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SOME REMARKS ON THE LEGAL INSTITUTION OF THE ADVOCATE GENERAL

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According to the article 252 of the Treaty on the Functioning of European Union (TFEU), the Court of Justice of the European Union (CJEU) shall be assisted by Advocates-General.[1] The institution of the Advocate General was first introduced into the Treaty of Rome (1957) under the influence of the French delegation during the preparation of the Treaty.

In general, this legal institution is unfamiliar to many legal systems. Before fixing regulations of status of advocates general in the mentioned EEC primary source, advocate generals had assisted only the French and German judicial systems. The French were staunchly opposed to allowing individual judges to present dissenting or concurring opinions, and instead proposed this be done by an Advocate General, a figure modelled on the French commissaire du gouvernement, who offers legal advice to the Conseil d'État (supreme administrative court) on the cases being tried.[2]

Initially, under the Treaty of Rome, there were only two Advocates General – one from France (Maurice Lagrange) and another from Germany (Karl Roemer).[3] As Takis Tridimas points out, Lagrange and Roemer served during the most formative years of Community law fulfilling in effect the role of pathfinders. Their influence has been particularly instrumental in establishing the principles of Community administrative law, and in distilling, through a comparative method of interpretation, the elements of national laws most suitable for transposition in the Community legal order. They often composed a synthesis of national laws, performing par

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1 Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26. 10. 2012, Article 252.

2 See: MAŃKO, R.: *Role of Advocates General at the Court of Justice of the European Union.* Members' Research Service. October 2019. Online available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642237/EPRS_BRI(2019)642237_EN.pdf ,(03/11/2019).

3 See: MAŃKO, R.: *Role of Advocates General at the Court of Justice of the European Union.* Members' Research Service. October 2019. Online available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642237/EPRS_BRI(2019)642237_EN.pdf, (03/11/2019).

excellence a creative exercise, bridging the gap between national and Community law and ensuring conceptual and ideological continuity.[4]

With the development of the European Union and the increase in the number of countries that joined the Union, the number of Advocates General positions has been growing steadily.

Following the first enlargement of the European Communities (1972), the number of Advocates General grew to four. Although, appointment to these four offices was the prerogative of large Member States such as France, Germany, the United Kingdom (UK), and Italy. It was only in 1981 – at the time of the second enlargement, when Greece joined – that a fifth Advocate General's post was added. This post was intended for rotation between smaller Member States. In 1986, when Spain and Portugal joined the Community, a sixth Advocate General's office was created where Spain has the right of appointment. In 1995, it was decided to increase the permanent number of Advocates General to eight and after some time – to nine. Five larger Member States (Germany, France, Italy, the UK and Spain) would continue to choose permanent Advocates General, and the remaining posts would rotate among the other Member States. The rotation between Member States was based on alphabetical order.[5]

According to Article 252(1) TFEU, the minimum number of Advocates General is set at eight. However, upon the request of the CJEU, the Council of the EU, by its unanimous decision, may increase that number. Moreover, for a period of five years in the past, as mentioned above, the number of Advocates General had been set at nine.[6] At the intergovernmental conference in Lisbon in 2007, the representatives of the Member States agreed in principle to raise the number of Advocates General to 11, where six countries (Germany, France, Italy, the UK, Spain, and Poland) would have a permanent Advocate General, although this decision was formally taken only in 2013, following the Court's request.[7]

Under the second paragraph of Article 252 TFEU the Advocate General is obliged to act "with complete impartiality and independence, 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 his involvement"[8].

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4 See: TRIDIMAS, T.: The Role of the Advocate General in the Development of Community Law: Some Reflections. *Common Market Law Review*, 1997, p. 1354.

5 See: MAŃKO, R.: *Role of Advocates General at the Court of Justice of the European Union*. Members' Research Service. October 2019. Online available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642237/EPRS_BRI(2019)642237_EN.pdf, (03/11/2019).

6 WÄGENBAUR, B.: *Court of Justice of the European Union. Commentary on the Statute and Rules of Procedure*. CH Beck, 2013, p. 25.

7 Cf. PIRIS, J.-C.: *The Lisbon Treaty: A Legal and Political Analysis*. Cambridge University Press, 2010, p. 233.

8 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26. 10. 2012, Article 252.

It is hard not to agree that the role of Advocates General is immeasurable. As a result, with the participation of the Advocate General, we have some kind of a double case consideration at the first instance. First, there is an in-depth study of all the factual circumstances, applicable law and judicial practice on the part of the Advocate General and its critical view of the dispute resolution, then a "re-examination" of the case by the court, taking into account the lawyer's position. And here is no matter whether the court will follow the lawyer's point of view or not in the end, in any case, we can safely say that the case was surveyed in such detail and professionalism.

In the literature, a large number of approaches to the functions of Advocates General are distinguished. For instance, the most detailed was a position of T. Tridimas who has highlighted the following destination of the Advocates General:

- providing assistance to the Court of Justice with the preparation of a case;
- proposing solutions to cases before the Court of Justice;
- providing 'legal grounds to justify that solution, in particular, relating it to the existing case law';
- opining 'on such points of law incidental to the case'; and making 'a critical assessment of the case law or commenting on the development of the law in the area in issue'.[9]

Thus, no doubts, the existence of this legal institution significantly facilitates and reduces the procedure for considering a case at the court since the applicable to a certain case legislation and conclusions with references to the analyzed judicial practice have been already outlined in the opinions of Advocates General.

In general, the functions of AG are clear while there is a substantial discussion concerning the role of this legal institution. A lot of arguments have been presented to explain the value of having this type of figure in the Court of Justice. Some argue that it is essential to have the AG's opinion, because the court's decisions do not contain enough detailed legal arguments underlying the decision. In other words, the submissions of the AG can complement the understanding of the legal issues considered in a particular case and the case law. Another common point of view is that opinions of the AG can provide an alternative interpretation of the law which may be useful for further reference. Others have an interesting suggestion as well that the Advocate General may even be seen as a kind of first instance with mandatory appeal.[10] All the mentioned views on the role of the Advocate General more or less reveal its purpose. However, in our opinion, if it is necessary to define concisely and accurately the essence of this legal institution, the Advocates General

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[9] See: TRIDIMAS, T.: The Role of the Advocate General in the Development of Community Law: Some Reflections. *Common Market Law Review*, 1997, p. 1358.

[10] See: Arrebola, C. – Mauricio, A. J. – Portilla, H. J.: An Economic Analysis of the Influence of the Advocate General on the Court of Justice of the European Union. *Cambridge Journal of International and Comparative Law*, Vol. 5, Issue 5, 2016, p. 111.

perform their main work by writing opinions or, in other words, "reasoned submission" for further consideration by the court.

The opinion of the Advocate General is sought in every case tried by the Court of Justice of the European Union, unless the latter decides that there is no new point of law. This happens in roughly 30% of the cases each year. Even though the General Court has the power to appoint Advocates General, however it rarely happens in practice.[11]

The opinions of the Advocates General, definitely, play a role in the outcome of the cases before the Court of Justice. Although, the noticing fact here is that these opinions are not obligatory for the court. At the same time it is important to find out what kind of influence is meant.

In general, according to Cambridge dictionary[12], an influence means the power to have an effect on people or things. So it can be absolutely applicable in the context of the relationship between the opinions of the Advocates General and the decisions of the Court of Justice. In that way, it is widely recognized that AG opinions impact court decision-making. However, it is a controversial issue among academics whether it is possible to assess this impact using a quantitative method.

We have a sufficient number of studies in this area when a certain category of cases has been analyzed (most often, an action for annulment). Consequently, the conclusion has been made about a certain percentage of cases in judicial practice when the court follows the AG's position. However, we do not support the idea that the criterion of the percentage ratio of how many times the court followed the AG's opinion is an important and determining factor. As it was noted, the court is not obliged to take into account the opinion without fail, but we have to consider the advocates general, like judges, have the appropriate education, extensive experience in the legal field, know the application of legislation, and analyze judicial practice, so it is the norm that in most cases the court's decision and the AG's opinion are in solidarity regarding the resolution of the case.

Moreover, some academics who criticize the mentioned quantitative approach have noted it is not simple to ascertain whether the Court of Justice followed the opinion of AG in a given case. It is known that deliberations of the Court are secret[13], and the court does not automatically quote an opinion of AG, even if it follows it. In some cases, the court points out the opinion of AG and refers to it as one of the proofs offered in support of the decision, but sometimes, on the contrary, it

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[11] See: MAŃKO, R.: *Role of Advocates General at the Court of Justice of the European Union*. Members' Research Service. October 2019. Online available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642237/EPRS_BRI(2019)642237_EN.pdf, (03/11/2020).

[12] *Cambridge English Dictionary*. Online available on: https://dictionary.cambridge.org/dictionary/english/influence (14/11/2020).

[13] Consolidated version of the Statute of the Court of Justice of the European Union, OJ C 228, 23. 08. 2012, Article 35.

may not be evident which parts of the AG's reasoning the Court has taken. In addition, the opinion may have been followed to a greater or lesser extent.

Thus, we completely support the point of view that it is impossible to assess the influence of opinion of the AG on the court decision based only on the percentage ratio because many elements may be missing from the quantitative analysis that was carried out of the relationship between the Advocate General and the Court. Although, at the same time, a considerable proportion of matching solutions, at least, shows the significance of the institution.

Furthermore, there is also a point of criticism that the influence of AG's opinions on the court decision-making does not fit into the guiding principle of judicial independence. In this case we agree with the position of researchers who argue that due to the principle of separation of powers the judiciary should, first of all, be independent of the executive and legislative branches, but not necessarily from internal elements within the judiciary. In compliance with TFEU and Statute of the CJEU the Advocate General is considered a full member of the Court of Justice of the European Union. Therefore, the independence of judges does not suffer from the fact that the AG's submission has an impact on the final outcome of the case, and, vice versa, this impact is quite expected and logical.

Talking about features of opinions of AG, it should be mentioned, unlike court decisions which are always written in a formal and terse language that uses standard phrases and wording often borrowed from earlier judgments, the Advocates General can choose their own style delving into details and sound reasoning. This is a fact that the opinions on a case are usually longer than the court's decision. Advocates General also consider the interpretive alternatives and various options of deciding on a case, before proposing their own solution. Even if the court have not follow the opinion the latter can be referred to in later cases[14]. Also this helps the parties to build their position on a particular case by borrowing arguments from the opinions of the AG.

It should be noted that, by and large, the status of the AG is very close to the status of judges and is regulated by the articles TFEU and Statute of the CJEU which contain provisions on the appointment, principles of work, the privileges and immunities, replacement, dismissal from office, and etc.

Article 253 TFEU establishes the necessary requirements to be appointed as the judges and AG of the Court of Justice, the latter considers "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". The AG as well as the judges are ap-

[14] See: MAŃKO, R.: *Role of Advocates General at the Court of Justice of the European Union.* Members' Research Service. October 2019. Online available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642237/EPRS_BRI(2019)642237_EN.pdf, (03/11/2019).

pointed "by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255".[15]

Articles 5 and 6 of the Statute of the CJEU set out the conditions for dismissal from the posts. These provisions can be conditionally divided into two groups: subjective (which depend on the will of the person) and objective (which do not depend on the will of a person). Objective conditions include the end of the term in office (or, in other words, normal replacement), death, deprivation of a position due to non-compliance with the requisite conditions or the duties arising from the office. While the subjective condition is the resignation of the judge by the letter of resignation "addressed to the President of the Court of Justice for transmission to the President of the Council".[16]

Having touched upon the topic of appointment and dismissal from the position of AG one should not miss the burning issue of Eleanor Sharpston's premature removal from office which is currently being actively discussed among specialists of constitutional and European law.

Eleanor Sharpston was one of the AG of the Court of Justice of the European Union. Her first appointment was in 2006 following her nomination by the UK government, her status as the AG had been renewed twice, most recently in 2015. That means that her fixed-term period of the legal tenure should have been valid until 6 October 2021. Despite this fact, the national governments of 27 EU Member States decided to terminate her appointment earlier. There is only one reason – Brexit.[17]

This decision is fixed in a declaration adopted on 29 January 2020 by the Conference of the Representatives of the 27 Governments of the EU Member States. 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, while AG Sharpston was allowed to continue sitting until a new AG arrives.

There is a lot of criticism and contradictions around the current situation, and we consider it necessary to go deeper into the issue and analyze the arguments from different sides.

On the one hand, let us figure out what arguments are on the side of the European Union. Do the mandates, including within the judicial system, end with the withdrawal of the state?

There is the only Treaty provision in the Declaration of 29 January 2020 adopted by the Conference of Representatives in support of AG Sharpston's mandate was automatically terminated due to Brexit. It is Article 50(3) TEU, according to

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[15] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26. 10. 2012, Article 253.

[16] Consolidated version of the Statute of the Court of Justice of the European Union, OJ C 228, 23. 08. 2012, Article 5–6.

[17] BOFFEY, D.: *Last British member of European court of justice could sue EU.* Online available on: https://www.theguardian.com/law/2020/feb/17/british-ecj-could-sue-eu-eleanor-sharpston (10/11/2020).

which "the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement…"[18]

It should also be noted that the Declaration of 29 January 2020 refers only to a recital from the Withdrawal Agreement when it noted the current mandates of members of institutions, bodies, offices and institutions of the EU nominated, appointed or elected in connection with the UK's membership of the Union will therefore automatically cease as soon as the treaties cease to apply to the United Kingdom, that is, on the day of withdrawal.[19]

In September, 2020 there was launched an unprecedented case, the AG sued the "European Union" before the court. Eleanor Sharpston made an action for annulment of Decision (EU) 2020/1251 of the Representatives of the Governments of the Member States before the Court of Justice of EU against the Representatives of the Governments of the Member States and the Council of the European Union. The claimant requested to annul partially the contested decision, in so far as it concerns the appointment of Mr Rantos to the post of Advocate General at the Court of Justice, for the period from 7 September 2020 to 6 October 2021.

She based her claim on four main points. The first alleges an error of law in the interpretation of Article 50(3) TEU, the second, infringement of the constitutional principle of the independence of the judiciary in EU law, the third, infringement of the procedures laid down by the Statute of the Court of Justice of the European Union to relieve a member of his or her duties, and the fourth, a lack of proportionality on legitimate and compelling grounds justifying the premature termination of her mandate. Also the applicant has mentioned that there are clear structural links between the decisions of the intergovernmental conferences of the Member States concerning the appointment of members of the Court of Justice, on the one hand, and the provisions of the TEU and the TFEU, on the other hand[20].

As a result[21], we can see from the judgment, the court rejected the claim because of formal grounds, Eleonor Sharpston's arguments were not considered on the merits. As noted, the claim was addressed to the Representatives of the Governments of the Member States and the Council of the European Union. The Court has concluded that the Council is an improper defendant in this case because the contested document was not adopted by the Council but by the Representatives of the governments of the Member States, on the basis of Article 253(1) TFEU. The court also has noted that it was not possible to file a complaint against the second respondent too, since, based on case law, acts adopted by Representatives of Member

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[18] Consolidated version of the Treaty on European Union, OJ C 326, 26. 10. 2012, Article 50.

[19] 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 C 384I, 12. 11. 2019, pp. 1–177.

[20] C-424/20 *Eleanor Sharpston v. Council of the European Union and Representatives of the Governments of the Member States*, 10 September 2020.

[21] T-550/20 *Eleanor Sharpston v. Council of the European Union and Representatives of the Governments of the Member States*, 6 October 2020.

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. Thus, based on the court's conclusions we do not see a real analysis of whether the decision to terminate the AG's powers prematurely made by the Representatives of the governments of the Member States is legitimate.

On the other hand, it is worth considering the arguments in favor of Eleanor Sharpston. The main question raised by academics is how the mentioned Conference of the Representatives could make such decision.

As a preliminary note, it is important to remind that the AG are covered by the Statute of the CJEU. The Statute makes it very clear that the AG should be considered judges as far as their status is concerned[22]. This was 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".[23] This means, in particular, that both the EU judges and the AG must perform their duties in a completely impartial and independent manner and meet the same conditions set in the TFEU and the Statute of the CJEU.

As it has been already mentioned, the Statute of the CJEU gives the clear and close list of legal grounds for the duties of an AG to end: normal replacement, death, resignation, or deprivation of office. It is quite obvious that in the case of Eleanor Sharpston none of the listed grounds was applied. Although, only in the cases mentioned above, in compliance with the Statute of the CJEU, a vacancy might arise, allowing the Member States to appoint a replacement.[24] The Statute and the Treaties more generally do not provide for any external intervention and mechanism when it comes to depriving the AG (the EU judges as well) of their offices.

Moreover, that is noticing that there is *no* provision in the Statute granting either the Council or any other body, for example, "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 AG is still valid. Furthermore, the CJEU, by confirming following the Declaration of the Conference of the Representatives, that AG Sharpston must stay in post and continue to hold office until her successor is appointed under the articles 5 and 8 of the Statute. As we can observe, on the one side, it is obviously that AG Eleanor Sharpston is covered by the Statute of the CJEU. But, on the other side, the Statute must also be respected by the Council and/or the Conference of the Repsentatives. This means that the early termination of her mandate cannot take place legally if

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[22] Consolidated version of the Statute of the Court of Justice of the European Union, OJ C 228, 23. 08. 2012, Article 8.

[23] C-17/98 Emesa Sugar (Free Zone) NV v Aruba, 4 February 2000.

[24] See: KOCHENOV, D.: Humiliating the Court? Irremovability and Judicial Self-Governance at the ECJ Today. *VerfBlog*, 4 July 2020. Online available on: https://verfassungsblog.de/humiliating-the-court/ (10/11/2020).

the court's jurisdiction to declare the termination of the mandate is not respected and the procedure and related conditions set out in the Statute are not followed. In other words, only the court, based on the Statute, should exclusively decide on the legal consequences of Brexit (if any) for AG Sharpston's mandate. Non-political actors should decide this issue, in particular through an organization that is not even mentioned once in either the TEU or the TFEU[25].

Based on the analysis of the provisions of the TEU, the TFEU or the Statute of the CJEU, there is not stipulation as to origin or nationality as far as the AG are concerned, there is no direct link made to any particular Member State. In other words, there is no legally binding provision linking AG with specific Member States. The only link between the UK and AG Eleanor Sharpston is the UK government's decision to nominate her for three consecutive mandates (in 2006, 2009 and 2015). At the same time, there is no such a phenomenon as a "UK AG". Otherwise, AG Sharpston did not and does not represent the UK and her mandate was never tied to a position which is legally linked to the UK. This is the reason why she was allowed to continue in her current position after the UK left the EU. And even if there really was one "British AG", this post would be abolished, and not just included in the rotation system, as happened in this case with Greece, which received the post instead of AG Sharpston.[26]

As stated above, the only connection between AG Sharpston and the UK is the decision of the UK government to nominate her. Thus, the question is whether Brexit, in the light of the legal framework applicable to the EU AG, can be interpreted as a legitimate and compelling reason that can justify the premature and automatic termination of AG Sharpston, and without breaching the principle of proportionality. It seems that the negative answer is justified.

For Professor Halberstam, AG Sharpston should be allowed to remain in her office 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".[27] 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".[28]

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[25] See: PECH, L.: The Schrödinger's Advocate General. *VerfBlog*, 29 May 2020. Online available on: https://verfassungsblog.de/the-schroedingers-advocate-general/ (10/11/2020).

[26] See: KOCHENOV, D.: Humiliating the Court? Irremovability and Judicial Self-Governance at the ECJ Today. *VerfBlog*, 4 July 2020. Online available on: https://verfassungsblog.de/humiliating-the-court/ (10/11/2020).

[27] See: HALBERSTAM, D.: Could there be a Rule of Law Problem at the EU Court of Justice? The Puzzling Plan to let U.K. Advocate General Sharpston Go After Brexit. *VerfBlog*, 23 February 2020. Online available on: https://verfassungsblog.de/could-there-be-a-rule-of-law-problem-at-the-eu-court-of-justice/ (08/11/2020).

[28] See: KOCHENOV, D.: Humiliating the Court? Irremovability and Judicial Self-Governance at the ECJ Today. *VerfBlog*, 4 July 2020. Online available on: https://verfassungsblog.de/humiliating-the-court/ (10/11/2020).

In agreement with Professors Halberstam and Kochenov, it can be noted early removal of Eleanor Sharpston from office, as well as the immediate announcement of a vacancy, looks like a violation of basic legislation and a threat to the independence of the judicial system, since in this unprecedented case, the established legal grounds were ignored.[29] 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".[30]

Also in the context of cases involving national measures that violate the most basic principles of the rule of law, the Court has fairly emphasized 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, 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".[31]

Summing up, we can conclude that the current situation is really complicated to evaluate, in addition, political factors play their role too. As noted, Eleonor Sharpston was appointed by common accord of all the Member States acting jointly. 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 arguments on this issue and does not even attempt to propose any legitimate and compelling reasons other than to put forward an opinion on whether we dare to say that Brexit should mean Brexit. Furthermore, the principle of proportionality is completely ignored, despite the court's case law, which, as noted above, requires that any exception to the principle of irremovability also fall within the scope of the principle of proportionality. Thus, as we can see, the rule of law is losing its force, and the principle of irremovability and the guarantee of judicial self-government at the supranational level are violated in relation to AG Sharpston.

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[29] See: PECH, L.: The Schrödinger's Advocate General. *VerfBlog*, 29 May 2020. Online available on: https://verfassungsblog.de/the-schroedingers-advocate-general/ (10/11/2020).

[30] C-64/16 *Associação Sindical dos Juízes Portugueses*, 27 February 2018.

[31] C-274/14 *Banco de Santander SA*, 21 January 2020.