

Advocates General at the Court of Justice: Any Doubts? Part II

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This article¹ continues to overview some features of Advocates General of the Court of Justice of the European Union and analyses the influence of their opinions on the case law of the Court. Their role in developing the Union's jurisprudence in general as well as shaping directions on how to apply EU law in dealing with new economies are of particular interest.

Keywords: European Union law, Court of Justice, Advocate General.

Generaliniai advokatai Teisingumo Teisme: ar kyla abejonių? II dalis

Straipsnyje toliau gvildinami kai kurie Europos Sąjungos Teisingumo Teismo generalinių advokatų bruožai ir analizuojama jų nuomonių įtaka teismui. Dėmesio skiriama ne vien jų įtakai Sąjungos teismų praktikos plėtrai, bet ir vaidmeniui brėžiant naujųjų ekonomikų teisinių santykių vertinimo gaires.

Pagrindiniai žodžiai: Europos Sąjungos teisė, Teisingumo Teismas, generalinis advokatas.

Introduction

The first part of the article was related to the origins of the institute of Advocate General (hereinafter also referred to as “AG”), its basic role, as well as AGs' opinions as stimulators of the legal debate. The object of the second part of this study is to highlight the opinions of AGs as generators of the case law development, reflecting on their impact on EU law as those who touch innovative issues as well as presenters of different views on interpreting the law. The article aims to overview the impact of AGs through a brief analysis of both recent case law as well as earlier jurisprudence in general, also shaping directions on how to apply EU law in dealing with new economies.

¹ This article continues author's observations expressed in 'Advocate General at the Court of Justice: any doubts? Part I'. It was prepared with the assistance of law clerk Ms. I. Žurauskienė. It does not reflect the view of the Court of Justice of the European Union or the judges.

The presentation of some judgments spotlights the links between AGs' opinions and the Court of Justice² (hereinafter referred to as the "Court of Justice," the "Court," or "CJ") judgments both when the proposed AGs' solutions are followed and when they are not. Although the main source of the paper is CJ case law and relevant AG opinions, some doctrine studies are relevant in order to provide a more panoramic view on the issue at stake. Since the latter topic has not yet been elaborated, as mentioned in Part I, in the Lithuanian legal literature, it stimulated the author to share his observations with the readers. The topics dealt with and the structure used in both parts of the article do not pretend to an exhausted analysis of the issue at stake. We believe, however, that even such a brief introduction of the specific EU judiciary's phenomenon not known in many EU Member States' jurisdictions could encourage more researchers and practitioners to "dig into" this interesting domain.

Multiple methods of research enable to analyse the relevant sources and to achieve the abovementioned objectives. The linguistic, logical and systemic methods help to underline the various approaches of legal argumentation. The comparative method enables to reveal the impact of the AG opinions on the CJ case law as well as to examine the evolution of the CJ jurisprudence in accordance with the propositions of Advocates General.

1. AGs as Generators of Jurisprudence Development

The importance of AGs' opinions is defined not only by their influence on a CJ decision in a particular case but also on the development of its jurisprudence in general or at least to the debates provoked (Hinarejos, 2012, p. 16). A good AG opinion is told to be when it rises above the existing law and suggests its further development, thus not just the solution for a case but also where the law should go next and why (Bobek, 2012, p. 555). By making critical assessments of the case law, an AG identifies trends, points out inconsistencies that may exist, and outlines possible future developments (Tridimas, 1997, p. 1358). An issue of inconsistency of the case law is a huge "headache" for most judicial institutions³ all over the world. The EU judiciary does not escape it either. Thus, by disclosing weaknesses, ambiguities, and inconsistencies in the case law, AGs send a signal to the jurisprudence policy-makers, enabling them to look for the means for "damage control." Moreover, Advocates General have usually taken the previous decisions of the Court into consideration and thus helped establish and develop an European *acquis*. They, as a rule, start their reasoning with the Court's case law and, partly because of such a reiteration, it becomes actual jurisprudence relied on and examined by future judgments, rather than a mere collection of decisions⁴.

AGs' opinions can be regarded as the accelerators of jurisprudence since the early days of the Court. Many progressive legal thoughts were first captured in opinions expressed by AGs. It does not mean that they were always immediately accepted. Many of them found their place in the legal reasoning of

² The Court of Justice of the European Union (CJEU) as an institution from 1 September 2016 consists of two jurisdictions: the Court of Justice and the General Court. In this article, the reference to the Court of Justice means the mentioned part of the CJEU.

³ With exception, probably, the judiciaries of non-democratic regimes where the independence of judges is supposed not to be a value.

⁴ Among the early examples of the consistency of the AGs opinions, it might be mentioned AG Lagrange who based his reasoning in *Costa* (*Costa v. E.N.E.L.*, 1964) on the *Van Gend en Loos* judgment (*Van Gend en Loos v. Administratie der Belastingen*, 1963), or in an opinion of 1956 (*Fédération charbonnière de Belgique v. High Authority*, 1956) presented the just-decided *Groupement industries sidérurgiques luxembourgeoises* (*Groupement des industries sidérurgiques Luxembourgeoises v. High Authority*, 1956) as a leading judgment in the field of judicial review about the interest in instituting proceedings. See more, in Clement-Wilz, 2011, p. 591.

the Court judgments only after some time. Landmark cases, like the grounds of the EU legal order in general, usually serve as good examples.

As known, after *Van Gend en Loos*, the rights recognized in the EU law can be enforced before national courts even if they are not transferred to national law. It is true that the solution proposed by AG Roemer in this case (*Van Gend en Loos v. Administratie der Belastingen*, 1962) was different from the Court judgment (*Van Gend en Loos v. Administratie der Belastingen*, 1963). While the Court did recognize the direct effect of an article of the Treaty establishing the European Economic Community relevant to the case, the AG did not see such an option. AG Roemer, however, being of the same opinion, did highlight that certain provisions of the Treaty were capable to create rights in favour of and impose duties on Member States as well as their authorities and citizens. The latter thinking looked quite revolutionary. It took some time until the Court recognized it. Thus, some ideas raised by AG Roemer, not taken into consideration in *Van Gend en Loos*, did find reflection in the Court's case law later on.

The development of the principle of state liability plays a significant role talking about the input of the Court's jurisprudence into the EU legal order. The CJ case law has gradually flourished in this area. The impact of AGs' insights, however, is sometimes underestimated.

The conception of state liability is associated with *Francovich* where the Court (*Francovich et Bonifaci v. Italie*, established, 1991) established that EU Member States could be liable to pay compensation to individuals who suffered a loss because of a Member State's failure to transpose an EU directive into national law from what is mandatory under EU law. The roots of it, however, lie in an earlier opinion of AG Reischl (*Russo v. AIMA*, 1975). He expressed that a national court should assist in the enforcement of rights provided by Community law while doing that in accordance with respective national legal systems. The AG stressed as well that if it was desired to avoid the risk of unequal treatment of individuals under the applied national legal system, it was necessary to work out principles upon which a uniform and effective method of enforcing individual rights under Community law could be established. Certainly, the input of AG Mischo in *Francovich* (*Francovich et Bonifaci v. Italie*, established, 1991) was also considerable. Despite few specific differing details, the Court's judgment was visibly inspired by the ideas generated by the AGs' opinions and followed their essential thoughts.

Following *Francovich*, the Court has been inclining to acknowledge state liability, namely in cases of Member States' failure to implement the directives. However, such a narrow understanding of their liability could not properly protect the individuals' rights. In *Brasserie du Pêcheur and Factortame*, the Court (*Brasserie du pêcheur v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte Factortame and Others*, 1996) went further and finally acknowledged that a Member State must be held liable and compensate damages to individuals in a case of any other EU (EC at the time) law infringement not depending on which state institution is responsible for the breach. The Court, of course, has also set the three basic state liability conditions⁵.

Did AG opinions play a role in it? The answer is an affirmative one. The Court was especially guided by AGs' opinions in working out the conditions of liability. First, it is obvious that AG Tesauro's propositions in this case (*Brasserie du pêcheur v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte Factortame and Others*, 1995) were taken into account. Moreover, AG Tesauro's opinion in *Dillenkofer* (*Dillenkofer and Others v. Bundesrepublik Deutsch-*

⁵ In *Brasserie du pêcheur and Factortame* the three obligatory conditions of the Member State's liability were also stressed: 1) the rule of law infringed must be intended to confer rights on individuals; 2) the breach must be sufficiently serious; 3) there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained.

land, 1995), as well as an earlier opinion of AG Léger in *Hedley Lomas (The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland))*, 1995) were also notable. However, there were slight differences on certain points between the mentioned AG insights and the Court judgment in *Brasserie du Pêcheur* and *Factortame*. The Court and the AGs spoke to a large extent with one voice when introducing this novel remedy as regards state liability (Tridimas, 1997, 1373–1374). Even though with a bit different argumentation, both mentioned AGs and the Court agreed that when determining state liability, the degree of discretion enjoyed by a state institution should be taken into account. The differences in approaches lied in the point of view as regards connection between Union (then Community) liability and State liability, i.e., whether and to which extent the same conditions should be applied. As mentioned, the differentiation of liability was finally decided to depend upon the degree of discretion enjoyed by a Community institution or a national authority. It represents not only the impact of AGs' opinions on the Court jurisprudence but also the advantages given by the existence of different opinions, as their convergence leads to a more balanced approach.

What about the impact of AGs on EU case law development related to the protection of fundamental rights? Do we see any trace of AGs here? The answer is affirmative. Let us start with *Schmidberger*. It was probably the first open clash between one of the EU (then Community) fundamental freedoms and a freedom of expression and assembly as the core principle guaranteed by the Austrian Constitution and ECHR. AG Jacobs realized the situation before him was the first case in which EU MS has invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms of the Treaty⁶. In his opinion, he rightly pointed out that it was quite probable that such kind of cases might “become more frequent in the future: many of the grounds of justification currently recognized by the Court could also be formulated as being based on fundamental rights considerations” (*Schmidberger*, 2002, point 89).

The Court of Justice (*Schmidberger*, 2003), just as AG Jacobs, accepted the Austrian government's arguments related to the right of *freedom of expression* and assembly. The Court held that the Member States and the Community were required to respect fundamental rights and that therefore those rights could justify a restriction of other Community obligations, including even a fundamental freedom, such as free movement of goods. Finally, the Court also followed the AG's opinion regarding to see whether the restrictions were proportionate. It determined that the restriction was proportionate, because the disruption of Community trade occurred for a limited time and on a limited route in order to pursuit an environmental aim.

Almost twenty years ago, it was quite brave to propose and accept a new rising paradigm regarding fundamental rights, not then yet formally enshrined in the EU primary legislation. Nowadays, in light of the EU Charter, the latter issues arise, as AG Jacobs had predicted, quite frequently and appear self-evident.

For many years, AGs kept convincing the Court of Justice that the approach towards the notion of the *court or tribunal* in light of article 267 TFEU (ex-article 177 EC Treaty) should be quite strict.

⁶ AG Jacobs concentrated on MS liability because of transport restriction due to the permission of demonstration. In this order, Eugene Schmidberger Transport Company pleading was based on the similarities with the earlier case *Commission v. France*. In the latter, it was held that France was responsible for impeding free movement by not taking adequate steps to control the actions of its farmers who were angry at imports from another Member States. AG Jacobs, however, acknowledged that there were important differences between *Schmidberger* and *Commission v. France*. In *Schmidberger* citizens were exercising their fundamental right by demonstrating in public, the purpose of that public demonstration was not to restrict the trade of a particular good coming from a particular country, the reasoning and difference established by the AG was followed the ECJ.

In *Gabalfrisa*⁷, for instance, AG Saggio (*Gabalfrisa*, 1999, points 14, 19 and 20) advised the Court to declare inadmissible the reference for a preliminary ruling from *Tribunales Económico-Administrativos Regional de Cataluña*, since the latter lacked an adequate degree of impartiality and independence from the government. The Court (*Gabalfrisa*, 2000) did not accept the arguments of AG and ruled that the national body met a necessary requirement to address the Court. After some time, *Tribunales Económico-Administrativo Central* submitted a preliminary request in *Banco Santander*. Having received the *Banco Santander* case, AG Hogan immediately raised an issue whether what had been decided in 2000 by the Court “remains good law in the light of developments in the case law of the Court since that judgment was first delivered” (*Banco Santander*, 2019, point 14). Further, in his opinion, he provided serious arguments defending the same line like AG Saggio had in 1999. Even more, he argued that the *Tribunales Económico-Administrativo Central* did lack the notion of various criteria of impartiality and independence, including not meeting the requirement *nemo iudex in causa sua* (*Banco Santander*, 2019, point 31). The Court, this time to a large extent, accepted AG Hogan’s arguments and ruled that the national body concerned did not meet the necessary requirement to address the CJ’s preliminary request (*Banco Santander*, 2020).

The examples of ideas promoted in AGs’ opinions and later reflected in CJ case law could be numerous. Undoubtedly, AGs play an important role in generating progressive legal ideas and actively participate in or inspire the relevant legal debate. AGs’ propositions, not only those briefly mentioned, had an impact on many of the Court’s judgments.

2. AGs as Advisors on Innovative Issues

The Court often faces legal issues that, in fact, have no clear answers in existing legal regulation. Moreover, the issues put on the desk before the Court nowadays are linked with the rapid development of new technologies and, consequently, growing impact of new economies on the EU market. It is obvious that legal regulation does not keep pace with time. An AG, where relevant, is the one who must be the first to propose a solution. This is how the role of AGs is complemented by the functions of an innovator. These are not the situations when, as mentioned, an Advocate General suggests a development or changes of jurisprudence – it means a challenge for the AG to provide suggestions on creating new jurisprudence. The cases related with new technologies become more frequent. The legal questions touched in such disputes quite often were not treated before. Innovative issues in most cases are ahead the legal regulation related to them. Thus, the EU judiciary, at least at the early stage, often faces the disputes where there is no case law yet. In such situations, AGs are the first, so to speak, to put their boots on the ground. In the legal sense, some of these new domains occupy “no man’s land.” By entering such areas, AGs are expected to mark the boundaries between EU and Member States’ jurisdictions, while also underlying CJ jurisdiction, providing new legal criteria on EU law interpretation, etc.

For instance, in *Uber (Asociación Profesional Elite Taxi, 2017)* and *Uber France (Uber France, 2018)*, the Court had to decide on the nature of services provided (and received) while using the widely

⁷ *Gabalfrisa SL* applied for a right to deduction of VAT paid in respect of transactions carried out prior to the commencement of their activity. According to the relevant national legislation (the State Tax Administration Agency) refused *Gabalfrisa*’s application. *Gabalfrisa* considered that the requirements laid down in national legislation were contrary to the EU Sixth Directive and commenced proceedings before the *Tribunal Económico-Administrativo Regional de Cataluña*, which referred the preliminary request to the European Court of Justice.

spread digital platform Uber⁸. Due to the necessity to determine the applicable legal provisions and requirements, the issue in the cases concerned, *inter alia*, the ascertainment of whether Uber activities had to be treated as transport services or as information society services. The path taken on the interpretation of EU law could lead to two completely different results.

The AG Szpunar's opinions and the Court judgments as regards the final assessment coincided completely: they both agreed that Uber services should be treated as transport services. However, the reasoning and argument lines were slightly different. The Court found that the intermediation service provided met the criteria of information society service, but because of the inherent connection to the transport services, it had to be regarded as forming an integral part of overall service. As the main component of this service was a transport service, the whole service was classified as a service in the field of transport. AG Szpunar proposed a slightly different direction to the same Uber services classification. He stressed, most importantly, that the service provided by digital means is not economically independent of the service that is not provided by digital means (in this case, transport services). Therefore, he treated the service in question as a single composite service that was a service in the transport field and not an information society service.

*Eturas*⁹ raised new competition law facets related to e-commerce that have never been treated before. The latter case merits a deeper analysis not only because of its Lithuanian origin. AG Szpunar was the first one to express his opinion (*Eturas and Others*, 2015) on the burden of proof of concerted practices when the undertakings concerned use digital platforms and not the usual methods of communication in the business world, such as participation in a meeting or an exchange of emails¹⁰. The main aspect, however, in *Eturas* should probably be considered the issue whether sending an email is enough in order to establish a concerted practice.

Both the AG and the Court (*Eturas and Others*, 2016) have concluded that the undertakings, using a common booking system who became aware of the illicit initiative and who continued to use the system, must be held liable for participation in a concerted practice. The national courts could, in the light of other objective and consistent indicia, apply a presumption that the travel agencies concerned were aware of the content of the message in issue as from the date of its dispatch, provided that those agencies had the opportunity to rebut it.

⁸ With the aid of a smartphone equipped with the Uber application, the platform allows users to order urban transport services in the cities covered by it. The application recognizes the location of the user and finds available drivers who are nearby. When a driver accepts a trip, the application notifies the user of such acceptance and displays the driver's profile together with an estimated fare to the destination indicated by the user. Once the trip has been completed, the fare is automatically charged to the bankcard, which the user is required to enter when signing up to the application. The application also contains a ratings function, enabling drivers to be rated by passengers and passengers to be rated by drivers. Average scores falling below a given threshold may result in exclusion from the platform (*Asociación Profesional Elite Taxi* (AG Opinion), 2017, point 13).

⁹ *Eturas* was the holder of the exclusive rights and the administrator of the E-TURAS online travel reservation system. The latter was controlled by *Eturas* and could be integrated into individual websites of travel agencies licensed by it. The *Eturas* standard license agreement did not contain any provision allowing the administrator to modify the price of the services provided by the agencies using the system.

¹⁰ The Advocate General has named in his opinion participation in a meeting or an exchange of e-mails as usual methods of communication in the business world (point 60). The Lithuanian competition authority had fined several agencies for concerted practices related to the usage of a common online travel reservation system. The operator of the reservation platform had sent the travel agencies participating in the system an electronic message capping the rebates that could be granted for products sold via the system and had technically adapted the system to implement this cap. AG immediately realized that the Court had a rare occasion to interpret the concept of a concerted practice, separately from the related concepts of an agreement or a decision adopted by an association of undertakings. It had to clarify the circumstances under which unilateral communication may result in a concerted practice between the addressees and the sender.

How can one distance themselves from a concerted practice in a virtual space? According to the AG, an undertaking may have two possibilities: either it publicly distances themselves from the content of the illicit initiative or, otherwise, report it to the administrative authorities. The Court has considered that an undertaking may not only use these two possibilities but also adduce other evidence, such as evidence of systematic application of a discount exceeding the cap in question¹¹, whereas the AG has considered that it would be insufficient to oppose the practice by mere conduct. Moreover, while the Court has not clarified the meaning of public distancing, the AG suggested the undertaking concerned should not only manifest its opposition, but must also adopt an independent conduct on the market. These differences let assume that the Advocate General has provided a stricter and more demanding approach¹² as regards the distancing from the infringement. Despite slightly different approaches, the final message in *Eturas* was quite clear: undertakings should be very attentive when participating in electronic platforms, and once they receive any messages of anti-competitive nature, they should *distance* themselves from such messages *as clearly as possible*.

The mentioned examples are mostly linked with digital platforms and the legal nature of its activities¹³ and its impact on the interpretation of EU law (information services, competition etc.). What about when the impact from “what is the nature of services” extends to a broader social context? Here we may invoke the example of *Cali apartments and HX* as approached by AG Bobek (2020). It illustrates the new challenges for balancing the private and public interests in light of peer-to-peer economies.

The Cour de cassation (France) has requested the CJ to deliver a preliminary ruling on a number of questions related to the application and interpretation of the EU Service directive (Directive 2006/123/EC, 2006) and the proportionality of a national measure introducing certain requirements/restriction on economic activities¹⁴. The main objective of introducing certain requirements¹⁵ for the City of Paris was to tackle the long-term housing shortage due to the increased short-term letting market caused by the peer-to-peer economy.

It seems that AG Bobek (*Cali apartments and HX*, 2020, point 4) rightly pointed out that the referring court opened up a truly thorny issue: what criteria or measures would be proportionate to the public interest in the objectives pursued? As regards the municipal rules of the City of Paris, to what extent can the grant of such an authorization be made conditional upon an offset requirement in the form of the concurrent conversion of non-residential premises into housing?

Admitting that in general and per se, an offset requirement could indeed be a way to address a

¹¹ Differently from the Advocate General, the Court accepted that distancing can be demonstrated by behavior on the market, but on condition that it is ‘systematic’. Thus, proof of a systematic application of a discount exceeding the ceiling in question would be sufficient to rebut the presumption of participation in the concerted practice (*Eturas and Others*, 2016, paragraph 49 and operative part). The latter approach allowed the national court considerably reduce the number of undertakings sanctioned by the national competition authority.

¹² Although to our personal view the Court’s approach looks more balanced one should not deny that the AG approach on the subject matter might also find certain supporters among legal scholars and practitioners.

¹³ See, for example, the Court of Justice of the European Union judgment in *Airbnb Ireland* (2019), concerning Airbnb, and judgments in *Asociación Profesional Elite Taxi* (2017) and *Uber France* (2018), concerning Uber.

¹⁴ Cali Apartments and HX (each owned a studio apartment located in Paris) have been fined for the unauthorised letting of their respective studios in Paris. Under French law, the repeated letting of furnished accommodation for short periods to a transient clientele which does not take up residence there is subject to authorisation. The Appellants have challenged that authorisation requirement before the national courts as being incompatible with their freedom to provide services under EU law.

¹⁵ The most disputable one was so called offsetting requirement, meaning that landlord wishing to let the furnished flat for a short duration must buy commercial premises (not just anywhere in Paris, but in the same arrondissement (district) or even neighborhood) of the same size as the flat and turn them into residential premises.

housing shortage problem, the AG was against the appellants' point of view that the offset requirement might be outdated and unsuitable in a digital economy. It cannot be stated that that requirement is in and of itself incompatible with Article 10(2)(c) of the Services Directive (*Cali apartments and HX*, 2020, point 133).

It is obvious that most freedoms and rights are not absolute. Having reiterated that, the AG, however, raised quite interesting remarks that might be useful not only for a referring court but also for other national jurisdictions to be dealt with similar issues. The Grand Chamber of the Court (*Cali apartments and HX*, 2020) has confirmed the most conclusions of AG Bobek. Some legal, economic and social observations and questions raised by the AGs' opinion that did not appear in the CJ judgement, however, might be helpful for national lawyers and judges, in particular administrative ones, facing a number of similar challenges.

The latter brief examples reflect that in cases posing new legal questions, the Advocates General have no choice and are obliged to become the generators of ideas. Their opinions play a role as a starting point for the Court. Even if their proposals are not followed, they are the first to have expressed their points of view that inevitably impact the legal debate, researcher's commentaries, etc.

3. AGs' Opinions as a Source of Different Views

Another important factor of AGs' opinions is their capacity to promote a diversity of points of view. Firstly, AGs' opinions typically set out the arguments in favour and against each possible choice and examine their consequences. The CJ judgments are not aimed to discuss every detail and option reflected in AGs' opinions. Nevertheless, the element of transparency of all legal arguments raised is a great value per se. AGs' opinions in some way secure the public that various options have been taken into consideration, and even if the Court does not speak about all of them, they have reached "the ears of the Court."

Wightman, also known as *Brexit*, can serve as a good example of an AG opinion (*Wightman and Others*, 2018) providing the Court and the general public with a variety of perspectives, presenting possible solutions, etc. In that case, a Scottish court had requested the Court of Justice to determine whether a Member State, after notifying its intention to withdraw from the EU, may revoke that notification (possibly unilaterally). Article 50 of the Treaty on European Union (TEU, 2016) did not provide any clear answer on that issue: it has set out the possibility for a Member State to decide to withdraw from the EU and some vague rules about the notification procedure. There was no indication, however, about the possible revocation of this notification.

Accordingly, AG Campos Sánchez-Bordona had started his analysis admitting that there was no clear answer to the received questions and that three different options were possible¹⁶. The AG has also paid attention to the existing debate on the question at issue both in the Member States and in the legal literature (point 59). He was of the opinion that EU law allowed the unilateral revocation of the notification of the intention to withdraw from the EU. The AG also stressed that although the reasons in favour of withdrawal notifications being revocable were more convincing, the ones against such a revocation did not lack weight as well (point 96). The whole analysis provided by the AG was structured on reflecting different positions and possibilities as well as supporting arguments. The Court judgment (*Wightman and Others*, 2018) was more concise than the AG opinion but it reached

¹⁶ As Article 50 TEU does not expressly answer such an apparently simple question, three solutions are possible: (a) no, not in any case; (b) yes, unconditionally; or (c) yes, under certain conditions (point 59).

the same conclusion. Thus, in this case the AG opinion could also be viewed as a supplement of the judgment, providing a more detailed reasoning for the solution of the case. Undoubtedly, the legal thinking reflected in the AG opinion was analysed by judges. The novelty of the legal issue related to the interpretation of Article 50 TEU deserved it. Could even the lawyer be aware about so many possible different approaches on the subject matter, summarized in one document? Sure, for a narrow circle of specialized lawyers, this was no novelty. For the broader legal community or even political sciences, however, the latter AG opinion could give rise to many ideas. For instance, it should stimulate the drafters of the EU legislation to be more precise in constructing legal texts.

Secondly, the status of Advocates General allows them to discuss the issues in a more direct manner, not even avoiding stronger assessments. One shall agree with the opinion that the function of AGs gives the incumbent two precious gifts: individuality and freedom, which are not available to judges. The freedom enjoyed by AGs guarantees that important, controversial or new issues are constantly highlighted before the Court (Albors-Llorens, 2012, p. 512). For example, in *Achmea*, AG Wathelet, commenting the positions of parties, evaluated the Commission's position as "striking" (*Achmea*, 2017, point 39). AG Bobek, making no attempt to hide his frustration about the Hungarian authorities' argument in *Torubarov*, was also quite direct: "That is, in my view, a curious argument, in which the cart is put before the horse, with an accusation made immediately thereafter that the horse is lame because it is not able to pull the cart properly" (*Torubarov*, 2019, point 82). It was the AG's reaction to a Member State's argument that the consistency of the case law could be better ensured by depriving the courts of the power to alter decisions while leaving the power to decide the merits of asylum applications to the administration. In one of recent opinions, AG Bobek, while discussing the way of interpretation of the secondary law proposed by some parties, expressed his clear disagreement by adding that it should be "a recipe for a legal chaos" (*Federatie Nederlandse Vakbeweging*, 2020, point 46). In the Court of Justice judgments, one would hardly ever see such comments. This is the advantage of AGs position, as cases can be analysed in a more flexible manner and therefore often can be seen from a different angle.

Thirdly, from time to time, AGs enter into a debate with an existing case law, suggesting different interpretation of certain legal norms. Let us take the recent AG Hogan's opinion in *Lovaszé Tóth* (2020). Despite the quite clear distinction of the Court¹⁷ on two criteria regarding the interpretation of the notion of "contrary to requirement to good faith" of Article 3(1) of the Service Directive 93/13 (Directive 93/13/EEC, 1993), the AG did "not think that these two criteria should be assessed separately" and supported the latter statement by certain reasoning (points 56–67) that does not seem unreasonable¹⁸. The same AG Hogan point of view was reiterated later on (*Profi Credit Polska and others*, 2020, points 101–102).

Even decades ago, the Advocates General were not silent. In *Leur-Bloem* (1996), AG Jacobs raised a question whether regarding the disputes arising in a non-EU (then – Community) context, the Court might forestall the incorrect application of Community law in the future. Admitting that "there is some force" in the Court's argument, AG Jacobs concluded that it was "not convincing" and provided his

¹⁷ See judgments in *Aziz* (2013, paragraphs 68 and 69), *Kiss and CIB Bank* (2019, paragraph 50 and 51) and *Profi Credit Polska* (2019, paragraph 55).

¹⁸ For instance, according to AG Hogan, since in the legal systems which use this precept, good faith is always presumed, the expression 'contrary to the requirement of good faith' should be understood as referring simply to the situation that would have prevailed in the absence of a significant imbalance and *not* as constituting a separate condition *in its own right*. Put another way, the words 'contrary to the requirements of good faith' are essentially descriptive of the state of affairs which is brought about where there is, in fact, a significant imbalance in the parties' rights and obligations such as to give rise to detriment of the consumer (point 58).

point of view on the subject matter, underlying that the “threat to the proper application of Community law in the State concerned would at most be only indirect and temporary.” In any case, according to him, “Community law will be interpreted and applied primarily by national courts” (points 48–50).

In *Kofisa Italia* (2000), AG Ruiz-Jarabo Colomer reiterated that AGs were not in favour of the case law, stressing that on the subject matter, “the Court of Justice never followed the proposals of its Advocates General.” The AG kept in mind the Court’s jurisdiction to interpret EU (then – Community) law in cases in which the national legislature has decided to rely on Community provisions in order to regulate matters that lie within the scope of domestic law. The AG was not persuaded by the arguments of the Court, since the latter was “making the scope of Community law and, therefore, its own jurisdiction, dependent upon decisions by Member State authorities” (points 17–39).

Entering into debate with the existing case law, AG Poiares Maduro, for instance, highlighted some ambiguity of the Court’s jurisprudence. In *Halifax and Others* (2005) the AG paid attention that the use of the term “abuse of rights” as it was used in the case law might actually be misleading. In the given case he suggested the term “prohibition of abuse of Community law,” explaining that the term “abuse of rights” will be used only where simplicity so requires (point 71).

Fourthly, ongoing quite intensive application of the EU Charter present AGs with certain opportunities to deliver their legal thinking regarding interpretation of the latter, including that in relation with the European Convention of Human Rights (hereinafter also referred to as “ECHR”). For instance, in *FMS and others* (2020), AG Pikamae was of the opinion that the Court of Justice might give an interpretation to rights contained in the Charter that are similar in content to those enshrined in the ECHR, resulting in a higher level of protection than that guaranteed by the latter (point 179). Indeed, *FMS and others* deserves an exceptional attention. An accession of the EU to ECHR remains a delicate issue¹⁹. Luxembourg and Strasbourg courts try to avoid discrepancies while applying their own legal instruments. There is no secret: the ECHR and EU Charter in many cases are similar. Nevertheless, there are nuances that allow one or the other to take a lower or higher *note in partitura*. Thus, *FMS and others* is interesting in the sense that the European Court of Human Rights has already touched certain issues regarding the legal status of the transit zone in Hungary²⁰. The issue later on was put on the desk of the Court of Justice. The AG, however, highlighted the specific circumstances of the factual situation at issue and reasoned why a higher degree of protection at the EU level based on the interpretation and application of the EU Reception Directive (Directive 2013/33/EU, 2013) should be granted²¹. The Court agreed with the AG’s proposals and ruled accordingly (*FMS and others*, 2020).

Fifthly, an academic debate can find its way to the Court through AGs’ opinions as well. AGs often engage in academic debate in an explicit and public manner, what is usually not the case considering

¹⁹ See Opinion 2/13 of the Court of Justice.

²⁰ In *Ilias and Ahmed v. Hungary* (2019) the European Court of Human Rights held that the accommodation of two third-country nationals in the Röszke (Hungary) transit zone did not constitute a deprivation of the ‘right to liberty and security’ for the purposes of the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²¹ In addition to *Ilias and Ahmed v. Hungary* approach, AG Pikamae suggested that the Court of Justice was empowered to interpret the provisions of EU Charter, relating to the plaintiffs’ rights, independently, specifying that those provisions were already incorporated in the definition of ‘detention’ set out in the Reception Directive. Thus, while the Charter requires that the rights enshrined therein and corresponding to the rights guaranteed by the ECHR should be interpreted as having the same meaning and scope as those conferred by the ECHR, the Court of Justice might give an interpretation to rights contained in the Charter which are similar in content to those enshrined in the ECHR resulting in a higher level of protection than that guaranteed by the latter (point 179). Thus, he proposed the Court to decide that the plaintiffs in the given cases were placed ‘on detention’ in the meaning of article 2(h) of the Directive 2013/33 (point 178).

CJ judgments, even if they are drafted while taking academic insights into consideration as well (Hinarejos, 2012, p. 17). There are numerous cases about AGs opinions citing or referring to the legal doctrine. For example, the analysis of the legal doctrine played a meaningful role in the *Brexit* case. AG Campos Sánchez-Bordona has referred to a number of opinions expressed in the legal doctrine, compared and used them to reflect the diversity of points of view as regards the United Kingdom's right of unilateral revocation of the notification to withdraw from the EU. In controversial cases, such referrals help to reflect different possibilities and prove that various options were well taken into consideration.

Sixthly, Advocates General often cite not only legal doctrine but also literary fiction, poetry or philosophical works. Although in most cases the latter have nothing to do with legal rules or theories, AGs seem to be willing to use them in strengthening their positions. It could be thus said that AGs have at their disposal more means for conveying their arguments. By using Homer's expression that words have wings, in comparison with the Latin expression *verba volant, scripta manent*, in the context of a case of possible discrimination, AG Sharpston attempted to ground her point of view that in certain cases, particularly in modern society, the spread of speech is immediate and wide (*Associazione Avvocatura per i diritti LGBTI*, 2019)²². The Court has followed the AG's proposals and ruled accordingly (*Associazione Avvocatura per i diritti LGBTI*, 2020)²³. Sometimes a parallel with instances of daily life can help understand a case better than any sophisticated legal analysis. For example, in one of her opinions (*Lesoochránárske zoskupenie VLK*, 2016), AG Kokott began her analysis by referring to the well-known, law-inspired works of Franz Kafka (having in mind *Before the Law*) and the story of Don Quixote. The AG gave a short reminder of these stories²⁴ that, in her point of view, could be although not legal yet a quite convincing argument supporting her proposal to the Court. AG Kokott compared these stories to the situation that had reached the Court, saying that this is how a non-governmental organization was endeavouring without success to obtain judicial protection before the Slovak courts. Or another recent situation, where AG Bobek ironically juxtaposed the possibility of "travelling without moving," referencing Frank Herbert's *Dune*, and "disclosing without giving," the core element of the legal dispute in the given case (Leino-Sanberg, 2020, points 1–2)²⁵.

Thus, AGs' opinions are less formal than the Court of Justice judgments and therefore often contain elements that provide a more extensive presentation about the issue at stake. Just a few passages of the AGs' opinions mentioned above help theoretical legal constructions or, in other words, "the law in books," to be converted into "the law in action," which is more understandable to the general public. An overview of existing different opinions, legal doctrine or other readings as well as an outright attitude towards circumstances of a case assure a versatile approach and give a comprehensive vision of a situation both to the Court of Justice and the public.

²² AG, among other issues has raised an interesting legal question whether was it possible, in the absence of an identifiable victim, for an association to seek to enforce of the prohibition of discrimination in employment and occupation, including through the award of damages? (point 1).

²³ While interpreting Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (2000) the Court has affirmatively answered to the question referred by the national court and raised in AG Opinion mentioned in reference above (point 66).

²⁴ 'In Kafka, the man seeking justice is for no discernible reason denied access to the court and eventually dies of exhaustion. Don Quixote, on the other hand, insists on tilting at windmills instead of devoting himself to more sensible pursuits' (point 2).

²⁵ The case related to an access to documents of the EU institutions provided by Regulation (EC) No 1049/2001. Request for access by a third party to a document that was being challenged before the General Court at the time of the request. The European Parliament refused to grant access on the basis of the protection of court proceedings.

Finally, a vast majority of AGs' opinions reflect the Court of Justice jurisprudence and its development in a given legal area. It increases, together with the Court of Justice judgements, the understanding of EU law, its interpretation and application. Yet more importantly it also inspires legal debate, including criticism, which is valuable for the development of legal thinking in general.

A Few Concluding Observations

1. In addition to observations in *Advocate General at the Court of Justice: Any Doubts? Part I* (Valančius, 2020), Advocates General play an important role in generating progressive legal ideas and actively participate in the relevant debate. Some propositions by the AGs had impact on landmark judgments that form the backbone of the EU case law.
2. In dealing with new legal issues, Advocates General become pioneers that inspire the further development of jurisprudence. AGs' opinions play the role of a starting point for the Court as well. Even if their proposals are not followed, they become the first perspectives on some issues and inevitably affect legal debates and studies.
3. Advocates General opinions are less formal than Court of Justice judgments and therefore often contain elements that provide a more extensive presentation about the issue at stake. Certain metaphors employed by AGs help theoretical legal construction or "the law in books" to be converted into "the law in action," which is more understandable for the general public.
4. As indicated in *Advocate General at the Court of Justice: Any Doubts? Part I*, the title of this paper, concluded with the phrase "any doubts?" regarding the institute of Advocate General in the Court of Justice, could be interpreted as a call to look for better solutions were improvements are due. Anyhow, it should be added that the phenomenon of AGs during the past decades has proven to be nothing but beneficial.

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Advocates General at the Court of Justice: Any Doubts?

Part II

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S u m m a r y

The article continues a brief overview of some features of Advocates General of the Court of Justice of the European Union and analyses the influence of their opinions on the case law of the Court. It focuses on the opinions of Advocates General and the judgments of the Court both when the AG propositions are followed and when they are not.

The provided analysis leads to several concluding remarks. Firstly, Advocates General play an important role in generating progressive legal ideas and actively participate in the relevant legal debate. Some AGs propositions had impact on the landmark judgments that form the basics of the EU case law. Secondly, for new legal issues, Advocates General become pioneers that inspire the development of jurisprudence. AGs' opinions play the role of a starting point for the Court as well. Even if their proposals are not followed, they frequently become the first voiced perspectives on some issues, and this has an inevitable impact at least on legal debates and studies. Thirdly, Advocates General opinions are more informal than Court of Justice judgments and therefore often contain elements that provide a more extensive presentation about the issue at stake. Certain metaphors employed by the AGs help theoretical legal construction, or "the law in books" to be converted into "the law in action," which is more understandable for the general public.

Generaliniai advokatai Teisingumo Teisme: ar kyla abejonų?

II dalis

Virgilijus Valančius

(Europos Sąjungos Bendrasis Teismas)

S a n t r a u k a

Straipsnyje toliau aptariami kai kurie Europos Sąjungos Teisingumo Teismo generalinių advokatų bruožai ir analizuojama jų nuomonių įtaka teismui. Tyrimas grindžiamas Teisingumo Teismo praktika. Jame taip pat išryškintos generalinių advokatų nuomonių ir Teisingumo Teismo sprendimų sąsajos tiek tais atvejais, kai generalinių advokatų pateikti siūlymai yra priimami, tiek kai Teismas jais nesiremia.

Straipsnyje atlikta analizė leidžia padaryti keletą apibendrinamųjų išvadų. Pirmia, generaliniai advokatai atlieka svarbų vaidmenį kuriant progresyvias teisines idėjas ir aktyviai dalyvauja susijusiose diskusijose. Kai kurie generalinių advokatų siūlymai yra padarę didelę įtaką pamatiniams Teisingumo Teismo sprendimams, sudarantiems ES jurisprudencijos pagrindus. Antra, susidūrę su naujais teisiniais klausimais, generaliniai advokatai tampa atitinkamos jurisprudencijos vystymo pradininkais. Generalinių advokatų nuomonės taip pat yra pradžios taškas bylą nagrinėjančiam Teisingumo Teismui. Net jei generalinių advokatų siūlymais nėra pasiremiama, jie neretai pirmieji pareiškia savo nuomonę tam tikrais klausimais, ir tai neišvengiamai turi poveikį teisiniams debatams ir mokslininkų komentarams. Trečia, generalinių advokatų nuomonės yra mažiau formalios nei Teisingumo Teismo sprendimai ir dėl to jose dažnai yra elementų, pateikiančių platesnę nagrinėjamo klausimo analizę. Generalinių advokatų naudojamos metaforos padeda teorinę teisinę konstrukciją arba, kitaip tariant, „formaliąją teisę“ paversti „veikiančia teise“, kuri visuomenei yra suprantamesnė.

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