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ORDER OF THE VICE-PRESIDENT OF THE COURT

10 September 2020 *

(Appeal — Interim relief — Article 157(2) of the Rules of Procedure of the General Court – Decision of the Representatives of the Governments of the Member States appointing three judges and one Advocate General to the Court of Justice – Application for Annulment – Prima facie case)

In Case C-423/20 P(R),

APPEAL under the second paragraph of Article 57 of the Statute of the Court of Justice of the European Union, lodged on 5 September 2020,

Council of the European Union, represented by M. Bauer, R. Mayer and A. Sikora-Kalèda, acting as Agents,

appellant,

the other parties to the proceedings being:

Eleanor Sharpston,

applicant at first instance,

Representatives of the Governments of the Member States,

defendant at first instance,

THE VICE-PRESIDENT OF THE COURT,

after hearing the Advocate General, M. Szpunar,

makes the following

* Language of the case: English.

Order

- 1 By its appeal, the Council of the European Union requests that the Court set aside the order of the Judge of the General Court hearing [an] application for interim measures, of 4 September 2020, *Eleanor Sharpston v. Council of the European Union and Representatives of the Governments of the Member States* (T-550/20 R, the ‘contested order’) by which that judge ordered that 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 (OJ 2020, L 292, p.1), 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.

Background to the dispute, procedure before the General Court and the order under appeal

- 2 In 2006, on the nomination of the government of the United Kingdom of Great Britain and Northern Ireland, the Representatives of the Governments of the Member States appointed Ms. Sharpston to the Court of Justice to serve as an Advocate General for a term of six years. Upon re-nomination by the same government, 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. 1) appointed the applicant to serve as Advocate General for the period from 7 October 2015 to 6 October 2021. She has served and continues to serve in that post.
- 3 Council Decision 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) fixes the number of Advocates General at the Court of Justice as eleven with effect from 7 October 2015.
- 4 On 2 September 2020, the Representatives of the Governments of the Member States adopted the Decision appointing three Judges and an Advocate-General to the Court of Justice, which was then made public on the Council's public register of documents after its adoption (the 'act at issue'). The press service of the General Secretariat of the Council also immediately published a press release. It is clear, in particular, from the act at issue that Mr. Rantos was appointed Advocate General to the Court of Justice from 7 September 2020 to 6 October 2021 following the withdrawal of the United Kingdom from the European Union.
- 5 By an application lodged at the Registry of the General Court on 4 September 2020, Ms. Sharpston requested, pursuant to Articles 278 and 279 TFEU and Article 157(2) of the Rules of Procedure of the General Court that:

- the operation of the act at issue, 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, be suspended until the determination of the application in Case T-550/20 *Eleanor Sharpston v Council of the European Union and Representatives of the Governments of the Member States*, or further order;
 - the effects of the act at issue be stayed in so far as it affects the expiry of the contracts of employment, or the secondment, of the applicant’s collaborators as appear in Annex A.3 to the application for interim measures;
 - the aforesaid interim measures be granted before 7 September 2020 or as soon as possible thereafter.
- 6 On 4 September 2020, the Judge of the General Court hearing an application for interim measures provisionally granted the application for interim relief under Article 157(2) of the Rules of Procedure of the General Court until the adoption of a final order concluding the interim measures proceedings brought by the applicant at first instance.
- 7 In particular, the Judge of the General Court hearing an application for interim measures held, at paragraph 9 of the contested order, that the application for interim relief met the two conditions to which the grant of interim relief is found to be subject according to the case-law cited at paragraph 8 of that order, namely that the interim measures sought appear necessary to enable that judge to obtain sufficient information so as to be in a position to give a ruling on a complex situation of fact and/or law raised by the application for interim measures, or where it appears necessary, in the interests of the proper administration of justice, that the status quo be maintained until a final order concluding the interim measures proceedings has been made.
- 8 In those circumstances, the Judge of the General Court hearing an application for interim measures provisionally granted the application for interim relief brought by the applicant at first instance.

The Procedure before the Court and the forms of order sought

- 9 By its appeal, the Council of the European Union (the ‘appellant’) claims that the Court should:
- set aside the order under appeal;
 - dismiss the application for interim relief in its entirety; and
 - reserve the costs.

- 10 The appellant moreover requests that the Court should rule on the present appeal without first hearing the other parties under Article 160(7) of the Rules of Procedure of the Court of Justice.
- 11 On the basis of the documents contained in the Court's file, in particular the arguments put forward both by the applicant at first instance, before the General Court, and by the appellant, before the Court, the Vice-President considers that she has at her disposal all the information necessary in order to rule on the present appeal. It is therefore appropriate, in accordance with Article 160(7) of the Rules of Procedure of the Court of Justice, which applies to the present appeal by virtue of Articles 39 and 57 of the Statue of the Court of Justice of the European Union, to rule on the present appeal without first hearing the other parties.

The appeal

- 12 In support of its appeal, the appellant raises three pleas in law.

The second plea in law

Arguments

- 13 By its second plea in law which it is appropriate to examine first, the appellant alleges, in substance, that, by provisionally granting the application for interim relief brought by the applicant at first instance in circumstances where, according to the appellant, the main action is manifestly inadmissible, the Judge of the General Court hearing an application for interim measures made an error of law.
- 14 The appellant recalls that in accordance with settled case-law, pursuant to the first paragraph of Article 263 TFEU, an action for annulment can be brought only against the institutions referred to in that provision, as well as against a body, office or agency of the Union which is competent to adopt the contested act and is the author of that contested act.
- 15 Indeed, according to the appellant, the content and all of the circumstances surrounding the adoption of the act at issue show that it was adopted by the Ambassadors of the Member States, meeting as Representatives of the Governments of the Member States and expressing their 'common accord' to the appointment of members of the Court of Justice, as provided for in Article 253 TFEU.
- 16 In those circumstances, the appellant submits that the main action is thus manifestly inadmissible in so far as it is directed against the Council of the European Union.
- 17 Moreover, the appellant explains that a conference of the Representatives of the Governments of the Member States is not meant to be an EU decision-making

body. On the contrary, a conference represents a rare intergovernmental dimension in the complex system of EU law, which remains beyond the scope of Article 263 TFEU. Indeed, most of the competences that the authors of the Treaties have not conferred on the institutions but left to the Member States, are exercised by them individually. However, for certain very specific and particularly sensitive topics, such as the appointment of judges and the determination of the seats of the institutions of the European Union (Article 341 TFEU), the Treaties set a framework but then leave the actual decision to the Member States, acting collectively. Thus, the Member States – as masters of the Treaties – have reserved to themselves, collectively, the adoption of certain acts. These are thus, as such, outside the scope of judicial control by the Court of Justice of the European Union, which by definition is only competent for acts which have been adopted by the institutions in the exercise of the competences conferred upon them.

- 18 In those circumstances, the appellant submits that the main application is manifestly inadmissible in that the act at issue, which was adopted on the basis of Article 253(1) TFEU, by common accord of the 27 Representatives of the Governments of the Member States, plainly falls outside the scope of the powers conferred by the authors of the Treaties upon the Union and thus outside the judicial control of the Court of Justice of the European Union.

Assessment

- 19 The first sentence of Article 156(4) of the Rules of Procedure of the General Court provides that an application for interim measures shall state ‘the subject matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for’.
- 20 Thus, according to the settled case-law of the Court, the judge hearing an application for interim relief may order the suspension of operation of an act, or other interim measures, if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the interests of the party making the application, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, which means that an application for interim measures must be dismissed if either of them is absent. The judge hearing an application for interim relief is also to undertake, where necessary, a weighing of the competing interests (order of the Vice-President of the Court of 21 March 2019, *Crédit Agricole and Crédit Agricole Corporate and Investment Bank v. Commission*, C- 4/19 P(R), EU:C:2019:229, paragraph 12 and the case-law cited).
- 21 As regards, in particular, the requirement of a prima facie case, the Court has held that it is met where at least one of the pleas in law relied on by the applicant for interim measures in support of the main action appears, prima facie, not to be unfounded (order of 8 April 2020, *Commission v. Poland*, C- 791/19 R, EU:C:2020:277, paragraph 52 and the case-law cited).

- 22 It follows that it is not possible for the condition concerning a prima facie case to be fulfilled and, consequently, for the application for interim relief to be granted, even on a provisional basis, where it is apparent, prima facie, that the main action has no prospect of success.
- 23 Indeed, in the present case, it is immediately clear from the content of the contested act at issue that it was adopted not by the Council of the European Union but by the Representatives of the Governments of the Member States, on the basis of Article 253(1) TFEU.
- 24 Consequently, it is apparent, prima facie, that the main action is manifestly inadmissible to the extent that it is directed against the Council of the European Union.
- 25 Moreover, it is clear from the very wording of Article 263 TFEU that only acts of the institutions, bodies, offices and agencies of the Union are subject to the judicial review that is exercised by the Court of Justice on the basis of that provision.
- 26 In that connection, the Court has held that it is clear from Article 263 TFEU that acts adopted by Representatives 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 courts of the Union (judgment of 30 June 1993, *Parliament v. Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 12).
- 27 That is so, prima facie, for the acts by which Judges and Advocates General of the Court of Justice are nominated and which are adopted, in accordance with Article 253(1) TFEU, by common accord of the governments of the Member States.
- 28 Consequently, it is apparent, again prima facie, that the main 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 the Representatives of the Governments of the Member States exercising the powers of those States, with the consequence that such act is not subject to the judicial review that is exercised by the Court of Justice of the European Union on the basis of Article 263 TFEU.
- 29 Since, prima facie, the main action thus has no prospect of success, it must be held, in accordance with the finding at paragraph 22 of the present order, that, in deciding to grant the application for interim relief, albeit on a provisional basis, the Judge at the General Court hearing an application for interim measures made an error of law.
- 30 Since the second plea in law raised by the appellant is thus well founded, the present appeal must be allowed and, consequently, the contested order must be quashed, without its being necessary to rule on the other pleas in law.

On the application for interim measures submitted to the General Court

- 31 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded the Court shall quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment. The abovementioned provision also applies to appeals brought under the second paragraph of Article 57 of the Statute of the Court of Justice of the European Union (order of the Vice-President of the Court of 23 April 2015, *Commission v. Van Breda Risk and Benefits*, C-35/15 P(R), EU:C:2015:275, paragraph 59 and the case-law cited).
- 32 In the present case, on the basis of the documents contained in the Court's file, in particular those to which reference is made in paragraph 11 of the present order, the Vice-President considers that the state of the proceedings is such that she is in a position to give a final ruling in the matter.
- 33 In that regard, in accordance with the case-law recalled at paragraph 20 of the present order, the conditions for the grant of interim relief are cumulative, meaning that an application for such relief must be rejected where one of those conditions is not satisfied.
- 34 Moreover, as was made clear at paragraph 22 of the present order, it is not possible for the condition concerning a prima facie case to be fulfilled where it is apparent, prima facie, that the main action has no prospect of success.
- 35 That is the case in the present instance, as was held in paragraph 29 of the present order, since the main action is, prima facie, manifestly inadmissible, for the reasons set out in paragraphs 23 to 28 of the present order.
- 36 Consequently, the application for interim measures must be dismissed.

On those grounds, the Vice-President of the Court hereby:

1. **Sets aside the order of the Judge of the General Court hearing [an] application for interim measures, of 4 September 2020, *Eleanor Sharpston v. Council of the European Union and Representatives of the Governments of the Member States* (T-550/20 R).**

- 2. Dismisses the application for interim measures in its entirety.**
- 3. Reserves the costs.**

Luxembourg, 10 September 2020.

A. Calot Escobar

R. Silva de Lapuerta

Registrar

Vice-President