The end of 'l'affaire Sharpston' – but not of the issues that it raised

'L'affaire Sharpston' – as it has become known – raised three interrelated issues.

First, can the Member States decide that, as a matter of law, the mandate of a serving Member of the Court has come to an end before its due date? Or is the power to take such a decision reserved to the Court itself, as Article 6 of the Statute of the Court (EU primary law) would suggest?

Second, where the Member States patently have taken such a decision, is that decision reviewable by the Court? Or does it lie outwith the Court's jurisdiction and thus escape any judicial scrutiny?

Third, given the (differing) provisions governing judges and advocates-general laid down by the TEU and TFEU, did Article 50(3) TEU automatically bring to an end, at the moment of Brexit, the mandate of the advocate-general nominated to a vacant post by the UK in 2015 (in accordance with Declaration No 38 to the Lisbon Treaty) and then appointed to that post by common accord of all the Member States?

To recapitulate the sequence of events: on 29 January 2020 the 27 Member States issued a Declaration asserting that UK withdrawal from the European Union had the legal effect of bringing my mandate as an advocate general automatically to a premature end and legally created a vacancy to be filled. On 31 January 2020 the President of the Court, Koen Lenaerts, wrote to the Council Presidency stating that, 'as is apparent from the Declaration', an advocate-general's post would be vacant with effect from 1 February 2020 (the day after Brexit) and inviting the Member States to proceed to nominate my successor. Applications were lodged before the General Court challenging each of those steps (Cases T-180/20 and T-184/20).

On Wednesday 2 September 2020 the Member States adopted a Decision that appointed a distinguished Greek jurist, Mr Athanasios Rantos, to the Court as an advocate-general with effect from Monday 7 September 2020. Case T-550/20 filed on Friday 4 September 2020 challenged that Decision. That same evening, Judge Antony Collins, as the judge appointed to deal with the interim measures application that accompanied that challenge, made a limited freezing order (an ex parte interlocutory measure) preserving the status quo until he could hear full argument on, and determine, the application for interim relief (Case T-550/20 R).[1] On the following day (Saturday 5 September 2020), the defendants – the Council and the 27 Member States – appealed that order to the Court (notwithstanding that that order was not a 'final' order and was not, therefore, in principle appealable).[2] They

[1] The operative part of that order read, 'The operation, and all consequential effects, of the Decision of the Representatives of the Governments of the Member States of 2 September 2020 appointing three judges and one Advocate-General to the Court of Justice, in so far as it purports to appoint Mr. Athanasios Rantos to the position of Advocate-General at the Court of Justice of the European Union, are suspended until the order terminating the present proceedings for interim relief is made'. The full order is available here.

[2] Article 56 of the Statute of the Court states that, 'An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions

requested that their appeals be not notified to me, and the Court indeed did not notify them or publicly acknowledge their existence. To my knowledge, this is a unique example of an appeal – in uncharted legal territory – against an order favourable to the defendant not being notified to that defendant where the Court intends to allow the appeal.[3]

The Court's practice is that orders are not pronounced in public: they are signed in private by presiding judge and registrar. They are then notified to the parties concerned. When – as here – notification is done electronically via eCuria, the order only takes effect when the lawyer to whom it is notified downloads the relevant file(s).[4]

On Thursday 10 September 2020 the Vice President of the Court (sitting alone) made and signed two orders. Those orders reversed the ruling of Judge Collins, finding for good measure – contrary to his determination that the submissions advanced 'raise complex issues of law that, at a very minimum, require detailed and comprehensive argument before the judge hearing the application for interim measures before the application for interim measures can be ruled' – that the application was prima facie inadmissible. (I am not aware, in the entire history of the Court, of an equivalent decision on appeal against an interlocutory measure.) Immediately after this act was accomplished early on the Thursday morning, my successor Mr Rantos was brought to a small empty court room.

At 09h30, the President, a President of chamber (Judge Vilaras), the First Advocate-General (AG Szpunar) and the Deputy Registrar entered that courtroom in order to read out judgments and opinions. As the procès-verbal (official record) of the hearing then explains,[5] the first thing that happened was that 'M le Président constate la presence à l'audience de M Athanasios Rantos, nommé avocat general à la Cour …' ('The President took note that Mr Rantos, appointed advocate general (…) was present at the hearing …'). By happy chance, the Deputy Registrar had a copy of the oath of office in Greek and the new Member of the Court was immediately sworn in behind doors guarded shut, presumably to prevent any unwelcome contrary voice being heard. Various judgments and opinions were then read out (as officially scheduled) and the hearing ended at 10h00. In the meantime, an automatic email

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of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility (emphasis added). It is difficult to see how an ex parte interlocutory freezing order qualifies as either a 'final decision' or a decision 'disposing' of the point at issue.

[3] Article 171 of the Court's Rules of Procedure ('Service of the appeal') lays down the normal rule: unsurprisingly, its first sub-paragraph states in terms that, 'The appeal shall be served on the other parties to the relevant case before the General Court'.

[4] See Article 91 of the Court's Rules of Procedure and Articles 6 and 7 of the Court's Decision regulating the use of eCuria. In default of being accessed by the party's lawyer, a document notified via eCuria becomes effective seven days after the lawyer has been notified of its existence. Where a case is being handled using eCuria, other means of service may only be used 'if required because of the size or nature of the item or where the use of e-Curia is not possible for technical reasons'. Neither of those exceptions was applicable here.

[5] The PV was distributed electronically to the secretariats of all the Members of the Court at 10h23, less than half an hour after the hearing was concluded.

had been sent by the Registry at 09h14 to my lawyer, Nicholas Forwood QC (who was of course completely unaware that any appeal was running), informing him that a 'new document' was available in his eCuria account. A little later he went online and, at 09h54, downloaded the first of the Vice President's two orders (together with the appeal documents, which were notified to him for the first time simultaneously with the orders allowing the appeals). That was the moment at which the Vice President's order became effective.

AG Rantos was therefore sworn in with 'maimèd rites'[6] at a moment when Judge Collins' freezing order was still in force; and my ceasing to hold office on 10 September 2020 was not marked in any way: my name was simply excised from the new version of the 'ordre protocolaire' distributed at 10h25 on 10 September 2020. My actual departure from the Court was thus both abrupt and painful.

According to the tradition of the Court, a departing Member sits robed with their colleagues as a member of the bench for one last time at an 'audience solennelle': an important and symbolic moment that pays tribute to their service with the Court. In my case, that part of the ritual was omitted, but efforts were consciously made, when two more new Members of the Court were sworn in on 6 October 2020, to fill in other ceremonial lacunae both for AG Rantos and myself and for another Member[7] who had joined in mid-lockdown during the Covid-19 pandemic. Thus, knowing that I was present in the courtroom on that occasion, the President took the trouble to say something brief but gracious about my work and I was afforded the opportunity to thank my team publicly in writing for their loyalty and professionalism.

On 6 October 2020, the General Court dismissed the three applications before it. Given the way in which the Vice President's order of 10 September 2020 was framed, the General Court presumably felt that it would be difficult to do otherwise.

I lodged appeals against the orders in Case T-180/20 (re the Declaration of 29 January 2020: this became Case C-684/20P) and Case T-550/20 (re the Decision of 2 September 2020: Case C-685/20P). By two reasoned orders issued on 16 June 2021, the CJEU dismissed those appeals as in part manifestly inadmissible and in part manifestly unfounded.

I am sad that the Court (that is, the CJEU) has failed to grasp the opportunity offered to it by the two appeals to confirm its own independence and uphold the rule of law within the European Union.

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[6] For those who would like to place the quotation: Hamlet questions the cleric accompanying Ophelia's minimalist funeral procession: '… who is that they follow? And with such maimèd rites? This doth betoken The corse they follow did with desperate hand Fordo its own life'. The cleric answers that the funeral is that of Ophelia, whose 'death was doubtful'; and is emphatic that 'No more be done: We should profane the service of the dead, To sing a requiem, and such rest to her as to peace-parted souls'. Her brother Laertes cannot bear this and responds, '… I tell thee, churlish priest, A ministering angel shall my sister be, When thou liest howling.' (Hamlet V, 1, 240-264).

[7] Advocate-General Jean Richard de la Tour.

The political background is – of course – Brexit. The legal background is far more ambiguous. There is no obvious legal link under the Treaties between an advocate general and any particular Member State; my normal six-year mandate was due to expire on 6 October 2021; and the Statute of the Court (EU primary law) expressly reserves to the CJEU itself the power to decide whether a sitting Member of the Court should cease to serve.

It is important to bear in mind that throughout this saga the Member States and the Council have never been required to explain why they assert (as a matter of law, rather than political desire) that my mandate was terminated automatically and prematurely by Brexit. (This is of course the reverse of the normal situation, in which a decision stating reasons is then challenged before a court by the party adversely affected thereby.) Here, the underlying question of law was never pleaded in detail – with argument and counter-argument – and then examined by a court. Separately from the litigation, I had made a formal request to the President of the Court asking that the Court should determine the question under the Statute of the Court; but the President, acting administratively, refused that request.

As I see it, the CJEU had three possibilities open to it for dealing with these appeals.

The *first option* was to apply the *Les Verts* case law (Case 294/83 *Partie Écologiste 'Les Verts' v European Parliament*) and take jurisdiction over two acts by the Member States that are necessarily based, not upon some extraneous power under international law, but upon the EU treaties themselves, because they are entirely concerned with the functioning and membership of the court which those treaties set up. The CJEU would then have gone on to rule, authoritatively, upon the substantive question of law ('did Article 50(3) TEU automatically bring Eleanor Sharpston's mandate as an advocate general to a premature end upon UK withdrawal from the EU?') having heard argument from both sides. Whatever the outcome – favourable or unfavourable to myself – the CJEU would have reasserted the rule of law in the European Union and its own independence and authority as the ultimate arbiter of questions of EU law.

The *second option* was to treat the questions raised with the seriousness that they deserved (in the Grand Chamber, after a full exchange of written pleadings, a hearing and an opinion from the advocate general) but to conclude that unfortunately the CJEU did not have jurisdiction over these two acts by the Member States. In so ruling, the CJEU would however have drawn attention to the underlying structural problem – its own independence – and called upon the Member States as the 'masters of the treaties' ('die Herren der Verträge') to take the necessary remedial action. That is what happened, in relation to the restrictive rules on *locus standi*, in Case C-50/00P *Unión de Pequeños Agricultores (UPA)* following AG Jacobs' magisterial Opinion in that case. The rules were subsequently amended by the Treaty of Lisbon. It is important to bear in mind that another pending case involving a decision taken 'by common accord' of the Member States (there, under Article 341 TFEU, concerning the seat of the European Labour Agency: Case C-743/19

Parliament v Council) has indeed been given precisely such treatment and – of course – has accordingly been allocated to the Grand Chamber.

Instead, the CJEU took the *third option* – to dismiss the appeals without more, because (so one must suppose) they were politically inconvenient and embarrassing. In so doing, the CJEU risks being seen as having acquiesced in the role of political cat's paw by opting to solve a serious question relating to judicial dismissals and appointments politically rather than legally. I regard that as deeply unfortunate, because such perceptions can only undermine both the CJEU's standing and its moral and legal authority at a time when the rule of law is genuinely under threat and when the CJEU badly needs to be seen as independent from any political influence and consistent and coherent in its rulings.

In the interests of both transparency and historical accuracy, I shall in due course make available on my own website akulith.eu (once it is operational in the autumn) the full pleadings lodged before the General Court and before the CJEU, the texts of the letters that I sent to the representatives of the Member States in COREPER, and the texts of all the orders made, together with a detailed chronology that makes clear to the reader precisely what material was before the two EU courts at what stages of the story. I shall leave it to the academic community to examine that material and to reach its own view, both as to the underlying forces at work and as to whether the lack of jurisdiction/lack of substance were so 'manifest' that reasoned orders by the General Court and by the CJEU dismissing the actions were appropriate; or whether, on the contrary, the reasoning advanced in those reasoned orders can most charitably be described as threadbare. Academic commentary thus far has been sharply condemnatory of the process and the result.[8] I restrict myself here to three observations.

First, it is impossible as a matter of logic simultaneously to rule that you have no jurisdiction to review the Member States' common action (so that the entire application is 'manifestly inadmissible') and yet to go on to rule that the applicant's argument on the substance is 'manifestly unfounded'. You either have jurisdiction to enter into an examination of the various arguments advanced in the application or you do not. It follows that anything said in the orders about the substance can only be *obiter*.

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[8] See, for example, Daniel Halberstam, Could there be a Rule of Law Problem at the EU Court of Justice? – Verfassungsblog; Dimitry Vladimirovich Kochenov & Graham Butler, 'The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution', NYU School of Law, Jean Monnet Working Paper No 2/20 (Microsoft Word - JMWP 02 Dimitry Kochenov - Graham Butler Cover (jeanmonnetprogram.org); Sophie Bonert, Predictable and Unsatisfying. The Sharpston Saga: the CJEU's Orders in Cases C-684/20P and C-684/20 P ((Predictable and Unsatisfying – Verfassungsblog): Michael De Boeck, ' "Ceci n'est pas une acte du Conseil". Extra-mural acts of the Council: tearing holes in the 'complete system of Iegal remedies?' (Op-ED in EULawLive 30.06.21).

Second, given that my objective in litigating was not to seek financial redress (I proposed, if successful, to donate to charity the difference between the transitional payment I now receive as a former Member and my salary), the only available course of action was the one that I took, namely to seek to annul the Declaration of 29 January 2020 and/or the Decision of 2 September 2020. The reference to its being 'common ground' that there were other procedural routes open to me is thus a regrettable distortion of the appeals as pleaded.

Third, the only basis relied upon by the Court to support the conclusion on the substance that Brexit automatically terminated my mandate (so that the action was 'manifestly unfounded') was the eighth recital to the Brexit Withdrawal Agreement. A first-year student of EU law knows that recitals (like declarations and statements of position) of themselves have no legal effect: see, for example, Case 215/88 *Casa Fleischhandels* and Case C-233/97 *KappAhl Oy* respectively. It is to be presumed that the Court is equally well-informed about its own jurisprudence. And that is before one recalls Grand Chamber case-law confirming that agreements with third countries under Article 218 TFEU (such as the Brexit Withdrawal Agreement) have in any event to comply with EU constitutional law: one need look no further than Case C-266/16 *Western Sahara* for that proposition.

My commitment to the rule of law has been the guiding principle of my 14½ years of service as an advocate general. For that reason, my immensely talented *pro bono* legal team and I gave serious consideration to whether to pursue this matter further by lodging an application against the Member States before the European Court of Human Rights in Strasbourg. However, EU accession to the ECHR on the terms envisaged was blocked by the Court in Opinion 2/13 and the commitment to ECHR accession plainly laid down in Article 6(2) TEU has not yet been honoured. Given the Court's own unwillingness to demonstrate its independence and recognise the genuine sensitivity of the current constitutional arrangements, taken in conjunction with the undoubted technical complexities of bringing an action that does not seek pecuniary redress against the particular mixed background of Member State action and action by the Court as an EU institution, we have decided that our individual and collective time will be better spent on other causes.

When someone says to you, 'move along, there's nothing to see here', that is usually a sure sign that there is stuff that is being scuffed under the carpet. The issues raised by 'l'affaire Sharpston' have not conveniently vanished with the signing of the orders dismissing the two appeals. Whilst one may devoutly hope that Brexit is a one-off phenomenon that can in due course be consigned to the history books, the question of whether the CJEU is – or is not – constitutionally independent of the Member States is one that should continue to matter to anyone who cares about the rule of law.

Eleanor Sharpston

6 August 2021