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Tamara Ćapeta

Seventy Years of Advocates General at the Court of Justice of the European Union

Leiden Europa Lecture

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Seventy Years of Advocates General at the Court of Justice of the European Union

Leiden Europa Lecture delivered by

Tamara Ćapeta

Advocate General at the Court of Justice of the European Union

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Universiteit Leiden

Europa Institute

Preface

Dear Madam Advocate General, dear colleagues, students, guests. Dear friends.

It is our honour to introduce to you Advocate General Tamara Ćapeta.

Tamara Ćapeta was appointed as the first Croatian Advocate General at the Court of Justice of the European Union in October 2021. But long before that she was already widely known as a leading academic in the field of EU law.

A graduate from the University of Zagreb and the College of Europe in Bruges, she started her career in the Croatian Ministry of Foreign Affairs at the Department for European Integration. She defended her PhD at Zagreb University and was appointed professor at the same university in 2002. From the accession of Croatia until 2014 she worked at the Court of Justice as the Head of Unit for translation into Croatian, before returning to Zagreb University to lead the European Law Department.

It is safe to say that this department, of which she is a co-founder, has produced some of Croatia's most eminent EU legal scholars and magistrates, which include – apart from herself – scholar and judges like Siniša Rodin, Tamara Perišin and Iris Goldner Lang. With all of them she has co-authored publications, in particular about the role of law and courts in the European Union.

The European Law Department of Zagreb University is also the home of the Croatian Yearbook of European Law and Policy, of which Tamara Ćapeta served as Editor-in-Chief. She is also a Jean Monnet Professor and was the coordinator of the Jean Monnet Centre of Excellence on the Rule of Law: a topic that remains of great relevance today.

Many of us at the Europa Institute will know Tamara Ćapeta from the doctoral summer school, which Zagreb University organises yearly. For two decades, this has been a place where young researchers in EU law have been able to present and discuss their research, against the backdrop of stunning medieval Dubrovnik.

As an academic, she has covered a broad range of questions of EU law: from economic integration and EMU to accession and withdrawal, from judicial legitimacy to legal realism. On the topic of legal realism, she recently elaborated in an episode of the highly recommended podcast series: Europa Felix. There she emphasized that, more often than not, a legal question does not have a single answer and that judges therefore have to make choices, and that they need to be open about these choices. She also explained the importance of context and the fact that context changes over time.

These elements, openness and context, are well illustrated in her recent Opinion in *Xella Magyarország.* Advocate General Ćapeta concluded that EU law allows for the screening of foreign direct investment of third country provenance, even if implemented via an EU-based company. But she openly stated that twenty years ago, she – and many others with her - would have considered this protectionism. However, now, against the background of the Russian invasion of Ukraine, she observed: "tomorrow's strategic geopolitical interests have the potential to influence today's commitments to free trade." Balancing the traditional pillars of EU law with a new geopolitical reality is likely to occupy many a legal mind in the years to come, and we look forward to your further views in that regard.

In today's lecture you will look back at seventy years of the Court of Justice of the European Union. One of your predecessors, Michal Bobek, once compared the role of the AG with that of a jester at a royal court. The only one allowed to tell uncomfortable truths to His Majesty with impunity. But also a

person to which a wise king would listen carefully. Of course, your personal style will differ from that of Advocate General Michal Bobek, but we would be wise, nonetheless, to listen to what you will have to say and look forward to your views on "Seventy Years of Advocates General" at the Court of Justice.

June 2023
Europa Institute, Leiden, The Netherlands

Prof. dr. Stefaan Van den Bogaert
Prof. dr. Armin Cuyvers
Prof. dr. Jorrit J. Rijpma

Dear colleagues, dear friends, ladies and gentlemen,

I am very happy and honoured that I was invited to address you as part of Leiden's Annual Europa Lectures. I would like to thank the Europa Institute and Professor Van den Bogaert for this invitation. I would like to also give a special thanks to Professor Jorrit Rijpma who put a lot of effort in the organisation of this event.

As you have heard in the flattering introduction, for which I extend my thanks, I am currently serving at the Court of Justice as one of its eleven Advocates General. I have joined their ranks from my previous position as a university professor. Thus, I am lucky and privileged for having the two most interesting jobs in the world.

The advocates general and academia have developed a special relationship. While the primary addressees of our opinions are, of course, judges sitting in the deciding chamber, academia has always been our second most important audience. Moreover, that relationship is not a one-way street. Scholarly writings are an important source of knowledge and ideas in the creative process of drafting opinions.

It is, therefore, indeed a great pleasure to address an academic community with a few thoughts about the role of advocates general at the Court of Justice.

Ever since Professor Stein recognised the Court of Justice, 'tucked away in the fairy Duchy of Luxembourg', as an important actor in shaping the European integration process, both legal and political science research have begun to include the Court's judgments among the necessary factors to understand and explain the European Union. To understand the output of an institution also requires an understanding of the way in which that institution functions. Given that AG Opinions are important input into judgments of the Court of Justice, for better understandings of the Court's judgments, it is necessary to know how opinions influence them.

Last year the Court of Justice celebrated its seventieth birthday and, together with the Court, its Advocates General turned 70, as they have been part of the institution from its inception.

I, therefore, have entitled my speech "70 years of Advocates General at the Court of Justice". However, it is not my intention to explore the history, even though many fascinating stories may be found in the past. I am much more interested in discussing the present, and the occasional glimpses into the past will help me to describe or to question certain contemporary issues.

What I primarily wish to explore in my speech is the question of the role of advocates general. I will try to raise the interest of the academic community by claiming that there is a lack of sufficient knowledge – let alone, a consensus – of what advocates general do or should do. That issue, therefore, deserves further research at both the descriptive as well as normative level.

As I already said, academia and advocates general have always been engaged in a conversation about particular aspects of EU law. However, the interest of academia in the function of advocates general is relatively new. With some exceptions, publications devoted to the Advocates General as part of the Court and their influence on the development and functioning of the Court as an institution, are mostly not older than 20 years.

The role of advocates general might be under-researched, but there is an awareness by academia of their importance. On the contrary, the world outside the legal professionals who come into contact with EU law, knows nothing about advocates general, including that they even exist. I learned that once I

was nominated. I would meet an acquaintance, and after our usual chit-chat, the question would arise:

- And what do you do these days?
- I am an advocate general at the Court of Justice. I now live in Luxembourg.
- Ah! You are an advocate, good for you.
- Well, no, I am not really an advocate. I really advise the judges to help them find a solution for the case.
- Ah! You are an advisor. Even better. Good for you.

After several conversations following a similar path, I now say:

- I work at the Court of Justice. I am something similar to a judge. And this seems to satisfy most of my interlocutors.

I am here today before a much more learned audience, and you are, of course, aware of the differences between a judge and an advocate general. I still hope, however, that I will be able to reveal some issues and raise some questions about the role of advocates general which is new also for you.

Let me start with the question what are advocates general for in the Court of Justice? The Treaties do not tell us much. Article 19 TEU provides that their duty is to assist the Court.

That idea – to have members of the Court that are different from judges, but also different from the parties and their lawyers, the 'fourth in the court', as my colleague Michal Bobek described advocates general – was born at the same time as the idea of having the Court within the institutional structure of what is the present European Union. One may read that establishment of the function of advocates general was inspired by the existence of a commissaire du gouvernement (today called a rapporteur public), in the French Conseil d'Etat, who had the function of assisting judges (but with some important differences). However, as the idea came late in the negotiations of the European Coal and Steel Community Treaty, it did not make it into the text of that first, founding treaty. The status of advocates general was, therefore, at the beginning, regulated only by the Statute of the Court. But, the idea from the outset was that advocates general would assist the Court.

While it is clear today that one way the advocates general assist the Court is by drafting opinions on cases, which stimulate deliberation in the deciding chamber of the Court, there are also other ways in which advocates general assist the Court. Before I return to this most important function – presenting opinions, and try to explain that we do not really know what exactly it requires from advocates general – I will first show some of the other ways in which we assist the Court, which might be less publicly known.

Every case that arrives at the Court is distributed to a judge who assumes the role of a reporting judge, and to an advocate general. While in the early days, the President of the Court was responsible for distributing cases to advocates general, since the seventies this task has been taken over by the first advocate general. That was, indeed, the reason why the position of the First AG was created. For a long time, that position – of the First Advocate General – was performed on a rotating basis for a period of one year. It was only in 2015 that this practice changed – at first by an informal agreement of advocates general themselves, which in 2019 was codified in Article 19 of the Rules of Procedure of the Court. Today, the First Advocate General is elected by their colleagues by way of a secret ballot for a three-year mandate.

He, and I use the pronoun 'he' as we have elected Mr Maciej Szpunar as the First Advocate General in 2021, allocates cases to individual advocates general. You might be curious as to how this happens: is there a key according to which the cases are distributed? Well, what I can tell you is that Mr Szpunar maintained a practice whereby each of us is given the possibility to express our wishes about the cases in which we would

like to take the role. We do not get all that we opt for, as there are always some cases that attract a lot of attention, but I can tell you that this procedure is well regarded amongst the AGs and the way it is implemented is fair. I may add, as I often receive such a question, that, in terms of areas of EU law, there is no specialisation among advocates general.

All the cases, including those nobody asked for, are assigned to one of the AGs. Only some of those cases will end up with an opinion.

Today, advocates general give an opinion only in the cases which are considered to raise novel issues of law. Up until 2003 (and the Treaty of Nice; the first case being C-335/02), opinions were provided for in all cases. Changing that rule was one of the means of rationalisation of the procedure before the Court which became necessary because of the ever-increasing caseload.

However, even cases which will not end up with an opinion are attributed to an AG. The reasons for this are the following: First, there are different procedural issues to be decided throughout the life of a case, such as joinder of cases, the stay of proceedings, requests to submit reply and rejoinder on appeal, requests that more than one person plead for a party in the hearing and similar issues. While these issues are decided by the President of the Court, that happens only after consulting the Reporting Judge and the Advocate General responsible for the case.

The other reason why each case is assigned to an advocate general is that the question whether a case necessitates an opinion or not is a matter still to be decided. That part of the life of a case is an important part. The preliminary research of the case is performed by the research and documentation service of the Court, which is one of the great facilities my Court has. The next stage takes part under the Reporting Judge. I have to admit that, before joining the Court, I was not aware of the importance of that step, and especially of its importance for advocates general. I have, of course, read in the textbooks that judges and advocates general meet every Tuesday to discuss how to proceed in each particular case. I have, however, never realised to which degree that step in the life of a case may determine its fate.

Sometimes, the same case may be construed in different ways. An important case might be understood as simple or, vice versa, a simple case, at least from someone's point of view, may be construed as one raising an important issue. The Reporting Judge is the first person to assess whether a new case raises new legal questions. That is done in the draft preliminary report which is sent to the Advocate General responsible for the case. That report is, as its name suggests, indeed only a preliminary assessment of the case, which serves as a template for a joint decision of the Court on how to proceed in that case, in terms of the formation of the chamber, the need for an opinion, and the necessity to have a hearing. However, in order to reach a conclusion about such issues, the reporting judge needs to make his or her first and general assessment of the legal problems and possible solutions in the case, taking into consideration the previous case law in the same area of law.

Depending on the proposal in a draft preliminary report, scenarios may differ. I may agree, in principle, with the assessment and proposed starting position about the substance of the case, as well as the proposal whether the case requires an opinion or not. In such a case, I can accept that an opinion is not necessary, if the Court does not ask for it. However, it may be that I assess the case differently than the Reporting Judge, who did not propose an opinion in the preliminary report. In such a case, I will propose an opinion. In principle, and this unwritten rule is known as Da Cuhna Rodriguez rule (after the former Portuguese judge who proposed it), if an AG believes that an opinion is necessary, the Court will not refuse it.

After the general meeting decides that a case merits an opinion, the most important part of an AG's duty to assist the Court starts, that of drafting and presenting the opinion to the deciding chamber. Even if that might seem self-explanatory, I would like to raise the following question here: what does providing judges with an opinion really entail? What is in fact the role of an advocate general?

I decided, as is proper these days, to ask Chat GPT. I wrote the question: What is the role of advocates general at the Court of Justice of the EU? This is part of the answer I received:

"the Advocates General are legal experts who play a crucial role in the decision-making process. Their primary responsibility is to provide independent and impartial legal opinions on cases brought before the CJEU."

Even if not wrong, that is not very telling in itself. The Treaties are equally vague about the role of AGs. According to Article 252(2) TFEU, "it shall be the duty of the Advocate-General … to make, in open court, reasoned submissions on cases."

What, however, does making reasoned submissions on a case mean?

That vague description of an AG's task left it to the advocates general themselves to shape their own job.

The important burden in that respect fell on the shoulders of the first two Advocates General, Mr. Maurice Lagrange, who also authored the first ever Opinion (in case 1-54, French Republic v High Authority of the ECSC) and Mr Karl Roemer. But, all of the Advocates General who have served afterwards, each in his or her own way, have contributed to shaping this function.

Altogether, including those currently serving, there have been 58 Advocates General. Only 7 of them were women, of which 3 currently serve. Not yet fifty-fifty, but certainly a change for the better. Each of them contributed to shaping of the role of advocates general. However, there is no, including among the advocates general themselves, consensus about what, more precisely, is required from them when they present their reasoned submissions.

As lawyers know, interpretation depends on the interpreter. Therefore, the answer to the question what kind of a submission best helps the judges, differs from one advocate general to another.

Some of us might understand our duty as offering the solution of the case. Similar to drafting a judgment. Judges will agree or disagree with the proposed solution, and this will facilitate their deliberation on the case.

Others might believe that we need to present the judges with multiple possible solutions for the case. We need to choose one among them as our preferable solution and substantiate why we believe that solution is the best one, but presenting other possible outcomes might also be perceived as important. There are also arguments explaining that the interpretative roads which were not taken help to legitimise the judgment, as it shows the parties to the case and the public that the Court assessed, but discarded, other possible outcomes of the same case.

One can also ask whether advocates general need to concentrate their efforts on sorting out the existing case law and finding a clear line which the case law has taken, and then propose a solution that fits within the context of that case law.

Or, should we try to critically assess the case law, by placing it within the wider context, and then confirm it or propose

changes? And what is a critical assessment of case law – looking for possible contradictions in the judgments or looking into the outcomes which the judgments produced in real life?

These few open issues I have mentioned, and there are others, show that we all seem to "know" the role of advocates general on a general level – advocates general assist judges – but, on a more detailed level, when we ask how we can best assist judges, there are multiple possible answers.

Of course, it might seem obvious that judges are best placed to answer that question. However, current practice does not offer a lot of guidance. Deciding chambers sometimes refer to AG Opinions when they decided to follow some of their proposals. They never mention them when they disagree. Should we conclude that in such cases an opinion was not useful? Given the secrecy of the deliberation process, which is closed also for advocates general, it is not possible to know, merely to speculate. As some scholars have already suggested, it is likely that the opinions which are not followed are equally useful to judges as they also influence the discussions among them and thus provide the required assistance.

As one colleague suggested, opinions may contribute reasons on which judges will ground their judgments, but may also create obstacles which judges must overcome if their reasoning does not follow the path proposed by an advocate general. Some of the opinions not followed caused academic discussions that contributed to better understanding of some legal questions, and some of those opinions, even if not followed, continue to be an inspiration for the debate. I will mention only two. One was the opinion of Advocate General Lenz, advocating for horizontal direct effect of Directives in case Faccini Dori, and the other, the Opinion of Advocate General Jacobs in the UPA case, advocating for reinterpretation of the admissibility criteria for direct actions of annulment introduced before the Court by individuals. The latter opinion even led to the amendment of the relevant provision of the Treaty.

The discussion on what kind of opinions the judges expect or find most useful has, to my knowledge, not taken place inside the Court either between the judges and advocates general, or among the advocates general themselves. Equally, academia has not yet, or at least not sufficiently, explored that issue. I, therefore, invite you to take this into consideration when you plan your next research project.

Before I end my presentation, I would like to say a few words about the independence of advocates general. The Treaties insist that, the same as judges, advocates general must be independent. That means that they cannot take instructions from anyone, including the governments that nominated them. When I was doing my PhD, I had to find the proper translation for the name "advocate general" in the Croatian language. I chose "nezavisni odvjetnik" when translated into English means an 'independent advocate'. The name remained and entered into the official version of the Treaties in Croatian.

The word "independence" can also be understood in another way, when used in relation to advocates general: advocates general render independent opinions. Indeed, that makes the opinions very different from judgments. Judgments are an expression of collegiate decision-making, and necessarily reflect certain compromises. Opinions, on the contrary, are individual opinions, reflecting only the views of a single person.

That being said, even if an advocate general by her or his name is behind all the arguments used to support their opinion, an AG does not work alone. We each have a team – a great team of knowledgeable lawyers, called referendaires. They prepare draft opinions, and, even more importantly, discuss certain problematic aspects of the case with the advocate general. My

referendaires are invited to challenge my positions, and if I cannot defend those positions against their arguments, this indicates I should rethink them before I go public with my opinion. That is of invaluable help for each advocate general.

Another and final note on the individual nature of opinions.

What is often juxtaposed is formal and repetitive language of judgments, and the more literate style used by advocates general. As much as the language of AGs is much less constrained than that of the judges who decide by consensus, there are still some limitations.

First, our opinions are principally aimed at judges. Using the language which the judges use sometimes more easily explains to the Court what we want to say, rather than more poetic expressions of the same.

Second, opinions should not be long. One reason for this is that they need to be translated into another 23 languages. The other is that judges need to understand the message, and they might not have time for reading novels.

The fact that all opinions are translated imposes another limitation – other languages need to be able to convey the same message. I learned that relatively early on. In one of my opinions, I used the expression 'spoiler alert'. That seems to have caused some trouble to different language departments on how to translate the expression, or even whether to translate it at all.

Still, from time to time, thinking of our other audiences, primarily in academia, we might make excursions into more literate forms of expression or may use uncommon analogies, comparing clear legal language to a unicorn, a non-standard regulation to a platypus, or an international application under the Patent Cooperation Treaty to a quantum state of superposition. If judges possibly do not appreciate this, although I hope they do, we are also hopeful that you, in academia, do.

Even though we do not yet have an answer in what precisely is or should be the contribution that an advocate general brings to the Court, the usefulness of advocates general for the Court is not questioned. An example and proof of that are the discussions of introducing advocates general in the General Court, once the proposal to transfer part of preliminary ruling competence to that Court sees the light of day.

I thank you for your attention and would love to hear your reflections about what makes a good opinion.

Tamara Ćapeta

Tamara Ćapeta was appointed as the first Croatian Advocate General at the Court of Justice of the European Union in October 2021. Prior to her appointment at the Court, she was already widely known as a leading academic in the field of EU law.

A graduate from the University of Zagreb and the College of Europe in Bruges, she started her career in the Croatian Ministry of Foreign Affairs at the Department for European Integration and the Department for UN Agencies with a seat in Europe. She defended her PhD at Zagreb University and was appointed professor at the same university in 2002. From the accession of Croatia until 2014 she worked at the Court of Justice as the Head of the Croatian Language Translation Unit, before returning to Zagreb University to head the European Law Department. She has published on a broad range of topics in EU law, including the role of the courts in the European Union. She was co-founder of the Croatian Yearbook of European Law and Policy, and served as its editor-in-chief from 2010 to 2015.

In 2018, she founded the Jean Monnet Centre of Excellence dedicated to research on the rule of law. In 2020, she was appointed by a joint committee of the European Union to serve as a member of the arbitration panel under the UK Withdrawal Agreement, a role she ceased to occupy following her appointment to the Court.

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