Lawful composition – the EFTA Court's approach

Carl Baudenbacher 2020-09-20T23:27:00

On 10 September 2020, the British Advocate General at the Court of Justice of the European Union, Eleanor Sharpston, was replaced by the Greek lawyer Athanasios Rantos. After having been a member of the ECJ since the mid-2000s, she was lastly reappointed in the spring of 2015 for an additional six year term of office until 6 October 2021. In her view, she could not be removed during that period, notwithstanding Brexit. Ms. Sharpston's line of argument was supported by a number of scholars.

Most of the commentators of the incident, which stirred up a great deal of dust, focus on the question whether the termination of Ms. Sharpston's mandate on 10 September 2020 was lawful. The following considerations, on the other hand, examine the legal situation in the event that her expulsion from the ECJ was after Brexit in line with EU law. A precedent of the EFTA Court in 2016 may be relevant in this context.

Following a proposal from Norway, the Governments of the EEA/EFTA States decided in December 2016 to renew the Norwegian judge of the EFTA Court, Per Christiansen, for an abridged term of three years instead of the six years mandated by the Agreement of the EFTA States establishing a Surveillance Authority and a Court of Justice. In a newspaper interview three months earlier, the then President had stressed that such a decision would be illegal. The EFTA Surveillance Authority, which essentially has the same watchdog function in the EFTA pillar as the European Commission in the EU pillar of the EEA, initiated infringement proceedings. It did so following a complaint from six Norwegian scholars. In view of the Christiansen case, the Liechtenstein Court of Appeal subsequently in Case E-21/16 *Nobile* referred the question to the EFTA Court whether judgments reached with the participation of an improperly appointed judge would be valid. The EEA/EFTA States repealed their decision of December 2016 and re-appointed the Norwegian judge for a term of six years.

The EFTA Court nevertheless made it clear in a decision of 14 February 2017 that if a judge appointed for only three years would be part of the bench, the Court would not be lawfully composed. The President confirmed this legal view in an order of 20 February 2017 when addressing the issue of whether the accelerated procedure was to be granted, and further elaborated on the issue of the lawful composition of the bench. In paragraph 30 of the order, the President stated that appointment and re-appointment for a fixed six years term "constitutes a minimum protection of judicial independence. It is an essential part of the judicial constitution (known in German as *Gerichtsverfassung*) of the EFTA pillar. The right to a six-year term cannot be waived by individual judges".

If one were to apply the EFTA Court's case law to the Sharpston matter, interesting questions would arise. On 1 February 2020 – one day after the UK left the EU – the President of the ECJ wrote to the European Council that there was a vacancy, which the EU Member States should fill by appointing a new Advocate General. The term 'vacancy' can only be understood as meaning that the position previously occupied by Ms. Sharpston was empty. However, Ms. Sharpston continued to be assigned cases in the following months. This means that she provisionally continued to be involved in cases without a fixed term of office. In particular, on 30 April 2020 she delivered a landmark opinion in Case C-693/18 *CLCV and Others* (*Dispositif d'invalidation sur moteur diesel*), which concerns the question whether a device which influences the operation of the emission control system of diesel motor vehicles during registration tests is prohibited by Union law.

One may therefore raise the question of whether the ECJ was lawfully composed in the period between the UK's departure from the EU on 31 January 2020 and the departure of AG Sharpston on 10 September 2020. If the EFTA Court's case law were to be applied, the answer to this question would most likely be negative. Admittedly, an Advocate General, unlike a Judge, is not a decision maker. In French terminology, the Advocates General are "*magistrats debout*" because they stand when they speak at the hearing, while the Judges remain seated and are therefore referred to as "*magistrats assis*". Nonetheless, even if they do not take part in the judgment itself, Advocates General are full members of the ECJ. They play a central role in the finding of justice based on the same legal guarantees and requirements as the Judges. Part of the guarantee of a lawfully composed bench must be full independence. If an Advocate General whose independence is impaired takes part in the proceedings, the decision-making process is not proper.
