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PROCEDURAL FRIEND OR FOE? THE ADVOCATE GENERAL IN THE COURT OF JUSTICE OF THE EUROPEAN UNION *REVISITED*

To Sir Professor David Edward, former Judge of the Court of Justice, with friendship and gratitude.

When it comes to the EU law and unearthing the secrets behind the office of the Advocate General, for me it all started with Him back in December 1998

The Advocate General in the Court of Justice merits special attention as an institutional *novum* peculiar to the Court. The Advocate General shares with judges the conditions and requirements for appointment. Judges and Advocates rank equally in precedence according to their seniority in office. In the case of equal seniority in office, precedence is determined by age. What distinguishes the Advocate General from a Judge is his function in the procedure and decision-making process of the Court. Bearing in mind that the function of Advocate General is *sui generis*, insistence on definition at all costs might be misleading. Suffice it to say that he acts as a voice of European Union law, a highly-qualified *amicus curiae*, guided by the objectives of consistency, justice and the coherence of European Union law[1]. The Advocate General provides an ideal test case for applying our

[1] On the Advocate General, see in general N. Burrows, R. Greaves, *Advocate General in the Court of Justice*, Oxford 2007; K. Borgsmidt, *The Advocate General at the European Court of Justice: A comparative study*, "European Law Review"1988, vol. 13, p. 107; M. Darmon, *The Role of the Advocate General in the Court of Justice of the European Communities*, [in]*The role of Courts in society*, ed. S. Shettreet, Leyden 1988;

theoretical construction of fair procedures in the context of the Court, since he is an integral part of the Court. This has particularly been the case in recent years, because his function has come under scrutiny as a result of various challenges brought before the European Court of Human Rights against judicial officers. The question is whether his voice might be indeed prejudicial to parties' procedural rights and guarantees.

1. The Advocate General under procedural strain?

In the first place, we should locate the criteria of fairness that could be relevant in an assessment of the Advocate General office. The right to a fair trial (legal process), using the Court's terminology is an overarching concept – an ideal that all procedural arrangements are to conform with. It remains, however, an open question as to what should make up the ideal. In *Krombach*, it was the right to be defended, in *Baustahlgewebe* it was the right to a hearing within a reasonable timeframe, in *Emesa* (discussed in detail below) the right to adversarial proceedings. Such an incremental approach and the resulting dynamism of the right to fair trial in European Union allows the Court to add gradually to the ideal of just (fair) procedure. The Court's receptiveness and procedural attentiveness is all the more necessary in this regard, in view of the procedural tests and standards to which its own procedure is subjected. In other words the Union model of procedural justice, always dynamic and evolving, comes to a point of reckoning. The question is the following one: does the Advocate General in the Court of Justice withstand the test of fair trial exigencies? In other words: is procedural justice properly *applied*?

When it comes to the procedural assessment of the office of Advocate General, the principle of equality of arms occupies a prominent place. Summers and Bayles also underscore the importance of this guarantee for the overall fairness

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A.A. Dashwood, *The Advocate General in the Court of Justice of the European Communities*, "Legal Studies" 1982, vol. 2, p. 202; N. Fennelly, *Reflections of an Irish Advocate General,* "Irish Journal of European Law" 1996, vol. 5, p. 1509; T. Tridimas, *The role of the Advocate General in the development of European Union law: Some reflections*, "Common Market Law Review" 1997, vol. 34, p. 1349; More recently, C. Ritter, *A New Look at the Role and Impact of Advocates – General – Collectively and individually*, "Columbia Journal of European Law" 2006, vol. 12, p. 751; A. Hinarejos, *Social Legitimacy and the Court of Justice of the EU. Some reflections on the role of the Advocate General*, "Cambridge Yearbook of European Legal Studies" 2012, vol. 14, p. 615; M. Bobek, *A Fourth in the Court: why Are There Advocates General in the Court of Justice?*, "Cambridge Yearbook of European Legal Studies" 2012, vol. 14, p. 529. More recently monograph by L. Clément-Wilz, *La fonction de l'avocat général près de la Cour de justice,* Bruylant 2011. In Polish literature T.T. Koncewicz, *Urząd Adwokata Generalnego w Trybunale Sprawiedliwości Wspólnot Europejskich*, "Radca Prawny" 2000, vol. 1, cz. I, vol. 2, cz. II; *Rzecznik generalny w Trybunale Sprawiedliwości Unii Europejskiej. Konfrontacja sądów czy proceduralne przewartościowanie?*, "Palestra" 2010, t. 7–8; *Rzecznik Generalny to głos wspólnotowego prawa,* "Rzeczpospolita", 31.08.2006.

of procedure[2]. If we turn to the jurisprudence of the Court of Human Rights on the fairness of proceedings, two components are given special recognition: equality of arms[3] and the right to an adversarial process. According to the former, each party must be afforded reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. According to the latter, the right to adversarial proceedings is respected when the parties are given the opportunity to have knowledge of and comment on the observations filed or the evidence obtained by the other party. This case law will be now analyzed in order to trace its relevance for the Advocate General in the Court.

1.1. Relevant Case Law of the European Court of Human Rights[4]

The case of *Borgers v Belgium*[5] dealt with the department of *Procureur Général* during the criminal proceedings before the Belgian Court of Cassation whose Member – *Avocat Général* – participated in the Court's proceedings as an adviser to the Court. He made his submissions in open court and then participated in the deliberations. The question was whether it was compatible with the right to fair trial and the principle of equality of arms. The Court said it was not. Recommendations made by *Avocat Général* to the Court entailed that he became an opponent of the applicant in the proceedings. Mr. Borgers did not have a right to reply to these submissions and his situation was further weakened by the participation of the Avocat Général in the Court's deliberations. In this way he was given "an additional opportunity to promote, without fear of contradiction by the applicant, his submissions to the effect that the appeal should be dismissed"[6]. A second Belgian case, *Vermeulen*, involved civil proceedings culminating in the Court of Cassation. The question was whether *Borgers dicta* should be extended to civil proceedings. Following the *Borgers* precedent, the ECtHR agreed with Mr. Vermeulen's allegation that his right to a fair trial has been violated. What

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[2] R.S. Summers, *Evaluating and improving legal process – a plea for process values,* "Cornell Law Review" 1974–1975, vol. 60, p. 1.

[3] For equality of arms as an integral element of procedural justice see *supra*.

[4] The ECHR is the international court created within the Council of Europe and charged protecting human rights as guaranteed in the European Convention of Human Rights. For the not always smooth interaction and mutual influence of Luxembourg (the Court of Justice of the EU) on Strasbourg (ECHR) and *vice versa*, seeS.Douglas-Scott, *A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis*, "Common Market Law Review" 2006, vol. 43, p. 629. For a recent attempt by the EU to accede to the European Convention of Human Rights see the Court of Justice in Opinion 2/13, available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d51ca327e1f59e4ab69d4dc201c1e3d57a.e34KaxiLc3eQc40LaxqMbN4PaNuTe0?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=998799.

[5] App. No. 12005/86, (1993) 15 EHRR 92.

[6] However, we should bear in mind the powerful dissenting opinions of judges Martens and Vilhjálmsson.

mattered was that the *Avocat Général* was intending to advise and consequently influence the Court of Cassation. The impossibility of the applicant being able to reply to the submissions made by *Avocat Général* infringed the applicant's right to adversarial procedure. This right meant "[…] the opportunity for the parties […] to have knowledge of and comment on *all* evidence adduced or observations filed, *even by an independent* member of the national legal service, with a view to *influencing* the court's decision"[7] (emphasis added).

Of special relevance for the Advocate General in the Court of Justice is the judgment of the ECtHR in the French case of *Kress*[8]. This concerned the compliance with Article 6 of the Convention of the *Office of Commissaire du Gouvernement in the Conseil d'Etat*. The importance of this decision stems from the simple fact that the office of the Advocate General in the Court of Justice was modeled on that of the *Commissaire du Gouvernement*[9]. The ECtHR held that the unquestionable status of independence and impartiality enjoyed by the *Commissaire* is not "sufficient to justify that the non-disclosure of his submissions to the parties and the fact that it is impossible for the parties to reply to them are not capable of offending against the principle of a fair trial". Therefore, it was necessary to identify other factors which might guarantee observance of the right to a fair trial. The French legal system contains three elements which pertinent in this regard. Firstly, the tenor of the submissions of the *Commissaire du Gouvernement* is communicated to the parties' lawyers at their request prior to the hearing. Secondly, the parties may reply to his submissions by way of a memorandum for the deliberations (the so-called *note en délibéré*). Thirdly, should the *Commissaire du Gouvernement* raise an issue not relied on by the parties, the presiding judge would adjourn the case and communicate them to the parties, so that they could take a stance on it. To this end, a new hearing would be scheduled. Bearing in mind these extra features and procedural guarantees, the ECtHR found that the right to a fair hearing had been respected[10].

By way of recapitulation, we may say that the crucial point boils down to the "influence factor". In other words, the test applied is whether the "officer

[7] The Belgian cases were completed by case of *Van Orshoven* App. No. 20122/92. I used the text of the judgment available at www.echr.coe.int.

[8] Already within the context of the French Court of Cassation and the Advocate General, the ECtHR held that his role is to advise the Court and influence, through the authority of his office, judges' decision in a way "that is either favourable or runs counter to the case put forward by the appellants" – case *Reinhardt and Slimane Kaïd v. France*, (App.No. 45130/98), para 105, available at www.echr.coe.int.

[9] In particular A. Barav, *Le commissaire du Gouvernement près le Conseil d'Etat francais et l'Avocat Général près la Cour de Justice des Communautés européennes*, "Revue Internationale de Droit Comparé" 1974, vol. 26, p. 809; K. Borgsmidt, *The Advocate General at the European Court of Justice: A comparative study*, "European Law Review" 1988, vol. 13, p. 107.

[10] However the violation was found on other grounds: attendance of the Advocate at the Court's deliberations which in the view of the Advocate General in the Court of Justice is only of secondary importance for my analysis.

in question can influence the court in a particular case. If so, then the case-law relating to the right to adversarial proceedings and equality of arms comes into play"[11]. How then does the Advocate General in the Court of Justice fit into this Strasbourg-drawn picture?

1.2. The Court of Justice: Message Received?

As early as in *Alvarez* case the argument was made that the oral part of the proceedings should be reopened so that the defendant Parliament would have a chance to respond to a plea raised in the opinion of the Advocate General, which in the Parliament's opinion went beyond the subject matter of the case[12]. The Court disagreed, pointing out that to grant such a request would be tantamount to enabling the parties to discuss the Advocate General's opinion.

However, it was not until 2000 that the Court had to look more seriously at the challenges directed at its Advocate General. The test case was that of *Emesa Sugar*[13]. Relying on the case-law of the Strasbourg court, the applicant argued that there had been a violation of Article 6 of the Convention, since the parties were not given opportunities to respond to the observations of the Advocate General. In the order of 4th February 2000, the Court distinguished the Advocate General from law officers who came under the critical scrutiny of the Strasbourg Court[14]. It said that Advocates General are members of the Court, equipped with total independence and impartiality. The opinion does not form a part of the proceedings between the parties. Rather it opens the deliberations of the Court. It is not addressed to the Court or to the parties but stems from an authority outside the Court. It is rather an individual reasoned opinion from a member of the Court of Justice. The Advocate General takes part publicly and individually in the process by which the Court reaches its judgment. The Court pointed out that the parties' right to reply to the opinion of the Advocate General would cause serious difficulties and considerably extend the length of procedure (at the same time noting, however, that a special constraint of a procedural nature should not justify a violation of a fundamental right). According to the Court, the possibility of reopening the oral procedure is sufficient to guarantee the parties' right to fair trial.

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[11] N. Burrows, R. Greaves, *The Advocate General and EC Law*, Oxford 2007, p. 47.

[12] Case 206/81, *Alvarez v. Parliament*, [1982] ECR 3369.

[13] Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, [2000] ECR I-655.

[14] It is to be remembered that after the negative order of the Court of Justice, *Emesa* brought an action against the Netherlands in Strasbourg. The decision of the Court of Human Rights was awaited with eagerness but unfortunately, the Court did not rule on the merits since the case did not concern a dispute about civil rights and obligations – App. No. 62023/00 (admissibility decision of 13 January 2005).

After *Emesa Sugar*, several attempts were made, always with implicit or explicit reference to Article 6 of the Convention, to sway the Court towards greater procedural receptiveness and considering its procedure from the perspective of a fair trial. All failed and the Court limited itself to repeating the now standard "*Emesa formula*", which states that it was in possession of all the necessary facts to be able to answer the questions[15].

The line of reasoning arguing for reopening the oral procedure in order to reply to the submissions of the Advocate General was slightly different in *Vick*[16]. It was argued there that the opinion had not been delivered in the prescribed manner since the operative part thereof had been read at the sitting of the Fifth Chamber, not of the Sixth Chamber, to which the case was assigned. The Court saw nothing wrong in this practice (which is widely used in Luxembourg). It said that the manner in which the opinion was delivered involved no infringement of the rules applicable to the Court or any rights enjoyed by the parties in the main proceedings[17]. The Judges of the Sixth Chamber hearing the case were apprised of the opinion of the Advocate General through the deposit of the opinion with the Registry. This, coupled with the reading of the operative part of the opinion at a public sitting, was sufficient to make the opinion public. Thus, there had been no irregularity in the delivery of the opinion.

This point resurfaced recently in the *Slob* case[18]. Mr. Slob sought leave from the Court to submit written observations following the opinion of the Advocate General, pointing out that whilst the Rules of Procedure do not provide the parties with the possibility of making such written submissions, they do not expressly rule out such possibility. He thus requested that the Court reopen the oral procedure. This case is particularly interesting because Mr. Slob's argument did not stop with these two conventionally made arguments. He added one more alternative, which invited the Court to show creativity in the interpretation of its procedure. Namely, he requested that Court enable him to respond to the Advocate General in such a manner as to enable him to guarantee his fundamental right to an adversarial procedure. In response, the Court merely recalled the order in *Emesa Sugar*: the lack of the parties' possibility to respond to the opinion of the Advocate General does not prejudice an individual's right to an adversarial procedure.

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15 Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577;case C-184/01, *Peter Hirschfeldt v. European Parliament*, [2002] ECR I-10173;case C-209/01, *Schilling v. Finanzamt*, [2003] ECR I-13389; case 181/02P, *Commission v. Kvaerner Werft GmbH*, [2004] ECR-5703.

16 Case C-234/96, *Deutsche Telekom Advocate General v. Agnes Vick*, [2000] ECR I-799.

17 Para 26.

18 Case C-496/04, *J. Slob v. Productschap Zuivel*, the judgement of 14th September 2006, available at www.curia.europa.eu.

2. The Advocate General in the Court of Justice: Procedural Justice under Strain?

The judgment of the ECtHR in the *Kress* case allows us to formulate three conditions which, when complied with, makes proceedings fair. Firstly, the opportunity available to parties and lawyers to discover the tenor of the opinion of the *Commisaire du Gouvernement* prior to the hearing. Secondly, the possibility of presenting the Court with a *note de délibéré* prior to its deliberations. Thirdly, the possibility open to the Court to adjourn the case if the *Commisaire du Gouvernement* introduces arguments not raised by the parties. These three conditions should form the yardstick for our assessment of the Advocate General in the Court of Justice from the perspective of procedural justice. As far as the first condition is concerned, in proceedings before the Court of Justice, there is no possibility of seeking the tenor of the submissions of the Advocate General prior to the hearing. Similarly, the parties are barred from submitting a memorandum for the deliberations. The Court satisfies itself with only one possibility: that of reopening an oral procedure when "it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated by the parties". The general practice of the Court shows that it is very reluctant to reopen oral procedures[19]. That is why the Court's insistence on the possibility of guaranteeing fairness through this device should be read in the light of sparing use of reopening, and the discretion it enjoys when deciding on the issue[20]. It is up to the parties to establish facts of decisive importance that came to their attention only after the closure of oral proceedings. Mere differences between the parties and the opinion do not suffice for reopening the oral procedure. In reality anything short of *force majeure,* that is, the existence of unforeseeable circumstances, independent of the diligent parties[21]. When the case is reopened, the parties have the opportunity to address the issues that were the cause of the reopening and the Advocate General delivers his second opinion on

[19] L.N. Brown, T. Kennedy, *The Court of Justice of the European Communities*, London 2000; and N. Burrows, R. Greaves, *The Advocate General*…, p. 52.

[20] Art. 83 of the Rules of Procedure of the Court of Justice provides: "The Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute".

[21] K. Lenaerts, D. Arts, I. Maselis, *Procedural Law of the European Union*, London 2006, p. 556,

the case[22]. In this way there is a divergence between the two courts[23]. The independence and impartiality of the Advocate General have never been questioned, but, as the ECtHR's case-law shows[24], they are not in themselves enough to ensure that the right to a fair trial is respected, with the right to adversarial proceedings and the principle of equality of arms. The justness of the proceedings requires procedural safeguards that would enable the parties to submit their point of view and arguments on any issue that might be of relevance for the decision of the Court. Of growing importance is the emerging doctrine of appearances. This has arisen from an increased public sensitivity to fair administration of justice. If the law officer recommends certain solution(s) to a court, or participates in the deliberations, he becomes, objectively speaking and if only to outward appearances, an ally or opponent of one of the parties, regardless of the acknowledged objectivity and impartiality of the office[25]. Could we apply 'the ally or opponent' theory to the Advocate General in the Court of Justice? The case of *Arben Kaba* suggests an affirmative answer to this question[26]. *Kaba* was a second reference from the Immigration Adjudicator. Mr. Kaba had argued, before the domestic court which referred the first case, that the first preliminary ruling had been based on the Advocate General's misunderstanding of the facts and the national law. He claimed that the Court of Justice might have been influenced by the Advocate General, without giving the parties any opportunity to rectify the alleged mistakes made by the Advocate General. Therefore, when hearing his case the Adjudicator made a second reference to the Court of Justice, asking this time about possible mechanisms available to the parties or the national court to ensure that the totality of the proceedings comply with the obligations under Article 6 of the Convention. Again, the Court was unmoved. This time it reversed the order of questions asked by the Adjudicator and answered the substantive questions that dealt with the European Union law by simply reiterating its ruling in the first *Kaba* case. Then it concluded that, given this answer, there is no point

[22] For example see case C-304/02, *Commission v. France* with comments by L. Clement-Wilz, *Une nouvelle interprétation de l'article 228-2 CE favorisée par le dialogue entre la Cour et son avocat général*, "Cahiers de droit européen" 2005, nr. 5–6; and P. Wennerås, *A New Dawn for Commission Enforcement Under articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments*, "Common Market Law Review"2006, vol. 43, p. 31.

[23] R. Lawson, *Current Trends in the Relationship between Strasburg and Luxemburg*, ERA Trier, 2–3 June, 2005, pp. 5–6.

[24] In *Borgers* it was confirmed explicitly that the Advocate General had acted with full independence and yet abreach of Article 6 of the Convention was found.

[25] It is to be noted that the Commissaire du gouvernement in *Kress* was called into question on the basis of a "doctrine of appearances".

[26] Judgment of the Full Court in case C-466/00, *Arben Kabav.Secretary of State for the Home Department* and case note by Marton Varju, "Common Market Law Review" 2004, vol. 41, p. 851.

in replying to the question about the application of Article 6 of the Convention to the Advocate General[27].

The Court is wrong to say that Article 6 of the Convention, as interpreted by the European Court of Human Rights, and the parties' right to an adversarial procedure, do not entail the right to respond to the opinion of the Advocate General[28]. It clearly emerges from the ECtHR case law that the fairness of the proceedings would militate in favor of such a right. The right to adversarial procedure is understood differently by the two Courts. Luxembourg defines it through reference to its purpose and sees it as an instrument preventing the Court from being influenced in its decision by an argument which the parties have been unable to discuss[29], whereas the ECtHR defines this right as "the opportunity for the parties to a civil or criminal trial to have knowledge and comment on *all* evidence adduced or observations filed *even by an independent* member of the national legal service"[30] (emphasis added). In this way we have a situation known already from "Hoechst-case law" in which a divergent line of case-law on Article 8 of the Convention was maintained by the Court of Justice and the ECtHR[31]. It is only recently that the Court of Justice has decided to bring its jurisprudence into line with that of Strasbourg[32]. However, with regard to the right to the understanding of adversarial process, we even have signals that this divergence is by no means accidental. In the *Gerry Plant* case[33] two separate actions were brought. In one case, the Court of First Instance ruled the action out of time, basing this decision on the documents submitted in the other action. It was argued by the applicants on appeal that the Court of First Instance breached "an elementary principle of natural justice and a rule inherent in the right to procedural fairness" since it did not give the applicant an opportunity either to consider the evidence or reply to it. The Advocate General drew a distinction between the Anglo-Saxon and continental legal systems. He said that, according to the former, adversarial proceedings demonstrate great resistance to anything

[27] Of interest in this second case is the opinion of Advocate General Ruiz-Jarabo Colomer. Having recalled the *Emesa Sugar* precedent, he drew particular attention to the possibility of the Court reopening the oral procedure also at the request of the parties. He was of the opinion that the present system of Union administration of justice does not violate the right to a fair trial. On the contrary, the opinions help to publicise, and to promote the transparency of the judicial function assigned to the Court of Justice (para 115 of the opinion).

[28] Most recently case C-496/04, *Slob*, para 30.

[29] Case C-496/04, *Slob*, para 32.

[30] *Vermeulen v. Belgium*, App. No. 19075/91, (1996) ECHR 1996-I, para 33.

[31] For details, see P.Craig,G.de Burca, *EU Law. Text. Cases. Materials*, Oxford 2003.

[32] For a detailed account of the case law, see M. Lienemeyer, D. Waelbroeck, *Case note on C-94/00, Roquette Frères SA*, "Common Market Law Review" 2003, vol. 40, p. 1481.

[33] Case C-480/99P, *Gerry Plant and others v. Commission* Rec 2002, I-265 (english version also available at www.curia.europa.eu).

deemed inquisitorial, which might affect the outcome of the proceedings and which is not instigated by the parties. According to the latter, the scope of the right to adversarial proceedings is more limited, for two reasons. Firstly, the maxim *iura novit curia* enables questions relating purely to the application of the law to be excluded from the adversarial process. Secondly, the presumed impartiality of judicial bodies extends to measures such as a request for an internal report or the adducing specific evidence, therefore reducing the need for the parties to respond. He criticized (crucially, by referring to *Vermeulen* case) the ECtHR for adopting the common-law model and accepting the parties' rights to comment on all the evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision[34]. His understanding of adversarial proceedings was much more limited. It only comes into play in relation to evidence submitted by one party for scrutiny by a judicial body. Such external evidence cannot be presumed to be impartial and independent, thus parties must have a right to be heard, failing which their rights of defense are not observed. His opinion is interesting for three reasons. First, he clearly favors and accepts departure from the ECtHR's understanding of the right to adversarial process. The parties do not have the right to submit observations on *all* evidence, but only when failure to observe the requirements of an adversarial process results in a breach of a fundamental right. Therefore, not every departure from these requirements will automatically lead to a breach of a fundamental right. Secondly, there is the aspect of externality. Only evidence that is external to the Court brings the right to an adversarial process into play. How should we perceive an opinion of the Advocate General from this perspective? Is it a document external to the Court? The case law above shows that the Court treats the opinion as a document emanating from a member of the Court, enjoying total independence and impartiality, thus obviating the parties' right to comment on it. Thus, the right to adversarial proceedings thus understood is not breached. Thirdly and finally, were we to accept in European Union law the *iura novit curia*, it would be very difficult for the parties to request the reopening of the oral procedure and take advantage of this only available channel of responding to the opinion. The parties would be barred from arguing that the advocate general misunderstood the law, since we presume that "the Court knows the law" anyway[35]. Today we have a situation in which the Court of Justice is unwilling to consider its procedure from the perspective of fair trial, as

[34] Paras 34 and 36 of the opinion.

[35] Commenting on the *Kaba*case, M. Varjupoints out that should we accept in the preliminary ruling proceedings that national law is a fact to be proven, the Union courts should remain open to all consideration of the parties. In such a case "an argument that Advocate General misapprehended the national law should serve as a strong basis for reopening the oral procedure". If, however, we accept *the iuranovit curia* also with regard to national law, the Court could do away with the parties' observations on national law; "Common Market Law Review" 2004, vol. 41, pp. 851, 858–859.

far as the Advocate General is concerned[36]. This is not to say of course that the Court is insensitive to procedural human rights and guarantees. It simply means that the protection of these rights is deemed sufficient, and the presence and function of the Advocate General do not endanger the principle of equality of arms and the right to an adversarial procedure. However, the evolving case law of the ECtHR (from the negative *Delcourt* case in 1970 to the positive *Kress* case in 2000) shows that Luxembourg should pay greater attention to the doctrine of appearances and increased public sensitivity to the fair administration of justice. Strasbourg case-law proves that even acting with the strictest objectivity is not enough to take the office in question out of the reach of Article 6 of the Convention. What matters is whether the function of the officer under consideration is to advise and consequently influence the court in favor of a given proposition. If the answer is yes, then his function should fall within the guarantees of Article 6. Nobody questions that the Advocate General in the Court acts with the utmost independence and impartiality. Similarly, nobody questions that his main task is to defend the integrality of European Union law. Yet equally, nobody would deny that he is one of the most influential members of the Court. The Judges themselves confirm that his opinion is the starting point for their deliberations[37]. His opinion is delivered in open court and without doubt influences the judges. Even in cases in which they do not agree with his submissions, the opinion resonates during the deliberations and is analyzed in depth. Bearing in mind the importance of procedure for the legitimation of courts on the one hand, and the parties' perception of how their rights and duties are handled on the other, it is of crucial importance that any doubts as to the fairness of the procedure should be removed. Equality of arms calls for giving the parties voice on every document in the case-file on the basis of which the Court will decide on their rights and obligations[38]. Mere formal guarantees like impartiality and independence are not enough to conclude that the right to a court is respected. Additional safeguards must be in place in order to make sure that this is indeed the case in reality[39].

The Court of Justice has always been in favor of interpreting the right to a judge extensively, underlining its importance as a fundamental Union right. The same should be the case here when the fairness of its own procedure is questioned, and at times when the role of the Advocate General changes towards his selective participation in only the most important cases. In light of increasing challenges to

[36] See also the critical remarks made by D. Spielmann, *L'indépendence de l'avocat généralà la Cour de justice des Communautés européennes face a l'égalité des armes et au principe du contradictoire*, "Revue trimestrielle des droits de l'homme" 2000, vol. 585.

[37] A. Tizzano, *Les conclusions représent le véritable point de départ du délibéré et un moyen essentiel de compréhension de l' arrêt*, "Europe" 2007, no. 4, p. 13.

[38] See case *Marlene Kress* (Apl. No. 39594/98) available at www.echr.coe.int.

[39] The Court of Human Rights adopted a global assessment of the office of *commisaire du gouvernement*, going beyond its formal status – paras 44, 48, 49.

the fairness of the procedure before the Court of Justice, there should be no doubt that sooner or later the ECtHR will get a chance to look more closely at the fairness of the Court's procedure. Criteria present in the ECtHR case law provide a strong indication that present status of the Advocate General, insulated from the parties' comments, could not withstand the scrutiny in the light of Article 6 standards.

The question is then how to preempt this danger? Taking a cue from the ECtHR's *Kress* judgment, a solution might be found in enabling the parties to submit a memorandum for the deliberations of the Court. It would not require the reopening of the oral procedure, as parties would be obliged to submit their observations in writing within one week after the delivery of the opinion. We should realize that this is important not only for overall procedural justice before the Court of Justice. As was argued by the national court in the second *Kaba* case, and confirmed by the long-standing case law of the Court, preliminary ruling proceedings in the Court form an integral part of the proceedings before national court(s). As a result, the national court would be responsible for any infringement of the European Convention during the procedure in the Court! This is indeed a very strong argument. The functional perspective sees national courts and the Court as players in one process: ensuring that European Union law is the same in all Member States[40]. Finally, procedural justice requires the Court to justify its decision in a convincing and complete fashion. Justice must not only be seen to be done, but also be done in an understandable way. This is so-called transparency through reasoning, and it is submitted that there remains a lot of room for improvement on the part of the Court. In all the cases in which the parties requested the reopening of the oral procedure, the Court made short shrift of their arguments in one (or at most two) paragraphs of the judgment. This is unsatisfactory, since some arguments about alleged unfairness and lack of procedural guarantees remain unanswered. "Procedural justice effect" tells us that parties that are dissatisfied with the outcome are more willing to accept it, if they are convinced that the procedure leading to it was just. This is why the Court should pay more attention to explaining the reasons for its action, rather than repeating in every case laconic *dicta* from *Emesa Sugar* without any attempt to distinguish the cases under consideration. A complaint by Emesa Sugar to the ECtHR lodged in the wake of the order by the Court of Justice remains always a serious warning sign, and an indication of how things might turn ugly should the ECtHR hold the element of fair trial rights to be missing in Luxembourg.

Most recently, though, the ECtHR dismissed a complaint from the Dutch company PO Kokkelvisserij[41]. The company had claimed that its right to a fair

[40] This is thetrue *raison d'être* of Article 267 of the Treaty on the Functioning of the European Union. For example, see case 166/73 *Rheinemuhlen (II)*, [1974] ECR 33, para 2.

[41] Judgment of 20 January 2009, *Case PO Kokkelvisserij v. The Netherlands*, (Application No. 13645/05).

trial had been violated by the intervention of the Advocate General in a case before the Court of Justice and by the Court's refusal to reopen the oral hearing of the Court. The case was a 267 TFEU referral from the Dutch Council of State. During the preliminary ruling procedure in Luxembourg, the company had argued that reopening the oral procedure was of the utmost importance because certain arguments of the Advocate General were factually and legally erroneous. The Court dismissed the claim that Article 6 of the ECHR had been violated by the lack of a procedural possibility of submitting written observations to the Advocate's General opinion. In doing so, the Court recalled Article 61 of the Rules of Procedure, which state that the Court is entitled to reopen the oral procedure at the request of either the Advocate General or the parties involved, or on its own initiative. Such a reopening is justified only if the Court had been insufficiently informed or if the case was about to be decided on the basis of an argument not yet discussed by the parties. In the case under consideration, the Court found no basis for such a reopening as the applicant company had not provided precise information that would make such reopening useful or necessary for deciding the case. Having rejected the request to reopen the oral proceedings, the Court proceeded to answer the questions submitted to it by the Dutch Council of State[42]. When the case was sent back to the Council for a decision on the merits, the applicant company continued to argue that the preliminary ruling of the Court of Justice must be disregarded on the ground that the applicant's procedural right to respond to the opinion of the Advocate General has been violated, and that breach in turn vitiated the ruling of the Court of Justice. The Council of State likewise dismissed these allegations and decided the case in line with the preliminary ruling given by the Court of Justice.

However, the applicant company did not give up and lodged the complaint against the Netherlands to the ECtHR. Importantly, the ECtHR pointed out that Article 61 of the Court of Justice's Rules of Procedure provided a realistic rather than a merely theoretical possibility of reopening the debates since the Court of Justice would scrutinize such requests on their merits. The ECtHR was convinced that the applicant's rights has been respected, as its request was subject to the scrutiny by the Court of Justice. *Kokkelvisserij* corroborates that while being aware of sometimes uneasy relationship, both European courts pay due deference to each other and are interested in constructive dialogue. From the perspective of the Court of Justice, its order in *Emesa Sugar* constituted a reaffirmation of the significance of ECtHR case law to the Union Law, because the Court felt obliged to answer the allegations that its procedures did not live up to the standards established in the case law of Strasbourg court. The ECtHR, for its

[42] Case C-127/02, *Waddenvereniging en Vogelbeschermingvereniging v. Deputy Minister of the Netherlands,* [2004] ECR-7405.

part, appears to abstain in *Kokkelvisseri*j from interfering too intrusively with the internal affairs of the Court of Justice. This is apparent in the flexible reading of its former case law on adversarial proceedings and the restraint applied when establishing the effectiveness of the Article 61 procedure and its compatibility with Article 6 of the ECHR[43]. For now at least, questioning the legality of the Court of Justice by the ECtHR seems very unlikely.

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In the realm of judicial behaviour, what judges say,
what rules they announce and/or threaten to announce
is often a more significant aspect of their behaviour
than how they vote

M. Shapiro[44]

While the story of *Van Gend den Loos* has been told and retold on numerous times, the present analysis aimed to move beyond what has been said and written elsewhere[45]. Instead, its focus has been *par excellence* procedural. The "*rights*" that the Court is referring to in *Van Gend* must also include procedural guarantees. Denial of these guarantees would be tantamount to a procedural denial of justice[46]. For vigilant individuals, awareness of the available procedures and remedies is as important as awareness of substantive entitlements. While understanding the importance of the substantive entitlements as part of this unique new legal order, this paper deals with the procedural dimension of this order. One ought to realize how the world we live in is getting smaller and smaller. This observation also holds true for the legal world, where the phrase best describing the current state of affairs is "legal interrelationship": there are more and more laws and courts, and case-law is getting more nuanced and complicated[47]. The

[43] C. Van de Heyning, *PO Kokkelvisserij v. The Netherlands Application No. 13645/05, judgement of 20 January 2009*, "Common Market Law Review" 2009, vol. 46, pp. 2117, 2125.

[44] M. Shapiro, *Can Judges Deliberate?*, Third Annual Walter W. Murphy Lecture in American Constitutionalism, Princeton University, 29 April 2003, p. 3 (paper on file with the Author).

[45] See J.H.H. Weiler, *Rewriting Van Genden Loos: Towards a Normative Theory of ECJ Hermeneutics*, [in]*Judicial Discretion in European Perspective*, ed. O. Wiklund, 2003.

[46] For detailed analysis and the relevance of the concept, see J.Paulsson, *Denial of Justice in International Law*, Cambridge 2005, p. 5.

[47] On the phenomenon of the proliferation of the courts, see R. Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, "International Comparative Law Quarterly" 2006, vol. 55, p. 791; N. Lavranos, *Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals. Part I*, "European Environmental Law Review" 2005, vol. 14, p. 213; *Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals. Part II*, "European Environmental Law Review" 2005, vol. 14, p. 240; *The MOX Plant Judgment of the ECJ: How exclusive is the jurisdiction of the ECJ?*,

claimants assume that their problems can and will be solved by neutral, competent and independent judges. The result is "*judicialization*" and "*juridification*", which means that more and more laws must be interpreted by courts in order to meet the growing expectations of the parties involved. In a globalized and complex world, people have greater expectations of judges. When politicians fail and disappoint, individuals turn to procedures they consider impartial, objective and effective, and to open-minded and creative judges to ensure that justice is indeed being done[48].

The procedural chain novel of the European Union proceeds incrementally and its authors (courts aided by empowered individuals) are aware of both the opportunities and limitations along the way. In order to understand the chain novel of the Advocate General, the caveat *incremental* is crucial here because "[…] the core of incremental doctrine is respect for the status quo and movement from the status quo only in short, marginal steps carefully designed to allow for further modifications in the light of further developments […] Incrementalism is a theory of freedom *and* limitation"[49].

Nowadays not only politicians but also judges have promises to fulfil: to make sure that the aggrieved party finds equitable solution in the court of law and, what is more, convince the party that loses the case that it was heard with due diligence, that their right to present all their arguments was respected and considered. This symbolic act of delegating trust renders judges "*gardiennne de promesses*"[50]. In this way the role of lawyers, law and procedures must evolve accordingly and search for a common denominator linking various judicial *fora*, interpretive approaches and judicial philosophies. The evolution of the office of the Advocate General, changing self-perception of the incumbents of the office over the years, and, most importantly, understanding by the individuals of the true role that the Advocate General plays in the judicial proceedings and in the legal order of the Union, all serve as a testament to this subtle and incremental normative change.

"European Environmental Law Review" 2006, vol. 15, p. 291; *Protecting Its exclusive Jurisdiction: The Mox Plant-judgment of the ECJ*, "Law and Practice of International Tribunals" 2006, p. 479. More recently his *On the need to regulate competing jurisdictions between international courts and tribunals*, EUI Working Papers Max Weber Programme, MWP 2009/14 available http://cadmus.eui.eu/bitstream/handle/1814/11484/MWP_2009_14.pdf.

[48] For various approaches and perspectives, see Ph.P. Wiener, *Dictionary of Selected Pivotal Ideas*, vol. I, *Despotism to Common Law,* and vol. III, *Concept of Law to Protest Movements*, 1980; *Justice*, ed. W. Sadurski; O. Höffe, *Political Justice. Foundations for a Critical Philosophy of Law and the State*, Blackwell 1995; P. Ricœur, *Le Juste*, Paris 1995; N. MacCormick, O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism*, 1986; J.N. Shklar, *The Faces of Injustice*, Yale 1990.

[49] M. Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or stare decisis*, "Law in Transition Quarterly"1965, vol. II, no. 3, pp. 156–157 (emphasis in the original).

[50] This expression comes from A.Garapon's, *Le Gardien de promesses–justice et démocratie*, Paris 1996.

Tomasz Tadeusz Koncewicz

PROCEDURAL FRIEND OR FOE? THE ADVOCATE GENERAL IN THE COURT OF JUSTICE OF THE EUROPEAN UNION REVISITED

The Advocate General in the Court of Justice merits special attention as an institutional *novum* peculiar to the Court of Justice. It shares with judges the conditions and requirements for appointment. However, what distinguishes the Advocate General from a Judge is his function in the procedure and decision-making process of the Court. Remembering that his function is *sui generis,* insistence on definition at all costs might be misleading. Suffice it to say that he acts as a voice of European Union law, a highly-qualified amicus curiae, guided by the objective of the consistency, justice and coherence of European Union law. However, in recent years his function has come under closer scrutiny as a result of various challenges brought before the European Court of Human Rights and gave rise to fascinating exchange in the politics of law between Luxembourg and Strasbourg. As such, the office of the Advocate General provided the most fertile ground for judicial dialogue and mutual learning between Europe's two highest courts. While this analysis asks the question of whether the voice of Advocate General might be indeed prejudicial to parties' procedural rights and guarantees, this more general systemic and dialogic dimension should not be lost to the world.