Council against that conclusion are, in my view, based on a misreading of the judgment under appeal or are, at any rate, legally unsound.

107. First, it is incorrect to state that the General Court derived its jurisdiction in the case at hand solely from the principle of equality. The General Court clearly stated that its jurisdiction was based on Articles 263 and 268 TFEU. In that connection, the General Court explained why the respondent's claims did not fall within the derogation set out in Article 24(1) TEU and Article 275 TFEU, which is to be interpreted narrowly.⁵³ One of the reasons for that is precisely that a different interpretation would be contrary to the principle of equality, in so far as members of staff in similar situations would be treated differently in respect of the review of work-related disputes by a court.⁵⁴

108. The preceding considerations also make it clear that SatCen's statements to the effect that the General Court breached the principle of conferral by claiming jurisdiction where no Treaty provisions provide for it fail to convince.

⁵¹ See also paragraph 107 of the judgment under appeal.

⁵² See also paragraph 122 of the judgment under appeal.

⁵³ See especially paragraphs 80 to 84 of the judgment under appeal.

⁵⁴ Paragraphs 94 to 97 of the judgment under appeal.

109. Second, SatCen contends that the contested decisions do not produce legal effects vis-à-vis third parties within the meaning of Article 263, first paragraph, TFEU and thus they cannot be challenged under that provision. In so far as the respondent is an employee of SatCen, she could not be regarded as being a ‘third party’ with respect to her employer. Thus, since Article 263, fourth paragraph, TFEU permits individuals to challenge acts ‘under the conditions laid down in the first and second paragraphs’, those decisions cannot — according to SatCen — be reviewed by the Court of Justice of the European Union.

110. I find SatCen’s argument untenable. The first and second paragraphs of Article 263 TFEU concern the admissibility of actions for annulment brought by Member States, the European Parliament, the Council or the Commission against any EU act intended to produce legal effects. However, for an act to be open to challenge, those effects are to be produced ‘vis-à-vis third parties’. That qualification is meant to exclude from the acts open to challenge the so-called *interna corporis*: acts that relate to the internal organisation of an institution, and that do not produce any legal effect outside that sphere.⁵⁵ There are two main reasons for that exclusion. First, because of their constitutional status, EU institutions must have the power to organise their internal functioning in the manner they see fit. Second, an institution or Member State has no legal interest in bringing proceedings against provisions whose effects are purely internal to another institution.

111. However, that is manifestly not the case here. The contested decisions were intended to affect the legal position of the respondent, who — at least in this context — has a legal personality distinct from that of the Agency. Moreover, those decisions are, undisputedly, acts addressed to the respondent for the purposes of Article 263, fourth paragraph, TFEU. In that connection, it must be borne in mind that, according to settled case-law, acts the legal effects of which are binding on, and capable of affecting the interests of, an applicant by bringing about a distinct change in his or her legal position are acts which may be the subject of an action for annulment.⁵⁶

112. Furthermore, followed to their full logical conclusion, the arguments put forward by SatCen would leave one category of its staff, or rather the key category of its staff, without access to any court. A category of staff clearly defined by an act of secondary law, the SatCen Staff Regulations, which is on any reasonable construction an EU regime,⁵⁷ would fall neither under Article 270 TFEU nor under Article 263 TFEU. It would remain trapped in a sort of judicial ‘no man’s land’.

113. Third, and lastly, I am unconvinced by SatCen’s argument that, since its relationship with the respondent is of a contractual nature, the General Court would have had jurisdiction only if the contract had included an arbitration clause in favour of the Court of Justice of the European Union. In points 99 to 101 above, I have explained why I take the view that, in a situation such as that at issue in the present proceedings, the dispute raises issues that go beyond mere compliance by the employer (SatCen) with the contract entered into with one of its employees (the respondent). For staff members such as the respondent, work-related disputes essentially turn on whether the EU agency acted in accordance with the general rules established through a decision of the Council: the SatCen Staff Regulations.

114. Accordingly, whether or not the respondent is in a position that is similar to that of the applicant in the case that led to the judgment of the Court in *H v Council and Others* — an issue that was debated at length between the parties — is of no relevance in the context of the present case. I would add, in passing, that — as the Council recognised at the hearing — if staff seconded from the Member

⁵⁵ See, to that effect, judgments of 25 February 1988, *Les Verts v Parliament* (190/84, EU:C:1988:94, paragraph 8) (*Les Verts II*); of 23 March 1993, *Weber v Parliament* (C-314/91, EU:C:1993:109, paragraph 9); and of 6 April 2000, *Spain v Commission* (C-443/97, EU:C:2000:190, paragraph 28).

⁵⁶ See, inter alia, judgments of 11 November 1981, *IBM v Commission* (60/81, EU:C:1981:264, paragraph 9), and of 9 December 2014, *Schönberger v Parliament* (C-261/13 P, EU:C:2014:2423, paragraph 13).

⁵⁷ Thus different from local staff whose contracts are likely to be governed by local laws, with an arbitration clause in favour of local (Member States’) courts (above, points 97 and 98).

States are to have access to the Court of Justice of the European Union in the same manner as staff seconded from the EU institutions (as the Court found in *H v Council and Others*), that should be the case, a fortiori, for staff members such as the respondent. Whereas the former could have more easily received adequate judicial protection from the courts of the Member States from which they were seconded,⁵⁸ that is not necessarily so for the latter. Indeed, staff members are directly recruited by an EU institution or body and do not have (and cannot have) any professional link with national authorities.

115. Finally, I note that, in paragraphs 124 to 132 of the judgment under appeal, the General Court duly explained why the respondent was, in its view, in a situation comparable to that of other staff of the EU institutions or bodies. I do not see any obvious legal error or any distortion of facts or evidence in those passages.

116. For those reasons, SatCen's first and second grounds of appeal should be dismissed.

4. The scope and consequences of the Court's jurisdiction: the plea of illegality of Article 28(6) of the SatCen Staff Regulations

117. I agree with the General Court's finding that the Court of Justice of the European Union has jurisdiction in the present case.

118. I do not agree, however, with the consequences that the General Court attached to that finding. Indeed, I am of the view that the General Court erred in law in upholding the respondent's plea of illegality in respect of Article 28(6) of the SatCen Staff Regulations.

119. At the outset, I must point out that SatCen has not raised this point in its submissions as a separate ground of appeal. However, the error of the General Court in that regard is the logical consequence of the arguments put forward by SatCen in its first and second grounds of appeal. Were SatCen to be successful on those grounds, the General Court's findings as to the illegality of Article 28(6) of the SatCen Staff Regulations would inevitably fall as well.

120. The possible invalidity of Article 28(6) of the SatCen Staff Regulations is also of broader practical significance since, as SatCen confirmed at the hearing, following the delivery of the judgment under appeal, the operation of the Appeals Board has been suspended by SatCen. Therefore, the pronouncement of the Court on that specific point would determine not only the future of that body, but also indirectly that of other similar bodies, set up within other EU agencies or offices to deal with dispute settlement in staff cases.

121. In the judgment under appeal, the General Court considered that, in so far as it specifies that there is to be no appeal from the decisions of the Appeals Board, Article 28(6) of the SatCen Staff Regulations conflicts with Article 19 TEU and Article 256 TFEU. Accordingly, the General Court concluded that, by setting up an Appeals Board whose jurisdiction is exclusive and concurrent with that of the General Court, and by maintaining that Appeals Board even after the entry into force of the Treaty of Lisbon, Decision 2009/747 infringed the Treaties. Article 28(6) of the SatCen Staff Regulations was, therefore, declared inapplicable to the case at hand.⁵⁹

⁵⁸ Importantly, those courts have the power, or an obligation, to refer a question of interpretation or validity of an EU act to the Court under Article 267 TFEU.

⁵⁹ See paragraphs 152 to 160 of the judgment under appeal.

122. I find such a conclusion unduly broad and unnecessary. I would suggest that, when read in its legislative as well as its broader context, another interpretation of Article 28(6) of the SatCen Staff Regulations is possible: one that is in conformity with Article 19(1) TEU and Article 47 of the Charter, while respecting the specific institutional choices made by the EU legislature, *in casu* the Council.

(a) Article 28(6) of the SatCen Staff Regulations: an administrative or judicial appeal?

123. Article 28(1) of the SatCen Staff Regulations, in the relevant part, permits any person to whom those regulations apply to ‘submit to the Director a request that he take a decision relating to him in matters covered by [the SatCen Staff Regulations]’. Any such (explicit or implicit) decision of the Director may, in accordance with Article 28(2) to (4) of the SatCen Staff Regulations, be subject to a procedure of administrative complaint and to mediation (the latter being only optional). In turn, Article 28(5) of the SatCen Staff Regulations provides that ‘having exhausted the possibilities of the first resort (*an internal administrative appeal*), staff members shall be at liberty to seek a settlement before [the SatCen] Appeals Board’.⁶⁰

124. Thus, when read in its entirety, Article 28 of the SatCen Staff Regulations seems to be concerned with *administrative* appeals only, including those taking place before the Appeals Board. The latter procedure is, indeed, referred to as one of *dispute settlement*, both in Article 28(5) of the SatCen Staff Regulations, and in Annex X (Appeals Board) to those regulations.⁶¹ There is nothing in Article 28 of the SatCen Staff Regulations or, for that matter, in any other provision of those regulations, regarding review *by a court* of SatCen’s decisions adopted in matters covered by those regulations.

125. The contested sixth subparagraph of Article 28 appears in that context. The key opening sentence of that provision states that ‘Decisions of the Appeals Board shall be binding on both parties. There shall be no appeal from them. The Appeals Board may: ...’.

126. Viewed in its internal context, the statement that ‘there shall be no appeal from them’ could, on the one hand, be interpreted as the EU legislature wishing to exclude any *remedy of a judicial nature*, thus indeed wishing to preclude any access to the Court of Justice of the European Union. However, in that case, one could suggest that it was only the second sentence of Article 28(6) of the SatCen Staff Regulations that had to be removed, and not Article 28(6) in its entirety. On the other hand, the same sentence could also be read as signalling that no further *appeal of an administrative nature* within the system of the SatCen Staff Regulations is possible after the decision of the Appeals Board on the matter, while being silent on any potential judicial remedy before a court.

127. There is little use in engaging in a comparative linguistic exercise at this stage, discussing whether the various (equally authentic) language versions have exactly the same meaning or whether some of them hint more at an administrative appeal while others at a judicial remedy. As usual, consulting the various language versions of the regulation rather serves to underline their semantic diversity.⁶²

128. Instead, I would note that a number of other texts, including provisions of primary law, employ different language when referring to a judicial remedy before a court. Most importantly, according to Article 47 of the Charter, ‘*everyone* whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy *before a tribunal*’.⁶³

⁶⁰ Emphasis added.

⁶¹ See, especially, Article 1 of Annex X.

⁶² See, for a similar exercise with regard to the equally ambiguous Article 32(3) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243, p. 1), my Opinion in *El Hassani* (C-403/16, EU:C:2017:659, points 28 to 33).

⁶³ Emphasis added.

129. Therefore, when Article 28 of the SatCen Staff Regulations is read in its entirety, and in the light of (or in contrast to) Article 47 of the Charter and Article 263, fifth paragraph, TFEU, it is by no means obvious that its sixth subparagraph is intended to exclude any *judicial* appeal against the decisions of the SatCen Appeals Board. I rather think that that provision should be interpreted as referring only to any further appeal of an administrative nature.

(b) The broader context: a 'tolerant' or 'intolerant' jurisdiction?

130. The Court of Justice of the European Union has inherent, vested jurisdiction for the interpretation of acts of EU law, unless its jurisdiction is expressly excluded on the basis of the Treaty provisions. That is indeed the starting point.

131. At the same time, the EU legislature enjoys discretion in devising the system of dispute settlement that it sees fit for any given EU agency, office or body, provided that that system does not encroach upon the prerogatives of the Court of Justice of the European Union and its vested jurisdiction.

132. There is a proportionate, tolerant way to reconcile those two propositions. While acknowledging that wide degree of discretion and accepting a number of potential institutional designs, there is the residual golden rule: when devising a secondary law regime, the EU legislature is required to guarantee, at a certain stage of the proceedings, the possibility of bringing a case concerning a final decision on staff matters before an independent court. If the decision concerns the exercise of EU public power by an EU body within the framework of an EU legislative regime, that court is ultimately the Court of Justice of the European Union.

133. On a more general level, it is the dual imperative of both independent legal protection of individuals and uniform interpretation of EU law that is valid not only for Member States implementing EU law at national level,⁶⁴ but also for EU institutions negotiating and designing mechanisms of external dispute settlement that might involve some elements of interpretation of EU law.⁶⁵ The same logic should therefore be applicable a fortiori to any internal EU dispute settlement mechanism, in particular in the case of staff matters being handled within the various EU bodies or agencies under specific staff regulations, outside of the scope of the General Staff Regulations.

134. In that context, I would agree with the General Court that discussion as to whether the SatCen Appeals Board satisfies the conditions of an impartial and independent tribunal is of little significance for the purpose of the present dispute,⁶⁶ but for a different reason: even if the SatCen Appeals Board were to fulfil those requirements, thus potentially satisfying the imperative of effective legal protection, the issue of a lack of uniformity in the interpretation of EU law would still remain. Again, if that consideration limits the institutional choices in the Member States, and even in other regimes of international law to which the Union is or intends to be a party, that must be true a fortiori for the Union's internal regimes.

135. Having said that, it does not necessarily follow that access to the EU Courts must be granted *immediately* and that an EU agency or body cannot have its own internal dispute settlement mechanism, even one of a semi-judicial nature, which must be availed of first, potentially on a compulsory basis. It may be in the interest of the sound administration of justice if, in situations such as the one at issue in this appeal, the dispute is first brought before a body that, although set up within or attached to an agency, is required to assess the matter independently in the context of a quasi-judicial procedure. A fresh and neutral pair of eyes may not only be more successful in assisting

⁶⁴ See judgment of 13 December 2017, *El Hassani* (C-403/16, EU:C:2017:960, paragraph 41).

⁶⁵ See, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011 (EU:C:2011:123, paragraphs 66, 68 and 80); Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraphs 174 to 176, and 246); and Opinion 1/17 (EU-Canada CET Agreement) of 30 April 2019 (EU:C:2019:341, paragraph 111).

⁶⁶ Paragraph 110 of the judgment under appeal.

the parties to find an amicable solution, but it may also help to clarify aspects of the dispute that may eventually need to be decided by the EU Courts. The existence of a system of internal appeals that precedes but does not ultimately prevent judicial proceedings may thus offer the parties a rapid, practical and less costly way to settle disputes. It may, in addition, contribute to avoiding unnecessary litigation before the Court of Justice of the European Union.

136. However, as already stated, SatCen has not pleaded, in the present proceedings, an alleged error of interpretation of Article 28(6) of the SatCen Staff Regulations by the General Court. In any event, the error in question could not have led to the judgment under appeal being set aside in so far as it does not call into question *the substantive findings* of that judgment with regard to the contested decisions: the decision to initiate disciplinary proceedings, the suspension decision, and the removal decision.

137. It is true that the General Court stated that it annulled the decision of the Appeals Board solely because, having considered Article 28(6) of the SatCen Staff Regulations invalid, that decision was found to have been adopted without a proper legal basis.⁶⁷ However, the decision of the Appeals Board was (largely) confirmatory of the contested decisions.⁶⁸ The Appeals Board's decision had no effect on the legal position of the respondent distinct from that which followed from the contested decisions.⁶⁹ Thus, the reasons that led the General Court to annul the latter would also have been valid and sufficient to set aside the former.

B. The third ground of appeal

1. Arguments of the parties

138. By its third ground of appeal, SatCen alleges that, in its assessment of the lawfulness of the removal decision, the General Court distorted the facts on two occasions.

139. First, the General Court did not take into account the fact that the persons who completed the questionnaire prepared by the investigator had already been orally interviewed by the same investigator during the survey conducted between January and February 2013. In addition, bilateral meetings were also held with 24 staff members during the administrative investigation. Because those facts were not taken into account, the General Court erroneously concluded that the use of the questionnaire constituted a manifestly inappropriate instrument to establish the facts and to evaluate the behaviour of the respondent, as opposed to bilateral interviews, which would have been a more appropriate way.

140. Second, SatCen argues that the General Court distorted the facts by considering that the decision was solely based on accusations designating general categories of behaviour, without establishing the existence of any specific event or behaviour that can be qualified as 'harassment'. In fact, additional supporting documentation, including written testimonies from staff members, letters and medical certificates, was annexed to the investigation report. Those documents were, however, not taken into account by the General Court.

⁶⁷ Paragraph 161 of the judgment under appeal.

⁶⁸ See especially paragraphs 38, 45 and 46 of the judgment under appeal.

⁶⁹ See, to that effect, judgment of 21 February 2018, *LL v Parliament* (C-326/16 P, EU:C:2018:83, paragraphs 38 and 39).

141. In her response, the respondent argues that the so-called interviews to which SatCen refers had not been mentioned in the proceedings before the General Court and thus constitute new facts, inadmissible at this stage of the proceedings. Additionally, SatCen did not provide any information on the content of those interviews. In any case, according to the respondent, the existence of prior interviews cannot invalidate the conclusions of the General Court as to the inadequacy of the investigation and the lack of impartiality.

2. Analysis

142. At the outset, it must be pointed out that, on appeal, complaints based on findings of fact and on the assessment of those facts are admissible where the appellant submits that the General Court has made findings of fact which the documents in the file show to be substantially incorrect or that it has distorted the clear sense of the evidence before it. In particular, there is distortion of the clear sense of the evidence where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect.⁷⁰

143. That is not the case here.

144. In the first place, I observe that, although it can be inferred from the overall report that the members of staff to whom the questionnaire had been addressed had also been interviewed previously, the fact remains that the conclusions reached in the report are *only* based on the answers given to the questionnaire. In the light of this, the fact that the staff members who completed the questionnaires had been interviewed beforehand during the general survey on human relations is immaterial.

145. Moreover, the General Court did not criticise the use of a questionnaire per se. In paragraphs 200 to 207 of the judgment under appeal, the General Court explained, in some detail, the reasons why the questionnaire used in the investigation was, in the light of the circumstances of the case, inappropriate to establish the reality of the harassment of which the respondent was accused.

146. In the second place, contrary to SatCen's claims, there is no additional supporting documentation, including written testimonies from staff members, annexed to the investigation report submitted before the General Court. Thus, the General Court can hardly be criticised for not taking into account 'all the documentation' allegedly used by the investigator to reach his conclusions. In fact, I could not identify any similar document in the case file. The only example of written testimony referring to concrete and precise factual elements is in the answers to the open-ended questions in the margin of the multiple-choice questionnaire. However, the General Court did consider those replies, as is clear from paragraph 203 of the judgment under appeal.

147. Therefore, it does not appear that the judgment under appeal is vitiated by a failure to take into account some evidence or facts, or that it has distorted the evidence and facts that it did consider.

C. The fourth ground of appeal

1. Arguments of the parties

148. By its fourth ground of appeal, SatCen argues that the General Court erred in law when interpreting Articles 1 and 2 of Annex IX to the SatCen Staff Regulations and the concept of 'rights of the defence', enshrined in Article 41 of the Charter.

⁷⁰ See, to that effect, judgment of 18 July 2007, *Industrias Químicas del Vallés v Commission* (C-326/05 P, EU:C:2007:443, paragraphs 57 and 60 and the case-law cited).

149. First, SatCen argues that the right of a person subject to an investigation for harassment to comment on the investigated facts, prior to the closure of the administrative inquiry, can be limited in order to protect the interests of third parties involved. In any case, the various preliminary interviews, particularly those in the course of the annual review on which the respondent could have commented, must be considered sufficient to guarantee the right to be heard.

150. Second, SatCen argues that it does not appear from the SatCen Staff Regulations, nor from the case-law, that a minimum time period should have elapsed between an invitation to a hearing prior to opening disciplinary proceedings and the date of such a hearing. In any case, the time frame should be assessed in the light of the principle of proportionality, taking into account, in particular, the serious facts alleged against the respondent and the urgency of the situation. Furthermore, the decision to open disciplinary proceedings does not constitute an act adversely affecting the interests of the respondent, but is merely a preparatory act.

151. Third, SatCen contends that the Director of SatCen, in exercising his discretion, has legitimately decided to let the rights and interests of those who filed harassment complaints prevail over the respondent's right to access the documents before the adoption of the decision to initiate disciplinary proceedings. In fact, given the small size of the Agency and the fact that 8 out of 13 people under the respondent's supervision filed a complaint, there was a high risk of retaliation, which persisted even after the closure of the investigation.

152. In response, the respondent defends the reasoning in the judgment under appeal. In particular, she argues that the argument concerning the existence of a risk of retaliation was not raised before the General Court and is thus inadmissible. In any event, in her view, SatCen failed to explain why any risk of retaliation would continue to exist even after the respondent had been suspended and she no longer had access to SatCen's premises.

2. *Analysis*

153. I take the view that the fourth ground of appeal is also to be dismissed.

154. In particular, in paragraph 221 of the judgment, the General Court correctly stated that, in the context of an investigation such as that to which the respondent was subject, the administration must reconcile two rights: the right of the person who is being investigated to exercise his rights of defence, on the one hand, and the right of the complainants to have their complaints examined properly, and treated confidentially, on the other.⁷¹

155. The General Court then went on to check whether SatCen had correctly reconciled the competing interests of the respondent and of the complainants. In the light of the circumstances of the case, the General Court came to the conclusion that it had not. In paragraph 222 of the judgment under appeal, bearing in mind the relevant rules included in the SatCen Staff Regulations,⁷² the General Court found that the disclosure of the witness statements to the respondent could not have jeopardised the proper conduct of the investigation. In paragraph 223 of that judgment, the General Court also noted that, in order to protect the administration's duty of confidentiality, while respecting the respondent's right of defence, SatCen could have allowed the latter to access an anonymised version of the witness statements.

⁷¹ See, to that effect, judgment of 4 April 2019, *OZ v EIB* (C-558/17 P, EU:C:2019:289, paragraph 52).

⁷² In particular, Article 2 of Annex IX to the SatCen Staff Regulations which provides that the Director of SatCen is required to communicate to any person who is the subject of an investigation all evidence in the files between the end of that investigation and the adoption of the decision to initiate disciplinary proceedings.

156. It seems to me that the General Court's considerations on this point are sound. It is not obvious to me that, as SatCen argues, it was completely impossible to grant the respondent access to an anonymised version of the witness statements, even when partly redacted⁷³ or in a summary form.⁷⁴ I understand that, in the light of the small size of the Agency, SatCen had to consider carefully the risks of retaliation that could have arisen if the respondent were able to identify the complainants. However, that risk could have been minimised with a careful exercise of anonymisation and redaction. Unless they are redacted to the point that they become completely meaningless, limited or partial access to the witness statements is certainly preferable to a complete refusal of access.

157. In any event, and perhaps more importantly, the risk of retaliation was certainly no longer present from the moment when the respondent was suspended from her duties. Yet, even at that point, she was not granted access to the witness testimonies (including in an anonymised or redacted form).

158. Against this backdrop, I do not think that the General Court applied the wrong legal criteria when verifying whether SatCen had managed to strike the correct balance between the respondent's right of defence and the right of confidentiality of the members of staff who participated in the investigation. I also do not see any distortion of the facts or of the clear sense of the evidence by the General Court when assessing the circumstances of the case.

159. Similarly, I see no error of law by the General Court when, in paragraph 216 of the judgment under appeal, it considered unreasonable the fact that the respondent 'was given less than 48 hours to submit her comments on [the investigation] report'. It is true that no provision of the SatCen Staff Regulations provides for a specific time frame in that regard. However, according to settled case-law, where the duration of a procedure is not set by a provision of EU law, the 'reasonableness' of the period of time taken by the institution to adopt a measure is to be appraised in the light of all of the relevant circumstances and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the parties to the case.⁷⁵

160. In the light of that, it seems to me that the concrete assessment of the reasonableness of a time frame in a specific case is, save in cases of distortion of facts or evidence, an issue that cannot be subject to an appeal. At any rate, considering the particularly serious facts alleged against the respondent and the duration of the investigation at the time when the respondent was asked to react to the investigation report, I certainly do not consider the General Court's finding concerning the amount of time granted to the respondent to be unreasonable.

V. Costs

161. According to Article 138(1) of the Rules of Procedure, applicable to appeal proceedings pursuant to Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

162. The respondent has applied for the costs. Since SatCen has, in my view, been unsuccessful, it should be ordered to pay the costs relating to the proceedings.

163. The Council should, for its part, be ordered to pay its own costs.

⁷³ See, to that effect, Opinion of Advocate General Saugmandsgaard Øe in *HF v Parliament* (C-570/18 P, EU:C:2020:44, points 71 and 72).

⁷⁴ See, to that effect, judgment of 4 April 2019, *OZ v EIB* (C-558/17 P, EU:C:2019:289, paragraph 59).

⁷⁵ See, inter alia, judgment of 28 February 2013, *Review of Arango Jaramillo and Others v EIB* (C-334/12 RX-II, EU:C:2013:134, paragraph 28 and the case-law cited).

VI. Conclusion

164. In the light of the foregoing, I suggest that the Court:

- dismiss the appeal;
- order the European Union Satellite Centre (SatCen) to bear the costs;
- order the Council to bear its own costs.