Could there be a Rule of Law Problem at the EU Court of Justice?

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The Member States' current plan of replacing the sitting U.K. Advocate General at the Court of Justice before the end of her six-year term raises a serious question whether doing so may violate the European Treaties. If yes, this would be a troubling intrusion on the independence of the Court and the constitutional structure of the Union – just when the EU should be setting an example for the Member States (both current and former).

It began on January 29, 2020, two days before Brexit. Having decided earlier that the U.K. would lose its CJEU judge upon leaving the Union, the Member States turned to the fate of the U.K. Advocate General. After observing that under Article 50(3) TEU "the Treaties cease to apply to the withdrawing Member State from the date of entry into force of the withdrawal agreement [WA]," *i.e.*, February 1, 2020, the Member States declared:

> "The ongoing mandates of members of institutions, bodies, offices and agencies of the Union nominated, appointed or elected in relation to the United Kingdom's membership of the Union will therefore automatically end as soon as the Treaties cease to apply to the United Kingdom, that is, on the date of the withdrawal."

With Brexit, the U.K. Advocate General's spot would therefore – so the January Declaration – go into the hopper for the usual rotation, allowing Greece, up next, to nominate a replacement for the "newly vacant post," i.e. to serve out the AG's current mandate until 6 October 2021.

This raises a constitutional puzzle. Under EU constitutional law (*i.e.*, the Treaties and the Statute of the CJEU), it seems the U.K. Advocate General's post is not "newly vacant." Indeed, unless the AG dies or resigns (Stat. CJEU Art. 5) or "in the unanimous opinion of the Judges and Advocates General of the Court of Justice, no longer fulfils the requisite conditions or meets the obligations arising from h[er] office," (id., Art. 6), her post doesn't appear vacant at all – at least not until her current term runs out.

To be sure, the AG's colleague, the U.K.'s CJEU Judge Christopher Vajda, has already been let go on Brexit Day. But that move was lawful. After all, Article 19(2) TEU provides: "The Court of Justice shall consist of one judge from each Member State." No Member State, no judge.

But aren't Advocates General different? Even after the Nice Treaty – in an unfortunate reaffirmation of national identification of high court judges – turned what was previously an informal understanding into the legal requirement that each

Member State have their judge on the Court, AGs were not to be so identified. There have always been fewer AGs than Member States. Plus, the treaties glaringly omit any requirement whatsoever connecting the former to the latter.

The system of appointment we all know, with "permanent" AGs from the big Member States and rotating AGs from the smaller ones, is the stuff of non-binding understandings. The principal textual indication comes from declarations, which, unlike protocols, are non-binding statements, even when appended to treaties. Declaration 38 (Treaty of Lisbon), for instance, indicated the Council will agree to increase the number of AGs to eleven if the CJEU so requests, and further:

> "In that case, the Conference agrees that Poland will, as is already the case for Germany, France, Italy, Spain and the United Kingdom, have a permanent Advocate-General and no longer take part in the rotation system, while the existing rotation system will involve the rotation of five Advocates-General instead of three."

The informality of such declarations seems evidenced by the colloquial use of the word "have," as though AGs were people or things to be had. More important, the use of "will" instead of "shall" underscores that Declaration 38 is not legally binding, but only a good will statement that the U.K. "will … have" an AG.

Doesn't Declaration 38 thus merely establish a non-binding statement that the other Member States will look kindly upon the U.K.'s nominee when considering appointments to the Court? Declaration 38 does not purport to – nor, one would think, could it – alter the constitutional rule that AGs "shall be appointed by common accord of the governments of the Member States for six years." (Art. 19(2) TEU). And once appointed, the six-year mandate would seem to run unless the AG is removed pursuant to Article 6 of the Statute of the CJEU.

The Member States might argue that the eighth introductory recital to the Brexit Withdrawal Agreement "consider[s] the end, on the date of entry into force of this Agreement, of the mandates of all members of institutions." Moreover, the WA defines "member of the institutions" to include Advocates General. (Art. 101 WA) But this definition was "for purposes of this title [on the continuing privileges and immunities of the members of institutions]," *i.e.*, not necessarily for purposes of the recitals.

Even if we read recital eight broadly, recitals (like declarations) generally have no legal force. And while they may be used as interpretive aides, this seems unnecessary where the Treaty is otherwise clear. Also, ought we not to shy away from imposing national identifications on EU high court members unless inexorably required by primary law? To be sure, invoking pragmatism in the face of Brexit, Member States might argue the incongruity of a non-EU citizen serving on the EU's highest court. There is, indeed, an outdated (and again, non-binding) Joint Declaration on AGs from 1995 invoking nationality. But isn't that issue moot given the well-known fact that AG Sharpston is (also) a citizen of Luxembourg?

The final puzzle is this: By allowing the AG to stick around until her successor arrives, don't the Member States admit to her continuing authority serve? And isn't the only legal basis the AG's appointment by common accord for "a term of six years" (Art. 253 TFEU; cf. Art. 19(2)), and her duty to sit *beyond that time* until a successor is picked (Art. 5, Statute CJEU)? If so, by what constitutional authority may the Member States, by mere declaration or recital, terminate the Advocate General early?

Fortunately, the fix to any such problem, if problem there is, would be easy. Just treat the January Declaration as the non-binding statement it is, have Greece continue with its selection, but make clear the AG's replacement would – despite any previous declaration – begin on October 7, 2021. That would safeguard the independence of the Court, the rule of law, and the constitutional structure of the Union.
