

Dámaso Ruiz-Jarabo Colomer and Manuel López Escudero, The institution of Advocate General at the Court of Justice

Caption: This study highlights the specific features of the institution of Advocate General, his or her institutional status and role within the Court of Justice of the European Communities. Ruiz-Jarabo Colomer has been an Advocate General at the Court of Justice since 19 January 1995.

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Dámaso Ruiz-Jarabo Colomer
and
Manuel López Escudero

The institution of Advocate General at the Court of Justice of the European Communities

[...]

1. Introduction

The status and duties of Judges at the Court of Justice are very similar to those of national judges; accordingly, they are not particularly difficult to understand. In contrast, the institutional position and role of the Advocate General within the highest Community court are less obvious, since similarities with certain figures in national legal systems are only superficial.

The Community Advocate General was established in the ECSC system. Although no reference is made to the office in the Treaty of Paris of 18 April 1951, there is one in the Protocol on the Statute of the Court of Justice annexed to the Treaty. The creation of an Advocate General attached to the Court of Justice was the result of a proposal from the French delegation. In its report on the Treaty establishing the ECSC, the delegation observed that ‘this institution, despite the name, which could have caused confusion, is the counterpart of the *commissaires du gouvernement* who generally exist in France in administrative courts and, in particular, in the judicial section of the Council of State. Everyone is aware of the high degree of independence traditionally enjoyed by the body of *commissaires du gouvernement* of the Council of State and the importance of the role which these members of the courts have performed and continue to perform, both in developing case-law and in their interaction with academic lawyers. It is with the conviction that such an institution will bring these same beneficial effects to the new Court that our partners have agreed to take advantage of the fruits of an essentially French experience.’⁽³⁾

More than 40 years of active involvement have enabled the institution of Advocate General to acquire its own special characteristics. [...]

II. The institutional position of the Advocate General

Under Articles 165 and 166 of the EC Treaty [now Articles 221 and 222], as amended by the most recent Act of Accession, the Court of Justice consists of 15 Judges and is assisted by eight Advocates General⁽⁵⁾. Despite the difference in terminology between these two provisions, Judges and Advocates General have identical institutional status, whilst carrying out different functions⁽⁶⁾. As the Court has stated, ‘without prejudice to their specific function, [Advocates General] are members of the Court in the same way as the Judges. As such, moreover, they have the same responsibilities with regard to administrative decisions and are concerned in the same way with the functioning of the institution’⁽⁷⁾. This identical status is clearly reflected in almost all the elements which comprise what might be called the ‘institutional status’ of the Advocate General.

1. The institutional status of the Advocate General

(a) Method of appointment and term of office

In the same way as Judges, Advocates General are appointed by common accord of the governments of the Member States. In practice, the Member State in question puts forward a nominee who is accepted by the other States. The eight Advocate General posts are allocated on the basis of a political agreement between the Member States, under which one post is accorded to each of the five ‘big Member States’ (France, Germany, Italy, Spain and the United Kingdom), whilst the other three posts are assigned on a rotation basis to the other States, in alphabetical order based on the name of each Member State in its own language,

namely: Belgique (1988–1994), Danmark (1991–1997), Ellas (1994–2000), Ireland, Luxembourg, Nederland, Österreich, Portugal, Suomi, and Sverige ⁽⁸⁾.

There is, for a transitional period, a ninth Advocate General, whose term of office expires definitively on 6 October 2000. It is held by an Italian legal expert, *A. M. La Pergola*, who, at the time of the accession of Austria, Sweden and Finland, had held the post of thirteenth Judge since October 1994. Since Norway ultimately did not join, the number of Member States rose to fifteen, an odd number which did not call for the appointment of an additional Judge in order to avoid an equal split of votes in deliberations. The Judge's post of *A. M. La Pergola* was therefore converted into an Advocate General's post ⁽⁹⁾.

The third paragraph of Article 167 of the EC Treaty requires a partial replacement every three years, with four Advocates General being replaced on each occasion. Their term of office, like that of Judges, is six years. However, the fourth paragraph of Article 167 of the EC Treaty allows Judges and Advocates General to be reappointed for an unlimited number of successive terms. Whilst it is true that the practice followed in this regard has never undermined either the independence of the Community courts or the continuity of their case-law, these fundamental values would nonetheless undoubtedly be reinforced by longer, but non-renewable, terms of office. This is, moreover, the position of the Court of Justice itself ⁽¹⁰⁾. It would be particularly appropriate to make a change along the lines advocated in the case of Advocates General. They are more vulnerable to criticism and pressure than Judges in so far as they deliver their Opinion in a personal capacity and they are not protected by the secrecy of the deliberations of the Court.

Like Judges, Advocates General take up their office on the date laid down in the instrument of appointment or, in the absence of any such provision, on the date of the instrument ⁽¹¹⁾. Traditionally, the term of office commences on 7 October and ends on 6 October of the year in question. However, where the appointments are the result of the accession of new Member States, the term of office commences on the date of such accession ⁽¹²⁾.

The duties of an Advocate General end as a result of normal replacement, death, resignation or if, in the unanimous opinion of the Judges and other Advocates General of the Court, he no longer fulfils the requisite conditions or meets the obligations arising from his office ⁽¹³⁾. If Advocates General are obliged to end their duties before their term of office has expired, they are replaced for the remainder of their term ⁽¹⁴⁾.

(b) Conditions of access to the office

Under the first paragraph of Article 167 [now Article 223] of the EC Treaty, Advocates General and Judges must be 'persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence ...'

The first qualification that a candidate must satisfy if he is to be appointed as Advocate General is that of total independence. Since it is a non-material qualification, it is difficult to verify in practice, but it does not sit well with internal appointment procedures which would take account of the degree of affiliation or attachment to political parties.

The second requirement concerns the professional qualifications of the candidate; he must satisfy the qualifications required in his country for appointment to the highest judicial offices or be a jurisconsult of recognised competence. That is why Advocates General are generally university professors who are held in high esteem, high-ranking members of the judiciary or senior officials in national administrations.

Lastly, there is a third qualification: status as a national of a Member State. Whilst no such requirement is laid down in the EC Treaty ⁽¹⁵⁾, it has always been tacitly applied. Advocates General and Judges have therefore all, without exception, been nationals of a Member State, and each Member State has always proposed one of its nationals as a candidate.

(c) Rights and obligations

The Statute of the Court of Justice and its Rules of Procedure lay down a series of obligations and rights which apply to Judges and Advocates General throughout their term of office.

Before taking up his duties, each Advocate General must, in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court ⁽¹⁶⁾. He then must give a solemn undertaking that, both during and after his term of office, he will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after he has ceased to hold office, of certain appointments or benefits ⁽¹⁷⁾.

Advocates General may not hold any political or administrative office during their term of office or engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council ⁽¹⁸⁾. Since the Court remains permanently in session, Advocates General and Judges are required to reside at the place where the Court has its seat, Luxembourg ⁽¹⁹⁾.

In order to guarantee their independence, Advocates General are immune from legal proceedings during their term of office. After they have ceased to hold office, they continue to enjoy immunity, albeit only in respect of acts performed by them in their official capacity, including words spoken or written. The Court, sitting in plenary session, may waive this immunity and, where criminal proceedings are instituted against them, they are to be tried, in a Member State, only by the Court competent to judge the members of the highest national judiciary ⁽²⁰⁾. Furthermore, the provisions of Articles 12 to 15 and 18 of the Protocol on the privileges and immunities of the European Communities also apply to Advocates General in the same way as to any other officials or staff of the Communities.

The identical institutional status of Judges and Advocates General is also shown in the formal precedence that they hold within the institution. Thus, their respective precedence is determined either by their seniority in office or, alternatively, by age, it being understood that Judges and Advocates General who are reappointed retain their former precedence ⁽²¹⁾.

This identical *status* undoubtedly explains the fact that some judges have been subsequently appointed to take up duties as an Advocate General and vice versa. For example, Advocates General *G. F. Mancini* and *Sir Gordon Slynn* were appointed as Judges in 1988, as was Advocate General *C. Gulmann* in 1994. On the other hand, Judges *A. Trabucchi*, *F. Capotorti* and *A. M. La Pergola* became Advocates General in 1973, 1976 and 1995 respectively.

The fundamental difference between Judges and Advocates General in terms of their institutional status resides in the fact that Advocates General do not participate in the election of the President of the Court of Justice. In this regard, the fifth paragraph of Article 167 [now Article 223] of the EC Treaty provides that the Judges elect the President of the Court of Justice from among their number for a renewable term of three years. The Court has proposed that this provision be amended in order to give Advocates General the opportunity to participate in the election of the President, since they hold the same status as members of the Court as Judges ⁽²²⁾. At all events, an Advocate General may not be elected as President, since that office entails, among other things, presiding over hearings and deliberations of the Court sitting in plenary session, which he is not permitted to do.

(d) The First Advocate General

Under Article 10 of the Rules of Procedure, each year the Court of Justice appoints its First Advocate General. Since 1974, this post has been held in rotation by various Advocates General on the basis of their seniority in office. This procedure gives Advocates General appointed on behalf of the 'big Member States' greater prospects for holding the post of First Advocate General than those of the small Member States, since the latter cannot be reappointed.

The essential function of the First Advocate General is to assign cases to the Advocates General, himself

included, once the President has designated the Judge-Rapporteur. Furthermore, he takes the necessary steps if an Advocate General is absent or prevented from acting. In the absence of any criteria adopted for the allocation of cases, the First Advocate General takes account of the rules of common sense ⁽²³⁾. There is no specialisation, and each Advocate General may deal with cases in the broadest possible fields, although that does not mean that his professional experience is not taken into account so that he may be assigned a certain type of case. As the Advocate General delivers his Opinion in open court, he is not assigned cases in which his Member State of origin is directly involved. Related or similar cases are assigned to the same Advocate General so as to take full advantage of work already done. The assignment of cases may also take account of the linguistic knowledge of the Advocate General and of his legal secretaries in order to reduce the amount of translation required.

2. The post of Advocate General at the Court of First Instance

Unlike the Court of Justice, the Court of First Instance consists only of Judges, and there are no Advocates General. However, all the Judges, with the exception of the President, may perform the duties of Advocate General in a particular case ⁽²⁴⁾. Where a Judge is appointed to that role, his duties are identical to those performed by Advocates General in the Court of Justice. However, an Advocate General is designated only where the Court of First Instance is sitting in plenary session or where, sitting in a chamber, it considers that the legal difficulty or the factual complexity of the case so requires ⁽²⁵⁾.

The Court of First Instance has appointed Judges to perform the duties of Advocate General only in a very small number of cases in its first few years of operation. At present, it sits in chambers, and it seems unlikely, in the light of the significant increase in its workload, that it will appoint an Advocate General again. This practice seems to be entirely reasonable, in so far as the Court of First Instance does not rule as final instance, since an appeal may be lodged against its judgments before the Court of Justice.

III. The role of the Advocate General

Advocates General participate with Judges in the administration of the Court of Justice. However, their primary function is to take part in the proceedings brought before the Court and to make reasoned submissions in the majority of cases.

1. The participation of the Advocate General in proceedings before the Court of Justice

Once the President has appointed the Judge-Rapporteur, the First Advocate General assigns the case to one of the Advocates General, who then, like the Judge-Rapporteur and the President, plays an ongoing and very important part in the progress of the entire proceedings. Whilst the majority of issues raised in the course of the proceedings fall within the remit of the President, he is nevertheless required to take into account the opinions of the Judge-Rapporteur and of the Advocate General, who closely monitor all the stages in the development of the case.

As far as the written stage of the proceedings is concerned, the Advocate General is consulted prior to the adoption of interlocutory decisions on all kinds of procedural issues, such as the formal inadmissibility of the application ⁽²⁶⁾, the introduction of new pleas ⁽²⁷⁾, the joining of several connected cases for the purposes of the written or oral procedure or of the final judgment ⁽²⁸⁾, the use of a language other than the language of the case ⁽²⁹⁾, a parallel action before the Court of First Instance ⁽³⁰⁾ or clearly inadmissible or unfounded appeals ⁽³¹⁾. In all such cases, the Judge-Rapporteur, as soon as he has French translations, or even before then if he knows the language of the case, drafts proposals for a decision after hearing the Advocate General and submits them to the President or to the Court with a view to the adoption of the appropriate decisions.

Upon the completion of the written stage and once the procedural documents have been translated into French, which is the working language of the Court, the Judge-Rapporteur begins the consideration of the case and gives the Advocate General advance notification of when he expects to present the results to the general meeting. The Advocate General may also begin his consideration of the case and inform the Judge-Rapporteur that he has done so.

After the consideration, the Judge-Rapporteur draws up a draft preliminary report ⁽³²⁾ and a draft Report for the Hearing or, if he does not propose that a hearing be held, a draft report by the Judge-Rapporteur, which he forwards to the Advocate General for approval ⁽³³⁾. If the Advocate General agrees with the proposals submitted by the Judge-Rapporteur, or if he makes suggestions which are accepted by the Judge-Rapporteur, the two reports are distributed to the other members of the Court. On the other hand, if the Advocate General takes a different position, he may submit a note to the general meeting.

The general meeting is attended by Judges, Advocates General and the Registrar. The Judge-Rapporteur and the Advocate General summarise the points raised by the case, and the general meeting decides, *inter alia*, on the assignment of the case to the Court or to one of the chambers (plenary, small plenary, chamber of five or three judges), the need for a hearing and the possible adoption of measures of inquiry. As far as evidence is concerned, the Advocate General is heard, after which the Court, by means of an order, prescribes measures of inquiry, in which he takes part ⁽³⁴⁾. The Advocate General is consulted where the Court orders the examination of witnesses, who may be summoned at his request and to whom he may put questions ⁽³⁵⁾. The extension or the renewal of a measure of inquiry also requires prior consultation of the Advocate General.

Where it is decided not to open the oral stage of the proceedings, the Advocate General announces in the general meeting the date on which he will deliver his Opinion, taking account of the fact that the report of the Judge-Rapporteur must first be forwarded to the parties. Where a hearing is held, the Advocate General plays a very important role. On the dais to the right of the Judges, he may, in the same way as the Judges, put questions to the agents, advisers or lawyers of the parties ⁽³⁶⁾. In practice, it is the Judge-Rapporteur and the Advocate General who put the majority of the questions of fact, since they have the best knowledge of the case. The Advocate General delivers his Opinion, under Article 59 of the Rules of Procedure, before the closure of the oral procedure, which is thus concluded, unless the Court, having heard the Advocate General, orders the reopening of the procedure ⁽³⁷⁾.

In addition to the involvement referred to above, the Advocate General is consulted in connection with many other procedural steps and issues ⁽³⁸⁾, among which the following should be noted:

- exclusion of advisers or lawyers from the proceedings ⁽³⁹⁾;
- rectification of any errors or slips in a judgment ⁽⁴⁰⁾;
- disputes concerning costs ⁽⁴¹⁾;
- applications for legal aid ⁽⁴²⁾;
- decision to stay the proceedings ⁽⁴³⁾;
- adoption of interim measures ⁽⁴⁴⁾;
- procedural issues ⁽⁴⁵⁾;
- exceptional review procedures ⁽⁴⁶⁾;
- application for interpretation of a judgment ⁽⁴⁷⁾;
- settlement of questions referred for a preliminary ruling which are identical to others on which the Court has already ruled, by means of a reasoned order in which reference is made to the previous judgment ⁽⁴⁸⁾.

As may be seen, the Advocate General is actively involved, normally in the form of a mandatory consultation, at all stages of the proceedings.

2. Presentation of reasoned submissions in open court

The second paragraph of Article 166 [now Article 222] of the EC Treaty provides as follows: ‘It shall be the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it in Article 164 [now Article 220].’ The presentation of reasoned submissions in open court is, without any doubt, the primary function of Advocates General and their most significant contribution in proceedings brought before the Court of Justice.

In principle, each case is assigned to an Advocate General. However, there is one exception with regard to Opinions on the compatibility with the treaties establishing the European Communities of international agreements which the Community is preparing to conclude with third countries or with international organisations. In this procedure, which does not take place before the Court, the President appoints a Judge-Rapporteur but not an Advocate General to make submissions on the request for an Opinion, since the Court merely summons all the Advocates General to hear their opinion in accordance with Article 108 of the Rules of Procedure. In our view, this exception should be abolished, and an Advocate General should also be appointed to make submissions on requests for an Opinion in view of the difficulty and importance of the legal problems which they generally raise. In such procedures, the submissions made by an Advocate General would prove more useful than, for example, in actions for failure to fulfil obligations where the existence of the breach of obligations is not even discussed.

On the other hand, notwithstanding the wording of Article 166 [now Article 220] of the EC Treaty ⁽⁴⁹⁾, the Advocate General does not necessarily deliver an Opinion in all the cases to which he is appointed. In order for the Advocate General to draft his Opinion, it is necessary for the procedure to be concluded normally, without any procedural issues which might prevent the case being settled by a judgment. If a procedural issue arises, the Court takes an interlocutory decision, in the form of an order, which merely requires the Advocate General to be heard first, but not to deliver an Opinion. Where a procedural issue arises (for example, the withdrawal by the national court of questions referred for a preliminary ruling or an application to discontinue in a direct action) after the Opinion has been delivered, the case may be concluded by an order of the President to remove it from the register and the Opinion is then not published in the official reports of cases, unless the Advocate General so requests ⁽⁵⁰⁾.

Although the Rules of Procedure include it formally in the oral stage of proceedings, the practice has developed, and the delivery of the Opinion constitutes a very distinct stage of the oral procedure, except in extremely simple cases where the Advocate General delivers his Opinion at the end of the hearing. The Advocate General delivers an Opinion in all cases, whether they give rise to an oral procedure or not. Furthermore, the Opinion is always presented in writing, distributed to all members of the Court and delivered to them in open court after the hearing ⁽⁵¹⁾, even though, in exceptional cases, the Opinion is delivered at the hearing itself ⁽⁵²⁾.

After the hearing, the Advocate General merely drafts his Opinion in his mother tongue and sends it for translation into French and into the language of the case, if it is an official language other than his mother tongue or French. Translations into the other official languages are carried out at a later date and, at all events, before the judgment is delivered. After a period of four to six weeks after the hearing, which is necessary in order to finalise the text and carry out the translations, the Opinion is read in open court by the Advocate General present at the hearing held on that date, who will not, in most cases, be the author of the Opinion. Before 1990, the text was read in its entirety, but since then the reading has included only the final part, which sets out the ruling which the Advocate General proposes should be given by the Judges hearing the case. Moreover, this reading has become a simple formality, since the Judges receive the text of the Opinion before it is delivered and the parties are not able to comment on or discuss the Opinion ⁽⁵³⁾.

The delivery of the Opinion ends the oral procedure, and the case then enters the deliberation phase. This means that, save in exceptional cases where the oral procedure is reopened, the parties may make observations on the Advocate General’s Opinion. In one staff case, the European Parliament requested the reopening of the oral procedure, asserting that, in his Opinion the Advocate General proposed the annulment

of the probationary report on the ground that it was incomplete and that Parliament had not been able to submit observations on this ground, which was not relied on by the applicant. The Court of Justice declared that to grant such a request ‘... would be tantamount to enabling the parties to discuss the Advocate General’s Opinion, which under Article 59(2) of the Rules of Procedure marks the end of the oral procedure’ ⁽⁵⁴⁾.

The Advocate General’s involvement in the proceedings ends when he delivers his Opinion, since he does not take part in the deliberations on the drafting of the judgment, which involves only the judges of the Court or the chamber hearing the case. The text of the Opinion and that of the judgment are published officially in the Reports of Cases before the Court of Justice and the Court of First Instance.

The Opinion constitutes a reasoned proposal for a decision in the case which has been drafted impartially by an independent legal expert, the Advocate General, in order to assist the Judges of the Court in their work. The principal characteristics of Opinions, which are quite different from judgments ⁽⁵⁵⁾, are as follows:

- they normally contain an analysis and a detailed explanation of the facts of the case and the arguments of the parties, which are very helpful in understanding the dispute, especially now that the Report for the Hearing is no longer published in the Reports of Cases;
- they generally conduct an exhaustive examination of the case-law of the Court of Justice which may be applicable to the case;
- increasingly frequently, they include references to legal theory in support of their arguments;
- they usually give a response to all the legal questions raised in the dispute, even if they are not strictly necessary for the decision that will eventually be adopted;
- they represent a text from the pen of a single author, which gives them a certain personal style and allows a more homogenous discourse than in judgments, where the agreement of several judges is necessary. It should be noted that, despite the differences in style between the Opinions of different Advocates General, there is a certain consensus on structure, which means that the presentation of Opinions usually follows a similar pattern.

By virtue of these characteristics, the Opinion of the Advocate General has a significant impact which, *inter alia*, takes the following forms: it is a point of reference for the Judges’ deliberations, it assists with understanding of the judgments of the Court of Justice, and it has an influence on the shaping and development of Community case-law.

(a) The Opinion of the Advocate General, a point of reference for the Judges in their deliberations

After the Opinion has been delivered, the Judge-Rapporteur may open the deliberation phase in various ways which are determined by reference to the Opinion. If the Judge-Rapporteur concurs with the proposals made by the Advocate General, he submits a draft judgment which is consistent with the Opinion, unless another Judge requests a prior deliberation ⁽⁵⁶⁾. If the Judge-Rapporteur does not share the view of the Advocate General, he may, taking full responsibility, present a draft judgment to open the deliberations, or he may submit to the other Judges, as the initial basis for discussion, an introductory note to the deliberation, which is then opened by a sitting devoted to a discussion of the main thrust of the reasoning and the decision to be taken in the judgments ⁽⁵⁷⁾.

The Advocate General does not participate in the Judges’ deliberations, since his involvement in the proceedings ends when the Opinion is delivered. However, his point of view is known, and the Judges take it into account in their discussions on the substance of the judgment ⁽⁵⁸⁾.

(b) The Opinion of the Advocate General facilitates understanding of judgments

In the Court of Justice, Judges do not have the right to give dissenting opinions. Judgments are therefore either the fruit of a consensus or are based on the opinion of the majority of Judges which emerges in the course of the deliberations. However that may be, judgments are a collective work, drafted in a language, French, that is known by all the authors but that is not the mother tongue of the majority of them. On the other hand, the ‘prudence’ required by any court, all the more so when it rules as final instance, means that judgments must be limited to the reasoning required for a decision in the dispute. These two factors, which are linked to the still incomplete nature of the Community legal system and the technical complexity of many of its rules, mean that some of the judgments of the Court of Justice do not have the desirable clarity and include fairly laconic reasoning.

This is a factor which gives very considerable added value to the Opinion of the Advocate General, as an aid for understanding the significance and the implications of the judgments of the Court of Justice. The Opinion plays such a role not only where the judgment adopts the proposals submitted by the Advocate General but also where it adopts a different course of action ⁽⁵⁹⁾.

There has been no statistical study on the percentage of cases in which the judgments concur with the Opinions of the Advocates General, undoubtedly on account of one of the difficulties which such a study would entail. Judges are not under any obligation to state in their judgments whether or to what extent they accept or reject the proposals submitted by Advocates General. In practice, no judgment expressly rejects the Opinion of the Advocate General. Where the judgment concurs with the Opinion, the judgment does not have to contain any reference to the Opinion, cite certain passages in full or make express reference thereto. In addition, the judgment may concur with the Opinion as regards the outcome of the dispute but differ in full or in part in its reasoning.

Where the judgment concurs with the Opinion, as regards both the outcome and the reasoning, which is what happens most frequently, the Opinion will more often than not be very helpful in securing a better understanding of the significance and implications of the judgment. It contains greater detail regarding the various aspects of the dispute, some of which may not have needed addressing in the judgment, as well as a more exhaustive examination of case-law and, where appropriate, the relevant legal literature.

This function of the Opinion becomes even more important where, for reasons of procedural economy, judgments refer expressly to certain points of the Opinion of the Advocate General, which thus become binding *ex post facto*, in so far as they then form an integral part of the judgment ⁽⁶⁰⁾. This recent practice speeds up the process for the drafting of judgments, since it enables the statement of grounds to be reduced, in so far as the Judges concur with the grounds set out in the Opinion of the Advocate General ⁽⁶¹⁾.

Where the judgment departs from the Opinion, the Opinion also helps to foster a better understanding of its implications, since it sets out a different approach which ‘forces’ the Judges to state reasons for the judgment in a substantiated and clear way.

(c) The Opinion of the Advocate General has an influence on the shaping and development of Community case-law

Unlike judgments, Opinions do not have binding legal effects on the parties to the dispute or on third parties. Nor are the Judges in the Court or the Chamber responsible for examining the case are not bound by them, and they remain entirely free to concur with them or not. Even though it has no binding legal effects, the Opinion reflects the view of a member of the Court of Justice. It is therefore published in the Reports of Cases, together with the judgment, and then takes on an undeniable legal authority ⁽⁶²⁾.

In this regard, the Opinion is often cited in legal literature and is relied on by the lawyers of the parties in support of their claims in disputes before both the Court of Justice and national courts.

It is equally indisputable that the Opinions of Advocates General have helped to shape and develop the case-law of the Court of Justice. Legal literature has been unanimous in emphasising the influence of the Opinions of the first two Advocates General, the Frenchman *M. Lagrange* and the German *K. Roemer*. It has been on the instigation of Advocates General in their Opinions that some of the most significant reversals of precedent have been made at the Court of Justice. For example, the approach advocated by Advocate General *G. Tesaurò* in his Opinion in *Hünermund* ⁽⁶³⁾ was adopted by the Court in the judgment in *Keck and Mithouard* ⁽⁶⁴⁾, and the judgment in *HAG II* reversed the precedent, as was proposed by Advocate General *F. G. Jacobs* ⁽⁶⁵⁾.

Where the Judges refuse to undertake a reversal of precedent proposed by the Advocate General, the case-law confirmed by the judgment is reinforced, unless the view of the Advocate General filters through into the minds of certain Judges and they constitute a majority in subsequent cases.

At all events, the freedom enjoyed by Advocates General to propose judicial decisions in an individual capacity in their Opinions has shown in Community practice that it constitutes a useful counterpart to the collegial arrangement in which the Judges draft judgments. This relationship has worked well and has allowed a *corpus* of case-law to develop, the importance of which has proved crucial to the consolidation of Community law as a legal order.

[...]

V. Final assessment

As we have seen, Advocates General have an institutional status as members of the Court of Justice which is almost identical to that of Judges, but their judicial functions are different, since their primary task in proceedings is to make reasoned submissions which are intended to assist Judges in their decisions. Both the institutional status and the judicial functions of Advocates General have been progressively consolidated over the 40 years during which the Court of Justice has been in operation, so that, at the present time, this institution has specific characteristics that distinguish it from any national legal institution to which it might be superficially similar.

[...]

The principal reasons which justified making Advocates General members of the Court of Justice are still valid. Firstly, even after the creation of the Court of First Instance, the Court of Justice continues to be a judicial body which rules on a large number of cases, in particular questions referred for a preliminary ruling, at first and last instance, with the result that it would seem appropriate for any case to be subject to an independent and impartial proposal for a decision which provides a counterpart to the judgment that is subsequently handed down ⁽⁸⁸⁾. The case will thus be subject to a double analysis which will help to secure greater legal quality in the final outcome. Secondly, the Opinions of the Advocates General partially offset the absence of a dissenting opinion in the judgments of the Court of Justice, in so far as they may include a proposal for a decision in the dispute which is drawn up by a member of the Court and is different from that adopted in the judgment ⁽⁸⁹⁾. It thus becomes possible to shed light on the absence of a broad consensus on a specific judicial course of action adopted in a particular case.

The continued validity of the reasons which gave rise to its creation and the undeniable contribution of Advocates General to the development of Community case-law justify the preservation of this institution within the Court of Justice, without, however, ruling out changes to its judicial role as part of a possible reform of the Community judicial system ⁽⁹⁰⁾. At all events, it may be said that Advocates General perform an irreplaceable task in assisting Judges and that that task is essential if the Court of Justice is to fulfil its function of ensuring that the law is observed in the interpretation and application of the laws which make up the Community legal order.

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[...]

(3) Report by the French delegation on the Treaty establishing the ECSC, Ministry of Foreign Affairs, Paris, October 1951, p. 32.

[...]

(5) There will be nine until 6 October 2000 for arithmetical reasons linked to the most recent enlargement.

(6) *G.C. Rodríguez Iglesias* : 'El Tribunal de Justicia de las Comunidades Europeas', in *G.C. Rodríguez Iglesias* and *D. J. Liñán Noguera*s (ed.): *El derecho comunitario europeo y su aplicación judicial*, Civitas, Madrid, 1993, p. 376.

(7) Report by the Court of Justice on certain aspects of the application of the Treaty on European Union, Luxembourg, 1995, point 18.

(8) Joint Declaration on Article 31 of the Decision adjusting the instruments concerning the accession of the new Member States to the European Union, OJ L 1, 1 January 1995, p. 221.

(9) Decision 95/4/EC, Euratom, ECSC of the Representatives of the Governments of the Member States of the European Communities of 1 January 1995 appointing Judges and Advocates General to the Court of Justice of the European Communities, OJ L 1, 1 January 1995, p. 223.

(10) Court Report, cited above, point 17. See also *W. van Gerven* : 'The Role and Structure of the European Judiciary now and in the Future', *European Law Review*, 1996, No 2, p. 221.

(11) Article 2 of the Rules of Procedure.

(12) Thus, the first Advocate General appointed for Spain following the accession of Austria, Finland and Sweden began his term of office on 1 January 1995. See Article 3 of Decision 95/4/EC, Euratom, ECSC of the Representatives of the Governments of the Member States of the European Communities of 1 January 1995 appointing Judges and Advocates General to the Court of Justice of the European Communities, OJ L 1, 1 January 1995, p. 223.

(13) Articles 5 and 6 of the Statute. Article 13 of the ECSC Statute of the Court of Justice establishes a different system for depriving of their office Advocates General who no longer fulfil the requisite conditions: 'The decision shall be taken by the Council, acting unanimously, after the Court has delivered its opinion.' Faced with this contradiction, the Court of Justice will have to choose to apply one system or the other.

(14) Article 7 of the Statute.

(15) *R. D'Sa* , *P. Duffy* : 'Judges and Advocates General', in *R. Plender* (ed.): *European Courts, Practice and Precedents*, Sweet & Maxwell, London, 1997, p. 145.

(16) Article 2 of the Statute.

(17) Article 4, third paragraph, of the Statute and Article 3(2) of the Rules of Procedure.

(18) Article 4, first and second paragraphs, of the Statute.

(19) Article 13 of the Statute.

(20) Article 3 of the Statute.

(21) Article 6 of the Rules of Procedure.

(22) Court Report , cited above, point 18.

(23) *A. Dashwood* : *op. cit.* , p. 209.

(24) Article 2(2) of the Rules of Procedure of the Court of First Instance.

(25) Articles 17 to 19 of the Rules of Procedure of the Court of First Instance.

(26) Article 38(7) of the Rules of Procedure.

(27) Article 42(2) of the Rules of Procedure.

(28) Article 43 of the Rules of Procedure.

(29) Article 29(2) of the Rules of Procedure.

(30) Article 47, third paragraph, of the Statute.

(31) Article 119 of the Rules of Procedure.

(32) Article 44 of the Rules of Procedure.

(33) See *A. Valle Gálvez* 'Stages of the Procedure', in *R. Plender* (ed.): *European Courts, Practice and Precedents*, Sweet & Maxwell, London, 1997, p. 283.

(34) Article 45(1) and (3) of the Rules of Procedure.

(35) Article 47(1) and (4) of the Rules of Procedure.

(36) Article 57 of the Rules of Procedure.

(37) Article 61 of the Rules of Procedure.

(38) See *A. Barav* : 'Avocat général', in *A. Barav* and *C. Philip* (dir.): *Dictionnaire juridique des Communautés européennes*, Presses universitaires de France, Paris, 1993, p. 85.

(39) Article 35(1) of the Rules of Procedure.

(40) Articles 66 and 67 of the Rules of Procedure.

(41) Article 74 of the Rules of Procedure.

(42) Article 76(3) of the Rules of Procedure.

(43) Article 82a of the Rules of Procedure.

(44) Article 85 of the Rules of Procedure.

(45) Article 91(4) and Article 92(1) of the Rules of Procedure.

(46) Article 100(1) of the Rules of Procedure.

(47) Article 102(2) of the Rules of Procedure.

(48) Article 104(3) of the Rules of Procedure.

(49) *H. Smit* , *P. Herzog* : 'Article 166', *The Law of the European Community. A Commentary on the EC Treaty*, Matthew Bender, New York, 1988, vol. 4, p. 301.

(50) Opinion of Advocate General *Roemer* in Case 31/68 *Chanel v Cepeha* [1970] ECR 403, removed from the register by Order of 3 June 1969, Advocate General *Jacobs* in Case C-120/94 *Commission v Greece* [1996] ECR I-1535, removed from the register

- by Order of the President of 19 March 1996, and Advocate General *Ruiz-Jarabo Colomer* in Case C-317/95 *Canadane Cheese Trading* [1997] ECR I-4681, removed from the register by Order of the President of 8 August 1997.
- (51) *G. C. Rodríguez Iglesias* : *op. cit.* , p. 391.
- (52) We may refer to Case C-37/95 *Ghent Coal Terminal* , in which the Advocate General delivered his Opinion at the hearing held on 11 July 1996 (see judgment of 15 January 1998, [1998] ECR I-1).
- (53) *L. N. Brown and T. Kennedy* : The Court of Justice of the European Communities, Sweet & Maxwell, London, 1994, p. 64.
- (54) Case 206/81 *Alvarez v Parliament* [1982] ECR 3369, ground 9.
- (55) According to *A. Barav* , ‘the Opinions of the Advocates General have neither the form nor the authority of a judgment. They may be characterised as academic dissertations, legal opinions which must be given, but are not binding on the Court’ (*A. Barav* : *op. cit.* , p. 825).
- (56) *N. Fennelly* : *op. cit.* , p. 19.
- (57) *G. C. Rodríguez Iglesias* : *op. cit.* , p. 392.
- (58) In his speech at the formal sitting on 9 October 1973 on the occasion of the departure of Advocate General *K. Roemer* , the President *R. Lecourt* made the following statement: ‘... in order to gain a true idea of the role of Opinions, it is necessary to have access to the deliberation. There it would be possible to appreciate that an authoritative and independent voice, rising above the parties, has been able to analyse each of their arguments with the necessary objectivity and take the risk of making a preliminary judgment on the dispute. There, it would be possible to observe, lastly, the importance of this sustained mental effort which gives rise to guidance, for each judge, which will fuel any considerations in the deliberation of the case; even though you are not present, your voice can still be heard’, Publication of the Court of Justice, 1973, p. 5.
- (59) *P. Gori* : *op. cit.* , pp. 384 to 387; *A. Dashwood* : *op. cit.* , pp. 213 and 214.
- (60) A good illustration is the judgment in Case C-310/93 P *BPB Industries & British Gypsum v Commission* [1995] ECR I-865, ground 11 of which reads as follows: ‘For the reasons given in, respectively, points 20 to 31, points 42 to 69 and points 76 to 86 of the Advocate General’s Opinion, the first, second and third pleas in law must be dismissed as unfounded.’ See *inter alia* the judgments in Case C-284/91 *Suiker Export* [1992] ECR I-5473, ground 3) and in Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951, ground 26.
- (61) This practice has been criticised by some legal literature, because it blurs the distinction between the Opinion and the judgment and the difference between the duties of the Judge and those of the Advocate General, which undermines the authority of the Court of Justice. See *L. N. Brown and T. Kennedy* : *op. cit.* , p. 66 and *J. A. Fuentetaja Pastor* : *op. cit.* , p. 41.
- (62) According to *Dashwood* , ‘... opinions of Advocates General stand as legal authorities in their own right. By the phrase legal authority I mean an expression of view on a point of law, normally by the holder of a judicial office but possibly also by a learned author, which commands attention, quite apart from any intrinsic merit, simply because it was uttered by that person’ (*A. Dashwood* : *op. cit.* , p. 214).
- (63) Opinion of Advocate General *Tesouro* in Case C-292/92 *Hünermund and others* [1993] ECR I-6787.
- (64) Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6017.
- (65) Case C-10/89 *HAG GF* [1990] ECR I-3711.
- [...]
- (88) *A. Mangas Martín , D.J. Liñán Noguerras* : Instituciones y derecho de la Unión Europea, Hall, Madrid, 1996, p. 201.
- (89) The institution of Advocate General ‘was regarded as a kind of counterpart to the prohibition on judges publishing any dissenting opinion’ according to *M. Lagrange* in the speech delivered at the formal sitting on 8 October 1964, publication of the Court of Justice, p. 2. See also *J. Boulouis , M. Darmon* : Contentieux communautaire, Dalloz, Paris, 1997, p. 3, and *M. Waelbroeck , D. Waelbroeck* : ‘Article 166’, Commentaire Mégret. Le droit de la CEE. Vol. 10: La Cour de justice. Les actes des institutions, Editions de l’Université de Bruxelles, 1993, p. 34.
- (90) See in this regard the proposals made by *W. van Gerven* : *op. cit.* , p. 222.