

The Advocate General; EU Adversarial Procedure; Accession to the ECHR*

Introduction

This paper reflects on the procedural role of the Advocate General¹ in cases referred to the Court of Justice of the European Union (CJEU). The role of the Advocate General has an impact on the extent to which the right to a fair hearing is ensured in European Union (EU) adversarial proceedings.

It is relevant, in the second instance, to assess the application of the European Court of Human Rights' (ECtHR) external review mechanism to the fair trial obligations *simpliciter* of Contracting States Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In contrast, the interpretation by the CJEU of the nature of its adversarial proceedings, in which the Advocate General participates prior to that Court's deliberations, the EU not yet a Contracting Party to the ECHR, is examined in section three.

The evolving nature of the EU and the values upon which it is premised, together with the procedural and substantive changes in EU law, require a re-appraisal of the Advocate General's role. The procedural changes to the Statute and Rules of Procedure of the CJEU, post Lisbon, receive appraisal in section four, as does the revised EU preliminary ruling procedure and, also in context, the EU Charter of Fundamental Rights.

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¹ See, for example, R. Greaves, 'Reforming some Aspects of the Role of Advocates General', in A. Arnall, C. Barnard, M. Dougan and E. Spaventa (eds.) *A Constitutional Order of States: Essays in EU Law in Honour of Alan Dashwood*, Hart, 2011, 161; N. Burrows and R. Greaves, *The Advocate General and EC Law*, Oxford University Press, 2007; E. Sharpston, 'The Changing Role of the Advocate General', in *Continuity and Change in EU Law Essays in Honour of Sir Francis Jacobs*, A. Arnall, P. Eeckhout and T. Tridimas (eds.) Oxford University Press, 2008, 20; C. Barnard, M. Gehring and I. Solanke (eds.) *The Advocate General: Securing Trust and Democracy in the EU Judicial Order* (2011-12) 14 *C.Y.E.L.S.*, 507-744.

The guarantees offered by the CJEU in discharging its jurisdictional tasks became the subject of review by the ECtHR in the case of *Kokkelvisserij*,² and is considered in the fifth section. A key point which is highlighted is the current gap in the protection of fundamental rights in the EU, where the acts and omissions of the EU, a non-Contracting Party to the ECHR, are involved but not those of an EU Member State (a Contracting Party to the ECHR).

The *impasse* in the EU - ECHR accession process is evaluated following the CJEU's negative Opinion as to the compatibility of the draft Accession Agreement with the EU Treaties. To conclude, the relationship of the CJEU with the ECHR will be measured, currently and in anticipation of future EU accession to the ECHR, regarding conformity of the EU's adversarial procedures with the standards of fairness required by the ECtHR interpreting the ECHR.

A case can be made for a circumscribed right of rejoinder to the Advocate General's submission to exist in matters which have the potential to encroach on the human rights of EU citizens. Such reconciliation on the part of the EU with the standards of fairness of the ECHR could be a relevant, timely and pre-emptive contribution to the stalled accession process, and beyond.

1. The Procedural Role of the Advocate General

The CJEU is composed of one judge from each EU Member State and a total of eleven Advocates General.³ The role and *duty* of Advocates General is to act with complete impartiality and independence, and to make, in open court, reasoned submissions in cases

² Below n. 84.

³ Council Decision 2013/336/EU of 25 June 2013 increasing the number of Advocates-General of the Court of Justice of the European Union [2013] OJ L179/92. Six of the nine are nominated as of right by the six largest Member States: Germany, France, U.K., Italy, Spain, and Poland. The remainder rotate in alphabetical order between the smaller Member States.

which, in accordance with the Statute of the Court of Justice, require their involvement.⁴ The term ‘independence’ relates primarily to independence from the Member States that nominate an Advocate General⁵ and from the parties arguing before the Court.⁶ Their independence from the internal workings of the rest of CJEU is also the essence of the role of EU Advocates General. The role was modelled on the French *Commissaire du Gouvernement* in proceedings before the *Conseil d’Etat*.⁷ Their respective roles, however, have evolved distinctly; each office belonging to a different legal order. The Court appoints the First Advocate General. As soon as the Judge-Rapporteur in any case has been designated by the President,⁸ the first Advocate General assigns a case to an Advocate General.⁹ Since the Treaty of Nice came into force in 2003 Advocates General do not give an opinion in every case; opinions may be dispensed with in cases which, for example, raise no new point of law.¹⁰ About fifty three per cent of the judgments delivered by the CJEU in 2012 were

⁴ Treaty on the Functioning of the EU (TFEU), Article 252, para. 2.

⁵ TFEU, Articles 253, 255.

⁶ Greaves (2011) above n. 1, 169, 171. I. Solanke, ‘Diversity and Independence in the European Court of Justice’ (2008-09) 15 *Columbia Journal of European Law*, 89, 98.

⁷ N. Mole, Editorial, ‘The complex and evolving relationship between the European Union and the European Convention on Human Rights’, (2012) *E.H.R.L.R.* 363, 365.

⁸ Advocates General do not participate in the election of the President of the CJEU.

⁹ Rules of Procedure of the CJEU, 29 September 2012, [2012] OJ L265/1 (repealing and replacing the Rules of Procedure of the Court of Justice of the European Communities adopted on 19 June 1991, as last amended on 24 May 2011), Article 10(1)(2).

¹⁰ Statute of the CJEU, Article 20, para. 5. Protocol (No 3) on the Statute of the CJEU, annexed to the Treaties, as amended by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council [2012] OJ L 228/1, [2012] OJ C 326/210.

delivered without an Advocate General's opinion.¹¹ Regarding references for preliminary rulings, acting in accordance with the expedited or urgent preliminary ruling procedures, the Statute and Rules of Procedure of the CJEU provide for the case to be heard without an Advocate General's submission.¹²

The Advocate General will be present when the CJEU decides procedural but not substantive matters. Advocates General and Judges have equal status 'in deciding the order in which cases should be heard,'¹³ which cases are of exceptional importance warranting a full court hearing,¹⁴ and cases in which no new point of law is raised. Advocates General do not participate in the judges' deliberations; those deliberations are, and must, remain secret.¹⁵

During the oral procedure before the CJEU, the Advocate General is free to ask questions of the parties to the proceedings.¹⁶ The previous Rules of Procedure referred to the Advocate General delivering his opinion *orally at* the end of the oral procedure.¹⁷ The new Rules stipulate that the Advocate General's opinion is *delivered after* the close of that hearing,¹⁸ the President of the CJEU having already declared the close of the hearing after the parties or

¹¹ CJEU Annual Report 2012, http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf

¹² Statute of the CJEU, Article 23a, paras. 1, 2.

¹³ P. Léger, 'Law in the European Union: the role of the advocate general' (2004) 10:1 *The Journal of Legislative Studies*, 2.

¹⁴ Statute of the CJEU, Article 16, para. 5.

¹⁵ Rules of Procedure 2012, Article 32(1)(2).

¹⁶ C. Ritter, 'A New Look at the Role and Impact of Advocates-General – Collectively and Individually' (2005-06) 12 *Columbia Journal of European Law*, 751,753, 757. Rules of Procedure 2012, Article 80.

¹⁷ [2011] OJ C162/17, Article 59(1). Since 1990, only the conclusions are read out in court and not the full opinion. Ritter (2005-6), *ibid.* 753.

¹⁸ Rules of Procedure 2012, Article 82(1).

interveners have given their oral argument.¹⁹ A clear delineating line symbolises the fact that the parties have no right *per se* to question the Advocate General's advice to the CJEU, prior to the start of the deliberations of the Judges. Former Advocate General, Philippe Léger explained that '[t]he opinion serves a vital function in assuring the parties that their case has been heard and their arguments considered'.²⁰ It is the practice of Advocates General to bring some consistency and clarity to EU law;²¹ to warn and to advise as to the direction in which they believe EU law should go,²² one the Court would be willing to accept. The Advocate General's submission is not legally binding and while it may be intended as advice, the extent of any influence from the Advocate General's submission feeding through into the Court's deliberations may not be ascertainable. The CJEU reaches a majority decision,²³ which may be very stunted and sparse in its reasoning to arrive at its stated outcome.²⁴ There is no provision for concurring, or for dissenting, judgments on the part of Judges in the CJEU, nor is there a right of appeal from that Court's collegiate decision. It remains the case that

¹⁹ *Ibid.* Article 81. The Rules of Procedure refer to the *opinion* of the Advocate General. The opinion is published prior to the delivery of the Court's judgment and is distinguishable from what has now become known as the *view* of the Advocate General in the expedited and urgent preliminary ruling procedures, which is not submitted at the end of the oral hearing and which is not made available until after the Court's judgment has been delivered. This will be discussed below.

²⁰ Léger (2004) above n. 13, 5. Especially that the Statute of the CJEU removes the obligation of the Judge Rapporteur in a case to draw up a report for the oral hearing. CJEU Annual Report 2012, n. 11, 10.

²¹ Ritter (2005-6) above n. 16, 759.

²² Sharpston (2008) above n. 1, 33.

²³ Rules of Procedure 2012, Article 32(4).

²⁴ Case C-34/09 *Ruiz Zambrano v ONEm* [2011] ECR I-1177 is an example of such a ruling.

Advocates Generals’ ‘opinions sometimes raise issues that were not pleaded by the parties,’²⁵ to which the parties have no automatic right to respond. This is an unsatisfactory state of affairs if the Advocate General wants to rely on that point and even more unsatisfactory if the Court subsequently relies on it in its judgment.

According to the revised Rules of Procedure, the CJEU may at any time, after hearing the Advocate General, order the opening or re-opening of the oral part of the procedure, in particular if it considers that it lacks sufficient information; or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the CJEU; or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the CJEU.²⁶ Whilst necessary and relevant,²⁷ in order to inform interested parties of the procedural opportunity to apply to have the oral proceedings re-opened, the revised Rules of Procedure do not go far enough. Consolidating the dicta of the CJEU in *Emesa Sugar*,²⁸ a case in which the parties were denied the right to respond to points raised by the EU Advocate General, the Rules of Procedure allude to the CJEU’s discretion to consider whether to re-open the proceedings and do not accord the parties a procedural right in this respect, arguably contrary to the principles inherent in the right to a fair hearing, as interpreted by the ECtHR.

2. The ECtHR: Article 6(1) ECHR and National Offices

²⁵ Ritter (2005-6) above n. 16, 758. See, for example, Case C-304/02 *Commission v France* [2005] E.C.R. I-6263; Case C-109/01 *Home Secretary v Akrich* [2003] E.C.R. I - 9607.

²⁶ Rules of Procedure 2012, Article 83.

²⁷ Greaves (2011) above n. 1, 167.

²⁸ Below n. 45.

The ECtHR in Strasbourg has adjudicated applications concerning officers in national procedures undertaking roles comparable to that of the EU Advocate General, from parties seeking the fundamental right to a fair hearing in accordance with Article 6(1) ECHR. Article 6(1) ECHR provides that *in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*. It is apparent that the ECtHR subjects the role of Member States' respective offices and adversarial procedures to stricter scrutiny²⁹ than that given to the office of Advocate General in EU adversarial proceedings. A stronger test³⁰ is applied to national court officers in relation to the requirements needed to establish fairness in court hearings. Three examples are illustrative. The case of *Vermeulen v Belgium*,³¹ concerned the Belgian legal system's *avocat général*. *Vermeulen* complained that he had not been able to reply, through his lawyer, to the *avocat général's* submissions. After scrutiny of the office, the ECtHR considered that the *avocat général's* submissions contained an opinion which derived its authority from that of the *procureur général's* department itself. The fact that it was impossible for *Vermeulen* to reply to them before the end of the hearing infringed his right to adversarial proceedings. This fact in itself amounted to a breach of Article 6(1) ECHR.³² In what has become its classic statement of principle for a fair hearing, the ECtHR declared: *that right means in principle*

²⁹ M. Bobek, 'A Fourth in the Court: Why are there Advocates General in the Court of Justice?' (2011-12) 14 *C.Y.E.L.S.* 529, 533.

³⁰ *Ibid.*

³¹ *Vermeulen* [GC] App. No. 19075/91 (1996) ECHR 1996-I.

³² *Ibid.* para. 33. The breach in question was further aggravated by the *avocat général's* participation in the court's deliberations, albeit only in an advisory capacity. A breach of Article 6(1) ECHR was found in this respect also. It should be reiterated that the EU Advocate General does not participate in the CJEU's deliberations.

the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision.

*Kress*³³ concerned the role of the French *Commissaire du Gouvernement* in adversarial proceedings before the *Conseil d'Etat*. The applicant complained, under Article 6 (1) ECHR, that she had not had a fair hearing in the administrative proceedings she had brought against Strasbourg Hospital. It had been impossible to inspect the submissions of the *Commissaire du Gouvernement* before the hearing or reply to them afterwards because he spoke last. The ECtHR reiterated its classic test for the concept of a fair trial,³⁴ which is the thread running through the Court's jurisprudence and its essential review criteria pertaining to the right to a fair hearing. It was not disputed by the ECtHR in *Kress* that in the proceedings in the *Conseil d'Etat* lawyers who so wished could ask the *Commissaire du Gouvernement*, before the hearing, to 'indicate the general tenor' of his submissions. Nor was it contested that the parties may reply to the *Commissaire du Gouvernement's* submissions by means of a memorandum for the deliberations. Importantly, in the event of the *Commissaire du Gouvernement* raising orally at the hearing a ground not raised by the parties, the presiding judge would adjourn the case to enable the parties to present argument on the point.³⁵ The ECtHR considered that the procedure followed, taken as a whole, afforded litigants sufficient

³³ *Kress* [GC] App. No. 39594/98, ECHR 2001-VI.

³⁴ *Ibid.* para. 74.

³⁵ *Ibid.* para. 76.

safeguards. No problem arose from the point of view of the right to a fair trial of compliance with the principle that proceedings should be adversarial.³⁶

In the case of *Martinie v France*³⁷ the ECtHR considered it necessary to examine the application not from the specific standpoint of adversarial process or equality of arms, but from the wider angle of *an overall assessment of the fairness of the proceedings*. The ECtHR declared that it had found a violation not only in respect of the participation, in an advisory capacity, of the Advocate-General at the deliberations of the Belgian Court of Cassation (see *Borgers*³⁸ and *Vermeulen*³⁹), but also the presence of the Deputy Attorney-General at the deliberations of the Portuguese Supreme Court even though he had no consultative or other type of vote (see *Lobo Machado*⁴⁰), and the mere presence of the Advocate-General at the deliberations of the Criminal Division of the French Court of Cassation (see *Slimane-Kaïd (no. 2)*⁴¹). That case-law is largely based on the doctrine of appearances and the fact that, like the *Commissaire du Gouvernement* before the French administrative courts, the Advocates General and Attorney-General in question express their view publicly on the case prior to the deliberations of the judges.⁴² It is significant that the ECtHR, in *Martinie*, considered that

³⁶ Consequently, there was no violation of Article 6(1) ECHR in this respect. There was a violation of Article 6(1) ECHR on account of the *Commissaire du Gouvernement's* participation in the deliberations of the trial bench, contrary to the doctrine of appearances.

³⁷ [GC] App. No. 58675/00, 12 April 2006.

³⁸ *Borgers v Belgium* (30 October 1991, Series A no. 214-B).

³⁹ Above n. 31.

⁴⁰ *Lobo Machado v Portugal*, 20 February 1996, Reports 1996-1.

⁴¹ *Slimane-Kaïd v France (no. 2)* no. 48943/99 27 November 2003.

⁴² *Martinie v France*, para. 53.

there was an imbalance on account of State Counsel's position in the proceedings: unlike the accountant, he was present at the hearing, and, *inter alia*, could express his own point of view orally without being contradicted by the accountant. That imbalance was accentuated by the fact that the hearing was not in public and was therefore conducted in the absence of any scrutiny either by the accountant concerned or by the public. A breach of Article 6(1) ECHR was upheld.⁴³ Fundamentally, the ECtHR reiterated that *the concept of a fair trial implies in principle the right for the parties to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service with a view to influencing the court's decision.*⁴⁴

3. The CJEU: Adversarial Proceedings and the EU Advocate General

The CJEU ruled on the procedural role of the Advocate General in the case of *Emesa Sugar*,⁴⁵ concerning a reference by a Netherlands' court for a preliminary ruling in which *Emesa Sugar* sought leave to submit written observations after the Advocate General had delivered his Opinion at the hearing. The CJEU distinguished the role of Advocate General from that of *avocat général* in *Vermeulen*, noting that the Advocate General's opinion is not, in contrast with that of the *avocat général*, an opinion addressed to the judges or to the parties which stems from an authority outside the Court.⁴⁶ Rather, the CJEU declared, it constitutes the individual reasoned opinion, expressed in open court, of a judicial member of the Court itself; the Advocate General taking part, publicly and individually, in the process by which that Court reaches its judgment, and in carrying out the judicial function entrusted to it. The

⁴³ *Ibid.* paras. 45, 46, 50.

⁴⁴ *Ibid.* para. 46.

⁴⁵ Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, Order [2000] ECR I 665.

⁴⁶ Judgment in *Vermeulen v Belgium*, para. 31.

Court was careful to add that the opinion is published together with the Court's judgment. The case law of the ECtHR on the role of an *avocat général* did not appear to the CJEU to be transposable to the Opinion of the EU Advocate General.⁴⁷

The CJEU stated, pragmatically, that given the special constraints, inherent in EU judicial procedure, connected in particular with its language regime, to confer on the parties the right to submit observations in response to the opinion of the Advocate General, with a corresponding right for the other parties, (particularly in preliminary rulings) to reply to those observations, would cause serious difficulties and considerably extend the length of the procedure.⁴⁸ The Court recognised that constraints inherent in the manner in which the administration of justice is organised within the Union cannot justify infringing a fundamental right to adversarial procedure. No such situation arose in EU law, the CJEU ruled, in that with a view to the very purpose of adversarial procedure, which is to prevent the CJEU from being influenced by arguments which the parties have been unable to discuss, that Court may of its own motion, on a proposal from the Advocate General or at the request of the parties, re-open the oral procedure, in accordance with its Rules of Procedure. The CJEU gave its interpretation as to the circumstances in which this might be possible, namely if that Court considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties.⁴⁹ In a sparsely reasoned ruling the CJEU declared that *Emesa's* application did not relate to the re-opening of the oral procedure nor did it rely on any specific factor indicating that it would be either useful or necessary to do so.⁵⁰ It only related to a request to submit written comments on the

⁴⁷ *Emesa Sugar*, paras. 14 -16.

⁴⁸ *Ibid.* para. 17.

⁴⁹ *Ibid.* para. 18.

⁵⁰ *Ibid.* para. 19.

Advocate General's Opinion. The CJEU dismissed *Emesa's* application to respond to the Advocate General's Opinion, which did not exist as of right according to the Court's Statute and Rules of Procedure.⁵¹ The outcome of this case does not shed a good light on the intentions of the CJEU to exercise its discretion on the merits of a case to re-open the oral proceedings.

Subsequent to *Emesa Sugar*, and to the ECtHR case of *Kress*, the CJEU in *Arben Kaba*⁵² was seized of a question referred for preliminary ruling, which concerned directly the extent to which the procedure before the EU judicature, which does not confer on the parties any absolute right to challenge the opinion of the Advocate General, complies adequately with the requirements of the ECHR as interpreted by the ECtHR.⁵³ It was not necessary for the CJEU to reply to this question,⁵⁴ though Advocate General Colomer provided some indications of the way in which the CJEU ensures compliance with Article 6(1) ECHR in a procedural context.

Confirming the CJEU's ruling in *Emesa Sugar*, he stated that the organic and functional link between Advocates General and the CJEU of which they are members, meant that the requirements of adversarial procedure were not applicable to them.⁵⁵ He noted that in the interest of the very objective of the adversarial process, namely to prevent the CJEU from

⁵¹ *Ibid.* para. 20. On appeal by *Emesa Sugar* to the ECtHR, in *Emesa Sugar NV v The Netherlands*, App. No. 62023/00, Decision of 13 January 2005, the applicant company claimed that it had been deprived of its right to a fair hearing as guaranteed by Article 6(1) ECHR, in that it had not been allowed to respond to the Opinion of the Advocate General to the CJEU. The ECtHR declared the application inadmissible for other unrelated reasons.

⁵² Case C-466/00 *Arben Kaba v Secretary of State for the Home Department (Kaba 2)* [2003] ECR I-2219.

⁵³ Opinion of Advocate General Colomer delivered on 11 July 2002, point 86.

⁵⁴ Advocate General Colomer answered the second question first, finding nothing in the error said to have been committed by the first Advocate General which might have affected the CJEU's reasoning in its first judgment.

⁵⁵ *Kaba*, points 94, 96, 98.

being influenced by arguments on which the parties have not had the opportunity to comment, the CJEU may of its own motion, on a proposal from the Advocate General or at a request of the parties, re-open the oral procedure, in accordance with the Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties.⁵⁶ Advocate General Colomer added that, in practice, any written submissions lodged by the parties after delivery of the opinion, are considered by the Advocate General, the Judge-Rapporteur and the President of the bench, with a view to examining whether they may be regarded as an application for the re-opening of the oral procedure.⁵⁷

The fact that written submissions *may* be regarded as an application for re-opening the oral hearing is no substitute for the inclusion in the Rules of Procedure of certain specified objective criteria, known by parties in advance of the oral hearing and the CJEU's consequential deliberations, which will constitute grounds on which the CJEU's decision to re-open the oral proceedings will be based. These are necessary criteria in order to ensure legal certainty and transparency, to dispel any doubts that may ensue of the potential for arbitrary decisions to be taken based on the objectives and interest of the EU legal order, and not the interest of fairness to individual parties before the CJEU.

Corroborating *Emesa Sugar*,⁵⁸ in that constraints inherent in the manner in which the administration of justice is organised within the Union cannot justify infringing a fundamental right to adversarial procedure, Advocate General Colomer explained that those constraints also pursue legitimate objectives designed to ensure the administration of justice within a reasonable time in the EU context; consequently, it is at least legitimate to weigh up

⁵⁶ *Emesa Sugar*, para. 18.

⁵⁷ *Kaba*, points 107, 108.

⁵⁸ *Emesa Sugar*, para. 18.

all the interests at stake; to consider the concrete repercussions flowing from the introduction of a given procedural requirement.⁵⁹ An equitable balance between expediency and fairness should be attained; the EU has not attained this. Grounds of expediency, albeit in a *sui generis* EU legal order, may no longer stand up to scrutiny by the ECtHRs' review mechanism, whether it be full review or deference in relation to the EU, after the Lisbon Treaty for reasons given below.

The justification given by Advocate General Colomer can be disputed. He stated that were the parties to be allowed the last word in the procedure, the Advocate General would be prevented from performing the function assigned to him, since in order for him to be able effectively to carry out the analysis required of him in the performance of his task of assisting the ECJ to guarantee observance of the law, he must have at his disposal all the information, arguments and details available to those who are to give final judgment in the case.⁶⁰ The parties would not have 'the last word', since the Advocate General's opinion would follow pursuant to the re-opened oral proceedings.

He reasoned that Advocates General, knowing that their respective opinion would be the subject of a response from the parties, would inevitably take their reactions into account when drafting it, and would not therefore deliver it 'with complete impartiality and independence' as required by the Treaties. Disagreement has been voiced in respect of this 'pessimistic'⁶¹ view. Schiemann expressed his concern that '[i]t can happen that an Opinion canvasses something which was not argued either in the written material or at the Hearing.

⁵⁹ *Kaba*, point 111.

⁶⁰ *Ibid.* point 110.

⁶¹ K. Schiemann, *The Functioning of the Court of Justice in an Enlarged Union and the Future of the Court*, in *Continuity and Change in EU Law Essays in Honour of Sir Francis Jacobs*, A. Arnulf, P. Eeckhout and T. Tridimas (eds.), Oxford University Press, 2008, 3, 18.

There is undoubtedly something to be said in such a case for giving the parties a chance to comment on this point.’ He also cautioned that ‘[t]here are strong practical considerations related to further expenditure of time and money which militate against this being done save in the rarest of cases’.⁶²

A case can be made for the fact that a procedural right of rejoinder to the Advocate General’s submission, while not existing as of right generally in every case, should exist in certain defined cases. Particularly as the EU’s areas of competence move beyond that of an economic entity to one in which the CJEU increasingly will be asked to interpret substantive EU law potentially affecting the human rights of its citizens.

4. Procedural and Substantive Changes in EU Law

In order to ameliorate the Luxembourg Court’s increasing workload, the Statute and Rules of Procedure of the CJEU introduced an accelerated procedure, renamed ‘expedited procedure’,⁶³ in references for preliminary rulings, and an urgent preliminary ruling procedure⁶⁴ (PPU) relating to the area of freedom, security and justice. In respect of each of these procedures the Court’s Statute provides in derogation from its standard procedure, that the case may proceed to deliberation in the CJEU *without* an Advocate General’s *submission*.⁶⁵ The Rules of Procedure⁶⁶ provide for the CJEU to rule *after hearing the*

⁶² *Ibid.* 8.

⁶³ Rules of Procedure 2012, Article 105.

⁶⁴ *Procédure préjudicielle d’urgence*. C. Barnard, ‘The PPU: is it worth the candle? An early assessment’ (2009) *E.L.Rev.* 281. Rules of Procedure 2012, Article 107. The urgent preliminary ruling procedure came into force on March 1, 2008, Decision 2008/79/EC [2008] OJ L24/42, inserting a new Article 23a into the Protocol of the Statute of the CJEU. It was consolidated into the Treaties by the Lisbon amendments, with effect from 1 December 2009, in Article 267, para. 4 TFEU.

⁶⁵ Article 23a (*emphasis added*).

⁶⁶ Rules of Procedure 2012, Article 105(5) and Article 112.

Advocate General, without mention of an Advocate General's submission or opinion. The rationale was not one that depended on the case raising no new point of law; but one where the urgency of the case was such that it warranted an expedited or urgent procedure.⁶⁷

A letter to the CJEU, signed by an influential group of academics, raised the point that the absence of publication of the Advocate General's *prise de position* risked failing to comply with the right to a fair hearing and the standards of the ECHR. This public aspect of the Advocate General's role was deemed a significant safeguard in adversarial proceedings by the CJEU in *Emesa Sugar*. Both the expedited procedure and PPU were the subjects of concern for the reason that the Advocate General's prior submission was relinquished,⁶⁸ and there was no longer a published Advocate General's opinion in the public domain in areas impinging on the interests of the parties.⁶⁹ The CJEU has since resorted in practice to publishing what has become known as the View⁷⁰ of the Advocate General in expedited and urgent preliminary rulings, albeit *after* the CJEU's deliberation and the outcome of the case. Retaining the publication of the Advocate General's advice,⁷¹ was one early example of

⁶⁷ Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2012] OJ C338/1, 39, 40.

⁶⁸ The first case heard under the accelerated/expedited procedure, Case C-189/01 *Jippes* [2001] ECR I 5689 and a subsequent case undertaken in accordance with the PPU, Case C-388/08 PPU, *Artur Leymann and Aleksei Pustovarov* [2008] ECR I 8993, exist with a published judgment only; without the published View of the Advocate General.

⁶⁹ Barnard (2009) above n. 64, 287, 293, 296.

⁷⁰ See point 6 of Advocate General Bot's View in Case C-403/09 PPU, *Jasna Detiček v Maurizio Sgueglia* [2009] ECR I 12193.

⁷¹ The Advocate General's view was later published after the CJEU had delivered its judgment in Case C-127/08 *Metock v Minister for Justice* [2008] ECR I-6341, a case heard pursuant to the accelerated, now expedited, preliminary ruling procedure. See Barnard (2009) above n. 64. The Views of Advocates General

deference by the EU, and more specifically the CJEU, so as to ensure compatibility with the ECHR right to a fair hearing.

The apparent *practice* of the Advocate General preparing a *prise de position*,⁷² delivered *after* the end of the oral proceedings, should be stated to be a *prior* requirement in the formal rules of the Court. The CJEU ‘hears’ the Advocate General; those ‘outline’ views should also be available to the parties, before the CJEU decides the outcome of the case.⁷³ The situation can no longer be sustained post Lisbon when the substantive areas in which the reasoned submissions of the Advocate General are no longer stated to be forthcoming as a matter of course are those that have the potential to affect the human rights of EU citizens. Questions referred for preliminary ruling under the PPU have, for example, concerned jurisdiction and the recognition and enforcement of judgments in matrimonial matters, matters of parental responsibility and the interests of the child;⁷⁴ and criminal proceedings against parties accused of a serious narcotics offence, the European arrest warrant and surrender procedures between Member States.⁷⁵

Sharpston in *Rinau* (C-195/08 PPU *Rinau*) and Kokott in *Goicoechea* (C-296/08 PPU *Santesteban Goicoechea*) were not available when the judgments were delivered, P. Koutrakos, ‘Speeding up the preliminary reference procedure – fast but not too fast’, Editorial (2008) *E.L.R.* 617, 618. These were published subsequently.

⁷² Case C-66/08 *Criminal Proceedings against Szymon Kozłowski* [2008] ECR I 6041. It appeared to Advocate General Bot, ‘necessary to present in writing the reasoning underlying the answers that [he planned] to propose to the Court’. Point 8 of his View delivered on 28 April 2008.

⁷³ Sharpston (2008) above n. 1, 29, 30.

⁷⁴ Case C-296/08 PPU, *Ignacio Pedro Santesteban Goicoechea* [2008] ECR I 6307.

⁷⁵ Case C-388/08 PPU, *Artur Leymann and Aleksei Pustovarov* [2008] ECR I 8993 (No published View).

It will not be necessary for the Member States to initiate primary Treaty changes to the adversarial system to ensure convergence with the human rights standards for a fair hearing as interpreted by the ECtHR, in matters of EU law. The EU internal rules have relieved Advocates General of their key role. The EU institutions, acting in accordance with the Treaties, have the competence to amend the Statute⁷⁶ and the Rules of Procedure⁷⁷ of the CJEU.

The Lisbon Treaty has merged the former first and third pillars of the EU; the interpretive preliminary ruling jurisdiction of the CJEU extends to the area of freedom, security and justice, inclusive of certain criminal issues, the five year transitional period⁷⁸ having transpired. This may lead to an increase in the number of preliminary references required to engage with the PPU. The Charter of Fundamental Rights of the EU (EUCFR),⁷⁹ accorded legal force, as a result of the Lisbon Treaty,⁸⁰ will engender an increase in preliminary rulings on substantive human rights issues, leading De Búrca to advocate that the CJEU ‘should, particularly in cases involving human rights claims, rethink its increasingly frequent practice of dispensing with the Opinion of an Advocate General’.⁸¹ She suggested that the CJEU ought to defer to the expertise and experience of the Strasbourg Court and refer to the case

⁷⁶ The European Parliament and the Council, acting in accordance with the ordinary legislative procedure – acting either at the request of the Court of Justice and after consulting the Commission or on a proposal from the Commission and after consulting the Court of Justice. Article 281 TFEU.

⁷⁷ The Court of Justice shall establish its Rules of Procedure. Those rules shall require the approval of the Council. Article 253, para. 6 TFEU.

⁷⁸ Protocol (No. 36) on Transitional Provisions of the Treaty of Lisbon, Article 10(1)(3), [2012] OJ C326/322.

⁷⁹ [2012] OJ C326/391.

⁸⁰ Article 6 (1) TEU, w.e.f. 1 December 2009.

⁸¹ G. De Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’ (2013) 2 *M.J.* 168.

law and standards of the latter when interpreting the standard of human rights of the EU under the EUCFR.⁸²

Procedurally, Article 47 of the EUCFR provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to *an effective remedy* before a tribunal in compliance with the conditions laid down in this Article. *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.* Article 47 EUCFR being the EU counterpart to Article 6(1) ECHR, Lenaerts has explained that ‘the protection offered by [Article 47] is more extensive since it guarantees the right to an effective remedy before a court’.⁸³ This is important for the CJEU when interpreting EU law, *inter alia*, on the right to a fair hearing *vis à vis* Article 6(1) ECHR, in the interests of protecting the individual human rights of EU citizens.

5. The ECtHR: Article 6(1) ECHR and EU Procedure

For the first time, in *Kokkelvisserij*,⁸⁴ the ECtHR was invited to pronounce on adversarial proceedings in the CJEU in which the Advocate General participates in a reference for a preliminary ruling from a national court.⁸⁵ The applicant association complained to the ECtHR under Article 6(1) ECHR that its right to adversarial proceedings had been violated as a result of the refusal of the CJEU to allow it to respond to the Opinion of the Advocate General before that Court gave its preliminary ruling. The applicant had requested to submit written remarks in reply to the Opinion of the Advocate General, or, alternatively, for an order for the re-opening of the earlier oral proceedings, or to be granted the opportunity

⁸² *Ibid.*, 170.

⁸³ K. Lenaerts, ‘Exploring the limits of the EU Charter of Fundamental Rights’ (2012) 8(3) *E.C.L.R.* 375, 396.

⁸⁴ *Cooperative Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v The Netherlands*, App. No.13645/05, 20 January 2009.

⁸⁵ Under Article 267 TFEU.

otherwise to revisit the Opinion. Recalling that the Statute and the Rules of Procedure of the CJEU did not provide for parties to submit observations in reply to the opinion of the Advocate General, and citing *Emesa Sugar*, reiterating its review criteria, the CJEU did not order the re-opening of the oral proceedings finding that the applicant association had submitted no precise information which made it appear either useful or necessary to do so.⁸⁶

The ECtHR noted *Vermeulen* and the fact that it had expressed itself in similar terms in other judgments; but stated that it did not follow that it would be bound to find a violation of Article 6(1) ECHR by the Netherlands⁸⁷ because the applicant association lacked an opportunity to respond to the Advocate General's Opinion in the CJEU. The ECtHR considered that the responsibility of Netherlands as a respondent Party was engaged as a result of its courts actively seeking a preliminary ruling from the CJEU. The ECtHR noted the nexus between the referring national court and the authoritative interpretation given to EU law by the CJEU, which the national court could not ignore. The ECtHR then applied the *Bosphorus*⁸⁸ presumption, declaring that *as a corollary, this presumption of equivalent protection to that afforded by the ECHR applied not only to actions taken by a Contracting Party but also to the procedures followed within such an international organisation itself and, in particular, to the procedures of the CJEU*. The presumption could be rebutted only if, in the circumstances of a particular case, it could be considered that the protection of Convention rights was *manifestly deficient*.

⁸⁶ Order dated 28 April 2004.

⁸⁷ The fact that the EU was not at that time a Contracting Party to the ECHR prevented the ECtHR from examining the procedure of the CJEU *directly* in light of Article 6(1) ECHR.

⁸⁸ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v Ireland* [GC], App. No. 45036, paras. 152-156, ECHR 2005-VI, paras. 152- 156.

The ECtHR considered whether the *procedure* before the CJEU was accompanied by *guarantees* which ensured equivalent protection of the applicant's rights. In that respect, it gave weight to the possibility offered by the Rules of Procedure of the CJEU— a possibility which must be accepted as realistic and not merely theoretical⁸⁹— to order the re-opening of the oral proceedings after the Advocate General has delivered his opinion, if it finds it necessary to do so. It gave weight also to the fact that a request for such re-opening submitted by one of the parties to the proceedings is considered on its merits. The ECtHR also noted that the national court, which had originally referred the case, could have submitted a further request for a preliminary ruling to the CJEU if it had found itself unable to decide the case based on the first ruling. The ECtHR presumed the EU to have an equivalent procedural system for the protection of the right to a fair hearing. The procedures of the CJEU in a reference for a preliminary ruling were not manifestly deficient so as to rebut that presumption and the Netherlands was not in violation of Article 6(1) ECHR.

Such a deferential standard of review cannot be unconditional and reciprocal deference is called for on the part of the EU to the standards of the ECHR as interpreted by the ECtHR; the situation having become all the more problematic in the light of the dicta of the CJEU in Opinion 2/13 on EU Accession to the ECHR, considered below.

It is also necessary to consider the instance in which the EU has sole responsibility, i.e. where there is no involvement on the part of a Member State of the EU, and where the EU is still not a Contracting Party to the ECHR. This 'gap' situation arose in the case of *Connolly*,⁹⁰ a staff case pursued through the EU Courts. Having been denied a reply to the opinion of the Advocate General in the CJEU's proceedings, *Connolly*, a former employee of the European

⁸⁹ In light of an opinion delivered by Advocate General Sharpston in Case C-212/06 *Gouvernement de la Communauté française and Gouvernement Wallon v Gouvernement flamand* [2008] ECR I-1683, point 157.

⁹⁰ *Connolly v 15 Member States of the European Union*, App. No. 73274/01, 9 Dec. 2008.

Commission, applied to the ECtHR alleging a violation of Article 6(1) ECHR.⁹¹ In these proceedings involving the EU institutions *only*, the ECtHR ruled as inadmissible the application relating to the inability to reply to the Advocate General on the simple basis that the EU was not a Contracting Party to the ECHR. There was no action or jurisdiction with which to link any contracting party. The ECtHR will have to rule directly on this situation if and when the EU becomes a Contracting Party to the ECHR and subject to the jurisdiction of the ECtHR, if procedures before the CJEU ‘deviate from the case law of the Court of Human Rights.’⁹²

A subsequent decision of the ECtHR in the case of *Gasparini*,⁹³ involving not the EU but the North Atlantic Treaty Organisation (NATO), was solely based on what was deemed to be a ‘structural lacuna’ in the international organisation’s internal procedural dispute resolution mechanism.⁹⁴ Although there was no State action or intervention, (as there was in *Kokkelvisserij*) the ECtHR did review the procedures before the NATO Appeals Board before it deemed there not to be a manifest deficiency sufficient so as to rebut the presumption of equivalent protection.⁹⁵ Lock,⁹⁶ writing after *Gasparini*, critically analysed the ECtHR’s

⁹¹ T. Lock, ‘Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order’ (2011) 48 *C.M.L. Rev.* 1025, 1027.

⁹² *Ibid.*

⁹³ *Gasparini v Italy and Belgium*, App. No. 10750/03, 12 May 2009. An employee in a dispute with NATO applied to the ECtHR alleging a violation of Article 6(1) ECHR on the grounds that NATO’s Appeal Board had not held its hearing in public.

⁹⁴ C. Ryngaert, ‘The Responsibility of Member States in Connection with Acts of International Organizations: Assessing the Recent Case Law of the European Court of Human Rights’ (2011) 60 *I.C.L.Q.* 997, 1005.

⁹⁵ *Ibid.* 1006.

decision of inadmissibility in *Connolly*, commenting that the inability of parties to reply to the Advocate General's submission constitutes such a structural deficiency in the CJEU's procedures, of the kind which was found in *Gasparini*, to have justified review by the ECtHR. The ECtHR, in *Gasparini*, may have subjected another international organisation to a more stringent review than that to which the EU is subject.

In application to the EU directly, after its proposed accession to the ECHR, the potential exists for the ECtHR to categorise the Statute and Rules of Procedure of the CJEU as constituting structural lacunae in the EU's internal dispute-settlement mechanism. The potential also exists, in the event that the EU reviews the CJEU's Statute and Rules of Procedure, for the ECtHR to continue to defer to the EU, it being a *sui generis* legal order and not solely an international organisation subject to the ECtHRs' full review mechanism in matters of procedure. The likelihood is that the procedural rules and practice of the CJEU will be more astutely scrutinised for compliance with Article 6(1) ECHR. There is absolutely no guarantee that the presumption of equivalence will continue to apply as and when the EU becomes a Contracting Party to the ECHR, or even before, should that event be forestalled, as is now the situation.

6. EU-ECHR Accession Stalled

The EU institutions have a Treaty mandate⁹⁷ to accede to the ECHR;⁹⁸ subject to the legal instruments of accession preserving the specific characteristics of the Union and Union law,

⁹⁶ T. Lock, 'Beyond Bosphorus: the European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human Rights' (2010) 10(3) *H.R.L.R.* 529, 535.

⁹⁷ Article 6(2) TEU.

⁹⁸ The ECHR has been amended in order to allow accession of the EU, a non-state entity, Article 59 para. 2 ECHR, as amended by Protocol 14 (CETS No. 194) to the Convention, w.e.f. 1 June 2010.

ensuring that accession does not affect the competences of the EU or the powers of its institutions and, in particular, the interpretive autonomy of the CJEU.⁹⁹ The EU has been careful to establish safeguard criteria in relation to accession, inclusive of preserving its interpretive autonomy,¹⁰⁰ and with particular regard to the mechanisms necessary to ensure that proceedings by non-Member States and individual applications would correctly be addressed to Member States and/or the Union as appropriate.¹⁰¹ The co-respondent mechanism was deemed to be facilitative of the EU¹⁰² and Member States,¹⁰³ respectively, joining as co-respondent parties, in order to reflect the *sui generis* nature of the EU legal order.¹⁰⁴ It was envisaged that the co-respondent mechanism would be applied only in a limited number of cases,¹⁰⁵ one such instance being the situation that arose in *Kokkelviserij*.¹⁰⁶ Also, in the event that an application was made directly to the ECtHR, the Member State in question having not referred a question for a preliminary ruling to the CJEU, it was contemplated that the prior involvement mechanism agreed in the draft Accession

⁹⁹ Protocol (No 8) Relating to Article 6(2) TEU on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

¹⁰⁰ Article 344 TFEU. Protocol 8, Article 3.

¹⁰¹ Protocol 8, Article 1(b).

¹⁰² Draft Accession Agreement Article 3, para. 2. See also, the Draft Declaration by the EU to be made at the time of signature of the Accession Agreement. Annex II, p. 13, Final draft Accession Agreement. 47+1(2013)-008 rev 2, 10 June 2013.

¹⁰³ Draft Accession Agreement, Article 3, para. 3.

¹⁰⁴ Draft Explanatory Report to the Draft Legal Instrument on the Accession of the EU to the ECHR, CDDH-UE(2011)16fin, Strasbourg, 19 July 2011, para. 38.

¹⁰⁵ *Ibid.* para. 50.

¹⁰⁶ *Ibid.* para. 44, fn. 18.

Agreement¹⁰⁷ would be instigated and that this would enable the CJEU in the first instance, where it had not previously ruled on the provision of EU law in question, to assess the compatibility of that provision with the Convention rights at issue, this being deemed necessary in order to preserve the autonomy of EU law and that of the CJEU.¹⁰⁸

The CJEU rejected the ‘agreement envisaged’¹⁰⁹ as being incompatible with Article 6(2) TEU and Protocol No. 8, and therefore the EU’s accession to the ECHR.¹¹⁰ This it did on a number of grounds,¹¹¹ according to which accession would be liable to upset the underlying balance of the EU and undermine the autonomy of EU law. The CJEU declared the agreement envisaged incompatible with the Treaties in that it would be liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR. The fact that Member States or the EU

¹⁰⁷ Article 3, para. 6.

¹⁰⁸ The CJEU would be required to act quickly in affording its assessment so as to avoid delay, if necessary by resorting to the expedited procedure. Draft Explanatory Report, para. 69.

¹⁰⁹ Final Report to the CDDH (including the draft agreement on the accession of the EU to the ECHR), Appendix I, 47+1(2013) 008 rev 2, Council of Europe, Strasbourg, 10 June 2013. [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf) .

¹¹⁰ Opinion 2/13 of the Court (Full Court), 18 December 2014, <http://curia.europa.eu/juris/document/document-print.jsf?doclang=EN&text=&pageIn...> A positive opinion of the CJEU is required as to the compatibility with the EU Treaties of a draft Accession Agreement of the EU to the ECHR before the accession process can proceed, Article 218(11) TFEU.

¹¹¹ Justice cannot be done to the wider international implications of the Court’s Opinion, nor, substantively, to its impact on the protection of human rights in Europe, within the necessary constraints of this article.

would be able to submit an application to the ECtHR¹¹² would ‘be liable in itself’ to undermine the monopoly of interpretation of EU law by the CJEU.¹¹³

Advocate General Kokott¹¹⁴ was more nuanced in her focus on the constitutional significance of the EU’s accession to the ECHR and the added value that would ensue for the enhanced protection of fundamental rights in Europe. She saw nothing in the draft agreement or accompanying documents that might indicate a curtailment of the competences of the EU in the context of accession to the ECHR;¹¹⁵ it being inevitable that in its judgments the ECtHR must examine the national law of the contracting parties concerned, in so far as this is necessary in order for it to determine a complaint that fundamental rights as guaranteed by the ECHR have been violated.¹¹⁶ It is with a view to ensuring that the powers of the Courts of the EU are maintained on such occasions, she continued, that Article 3(6) of the draft agreement establishes the prior involvement procedure.

It will be recalled that under that procedure, in proceedings pending before the ECtHR to which the EU is a co-respondent, the CJEU is to be afforded sufficient time to assess the compatibility with the ECHR of a provision of EU law, in so far as it has not yet made such an assessment.¹¹⁷ Advocate General Kokott noted that the question whether the CJEU has

¹¹² Under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively. Opinion 2/13, paras. 201-214.

¹¹³ According to the CJEU, the agreement does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the CJEU that enable the specific characteristics of the EU and EU law to be preserved. *Ibid.* paras. 215-248.

¹¹⁴ View delivered on 13 June 2014; published after the Court delivered its Opinion on 18 December 2014.

¹¹⁵ For the purposes of the second sentence of Article 6(2) TEU and the first sentence of Article 2 of Protocol 8. View, points 39, 43.

¹¹⁶ *Ibid.* point 123, fn. 81.

¹¹⁷ *Ibid.* point 124.

already expressed a view on the compatibility with the ECHR of a provision of EU law will be of decisive importance as regards the initiation of the prior involvement procedure. She cautioned that there may be borderline cases in which, notwithstanding the fact that the CJEU may have previously considered the provision of EU law concerned, it remains unclear whether it has already commented sufficiently on the compatibility of that provision with the fundamental right protected by the ECHR, violation of which is now alleged in the proceedings before the ECtHR and whether in general terms it examined this compatibility from the same legal aspects as those now relevant in the proceedings before the ECtHR.¹¹⁸ If, in such borderline cases, the decision regarding the necessity of the prior involvement of the CJEU were to be left to the ECtHR alone, Advocate General Kokott stated, it would be incompatible with the autonomy of EU law, since ultimately the CJEU itself is the only reliable authority on whether it has previously dealt with the specific legal issue before the ECtHR regarding the compatibility of a particular provision of EU law with one or more fundamental rights protected by the ECHR.¹¹⁹ In her view, and corroborating the CJEU's Opinion in this regard, 'in order to respect the principle of autonomy of the EU legal order and to preserve the jurisdiction of the CJEU, it is necessary to ensure that, in the event of any doubt, the ECtHR will *always* carry out the prior involvement procedure in accordance with Article 3(6) of the draft agreement.'¹²⁰ She added that the ECtHR may dispense with the prior involvement of the Court of Justice only when it is obvious that the Courts of the EU have already dealt with the specific legal issue raised by the application pending before the ECtHR. She stipulated that clarification to that effect is, in her view, indispensable, and must be binding under international law, so as to ensure that the autonomy of the EU legal order is

¹¹⁸ *Ibid.* points 180-182.

¹¹⁹ *Ibid.* points 183-184.

¹²⁰ *Ibid.* point 227 (*emphasis added*).

unaffected in the light of the prior involvement procedure. She drew a comparison with the procedural law of the EU concerning the preliminary ruling procedure.¹²¹

This would not appear to be as unequivocal pronouncement as that of the CJEU in its Opinion asserting that it is only the CJEU that can make that assessment of such a definitive determination of EU law, whose decision must bind the ECtHR.¹²² Advocate General Kokott affirmed the CJEU's interpretive jurisprudence concerning the third paragraph of Article 267 TFEU. This underlines, *procedurally*, the need for the decisive criteria as to whether the CJEU had previously ruled on a provision of EU law so as to trigger the prior involvement procedure or not, to be determined by the CJEU, which would render a re-negotiated draft accession agreement in this respect to be a viable proposition.

It will be reiterated that the interpretation of the role of the Advocate General in EU Adversarial proceedings by the CJEU in *Emesa Sugar* led to it stating that the reasoning of the ECtHR did not appear to be transposable to the EU office of Advocate General. The CJEU did have the opportunity further to rule on the direct question of the compatibility with Article 6(1) ECHR of the lack of the ability to be able to respond to the Advocate General's Opinion, in *Kaba*, which was not engaged with by the Luxembourg Court, it not being necessary to the outcome of the case. The result of the CJEU's internal rules derogating from the role of the Advocate General to deliver a reasoned submission in open Court, in cases capable of affecting the human rights of EU citizens, would now give rise to a subsequent need for the CJEU to give a definitive ruling on such a question of compatibility in the event that the question arises in proceedings brought before the ECtHR post EU accession to the ECHR. This also underlines the necessity of having a secure communication procedure in place in the Council of Europe in order to notify the CJEU of the application raised.

¹²¹ Article 267, para. 3, TFEU. View, point 184.

¹²² Opinion 2/13, para. 238.

Advocate General Kokott proposed a viable solution in so far as a final decision of the EU¹²³ gives rise to a finding by the ECtHR that the ECHR has been violated, when it may, in certain cases, become necessary to re-open the relevant judicial proceedings.¹²⁴ The EU's internal rule making procedures, and, in particular, resort to the ordinary legislative procedure in order to amend the Statute of the CJEU, together with any accompanying amendments to the Court's Rules of Procedure relating to an application for revision of a judgment of the CJEU,¹²⁵ are all that need to be engaged with, so as to ensure the compatibility of the draft accession agreement with EU law in this instance, which would 'not be in the nature of a constitutional change'¹²⁶ The EU and CJEU can and should exercise deference to the standards of a fair trial required by the ECtHR interpreting the ECHR and pre-empt this potential eventuality.¹²⁷

EU-ECHR Relationship: Concluding Comments

It is recommended that the EU revisit the question of the right of rejoinder to the Advocate General's submission in the interests of upholding the standards for a fair trial in accordance with the ECHR as interpreted by the ECtHR. This is so having regard to the evolving values on which the EU is premised; the ability under the Statute and Rules of Procedure of the

¹²³ '... the impact of the case law of the Court of Human Rights in the EU system is dependent on the view taken of it by the Court of Justice.' J. Kokott and C. Sobotta, 'Protection of Fundamental Rights in the European Union: On the Relationship between EU Fundamental Rights, the European Convention and National Standards of Protection' (2015) Vol. 34, No. 1 *Yearbook of European Law*, 60, 65.

¹²⁴ View, point 81.

¹²⁵ Article 48 TFEU.

¹²⁶ View, point 74.

¹²⁷ '... after the 2014 Opinion on accession, it is to be expected that Strasbourg will look very closely at any human rights problems that are related to EU law, and in particular to Luxembourg jurisprudence. The usual suspects are well known: ... the role of Advocates General' Kokott and Sobotta (2015) above n. 127, 69.

CJEU to derogate from the role of the Advocate General to deliver his submission in open court prior to the Court's deliberations and its final decision; and the current situation regarding the accession of the EU to the ECHR. This is essential now that the EUCFR, housing substantive human rights for EU citizens, is legally binding and ripe for interpretation by the CJEU. Expediency *versus* fairness should not be the overarching characteristic of the EU adjudication system entitling the EU to dispense with the rules of a fair hearing in those cases with the potential to violate a party's human rights.

The outcome of Opinion 2/13 in terms of the relationship between the CJEU and the ECtHR, pending EU accession, will not become apparent until applications arise in which the ECtHR will be asked to return judgment as to the equivalence of the protection afforded by the EU legal system with the standards of ECHR. As the ECtHR declared in *Bosphorus*, '*any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change to fundamental rights protection.*'¹²⁸ The preoccupation of the CJEU with the protection of its own prerogatives, namely the autonomous legal order of the EU cocooned from the external control mechanism of the ECHR and the standards of human rights pertaining in Europe as interpreted by the ECtHR, to the detriment of the individual human rights of EU citizens, may be the catalyst that will serve to rebut the presumption of equivalent protection accorded to the EU by the ECtHR.

Pending accession, the protection gap will persist in which there is no Contracting Party involvement, solely the acts or omissions of the EU, as outlined in *Connelly* and where, currently, the ECtHRs' jurisprudence on the right to a fair hearing does not directly apply. Hence the importance of the re-negotiations necessary to put the accession process back on track. It can be said, optimistically, that the suggestions articulated by Advocate General

¹²⁸ Above n. 88, para. 155.

Kokott do offer solutions to the current *impasse* by way of amendment to the EU's internal rules, and feasible renegotiation of the draft accession agreement so as to ensure that the autonomy of the EU legal order and that of the CJEU is preserved, while also ensuring that the balance shifts in the EU so as to maintain the Treaty mandated protection of human rights.

It should continue to be contemplated that the prospective EU accession to the ECHR will lead to greater scrutiny of the CJEU's internal procedural rules by the ECtHR in direct application of Convention standards to a Contracting Party. It is also within contemplation that the *sui generis* nature of the EU legal order, which is what the CJEU considers it to be, will receive due deference by the ECtHR, but not to the detriment of EU citizens denied a right of rejoinder, and also prior recourse, to the Advocate General's submission. There is a case to be made for the EU to revisit its internal rules, specifically the Statute and Rules of Procedure of the CJEU. This it should do separately to, and also consistently with, the accession process.