The Schrödinger's Advocate General

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We know Brexit means Brexit but should it also mean violating EU Primary Law?

Let me explain.

A month ago, it was revealed that Eleanor Sharpston QC, one of the Advocates General (AG) of the European Court of Justice, launched an unprecedented legal action "against the EU and her own judicial colleagues after attempts were made to sack her".

First appointed AG in 2006 following her nomination by the UK government, her appointment was renewed twice, most recently in 2015. Notwithstanding the fact that AG Sharpston was reappointed for a fixed-term period of six years running until 6 October 2021, the national governments of 27 EU Member States decided to terminate her appointment early. Why? Because Brexit ought to mean Brexit or so it seems.

This was done by means of a declaration adopted on 29 January 2020 by the Conference of the Representatives of the 27 Governments of the EU Member States ("Conference of 27" hereinafter). Two days later, the President of the Court of Justice confirmed the existence of a vacancy from 1 February 2020, following the entry into force of the Withdrawal Agreement (WA), yet AG Sharpston was allowed to continue sitting until her successor arrives.

According to the accounts provided in UK and Belgian media outlets, AG Sharpston has since lodged two annulment actions with the EU General Court: the first one is directed at the Council of the EU and the Conference of 27 in respect of the declaration of 29 January 2020 and the second one is directed at the CJEU itself in respect of the letter of the President of the Court of Justice dated 31 January 2020. In a nutshell, AG Sharpston is of the opinion that "the assertions made by the EU 27 and in the president's letter are unlawful because they bypass safeguards contained in the court's statute, which is primary EU law. That says the mandate of a serving member can be terminated only by the court itself for specific, mainly disciplinary, reasons".

This post builds on the analysis previously offered by Professors Halberstam and Kochenov. For Professor Halberstam, the non-binding declaration adopted by the Conference of 27 should be treated as such and AG Sharpston continue until the end of her six-year mandate in order to "safeguard the independence of the Court, the rule of law, and the constitutional structure of the Union." For Professor Kochenov, concurring with Professor Halberstam, the declaration of 29 January 2020 not only violates EU primary law but also violates one of the core components of the rule of law: the "security of tenure of the members of courts".

In agreement with Professors Halberstam and Kochenov, this post will submit that the 27 national governments legally erred in this instance and that while they were manifestly not guided by any purpose to undermine judicial independence, it was equally wrong to promptly declare the existence of a vacancy when a reasonable case can be made that the Conference of 27 violated EU primary law. It is to be hoped therefore that the Court of Justice will carefully examine the two annulment actions lodged by AG Sharpston which raise in particular the novel question of the "automatic" effects of Article 50(3) TEU, and reaffirm, in this context, the cardinal importance of the principle of irremovability of judges.

1. Brief overview of relevant legal and factual framework

As a preliminary remark, it may be helpful to remind that AG are covered by the Statute of the CJEU. The Statute, which is to be found in Protocol No 3 annexed to the EU Treaties and is "equal in rank" to the Treaties, makes crystal clear that AG are to be considered judges as far as their status is concerned. This has been confirmed by the Court itself: "Advocates General have the same status as the Judges, particularly so far as concerns immunity and the grounds on which the may be deprived of their office, which guarantees their full impartiality and total independence". This means inter alia that both EU judges and AG must perform their duties in complete impartiality and independence and satisfy the same conditions – they must in particular be "chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence" (Article 253 TFEU).

AG and judges of the CJEU however perform different but interconnected roles. As recalled for instance by the Court of Justice in the *A. K.* ruling of 19 November 2019 relating to the disciplinary chamber of Poland's Supreme Court, "under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by those submissions or by the reasoning underpinning those submissions."

Because AG and judges of the CJEU perform different roles, a number of differences exist between them, the most important of which for the purposes of this post can be found in Article 19(2) TEU:

The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

Not only is there no stipulation as to origin or nationality but as far as AG are concerned, there is no direct link made to any particular Member State in the TEU, TFEU or the Statute of the CJEU. In other words, there is no legally binding

provision linking AG with specific Member States. However, there has been a *political* agreement to allocate a number of permanent AG posts to a specific number of countries (Germany, France, Italy, Spain, the UK and most recently, Poland) and create a rotation system for five additional posts of AG (see Declaration No. 38 annexed to the EU Treaties). It was on the basis of this *political* agreement that AG Sharpston was nominated by the UK government before being appointed three times by common accord of the governments of the EU Member States on the basis of Article 253 TFEU, with her third mandate due to expire in October 2021. Another important consideration is that according to the Court of Justice itself, "the number of Advocates General of the Court of Justice, fixed at eleven by the Council Decision of 25 June 2013, is not affected" by the UK's withdrawal from the EU. By contrast, the number of judges of the ECJ and GC were reduced with immediate effect, with one fewer judge for the ECJ and two fewer judges for the GC (in practice, the UK never exercised its right to nominate a second GC judge due to Brexit looming).

In this respect, it is important to stress that the EU Treaties do *not* provide for any EU Member State or the EU Member States acting together with the authority to prematurely end the mandate of a judge or AG. Instead, the replacement of judges and AG is exclusively governed by the conditions laid down in the CJEU Statute: "apart from normal replacement, or death, the duties of a Judge shall end when he resigns" with any resigning judged under an obligation to "continue to hold office until his successor takes up his duties" (Article 5). There is an exception to these principles provided in Article 6 of the Statute: "A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office". The reference to "Judge" in these provisions also covers AG, because, as made clear by Article 8 of the CJEU Statute, Articles 2-7 of the Statute apply to the AG. The Statute and the Treaties more generally do *not* provide for any *external* intervention and/or *external* mechanism when it comes to depriving a judge/AG of his/her office.

Lastly, as regards the issue of whether AG Sharpston's mandate was automatically terminated due to Brexit, the only Treaty provision cited in support of this position in the Declaration of 29 January 2020 adopted by the Conference of 27 is Article 50(3) TEU ("The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement…"). Also noteworthy is lack of any reference to any substantive provision of the WA with the declaration of 29 January 2020 only referring, but *not even explicitly*, to a recital from the WA when it noted that

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.

A factually important consideration in this respect is that AG Sharpston, despite her post being considered vacant, has continued to perform all of her normal duties as a serving AG post Brexit *at the invitation of the CJEU*. Indeed, in a press release published on 31 January 2020, the Court indicated that "Pending the nomination of

a new Advocate General by the governments of the Member States, Ms Eleanor Sharpston will continue to hold office, in accordance with Articles 5 and 8 of the Statute of the Court of Justice, until her successor takes up his or her duties." By contrast, and as previously noted, the mandates of the judges nominated by the UK government to the ECJ and GC were terminated with effect from 31 January 2020 at midnight.

2. Violating EU primary law in the rush to be done with Brexit

In the two-page long declaration of 29 January 2020, the representatives of 27 governments of the EU Member States adopted the view that the permanent post of AG which was assigned to the UK on the basis of a political agreement must "automatically end as soon as the Treaties cease to apply to the United Kingdom, that is, on the date of the withdrawal," that is, on 1 February 2020.

Leaving aside the issues of the legality of a declaration adopted without the UK while the UK was still a Member State by an entity only referred to briefly in Declaration 54 annexed to the EU Treaties and concerning the European Atomic Energy Community, there are two main legal problems with this view.

First, it is submitted that Article 50(3) TEU does not allow the representatives of 27 governments of the EU Member States to disregard the autonomy and independence of the Court of Justice. Once appointed, AG, similarly to judges, cannot however be deprived of their mandate except by a decision of the Court of Justice taken in accordance with the conditions laid down in Article 6 of the CJEU Statute. In other words, there is *no* provision in the Statute granting either the Council or any entity called "Conference of the Representatives of the Governments of the Member States" the authority to declare a judicial post within the CJEU vacant, in particular in a situation where the mandate of the relevant judge/AG is yet to expire. Furthermore, the CJEU, by confirming following the Declaration of the Conference of 27, that AG Sharpston must stay in post and continue to hold office until her successor is appointed "in accordance with Articles 5 and 8 of the Statute", implicitly recognised that Brexit does not (completely) mean Brexit as far as AG Sharpston is concerned. Yet there cannot be an application à la carte of the CJEU Statute: Either AG Sharpston is covered by it or she isn't. She cannot be the Court's *Schrödinger's* AG. Since the CJEU accepts that the Statute applies to her situation, the Statute must also be respected by the Council and/or the Conference of 27. This means no premature termination of her mandate can lawfully take place unless the Court's jurisdiction to a declare a mandate terminated is respected and the procedure and connected conditions laid down in the Statute complied with. In other words, It is for the Court of Justice and only for the Court of Justice, on the basis of the CJEU Statute, to exclusively decide on the legal effects of Brexit (if any) on the mandate of AG Sharpston. It is not for political actors for decide this matter, in particular via an entity which is not even mentioned once in either the TEU or the TFEU.

Second, and substantively, it is not obvious that Brexit must *automatically* mean the *premature* termination of AG Sharpston's fixed-term mandate. As previously noted, Article 19(2) TEU does provide with a link between the judge and the Member State that nominated him/her ("one judge from each Member State") with the consequence that should the Member State leave the EU, the post of judge associated with that Member State must logically disappear on the day that State's withdrawal is effective. By contrast, Article 19(2) provides that AG shall assist the ECJ. It does *not* provide for one AG from each Member State. There are indeed fewer AG than the number of Member States. There is furthermore no legal obligation whatsoever for a Member State to nominate a national. One must emphasise in this regard that Brexit has not led to any reduction in the number of AG but merely ended the possibility for the UK to nominate a permanent AG in the future. *All* the political agreement set out in Declaration No 38 does is to regulate which Member State can put forward a candidate's name when a vacancy arises. It is also worth recalling in this respect that the CJEU itself accepted that the situation of judges and AG is not identical on 31 January 2020 when it took "formal notice" of the fact that the withdrawal of the UK has the effect of bringing to an end the mandates of the judges nominated by the UK.

This means that the only link between the UK and AG Sharpston is the UK government's decision to nominate her for three consecutive mandates (in 2006, 2009 and 2015) on the basis of a *political* agreement now to be found in Declaration No 38. There is however no such a thing as a "UK AG". In other words, AG Sharpston did not and does not represent the UK and her mandate was never tied to a position which is legally connected to the UK. This is indeed why she is currently continuing in her current position post Brexit. And even if there were indeed one "UK AG", the post would have been abolished rather than just incorporated into the rotating system, which is what happened in the present instance with Greece allocated the post currently occupied by AG Sharpston.

Finally, since *no substantive provision* ofthe WA formally affected the 2015 Decision appointing AG Sharpston and other judges and AG to six-year mandates or the 2013 Decision increasing the number of AG from 8 to 11, *which both remain in force*, it is difficult to see how Brexit can be said to have automatically terminated AG Sharpston's mandate. An implicit reference to a mere *non-binding* recital in the WA (see eighth recital) cannot justify a different conclusion. One must stress in this respect that the disputed Declaration does *not* invoke a single substantive provision from the WA to support its analysis that Brexit would have automatically and prematurely terminated the pre-Brexit six-year mandate of AG Sharpston.

3. The ECJ must defend its independence and reaffirm cardinal importance of the principle of irremovability of judges

As the Court itself has repeatedly held, the EU is "a union based on the rule of law" whose founding treaties have "established a new legal order, possessing its own institutions for the benefit of which the Member States thereof have limited their

sovereign rights, in ever wider fields". Amongst these institutions, the Member States decided to establish a CJEU whose independence is strongly and comprehensively guaranteed, in particular by the legally binding Statute of the CJEU provided for in Article 281 TFEU and which has legal value equal to the Treaties.

In the context of cases relating to national measures violating the most basic tenets of the rule of law, the Court has rightly stressed the "cardinal importance" of the principle of irremovability of judges which "requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or *until the expiry of their mandate* [our emphasis], where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality".

In the present case, however, the Council/national governments of 27 Member States did not claim that AG Sharpston must be dismissed on account of incapacity or a serious breach of her obligations but on account of the UK's departure from the EU even though, as argued above, her only link with the UK is the UK government's decision to nominate her. The question is therefore whether Brexit, in light of the legal framework applicable to EU AG, can be construed as a legitimate and compelling ground which can justify the *premature* and *automatic* termination of AG Sharpston's fixed judicial term while also not breaching the principle of proportionality. It is submitted a negative answer is warranted.

In a nutshell, she was appointed by common accord of all the Member States acting together. AG Sharpston is therefore not the "AG of the UK" but rather one of the Court's AG and EU primary law does not allow for the automatic termination of AG's mandates. The declaration of 29 January 2020 does not offer any reasoning on this point and neither does it even attempt to put forward any legitimate and compelling grounds apart from putting forward the view, dare we say, that Brexit must mean Brexit. The principle of proportionality is furthermore completely ignored notwithstanding the case law of the Court of Justice which, as noted above, requiring that any exception to the principle of irremovability be also subject to the principle of proportionality.

As the Court itself has repeatedly held, "the concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against *external* (our emphasis) interventions or pressure liable to impair the independent judgment of its members and to influence their decisions".

This means inter alia "protection against removal from office of the members of the body concerned" via rules which guarantee "that judges may remain in post provided that they have not reached the obligatory retirement age *or until the expiry of their mandate, where that mandate is for a fixed term*" (our emphasis). As noted above, it is submitted that Brexit cannot be considered a legitimate and compelling ground to set aside the principle of irremovability and even if it were, the automatic

premature termination of AG Sharpston's mandate cannot be reconciled with the principle of proportionality, not to mention her EU Charter right to be heard. These issues are furthermore matters for the Court of Justice and not for the "Conference of the Representatives of the Governments of the Member States", which is nowhere mentioned in the TEU, TFEU or the protocols annexed to the EU Treaties.

4. Concluding remarks

At a time of increasingly blatant attacks on the most basic tenets of the rule of law and increasing open defiance of the Court's rulings and orders, in particular by fake judges and puppet courts doing the bidding of the local autocrat while judges upholding judicial independence are harassed or forcibly dismissed under false pretences, the EU institutions must lead by example. This requires inter alia that the EU political institutions, and in particular the national governments acting in the Council, to act with the most utmost care when taking decisions relating to the composition and/or jurisdiction of the CJEU. President Lenaerts elegantly and perfectly encapsulated the importance of judicial independence in his keynote speech at the RECONNECT conference held on 5 July 2019 when he observed that "without judicial independence, there is no true justice, whether at national or supranational level."
