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Invisible Influence?

The Role of the Advocate General in the European Court of Justice on the Development of Community Law

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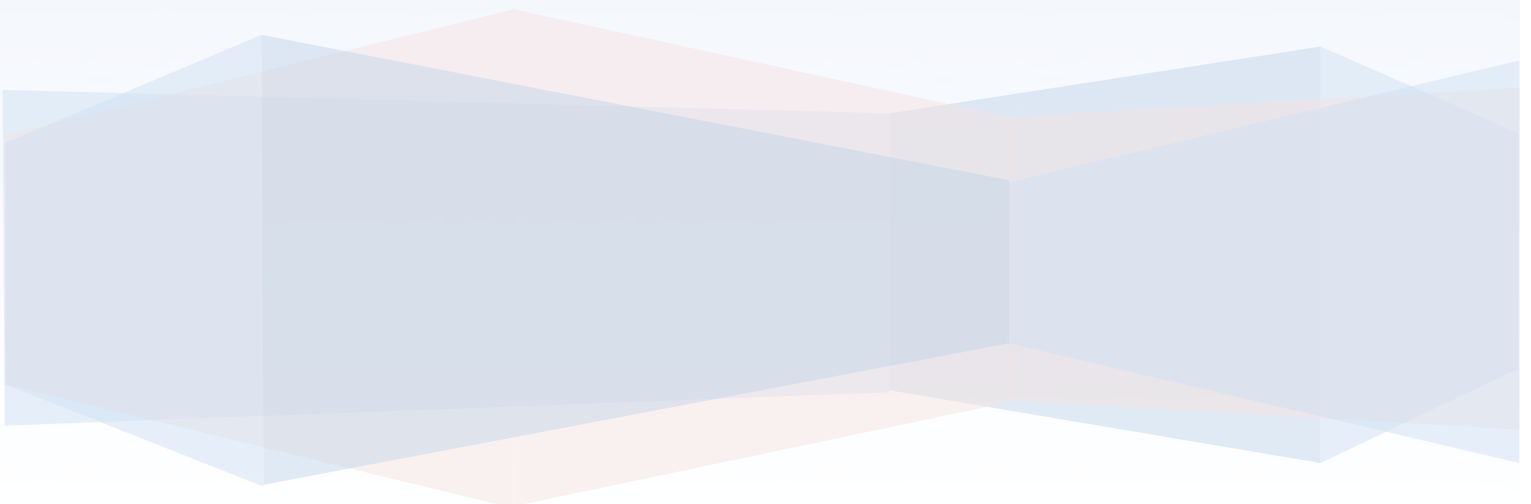


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I. Abstract

Without analogy in the American legal system, the role of the Advocate General, as defined by Article 252 of the Treaty of Lisbon, is simply yet eloquently, to “assist the Court”. Officially this means the Advocate General’s work is the delivery of full, formal advisory (non-binding) opinions to the European Court of Justice. Unofficially, Advocate General’s have been influencing the development of European Union law since as early as 1952. However, there exists a gap in contemporary research quantifying and explaining the Advocate General’s impact. The Advocate General is fully involved in judging the importance of issues raised in Community law, and how a case should proceed: he is directly responsible for helping move European case law forward. Although his opinion is non-binding, my research dealing with the important process of member state non-compliance, shows that a striking majority of the time the European Court of Justice will not only agree with the Advocate General’s judgment, but mirror his reasoning as well. The Advocate General remains an important and unique position within the European Court of Justice.

II. Introduction

Discussion of the role of the Advocate General is becoming a trending topic amongst European Union historians as an increased focus is placed on the historical development of the European Court of Justice. While many scholars (Burrows, Greaves, Dashwood, Arnall, Eeckhout, Tridimas, Rasmussen) examine the function and influence of the Advocate General, none attempt to quantify this power using concrete data. Using the infringement articles established in the Treaty on the Functioning of the European Union¹ as a tool, this paper will provide research which empirically measures the impact of the Advocate General on the European Court of Justice and the development of Community law.

Examining how often and to what extent the European Court of Justice agrees with the Advocate General's opinion in infringement cases in the time period 1961-1977 lead to the discovery of a tangible link between the Advocate General's opinion brief and the European Court of Justice's final judgment. Professor A.A. Dashwood estimates that the Court follows the Advocate General's opinion in approximately 70 per cent of cases. The research in this capstone will show that this percentage is actually statistically higher, closer to a 91 per cent agreement rate. This statistic is important because it shows that several authors such as Tridimas and Arnall are wrong in assuming that it is impossible to empirically gauge the influence of the Advocate General on the development of case-law of the Court.² Admittedly, it is difficult as Tridimas notes, to prove how "the contribution of the Advocate General [can] be separated from other

¹ *Official Journal of the European Union*. "Consolidated Version of the Treaty on the Functioning of the European Union". Article 258-260. 9/5/2008
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>

² Noreen Burrows and Rosa Greaves. "The Advocate General and EC Law". Published in *Oxford Scholarship Online*: January 2009. p.7-8

influences that might be brought to bear on the Court in reaching its decision.”³ However, a teleological examination of the development of the European Court of Justice, European Community case law, and the career of the first Advocate General (Maruice Lagrange, who was very active as Advocate General during the time period in which the first infringement proceedings occurred) helps give meaning to the numbers. EU law scholars Paul Craig and Grainne De Burca’s conclusion that the opinion of the Advocate General is “very influential, and in fact is followed by the ECJ in a majority of cases” is concurrent with the hypothesis of this capstone.⁴ Despite the Advocate General’s lack of official, binding, power the position still holds a tremendous amount of prestige, authority and impact.

III. Building on Previous Research

The research presented in this capstone will build upon the works of many EU scholars in further establishing the influence of the Advocate General. Noreen Burrows and Rosa Greaves have written several papers on European Community law and the role of the Advocate General. Ultimately they conclude that “there is no simple answer” to the question of whether “the Court follows the Opinion of the Advocate General in coming to a decision on a case”; furthermore they note that their research is just the “tip of the iceberg [and that] it would be useful for similar research to be undertaken”. The work presented in this paper directly answers the call to action presented by Burrows and Rosa.

³ *Ibid*, p.7

⁴ Paul P. Craig and Grainne De Burca. EU Law: Text, Cases, and Materials (3rd Ed.) New York: Oxford University Press, 2003. p.94

Through his research, Takis Tridimas emerges as one of the biggest supporter-critics of the Advocate General. While he questions whether or not it is truly possible to determine the influence of the Advocate General on a case by case basis, he still understands the important role of the Advocate General, stating: “as the Court itself has evolved, the role played by the Advocates General has changed and developed with it”.⁵ Tridimas would most likely argue that the data presented in this paper fails to fully account for the exact amount of influence an Advocate General’s opinion holds, but he would agree with my conclusion that it is undeniable that there exists at least *some* amount of influence.

Diana Panke and Lisa Conant’s work on the European Court of Justice and member state non-compliance proved to be very useful for establishing the infringement process as a means of measuring the influence of the Advocate General. The infringement proceedings (a total of 35 cases in the 1961-1977 time period) were chosen because (1) they have already been proven by Panke to be an effective means of analyzing the European Court of Justice, (2) they offer a concrete and workable amount of cases in which it is possible to compare the rulings of the Court with the opinion of the Advocate General, (3) the Advocate General issued an opinion in all of the examined cases, and finally (4) several different Advocate Generals were active in issuing briefs on member state non-compliance, thus a diverse pool of data was available.

Before understanding what role the Advocate General plays in the development of Community law it is important to understand how the European Community came to be. It is also important to trace and build upon the research conducted on the Court of Justice, so that the relationship between the ECJ and the Advocate General can truly be understood.

⁵ Anthony Arnall, Piet Eeckhout, Takis Tridimas. “Continuity and Change in EU Law, Essays in Honor of Sir Francis Jacobs”. *Oxford Scholarship Online* (2009) p.32

IV. A Brief History of the European Union

When the six countries France, Italy, Belgium, Luxembourg, West Germany, and the Netherlands signed the Treaty of Paris in 1951 they created the precursor to the European Union known as the European Coal and Steel Community (ECSC). Over the next 50 years their experiment in diplomatic and economic stability would flourish into one of the largest economic and political entities of the twenty-first century. The European Coal and Steel Community was the first organization to introduce the concept of “supranational integration” through the creation of common institutions responsible for “Community decision-making”.⁶ The governments of the member states delegated power and authority to the newly created Community institutions. These institutions act within the limits of the powers conferred on them by the member states and the objectives assigned to them by the treaties that established them. The prototypical institutions created within the ECSC were the High Authority, the Common Assembly, the Special Council of Ministers, and the Court of Justice.⁷ These preliminary institutions, while restricted in scope and power, functioned as important bodies of European integration. Through future treaties⁸, reforms, and international agreements these initial organizations transformed into their modern day counterparts known as the European Commission, the European Parliament, the Council of the European Union, and the European Court of Justice.

⁶ CVCE (Centre Virtuel de la Connaissance sur l'Europe). “The European Communities”. 11/08/2011 http://www.cvce.eu/obj/The_European_Communities-en-3940ef1d-7c10-4d0f-97fc-0cf1e86a32d4.html

⁷ The High Authority would later become the **European Commission**, the Common Assembly would become the **European Parliament**, the Special Council of Ministers would become the **Council of the European Union**, and the Court of Justice would become the **European Court of Justice**.

⁸ Treaty of Rome established the European Economic Community and the Euratom Treaty established the European Atomic Energy Community. In 1967 the Merger Treaty merged the institutions of Euratom and the ECSC with those of the EEC.

V. The Role of the Advocate General in its Institutional Context

A. The European Court of Justice

While the Commission, the Parliament, the Council, and the Court of Justice all contributed to the further integration of the European Union, they did not do so in equal parts. European Union historians and political scientists are constantly debating the function that each institution played in the integration process of the EU. However, the European Court of Justice (ECJ) deserves particular attention because of its historical and present day contributions. The Germans originally envisioned a court that would not only protect the member states from the other institutions, but would also act as a constitutional court. They argued for a court that would be “accessible to private enterprise, litigate conflicts of power between the community’s organs, have jurisdiction not only over the [High Authority] but also over the Council of Ministers, the Assembly” and be the only body able to interpret the treaties.⁹ In order to create a uniform jurisprudence, the court would alone handle disputes related to the application of the treaty and would also be able to annul decisions of the High Authority that violated the spirit and terms of the treaty. While Germany and the Benelux countries supported the possibility of a federal court, the French were much more reluctant in accepting its creation, with the firm intention of limiting its authority. What resulted was a court that was “more than an international court, but not quite a constitutional court either; it was mainly an administrative court, empowered to ensure that the High Authority would act within the powers granted by the treaty.”¹⁰ Thus a balance was struck with the French asserting for the strong and central position of the High Authority while the

⁹ Anne Boerger. “Negotiating the Foundations of European Law, 1950-1957: The Legal History of the Treaties of Paris and Rome”. *Journal of European Integration History*, (18:2), p.7-8

¹⁰ *Ibid*, p.10

Benelux countries and Germany pushed for a court that would make sure the High Authority's decisions conformed to the treaty. The result was a system with the "contours of a federal supreme court system of judicial review, but would depend completely on the cooperation of national courts in order to function."¹¹

B. The Role of the Advocate General in the Court of Justice

It is the responsibility of the Court of Justice to ensure that the law is observed based on the interpretation and application of the Treaties of the European Union. The national courts are responsible for applying Community law and, when confronted with a question of interpretation, they refer to the European judges. Originally only seven judges served the ECJ when it was established in 1952. Today, Article 253 of the Treaty on the Functioning of the European Union dictates that,

"the Judges of the Court of Justice shall be chosen from 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 recognized competence; [furthermore] they shall be appointed by common accord of the governments of the Member States for a term of six years."¹²

¹¹ *Ibid*, p.17

¹² *Official Journal of the European Union*. "Consolidated Version of the Treaty on the Functioning of European Union." Article 253. 9/5/2008.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>

Additionally, these judges may hold office for a renewable term an unlimited number of times. Currently 27 judges preside in the European Court of Justice. A President of the Court is chosen from amongst the judges and supervises hearings and deliberations, and is responsible for assigning cases to the chambers for detailed examination. The president also appoints a Judge-Rapporteur who functions as the reporter for the court: he writes and delivers the opinion of the court on the particular case he is assigned to.

The European Court of Justice's decision making process is further assisted by the office of the Advocates General (AG). The Advocate General is a full member of the Court and participates at the oral stage of the judicial hearing. The position of AG was created at the same time as the ECJ itself. Currently eight Advocates General serve the ECJ, however should the ECJ so request, the Council, acting unanimously, may increase the number of Advocates General.¹³ According to Article 252 of the Treaty on the Function of the European Union,

“it shall be the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.”¹⁴

Thus, the AG's most important duty is writing reasoned opinions dealing with court cases, which he then submits to the ECJ before it issues its official ruling. Although a member of the Court, the AG acts as an independent adviser; he does not attend the Judges' deliberations, even in a consultative capacity. Although not technically legally binding, his conclusions may

¹³ The number of Advocates-General has increased as the Community has enlarged.

¹⁴ *Ibid*, *Official Journal of the European Union*. Article 252

strongly influence the development of Community law. In 1976 Lasok and Bridge described the function of the Advocate General in the following terms: “their task is a three-fold one: to propose a solution to the case before the Court; to relate that proposed solution to the general pattern of existing case-law; and if possible, to outline the probable future development of the case-law.”¹⁵

The Advocate General’s opinion is published in the European Court Reports alongside the judgment of the Court. It is also published on the Court’s website on the day that it is delivered, thus the AG’s report has longer exposure compared to the Court’s judgment and tends to prepare the legal landscape. Craig and de Burca suggest that “the style and content of the Advocate General’s opinions are virtually always more readable than those of the Court’s judgments, and often shed light on the meaning of an obscure judgment”.¹⁶ The written opinion explains the AG’s understanding of relevant and applicable case law and “in fact is followed by the ECJ in a majority of cases”.¹⁷ What Craig and de Burca lacked in their analysis was concrete data demonstrating the influence of the Advocate General: while right in their assumption, they lacked a number that directly quantified the impact of the Advocate General on the ECJ, which is what the research in this paper will address.

¹⁵ Noreen Burrows and Rosa Greaves. “The Advocate General and EC Law”. *Oxford Scholarship Online* (2009)

¹⁶ Paul P. Craig and Grainne De Burca. EU Law: Text, Cases, and Materials (3rd Ed.) New York: Oxford University Press, 2003. p.94

¹⁷ *Ibid*, p.94

VI. A Quasi-Constitutional Supreme Court for Europe

The option of transforming the ECJ into a constitutional court, although considered at various points during the negotiations of the Paris and Rome treaties, was ultimately pushed aside¹⁸. Instead, jurists and several other legal actors, without any master plan in mind or even foreseeing how these provisions would play out in the future, continuously introduced small measures pushing the court towards a quasi-constitutional entity. The first Advocates Generals were among the individuals who would apply the treaties and use the legal order to advance European integration and the development of the European law. It was in the early, formative, period of the 1960s that the constitutional practice was first fully realized by the court. The principles of direct effect and primacy, established in two landmark cases, demonstrated the importance of the ECJ, and why this time period in particular was so crucial to the development of European law. However, comparing the Advocate General's opinion and the ruling of the Court, in these landmark cases, only adds further complexity to the research question presented in this capstone. Even in these instances of fundamental case law, there is real confusion about how influential the Advocate General is. By examining the landmark cases dealing with the question of constitutional significance, and then comparing the Advocate General's opinion to that of the Court, it is possible to see that Maurice Lagrange and Karl Roemer undeniably had an impact on the development of Community law.

¹⁸ Anne Boerger. "Negotiating the Foundations of European Law, 1950-1957: The Legal History of the Treaties of Paris and Rome". *Journal of European Integration History*, (18:2), p.20

A. Landmark Cases: A Fundamental Period for the European Court of Justice

The European Court of Justice advanced European integration by establishing European case law precedent through two important landmark cases. In *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963, Case 26/62) the ECJ established the principle of direct effect and in *Flaminio Costa v ENEL* (1964, Case 6/64) the ECJ established the primacy of European law over the laws of its member states. Together, the two rulings helped establish the ECJ as the supreme court of the European Union in matters of Union law.

Van Gend en Loos highlights the creative teleological jurisprudence of the European Court of Justice. Van Gend en Loos was a transportation company that imported chemicals from West Germany to the Netherlands. The Dutch customs authority charged a tariff for the importation of these chemicals to which the Van Gend en Loos company objected, and brought the case before a national court. The national court requested a preliminary ruling from the ECJ, asking whether Article 12¹⁹ of the Treaty of Rome gave rights to the citizens of a member state, which could then be enforced in national courts. While Article 12 makes no mention of the concept of direct effect, by ruling that Article 12 was capable of creating personal rights for Van Gend en Loos, the ECJ recognized that without a concept of direct effect sufficient legal protection would not be given to individuals. Thus individuals within the European Union were given the ability to act as enforcers in national courts, which the ECJ viewed as an effective supervisory mechanism. *Van Gend en Loos* “established the principle of direct effect, recognizing that treaty provisions could enjoy positive legal force directly in national law, if they

¹⁹ Article 12 states the following: "Member States shall refrain from introducing between themselves any new customs duties on imports and exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other."

met certain conditions.”²⁰ Although there was broad political support for a European Community, it took “Dutch ideas of international law to inspire and legitimize national reforms that would ultimately pave the way for the famous *Van Gend en Loos* ruling”, and by doing so establish the direct effect provision.²¹ Although *Van Gend en Loos* was crucial in shaping the ECJ as a quasi-constitutional court, it is important not to simply think of the development of European law as merely a “constitutional” or “administrative” process, but rather one that was influenced by many factors, particularly national constitutional traditions and the legal order, of which the Advocate General was a part of. Furthermore, the ECJ identified three criteria necessary to establish direct effect of EU law, they are: (i) the provision must be sufficiently clear and precisely stated (ii) it must be unconditional and not dependent on any other legal provision, and (iii) it must confer a specific right upon which a citizen can base a claim.²² If all of these criteria are met, then the rights in question can be enforced before the national courts.

Costa was similarly important in progressing the body of European law through the principle of primacy. The European Court of Justice held that in situations where there is a conflict between the laws of member states and European law, European law is applied first. The impact and implications of *Costa* are very straightforward: without this landmark case, the ECJ would not be able to function as a constitutional-like entity. The principle of primacy is an essential requirement for integration, and it was the European Court of Justice that established this concept through its ruling in *Costa*.

²⁰ Bill Davies and Morten Rasmussen. “Towards a new history of European law”. p.2

²¹ Karin van Leeuwen. “On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms ‘Towards’ Europe”. p.18

²² Eurofound. “Direct Effect”. 13 January, 2011
<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/directeffect.htm>

B. Maurice Lagrange: The First Advocate General

Introducing these two classically federal doctrines assumed, under one interpretation, that the Treaties of Rome could be viewed as if they were a constitution, establishing a constitutional practice in its case law towards the national courts.²³ Rasmussen, however, instead argues that the development of these landmark cases can be traced prior to 1958 as the works of the European Commission's legal service and Maurice Lagrange. Lagrange was the key legal advisor to Jean Monnet, who was father to the idea of European unity and the European Coal and Steel Community. Lagrange was very unique because he was one of the main drafters of the Treaty of Paris, and would then serve as the first Advocate General in the ECJ.²⁴ Rasmussen writes that Lagrange was always striving to discover "the great lines and the fundamental objectives in the vagueness and compromises of the Treaty provisions".²⁵

Lagrange's work lay in establishing the Advocate General as a source of influence in the European Court of Justice. Very little research has been conducted showing how the Advocates Generals have directly advanced the body of European law. Yet if particular attention is paid to Lagrange's career, it is apparent that despite not having any sort of formal power, he was a key legal actor that aided in the development of EU law, culminating in the landmark cases of *Van Gend en Loos* and *Costa*. Although he differed in his view of a comparative method as to what rules and principles of law should be incorporated into the Community's legal order, Lagrange's opinions were primarily based on an analysis of comparable situations in the national legal systems of member states. "Lagrange would study national solutions to similar legal problems

²³ Morten Rasmussen. "The First Advocate Generals and the Making of European Law, 1950-1958". p1-3

²⁴ *Ibid*, Rasmussen, p.5

²⁵ *Ibid*, Rasmussen, p.5-6

[he faced] in order to extract common principles which could be applied, by analogy, to the interpretation of the Community's Treaties.”²⁶

Lagrange supported the European legal service's work in arguing for the ECSC existing as a Community somewhere in between an international organization and a federal structure.²⁷ Together they argued that the ECSC was a partial federation, and thus the ECJ should have some form of a constitutional role. This debate was occurring in the early 1950s, a great deal of time before the actual cases of *Van Gend en Loos* and *Costa* were decided by the ECJ. The legal service was encouraging a teleological interpretation of the Treaties, an interpretation based on “the spirit and common sense [of the Treaty, and not just a] dogmatic textual interpretation”.²⁸ While Lagrange as Advocate General and the legal service were vocally arguing for the advancement and further integration of European law, initially the ECJ was very limited and unwilling in adopting a constitutional mode of interpretation and issuing progressive jurisprudence. However, the Court eventually began to adopt the teleological interpretation method in its rulings, an approach upheld by both Lagrange and the legal order.

C. Invisible Influence: The Impact of the Opinion

When the Court does not agree with the opinion of the Advocate General it does not necessarily mean that the Advocate General did not play an important role in the outcome. The Advocate General often treads through difficult and uncharted terrain when drafting and writing his brief. An opinion which provides a firm counter-factual argument to the Court can also assist

²⁶ Noreen Burrows and Rosa Greaves. “The Advocate General and EC Law”. p.80-81

²⁷ *Ibid*, Burrows and Greaves, p.81

²⁸ *Ibid*, Rasmussen, p.7

the Court in coming to its decision. For example, although it is documented that AG Roemer and the Court came to different conclusions as to the application of direct effect of Article 12, it does not mean that Roemer's opinion did not raise significant constitutional issues which needed to be addressed. In his understanding of *Van Gend en Loos*, Roemer was not completely opposed "to the idea that provisions of the Treaty could create rights for individuals that must be protected by the national courts" (direct effect).²⁹ He agreed that Community law is not restricted to contractual agreement between States. Roemer referenced the system established by the Treaties to enforce Community law:

"It is the function of the Commission to enforce against the Member States the obligations imposed by the Treaty, and for the Member States to take the measures required to comply. Had it been intended by the drafters of the Treaty that Community law would have direct application over national law in the sense of predominance over it then the sanction included in the Treaty would have been a declaration of nullity of national provisions."³⁰

Roemer did not wish to create legal uncertainty for member states in economic and political undertakings, which relied on the certainty of national law in their commercial activities. Thus Roemer chose instead to defer to the constitutional traditions of the member states and to the member states themselves as authors of the Treaty. On behalf of the court he explored the different constitutional traditions of member states and their implications. Roemer's issued opinion recognizes the implications towards national constitutional law of a finding of

²⁹ Noreen Burrows. "The Advocates-General and the development of the principle of direct effect". p.193

³⁰ *Ibid*, Burrows, p.193

direct effect in Article 12, whereas the Court ignores the implications (and it could only come to its final judgment by ignoring the opinion of the AG on this point).

It is inaccurate to assume that Roemer did not understand the constitutional significance of the questions put forth to the Court in *Van Gend en Loos*. What he misunderstood was the readiness of the Court to abandon previously accepted boundaries of national constitutional law and international law. The court was willing to create the conditions for direct effect (conditions where individuals could invoke provisions of Community law in the national court) because the ECJ sought to deepen the legal integration of the member states into the European Community. It deepened integration by first demonstrating the power of Community law could be applied to protect the interests of not only the member states but of individuals as well, and secondly, by calling on the vigilance of individuals to ensure member state compliance with Community law. For Roemer, direct effect was a legal question of interpretation to which he wished to preserve the prevailing system, but for the ECJ the issue of direct effect could be a means of furthering European integration. Roemer understood the constitutional significance of his opinion for the legal order of the member states and chose the cautious approach. Meanwhile, the ECJ encouraged by the legal service, took the route of clever, although risky, jurisprudence. The ECJ's disagreement with Roemer's opinion doesn't highlight his excellent service in examining the full spectrum of legal consequences (most of which the Court chose to ignore).

D. Lagrange and *Costa*

As the presiding Advocate General for the case *Costa v. ENEL*, Lagrange was able to impact the ECJ's final decision in establishing the primacy of EU law. However, Lagrange

cautioned the Court that, “under the guise of interpretation, [the Court] might more or less substitute itself for the national court which...retains jurisdiction to apply the Treaty and the regulations of the Community which have been incorporated into national law by ratification”.³¹

Lagrange believed in the primacy of Community law but did not wish for there to exist a conflict between the Court of Justice and the highest national courts such that there could a serious prejudice on the system of judicial review instituted by the Treaty. The European Court of Justice followed the Advocate General’s reasoning on this point stating:

“the Court has power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty. Consequently a decision should be given by the Court not upon the validity of an Italian law in relation to the Treaty, but only upon the interpretation of the above mentioned Articles”³²

Lagrange found it difficult to give an interpretation of the Treaty under which these circumstances would appear to be a purely theoretical exercise unconnected with the solution of the dispute proposed by the Italian government. The core problem was the coexistence of two opposing legal rules which both applied to the domestic system (one deriving from the Treaty and Community institutions, and the other from the national legislature and institutions) of the member states. Lagrange’s solution was to view the Treaty as creating “its *own* legal system

³¹ Opinion of Mr. Advocate-General Lagrange Delivered on 25 June 1964. Case 6/64.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964CC0006:EN:PDF>

³² Noreen Burrows and Rosa Greaves. “The Advocate General and EC Law”. Published in *Oxford Scholarship Online*: January 2009. p.80

which, although distinct from the legal system of each of the member states, by virtue of certain precise provisions of the Treaty, [transferred] jurisdiction to the Community institutions”.³³

Although the Court did not make a formal reference to Lagrange’s opinion in its *Costa* ruling, the fact that the court did not reach a different conclusion from that of the AG and followed similar legal reasoning is significant and supports the idea that Lagrange’s opinions “carried weight with the judges”.³⁴ According to Burrows and Greaves, “fewer than 10 opinions of Lagrange were not followed by the Court”. Furthermore, in some judgments, such as Case 1/54, the Court referred directly and expressly to Lagrange’s opinion.³⁵

VII. The Infringement Process and the Advocate General’s Involvement

When a member state of the European Union fails to comply with Community law, it falls upon the European Commission to end the non-compliance. As identified in Article 258 of the Treaty on the Functioning of the European Union³⁶ and Article 226 of the EC Treaty, the power to begin an infringement proceeding lies with the Commission. However, if the member state refuses to adhere to the Commission, a formal case is brought before the European Court of Justice. The infringement process was formerly defined in much the same way by Article 169 of the Treaty establishing the European Economic Community.

³³ *Ibid*, p.81

³⁴ Noreen Burrows and Rosa Greaves. “The Advocate General and EC Law”. Published in *Oxford Scholarship Online*: January 2009. p.85

³⁵ *Ibid*, p.84

³⁶ In the Lisbon Treaty, the Rome Treaty was renamed to the Treaty on the Functioning of the European Union.

The infringement process can be classified into two main stages: the pre-litigation administrative phase and the official litigation procedure. The European Commission resolves over 80 percent of its infringement proceedings during the pre-litigation stage of the process.³⁷ However, in the remaining 20 percent of cases it falls on the European Court of Justice to examine the facts of the case and issue a verdict.

In all recorded instances, the Commission will first issue a warning and only as a final means to end non-compliance will it refer the case to the ECJ. This warning comes in the form of a letter of formal notice, representing the pre-litigation procedure. The letter allows the member state to “voluntarily conform to the requirements of the Treaty.”³⁸ The member state is given time to respond by identifying “problems regarding the application of EU law” within a given time frame.³⁹ Included in the pre-litigation procedure is the requirement (under article 258) for the Commission to issue a reasoned opinion on the infringement. The reasoned opinion gives a detailed statement, based on the previous letter of formal notice, of the reasons why the member state has failed to fulfill its obligations under Community law. The member state is also given a specific time limit in which it must comply, otherwise the case is referred to the European Court of Justice.

If domestic change does not take place to address the failure to fulfill obligations under the Treaty, the member state may then become subject to fines and sanctions (Article 228). Failure to comply with ECJ judgements results in subsequent rulings with financial penalties.

³⁷ Lisa Conant. Justice Contained: Law and Politics in the European Union. Cornell University Press: Ithaca and London. p.74

³⁸ European Commission. “Application of EU Law: Infringements of EU Law.” http://ec.europa.eu/eu_law/infringements/infringements_en.htm

³⁹ *Ibid.* European Commission

However, there is no recorded instance of continuous member state non-compliance; eventually every member state implements the relevant standards required by the Treaty.⁴⁰

The infringement proceedings (ex. Article 169) are an ideal tool for examining the influence of the Advocate General. There are a limited number of infringement cases (a total of 35 cases in the 1961-1977 time period) in which the opinion of the AG can be compared to the Court's judgement. Furthermore, other scholars have successfully demonstrated that (ex.) Article 169 can be used as a means of analyzing the European Court of Justice. Professor A.A. Dashwood estimates that "the Court follows the [opinion of the] Advocate General in about 70 percent of cases", claiming that his impression may be that the actual figure is lower.⁴¹ However, using the infringement cases from 1966-1977 it was possible to prove that the Court followed the opinion of the A.G. in 91% of all recorded instances.

A. Table A.

Case Number	Year	Member State	Advocate General	Is the Court's Judgment Equivalent to the Opinion of the AG?
7/61	1961	Italy	Lagrange	Yes
10/61	1962	Italy	Lagrange	Yes
2/62 and 3/62	1962	Belgium/Luxembourg	Roemer	Yes
90/63 and 91/63	1964	Belgium/Luxembourg	Roemer	Yes
45/64	1965	Italy	Gand	Yes
7/68	1968	Italy	Gand	Yes
16/69	1969	Italy	Roemer	Yes
45/64	1969	Italy	Gand	Yes

⁴⁰ The data stems from the Annual Reports of the European Commission. The data set includes up to 2000 cases for 12 EU Member States dealing with infringement.

⁴¹ A.A. Dashwood. "The Advocate General in the Court of Justice of the European Communities". *Legal Studies*: Issue 202, 1982, p.212

Case Number	Year	Member State	Advocate General	Is the Court's Judgment Equivalent to the Opinion of the AG?
24/68	1969	Italy	Roemer	Yes
6 and 11/69	1969	France	Roemer	Yes
31/69	1970	Italy	Gand	Yes (but later this case was dismissed)
38/69	1970	Italy	Gand	Yes
33/69	1970	Italy	Gand	Yes
7/69	1970	Italy	Roemer	No (but later this case was dismissed)
28/69	1970	Italy	Gand	Yes
77/69	1970	Belgium	Gand	Yes
26/69	1970	France	Roemer	No
8/70	1970	Italy	Roemer	Yes
7/71	1971	France	Roemer	Yes
48/71	1972	Italy	Roemer	Yes
39/72	1973	Italy	Mayras	Yes
30/72	1973	Italy	Mayras	Yes
79/72	1973	Italy	Roemer	Yes
70/72	1973	Italy	Mayras	Yes (but later this case was dismissed)
167/73	1974	France	Reischl	Yes
172/73	1974	Italy	Removed - No Record	This case was later removed from the records
12/74	1975	Germany	Warner	Yes
52/75	1976	Italy	Mayras	Yes
10/76	1976	Italy	Reischl	Yes
68/76	1977	France	Capotorti	Yes
31/77R and 53/77R	1977	United Kingdom	Mayras	Yes
61/77R	1977	Ireland	Reischl	Yes
89/76	1977	Netherlands	Mayras	No
61/77RII	1977	Ireland	Reischl	No
123/76	1977	Italy	Warner	Yes

The data in Table A was obtained by researching and reading Court briefs and the opinions of several Advocate Generals on all the infringement cases brought before the ECJ

between 1961 and 1977. The judgments for the cases are published alongside the AG's opinion, both online and in print, and both sources were used to collect this data. 1961 was the first year a case of member state non-compliance was brought before the Court; 1977 was chosen as an end point because (1) the 16 year time period provided a wealth of cases to study and (2) as the enlargement of the European Union continued, the number of total infringement cases in a given year rose exponentially, making it difficult to reasonably examine each proceeding.

After a copy of all the cases was obtained, the following information was carefully documented: (1) case number, (2) presiding Advocate General (3) year of occurrence (4) member state against which non-compliance was charged (5) whether the ruling of the Court was parallel to the opinion of the Advocate General (6) whether the legal reasoning was similar in both instances, and finally (7) whether the concluding statements were identical.

After studying the data, the first important finding that emerged was a definite relationship between the Advocate General's opinion and the judgement issued by the European Court of Justice. After accounting for one case (172/73) being removed from the records, the European Court of Justice ruled concurrent with the Advocate General in 31 out of 34 cases, or in other words, the ECJ agreed with the Advocate General's opinion 91% of the time. This finding is very surprising because 91%, by all means, suggests a high level of influence on the part of the Advocate General. Despite the Advocate General's opinions being non-binding, the impact of this statistic is undeniable. A correlation rate this high suggests at least some amount of influence stems from the office of the AG.

By further comparing not only the agreement rate, but the legal reasoning of the ECJ's judgment to the opinion of the AG, this research is able to disprove the notion that the 91%

agreement rate can be attributed to pure probability. While it is true that a case can only have two possible outcomes- guilty or innocent of infringement- and that the correlation between the AG's and the ECJ's briefs could be the result of educated chance, the fact that the same legal reasoning was used in all but 7 cases suggests otherwise. What is *most* interesting is that in 26 out of 34 infringement cases (76.5%) the wording and phrasing used in the concluding statements were *identical*. This more than anything else suggests that the Court does in fact view the Advocate General as particularly helpful in interpreting Community law, and consequently that the Advocate General's opinion is a source of influence on the Court.

B. Table B.

Case Number	Year	Member State	Advocate General	Are the judgements worded the same? (no new information added)	Was the legal reasoning the same?
7/61	1961	Italy	Lagrange	Yes	Yes
10/61	1962	Italy	Lagrange	Yes	Yes
2/62 and 3/62	1962	Belgium/Luxembourg	Roemer	Yes	Yes
90/63 and 91/63	1964	Belgium/Luxembourg	Roemer	Yes, but more specific	Yes
45/64	1965	Italy	Gand	Yes	Yes
7/68	1968	Italy	Gand	Yes, but more specific	Yes
16/69	1969	Italy	Roemer	Yes, but more specific	Yes
45/64	1969	Italy	Gand	No	Yes
24/68	1969	Italy	Roemer	No	No, (more depth)
6 and 11/69	1969	France	Roemer	Yes	Yes
31/69	1970	Italy	Gand	Yes	No, (more depth)
38/69	1970	Italy	Gand	Yes, but more specific	Yes

Case Number	Year	Member State	Advocate General	Are the judgements worded the same? (no new information added)	Was the legal reasoning the same?
33/69	1970	Italy	Gand	Yes	Yes
7/69	1970	Italy	Roemer	No	No
28/69	1970	Italy	Gand	No, costs are different	Yes
77/69	1970	Belgium	Gand	Yes	Yes
26/69	1970	France	Roemer	No	No, (more depth)
8/70	1970	Italy	Roemer	Mostly, some new info	Yes
7/71	1971	France	Roemer	Mostly, some new info	Mostly
48/71	1972	Italy	Roemer	Yes	Yes
39/72	1973	Italy	Mayras	Yes	Yes
30/72	1973	Italy	Mayras	Yes	Yes
79/72	1973	Italy	Roemer	No	No
70/72	1973	Italy	Mayras	Yes	No, (more depth)
167/73	1974	France	Reischl	Yes	Yes
172/73	1974	Italy	Removed	Removed	Removed
12/74	1975	Germany	Warner	No	No
52/75	1976	Italy	Mayras	No	No
10/76	1976	Italy	Reischl	Yes, but more specific	Yes
68/76	1977	France	Capotorti	Yes, but more specific	Yes
31/77R and 53/77R	1977	United Kingdom	Mayras	Yes, but more specific	No, (more depth)
61/77R	1977	Ireland	Reischl	No	Yes
89/76	1977	Netherlands	Mayras	No	No
61/77RII	1977	Ireland	Reischl	No	No
123/76	1977	Italy	Warner	Yes, but more specific	Yes

From an objective standpoint, it is difficult to conclusively give a number that would “unquestionably” constitute influence on the part of the Advocate General. Is a 50% agreement rate conclusive of influence? Perhaps 75%? Furthermore, as previously discussed, an Advocate General’s Opinion can still be influential even if the Court does not agree with it in its ruling. However, the fact that the agreement rate between the ECJ and the AG is **91%**, combined with evidence of similar logical reasoning and identical wording of concluding statements suggests that the Court is definitely paying attention to the Advocate General. Although the Advocate General is not present in the judges chambers during deliberation his voice is not silent. A.A. Dashwood himself believes that the AG’s opinion helps the Judge Rapporteur in producing the first draft of the judgement, and in the drafting process of successive drafts.⁴² “What is [most] important is the *dialogic* relationship between the Advocate General and the Court. This dialogic relationship does not end with the outcome of any particular case but continues as part of the ongoing conversation on the interpretation of Community law”.⁴³

VIII. Is the Advocate General Necessary?

Burrows and Greaves raise the issue of whether there is still a need for the Advocate General in today’s European Court of Justice. Their argument stems from the fact that the legal order and Community law have matured into a complete legal system alongside the national courts and national authorities. They claim that the background research done by the Advocate General could instead be provided by the “rich sources of legal advice ranging from academic

⁴² *Ibid*, Dashwood, p.211

⁴³ Noreen Burrows and Rosa Greaves. “The Advocate General and EC Law”. *Oxford Scholarship Online* (2009) p.292

writings to the written submissions of a number of law practitioners often from different legal systems.”⁴⁴ One of the benefits of eliminating the position would be an expedited court process where time and money spent is saved from having to translate documents into so many different languages. However, Greaves and Burrows fail to take into consideration that the Advocate General not only offers background research to the Court, but can also present an important counter argument as well. As the Court’s jurisdiction continues to expand, there is an ever greater need for the role of the Advocate General, who has historically thrived in uncharted legal territory. “In a world in which not all cases are properly pleaded and judges do not have the leisure to trawl through the extensive academic literature in the hopes of finding something interesting and pertinent, the Advocate General continues to provide open, public reflection on the present state of [European] case law, the possible directions in which that case law might now go and reasoned suggestions as to why it would be better for the case law to move in one direction rather than another.”⁴⁵ The public dialogue between the Court and the Advocates Generals is as important and relevant now as it ever has been.

IX. Research Complications

One possible source of error in my data is that my research does not fully address the complicated issue of translation. When the Advocate General delivers his opinion it is not always given in English, and thus it is immediately translated into several different languages. However, when conducting research into the similarity between the wording of the AG’s opinion and the

⁴⁴ Anthony Arnall, Piet Eeckhout, Takis Tridimas. “Continuity and Change in EU Law, Essays in Honor of Sir Francis Jacobs”. *Oxford Scholarship Online* (2009) p.32

⁴⁵ *Ibid*, p.32

ruling of the Court, all the briefs were in English, meaning that they must have been translated one or more times. One possible reason for why the concluding statements may have the same *exact* wording could be from a translation bias. If the same third party is translating both the opinion of the Advocate General and the judgement of the Court, it could reason that they are going to use similar terms that are familiar to them. Furthermore, some legal reasoning could easily be lost in translation going between the many different languages of the EU.

It is also very difficult to truly measure the full effect an AG's opinion has on the Court because the ECJ rarely references the AG's opinion in their ruling. The judgements themselves almost never explicitly refer to the AG's opinion of the case, meaning that any influence measured in the data presented in this paper could theoretically be explained by some outside factor. If the Court attempted to make more direct references to the AG's argument it would provide a visible link that could be studied for influence.

Even if the Court does adopt a solution proposed by the Advocate General it may do so on grounds that differ wholly or partially from the grounds in the opinion. If the Court does agree with the Advocate General in a ruling, it does not necessarily mean it is agreeing with the same reasoning the AG applied. However, it is possible to limit this complication by looking not only at the agreement rate between the Court and the AG but also how often the logical reasoning matches up, which this capstone has done. The court may also only adopt only part of the AG's opinion, however this would still demonstrate a level of impact by the office of the AG on the ECJ.

Tridimas hits the center of the issue when "he points out that [quantifying the AG's influence] is a method liable to convey a fallacious understanding of the task which the AG is

required to perform, since the task of the AG is not to give judgment but to assist the Court in *reaching* judgement.”⁴⁶ He suggests that it is not possible to measure how far a judgment has been followed. Ultimately the same problem arises: how can the contribution of the Advocate General be separated from the other influences that might be brought to bear on the Court in reaching its decision? It is impossible at this time to prove the exact influence the AG has over the ECJ, but the research in this paper carries the discussion towards the right direction by being the first project to truly attempt to quantify the impact of the Advocate General.

X. Research Expansion

If the research presented in this capstone is to be expanded, a good area for direction would be to examine the remaining infringement cases (1978-present) and see if the findings are comparable to those presented here. During the 2000s a huge influx of infringement cases occurred due to new telecommunications legislation implemented in the EU, which could possibly shift the statistical data significantly. Additionally a larger data set would also be useful in further establishing and quantifying the Advocate General’s influence.

XI. Conclusion

The Advocates General may assist the court in the following ways: (1) by arguing for innovation based on a teleological approach, (2) by arguing for consolidation based on existing case-law or legislation (3) by arguing against past case-law and (4) by arguing for a strict interpretation of the Treaties. Whether the Advocate General will argue for innovation or for

⁴⁶ Noreen Burrows and Rosa Greaves. “The Advocate General and EC Law”. *Oxford Scholarship Online* (2009) p.7

consolidation is circumstantial and ultimately encompasses only a fraction of his impact on the Court.

The Advocate General's official duty of issuing a non-binding opinion to the European Court of Justice is seen by many scholars as a dialogue on existing Community law and the direction it should take. The history of the legal system is currently a hot topic in European Union research, and this capstone adds to this growing field by being the first to use the infringement proceedings as a method for measuring the Advocate Generals impact on the Court.

Despite the AG's lack of formal, binding power, the findings of this capstone suggest that there does exist an invisible sort of influence. While the Court makes no direct mention of the Advocate General or his opinion in its final ruling, the researched analyzed in this capstone paper indicates the Court is definitely paying attention to him. Ultimately, despite the difficulty of proving the existence of this influence, very few scholars will challenge the importance of Advocate General position. The most important aspects of the AG's work is the explanatory and exploratory value of his opinion and the invaluable dialogue that he creates with the European Court of Justice. One of the limitations of this capstone is that it is historical in nature, however, this can also present itself as a benefit, by actively contributing to many recently emerging EU historical studies.

Works Cited

Articles:

- A.A. Dashwood. "The Advocate General in the Court of Justice of the European Communities". *Legal Studies*: Issue 202, 1982
- Anne Boerger. "Negotiating the Foundations of European Law, 1950-1957: The Legal History of the Treaties of Paris and Rome". *Journal of European Integration History*, (18:2)
- Anthony Arnall, Piet Eeckhout, Takis Tridimas. "Continuity and Change in EU Law, Essays in Honor of Sir Francis Jacobs". *Oxford Scholarship Online* (2009)
- Bill Davies and Morten Rasmussen. "Towards a New History of European Law".
- Karin van Leeuwen. "On Democratic Concerns and Legal Traditions: The Dutch 1953 and 1956 Constitutional Reforms 'Towards' Europe".
- Morten Rasmussen. "The First Advocate Generals and the Making of European Law, 1950-1958"
- Noreen Burrows. "The Advocates-General and the Development of the Principle of Direct Effect".
- Noreen Burrows and Rosa Greaves. "The Advocate General and EC Law". Published in *Oxford Scholarship Online*: January 2009.

Books:

- Lisa Conant. Justice Contained: Law and Politics in the European Union. Cornell University Press: Ithaca and London.
- Paul P. Craig and Grainne De Burca. EU Law: Text, Cases, and Materials (3rd Ed.) New York: Oxford University Press, 2003.

Official Documents:

- CVCE (Centre Virtuel de la Connaissance sur l'Europe). "The European Communities". 11/08/2011 http://www.cvce.eu/obj/The_European_Communities-en-3940ef1d-7c10-4d0f-97fc-0cf1e86a32d4.html
- European Commission. "Application of EU Law: Infringements of EU Law." http://ec.europa.eu/eu_law/infringements/infringements_en.htm
- Official Journal of the European Union*. "Consolidated Version of the Treaty on the Functioning of European Union". 9/5/2008. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>
- Opinion of Mr. Advocate-General Lagrange Delivered on 25 June 1964. Case 6/64. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964CC0006:EN:PDF>