HIGHLIGHT

H. v. Council et Al. – A Minor Expansion of the CJEU's Jurisdiction Over the CFSP

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On 19 July 2016 the Grand Chamber of the CJEU issued its judgment in case C-455/14 P, *H. v. Council et al.* [1] It is part of a line of recent cases that help clarify and, arguably, expand the CJEU's jurisdiction over the Common Foreign and Security Policy (CFSP). More specifically, the case concerned an action for annulment and compensation brought by H., an Italian national and former seconded staff member of the European Union Police Mission to Bosnia and Herzegovina (EUPM bih). The acts that H. sought to annul were the April 2010 decisions of the Chief of Personnel of the EUPM bih to involuntarily redeploy H. to the post of "Criminal Justice Adviser – Prosecutor" in the Banja Luka regional office. The case was brought against three defendants: the Council, the Commission, and the EUPM bih.

The CJEU decided the case on appeal. Before the General Court, both the Council and the Commission put forward objections regarding admissibility. They submitted that the contested decisions were adopted under the CFSP, and that the Union courts consequently lacked jurisdiction, in light of the second subparagraph of Art. 24, para. 1, TEU and Art. 275, para. 1, TFEU. The General Court accepted these objections, finding the case inadmissible due to lack of jurisdiction. H. then appealed to the CJEU.

In its judgment, the CJEU reiterated that it does not, in principle, have jurisdiction with respect to Treaty provisions relating to the CFSP, or acts adopted in the basis of those provisions. This follows from Art. 24, para. 1, TEU and Art. 275, para. 1, TFEU, according to which the CJEU "shall not have jurisdiction" over the CFSP. This is a carve-out from the CJEU's general jurisdiction, as defined in TEU Art. 19, para. 1. In *H. v. Council et*

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[1] Court of Justice, judgment of 19 July 2016, case C-455/14 P, *H. v. Council et al*.

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al., the CJEU reiterated that this carve-out has to be "interpreted narrowly", as it has held in a string of recent cases (para. 40). In support of a narrow interpretation the CJEU also added that the Union is founded on "the values of equality and the rule of law", and that 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" (para. 41).

Turning its attention to the case at hand, the CJEU admitted that the contested decisions were "set in the context of the CFSP" (para. 42). However, this did "not necessarily lead to the jurisdiction of the EU judicature being excluded" (para. 43).

Indeed, the CJEU *did* find that it has jurisdiction over the impugned acts, through a line of reasoning that emphasized the need to treat all EUPM bih staff equally with regard to access to justice. First, the CJEU pointed out that, according to Art. 270 TFEU, the CJEU has jurisdiction to rule on all actions brought by *EU* staff members – including those that have been seconded to the EUPM bih. However, H. was seconded by a *Member State*. There is no provision comparable to Art. 270 TFEU that explicitly confers upon the CJEU jurisdiction over staff seconded from member states. Thus, since the dispute concerned staff management in a CFSP mission, the CFSP jurisdictional carve-out should in principle apply. Second, the CJEU emphasized that – although the position of staff seconded from an EU institution and staff seconded from member states were not identical in all aspects – the EUPM bih staff were "subject to the same rules so far as concerns the performance of their duties 'at theatre level'" (para. 50). Third, the CJEU found that, even though these rules have "an operational aspect falling within the CFSP, they also constitute, by their very essence, acts of staff management, just like all similar decisions adopted by the EU institutions" (para. 54). Fourth and finally, the CJEU concluded that the CFSP jurisdictional carve-out could not be considered to be so broad as to preclude review of acts of staff management for only one class of staff seconded to EUPM bih, namely staff seconded from the member states. Support for this conclusion was also found in the Council Decision defining the statute, seat and operational rules of the European Defence Agency,[2] which gives the CJEU jurisdiction in matters concerning seconded national experts.

Consequently, the CJEU set aside the order dismissing the case, and referred it back to the General Court. In doing so, the CJEU also added that that the contested decisions were attributable only to the Council, because the Commission was not involved in the EUPM bih's chain of command (para. 65). Accordingly, the case is only admissible insofar as it is directed against the Council.

The judgment in *H. v. Council et al.* has been hailed as "another case in a series of breakthroughs for the Court of Justice in CFSP", particularly because the CJEU uses "secondary Union law, a CFSP Decision, to prise open the jurisdictional bounds imposed on

[2] Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency; see notably Art. 11, paras 3, let. b), and 6.

the former Second Pillar".[3] Yet, it is important to realize that this case does not leave the door wide open for judicial review over CFSP acts. Rather, this case is another example of the CJEU policing the margins of the CFSP jurisdictional carve-out, while ever-so-slightly nibbling away at it. In a string of cases leading up to *H. v. Council et al*. the CJEU asserted jurisdiction over CFSP acts that had some roots in other areas of Union law, either with respect to legal basis (*Elitaliana*) or procedural rules (*Mauritius* and *Tanzania*).[4]

What distinguishes *H. v. Council et al.* from the existing case-law is that the CJEU used a new technique to nibble away at the carve-out. The impugned acts did not have any roots in other areas of Union law. Nevertheless, the CJEU asserted jurisdiction by insisting that all staff should be treated equally when it comes to access to justice. For those seeking judicial review over CFSP acts, *H. v. Council et al.* is a new tool in the toolbox. Still, apart from other staff cases, it is difficult to envisage where the equality argument advanced by the CJEU in *H. v. Council et al.* could be applied in the future.

[3] G. Butler, *H. v. Council: Another Court Breakthrough in the Common Foreign and Security Policy*, in *EU Law Analysis*, 22 July 2016, eulawanalysis.blogspot.com.

[4] Court of Justice, judgment of 12 November 2015, case C-439/13 P, *Elitaliana SpA v. EULEX Kosovo*; Court of Justice, judgment of 24 June 2014, case C-658/11, *Parliament v. Council (Mauritius Transfer Agreement)*; Court of Justice, judgment of 14 June 2016, case C-263/14, *Parliament v. Council (Tanzania Transfer Agreement)*; See M.E. Bartoloni, *Base giuridica sostanziale e accordi "interpillier": quale ruolo per il Parlamento europeo? Note a margine del caso* Tanzania, in *European Papers – European Forum*, *Insight* of 17 August 2016, www.europeanpapers.eu, pp. 599-609.