Reports of Cases

ORDER OF THE COURT (Eighth Chamber)

14 April 2021 *

(Appeal – Article 181 of the Rules of Procedure of the Court of Justice – Protection of the financial interests of the European Union – Combating fraud – European Council meetings – Multiannual Financial Framework – Request for exclusion of the representative of the Czech Republic due to an alleged conflict of interest – Reply claiming lack of competence – Action for failure to act – Alleged failure to act by the European Council – Inadmissibility – Definition of position – *Locus standi* – Interest in bringing proceedings)

In Case C-504/20 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 28 September 2020,

Lukáš Wagenknecht, residing in Pardubice (Czech Republic), represented by A. Koller, advokátka,

applicant,

the other party to the proceedings being:

European Council,

defendant at first instance,

THE COURT (Eighth Chamber),

composed of N. Wahl, President of the Chamber, F. Biltgen (Rapporteur) and J. Passer, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 181 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 By his appeal, Mr Lukáš Wagenknecht seeks to have set aside, first, the order of the General Court of the European Union of 17 July 2020, *Wagenknecht* v *European Council* (T-715/19, EU:T:2020:340), by which the General Court dismissed as inadmissible and, in any event, manifestly lacking any

* Language of the case: English.

foundation in law his action for failure to act based on Article 265 TFEU and seeking a declaration that the European Council unlawfully failed to act on his application for the exclusion of the Prime Minister of the Czech Republic, Mr Andrej Babiš, from the European Council meeting of 20 June 2019 and future meetings concerning the negotiations on the financial perspectives, due to his alleged conflict of interests, and, second, the order of the President of the General Court of 23 July 2020, *Wagenknecht* v *European Council* (T-715/19 R, not published, EU:T:2020:358; 'the order for interim relief'), ruling that there was no longer any need to rule on his application for interim measures under Article 279 TFEU.

Background to the dispute

2 For the purposes of the present appeal, the background to the dispute, as set out in paragraphs 1 to 3 of the order under appeal, may be summarised as follows.

3 By letter dated 5 June 2019 and received at the European Council on 10 June 2019, the appellant, a member of the Senát Parlamentu České republiky (Senate of the Czech Republic), asked the European Council to exclude the Prime Minister of the Czech Republic from the European Council meeting of 20 June 2019 and from future meetings concerning the negotiations on financial perspectives (Multiannual Financial Framework (MFF) 2021/2027; 'the call to act of 5 June 2019'), on account of the alleged conflict of interests of that representative of the Czech Republic, caused by his personal and family interests in undertakings in the Agrofert Group, which is active, in particular, in the agri-food sector.

4 On 24 June 2019, the European Council replied to that letter. While stating that it was not defining its position on the substance of the appellant's allegations and assuring him that it attached the greatest importance to combating fraud and other illegal activities affecting the financial interests of the European Union, it noted that Article 15(2) TEU specified the composition of the European Council by providing that the latter 'shall consist of the Heads of State or Government of the Member States and of its President and President of the [European] Commission', it not being possible to alter that composition in the absence of any provision in the Treaties providing for the possibility of such an amendment. In addition, the European Council stated that the question as to which person, between the Head of State or the Head of Government, must represent each of the Member States of the European Union is a matter for national constitutional law alone, so that it was not within the discretion of the European Council or of its President to decide who was to be the representative of each Member State within that institution or to decide who, as between the Head of State or the Head of Government, was to be invited to the various meetings of the European Council.

5 On 2 July 2019, the appellant wrote to the European Council by email asking the Secretary-General of that institution for clarification of the response given to him on 24 June 2019. That email remained unanswered.

The action before the General Court, the order under appeal and the order for interim relief

6 By application lodged at the Registry of the General Court on 21 October 2019, the appellant brought an action under Article 265 TFEU for a declaration that the European Council had failed to act in that it unlawfully failed to act in response to the call to act of 5 June 2019.

7 On 19 March 2020, the European Council raised a plea of inadmissibility under Article 130(1) of the Rules of Procedure of the General Court by which it asked the General Court to dismiss the action as manifestly inadmissible and to order the appellant to pay the costs.

8 By separate document sent to the Registry of the General Court on 27 May 2020, the appellant, pursuant to Article 279 TFEU, requested the President of the General Court to adopt an interim measure ordering the inclusion, in the conclusions of the European Council, of a text stating, in essence, that any legal person connected with the Prime Minister of the Czech Republic is to be prohibited from receiving funds in the context of the MFF 2021/2027.

9 By the order under appeal, adopted on the basis of Articles 126 and 130 of its Rules of Procedure, the General Court dismissed the action as inadmissible, after holding, first, in paragraphs 25 to 27 of that order, that the appellant had neither any interest in bringing proceedings nor any *locus standi* and, second, in paragraphs 28 to 33 of that order, that the European Council had, in its letter of 24 June 2019, defined its position on the call to act of 5 June 2019. However, the General Court considered it appropriate, in paragraphs 34 to 38 of the order under appeal, also to examine the substance of the action and dismissed it as, in any event, manifestly lacking any foundation in law.

10 By the order for interim measures, the President of the General Court ordered that there was no longer any need to adjudicate on the application for the adoption of an interim measure.

The form of order sought by the appellant before the Court of Justice

11 By his appeal, the appellant claims that the Court of Justice should:

– set aside the order under appeal;

– uphold the pleas in law submitted before the General Court; and

– set aside the order for interim measures.

The appeal

12 Under Article 181 of the Rules of Procedure of the Court of Justice, where the appeal is, in whole or in part, manifestly inadmissible or manifestly unfounded, the Court of Justice may at any time, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide by reasoned order to dismiss that appeal in whole or in part.

13 It is appropriate to apply that provision in the context of the present appeal.

14 In support of his appeal, on the one hand, the appellant raises 15 grounds of appeal alleging infringement, first, of the principle of protection of legitimate expectations as to the legitimate conduct of the EU institutions; second, of Article 130(3) and (7) of the Rules of Procedure of the General Court and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'); third, of the third paragraph of Article 265 TFEU, read in conjunction with the fourth paragraph of Article 263 TFEU; fourth, of Article 4(2) TEU and the constitutional and common rules of the Member States; fifth, of Article 2 of the ECHR and Article 2 of the Charter of Fundamental Rights of the European Union 'the Charter'); sixth, of Article 6 of the ECHR and Article 47 of the Charter; seventh, of Article 13 TEU; eighth, of Article 15(2) TEU; ninth, of Article 325(1) TFEU; tenth, of Article 61 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1); eleventh to fourteenth, of Article 2 TEU and, fifteenth, of the principle of legitimate expectations as regards the order made against him to pay the costs.

15 On the other hand, by his sixteenth ground of appeal, the appellant seeks to bring an appeal against the order for interim relief and an application for interim measures.

16 It is appropriate to deal first with the first, third, fifth, sixth, eleventh and twelfth pleas, which concern the grounds of the order under appeal relating to the admissibility of the action, then, second, with the other grounds raised in support of the appeal.

The first ground of appeal

17 The first ground of appeal is directed against paragraphs 29 to 33 of the order under appeal, in which the General Court held that the letter from the European Council of 24 June 2019 constituted a definition by that institution of its position on the call to act of 5 June 2019, with the result that the action did not satisfy the conditions for admissibility, laid down in Article 265 TFEU, of an action for failure to act.

Arguments of the appellant

18 The appellant alleges, in the first place, infringement of the principle of protection of legitimate expectations as to the legitimate conduct of the EU institutions, in that the General Court stated, ambiguously, that he should not have expected the European Council to act in accordance with Article 61 of Regulation 2018/1046 and Article 325 TFEU, since that institution stated, in a contradictory manner, in its letter of 24 June 2019, that it would comply with the obligation to combat fraud and corruption, but that it did not have the power to do so.

19 In the second place, the appellant claims that the European Council, in its letter of 24 June 2019, described by the appellant as a 'non-reply', breached its obligation to communicate clearly and comprehensibly and that the bringing of an action for annulment of that letter, under Article 263 TFEU, as referred to by the General Court in paragraph 32 of the order under appeal, proved to be pointless.

Findings of the Court

20 As is clear from the case-law of the Court of Justice, the General Court was correct to point out, in paragraphs 29 to 31 of the order under appeal, that the conditions for admissibility of an action for failure to act, laid down in Article 265 TFEU, are not satisfied where the institution called upon to act has defined its position on that request before the action is brought (orders of 8 February 2018, *CBA Spielapparate- und Restaurantbetrieb* v *Commission*, C-508/17 P, not published, EU:C:2018:72, paragraph 15, and of 3 December 2019, *WB* v *Commission*, C-270/19 P, not published, EU:C:2019:1038, paragraph 13), and that the adoption of an act other than that which the persons concerned would have wished or regarded as necessary, such as a duly reasoned refusal to act in accordance with the call to act, constitutes a definition of position putting an end to the failure to act (see, to that effect, judgment of 19 November 2013, *Commission* v *Council*, C-196/12, EU:C:2013:753, paragraph 22 and the case-law cited).

21 The latter finding is particularly true where the institution concerned refuses to act in accordance with the call to act because of a lack of competence (see, to that effect, order of 3 December 2019, *WB* v *Commission*, C-270/19 P, not published, EU:C:2019:1038, paragraph 12).

22 It is in accordance with the case-law cited in paragraph 20 of the present order that the General Court considered, in essence, in paragraph 32 of the order under appeal that the letter of the European Council of 24 June 2019, sent in response to the call to act of 5 June 2019 and containing the institution's decision not to take steps to the effect recommended in that call to act, brought an end

to the failure to act, thereby rendering inadmissible the action brought by the appellant under Article 265 TFEU. The General Court added that it was open to the appellant to bring an action under Article 263 TFEU against that decision, provided that he could prove that he had *locus standi*.

23 However, it must be borne in mind that the definition of a position, within the meaning of the second paragraph of Article 265 TFEU, must set out clearly and definitively the position of the institution concerned on the appellant's call to act and that the classification of that institution's response to that call to act as a 'definition of position' putting an end to the alleged failure to act is a question of law which may be raised on appeal (see, to that effect, order of 16 June 2020, *CJ* v *Court of Justice of the European Union*, C-634/19 P, not published, EU:C:2020:474, paragraphs 29 and 31 and the case-law cited).

24 In the present case, the arguments put forward by the appellant in his first ground of appeal are not such as to call into question the classification of the letter from the European Council of 24 June 2019 as a 'definition of position' or, therefore, the General Court's conclusion that the action was inadmissible on that ground.

25 Thus, in the first place, the allegation that the General Court stated that the appellant ought not to have relied upon the European Council to act in accordance with Article 61 of Regulation 2018/1046 and Article 325 TFEU is clearly the result of a misreading of the order under appeal. The General Court confined itself, in paragraph 32 of that judgment, to stating that the European Council, in its letter of 24 June 2019, had explained, in clear terms, the reasons for its inability to act in the manner requested by the appellant, without, however, drawing therefrom the conclusion which the appellant seeks to attribute to it.

26 In so far as the appellant's argument must be understood as criticising the General Court for failing to find that that letter is vitiated by contradictory reasoning, it must be stated that there is clearly no contradiction between the assurance expressed in that letter that the European Council attached the greatest importance to combating fraud and other illegal activities affecting the financial interests of the European Union, on the one hand, and that institution's refusal to act in accordance with the appellant's call to act as it lacks the competence to do so, on the other.

27 It follows that that line of argument is manifestly unfounded.

28 In the second place, as regards the appellant's argument that, in its letter of 24 June 2019, the European Council infringed its obligation to communicate clearly and comprehensibly, it follows from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 169(2) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (judgment of 16 September 2020, *BP* v *FRA*, C-669/19 P, not published, EU:C:2020:713, paragraph 26 and the case-law cited).

29 In the present case, the appellant merely makes a very general assertion, without providing any legal reasoning to demonstrate in what way the statement of the European Council, in its letter of 24 June 2019, is not clear or comprehensible and still less in what way the General Court erred in law in that regard. Consequently, that argument must be rejected as being manifestly inadmissible.

30 Furthermore, it must be borne in mind that the issue of the conditions of admissibility of an action for failure to act is distinct from the issue of whether the act adopted by the EU institution to which the request was made, which brings its failure to act to an end, may be the subject of an action for annulment (see, to that effect, order of 16 June 2020, *CJ* v *Court of Justice of the European Union*,

C-634/19 P, not published, EU:C:2020:474, paragraph 36 and the case-law cited). Accordingly, the applicant's argument that the bringing of an action under Article 263 TFEU against that letter from the European Council was pointless is ineffective.

31 It follows that the first ground of appeal must be rejected as being, in part, manifestly inadmissible and, in part, manifestly unfounded.

The third, fifth and twelfth grounds of appeal

32 By his third ground of appeal, the appellant submits that, as regards paragraphs 25 to 27 of the order under appeal, the General Court unlawfully added two conditions for the establishment of his *locus standi* which do not appear in the third paragraph of Article 265 TFEU, read in conjunction with the fourth paragraph of Article 263 TFEU, and erred in law in finding that he lacked *locus standi* and any interest in bringing proceedings.

33 By his fifth ground of appeal, the appellant alleges infringement of Article 2 of the ECHR and Article 2 of the Charter, in that the General Court held, in paragraph 39 of the order under appeal, that he was neither directly nor individually affected by the alleged failure to act, despite the threats to his physical integrity incited by the remarks of the Prime Minister of the Czech Republic concerning him.

34 By his twelfth ground of appeal, the appellant alleges infringement of the fundamental value of equality before the law, as enshrined in Article 2 TEU, and criticises paragraphs 27 and 38 of the order under appeal. In his view, it follows from those two paragraphs that only recipients of payments made by the European Union in connection with the funds spent in the Member States have standing to challenge the lawfulness of those payments.

35 Thus, by those three grounds of appeal, the appellant challenges, in essence, the General Court's finding that his action was inadmissible on account of his lack of *locus standi* and interest in bringing proceedings.

36 In so far as, for the reasons set out in paragraphs 20 to 31 of the present order, the General Court did not err in law in holding the action to be inadmissible, on the ground that the European Council had defined its position on the call to act of 5 June 2019 before that action was brought, it is not necessary to examine whether the finding of the General Court referred to in the preceding paragraph is erroneous in law. In those circumstances, such an error would have no bearing on the outcome of the dispute and would not affect the operative part of the order under appeal in so far as that action was dismissed as inadmissible (see, by analogy, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 74, and order of 25 October 2016, *VSM Geneesmiddelen* v *Commission*, C-637/15 P, not published, EU:C:2016:812, paragraphs 54 and 55).

37 Accordingly, the third, fifth and twelfth grounds of appeal must be rejected as ineffective.

The sixth and eleventh grounds of appeal

38 By his sixth ground of appeal, the appellant alleges infringement of Article 6 of the ECHR and Article 47 of the Charter and, by his eleventh plea, a failure to have regard to the fundamental value of justice, as enshrined in Article 2 TEU, in that the General Court found his action to be inadmissible on the grounds set out in the order under appeal.

39 In that regard, it is sufficient to note that, although the conditions governing the admissibility of an action before the Court of Justice must be interpreted in the light of the values and fundamental rights of EU law, those values and fundamental rights cannot, however, have the effect of altering the system of judicial review laid down by the Treaties, in particular the rules relating to the admissibility of direct actions brought before the EU Courts (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97, and order of 8 February 2018, *CBA Spielapparate- und Restaurantbetrieb* v *Commission*, C-508/17 P, not published, EU:C:2018:72, paragraph 20).

40 Accordingly, the sixth and eleventh grounds of appeal must be rejected as manifestly unfounded.

The fourth, seventh to tenth, thirteenth and fourteenth grounds of appeal

41 The fourth, seventh to tenth, thirteenth and fourteenth grounds of appeal are directed against the grounds set out in paragraphs 34 to 38 of the order under appeal, concerning the substance of the action before the General Court.

42 In so far as it follows from paragraphs 20 to 31 of the present order that the General Court was entitled to hold, in paragraph 39 of the order under appeal, that the action before it was inadmissible, those grounds are included for the sake of completeness.

43 In accordance with the settled case-law of the Court of Justice, complaints directed against grounds included in a decision of the General Court purely for the sake of completeness must be rejected as ineffective, since they cannot lead to the decision being set aside (see, to that effect, judgment of 12 November 2020, *Gollnisch* v *Parliament*, C-676/19 P, not published, EU:C:2020:916, paragraph 55 and the case-law cited).

44 Consequently, the fourth, seventh to tenth, thirteenth and fourteenth grounds of appeal, directed against the grounds of the order under appeal relating to the substance, on which there was no need to adjudicate, must be rejected as ineffective.

The second ground of appeal

45 By his second ground of appeal, the appellant submits that the General Court infringed Article 130(3) and (7) of its Rules of Procedure and Article 6 of the ECHR by including, in paragraphs 34 to 38 of the order under appeal, considerations relating to the substance of his action, which ought to have been dealt with in a judgment.

46 As is clear from paragraphs 41 to 43 of the present order, it was only for the sake of completeness that the General Court, in those paragraphs of the order under appeal, examined the substance of the action.

47 It follows that the second ground of appeal must be rejected as ineffective.

The sixteenth ground of appeal

48 By his sixteenth ground of appeal, the appellant seeks to bring an appeal against the order for interim relief and an application for interim measures.

49 However, it follows from Articles 39 and 57 of the Statute of the Court of Justice of the European Union, read in conjunction with Article 160(4) and Article 190(1) of the Rules of Procedure of the Court of Justice, that such an appeal and such an application for interim measures must be made by a separate document.

50 In the absence of an application made in such a manner in the present case, that appeal and that application for interim measures are manifestly inadmissible.

The fifteenth ground of appeal

51 By his fifteenth ground of appeal, the appellant claims that the General Court infringed the principle of legal predictability by ordering him to pay the costs, even though the amount of those costs was not indicated in the order under appeal and that Articles 133 to 141 of the Rules of Procedure of the General Court, relating to costs, do not lay down any substantive rule allowing costs to be determined.

52 In that regard, it suffices to recall that, in accordance with settled case-law, where all the other grounds of appeal have been rejected, any submissions concerning the alleged unlawfulness of the decision of the General Court on costs must be rejected as inadmissible, pursuant to the second paragraph of Article 58 of the Statute of the Court of Justice of the European Union, in accordance with which an appeal may not relate only to the amount of the costs or the party ordered to pay them (order of 12 January 2017, *Europäischer Tier- und Naturschutz and Giesen* v *Commission*, C-343/16 P, not published, EU:C:2017:10, paragraph 24 and the case-law cited).

53 Since the other grounds of appeal have been rejected, the fifteenth ground of appeal must be rejected as manifestly inadmissible.

54 It follows from the foregoing that the appeal must be dismissed in its entirety as being, in part, manifestly inadmissible and, in part, manifestly unfounded.

Costs

55 Under Article 137 of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings by virtue of Article 184(1) of those Rules, a decision as to costs is to be given in the order which closes the proceedings.

56 Since the present order was adopted before the appeal was served on the other party to the appeal and therefore before the latter could have incurred costs, it must be held that the appellant is to bear his own costs.

On those grounds, the Court (Eighth Chamber) hereby orders:

1. **The appeal is dismissed as being, in part, manifestly inadmissible and, in part, manifestly unfounded.**

2. **Mr Lukáš Wagenknecht shall bear his own costs.**

Luxembourg, 14 April 2021.

A. Calot Escobar
Registrar

N. Wahl
President of the Eighth Chamber