



Recent Developments in EU external relations law

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Parameters

'recent' developments: July 2023 to
June 2024

External relations – broad sense

Case law focus

Commission perspective



Case law

Opinion of AG Ćapeta of 23 November 2023 - Joined Cases C-29/22 P and C-44/22 P, KS & KD

Opinion of AG Ćapeta of 23 November 2023 - Case C-351/22 - Neves 77 Solutions SRL

Judgment of the CJEU of 27 February 2024 in Case C-382/21 - The KaiKai Company Jaeger Wichmann GbR

Opinions of AG Ćapeta, 21 March 2024 in Joined Cases C-778/21 P | Commission v Front Polisario and C-798/21 P | Council v Front Polisario, Joined Cases C-778/21 P | Commission v Front Polisario and C-798/21 P and Case C-399/22

Judgment of the CJEU of 9 April 2024 in Case C-551/21 – Commission v Council – ‘Gabon Fisheries’

Opinion AG
ĆAPETA 23
November 2023 -
Joined Cases
C-29/22 P and
C-44/22 P, KS &
KD

- Case about damages and jurisdiction
- Linked to the Opinion in *Neves 77 Solutions* (C-351/22) – also about jurisdiction (xport restrictions on certain dual-use items)
- Framework of ongoing negotiations around accession to the ECHR. EU has agreed to find an 'internal solution' on the scope of the Court's jurisdiction on CFSP
- Does the 'limitation' on the Court's jurisdiction under Article 24(1) TEU and Article 275 TFEU apply to damages?
- Substantive outcome: GC got it wrong – there is jurisdiction!

What is the rule and what is the exception

”it seems evident to me that the jurisdiction of the EU Courts to hear a claim by which an individual requires protection from breaches of his or her fundamental rights cannot be excluded simply because that breach occurred in the context of the CFSP”

- Previous case law – *Rosneft, Bank Refah, Elitaniiana, H*

Court should not review the conformity of CFSP rules

Court should not interpret CFSP rules or acts adopted on the basis of those rules

What is the function of the limitation?

Judgment of the CJEU of 27 February Case C-382/21 - The KaiKai Company Jaeger Wichmann GbR

- What is the relationship between international law and the EU legal order?
- What are the limits of the principle of interpretation in conformity?

“Since the TRIPs Agreement is binding on the European Union and, accordingly, takes precedence over EU secondary legislation, the latter must be interpreted, as far as is possible, in accordance with the provisions of that agreement (see, by analogy, judgments of 10 September 1996, Commission v Germany, C-61/94, EU:C:1996:313, paragraph 52, and of 1 August 2022, Sea Watch, C-14/21 and C-15/21, EU:C:2022:604, paragraphs 92 and 94 and the case-law cited). It follows that Regulation No 6/2002 must be interpreted, as far as is possible, in accordance with the TRIPs Agreement and, as a consequence, with the rules set out by the articles of the Paris Convention, including Article 4 thereof, which are incorporated into that agreement (see, by analogy, judgments of 15 November 2012, Bericap Záródástechnikai, C-180/11, EU:C:2012:717, paragraphs 70 and 82, and of 11 November 2020, EUIPO v John Mills, C-809/18 P, EU:C:2020:902, paragraphs 64 and 65).”
para 70

Case C-551/21 Commission v Council 'Gabon Fisheries'

- Who can sign an international agreement on behalf of the EU?
- Who decides?
- Now what?



Continuation of a pre-Lisbon practice whereby the Council rotating Presidency represented the EC externally

Translated into external agreements by provisions conferring the signature (and certain other acts of external representation) to the Presidency to determine.

Protocol to Fisheries Agreement:

Proposal Article 2: "The Council general Secretariat shall establish the instrument of full powers to sign ... for the person indicated by the Commission"

Council changed Article 2: "The President of the Council is hereby authorised to designate the person(s) empowered to sign ..."
(still possibly open)

Presidency designated the Portuguese Permanent Representative to sign

Who?

- The HR, represented by the EEAS Legal Department, authorised (for the first time) to intervene at the side of the Commission (similar concerns on the HR prerogatives in external representation in CFSP matters)
- Order of the President of the Court of 3 March 2022: the HR was to be authorised a Union body with an interest in the matter, not as an institution.

What was argued by the Council?

- Exception of inadmissibility raised by the Council
 - Article 2 is not severable)
 - The designation by the full powers instrument was not identified
- Main defence : signature is not part of external representation, but still part of the decision to sign which is reserved to the Council (Article 218(5) TFEU), and thus there must be a free policy margin for the Council to designate for the signature the Presidency alone, or the Presidency with the Commission. This “continuum” renders Article 17 TEU inapplicable.

Judgment

- The Commission should sign/designate who signs international agreements “outside of the CFSP and unless the Treaties provide for a different allocation of powers on that point”. This is part of the prerogatives conferred under Article 17(1) TEU to ensure the EU's external representation.
- Signing an international agreement is an act of representation: this interpretation is supported by customary international law as codified in Article 2(1)(c) and Article 7(1)(a) of the Vienna Convention.
- though the procedure for the negotiation, signing and conclusion of international agreements in Article 218 TFEU may, as a whole, be regarded, as a ‘continuum’, during each of the steps of that procedure, each institution must, subject only to the exceptions expressly provided for, exercise its powers as allocated by the Treaties.
- It is irrelevant that the Council has continued, since the entry into force of the EU and FEU Treaties, to designate the signatories of international agreements and regularly to choose as signatory the permanent representative to the EU of the Member State exercising the rotating Presidency of the Council. “A practice, however consistent, cannot alter the rules of the Treaties that the institutions are obliged to respect”.
- Article 2 is severable

What's next?

- Effects were maintained
- The Treaty Office?
- Other acts of 'external representation'?

Any questions?

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