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Op-Ed: “The train shall stop in Luxembourg”: AG Ćapeta stands for fundamental rights jurisdiction in CFSP action (Joined cases KS and KD C-29/22 P and C-44/22 P)” by Francesca Bandini and Walter Bruno

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On 23 November 2023, AG Ćapeta delivered her Opinion in the *KS and KD* joined cases, where she suggests that the Court of Justice should have jurisdiction in actions for damages founded on a breach of fundamental rights in the area of CFSP, which, given the abolition of the pillar structure, should now be subject to ‘the same constitutional principles as the rest of EU policies’ (point 72).

The facts at the origin of the case are as follows: both KS and KD had family members disappearing or killed in Kosovo in 1999. In 2008 Eulex Kosovo, a CSDP civilian mission, was established by the EU with the aim of, *inter alia,* making sure that crimes occurred in the area were investigated and adjudicated properly. KS and KD, supported by the findings of the Human Rights Review Panel (HRRP) created within the mission, claim that Eulex Kosovo did not fulfill its mission and that their fundamental rights were violated.

What is peculiar of this case is the judicial journey made by the applicants.

The first action for annulment and non-contractual liability of the EU was initiated in Luxembourg in 2017 and dismissed as the General Court maintained that it lacked jurisdiction, being a CFSP matter.

Consequently, in 2018, KS and KD brought the case before the English High Court of Justice, claiming damages from the EU, the Council and the High Representative and Eulex Kosovo. Once again, their claim was rejected, with the national court declining jurisdiction and referring to the Court of Justice as the competent one.

This decision prompted the applicants to make a second journey to Kirchberg where, in 2020, they claimed reparation and compensation for multiple violations of their fundamental rights before the General Court, which, once more, dismissed the case on the ground of jurisdiction, leading to the appeal of its Order and the present stage of the proceeding.

In this 'bouncing game' of jurisdiction, AG Ćapeta's opinion offers food for thought on several levels.

Ceci n'est pas Carvalho: 'Interpretation, not modification, of Treaties'

The judges of the Ninth Chamber of the General Court mentioned the *Carvalho* case law to support the dismissal of the action brought by KS and KD (point 41). Thus, the Order turned *Carvalho* into an unavoidable obstacle for AG Ćapeta to claim the jurisdiction of the Court. For the success of her argumentation, the Advocate General needs to survive *Carvalho*'s trap.

The principles underlying the argumentation put forward by the plaintiffs in the Carvalho case echo in this Opinion. AG Ćapeta introduces them through a question in point 95: 'what does the fidelity to the law require from the Court? [...] strictly abide by the wording of the Treaties [...] or [...] give preference to EU constitutional principles?'.

The subsequent paragraphs finely distinguish the two cases. KS and KD already felt the need to distance their situation from *Carvalho* and claimed that they were not comparable. The General Court, on the contrary, adopted and replicated that reasoning, giving a similar solution: no standing yesterday, no jurisdiction today. The Advocate General stays in the middle: *Carvalho* principles apply to the current case, but *ceci n'est pas Carvalho*.

AG Ćapeta concludes that EU Courts are genuinely 'obliged' to interpret the Treaties in conformity with the principle of effective judicial

protection, and quotes (point 101) AG Bobek in *SatCen v. KF* (point 69): Article 47 of the Charter requires provisions of the Treaties to be interpreted 'so that they can *achieve their full potential* to provide judicial protection' (emphasis added). The quote by her (former) colleague is curious. It was rendered in a CFSP case, yet it fosters the same argument made by claimants in *Carvalho* as well as by other attempted challenges to *Plaumann*: interpretation is not modification. Setting aside whether the *Plaumann* doctrine is a matter of interpretation or modification of the Treaties (see here), this Op-Ed seeks coherence between the *Carvalho* judgment and the present Opinion by AG Ćapeta. How shall they coexist if the Court decides to adhere to it?

The question is then whether the Advocate General effectively distinguished the two situations. In this Opinion, AG Ćapeta juxtaposes a general rule (jurisdiction and institutional role for the Court of Justice) and an exception (jurisdictional limitation). The judges' restrictive interpretation on standing in *Carvalho* can be consistent with it, if we assume that the individual access to EU Courts through direct actions (Article 263 para 4 TFEU) represents a mere exception in the system of remedies *vis-à-vis* the general rule of non-accessibility. However, a difference remains: a restrictive interpretation of the CFSP limitation allows for a broader access to EU Courts. On the contrary, the restrictive interpretation of Article 263 para 4 TFEU is at detriment of such access. In the light of 'the interest of the EU legal order' to access to justice against fundamental rights violations (point 153), how to agree with both outcomes?

***Inside out*: what is left of jurisdictional limitation?**

In the view of the Advocate General, the protection of fundamental rights and the institutional role of the EU judicature make it possible for the Court of Justice to claim jurisdiction over damage actions in the field of CFSP. What is then the scope of the exclusion, or limitation, of jurisdiction if EU Courts can look into CFSP? In other words, what can the EU courts scrutinise and what cannot?

In the present case, applicants challenged the decision regarding the extent of funding of Eulex Kosovo, claiming, with a prudent strategy, that it was not political but administrative. Therefore, the Court should

have excluded such act from the jurisdictional limitation. However, AG Ćapeta goes beyond this cautious argument. She affirms that the distinction based on the nature of the acts is irrelevant. Instead, the claim of fundamental rights violation legitimises the jurisdiction of the Court of Justice of the EU. Whether the act is political, strategic or administrative, it must respect fundamental rights and the EU constitutional values.

Nevertheless, the Courts cannot look into the discretionary policy choices and the coherence of the CFSP policy. EU Courts cannot check the conformity of CFSP acts *vis-à-vis* CFSP primary law. Furthermore, they cannot interpret such primary and secondary law. Consequently, the EU shall acknowledge a possible lack of consistency and coherence in interpreting and applying CFSP rules.

AG Ćapeta herself suggests to also read her own Opinion in the case *Neves 77 Solution*, delivered on the same day to better grasp her reasoning (for a comprehensive analysis of such opinion, see the recent Op-Ed by Graham Butler). She writes in *Neves 77 Solution*: 'What the Court is allowed to assess [...] is whether a CFSP rule *as understood by its author* is permitted in the light of EU fundamental rights' (point 72, emphasis added). In other words, regardless of the policy choice, it shall respect fundamental rights because 'in constitutional democracies, policy choices are not unlimited' (AG Opinion in *KS and KD*, para 115) and 'the breach of fundamental rights cannot be a political choice in the European Union' (AG Opinion in *KS and KD,* point 155).

Accordingly, when fundamental rights are at stake, admissibility should not be questioned, leaving the issue of the degree of scrutiny to a later stage. This, however, raises a pivotal question: how can the Court safely comprehend the meaning of a CFSP rule 'as understood by its author'?

***Who do I call if I want to call Europe?*: complete system of remedies and room for national courts**

A third element worth of analysis draws back to the tension between EU and national courts in granting effective judicial protection in cases like the one at stake. The problem is double-faceted: on the one hand, a question arises: on what national court could exercise jurisdiction in a damage action in the area of CFSP which entails human rights

violations? On the other hand, there is an ever more poignant issue: is such national court, wherever located, willing or bound to take on jurisdiction when the Court of Justice does not?

With regard to the first aspect, according to AG Ćapeta, no criteria allow for a clear allocation of jurisdiction to a certain national court rather than another. Moreover, having a plethora of competent courts in such a sensitive policy area could cause an unwishful incoherence in the case-law. Such outcome would indeed be in contrast with the findings of the Court of Justice which has long established the exclusive jurisdiction of EU Courts in action for damages against the EU.

Moving on to the second aspect, the opinion briefly mentions that 'a denial of jurisdiction by a national court could [...] be overcome if the Court adopts the firm position that it does not have jurisdiction' (point 137).

Actually, this might not be the case and this saga is a clear example of that. Once rejected by the General Court, KS and KD turned to a national court, but the denial of jurisdiction by Luxembourg was not enough of a reason for the English High Court to hear the case.

There are no guarantees that, if the Court of Justice recognises once and for all its lack of jurisdiction, this would not happen again. The most straightforward reason for such an outcome could be found in a loophole in the idea of the 'complete system of judicial remedies': while constantly invoked, it is not equally sustained by procedural rules. In fact, the EU system does not provide for a provision clearly imposing national courts to hear a case, when EU Courts decline their jurisdiction. Most likely, in situations such as this one, if the Court of Justice dismisses the case, the lack of remedy will burden the individual applicant who would again face the question: where to go next? And here it goes, back into the vicious cycle.

Conclusions: the train shall stop in Luxembourg

With this Opinion, AG Ćapeta builds upon the fertile ground of constitutional momentum for the Court of Justice. It quickly emerges in points 130 to 133 of the Opinion, specifically concerning the institutional role of the EU judicature in the European constitutional framework. There are two boundaries that an exceptional limitation,

such as the one at stake, cannot push: 'safeguarding the institutional structure set out in the Treaties' and 'protecting the rights of individuals' (point 133).

Recognising jurisdiction in such cases means safeguarding the institutional balance provided for by the Treaties (point 130). In this sense, the Opinion is a complementary application of the principles already affirmed in cases like *Pringle*: an exceptional legal framework (might it be an 'additional' task, as in *Pringle*, or a limitation, as in *KS and KD*) cannot alter 'the essential character of the powers conferred on' EU institutions by the Treaties.

Additionally, the breach of fundamental rights cannot be a political choice free from judicial review: the protection of individuals in the framework of the Treaties gives the Court legal legitimacy to render justice in this type of cases.

Finally, in light of the ongoing negotiations for the EU accession to the ECHR, this is the case the Court was missing at the time of Opinion 2/13 to judge upon the jurisdictional limitation under CFSP.
If it is true that 'every train that may end up in Strasbourg first needs to stop in Luxembourg' (para 150), then, according to AG Ćapeta, her proposed interpretation shall detangle the knot of jurisdiction in CFSP cases, also in light of the accession agreement. A train not to miss. This way the Court of Justice could abide by its constitutional vocation, while safeguarding the autonomy of the EU legal order. Indeed, the intervention of numerous Member States (the same Masters of the Treaties responsible for the jurisdictional limitation) supporting the Commission's view in line with AG Ćapeta's stance further increases the Court legitimacy to decide accordingly.

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