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SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (Grand Chamber)

10 September 2024 *

- 1302820 -

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* Language of the case: English.

EN

(Appeal – Common foreign and security policy (CFSP) – Joint Action 2008/124/CFSP – European Union Rule of Law Mission in Kosovo (Eulex Kosovo) – Action for damages – Damage allegedly suffered as a result of various acts and omissions by the Council of the European Union, the European Commission and the European External Action Service (EEAS) in the implementation of that joint action – Insufficient investigation of the torture, disappearance and killing of persons – Jurisdiction of the Court of Justice of the European Union to rule on that action – Last sentence of the second subparagraph of Article 24(1) TEU – Article 275 TFEU)

In Joined Cases C-29/22 P and C-44/22 P,

TWO APPEALS pursuant to Article 56 of the Statute of the Court of Justice of the European Union, brought, respectively, on 12 and 19 January 2022,

KS,

KD,

represented by P. Koutrakos, dikigoros, F. Randolph KC and J. Stojsavljevic-Savic, Solicitor,

appellants (C-29/22 P),

applicants at first instance (C-44/22 P),

European Commission, represented initially by M. Carpus Carcea, L. Gussetti, Y. Marinova and J. Roberti di Sarsina, subsequently by M. Carpus Carcea, L. Gussetti and Y. Marinova, and last by M. Carpus Carcea and Y. Marinova, acting as Agents,

appellant (C-44/22 P),

defendant at first instance (C-29/22 P),

supported by:

Kingdom of Belgium, represented by M. Jacobs, C. Pochet and L. Van den Broeck, acting as Agents,

Grand Duchy of Luxembourg, represented by A. Germeaux and T. Schell, acting as Agents,

Kingdom of the Netherlands, represented by M.K. Bulterman and J. Langer, acting as Agents,

Republic of Austria, represented by A. Posch, J. Schmoll, M. Meisel and E. Samoilova, acting as Agents,

Romania, represented by R. Antonie, L.-E. Baţagoi, E. Gane and L. Ghiţă, acting as Agents,

Republic of Finland, represented by H. Leppo and M. Pere, acting as Agents,

Kingdom of Sweden, represented by H. Eklinder, F.-L. Göransson, C. Meyer-Seitz, A. Runeskjöld, M. Salborn Hodgson, R. Shahsavan Eriksson, H. Shev and O. Simonsson, acting as Agents,

interveners in the appeal (C-44/22 P),

the other parties to the proceedings being:

Council of the European Union, represented initially by P. Mahnič, R. Meyer and A. Vitro, and subsequently by P. Mahnič and R. Meyer, acting as Agents,

defendant at first instance,

supported by:

Czech Republic, represented by D. Czechová, K. Najmanová, M. Smolek, O. Šváb and J. Vláčil, acting as Agents,

French Republic, represented initially by J.-L. Carré, A.-L. Desjonquères, T. Stéhelin and W. Zemamta, then by J.-L. Carré, T. Stéhelin and W. Zemamta, next by J.-L. Carré, B. Fodda, E. Leclerc, T. Stéhelin and W. Zemamta, subsequently by J.-L. Carré, B. Fodda, E. Leclerc, S. Royon, T. Stéhelin and W. Zemamta, further by J.-L. Carré, M. de Lisi, B. Fodda, E. Leclerc, S. Royon and T. Stéhelin, and last by M. de Lisi, B. Fodda, S. Royon, T. Stéhelin and B. Travard, acting as Agents,

interveners in the appeals (C-29/22 P and C-44/22 P),

European External Action Service (EEAS), represented by L. Havas, S. Marquardt and E. Orgován, acting as Agents,

defendant at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A Arabadjiev, A. Prechal, K. Jürimäe, T. von Danwitz, Z. Csehi and O. Spineanu-Matei, Presidents of Chambers, J.-C. Bonichot, S. Rodin, I. Jarukaitis, A. Kumin (Rapporteur) and M. Gavalec, Judges,

Advocate General: T. Ćapeta,

Registrar: R. Stefanova-Kamisheva, Administrator,

having regard to the written procedure and further to the hearing on 27 June 2023,

after hearing the Opinion of the Advocate General at the sitting on 23 November 2023,

gives the following

Judgment

1 By their respective appeals, KS and KD, on the one hand, and the European Commission, on the other hand (together, 'the appellants'), seek to have set aside the order of the General Court of the European Union of 10 November 2021, *KS and KD* v *Council and Others* (T-771/20, 'the order under appeal', EU:T:2021:798), by which the General Court declared that it manifestly lacked jurisdiction to hear and determine the action brought by KS and KD on the basis of Article 268 TFEU, read in conjunction with the second paragraph of Article 340 TFEU, which sought compensation for the damage allegedly suffered by KS and KD as a result of various acts and omissions by the Council of the European Union, the Commission and the European External Action Service (EEAS) in the implementation of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (OJ 2008 L 42, p. 92), relating, in particular, to investigations carried out during that mission into the torture, disappearance and killing of members of their families in 1999 in Pristina (Kosovo).

Legal context

Joint Action 2008/124

2 Article 1 of Joint Action 2008/124, entitled 'The mission', provides in paragraph 1:

'The EU hereby establishes [a] European Union Rule of Law Mission in Kosovo, [Eulex Kosovo] (hereinafter ["Eulex Kosovo"]).'

3 Under Article 2 of that joint action, entitled 'Mission Statement':

'[Eulex Kosovo] shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.

[Eulex Kosovo], in full cooperation with the European Commission Assistance Programmes, shall fulfil its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities.'

4 Article 3 of that joint action, entitled 'Tasks', provides:

'In order to fulfil the Mission Statement set out in Article 2, [Eulex Kosovo] shall:

...

(d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities;

...

(i) ensure that all its activities respect international standards concerning human rights ...'

5 Article 12 of that joint action, entitled 'Political control and strategic direction', provides in paragraphs 1 and 2:

'1. The [Political and Security Committee (PSC)] shall exercise, under the responsibility of the Council, political control and strategic direction of [Eulex Kosovo].

2. The Council hereby authorises the PSC to take the relevant decisions for this purpose, in accordance with the third paragraph of Article 25 [EU]. This authorisation shall include the powers to amend the [Operation Plan (OPLAN)] and the chain of command. It shall also include powers to take subsequent decisions regarding the appointment of the Head of Mission. The Council, on the recommendation of the [Secretary-General/High Representative of the Union for Foreign Affairs and Security Policy (SG/HR)], shall decide on the objectives and termination of [Eulex Kosovo].'

6 In October 2009, the European Union established, on the basis of Article 12(2) of Joint Action 2008/124 and in accordance with the procedure laid down in the third paragraph of Article 25 EU (now the third paragraph of Article 38 TEU), the Human Rights Review Panel ('the review panel') with responsibility for examining complaints of human rights breaches committed by Eulex Kosovo in the implementation of its executive mandate. The review panel is an independent, external accountability body which, after reviewing those complaints, delivers a finding as to whether or not Eulex Kosovo has infringed the human rights law as ensured in Kosovo. Where the panel determines that there has been a breach, its findings may include non-binding recommendations for remedial action by the Head of Mission of Eulex Kosovo.

7 By virtue of Article 1(3) of Council Decision (CFSP) 2023/1095 of 5 June 2023 amending Joint Action 2008/124 (OJ 2023 L 146, p. 22), that joint action was extended until 14 June 2025.

Decision 2014/349/CFSP

8 Joint Action 2008/124 was amended, in particular, by Council Decision 2014/349/CFSP of 12 June 2014 (OJ 2014 L 174, p. 42) ('Joint Action 2008/124, as amended by Decision 2014/349').

9 Article 15a of Joint Action 2008/124, as amended by Decision 2014/349, is worded as follows:

'[Eulex Kosovo] shall have the capacity to procure services and supplies, to enter into contracts and administrative arrangements, to employ staff, to hold bank accounts, to acquire and dispose of assets and to discharge its liabilities, and to be a party to legal proceedings, as required in order to implement this Joint Action.'

Decision (CFSP) 2018/856

10 Joint Action 2008/124 was also amended by Council Decision (CFSP) 2018/856 of 8 June 2018 (OJ 2018 L 146, p. 5) ('Joint Action 2008/124, as amended by Decision 2018/856').

11 Article 2 of Joint Action 2008/124, as amended by Decision 2018/856, provides:

'[Eulex Kosovo] shall support selected Kosovo rule of law institutions on their path towards increased effectiveness, sustainability, multi-ethnicity and accountability, free from political interference and in full compliance with international human rights standards and best European practices – through monitoring activities and limited executive functions as set out in Articles 3 and 3a – with the aim of handing over remaining tasks to other long-term EU instruments and phasing out residual executive functions.'

12 Article 3(d) and (e) of Joint Action 2008/124, as amended by Decision 2018/856, provides:

'In order to fulfil the Mission Statement set out in Article 2, [Eulex Kosovo] shall:

...

(d) retain certain limited executive responsibilities in the areas of forensic medicine and police, including security operations and a residual Witness Protection Programme and the responsibility to ensure the maintenance and promotion of public order and security including, as necessary, through reversing or annulling operational decisions taken by the competent Kosovo authorities;

(e) ensure that all its activities respect international standards concerning human rights ...'

Background to the dispute

13 The background to the dispute, as set out in paragraphs 1 to 11 of the order under appeal, may, for the purposes of the present proceedings, be summarised as follows.

14 On 11 March 2014, KD filed a complaint with the review panel concerning the investigation into the abduction and killing of her husband and son, and a decision was issued on 19 October 2016. The review panel concluded that there had been a breach of Article 2 (right to life), Article 3 (prohibition of torture) and Article 13 (right to an effective remedy) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), in conjunction with Article 2 thereof, and made recommendations to the Head of Mission of Eulex Kosovo for remedial action. By decision of 7 March 2017, that panel, first, found that that head had implemented its recommendations only in part and, second, decided to close that case.

15 On 11 June 2014, KS filed a complaint with the review panel concerning the investigation into her husband's disappearance, in respect of which a decision was issued on 11 November 2015. The review panel found a breach of her rights with regard to the procedural aspect of Article 2 (right to life), Article 3 (prohibition of torture), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) ECHR, and made recommendations to the Head of Mission of Eulex Kosovo for remedial action. By letter of 29 April 2016, the Head of Mission stated that he had informed the Civilian Planning and Conduct Capability (CPCC) and a number of Member States of those recommendations. By decisions of 19 October 2016 and 7 March 2017, the review panel, first, found that that Head of Mission had initially not implemented those recommendations at all, and subsequently that he had implemented them in part only and, second, decided to close the case.

16 In response to a letter sent on 5 December 2016 on behalf of KS and KD, alleging failure to take remedial action to put an end to the human rights breaches at issue, the Council and the EEAS stated, by letters of 12 October 2017, that Eulex Kosovo had done the best that it could to investigate the acts denounced in the complaints referred to in paragraphs 14 and 15 above ('the crimes at issue') and that the review panel was an accountability mechanism, which was not intended to be a judicial body.

17 By application lodged on 19 July 2017 before the General Court and registered as Case T-840/16, KS brought an action against the Council, the Commission and the EEAS seeking 'annulment/amendment to the Joint Action 2008/124 ... and subsequent Amendments [for] violation of ... Article 13 [ECHR] and Article 47 of the Charter [of Fundamental Rights of the European Union] ... ("the Charter"), [and seeking to establish] non-contractual liability for the violation of ... Articles 2, 3, 6, 13 and 14 [ECHR]'. By order of 14 December 2017, *KS* v *Council and Others* (T-840/16, EU:T:2017:938), the General Court dismissed that action, in particular on the ground that it manifestly lacked jurisdiction to hear and determine it.

18 On 14 June 2018, considering that the recommendations at issue of the review panel had not been properly followed up and that no remedial action had been taken, KS and KD brought an action for damages, together with six other individuals, before the High Court of Justice (England & Wales), Queen's Bench Division (United Kingdom), against the European Union, represented by the Commission under Article 335 TFEU, the Council, the High Representative of the Union for Foreign Affairs and Security Policy and Eulex Kosovo. In support of that action, KS and KD alleged breaches of rights protected by the ECHR and the Charter due to the failure, during that mission, to conduct investigations into the torture, the disappearance and killing of their close family members in 1999 in Pristina. By judgment of 13 February 2019, that court found that it did not have jurisdiction to hear and determine the case ('the judgment of the High Court of Justice').

The action before the General Court

19 By application lodged at the Registry of the General Court on 29 December 2020, KS and KD brought the action referred to in paragraph 1 above, seeking to establish the non-contractual liability of the Council, the Commission and the EEAS under the second paragraph of Article 340 TFEU ('the action brought by KS and KD').

20 In support of that action, KS and KD relied, in essence, on:

– a breach of Articles 2 and 3 ECHR and of Articles 2 and 4 of the Charter, committed by Eulex Kosovo, on account of the insufficient investigation of the disappearance and killing of their family members, owing to that mission's lack of the necessary resources and appropriate personnel to perform its executive

mandate, a breach found by the review panel on 11 November 2015 in respect of KS and on 19 October 2016 in respect of KD;

– a breach of Article 6(1) and Article 13 ECHR and of Article 47 of the Charter, owing to the absence of provisions for legal aid for qualifying applicants in proceedings before the review panel and to the establishment of that panel without the power to enforce its decisions or to provide a remedy for breaches found to have been committed;

– the failure to take remedial action to remedy some or all of the breaches referred to in the first and second indents, despite the fact that the findings of the review panel were brought to the European Union's attention by the Head of Eulex Kosovo on 29 April 2016;

– the misuse or abuse of executive power by the Council and the EEAS on 12 October 2017 by their assertions that Eulex Kosovo had done the best that it could to investigate the abduction and probable murder of the husband of KS and the murder of the husband and the son of KD and that the review panel was not intended to be a judicial body;

– the misuse of or failure to use executive power properly as a result of the removal of Eulex Kosovo's executive mandate by Decision 2018/856, while the breaches referred to in the first and second indents remained extant; and

– the misuse or abuse of executive or public power for failing to ensure that the case of KD, a prima facie well-founded war crimes case, be subject to a legally sound review by Eulex Kosovo and/or the Specialist Prosecutor's Office for investigation and prosecution before the Kosovo Specialist Chamber.

21 By that action, KS and KD claimed, inter alia, that the General Court should order the Council, the Commission and the EEAS, jointly or severally, to provide reparation and compensation to them, including by the payment of interest at a rate and for such a period as the General Court deemed appropriate, for the damage allegedly suffered by them as a result of the breach of their 'fundamental human rights' protected in the present case by Articles 2, 3, 6, 8 and 13 ECHR and Articles 2, 4 and 47 of the Charter as regards KS and by Articles 2, 3, 6 and 13 ECHR and Articles 2, 4 and 47 of the Charter as regards KD, in accordance with the second paragraph of Article 340 TFEU.

22 On 9 February 2021, in a measure of organisation of procedure, the General Court requested the Council, the Commission and the EEAS to make their views known, in their responses to the aforementioned action, on the question of the jurisdiction of that court under the second subparagraph of Article 24(1) TEU.

23 By letter of 25 March 2021, KS and KD requested that Eulex Kosovo be added as a defendant in the proceedings in the case which gave rise to the order under appeal. That request was refused by decision of 31 March 2021 of the President of the Ninth Chamber of the General Court.

24 The Commission responded to the General Court's request referred to in paragraph 22 above, by letter of 18 May 2021, stating that the General Court had jurisdiction to hear and determine the action brought by KS and KD, but raising a plea of inadmissibility in so far as that action was directed against the Commission. The Council and the EEAS responded to that request, by letters of 19 May 2021, respectively, raising a plea of lack of jurisdiction and, in the alternative, a plea of inadmissibility, in particular in so far as the action was directed against them.

25 On 5 June 2021, KS and KD applied for measures of inquiry under Article 88 of the Rules of Procedure of the General Court, seeking the production of the full version of the OPLAN of Eulex Kosovo, beginning from its creation in 2008 ('the initial application for access to Eulex Kosovo's OPLAN'), which had been referred to in the part of the EEAS's defence relating to the pleas of inadmissibility and lack of jurisdiction, raised by that service.

26 On 23 July 2021, KS and KD lodged their observations on the pleas of inadmissibility and lack of jurisdiction referred to in paragraph 24 above and contended that those pleas should be dismissed.

The order under appeal

27 By the order under appeal, the General Court dismissed the action brought by KS and KD on the ground that it manifestly lacked jurisdiction to hear and determine it, and did not examine the pleas of inadmissibility raised by the Council, the Commission and the EEAS or the initial application for access to Eulex Kosovo's OPLAN.

28 In paragraph 28 of that order, the General Court found that that action arose from acts or conduct which fell within the scope of political or strategic issues connected with defining the activities, priorities and resources of Eulex Kosovo and with the decision to set up a review panel as part of that mission and that, in accordance with Joint Action 2008/124, the establishment and activities of that mission came within the common foreign and security policy (CFSP) provisions of the EU Treaty.

29 In addition, in paragraphs 29 to 33 of that order, the General Court held, in essence, that, pursuant to the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, the Court of Justice of the European Union did not, as a rule, have jurisdiction with respect to the provisions relating to the CFSP and acts adopted on the basis of those provisions, and that the exceptions to that principle, provided for in that first provision and in the second paragraph of Article 275 TFEU, were not applicable in the present case, on the ground that the action concerned neither restrictive measures against natural or legal persons, within the meaning of the latter provision, nor compliance with Article 40 TEU.

30 Furthermore, the General Court held, in essence, in paragraphs 34 to 39 of the order under appeal, that the circumstances of the case giving rise to that order were not comparable to those prevailing in the cases giving rise to the judgments of the Court of Justice of 12 November 2015, *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753), and of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569), to the judgment of the General Court of 25 October 2018, *KF* v *SatCen* (T-286/15, EU:T:2018:718), and to the order of the General Court of 10 July 2020, *KF* v *SatCen* (T-619/19, EU:T:2020:337); the latter cases admittedly arose in the context of the CFSP, but concerned provisions whose application was subject to review by the Courts of the European Union. Similarly, the General Court held that the situation in the present case was completely different from that in the case giving rise to the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793), in that the action brought by KS and KD related to the allegedly unlawful nature of acts or omissions of the Council, the Commission and the EEAS under Article 24(1) TEU, falling within the definition and implementation of the CFSP, and not to individual restrictive measures adopted in the context of that policy.

31 Moreover, the General Court stated, in paragraph 40 of the order under appeal, that the rules of the EU and FEU Treaties excluding the jurisdiction of the Courts of the European Union in the sphere of the CFSP precluded the General Court from accepting jurisdiction as regards compensation, concerning acts or conduct falling within the CFSP, such as those referred to in paragraph 20 above, solely on the basis that such recognition would have been the only way of guaranteeing effective judicial protection for KS and KD.

32 Thus, in paragraph 41 of that order, the General Court held, referring to paragraphs 69 and 78 of the judgment of 25 March 2021, *Carvalho and Others* v *Parliament and Council* (C-565/19 P, EU:C:2021:252), that although the provisions relating to the jurisdiction of the Courts of the European Union must be interpreted in the light of the fundamental right to effective judicial protection, such an interpretation cannot have the effect of setting aside the conditions expressly laid down in the FEU Treaty.

The procedure before the Court of Justice and the forms of order sought

33 By decision of the President of the Court of Justice of 21 March 2022, Cases C-29/22 P and C-44/22 P were joined for the purposes of the written and oral part of the procedure and of the judgment which closes the proceedings.

34 By decisions of 16 May 2022 and 12 May 2023, the President of the Court granted the French Republic and the Czech Republic, respectively, leave to intervene in support of the form of order sought by the Council in the present joined cases.

35 By decisions of 27 April and 12 May 2023, the President of the Court granted the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, Romania, the Republic of Finland and the

Kingdom of Sweden leave to intervene in support of the form of order sought by the Commission in Case C-44/22 P.

36 By orders of the Court of 24 June 2022, *KS and KD* (C-29/22 P-AJ), and of 24 June 2022, *KS and KD* (C-44/22 P-AJ), KS and KD were granted legal aid in order to be able to meet the costs relating to the appeals in the present joined cases.

37 By their appeal, KS and KD claim that the Court of Justice should:

– allow the appeal, set aside the order under appeal and grant the interim relief sought before the General Court;

– alternatively, allow the appeal and remit the case to the General Court for final determination; and

– order the Council, the Commission and the EEAS to pay the costs relating to the present appeal, the proceedings before the General Court and the proceedings before the review panel.

38 By its appeal, and its response in Case C-29/22 P, the Commission claims that the Court of Justice should:

– set aside the order under appeal;

– establish that the Courts of the European Union have exclusive jurisdiction to hear and determine the case;

– refer the case back to the General Court for decision on the admissibility and on the merits; and

– reserve the costs of these proceedings and the previous related proceedings.

39 In their response in Case C-44/22 P, KS and KD request the Court of Justice, should it declare that it has jurisdiction to hear and determine the present appeals, that they be permitted to submit an application for the adoption of measures of inquiry pursuant to Article 64(2)(b) of the Rules of Procedure of the Court of Justice, prior to determining whether the matter should be remitted to the General Court.

40 The Council contends that the Court of Justice should:

– dismiss the appeals as unfounded, and

– order KS, KD and the Commission to pay the costs.

41 The EEAS contends that the Court of Justice should:

– in the event that it considers that it has jurisdiction to rule on the appeal, and that it has sufficient elements to decide on the action brought by KS and KD, declare that action and the appeal inadmissible in so far as concerns the EEAS, and

– order KS, KD and the Commission to pay the costs.

The appeals

42 In support of their appeal in Case C-29/22 P, KS and KD put forward a single ground, comprising four parts, alleging that the General Court erred in law by declaring that it manifestly lacked jurisdiction to hear and determine their action for damages. By the first part of that ground of appeal – which is subdivided into two complaints – they complain the General Court, first, adopted a broad interpretation of the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU and, second, narrowly and selectively read the case-law arising from the judgments of 12 November 2015, *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753), of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569), and of 25 June 2020, *SatCen* v *KF* (C-14/19 P, EU:C:2020:492). The second part of that ground of appeal, which alleges misapplication of the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793), is subdivided into three complaints. First, it is argued that the General Court wrongly held that the acts and omissions at issue concerned the definition and implementation of the CFSP and that they were, therefore, subject to the second subparagraph of Article 24(1) TEU on the sole ground that they arose within the context of that policy. Second, that court did not engage with the position of the action for damages in the context of the European Union's system of judicial protection. Third, the General Court ought to have taken into account the Commission's argument that the European Union is a union based on the rule of law, provided with a coherent and complete system of legal remedies. By the third part of their single ground of appeal, KS and KD complain that the General Court misapplied the judgment of 25 March 2021, *Carvalho and Others* v *Parliament and Council* (C-565/19 P, EU:C:2021:252). The fourth part of the single ground of appeal alleges that the General Court erred in law by failing to address material parts of the claim and in providing insufficient reasons for the order under appeal.

43 In support of its appeal in Case C-44/22 P, the Commission puts forward four grounds of appeal. By its first ground of appeal, which is divided into three parts, the Commission submits that the General Court erred in law, first, by failing to recognise that the exclusion of the jurisdiction of the Court of Justice of the European Union provided for in Article 24 TEU and Article 275 TFEU constitutes a derogation from its general jurisdiction, second, by failing to interpret that exclusion narrowly, as interpreted by the settled case-law of the Court, and, third, by considering that the case-law arising from the judgments of 12 November 2015, *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753), of 19 July 2016,

H v *Council and Others* (C-455/14 P, EU:C:2016:569), and of 25 June 2020, *SatCen* v *KF* (C-14/19 P, EU:C:2020:492), was not applicable in the present case.

44 The second ground of appeal, which has two parts, alleges that the General Court erred in law by failing to classify the action brought by KS and KD as an action for damages concerning alleged breaches of 'fundamental human rights'. By the first part of that second ground of appeal, the Commission complains that the General Court considered that the acts and omissions referred to in that action fell within political or strategic issues connected with the mission and concerning the definition or implementation of the CFSP. By the second part of the second ground of appeal, the Commission complains that the General Court failed to interpret Article 24 TEU and Article 275 TFEU in the light of 'the EU fundamental rights and freedoms under the Charter and the ECHR, and the EU founding values of the rule of law and respect for human rights'. By its third ground of appeal, the Commission submits that the General Court misinterpreted the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793), and erred in law in failing to consider the aforementioned action for damages as an independent legal action for which there is no exemption from the jurisdiction of the Courts of the European Union under Article 268 and the second paragraph of Article 340 TFEU. By its fourth ground of appeal, which is divided into two parts, the Commission complains that the General Court, first, failed to ensure the autonomy of the EU legal order in that it failed to establish the exclusive jurisdiction of the Courts of the European Union to hear and determine the case at hand and, second, deprived KS and KD of any effective remedy.

The first complaint of the first part, the second and third complaints of the second part, and the third part of the single ground of appeal in Case C-29/22 P and the first and second parts of the first ground of appeal, the second part of the second ground of appeal, the third ground of appeal and the second part of the fourth ground of appeal in Case C-44/22 P

Arguments of the parties

45 The appellants, supported by the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, Romania, the Republic of Finland and the Kingdom of Sweden, submit that, in paragraphs 29 to 33 and 37 to 42 of the order under appeal, the General Court made several errors of law concerning the interpretation of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU. The General Court failed to take into account the case-law of the Court of Justice arising, in particular, from paragraph 70 of the judgment of 24 June 2014, *Parliament* v *Council* (C-658/11, EU:C:2014:2025), and from paragraph 32 of the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793), according to which the general jurisdiction conferred on the Court of Justice of the European Union by Article 19 TEU must be interpreted broadly, whereas the derogation from that jurisdiction, provided for in the second

subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, must be interpreted narrowly. According to the Commission, the General Court ought to have engaged in a systematic and teleological interpretation of those provisions, taking into account the principles and rights flowing from Article 2, Article 3(5) and Articles 6, 19, 21 and 23 TEU, as well as Articles 268, 340 and 344 TFEU and Article 47 of the Charter.

46 In the first place, the appellants submit that the General Court erred in law by failing to interpret the limitations on the jurisdiction of the Court of Justice of the European Union, laid down in the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, in the light of the core rules of EU primary law and the general principles of EU law, in particular the principle of the rule of law and the right to an effective remedy, which apply to all areas of EU law, including the CFSP.

47 More specifically, according to the Commission, the General Court failed to correctly interpret and apply Article 47 of the Charter, as interpreted in paragraph 74 of the judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236), since it did not analyse by what other means KS and KD could obtain judicial protection and failed to take account of the judgment of the High Court of Justice. By finding that there was no remedy for KS and KD under EU law, the General Court, first, infringed the guarantees provided for in Articles 2 and 6 TEU and Article 47 of the Charter. Second, the General Court thereby disregarded the case-law of the Court of Justice, according to which the judicial system of the European Union sets out a complete system of legal remedies and procedures designed to ensure judicial review of the legality of EU acts, at the core of which is the protection of individual rights, as is apparent, in particular, from paragraph 285 of the judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461) and paragraph 66 of the judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236). There is, therefore, no derogation under any provision of the Treaties from the jurisdiction of the Court of Justice of the European Union as regards alleged human rights breaches stemming from acts, actions or omissions attributable to the European Union, with the result that that court is required to interpret those treaties as providing remedies for those breaches.

48 In support of those arguments, the Commission also submits that Articles 6 and 13 ECHR, as interpreted by the European Court of Human Rights ('the ECtHR'), guarantee the right to access to court and to an effective remedy. The European Union and its institutions are bound to comply with those articles in all areas of EU law, as is apparent from Article 6(3) TEU and the Charter. In the present case, the action brought by KS and KD reveals a genuine and serious dispute, with the result that, in accordance with the judgment of the ECtHR of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland* (CE:ECHR:2021:0507JUD000490718, § 187), Article 6(1) ECHR is applicable. In addition, if KS and KD were to be excluded from the system of judicial protection of the European Union, simply because the

acts and omissions at issue arise in a CFSP context, the principle of equal treatment would be infringed.

49 Furthermore, the Commission submits that the Court has already held, in paragraph 23 of the judgment of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166), that the European Union is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the Treaties. Thus, the principle of the rule of law, which is enshrined in Article 2 TEU and to which Article 19 TEU gives expression, applies fully in the area of the CFSP, pursuant to Article 23 TEU, read in conjunction with Article 21(2)(b) TEU, and the Court assessed its jurisdiction in the light of that principle, in particular in paragraph 41 of the judgment of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569), and in paragraphs 35 and 36 of the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793).

50 At the hearing, the Commission, supported by the Republic of Finland and the Kingdom of Sweden, added, in essence, that the General Court ought to have declared itself as having jurisdiction by interpreting the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU in the light of the first sentence of Article 6(2) TEU, which imposes an obligation on the European Union to accede to the ECHR. According to the Commission, the fact that that accession constitutes an obligation, and not an option, derives in particular from Article 218(8) TFEU, which reinforces the logic of the autonomy of the EU legal order and the fact that that legal order is distinct from the legal order of the Member States.

51 In the second place, the appellants submit that the General Court ought to have declared that it had jurisdiction to hear and determine the action brought by KS and KD, since breaches of fundamental rights are relied on in support of that action. In that regard, the Commission observes that it is apparent from paragraph 4 of the judgment of 17 December 1970, *Internationale Handelsgesellschaft* (11/70, EU:C:1970:114), paragraphs 97 and 98 of the judgment of 18 July 2013, *Commission and Others* v *Kadi* (C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518), and paragraphs 36, 47 and 48 of the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793), first, that provisions of the Treaties relating to the CFSP are an integral part of the general framework of EU law and of the EU constitutional architecture and, second, that the EU legal order includes the protection of fundamental rights as a general and an overarching principle of EU law, with the result that all provisions of EU law, including those relating to the CFSP, are subject to the Charter. According to KS and KD, such an assessment is confirmed by Article 51(1) of the Charter, under which the Charter is applicable where an EU institution, body, office or agency is implementing EU law.

52 At the hearing, the appellants added that the case-law arising from paragraphs 55 to 60 and 67 of the 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), confirms that the Court of Justice of the European Union has jurisdiction to hear and determine any action in support of which breaches of fundamental rights are pleaded. Furthermore, the Commission stated that the purpose of Article 24 TEU was to protect political decisions, not breaches of rights protected by the ECHR and the Charter. Indeed, such breaches could not be described as 'political decisions' or 'strategic decisions', since respecting and protecting fundamental rights are obligations imposed by EU primary law, and not political choices.

53 In the third place, the appellants submit that, in paragraphs 37 to 39 of the order under appeal, the General Court misapplied the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793), in finding that the situation in the present case was completely different from that in the case which gave rise to that judgment. It incorrectly interpreted that judgment as meaning that the jurisdiction of the Court of Justice of the European Union to rule on the non-contractual liability of the European Union is limited to the specific situation of individual restrictive measures adopted by the Council under the CFSP.

54 According to the appellants, it follows that the General Court did not take account of the fact that, in that judgment, the Court of Justice declared that it had jurisdiction to rule on the harm allegedly caused by such restrictive measures, on account of the necessary coherence of the system of judicial protection provided for by EU law, in order to avoid a lacuna in the judicial protection of the natural or legal persons concerned by those measures.

55 Furthermore, contrary to what the General Court held, the reasoning of the Court of Justice in paragraphs 32 to 39, 43 and 44 of the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793), was not premised on, or limited to, the fact that restrictive measures were at issue. That reasoning is based on the fact that an action for damages is an independent legal remedy for which there is no derogation from the jurisdiction of the Court of Justice of the European Union provided for in Article 268 and the second paragraph of Article 340 TFEU, in particular, as regards compensation for the harm allegedly suffered by natural or legal persons as a result of CFSP decisions other than restrictive measures and pursuant to which breaches of rights guaranteed by the ECHR and the Charter have allegedly been committed.

56 In addition, in the Commission's view, the General Court erred in law in interpreting that judgment as meaning that the Court of Justice of the European Union had jurisdiction to examine an action for damages under Articles 268 and 340 TFEU only if it had jurisdiction to decide on an action for annulment or for failure to act brought under Articles 263 and 265 TFEU, respectively.

57 In the fourth place, the appellants complain that the General Court misinterpreted, in paragraph 41 of the order under appeal, the case-law arising from paragraphs 69

and 78 of the judgment of 25 March 2021, *Carvalho and Others* v *Parliament and Council* (C-565/19 P, EU:C:2021:252). Indeed, that case-law is not relevant to examining the jurisdiction of the Court of Justice of the European Union in the present case, since it concerns a distinct context, namely the interpretation of the requirements for recognising *locus standi* in an action for annulment under the fourth paragraph of Article 263 TFEU. In support of that argument, KS and KD also submit that they did not request that the Court's case-law be changed or that the exclusion of that jurisdiction provided for in the second subparagraph of Article 24(1) TEU and Article 275 TFEU be set aside.

58 In the fifth and last place, KS and KD submit, in their response in Case C-44/22 P, that Article 298(1) TFEU and Article 41 of the Charter support the proposition that the Court of Justice of the European Union does have jurisdiction to rule on their action. Indeed, an open, efficient and independent European administration ought to have ensured that Eulex Kosovo and the review panel were established in a manner that did not infringe EU law. Thus, when the decisions at issue of that panel were notified to the EU institutions and to Member States, measures ought to have been taken to bring the breaches of the fundamental rights at issue to an end.

59 The Council and the EEAS, supported by the French Republic and, in part, by the Czech Republic, dispute the appellants' arguments.

Findings of the Court

60 By the first complaint of the first part, the second and third complaints of the second part, and the third part of the single ground of appeal in Case C-29/22 P, and by the first and second parts of the first ground of appeal, the second part of the second ground of appeal, the third ground of appeal and the second part of the fourth ground of appeal in Case C-44/22 P, which it is appropriate to examine together, the appellants submit, in essence, that, in paragraphs 29 to 33 and 37 to 42 of the order under appeal, the General Court made several errors of law in the interpretation of the second subparagraph of Article 24(1) TEU, the first paragraph of Article 275 TFEU and the case-law of the Court relating to those provisions.

61 In that regard, it must be borne in mind that the interpretation of a provision of EU law requires account to be taken not only of its wording, but also of its context, and of the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EU law may also reveal elements that are relevant to its interpretation (see, to that effect, judgments of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraph 135, and of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)*, C-24/19, EU:C:2020:503, paragraph 37).

62 It must also be borne in mind that, in accordance with the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275

TFEU, the Court of Justice of the European Union does not, in principle, have jurisdiction with respect to the provisions relating to the CFSP or with respect to acts adopted on the basis of those provisions. Those provisions introduce a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court of Justice of the European Union to ensure that in the interpretation and application of the Treaties the law is observed, and they must, therefore, be interpreted narrowly (judgments of 24 June 2014, *Parliament* v *Council*, C-658/11, EU:C:2014:2025, paragraphs 69 and 70; of 19 July 2016, *H* v *Council and Others*, C-455/14 P, EU:C:2016:569, paragraphs 39 and 40; and of 6 October 2020, *Bank Refah Kargaran* v *Council*, C-134/19 P, EU:C:2020:793, paragraphs 26 and 32).

63 In addition, the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU expressly lay down two exceptions to that principle, namely, the jurisdiction of the Court of Justice of the European Union, first, to monitor compliance with Article 40 TEU and, second, to give rulings on actions brought subject to the conditions laid down in the fourth paragraph of Article 263 TFEU, concerning the review of the legality of Council decisions adopted on the basis of provisions relating to the CFSP, which provide for restrictive measures against natural or legal persons (judgments of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 60, and of 6 October 2020, *Bank Refah Kargaran* v *Council*, C-134/19 P, EU:C:2020:793, paragraph 27).

64 However, in the present case, it is common ground that the acts and omissions referred to in the action brought by KS and KD do not concern the monitoring of compliance with Article 40 TEU or the review of such individual restrictive measures.

65 That said, the appellants submit that the General Court erred in law in failing to interpret the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU in the light of the rights and principles enshrined in Article 2, Article 3(5) and Articles 6, 19, 21 and 23 TEU, in Articles 268, 340 and 344 TFEU, in Article 47 of the Charter and in Articles 6 and 13 ECHR.

66 In that regard, it is apparent from Article 3(5) TEU that, in its relations with the wider world, the European Union is to contribute, inter alia, to the protection of human rights. In addition, under Article 23 TEU, 'the [European] Union's action on the international scene, pursuant to [Chapter 2 of Title V of the EU Treaty], shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1 [of that title]'. Furthermore, in accordance with the first subparagraph of Article 21(1) TEU, which forms part of Chapter 1, 'the [European] Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and

solidarity, and respect for the principles of the United Nations Charter and international law'.

67 Moreover, Article 51(1) of the Charter confirms the Court's settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law (see, to that effect, judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 and 19, and of 25 January 2024, *Parchetul de pe lângă Curtea de Apel Craiova*, C-58/22, EU:C:2024:70, paragraph 40).

68 Accordingly, it must be held, as the Advocate General observed in points 77, 79 and 80 of her Opinion, that the inclusion of the CFSP in the EU constitutional framework means that the basic principles of the EU legal order also apply in the context of that policy. These include, in particular, respect for the rule of law and fundamental rights, values expressed in Article 2 TEU and given concrete expression to in Article 19 TEU, which require that both EU and Member State authorities be subject to judicial review.

69 However, it should be noted, in the first place, that, in accordance with the first sentence of the second subparagraph of Article 24(1) TEU, 'the [CFSP] is subject to specific rules and procedures' in Chapter 2 of Title V of the EU Treaty. The last sentence of the second subparagraph of Article 24(1) TEU, which provides that the Court of Justice of the European Union does not, in principle, have jurisdiction with respect to the provisions relating to the CFSP or with respect to acts adopted on the basis of those provisions, is one of those specific rules.

70 However, such a limitation of the jurisdiction of the Court of Justice of the European Union can be reconciled both with Article 47 of the Charter and with Articles 6 and 13 ECHR.

71 In that regard, first, it should be noted, as the Court has already held in paragraph 74 of the judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236), that Article 47 of the Charter cannot confer jurisdiction on the Court, where the Treaties exclude it. Nor is that article intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Court of Justice of the European Union, as is apparent also from the Explanation on Article 47 of the Charter, which must – in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter – be taken into consideration for the interpretation of that Article 47 (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97).

72 Furthermore, it must be recalled that the principles of conferral and of institutional balance also apply in the area of the CFSP. Indeed, in accordance with Article 5(1) and (2) TEU, 'the limits of Union competences are governed by the principle of conferral', that principle meaning that 'the Union shall act only within

the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein[, whereas c]ompetences not conferred upon the Union in the Treaties remain with the Member States'. Moreover, in so far as Article 13(2) TEU provides that 'each institution shall act within the limits of the powers conferred on it in the Treaties', that latter provision reflects the principle of institutional balance, characteristic of the institutional structure of the European Union, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions (judgments of 13 June 1958, *Meroni* v *High Authority*, 9/56, EU:C:1958:7, p. 152; of 22 May 1990, *Parliament* v *Council*, C-70/88, EU:C:1990:217, paragraph 22; of 14 April 2015, *Council* v *Commission*, C-409/13, EU:C:2015:217, paragraph 64; and of 22 November 2022, *Commission* v *Council (Accession to the Geneva Act)*, C-24/20, EU:C:2022:911, paragraph 83).

73 Accordingly, the claim that the acts or omissions which are the subject of an action brought by an individual infringe that individual's fundamental rights is not in itself sufficient for the Court of Justice of the European Union to declare that it has jurisdiction to hear and determine that action (see, by analogy, judgment of 25 March 2021, *Carvalho and Others* v *Parliament and Council*, C-565/19 P, EU:C:2021:252, paragraph 48); otherwise, the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU would be deprived of their effectiveness in part and the principles of conferral and of institutional balance infringed.

74 Furthermore, contrary to what the appellants argued at the hearing, that assessment is not called into question by the case-law of the Court arising from paragraphs 55 to 60 and 67 of the 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), according to which the Charter is addressed to the EU institutions, even when they act outside the EU legal framework.

75 In that regard, it must be borne in mind that, in the case which gave rise to that judgment, the Court ruled on an action for non-contractual liability brought by several natural and legal persons against the Commission and the European Central Bank (ECB) on the ground that their fundamental rights had been infringed in the context of the Treaty establishing the European Stability Mechanism concluded in Brussels on 2 February 2012.

76 Thus, that judgment concerned a breach of fundamental rights in a context other than that of the CFSP, a context which does not fall within the scope of the provisions of the Treaties in respect of which Article 24 TEU and Article 275 TFEU limit the jurisdiction of the Court of Justice of the European Union.

77 Second, the Court must admittedly ensure that the interpretation which it gives to Article 47 of the Charter, the first and second paragraphs of which correspond to Article 6(1) and Article 13 ECHR, safeguards a level of protection which does not

fall below the level of protection established in those provisions of the ECHR, as interpreted by the European Court of Human Rights (see, to that effect, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 116 to 118 and the case-law cited).

78 On the one hand, although under Article 6(1) ECHR 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law', that right is not absolute and may be subject to legitimate restrictions (ECtHR, 14 December 2006, *Markovic and Others v. Italy*, CE:ECHR:2006:1214JUD000139803, §§ 93 and 99). In that regard, the European Court of Human Rights has held that it was not its task to interfere with the institutional balance between the executive and the national courts; that institutional balance may be reflected in a constitutional limitation of the jurisdiction of the courts of a State as regards acts that cannot be detached from the conduct by that State of its international relations (ECtHR, 14 September 2022, *H.F. and Others v. France*, CE:ECHR:2022:0914JUD002438419, § 281).

79 On the other hand, Article 13 ECHR, which provides that 'everyone whose rights and freedoms as set forth in [the ECHR] are violated shall have an effective remedy before a national authority', guarantees the availability at national level of a remedy to enforce the substance of the ECHR rights and freedoms in whatever form they may happen to be secured in the domestic legal order, with the result that the effect of that article is to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the ECHR and to grant appropriate relief (ECtHR, 10 July 2020, *Mugemangango v. Belgium*, CE:ECHR:2020:0710JUD000031015, § 130 and the case-law cited).

80 However, nor can the protection afforded by Article 13 ECHR be regarded as being absolute, since the context in which an alleged violation – or category of violations – occurs is capable of justifying a limitation on the conceivable remedy (see, to that effect, ECtHR, 26 October 2000, *Kudła v. Poland*, CE:ECHR:2000:1026JUD003021096, § 151). Moreover, it follows from the case-law of the European Court of Human Rights that Article 6(1) ECHR is a *lex specialis* in relation to Article 13 ECHR (see, to that effect, ECtHR, 9 March 2006, *Menesheva v. Russia*, CE:ECHR:2006:0309JUD005926100, § 105), with the result that the latter article cannot call into question the power of States to justify legitimate limitations of the right enshrined in Article 6(1), such as the limitations referred to in the case-law of that court recalled in paragraph 78 above.

81 Accordingly, the General Court did not err in law in holding, in essence, that neither the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, read in the light of Article 47 of the Charter, Article 6(1) and Article 13 ECHR, and Article 2, Article 3(5) and Articles 6, 19, 21 and 23 TEU, nor the pleading of breaches of fundamental rights, justified, in themselves, a finding by that court that it had jurisdiction to hear the action brought by KS and KD.

82 In that context, it is also necessary to reject the argument, advanced in particular by the Commission, that the General Court ought to have declared itself to have jurisdiction by interpreting Article 24(1) TEU and the second paragraph of Article 275 TFEU in the light of the first sentence of Article 6(2) TEU. In that regard, it is sufficient to note that, in any event, under the first sentence of Article 2 of Protocol (No 8), relating to Article 6(2) [TEU] on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, 'the agreement [relating to that accession] shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions'. Accordingly, Article 6(2) TEU cannot be interpreted as having the effect of extending the jurisdiction of the Court of Justice of the European Union in relation to the CFSP.

83 In the same vein, in the light of the case-law set out in paragraph 71 above, it is also necessary to reject the Commission's arguments that, first, the principle of equal treatment would be infringed if KS and KD were excluded from the EU system of judicial protection and, second, the General Court ought to have examined by what other means KS and KD could have obtained effective judicial protection.

84 Consequently, contrary to what the Commission in essence claims, nor can it be held that the General Court ought to have taken account of the fact that, by the judgment of the High Court of Justice, a national court declared itself to lack jurisdiction.

85 In the second place, the appellants submit that, in paragraphs 37 to 39 of the order under appeal, the General Court misapplied the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793). In that regard, it must be borne in mind that, in that judgment, the Court of Justice did indeed declare that it had jurisdiction to rule on an action for damages in so far as that action sought to obtain compensation for the harm allegedly caused by restrictive measures provided for in CFSP decisions.

86 However, unlike the situation in the case which gave rise to that judgment, the action brought by KS and KD does not relate to individual restrictive measures. The Court has stated that, as regards measures adopted on the basis of provisions relating to the CFSP, it is the individual nature of those measures which, in accordance with the second paragraph of Article 275 TFEU, permits access to the Courts of the European Union (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 103 and the case-law cited, and judgment of today's date, *Neves 77 Solutions*, C-351/22, paragraph 37).

87 In those circumstances, the General Court cannot be criticised for having held, in paragraphs 37 to 39 of the order under appeal, that that action concerned a situation completely different from that at issue in the case giving rise to the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793), and that the issue of the jurisdiction of the Courts of the

European Union in relation to the CFSP in general terms had not been addressed in that judgment.

88 That conclusion is not called into question by the appellants' argument that the General Court ought to have declared that it had jurisdiction to hear and determine the action brought by KS and KD on the basis of that judgment since the Court of Justice of the European Union has jurisdiction to hear all actions for non-contractual liability under Articles 268 and 340 TFEU, including in CFSP matters, with Article 24 TEU and Article 275 TFEU not providing for any derogation from that general jurisdiction.

89 In that regard, it must indeed be borne in mind that, pursuant to the second paragraph of Article 340 TFEU, 'in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'. Moreover, as provided in Article 268 TFEU, 'the Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340 [TFEU]'.

90 Furthermore, it is settled case-law that the Court of Justice of the European Union has exclusive jurisdiction in disputes involving the non-contractual liability of the European Union, to the exclusion of national courts and tribunals (see, to that effect, judgments of 13 February 1979, *Granaria*, 101/78, EU:C:1979:38, paragraph 16, and of 15 July 2021, *OH (Immunity from jurisdiction)*, C-758/19, EU:C:2021:603, paragraph 22).

91 That said, it is important to make clear that neither the exclusive nature of that jurisdiction nor the independent nature of an action to establish non-contractual liability of the European Union can have the effect of extending the limits of the jurisdiction conferred on that institution by the Treaties. The last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU lay down such limits of jurisdiction and must, so far as actions relating to the CFSP are concerned, be regarded as *leges speciales* in relation to Articles 268 and 340 TFEU. Accordingly, it cannot be accepted that the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU do not apply to actions seeking to establish the non-contractual liability of the European Union.

92 That finding is confirmed by the case-law of the Court, according to which the last sentence of the second subparagraph of Article 24(1) TEU refers to the second paragraph of Article 275 TFEU in order to determine not the type of procedure under which the Court may review the legality of certain decisions, but rather the type of decisions whose legality may be reviewed by the Court, within any procedure that has as its aim such a review of legality (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 70).

93 In the third place, it is necessary to reject the appellants' argument that the General Court erred in law in that it relied on the case-law arising from paragraphs 69 and 78 of the judgment of 25 March 2021, *Carvalho and Others* v *Parliament and Council* (C-565/19 P, EU:C:2021:252), in order to hold, in paragraph 41 of the order under appeal, that an interpretation of the provisions of the Treaties relating to the jurisdiction of the Courts of the European Union in the light of the fundamental right to effective judicial protection cannot have the effect of setting aside the conditions expressly laid down in the FEU Treaty.

94 Indeed, although that case-law concerns the conditions for the admissibility of an action for annulment under the fourth paragraph of Article 263 TFEU, it must be noted, as the Advocate General observed in point 99 of her Opinion, that the General Court was fully entitled to apply that case-law when assessing its jurisdiction to hear and determine the action brought by KS and KD inasmuch as that same case-law expresses a principle of interpretation applicable to all the legal remedies provided for by the Treaties.

95 In the fourth and last place, it is apparent from the foregoing, and in particular from paragraph 71 above, that the Court of Justice must reject the argument by which KS and KD submit, in essence, in their response in Case C-44/22 P, that Article 298(1) TFEU and Article 41 of the Charter support the proposition that the General Court ought to have declared that it had jurisdiction to hear and determine their case.

96 Consequently, it is appropriate to reject the first complaint of the first part, the second and third complaints of the second part, and the third part of the single ground of appeal in Case C-29/22 P as well as the first and second parts of the first ground of appeal, the second part of the second ground of appeal, the third ground of appeal and the second part of the fourth ground of appeal in Case C-44/22 P.

The second complaint of the first part and the first complaint of the second part of the single ground of appeal in Case C-29/22 P and the third part of the first ground of appeal and the first part of the second ground of appeal in Case C-44/22 P

Arguments of the parties

97 The appellants submit, in essence, that, in paragraphs 34 to 36 of the order under appeal, the General Court narrowly and selectively read the case-law arising from the judgments of 12 November 2015, *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753), of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569), and of 25 June 2020, *SatCen* v *KF* (C-14/19 P, EU:C:2020:492), in that it restricted its jurisdiction to the cases covered by that case-law, namely, in particular, personnel management of a Common Security and Defence Policy (CSDP) mission and the award of a public contract involving expenditure from the EU budget. The Commission submits that, in so doing, the General Court limited

its analysis of that case-law to a mere comparison of the facts with those characterising the present case, and that that case-law is applicable in the present case, since the CFSP constitutes only the context in which the alleged breaches of KS's and KD's rights, as protected by the Charter and the ECHR, took place.

98 In addition, KS and KD submit that the General Court erred in law, in paragraph 39 of the order under appeal, in so far as it held that any measure adopted by the EU institutions under Article 24(1) TEU concerns 'the definition and implementation of the CFSP,' and is, therefore, excluded from the scope of the jurisdiction of the Court of Justice of the European Union. Indeed, the terms 'definition' and 'implementation' appear not in the last sentence of the second subparagraph of Article 24(1) TEU, which concerns the jurisdiction of the Court of Justice of the European Union, but in the second sentence of that provision. Thus, the General Court disregarded the spirit of that provision and the intention of its drafters. In addition, the General Court presumed that the acts and omissions at issue in the present case were of a purely political nature merely because they were adopted on the basis of the competence of the European Union in the area of the CFSP and it inferred from this that they were subject to the same provision. At the hearing, KS and KD added that the issue of the jurisdiction of the Court of Justice of the European Union must be examined on a case-by-case basis.

99 Furthermore, the Commission submits that paragraphs 23, 28 and 39 of the order under appeal are vitiated by errors of law in that the General Court held, without providing any further explanation, that the action brought by KS and KD arose from acts or omissions which fall within the scope of political or strategic issues connected with Eulex Kosovo and thus concerning the definition and implementation of the CFSP, instead of classifying that action as an action for damages for alleged breaches of 'fundamental human rights'. Indeed, the General Court did not examine or legally qualify either the nature of the alleged breaches of EU law, or those acts and omissions.

100 Moreover, according to the Commission, the General Court did not detail the conditions that must be met in order for acts or omissions to be classified as 'strategic' or 'political', nor did it specify the consequences of such a classification for the interpretation of the exclusion of the jurisdiction of the Court of Justice of the European Union in relation to the CFSP provided for in the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU. However, it is essential to define the scope of that exclusion, which cannot be limited to either the formalistic criterion according to which the measure at issue falls within the scope of the CFSP, as is apparent from paragraphs 42 and 43 of the judgment of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569), or to the assumption that those acts or omissions are 'strategic' or 'political' in nature. By confining itself, in that regard, to referring to the arguments advanced by KS and KD in support of their action, the General Court's reasoning was circular. According to the Commission, that action, although in the context of the CFSP, concerned alleged breaches of human rights in the context of the implementation of the Eulex Kosovo mission, with the result that it related to

that mission's administrative operation. Unlike, in particular, the establishment of a mission or the definition of its objectives and tasks, fundamental rights obligations are not a matter of CFSP policy or of political or strategic issues and choices.

101 At the hearing, the Commission added that, in order to establish the jurisdiction of the Court of Justice of the European Union to examine alleged breaches of fundamental rights, it would be necessary to demonstrate the existence of a direct causal link between the alleged breach of fundamental rights and each of the acts and omissions at issue. In the present case, such a link could be established without difficulty in the light of the human rights breaches at issue that were found by the review panel.

102 At the hearing, the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria and the Kingdom of Sweden argued, in essence, that the question whether the acts and omissions at issue are of a political or strategic nature plays no role in the examination of the jurisdiction of the Court of Justice of the European Union in relation to the CFSP, since those acts and omissions concern breaches of fundamental rights. In such a case, the exclusion of the jurisdiction of that institution provided for in the last sentence of the second subparagraph of Article 24(1) TEU and in the first paragraph of Article 275 TFEU would not apply.

103 In addition, Romania stated that fundamental rights had to be respected in all areas of EU law, including the CFSP. That being the case, where an *actio popularis* is precluded, the person concerned would have to bring, in a detailed manner, contentious proceedings concerning a right recognised under domestic law and demonstrate that he or she had directly suffered the effects of the measure at issue, in order to establish the jurisdiction of the Court of Justice of the European Union, as is apparent from the judgment of the ECtHR of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland* (CE:ECHR:2021:0507JUD000490718, § 187), relating to Article 6(1) ECHR.

104 Furthermore, according to the Republic of Finland, the exclusion of the jurisdiction of the Court of Justice of the European Union in relation to the CFSP seeks to preserve institutional balance. It follows that only measures relating to the definition of that policy, and in particular the CSDP, would fall within the scope of that exclusion, whereas that institution would have jurisdiction to review the acts and omissions committed in the context of the practical implementation of those policies, such as the acts and omissions at issue in the present case.

105 The Council and the EEAS counter that, unlike the situation in the cases which gave rise to the judgments of 12 November 2015, *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753), of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569), and of 25 June 2020, *SatCen* v *KF* (C-14/19 P, EU:C:2020:492), the acts and omissions referred to in the action brought by KS and KD do not relate to purely personnel management matters, employment

disputes or the implementation of an act which, although adopted for operational purposes by a CFSP body, is based on the FEU Treaty. Those acts and omissions relate to political or strategic matters in the field of that policy, in particular in so far as they concern the mandate given to Eulex Kosovo and the resources that were made available to that mission in order to carry out that mandate. It follows that the Court of Justice of the European Union does not have jurisdiction, pursuant to the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, to hear and determine that action.

106 Indeed, according to the Council, it is apparent from points 57 to 61 of the Opinion of Advocate General Bobek in *SatCen* v *KF* (C-14/19 P, EU:C:2020:220) that the Court of Justice of the European Union does not have jurisdiction in CFSP matters, pursuant to those provisions, where an EU act, first, is formally based on CFSP provisions and, second, corresponds as to its content to a CFSP measure. Thus, the jurisdiction of the Court of Justice of the European Union cannot extend to measures falling within the core of the CFSP, and in particular the CSDP, neither as regards the legality of the measures falling within the definition and implementation of those policies nor as regards the establishment of non-contractual liability of the European Union incurred by actions or failures to act in that area.

107 Furthermore, the Council submits that, in order to preserve the effectiveness of the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, a suitable criterion must be found in order to delimit the jurisdiction of the Court of Justice of the European Union in relation to the CFSP. That criterion could be attached to the operation of general principles of the EU legal order, such as the principle of good administration, and should allow a clear distinction to be maintained between acts implying discretionary policy choices, whether contained in CFSP decisions or in acts adopted on the basis of the CFSP, and administrative acts aimed at the implementation of concrete actions. Indeed, to allow judicial review of the number and distribution of the capabilities of Eulex Kosovo would mean that the CSDP effort of the European Union implies an obligation of result whenever the European Union decides to intervene in order to uphold the principles set out in Article 21(1) TEU; this is not provided for in the Treaties and is incompatible with the exercise of a competence which implies complex policy choices dependant, inter alia, on the actions of outside actors which are not subject to Union rules.

108 At the hearing, the Council added that it was necessary to analyse the jurisdiction of the Court of Justice of the European Union in relation to the CFSP on a case-by-case basis, the latter institution having jurisdiction only to interpret or examine the legality of specific measures carrying out that policy, not acts of general application. In the present case, the Court of Justice of the European Union might have jurisdiction to examine whether Eulex Kosovo infringed KS's and KD's fundamental rights in the context of the investigations carried out by that mission, whereas the removal of the executive mandate of that mission by Decision

2018/856 and the question of whether sufficient resources had been allocated to it are political or strategic issues.

109 In addition, according to the EEAS, the acts or omissions referred to in the action brought by KS and KD are either operational actions of Eulex Kosovo or strategic or policy matters. Investigative actions – or failure to take such action – by that mission are measures exclusively taken in the field of the CFSP. The actions taken by such a mission could only be subject to judicial review, however, if, in the implementation of its mandate, it committed manifest errors or acted in an arbitrary manner. That was not the case here.

110 At the hearing, the EEAS added that the definition of strategic lines, within the meaning of Article 26 TEU, decisions relating to operational actions, under Article 28 TEU, the position of the European Union on particular matters of a geographical nature, pursuant to Article 29 TEU, and the decision to appoint a special representative, in accordance with Article 33 TEU, fall within the core of the CFSP and cannot, therefore, be subject to judicial review. Furthermore, Article 43 TEU provides for a list of multiple tasks to be performed by CSDP missions. That list illustrates the type of decisions which are not subject to judicial review by the Court of Justice of the European Union, since it is the Council which decides to implement, inter alia, humanitarian and rescue tasks, and military advice and assistance tasks. By contrast, executive decisions adopted on the basis of acts of the Council, in particular by the Commission or the mission concerned itself, such as those relating to the employment of staff, within the meaning of Article 15a of Joint Action 2008/124, as amended by Decision 2014/349, could be subject to such judicial review.

111 The French Republic argued at the hearing that the European Court of Human Rights accepted, in the judgment of 14 December 2006 (*Markovic and Others v. Italy*, CE:ECHR:2006:1214JUD000139803), that certain acts of foreign policy fall outside the jurisdiction of the courts. Thus, a distinction must be drawn between, on the one hand, acts of purely administrative management which are not inextricably linked to the CFSP and which have no political connotation and, on the other hand, acts the purpose of which is to contribute to the conduct, definition or implementation of the CFSP. In the present case, the acts and omissions referred to in the action brought by KS and KD fall within the latter category of acts and cannot be detached from that policy, which is central to the present cases, with the result that only the national courts would have jurisdiction to examine those acts and omissions. In particular, the decision to open an investigation directly comes within the conduct of the Eulex Kosovo mission. It is not, therefore, a management activity or decision. Moreover, the criterion of direct link proposed by the Commission is irrelevant, since it is the substantive content of the contested act which is determinative for the purpose of assessing the jurisdiction of the Court of Justice of the European Union, and not the pleas in law relied on.

112 The Czech Republic argued at the hearing that the specific nature of the CFSP had to be protected and that that policy was subject to specific rules and procedures,

including as regards the jurisdiction of the Court of Justice of the European Union. That said, it would be possible to strike a balance between, on the one hand, the need to protect those specific rules and procedures and, on the other hand, the guarantee of effective judicial protection of fundamental rights.

Findings of the Court

113 By the second complaint of the first part and the first complaint of the second part of the single ground of appeal in Case C-29/22 P and by the third part of the first ground of appeal and the first part of the second ground of appeal in Case C-44/22 P, the appellants complain, in essence, first, that the General Court erred in law in paragraphs 34 to 36 of the order under appeal, in so far as it held that the case-law of the Court of Justice arising from the judgments of 12 November 2015, *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753), of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569), and of 25 June 2020, *SatCen* v *KF* (C-14/19 P, EU:C:2020:492), was not applicable in the present case, and, second, that the General Court declared that it lacked jurisdiction on the ground that the action brought by KS and KD arose from acts and omissions relating to political or strategic issues connected with Eulex Kosovo and concerning the definition and implementation of the CFSP. In that latter regard, KS and KD submit that paragraph 39 of that order is vitiated by an error of law, whereas the Commission disputes paragraphs 23, 28 and 39 of that order.

114 As a preliminary point, it should be noted that, in paragraph 23 of that order, the General Court confined itself to setting out the arguments put forward by KS and KD in their action. Inasmuch as the Commission does not allege any distortion of those arguments, the first part of the second ground of its appeal must be rejected from the outset in so far as it concerns that paragraph 23, since it is based on a misreading of the order under appeal.

115 Furthermore, it follows from the case-law referred to in paragraph 63 above that, in examining the jurisdiction of the Court of Justice of the European Union to hear and determine an action concerning acts or omissions falling within the scope of the CFSP, it is necessary to ascertain, first, whether the situation at issue falls within one of the situations provided for in the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU, in which that jurisdiction is expressly allowed.

116 If that is not the case, it is necessary, second, to assess whether – as is apparent, in essence, from the case-law of the Court of Justice arising from paragraph 49 of the judgment of 12 November 2015, *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753), paragraph 55 of the judgment of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569), and paragraph 66 of the judgment of 25 June 2020, *SatCen* v *KF* (C-14/19 P, EU:C:2020:492) – the jurisdiction of the Court of Justice of the European Union may be based on the fact that the acts and omissions at issue are not directly related to the political or strategic choices made

by the institutions, bodies, offices and agencies of the Union in the context of the CFSP, and in particular the CSDP.

117 Thus, if the acts and omissions at issue are not directly related to those political or strategic choices, the Court of Justice of the European Union has jurisdiction to assess the legality of those acts or omissions or to interpret them. By contrast, if those acts or omissions are directly related to those political or strategic choices, that institution must declare that it lacks jurisdiction.

118 It follows that, pursuant to the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, the Court of Justice of the European Union does not have jurisdiction to assess the legality of, or interpret, acts or omissions directly related to the conduct, definition or implementation of the CFSP, and especially the CSDP, that is to say, in particular the identification of the European Union's strategic interests and the definition of both the actions to be taken and the positions to be adopted by the European Union as well as of the general guidelines of the CFSP, within the meaning of Articles 24 to 26, 28, 29, 37, 38, 42 and 43 TEU.

119 As is apparent from paragraphs 62, 68 to 73, 77 to 80 and 91 above, that consideration, first, is consistent with the wording of those provisions, which, in principle, exclude the jurisdiction of the Court of Justice of the European Union in CFSP matters, second, is supported by the context of those provisions, since it enables the effectiveness of the provisions to be preserved, without, however, unduly prejudicing the right to an effective remedy, and, third, corresponds to the aim pursued by those same provisions.

120 That said, it is necessary to ascertain, first, whether the General Court erred in law in paragraphs 28, 33 to 36 and 39 of the order under appeal in that, in order to decline jurisdiction on the basis of the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, it applied the test of whether the acts and omissions referred to in the action brought by KS and KD fell within the scope of 'political or strategic issues connected with [Eulex Kosovo]' which concerned 'the definition and implementation of the CFSP' and, second, whether the application of that test in the present case is vitiated by error.

121 In that regard, it is necessary to carry out a specific analysis of each of the acts and omissions falling within the scope of the CFSP, and in particular the CSDP, referred to in the action at issue, while taking account of the fact that the aim of legal certainty does not require that the Courts of the European Union have to consider the substance of the case in order to establish whether they have jurisdiction (see, by analogy, judgments of 3 July 1997, *Benincasa*, C-269/95, EU:C:1997:337, paragraph 27, and of 8 February 2024, *Inkreal*, C-566/22, EU:C:2024:123, paragraph 27).

122 In the first place, in the present case, in paragraphs 28, 33 to 36 and 39 of the order under appeal, the General Court found that the action brought by KS and

KD did not fall within the possible situations in which the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU expressly provide that the Court of Justice of the European Union has jurisdiction in CFSP matters, which is not disputed in the present appeals.

123 In the second place, the General Court held, in essence, that the acts and omissions referred to in that action were directly related to that policy, having regard to their political and strategic nature and to their link with the definition and implementation of the CFSP.

124 In those circumstances, it is necessary to assess whether the General Court erred in law, in paragraphs 28 and 39 of the order under appeal, in declaring that it lacked jurisdiction to hear and determine the action brought by KS and KD on the ground that each of the acts and omissions referred to in that action, and set out in paragraph 20 above, related directly to the definition and implementation of the political or strategic choices of the CFSP.

125 First, in support of their action, KS and KD pleaded a breach by Eulex Kosovo of Articles 2 and 3 ECHR and Articles 2 and 4 of the Charter, on account of insufficient investigation owing to that mission's lack of the necessary resources and appropriate personnel to perform its executive mandate.

126 As regards the alleged lack of necessary resources, it must be found that the resources made available to a CFSP mission, and in particular a CSDP mission, on the basis of the first subparagraph of Article 28(1) TEU, are directly related to the political or strategic choices made within the framework of the CFSP, as the General Court in essence held.

127 By contrast, as regards the alleged lack of appropriate personnel of the Eulex Kosovo mission, that mission's capacity to employ staff, which is apparent from the wording of Article 15a of Joint Action 2008/124, as amended by Decision 2014/349, constitutes an act of day-to-day management forming part of the performance of that mission's mandate. Thus, it is for the mission to ensure, within the framework of the resources made available to it, that the personnel it employs are appropriate.

128 In contrast to the claim relating to a lack of necessary resources, the decisions taken by Eulex Kosovo as to the choice of personnel employed by that mission are not directly linked to the political or strategic choices made by it in the context of the CFSP. It follows that the General Court erred in law inasmuch as it held that the alleged lack of appropriate personnel fell within political or strategic issues which concern the definition and implementation of the CFSP.

129 Second, in support of their action, KS and KD alleged a breach of Article 6(1) and Article 13 ECHR and of Article 47 of the Charter, owing to the absence of provisions for legal aid in proceedings before the review panel and of a remedy

for breaches found to have been committed that would also enable that panel to enforce its decisions.

130 As regards the absence of provisions for legal aid in proceedings before the review panel, it must be noted that that part of the action brought by KS and KD concerns the procedural rules of that panel, which, as is apparent from paragraph 6 above, is responsible for examining complaints of human rights breaches committed by Eulex Kosovo. However, those purely procedural rules are not directly related to the political or strategic choices made in the context of the CFSP. Accordingly, paragraphs 28 and 39 of the order under appeal are vitiated by errors of law in so far as those paragraphs concern the absence of such procedural provisions.

131 Similarly, as regards the lack of enforcement powers conferred on the review panel or of remedies for breaches found by it to have been committed, it must be noted that, in accordance with Articles 1 and 2 of Joint Action 2008/124, the Eulex Kosovo mission was established to assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that those institutions are free from political interference and adhering to internationally recognised standards and European best practices. Thus, the decision whether or not to make the acts and omissions of that mission subject to a review mechanism meeting those standards does not directly relate to the political or strategic choices concerning that mission, but only to an aspect of its administrative management. Consequently, the General Court erred in law, in paragraphs 28 and 39 of the order under appeal, in finding that that part of the action brought by KS and KD fell directly within the scope of such choices.

132 Third, KS and KD relied, in support of their action, on a failure to take remedial action to remedy the breaches of fundamental rights found by the review panel. In addition, they alleged a misuse or abuse of power, first, on account of the assertions of the Council and the EEAS that Eulex Kosovo had done the best that it could to investigate the crimes at issue and that the review panel was not intended to be a judicial body and, second, on the ground that the case of KD, concerning a war crime, had been subject neither to a legally sound review by Eulex Kosovo or the Specialist Prosecutor's Office for investigation nor prosecution before the Kosovo Specialist Chamber.

133 In that regard, it must be found that the absence of both that remedial action and a legally sound review of that case concern the failure to adopt individual measures relating to the particular situations of KS and KD and are not directly related to the political or strategic choices made in the context of the CFSP. The same is true of the assertion of the Council and the EEAS that the Eulex Kosovo mission had done the best that it could to investigate the crimes at issue.

134 As regards the assertion that the review panel is not intended to be a judicial body, it must be held that this is a non-binding act.

135 In those circumstances, the acts and omissions referred to in paragraph 132 above cannot be related directly to the political or strategic choices made within the framework of the CFSP, with the result that paragraphs 28 and 39 of the order under appeal are vitiated by an error of law in so far as the General Court held that those acts and omissions fell within political or strategic issues concerning the definition and implementation of that policy.

136 Fourth, the decision to remove the executive mandate of a CFSP mission, and in particular a CSDP mission, is directly related to such choices, for the purposes of Article 28(1) and Article 43(2) TEU. Accordingly, the General Court did not err in law in so far as it declared that it lacked jurisdiction to rule on the complaints concerning the removal of Eulex Kosovo's executive mandate by Decision 2018/856, which terminated the obligation of that mission, enshrined in Article 3(d) of Joint Action 2008/124, to ensure that certain crimes 'are properly investigated, prosecuted, adjudicated and enforced'.

137 In the light of the foregoing considerations, the second complaint of the first part and the first complaint of the second part of the single ground of appeal in Case C-29/22 P and the third part of the first ground of appeal and the first part of the second ground of appeal in Case C-44/22 P must be upheld and, therefore, the order under appeal set aside to the extent that, in paragraphs 28 and 39 of that order, the General Court declared that it manifestly lacked jurisdiction to hear and determine the action brought by KS and KD on the ground that it related to political or strategic issues concerning the definition and implementation of the CFSP in so far as that action concerned:

– a breach of Articles 2 and 3 ECHR and of Articles 2 and 4 of the Charter, committed by Eulex Kosovo, on account of the insufficient investigation of the disappearance and killing of their family members, owing to that mission's lack of appropriate personnel to perform its executive mandate, a breach found by the review panel on 11 November 2015 in respect of KS and on 19 October 2016 in respect of KD;

– a breach of Article 6(1) and Article 13 ECHR and of Article 47 of the Charter, owing to the absence of provisions for legal aid for qualifying applicants in proceedings before the review panel and to the establishment of that panel without the power to enforce its decisions or a remedy for breaches of human rights committed by Eulex Kosovo;

– the failure to take remedial action to remedy some or all of the breaches referred to in the first and second indents, despite the fact that the findings of the review panel were allegedly brought to the European Union's attention by the Head of Eulex Kosovo on 29 April 2016;

- the misuse or abuse of executive power by the Council and the EEAS on 12 October 2017 by their assertions that Eulex Kosovo had done the best that it could to investigate the crimes at issue of which members of the families of KS and KD were victims and that the review panel was not intended to be a judicial body; and

- the misuse or abuse of executive or public power for failing to ensure that the case of KD, concerning a war crime, be subject to a legally sound review by Eulex Kosovo and/or the Specialist Prosecutor's Office for investigation and prosecution before the Kosovo Specialist Chamber.

138 The second complaint of the first part and the first complaint of the second part of the single ground of appeal in Case C-29/22 P and the third part of the first ground of appeal and the first part of the second ground of appeal in Case C-44/22 P must be rejected as to the remainder.

The fourth part of the single ground of appeal in Case C-29/22 P

Arguments of the parties

139 By the fourth part of their single ground of appeal, KS and KD submit, in the first place, that the General Court erred in law by failing to address material parts of their claim and by failing to provide sufficient reasons to substantiate its conclusion that it manifestly lacked jurisdiction to hear that action. Indeed, there is no evidence that it engaged with the legal principles set out in the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793), or that it took account of the Commission's argument that it was inconceivable that the EU legal order would allow that an EU action is construed in a way as to infringe its foundational principles without any protection for the individuals bearing the burden of such infringement. In addition, the General Court ought to have addressed the detailed arguments put forward by the Commission about the relevance of the Charter and the ECHR in order to rule on its jurisdiction. Furthermore, the General Court failed to take account of either the judgment of the High Court of Justice or the consequences of the order under appeal for KS and KD. That absence of reasoning is particularly egregious given the seriousness of the breaches of fundamental rights that were the subject matter of the action.

140 In the second place, KS and KD submit that the General Court misunderstood their arguments in that, in paragraphs 23 and 28 of the order under appeal, it referred to 'political or strategic issues'. By those arguments, they did not seek to challenge the political or strategic choices of the European Union to establish Eulex Kosovo, but the executive mandate entrusted to that mission, in particular as regards the conduct of an investigation, which is not inherently of CFSP nature and could take place in a non-CFSP context.

141 In the third place, KS and KD submit that, contrary to what is stated in paragraph 40 of that order, they did not claim that the General Court ought to have

recognised that it had jurisdiction to hear their action solely on the basis that such recognition would be the only way of guaranteeing them effective judicial protection.

142 The Commission concurs with the arguments of KS and KD, whereas the Council and the EEAS dispute them.

Findings of the Court

143 In so far as, by the fourth part of their single ground of appeal, KS and KD complain, in the first place, that the General Court failed to address certain of their arguments and infringed its obligation to state reasons, it should be borne in mind, first, that, in the context of an appeal, the purpose of review by the Court of Justice is, inter alia, to consider whether the General Court addressed, to the requisite legal standard, all the arguments raised by the appellants and, second, that the plea alleging that the General Court failed to respond to arguments relied on at first instance amounts essentially to pleading a breach of the obligation to state reasons. However, that obligation does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case, and the General Court's reasoning may therefore be implicit on condition that it enables the persons concerned to know why it has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (judgment of 28 September 2023, *Changmao Biochemical Engineering* v *Commission*, C-123/21 P, EU:C:2023:708, paragraphs 185 and 186 and the case-law cited).

144 In the present case, in so far as KS and KD submit that the General Court failed to address the legal principles set out in the judgment of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793), it must be found that, in paragraphs 37 to 39 of the order under appeal, the General Court clearly stated the reasons why it considered that the case-law arising, inter alia, from paragraph 39 of that judgment was not relevant in the present case.

145 Moreover, it cannot be validly complained that the General Court failed to take account of the Commission's argument that it was inconceivable that the EU legal order would not provide any protection for the individuals whose fundamental rights have been infringed. In paragraph 40 of the order under appeal, the General Court held, in essence, that the reasoning set out in paragraphs 29 to 39 of that order could not be called into question solely on the basis that recognition of its jurisdiction would be the only way of guaranteeing effective judicial protection to KS and KD.

146 In addition, it must be noted that, in paragraph 41 of the order under appeal, the General Court responded to the Commission's argument concerning the relevance of the Charter and the ECHR in the context of the assessment of the jurisdiction of the Court of Justice of the European Union.

147 Furthermore, in so far as KS and KD complain that the General Court failed to take account of the judgment of the High Court of Justice or of the consequences for them of the order under appeal, those are criticisms that relate to the General Court's examination of its jurisdiction and must, therefore, be rejected in the light of what is apparent from paragraphs 83 and 84 above.

148 In the second place, in so far as KS and KD submit, in essence, that the General Court distorted or misrepresented their arguments in that, in paragraphs 23 and 28 of the order under appeal, it referred to 'political or strategic issues', it must be recalled that an appellant alleging distortion of its own arguments must, under Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of its Rules of Procedure, indicate precisely the evidence alleged to have been distorted and demonstrate the errors in the analysis which, in its view, resulted in the General Court making that distortion (judgment of 13 July 2023, *Commission* v *CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraph 212 and the case-law cited).

149 However, having regard to what is apparent from paragraphs 27 and 28 of the application in the case giving rise to the order under appeal, it must be held that, in paragraphs 23 and 28 of that order, the General Court did not distort or misrepresent the arguments of KS and KD.

150 In the third place, KS and KD submit, in essence, that the General Court distorted their arguments in that it is apparent from paragraph 40 of the order under appeal that they maintained that the General Court ought to have recognised that it had jurisdiction to hear their action solely on the basis that such recognition would be the only way of guaranteeing them effective judicial protection. In that regard, it is sufficient to note that, having regard to what is stated in paragraph 145 above, that argument is based on a misreading of that order. Indeed, it is clear from paragraph 40 of that order not that KS and KD only put forward that reason in order to establish that jurisdiction, but that the General Court's finding that it lacked jurisdiction, resulting from paragraphs 29 to 39 of that order, could not be called into question solely on the basis that there was no other way of guaranteeing them effective judicial protection.

151 Accordingly, the fourth part of the single ground of appeal in Case C-29/22 P must be rejected.

The first part of the fourth ground of appeal in Case C-44/22 P

Arguments of the parties

152 By the first part of its fourth ground of appeal, the Commission submits that the General Court ought to have established the exclusive jurisdiction of the Court of Justice of the European Union to hear and determine the action brought by KS and KD in accordance with Articles 268, 340 and 344 TFEU and the settled case-law of the Court arising in particular from paragraph 14 of the judgment of

13 February 1979, *Granaria* (101/78, EU:C:1979:38) and paragraph 17 of the judgment of 29 July 2010, *Hanssens-Ensch* (C-377/09, EU:C:2010:459). Furthermore, it is necessary both to ensure the coherence of the system of judicial protection and the uniform application of Union measures, as well as to ensure the unity of the Union legal order and to preserve the autonomy of that order and the supremacy of EU law, as is apparent from the case-law of the Court of Justice arising, in particular, from paragraph 166 of Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014 (EU:C:2014:2454) and from paragraphs 66, 78 and 80 of the judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236).

153 Moreover, as is apparent from the judgment of the High Court of Justice, only the Court of Justice of the European Union can provide an effective remedy in cases such as the present one, where the legality of actions allegedly attributable to the European Union is challenged by individuals in an action for damages, with national courts not being equipped to provide, in CFSP actions, the full range of remedies necessary to ensure compliance with Article 13 ECHR.

154 KS and KD concur with the Commission's arguments, while the Council and the EEAS dispute them.

Findings of the Court

155 By the first part of its fourth ground of appeal, the Commission complains, in essence, that the General Court failed to establish the exclusive jurisdiction of the Court of Justice of the European Union to hear and determine the action brought by KS and KD.

156 That said, first, in the light of what is apparent from paragraphs 126 and 136 above, the General Court did not err in law in so far as it declared that it lacked jurisdiction to hear and determine that action to the extent that it concerned an alleged lack of resources on the part of Eulex Kosovo and the removal of the executive mandate of that mission by Decision 2018/856. Thus, a fortiori, the General Court could not have established that it had exclusive jurisdiction to rule in that regard.

157 Second, as regards the other acts and omissions referred to in that action, it is sufficient to note that, as is apparent from paragraph 137 above, the General Court erred in law in declaring that it lacked jurisdiction on the ground that those acts and omissions related to political or strategic issues concerning the definition and implementation of the CFSP, there being no need to examine whether the General Court ought to have established that it had exclusive jurisdiction to rule on that action in so far as it concerned those acts and omissions.

158 In those circumstances, the first part of the fourth ground of appeal in Case C-44/22 P must be rejected.

The action before the General Court

159 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, where it quashes the decision of the General Court, itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

160 KS and KD request the Court of Justice to give final judgment on their action on the grounds of their age and state of health. However, in their response in Case C-44/22 P, they requested the Court to give them the opportunity to submit a fresh application for access to Eulex Kosovo's OPLAN before it took any decision on the pleas of inadmissibility raised by the Council, the Commission and the EEAS. Inasmuch as the General Court did not rule on the initial application for access to Eulex Kosovo's OPLAN, KS and KD were, in their view, prejudiced in the proceedings before the General Court in breach of Article 41 of the Charter and Article 298(1) TFEU. At the hearing, they added that, unlike the situation in the case giving rise to the judgment of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569, paragraphs 65 to 68), the Court of Justice would not be in a position to rule definitively on the admissibility of their action until after a decision had been taken on that fresh application. In the alternative, KS and KD request the Court of Justice to refer the case back to the General Court.

161 The Commission submits that, as regards the admissibility and merits of the action brought by KS and KD, the state of the proceedings does not permit judgment to be given. Indeed, the present cases can be distinguished from that giving rise to the judgment of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569, paragraphs 65 to 68), where the Court of Justice, on appeal, did indeed have all the elements at its disposal to rule on the admissibility of the action as against the different defendants at first instance.

162 The Council and the EEAS stated, in particular at the hearing, that the case should be referred back to the General Court for it to examine the pleas of inadmissibility at issue and, if necessary, whether the action brought by KS and KD was well founded.

163 In the present case, it should be recalled that, by the pleas of inadmissibility at issue, each of the defendants at first instance, namely the Council, the Commission and the EEAS, argued that the action brought by KS and KD was inadmissible in so far as it was directed against it. However, it must be stated that, in order to rule on those pleas of inadmissibility, it would be necessary to answer complex questions concerning liability for the various alleged breaches, questions which could not be answered by completely disregarding the examination of the merits of that action. Moreover, that examination, which the General Court did not carry out, would involve a number of factual assessments. Yet, that action has not been argued on the substance in the present appeal proceedings.

164 In that context, it must be held that, in the present case, the Court of Justice does not have the necessary information in order to give final judgment on those pleas of inadmissibility or on the merits of the action brought by KS and KD.

165 Furthermore, as regards the initial application for access to Eulex Kosovo's OPLAN, it must be held there is no need to adjudicate on that application, since it is not the subject of the present appeals. First, KS and KD have not formally challenged the order under appeal in so far as the General Court did not rule on that application. Second, in the course of the present appeals, they have not made a fresh application for access to the OPLAN of that mission, but merely expressed their wish to be able to submit such an application before the Court of Justice ruled on the pleas of inadmissibility at issue. As is apparent from the preceding paragraph, as regards those pleas, the state of the present joined cases does not permit judgment to be given.

166 It follows from the foregoing that the case must be referred back to the General Court for a ruling on the admissibility and, if necessary, the merits of the action brought by KS and KD, as well as on the initial application for access to Eulex Kosovo's OPLAN.

Costs

167 Since the case is to be referred back to the General Court, the costs relating to the present appeals must be reserved.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the order of the General Court of the European Union of 10 November 2021, *KS and KD* v *Council and Others* (T-771/20, EU:T:2021:798), to the extent that the General Court declared that it manifestly lacked jurisdiction to hear and determine the action brought by KS and KD on the ground that it related to political or strategic issues concerning the definition and implementation of the common foreign and security policy (CFSP) in so far as that action concerned:**

   – **a breach of Articles 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and of Articles 2 and 4 of the Charter of Fundamental Rights of the European Union, committed by the Eulex Kosovo mission, on account of the insufficient investigation of the disappearance and killing of their family members, owing to that mission's lack of appropriate personnel to perform its executive mandate, a breach found on 11 November 2015 in respect of KS and on 19 October 2016 in respect of KD, by the Human Rights Review Panel established on the basis of Council**

Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO;

– **a breach of Article 6(1) and Article 13 of that convention and of Article 47 of that charter, owing to the absence of provisions for legal aid for qualifying applicants in proceedings before that review panel and to the establishment of that panel without the power to enforce its decisions or a remedy for breaches of human rights committed by Eulex Kosovo;**

– **the failure to take remedial action to remedy some or all of the breaches referred to in the first and second indents, despite the fact that the findings of that review panel were allegedly brought to the European Union's attention by the Head of Eulex Kosovo on 29 April 2016;**

– **the misuse or abuse of executive power by the Council of the European Union and the European External Action Service on 12 October 2017 owing to their assertions that Eulex Kosovo had done the best that it could to investigate crimes of which members of the families of KS and KD were victims and that the same review panel was not intended to be a judicial body; and**

– **the misuse or abuse of executive or public power for failing to ensure that the case of KD, concerning a war crime, be subject to a legally sound review by Eulex Kosovo and/or the Specialist Prosecutor's Office for investigation and prosecution before the Kosovo Specialist Chamber;**

2. **Dismisses the appeals in Cases C-29/22 P and C-44/22 P as to the remainder;**

3. **Refers the case back to the General Court of the European Union for a ruling on the admissibility and, if necessary, the merits of the action brought by KS and KD, as well as on their application for measures of inquiry seeking the production of the full version of the Operation Plan (OPLAN) of Eulex Kosovo, beginning from the creation of that mission;**

4. Reserves the costs.

Lenaerts Bay Larsen Arabadjiev

Prechal Jürimäe von Danwitz

Csehi Spineanu-Matei Bonichot

Rodin Jarukaitis Kumin

Gavalec

Delivered in open court in Luxembourg on 10 September 2024.

A. Calot Escobar K. Lenaerts

Registrar President

Certified a true copy,

Luxembourg, 10. 09. 2024

For the Registrar

Matija Longar
Administrator