



Reports of Cases

ORDER OF THE COURT (First Chamber)

16 June 2021 *

(Appeal – Article 181 of the Rules of Procedure of the Court of Justice – Consequences of the departure of the United Kingdom of Great Britain and Northern Ireland from the European Union for the Members of the Court of Justice of the European Union – Declaration of the Conference of the Representatives of the Governments of the Member States – End of the mandate of an Advocate General – Action for annulment)

In Case C-684/20 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 16 December 2020,

Eleanor Sharpston, residing in Schoenfels (Luxembourg), represented by N. Forwood, Barrister-at-Law, J. Robb, Barrister, and by J. Flynn QC and H. Mercer QC,

appellant,

the other parties to the proceedings being:

Council of the European Union,

Conference of the Representatives of the Governments of the Member States,

defendants at first instance,

THE COURT (First Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan and N. Jääskinen, Judges,

Advocate General: M. Szpunar,

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

* Language of the case: English.

Order

- 1 By her appeal, Ms Eleanor Sharpston seeks to have set aside the order of the General Court of the European Union of 6 October 2020, *Sharpston v Council and Conference of the Representatives of the Governments of the Member States* (T-180/20, not published, ‘the order under appeal’, EU:T:2020:473), by which it rejected her application seeking partial annulment of the Declaration by the Conference of the Representatives of the Governments of the Member States on the consequences of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union for the Advocates General of the Court of Justice of the European Union, of 29 January 2020 (‘the declaration at issue’).

Legal context

- 2 The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7; ‘the Withdrawal Agreement’), approved by Council Decision (EU) 2020/135 of 30 January 2020 (OJ 2020 L 29, p. 1), which entered into force on 1 February 2020, sets out in the eighth paragraph of the preamble thereto:

‘Considering that it is in the interest of both the Union and the United Kingdom to determine a transition or implementation period during which – notwithstanding all consequences of the United Kingdom’s withdrawal from the Union as regards the United Kingdom’s participation in the institutions, bodies, offices and agencies of the Union, in particular the end, on the date of entry into force of this Agreement, of the mandates of all members of institutions, bodies and agencies of the Union nominated, appointed or elected in relation to the United Kingdom’s membership of the Union – Union law, including international agreements, should be applicable to and in the United Kingdom, and, as a general rule, with the same effect as regards the Member States, in order to avoid disruption in the period during which the agreement(s) on the future relationship will be negotiated’.
- 3 Article 19(2) TEU provides that the Court of Justice is to consist of one judge from each Member State and is to be assisted by Advocates General.
- 4 Under Article 252 TFEU, the Court of Justice is to be assisted by eight Advocates General and that, should the Court so request, the Council of the European Union, acting unanimously, may increase the number of Advocates General.
- 5 Under the Declaration on Article 252 of the Treaty on the Functioning of the European Union regarding the number of Advocates General in the Court of Justice annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, the Conference of the Representatives of the Governments of the Member States declared that if, in accordance with the first paragraph of Article 252 TFEU, the Court of Justice were to request that the number of Advocates General be increased by 3, that is, 11 instead of 8, the Republic of Poland would, as is already the case for the Federal Republic of Germany, the French Republic, the Italian Republic, the Kingdom of Spain and the United Kingdom, have a permanent Advocate General and no longer take part in the rotation system, which would involve the rotation of 5 Advocates General instead of 3.
- 6 By Council Decision 2013/336/EU of 25 June 2013 increasing the number of Advocates General of the Court of Justice of the European Union (OJ 2013 L 179, p. 92), the number of Advocates General was increased from 8 to 11.

Background to the dispute

- 7 In 2005, on the nomination of the Government of the United Kingdom, the representatives of the governments of the Member States appointed Ms Sharpston to the Court of Justice to serve as an Advocate General for the remainder of the mandate of her predecessor, that is, until 6 October 2009. In 2009, following a new proposal from the same government, the appellant was appointed as Advocate General at the Court of Justice for a new six-year mandate for the period from 7 October 2009 to 6 October 2015. Finally, under Decision (EU, Euratom) 2015/578 of the Representatives of the Governments of the Member States of 1 April 2015 appointing Judges and Advocates General to the Court of Justice (OJ 2015 L 96, p. 11) the appellant was appointed to serve as Advocate General for the period from 7 October 2015 to 6 October 2021.
- 8 On 29 January 2020, the Conference of the Representatives of the Governments of the Member States adopted the declaration at issue in which it recalled that since the United Kingdom had initiated the procedure laid down in Article 50 TEU for withdrawal from the European Union the Treaties would cease to apply to that Member State from the date of entry into force of the Withdrawal Agreement. It also noted that, therefore, the mandates of members of institutions, bodies and agencies of the European Union who were nominated, appointed or elected in relation to the United Kingdom's membership of the European Union would end on the date of the withdrawal. It stated that it followed that the permanent post of Advocate General assigned to the United Kingdom by the Declaration on Article 252 of the Treaty on the Functioning of the European Union regarding the number of Advocates General in the Court of Justice annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, would be included in the rotation system among the Member States for the appointment of Advocates General. It noted that, according to the protocol order, the next eligible Member State would be the Hellenic Republic. In view of the exceptional circumstances in which that appointment was to be made and for the purpose of observing, in accordance with Article 253 TFEU, both the rule on the partial replacement of the members of the Court of Justice every three years and the rule on their six-year terms of office, the term of office of the Advocate General proposed by the Hellenic Republic for the vacant post of Advocate General would end on the date of the next partial renewal of the Court of Justice, that is, on 6 October 2021.

The procedure before the General Court and the order under appeal

- 9 By application lodged at the Registry of the General Court on 7 April 2020, the applicant sought partial annulment of the declaration at issue.
- 10 In the order under appeal, after having held, in paragraph 27, that the declaration at issue was adopted not by the Council, but by the Conference of the Representatives of the Governments of the Member States, the General Court dismissed as inadmissible, in paragraph 28, the action before it in so far as it was directed against the Council.
- 11 As regards the claims made against the Conference of the Representatives of the Governments of the Member States, the General Court noted, in paragraphs 29 and 30 of the order under appeal, that it has jurisdiction under Article 263 TFEU only against acts of the institutions, bodies, offices or agencies of the European Union and that it follows from the case-law of the Court of Justice that acts adopted by representatives of the governments of the Member States, acting not in their capacity as members of the Council of the European Union or of the European Council but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the EU Courts.

- 12 The General Court also referred, in paragraphs 31 and 32 of the order under appeal, to the order of the Vice-President of the Court of Justice of 10 September 2020, *Representatives of the Governments of the Member States v Sharpston*, (C-424/20 P(R), not published, EU:C:2020:705), in order to note, first, that acts by which Judges and Advocates General of the Court of Justice are appointed, in accordance with Article 253(1) TFEU, are adopted by common accord of the governments of the Member States and, second, an action is manifestly inadmissible to the extent that it seeks the annulment of a decision taken not by an institution, body, office or agency of the Union but by representatives of the governments of the Member States exercising the powers of those States.
- 13 In paragraph 33 of the order under appeal, the General Court noted that, on 29 January 2020, the representatives of the governments of 27 of the 28 Member States of the European Union on that date took part in the meeting giving rise to the declaration at issue and adopted it in their capacity as representatives of the governments of the Member States and not as members of the Council. In paragraph 34 of that order, the General Court noted that, despite the fact that the Council is referred to in its heading and that it was published on the Council's website, the declaration at issue shows, by its content, that it is a declaration of the representatives of the governments of the Member States, by common accord, and not a declaration of the Council or an EU body or entity.
- 14 The General Court thus concluded, in paragraph 35 of the order under appeal, that the action before it should be dismissed as inadmissible.

Procedure before the Court of Justice and form of order sought by the appellant

- 15 By her appeal, Ms Sharpston asks the Court of Justice to set aside the order under appeal, to direct the other parties to the proceedings to answer the question whether it is necessary to consider that her mandate ended upon the withdrawal of the United Kingdom from the European Union, on 31 January 2020, at midnight, by virtue of Article 50(3) TEU, to refer the case back to the General Court unless the state of the proceedings enables it to give judgment, and to order the Council and the Conference of the Representatives of the Governments of the Member States to pay the costs.

The appeal

- 16 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 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.
- 17 It is appropriate to apply that article in the present case.
- 18 In support of her appeal, the appellant raises five grounds of appeal.

The first to third and fifth grounds of appeal

Arguments of the appellant

- 19 By her first ground of appeal, the appellant claims that the General Court infringed Article 263 TFEU in holding, in paragraphs 29 and 35 of the order under appeal, that the action was inadmissible on the ground that it was not brought against an act adopted by an institution, body, office or agency of the European Union.

- 20 The appellant maintains that it follows not only from the wording of Article 263 TFEU, in its various language versions, but also from the drafting history and purpose of that article as well as from the case-law of the Court of Justice that the scope of that article must be interpreted broadly, both as regards the acts it covers and their authors.
- 21 The appellant submits that, while the Court of Justice excludes from the scope of Article 263 TFEU acts adopted by the representatives of the governments of the Member States outside the EU legal order, the same does not apply to acts, such as the declaration at issue, adopted by the representatives of the governments of the Member States acting in the context of the powers conferred, or purportedly conferred, by the Treaties, which have effects within the EU legal order.
- 22 The appellant argues that in paragraphs 30, 32 and 35 of the order under appeal, the General Court, accordingly, erred in law in considering that all acts adopted by the representatives of the governments of the Member States, otherwise than in their capacity as members of the Council of the European Union or of the European Council, cannot be the subject of judicial review under Article 263 TFEU and that it should have decided that it had jurisdiction to assess the legality of the declaration at issue, in so far as it prematurely terminated her mandate as Advocate General.
- 23 In the context of her final remarks, the appellant asserts that it follows from paragraphs 91 to 98 of the judgment of 16 December 2020, *Council and Others v K. Chrysostomides & Co. and Others* (C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028) that the impossibility of reviewing a political agreement under Article 263 TFEU presupposes the existence of alternative remedies against the acts implementing that agreement, in order to prevent individuals from being deprived of their right to effective judicial protection, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. However, such alternative remedies do not exist in the present case.
- 24 By her second ground of appeal, the appellant submits that the General Court wrongly failed to draw a distinction, for the purposes of determining its jurisdiction, between the decision of the representatives of the governments of the Member States to appoint an Advocate General to the Court of Justice and the prior decision relating to the vacancy for the post thus filled, even though the action brought before it in Case T-180/20 and the present appeal relates to that latter decision.
- 25 The appellant maintains that although, in general, the question whether the post of a member of the Court of Justice is in fact vacant does not arise, it cannot be ruled out that it could arise in certain situations. In that regard, she considers that an act of the Member States which unlawfully establishes a vacancy for such a post should be amenable to review by the Courts of the European Union.
- 26 The appellant argues that it must then be for the EU Courts alone to rule on the matter and refers in particular to Article 19 TEU and Articles 4 and 6 of the Statute of the Court of Justice of the European Union.
- 27 The appellant adds that the validity of acts of the representatives of the governments of the Member States provided for by the FEU Treaty may moreover be challenged, at least indirectly, via procedural routes other than an action for annulment, as the Council acknowledged on behalf of the Conference of the Representatives of the Governments of the Member States in the plea of inadmissibility raised before the General Court, and that it must be inferred from this that a direct action against those measures must also be possible.
- 28 Consequently, according to the appellant, the General Court erred in law in finding, in paragraphs 30, 32 and 35 of the order under appeal, that acts adopted by representatives of the governments of the Member States, whatever they may be, cannot be the subject of an action under Article 263 TFEU.

- 29 By her third ground of appeal, the appellant maintains that the General Court misinterpreted, in paragraphs 30, 33 and 34 of the order under appeal, the principles deriving from the judgment of 30 June 1993, *Parliament v Council and Commission* (C-181/91 and C-248/91, EU:C:1993:271).
- 30 The appellant submits that it does not follow from that judgment that all acts of the representatives of the governments of the Member States acting in concert are exempt from judicial review under Article 263 TFEU, but that the Court of Justice ruled in that judgment only on acts adopted by representatives of the governments of the Member States outside the EU legal order.
- 31 Thus, in the appellant's view, the question whether the EU Courts have jurisdiction to review the legality of an act, such as the declaration at issue, adopted by the representatives of the governments of the Member States by virtue of competences conferred, or purportedly conferred, by the Treaties and which has effects in the EU legal order, has not been resolved in the case-law of the Court of Justice and should be answered in the affirmative.
- 32 The appellant asserts that the General Court therefore incorrectly referred, in paragraphs 30 and 35 of the order under appeal, to the judgment of 30 June 1993, *Parliament v Council and Commission* (C-181/91 and C-248/91, EU:C:1993:271), and in particular to paragraph 12 of that judgment, as the basis for its analysis and should at the very least have referred to other passages of that judgment, such as paragraph 13, from which it is apparent that acts producing legal effects on third parties in the EU legal order must be subject to review by the EU Courts.
- 33 By her fifth ground of appeal, the appellant maintains, in the alternative, that the General Court also wrongly failed, in paragraphs 27 and 28 of the order under appeal, to address her argument that, while the Conference of the Representatives of the Governments of the Member States cannot be the defendant in an action brought under Article 263 TFEU, it is the Council which must be the defendant, whether as the alter ego of that Conference or as the EU institution most closely connected by reason of its involvement in the adoption and promulgation of the declaration at issue.
- 34 The appellant relies, in particular, on the need to review possible infringements of EU law by the Member States if they cannot be defendants in such proceedings and considers that, while the Council is not the author of the contested act, it should nevertheless be able to be held liable for such infringements before the EU Courts.
- 35 The appellant submits that the provisions of the Treaties relating to the jurisdiction of the Court of Justice do not exhaustively specify defendants and refers by analogy to Articles 268 and 340 TFEU.
- 36 The appellant argues that it is necessary to determine whether the finding that the post formerly occupied by her was vacant, made by the declaration at issue, is attributable to the Council, the Conference of the Representatives of the Governments of the Member States or the President of the Court of Justice of the European Union, and considers that the Court of Justice is, in any event, the only authority authorised to rule on the matter.
- 37 The appellant adds that the Council, through its legal service, played an active role, either solely or jointly with the Conference of the Representatives of the Governments of the Member States, as regards the determination of the premature end of her mandate and that it is thus co-author of the defect vitiating the declaration at issue.

Findings of the Court of Justice

- 38 By her first to third and fifth grounds of appeal, which it is appropriate to examine together, the appellant submits, in essence, that the General Court erred in law in dismissing as inadmissible her application for partial annulment of the declaration at issue on the ground that it was adopted by the representatives of the governments of the Member States acting as such and not by the Council.
- 39 According to the case-law of the Court of Justice, it follows from the wording of Article 263 TFEU that acts adopted by representatives of the governments of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the EU Courts (see, to that effect, judgment of 30 June 1993, *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 12).
- 40 The relevant criterion thus used by the Court of Justice to exclude the jurisdiction of the EU Courts to hear and determine an action brought against such acts is therefore that relating to their author, irrespective of their binding legal effects.
- 41 The arguments put forward by the appellant in her first and fifth grounds of appeal, to the effect that the authors of the acts to which Article 263 TFEU refers, namely the institutions, bodies, offices and agencies of the European Union, should be interpreted broadly, in order to consider that the declaration at issue was adopted by an institution, body, office or agency of the European Union within the meaning of that article, or, at the very least, to treat the action brought before the General Court as an action brought against a Council decision, given its involvement in the adoption and dissemination of that declaration, cannot therefore be upheld without contravening the clear wording of that article.
- 42 It is clear that such an interpretation would also conflict with the intention of the authors of the Treaties, reflected by Article 263 TFEU, whose scope is limited solely to acts of EU law adopted by the institutions, bodies, offices and agencies of the European Union, to exclude from judicial review by the Court of Justice acts which it is for the Member States to adopt, such as decisions appointing members of the EU Courts.
- 43 Although, in the present case, the declaration at issue does not make an appointment, it is nonetheless closely linked to the exercise of that competence in so far as it takes note of the vacant post entailed by the departure of the United Kingdom from the European Union and determines certain legal consequences to be drawn from it when making the appointment to that post.
- 44 Contrary to what the appellant maintains in her third ground of appeal, it follows from the foregoing that it is also immaterial whether the representatives of the governments of the Member States acted within the framework of the Treaties or other legal sources, such as international law.
- 45 Consequently, the General Court did not err in pointing out, in paragraph 30 of the order under appeal, that it is clear from Article 263 TFEU that acts adopted by representatives of the governments of the Member States, acting not in their capacity as members of the Council of the European Union or of the European Council but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the EU Courts.
- 46 In the context of her second ground of appeal, the appellant submits that the EU Courts should nevertheless consider that they have jurisdiction to assess the legality of the declaration at issue on the ground that it contains a decision of the representatives of the governments of the Member States finding, *ultra vires*, that her mandate as Advocate General is prematurely terminated.

- 47 That analysis cannot be accepted, however, since the declaration at issue cannot, in any event, be regarded as having been adopted by an EU institution, body, office or agency referred to in Article 263 TFEU.
- 48 It should also be noted that the declaration at issue cannot be regarded as containing a decision having legal effects adversely affecting the appellant in that it decided to terminate her mandate as Advocate General prematurely, since the Conference of the Representatives of the Governments of the Member States merely took note of the consequences necessarily entailed by the departure of the United Kingdom from the European Union.
- 49 Since the Treaties ceased to be applicable to the United Kingdom on the date of its withdrawal, on 1 February 2020, pursuant to Article 50(3) TEU, that State is no longer, as from that date, a Member State. It follows, as the eighth paragraph of the preamble to the Withdrawal Agreement states, that the ongoing mandates of the members of the institutions, bodies, offices and agencies of the European Union nominated, appointed or elected in view of the United Kingdom's membership of the European Union automatically came to an end on that date.
- 50 Consequently, the General Court cannot be criticised for not having considered itself to have jurisdiction to assess the legality of a purported decision by the representatives of the governments of the Member States finding that the appellant's mandate had ended prematurely.
- 51 It follows that the first to third and fifth grounds of appeal must be rejected as manifestly unfounded.

The fourth ground of appeal

Arguments of the appellant

- 52 By her fourth ground of appeal, the appellant submits that, in paragraphs 31 and 32 of the order under appeal, the General Court wrongly accorded precedential value to the order of the Vice-President of the Court of Justice of 10 September 2020, *Representatives of the Governments of the Member States v Sharpston* (C-424/20 P(R), not published, EU:C:2020:705), whereas such an order could not prejudice the decision on the substance of the present dispute.
- 53 She adds that the General Court was also wrong, in paragraph 31 of the order under appeal, to rely on that order, since it related to an action concerning a decision appointing an Advocate General to the Court of Justice, whereas her action concerned the decision of the representatives of the governments of the Member States declaring that such a post was vacant.
- 54 Furthermore, the order of the Vice-President of the Court of Justice referred to in paragraphs 31 and 32 of the order under appeal was adopted in breach of the procedural rules of the Court of Justice, in particular because the appellant was not heard even though no urgency was established, but also because the arguments relied on by the representatives of the governments of the Member States should have been rejected as inadmissible on the ground that they were raised for the first time before the Court of Justice.
- 55 The appellant submits, lastly, that, in so doing, the General Court itself infringed the principle of *audi alteram partem* by not allowing her to submit her observations on the relevance of paragraph 12 of the judgment of 30 June 1993, *Parliament v Council and Commission* (C-181/91 and C-248/91, EU:C:1993:271), referred to in paragraph 30 of the order under appeal, and of the order of the Vice-President of the Court of Justice of 10 September 2020, *Representatives of the Governments of the Member States v Sharpston* (C-424/20 P(R), not published, EU:C:2020:705), referred to in

paragraphs 31 and 32 of the order under appeal. In so doing, the General Court unjustifiably ‘extended’ and ‘prolonged’ not only the legal effect but also the procedural defects of that order of the Vice-President of the Court of Justice.

Findings of the Court

- 56 As regards the arguments relating to the error allegedly committed by the General Court, in paragraphs 31 and 32 of the order under appeal, concerning the scope of the order of the Vice-President of the Court of Justice of 10 September 2020, *Representatives of the Governments of the Member States v Sharpston* (C-424/20 P(R), not published, EU:C:2020:705), which, moreover, is not relevant to the present case, it is sufficient to note that the General Court did not, in any event, commit any error by pointing out, first, in the abovementioned paragraph 31, that acts by which Judges and Advocates General of the Court of Justice are appointed, in accordance with Article 253 TFEU, are adopted by common accord of the governments of the Member States and, second, in paragraph 32, that an action brought under Article 263 TFEU against such an act, is manifestly inadmissible to the extent that it seeks the annulment of a decision taken not by an institution, body, office or agency of the Union but by representatives of the governments of the Member States exercising the powers of those States. It follows that such arguments are manifestly ineffective.
- 57 The arguments relating to procedural infringements allegedly committed on adoption of that order of the Vice-President of the Court of Justice are, moreover, manifestly inadmissible since that order does not constitute the subject matter of the present action.
- 58 The appellant’s claims relating to the infringement by the General Court of the principle of *audi alteram partem* must therefore also be rejected as manifestly unfounded.
- 59 The fourth ground of appeal must therefore be rejected as being in part manifestly inadmissible and in part manifestly unfounded.
- 60 It follows from all of the foregoing that, since none of the grounds of appeal relied on by the appellant in support of her appeal have been upheld, the appeal must be dismissed as being in part manifestly inadmissible and in part manifestly unfounded.
- 61 In those circumstances, there is no need to grant the measure of inquiry requested by the applicant.

Costs

- 62 Under Article 137 of the Rules of Procedure, applicable to the appeal procedure under Article 184(1) of those rules, a decision as to costs is to be given in the order which closes the proceedings.
- 63 Since the present order has been adopted before the appeal was served on the other parties to the proceedings and, therefore, before they could have incurred costs, the appellant must be ordered to bear her own costs.

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

- 1. The appeal is dismissed as, in part, manifestly inadmissible and, in part, manifestly unfounded.**
- 2. Ms Eleanor Sharpston shall bear her own costs.**

Luxembourg, 16 June 2021.

A. Calot Escobar
Registrar

J.-C. Bonichot
President of the First Chamber