

Discordant Interpretations of the Right to a Fair Trial before the European Court of Human Rights and the Court of Justice of the European Union

The necessity to guarantee consistency in the interpretation of the procedural right
to adversarial proceedings of the right to a Fair Trial in a context of Constitutional
Pluralism

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List of Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
MS	Member States
TEU	Treaty on European Union

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CHAPTER ONE

1 Introduction

1.1 Contextualisation of the Research Project

The inter-institutional dynamics of the European judicial arena, principally characterised by the functioning of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) of the Council of Europe, have created a plurality of constitutional sources and a consequent context of constitutional pluralism.¹ The two independent supranational Courts share territorial and legal jurisdiction over matters of human rights protection creating a double system to guarantee fundamental rights in the European region. Accordingly, Member States of the European Union are accountable both for ensuring the respect of the European Convention on Human Rights (ECHR or Convention), which is binding on them, and for observing the principles of *precedence*² and *direct effect*³ of EU law enshrined in the Treaties of the European Union. Both Courts release legally binding judgments that Member States are compelled to comply with to respect their supranational legal authorities.

The main challenge arising from the coexistence of these two autonomous supranational legal systems consists in the absence of a hierarchical judicial order between the Strasbourg (ECtHR) and Luxembourg (CJEU) courts. While Member States are subject to the jurisdiction of the ECtHR, the EU and its institutions are not and they cannot, therefore, be held accountable for any alleged violation of the Convention.⁴ Any complaint against the EU concerning the violation of the rights enshrined in the Convention would be inadmissible *ratione personae* since the Union has not acceded the Convention yet.⁵ Consequently, the ECtHR lacks the legal competence to review and adjudicate on Acts and measures adopted by

¹ Maduro, M.P., 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' [2007] European Journal of Legal Studies p.1

² Case 6/64 *Costa v ENEL* [1964] ECR 1194

³ Case 26/62 *Van Gend en Loos* [1963] ECR 3

⁴ Case Opinion 2/13 pursuant to Article 218(11) TFEU, 2014

⁵ *Ibid.*

the EU and its institutions, whereas the ECJ holds the ultimate power to interpret and enforce EU law.⁶

Nevertheless, despite the lack of jurisdiction of the Strasbourg Court over Community Acts, in *M & Co. v Federal Republic of Germany* the European Commission on Human Rights partially asserted its competence over Member States' actions that result from the implementation of Community measures.⁷ Accordingly, in compliance with Article 1 of the Convention, MS are considered to be “[...] responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations”.⁸ However, although stressing MS's responsibility to ensure the respect of the Convention principles, the ECHR does not automatically exclude the transfer of competencies concerning human rights protection to other international organisations as long as “[...] Convention rights continue to be ‘secured’”.⁹ Hence, provided that international organisations guarantee *equivalent protection* of fundamental rights, the transfer of powers to such organisations “[...] is not incompatible with the Convention”.¹⁰ In reverse, this principle entails that, in the absence of *equivalent protection* of fundamental rights, the ECtHR may have the legal competence to assume jurisdiction over the domestic implementation of a Community measure.¹¹

The vague language employed by the Court in articulating this principle left open to interpretation the minimum requirements of the *equivalent protection* standards up until the *Bosphorus Hava Yollari Turizm v. Ireland* case before the ECtHR.¹² In the *Bosphorus* case, the Court developed an *equivalent protection* test based on the elaboration of the ‘equivalent’ concept that was interpreted as ‘comparable’ with the Convention standards and was directed at the “[...] substantive guarantees offered and the mechanisms controlling their observance [...]”¹³ of the relevant organisation. Nonetheless, the Court maintained its prerogative to

⁶ Garlicki, L., ‘Cooperation of Courts: The Role of Supranational Jurisdiction in Europe’ [2008] International Journal of Constitutional Law p.510

⁷ Ibid. p.524

⁸ *M. & Co. v the Federal Republic of Germany* [1990] 64 Eur Commission H.R.

⁹ *Matthews v U.K.* [1999]28 EHRR 361, para. 32

¹⁰ *M. & Co. v the Federal Republic of Germany*; the European Court of Human Rights later elaborated an ‘equivalent protection’ doctrine.

¹¹ *Matthews v U.K.*, 1999, para. 27

¹² *Bosphorus Hava Yollari Turizm v. Ireland*, [2005]-VI Eur. Ct. H.R

¹³ Ibid. para. 155

enforce the Convention standards over those of an international organisation “[...] in the circumstances of a particular case [...] [where] the protection of the Convention rights was manifestly deficient”.¹⁴

In this context of multidimensional constitutional protection of human rights in Europe, the dilemma of two courts deciding on similar matters in the absence of an established hierarchical legal order and of institutional procedural mechanisms to prevent judicial conflicts and contradictions arises.¹⁵ In particular, this analysis will explore such a possibility concerning the interpretation of the right to a Fair Trial and the effect that divergent interpretations of the procedural right to adversarial proceedings enshrined in it might have on the enjoyment of the right.

1.2 Relevancy and Contribution

Currently, the accession of the European Union to the ECHR has been put on hold by the legal complications that have been pointed out by the Court of Justice in its Opinion 2/13. According to the Court, the accession to the Convention would, in fact, directly affect the *new legal* order created by the Treaties of the EU as well as the EU-specific constitutional framework, its founding principles, and its own set of legal rules that are directly applicable and have precedence over national laws in all Member States.¹⁶ Hence, given the absence of a provision in the Convention that would ensure that the *primacy, unity* and *effectiveness* of EU law would not be compromised by the new standards of protection that the ECHR confers to its Contracting Parties, the Court found the agreement on the accession to the ECHR to be incompatible with its legal principles.¹⁷

Consequently, the significance of the missed accession of the Union to the ECHR principally concerns the extent to which the Convention will be able to affirm its competence to review the appropriateness of Community judicial procedures to guarantee similar standards of protection.¹⁸ At present, the two supranational Courts continue to deliver to the

¹⁴ Ibid. para. 156

¹⁵ Ravasi, E., *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine* (Brill, 2017) p.4

¹⁶ Ibid. paras 157, 158, 166.

¹⁷ Ibid. para 258.

¹⁸ Harmsen, R., ‘National Responsibility for European Community Acts Under the European Convention on Human Rights: Recasting the Accession Debate’ [2001] *European Public Law* p.640

same states binding and, at times, conflicting judgments concerning similar legal issues. Accordingly, in guaranteeing the observance of the right to a Fair Trial, the CJEU and the ECtHR have not found a consistent interpretative principle to adjudicate on the right to adversarial proceedings. Consequently, while the Strasbourg Court considers that the party at trial should be given the opportunity to respond to the Opinion of the Advocate General, the Luxembourg Court denies such possibility preventing, in this way, a uniform and coherent application of such procedural right before the two Courts.

Drawing from this judicial conundrum, this study aims to contribute to the research field and shed new light on the legal dilemma arising from the presence in the European region of a plurality of constitutional sources and a resulting double system of human rights protection. Consequently, the absence of a coordinating mechanism triggers tension between the responsibility of Member States to observe Community law and their need to ensure the protection of fundamental rights under the Convention principles. The main problem with the current configuration is that an individual appearing before the ECJ does not have a possibility to react to the AG Opinion and, if the judgment results against them, they cannot appeal to it elsewhere. Hence, the lack of a procedural right might result in a substantive violation of the right complained of before the ECJ.

1.3 Research Questions and Objectives of the Research

In light of the legal dilemma that this study focuses on, the main research question this analysis sets out to examine is:

Can the Right to a Fair Trial, enshrined in Article 6 of the European Convention on Human Rights and Article 47 of the European Charter of Fundamental Rights, be enforced equally before the CJEU and ECtHR despite the different access to the procedural right to Adversarial Proceedings?

In answering the main research question this study will be addressing a set of related sub-questions:

- i. *Does the possibility to respond to the Opinion of the Advocate General represent a procedural necessity of the adversarial principle of the right to a Fair Trial?*

- ii. *Who would be answerable within the Convention system in the case where some aspects of the European Community measures were found deficient?*

- iii. *Does the delegation of human rights' obligations through the principle of 'equivalent protection' guarantee effective standards of protection of fundamental rights under EU law?*

This research project positions itself in the broader discourse concerning the necessity to guarantee legal coherence in the protection of fundamental rights given the coexistence of different constitutional sources at the supranational level in the European region. The existing literature on constitutional pluralism has advanced a theoretical approach to explain the presence of a double legal system for the protection of human rights and to avoid and resolve conflicts between the two supranational Courts. Nonetheless, a gap in the literature exists concerning the legal dilemma to ensure equal standards of protections of the right to a Fair Trial in the absence of a hierarchical order between the supranational constitutional systems. In light of this, this study will explore the dynamic process of judicial review that the Strasbourg and Luxembourg Courts carry out in adjudicating on the possibility to reply to the Opinion of the Advocate General before the closing of the oral proceedings as part of the right to adversarial proceedings of the right to a Fair Trial. By looking at the principle of *equivalent protection* this analysis will examine the effectiveness of Community standards and will carry out an extensive analysis of Member States' delegated responsibility.

Ultimately, the thesis aims at shedding new light on the absence of an adequate system to review the legitimacy of EU judicial procedures concerning the respect of the right to adversarial proceedings within the protection of the right to a Fair Trial as guaranteed under the Convention standards.

1.4 Background

1.4.1 The Right to a Fair Trial within the ECHR Legal Framework (CoE) and within the EU Legal (EUFRA) Framework

The Right to a Fair Trial and procedural fairness is guaranteed before the ECtHR under Article 6 of the European Convention on Human Rights,¹⁹ and before the ECJ under Article 47 of the Charter of Fundamental Rights of the EU (the Charter). The right to a Fair Trial is closely connected to the principle of due process of law as a fundamental protection for the individual, that has extended from the fair application of the law of the land to its observance under international law.²⁰ The Human Rights Committee has identified in the respect and application of the fair hearing right two key and interlocking elements that characterise the principle of fairness of the Article 6(1) both of a procedural nature, the ‘equality of arms’ and the ‘adversarial proceeding’ principles.²¹ The ‘equality of arms’, as interpreted by the Strasbourg Court in the context of the Fair Trial right, requires that parties to proceedings shall be given a reasonable opportunity to present their views in a manner that is not disadvantageous compared to their opponent.²² While the principle of ‘adversarial proceedings’, as clarified below, entails the possibility for the parties to comment and contradict the allegations submitted to the Court.²³ These principles are, according to the ECtHR, closely linked together and constitute key components of the notion of ‘fair hearing’ within the meaning of Article 6(1) of the Convention.²⁴

1.4.1.1 Article 6(1) ECHR

Article 6(1):

“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 [...]”.²⁵

¹⁹ Human Rights Committee, ‘CCPR, General Comment 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial’ UN Doc CCPR/C/GC/32 (23 August 2007)

²⁰ Zappalà, S., *Human Rights in International Criminal Proceedings* (Oxford Scholarship Online, 2010) p.5

²¹ Settem, O.J., *Applications of the ‘Fair Hearing’ Norm in ECHR Article 6(1) to Civil Proceedings: With Special Emphasis on the Balance between Procedural Safeguards and Efficiency* (Springer, 2016) p.97

²² Mrčela, M., ‘Adversarial Principle, the Equality of Arms and Confrontational Right –European Court of Human Rights Recent Jurisprudence’ [2018] *EU and Comparative Law Issues And Challenges* p.17

²³ Burrows, N., and Graeves, R., *The Advocate General and EC Law* (Oxford University Press, 2007) p.37

²⁴ *Regner V. The Czech Republic* [2017] ECHR 283 para. 146

²⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Art. 6

i. Distinction between Criminal and Civil Proceedings

The wording of Article 6(1) places criminal and civil cases on the same footing implying that equal standards apply to both forms of procedure. However, the provisions that follow in Article 6 under paragraph (2) and (3) specifically concern only the right of individuals charged with a criminal offense, while excluding civil cases. Such distinction between civil and criminal proceedings is not an artificial one but it rather reflects the inherent differences that the two forms of procedure entail.²⁶ Accordingly, the distinctions between civil and criminal cases include different objects and purposes, different status of the parties and different public interest of the outcome.²⁷ A further distinction includes the ‘margin of appreciation’ that is granted in the application of the Fair Trial right. While the requirements of paragraphs (2) and (3) reflect a more limited flexibility in the operation of the legal standards, thus a smaller margin of appreciation in criminal cases, civil procedures entail a much reduced risk of abuse of power in the course of the proceedings and can, therefore, allow a wider margin of appreciation.²⁸ Nevertheless, on specific matters such as the one at study, the parties’ rights derived from the procedural guarantee to adversarial proceedings are the same in both civil and criminal cases.²⁹

ii. The Adversarial Principle

The concept of a Fair Trial includes the right to adversarial proceedings as a fundamental procedural right.³⁰ The adversarial principle implies that both parties at trial have the right to argue their case before the court reaches a decision and to access and question all evidence presented.³¹ According to the reasoning of the Strasbourg Court in previous judgments, the adversarial principle entails the opportunity for both parties “[...]to comment on all *relevant* aspects of the case” and to comment on all submissions to the court that have been presented

²⁶ Bardsen, A., 'Reflections on Fair Trial in Civil Proceedings according to Article 6 Sec. 1 of the European Convention on Human Rights' [2007] 51 Scandinavian Stud L 99, p.121

²⁷ Ibid.

²⁸ Ibid. p.123

²⁹ *Lobo Machado v. Portugal* [1996] ECHR 15764/89 para 31; *Vermeulen v Belgium* (2001) 31 EHRR 15 para 33.

³⁰ Council of Europe, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Civil Limb)*, August 2019, p. 66

³¹ Settem, 2016, p.99

“[...] with a view of *influencing* [...]” the court’s decision.³² The possibility to respond to all submissions presented to the court includes submissions filed by the opposing party and those submitted by a third party including the independent legal officers attached to the Court such as the Advocate General.³³

1.4.1.2 Article 47 ECJ Charter of Fundamental Rights

Article 47:

“[...] Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. [...]”³⁴

Differently from the wording of Article 6 of the Convention, Article 47 of the Charter does not distinguish between civil and criminal proceedings but, instead, it has a broader reach and guarantees the right to a Fair Trial and the annexed procedural rights coherently in all legal domains.³⁵ Given the nature of the European Union primarily as an economic integration organisation, the EU standards of judicial protection under Article 47 of the Charter apply consistently to all levels of EU law adjudication.

i. Procedural Guarantees of Article 47

The procedural right to adversarial proceedings, as interpreted by the Luxembourg Court in its case law, is inherent to Article 47 of the Charter. As regards its judicial proceedings, the Court emphasises how “[...] the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to

³² *Galich v Russia* [2009] ECHR 33307/02 paras 23-25 (emphasis added); *Drassich v Italy* [2007] ECHR 25575/04 para 33.

³³ Settem, 2016, p.215

³⁴ European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, Art 47

³⁵ European Union Agency for Fundamental Rights, *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level Guidance* (Publications Office of the European Union, 2018) p.29

comment on them [...]”.³⁶ Accordingly, in compliance with Article 47, the Court stresses the need to ensure the respect of the adversarial principle to enable the parties at trial to make submission concerning the evidence related to the decision to consequently present an effective defense.³⁷ However, this procedural guarantee does not include the possibility to comment on those ‘reasoned submissions’ that the Court requests from independent judicial advisors in the form of Opinions when it requires to be assisted in the interpretation and application of the Treaty Law.³⁸

Taking into account the difference between the civil and criminal limb of ECHR Article 6(1) and the absence of such a distinction in Article 47 of the EU Charter, this study will proceed with analysing the application of the Right to a Fair Trial equally in both criminal and civil proceedings.

1.4.2 Cross-Referencing and to What Extent There Has Been any Effort to Find a Joint Solution?

Having acknowledged the pluralist structure of the European constitutional framework, this section will analyse the judicial dialogue between the CJEU and the ECtHR that is aimed at ensuring legal coherence between the two supranational systems in the absence of hierarchical integration. Despite the currently missed accession of the EU to the ECHR, the existing relationship between the Strasbourg and Luxembourg Courts is based on a continuous interrelation and cooperation to ensure equal standards of protection of fundamental rights. Accordingly, Article 6(3) of the Treaty on European Union, while not formally binding the EU to the ECHR, ensures the protection of fundamental rights “[...] as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...]”.³⁹ From this, explicit references to the case-law of the ECtHR have followed in the judgments and reasonings of the CJEU demonstrating the Court’s disposition to accord precedence to the Convention standards.⁴⁰ An example of such convergence is the *Kadi* case,⁴¹ where the ECJ

³⁶ Case C-300/11 *ZZ v Secretary of State for the Home Department* [2013] para 55.

³⁷ *Ibid.* para 56.

³⁸ Case C-17/98 *Emesa Sugar (Free Zone) NV v Aruba* [2000] ECR I-665

³⁹ Consolidated Version of the Treaty on European Union [2007] OJ C326/13

⁴⁰ Lock, T., *The European Court of Justice and International Courts* (Oxford University Press, 2015) p.171

dedicated several paragraphs to explicate the divergent situation of *Kadi* as compared to the ECtHR's decision in the *Behrami* case.⁴² Hence, establishing a distinction between the two cases, characterised by the same dilemma on jurisdictional competences, the ECJ demonstrated its willingness to engage with the case-law of the Strasbourg Court to ensure a minimum standard of human rights protection.⁴³

Nonetheless, the two independent Courts have at times found themselves upholding divergent interpretations of the same procedural standards of fundamental rights. A relevant example to this analysis is the *Emesa Sugar (Free Zone) NV v Aruba* case where the ECJ rejected the interpretation of the ECtHR concerning the possibility to respond to the Opinion of the Advocate General presented in the *Vermeulen v Belgium* case that the applicant had referred to.⁴⁴ In such cases, the main problem results in the Strasbourg and Luxembourg Courts binding the same states to different judicial interpretations of similar human rights standards without the possibility to guarantee institutional coherence.⁴⁵ Moreover, when deliberating on the full accession of the Union to the ECHR, the ECJ stated as its priority that of maintaining the autonomy and the specific characteristics of its legal order, as established by the Treaties, as well as the capacity of the EU judicial system to “[...] ensure consistency and uniformity in the interpretation of EU law.”⁴⁶

Hence, the double system for the protection of human rights produced by the co-existence of the two independent supranational courts has determined the condition for which, while all MS are subject to the legal jurisdiction of the ECtHR, the EU and its institutions are not.

1.4.3 Judicial Activism and the Role of the European Courts

The necessity to examine the function of supranational courts stems from the key role that international tribunals play, especially through their case law, in shaping the content and

⁴¹ Joined Cases C-402/05 P and 415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*

⁴² *Behrami and Behrami v France* [1999] ECHR 71412/01 para.182.

⁴³ *Ibid.* p.171

⁴⁴ *Emesa Sugar (Free Zone) NV v Aruba*, 2000, para 14.

⁴⁵ Ravasi, 2017, p.4

⁴⁶ Case Opinion 2/13, para 174.

structure of international law.⁴⁷ The judicial function that international judges exert in the protection of fundamental rights is not merely restrained to the role of dispute-settlers but it is interpreted as serving the broader scope of clarifying controversial aspects in international law.⁴⁸ Accordingly, the Strasbourg Court has strongly emphasised such function when assessing that its own judgments do not just serve the purpose of adjudicating the cases brought before it, but also to “[...] elucidate, safeguard and develop the rules instituted by the Convention [...]”.⁴⁹ The function of international courts is also characterised by the absence of a hierarchically organised judicial system which implies that the judicial decisions they take are final and are not subject to the control of higher judicial instances.⁵⁰ Accordingly, both Courts present a two-tier system for which at the ECtHR the parties at trial can request a referral of their case to the Grand Chamber whose decision is final,⁵¹ and at the CJEU, composed of the Court of Justice and the General Court, appeals on points of law may be brought before the ECJ against judgment and orders of the General Court.⁵²

Without delving too deeply into the study of judicial activism, this analysis will endorse the aforementioned assumptions that the function of judges and international courts plays an active role in shaping the structure and content of human rights law through the phenomenon of judicial power.

1.5 Methodology of the Research

This section is dedicated to the methodological structure of the research project with the purpose of presenting a normative framework as to how the Strasbourg and Luxembourg Courts *should* engage in the interpretation of the procedural right to adversarial proceedings of the Right to a Fair Trial. This study will be conducted as a doctrinal legal research through a comparative constitutional pluralist approach, based on the collection and analysis of

⁴⁷ Zarbiyev, F., ‘Judicial Activism in International Law- A Conceptual Framework for Analysis’ [2012] *Journal of International Dispute Settlement* p.248

⁴⁸ *Ibid.*, p.258

⁴⁹ *Ireland v the United Kingdom* (1978) Series A 25, para 154.

⁵⁰ See Romano, P.R, Alter K.J., and Shany, Y., *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013)

⁵¹ ECHR, Article 43

⁵² Consolidated version of the Treaty on the Functioning of the European Union [2007] OJ/C115Article 256 para 1.

primary legal sources and aimed at understanding and applying the body of law developed by the Strasbourg and Luxembourg Courts.

1.5.1 Interpretative Frameworks

In order to examine the application of the Right to a Fair Trial as enshrined in the Convention and the Charter, this study will first advance the analytical principles that both Court use for the interpretation of the ECHR and the EU Charter.

1.5.1.1 *The Vienna Convention on the Laws of Treaties (VCLT)*

The ECHR Article 6(1) and Article 47 of the EU Charter are interpreted in accordance with the ordinary principles for Treaty interpretation of the 1969 Vienna Convention on the Laws of Treaties (VCLT).⁵³ The main interpretative principle is embedded in Article 31 which defines the general rule for the interpretation of a Treaty according to which such interpretation should be carried out “[...] in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose”.⁵⁴ Article 31.3(c) then underlines the importance of taking into account, when interpreting a Treaty, any other relevant rule of international law to emphasise the influence that a systemic interpretation of the Right to a Fair Trial in other sources of law could exert on the interpretation that the ECJ and ECtHR endorse. Furthermore, Article 32 provides the ‘supplementary means of interpretation’ according to which the *Travaux Préparatoires* and general circumstances can be taken into consideration to determine the meaning of a Treaty and interpret it according to Article 31.⁵⁵

Nevertheless, the VCLT rules are not necessarily exhaustive and the absence of doctrinal guidance in the application of Articles 31 and 32 leaves to the Luxembourg and Strasbourg Courts substantial scope of manoeuvre and additional flexibility in the interpretation of human rights treaties.⁵⁶

⁵³ Vienna Convention on the Laws of Treaties (entered into force 27 January 1980, opened for signature 23 May 1969) 1155 UNTS 331, Article 31

⁵⁴ Ibid.

⁵⁵ Vienna Convention, Article 32

⁵⁶ Beck, G., ‘The Court of Justice of the EU and the Vienna Convention on the Law of the Treaties’ [2016] Yearbook of European Law p.492

1.5.1.2 The Interpretative Method of the ECtHR

The legal provisions concerning fundamental rights are traditionally vague legal principles that are not straightforwardly applied by the Courts. Hence, the Strasbourg Court has developed an interpretative method that encompasses both a *teleological* and a *textual* approach that are supplementary to each other.⁵⁷

As the word *textual* implies, this approach principally focuses on the *text* and provisions of the Convention itself. The literal meaning of the Convention represents a valid starting point for the interpretation of the right to a Fair Trial since, in interpreting the term ‘fair’, one can identify practices that are undeniably ‘not fair’ and that, if accepted, would consequently violate the minimum requirements to guarantee such standard.⁵⁸

Nonetheless, focusing merely on the literal meaning of the Convention is not exhaustive enough since many of its provisions are formulated in rather broad and general terms, hence, the Strasbourg court has also developed a teleological method of interpretation. Treaty provisions have to be interpreted also in light of the ‘object and purpose’ of the Convention by looking at the broader intentions of its drafters as articulated in the preamble.⁵⁹ Accordingly, the main objectives that the Convention is intended to guarantee, comprise the *universal* and *effective recognition* of the rights declared therein, their *further realisation* and their *common understanding and observance* based on states’ common values such as their *ideals, freedom and the rule of law*.⁶⁰

1.5.1.3 The Legal Reasoning of the ECJ

The methodological principles hitherto presented offer a normative framework as to how the ECJ currently engages and *should* engage, in the interpretation of the EU Charter and, in particular, of the Right to a Fair Trial.⁶¹

⁵⁷ Settem, 2016, p.15

⁵⁸ Ibid. p.16

⁵⁹ Ibid. p.17

⁶⁰ ECHR, Preamble.

⁶¹ Conway, G., *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012) p.5

The core mode of argumentation of the Luxembourg Court is characterised by a purposive method of interpretation that has been defined by Mitchell Lasser as a *meta-teleological* approach.⁶² Accordingly, the Court often refers to the necessity to guarantee uniformity, coherence, and effectiveness of EU law based on the respect of the higher general purpose of respecting the EU legal order. The ECJ discourse mainly reflects the necessity to promote those systemic policies that are central to generate the normative and institutional unity of the Community legal order.⁶³ Consequently, the incorporation of the Charter at a Treaty level principally reflected the Court's willingness to prevent challenges to the EU legal order from national supreme and constitutional courts based on claims of fundamental rights protection.⁶⁴

Nevertheless, according to this study, the *meta-teleological* approach that the Court adopts should instead be grounded on the greater objective of guaranteeing fundamental human rights rather than being constrained by the "pre-given core of meaning"⁶⁵ that is enshrined in the EU legal order.

1.5.2 Theoretical Framework

1.5.2.1 *European Constitutional Pluralism*

As theorised by Andrea Bianchi, the notion of *Constitutional Pluralism* has been put forward as "[...] a new ordering factor for a world in which equally plausible claims to exercise ultimate legal authority over sectoral and functionally differentiated polities compete".⁶⁶ *Constitutional Pluralism* is characterised by the idea that, because of their equivalence in rank, not all norms of a specific legal order can be situated in a hierarchical structure and that, consequently, some of the normative conflicts that arises may not be legally resolved.⁶⁷ The

⁶² Lasser, M., *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press, 2009) p.207

⁶³ Ibid. p.22

⁶⁴ Case 11/70 *Internationale Handelsgesellschaft GmbH* [1970] ECR 1125, para. 3.

⁶⁵ Conway, 2012, p.87

⁶⁶ Bianchi, A., *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press, 2016) p.49

⁶⁷ Besson, S., 'European Human Rights Pluralism: Notion and Justification' in Maduro, M., Tuori, K. and Sankari, S., (eds.) *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press, 2014) p.171

human rights regime in the European region is determined by the coexistence of a multiplicity of human rights norms and of judicial interpretations that different legal orders develop of such norms.⁶⁸ This supranational legal order can be defined as an autonomous ‘integrated legal order’ composed of other autonomous legal orders that, although combined, maintain their legal independence.

Such a hybrid form of international human rights law enforcement mechanism is characterised by the coexistence of functionally distinct supranational tribunals that apply common bodies of rules, by a flourishing inter-judicial dialogue of courts, and the combination of legal procedures across different legal orders.⁶⁹ *Constitutional pluralism* at the European regional level emerges, therefore, as a subtle response to the fragmentation of international human rights law and to the consequent conflict that arises between different legal orders. Nevertheless, although such a pluralist approach challenges the notion of a European hierarchical constitutional order, it is still possible to identify the ECHR regime as the most general and fundamental legal system concerning the protection of human rights. Accordingly, the rights enshrined in the Convention establish a minimum standard of protection that both the national and the EU legal orders are expected to observe.⁷⁰

i. The role of Courts, Judicial Review and Proportionality Analysis

This context of *Constitutional Pluralism* has triggered jurisdictional conflicts between supranational courts concerning the appropriate interpretation of human rights law. Such disagreement principally concerns those duties that arise from the application of the same human rights norms to a similar set of circumstances by different authorities. *Constitutional Pluralism* has additionally strengthened the judicial review mechanisms of international tribunals.⁷¹ The role of supranational courts is therefore crucial to coordinate the scope of judicial review, employed as a constitutional ordering factor, among different sets of judicial authorities. Moreover, the traditional use of proportionality analysis or interest balancing interpreted as a “decision-making procedure, or analytical structure that judges employ to deal

⁶⁸ Ibid. p.172

⁶⁹ Bianchi, 2016, p.231

⁷⁰ Huomo-Kettunen, M., ‘Heterarchical Constitutional Structures in the European Legal Spaces’ [2013] *European Journal of Legal Studies* p.62

⁷¹ Bianchi, 2016, p.57

with tensions between two pleaded ‘values’ or ‘interests’”,⁷² is here reconceptualised as a balancing technique between different interpretative frameworks of the same human rights norms. Accordingly, such proportionality analysis will here be applied to the purposive methods of interpretation of the ECtHR and ECJ in addressing the necessity to balance the objectives of the two supranational legal orders.

1.5.3 Comparative Framework

This study will establish a comparative analysis concerning the inter-institutional dynamics between the ECJ and ECtHR to determine whether structural deficiencies are present in the European region concerning the protection of the right to a Fair Trial. The comparative aspect of this research will principally concern the equivalency of the protection guaranteed by the Luxembourg court in light of the minimum protection standards established by the Convention. Hence, this study will put in comparison the interpretative frameworks, derived by an analysis of the judicial discourse developed through their the case-law, of both supranational courts in relation to the procedural right to adversarial proceedings of the right to a Fair Trial. The necessity to interact and coordinate that legal controversies are triggering has given space to more active judicial dynamics and inter-institutional connections.⁷³ A comparative analysis will be fundamental to explain the different degrees of protection of the right to a Fair Trial as a variation in the interpretative judicial discourse concerning human rights provisions employed by the two Courts.

1.5.4 Methods of Data Collection

To conduct a normative analysis, this study will principally engage in a qualitative investigation of legal sources by examining the case-law of both supranational Courts and the nature of the legal reasoning behind them. Given the large quantity of case law that the ECJ and ECtHR have produced, this study will mainly rely on the commentaries in academic literature and the collected doctrine that have already determined what cases constitute the ‘canon’ within this legal discipline.⁷⁴

⁷² Ibid. p.56

⁷³ Lasser, 2009, p.3

⁷⁴ Conway, 2012, p.8

This research will also draw on the main sources of international law including international treaties, general principles of international law, customary international legal rules and subsidiary means such as judicial decisions.⁷⁵ To conduct a comprehensive and thorough analysis this study will also take into account secondary sources such as academic literature, books, and scholarly writings.

1.6 Structure of the Research

This research is structured into *four* main chapters that are organised and proceed as follows.

Chapter One has been dedicated to present the research project, explain the background to the problem and the discourse derived from the existing literature. It has also put forward the main research questions that this analysis is going to address and the underlying methodological framework that will structure this doctrinal legal research. *Chapter Two* will then be dedicated to clarifying the role of the Advocate General in the ECJ and in the national legal systems based on the Napoleonic Civil Code before the ECtHR, and to explicate the influence that their Opinion exerts on the Court's final judgment. Having acknowledged the co-existence of different supranational legal orders in Europe, *Chapter Three* will present the current mechanisms for the harmonisation of distinct judicial interpretative frameworks. Hence, this *chapter* will concern the analysis of the principle of *equivalent protection* as developed by the ECtHR's jurisprudence and the interpretation of a 'manifestly deficient' mechanism to ensure the protection of the right to a Fair Trial. *Chapter Three* will also explore Member States' responsibility under the Convention for violations derived by compliance with EU law. Finally, *Chapter Four* will provide the final remarks based on an assessment of the proportionality analysis established between the two supranational legal systems for the protection of the fundamental right to a Fair Trial in the European region.

1.7 Possible Limitations

The choice to conduct this analysis as pure doctrinal research instead of adopting an interdisciplinary approach may subject the study to the narrower scope and application of

⁷⁵ International Court of Justice (ICJ) *Statute of the International Court of Justice* (18 April 1946), Article 38(1)

understanding the law by making reference primarily to the case-law of the Courts.⁷⁶ Accordingly, this study will not involve the analysis of factors that lay outside the legal system and that may have played a role in influencing the European legal orders, concepts or doctrines. Although acknowledging the contribution that the study of such extra-legal factors may bring, this research will not engage in an interdisciplinary research as it does not deem it necessary to present an effective response to the research inquiry.

Moreover, despite grounding this study on the analysis of primary legal sources, the research may still be subject to the subjective eye and perception of the doctrinal researcher. The reasoning power and analytical skills of the writer may, in fact, lead to different perceptions of the same legal principles and doctrines and consequently subject the doctrinal legal research to the logical reasoning of the researcher.

⁷⁶ Mc Conville, M., and Chui, W.H., *Research Methods for Law* (Edinburgh University Press, 2007) p.5

CHAPTER TWO

2 Role of the Advocate General within the Framework of the Right to a Fair Trial

This *second chapter* will explore the procedural role of the Advocate General in cases referred to the ECtHR and the CJEU. The function of the Advocate General and the possibility to respond to their Opinions have an impact on the extent to which both judicial systems guarantee the procedural right to adversarial proceedings in ensuring the right to a Fair Trial.⁷⁷ In those Contracting State Parties whose national legal systems are based on the Napoleonic Civil Code and that comprise the figure of the Advocate General (who is referred to with different designations in the different national systems), the opportunity to respond to their Opinions is subject to the external review mechanisms of the Strasbourg Courts. Structurally, the Advocates General in these legal systems occupy an intermediate position between the Court and the parties and operate as judicial *magistrats* who discuss the proper application of the law.⁷⁸ Instead, the CJEU's interpretation of its adversarial proceedings concerns the role of the Advocate General as part of the institutional mechanisms of the EU Courts as established by their founding Treaties.

Although acknowledging the different procedural roles that the figure of the Advocate General plays in the national and EU legal systems,⁷⁹ the function that they carry out throughout the judicial process is similar and it is considered to exert an influence on the outcome of the Courts' deliberations.

2.1 Role and Function of the Advocate General

2.1.1 In the Court of Justice of the European Union

⁷⁷ Ryland, D., 'The Advocate General; EU Adversarial Procedure; Accession to the ECHR' [2016] European Human Rights Law Review p.1

⁷⁸ Lasser, 2009, p.47

⁷⁹ *Emesa Sugar (Free Zone) NV v Aruba*, 2000, para 14.

The CJEU is constituted by one judge from each EU Country and a total of eleven Advocates General.⁸⁰ The function of the Advocate General, as established by the founding Treaties, is “[...] acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases [...]”.⁸¹ Such independence is principally intended as independence from the MS that appoint them and from the parties at trial. Advocates General at the CJEU function as advisors to the Courts and are called to deliver their Opinion before the final judgment and at the end of the hearing after the parties and interveners have given their oral arguments.⁸² This figure was modelled on the French *Commissaire du Gouvernement* operating in the proceedings before the French Supreme Administrative Court, the *Conseil d’État*, but their roles have evolved distinctly.⁸³

The function that Advocate General conducts at the CJEU is manifold. In the first place, the institution of the Advocate General, working as a ‘double scrutiny’, is envisaged as a ‘safeguard’ apparatus since in the vast majority of the cases, the ECJ acts at the same time as a court of first and last instance in the absence of a lower Court deciding on the case and of an appeal procedure to the Court’s final judgment.⁸⁴ Furthermore, the AG’s Opinion usually brings more clarity and transparency to the reasoning behind the Court’s Judgment. Accordingly, most of the time the final judgments of the Court do not offer comprehensive details concerning the legal reasoning that led to the Court’s decision, hence, the Opinion of the Advocate General can be complementary to understanding the case law and legal questions in a specific case.⁸⁵

The figure of the Advocate General is also expected to remain independent from the other judges of the Court and to think independently from the CJEU case law and Union Law.⁸⁶ Another fundamental aspect of the AG’s role is its transparency. Accordingly, while

⁸⁰ Council Decision of 25 June 2013 increasing the number of Advocates-General of the Court of Justice of the European Union, 2013/336/EU

⁸¹ Consolidated version of the Treaty on the Functioning of the European Union, 2007, Article 252 para 2.

⁸² Ritter, C., ‘A New Look at the Role and Impact of the Advocates-General Collectively and Individually’ [2006] *Columbia Journal of European Law* p.751

⁸³ Ryland, 2016, p.3

⁸⁴ Ritter, 2006, p.752

⁸⁵ Arrebola, C., Mauricio, A.J. and Portilla, J.H., ‘An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union’ [2016] *Cambridge Journal of International and Comparative Law* p.111

⁸⁶ Clement-Wilz, L., ‘The Advocate General: a Key Actor’ [2011-2012] *Cambridge Yearbook of European Legal Studies* p.604

the opinions of the sitting judges are kept secret behind the closed doors of the deliberations,⁸⁷ the personal views of the Advocate General, expressed in their Opinions, are publicly shared and perform the function of assisting both the judges in reaching their decision and the public by explaining in greater details the legal issues of the case.⁸⁸ The AG's Opinion also contributes to the broader academic debate by bridging the doctrinal analysis with the jurisprudence of the Court. Engaging with the detailed debates over fundamental issues concerning the coherence of EU law, these Opinions fill an intermediate place and can be interpreted simultaneously as judicial and doctrinal mechanisms.⁸⁹ Hence, making use of their freedom to advise, explore and warn and their more flexible approach to the Court's jurisprudence, the Advocates General helps to place the decision-making of the Court in a broader legal context.⁹⁰

2.1.2 In the National Legal Systems Modelled on the Francophone Prototype before the ECtHR

The institution of the Advocate General does not originate from the EU judicial framework but it derives from the francophone tradition and it is characteristic of specific national systems such as that of France, Belgium, the Netherlands, and Portugal.⁹¹ Accordingly, the role of the Advocate General at the CJEU is modelled on the figure of the *Commissaire du Gouvernement* that is peculiar to the francophone judicial orders. Despite the term '*Commissaire du Gouvernement*', this judicial figure is not an official representative of the government but, rather, it constitutes one of the members of the Council (*Conseil d'État*) entrusted with "[...] the task of advising the judicial body as to the proper grounds for decision, according to his particular view of administrative law".⁹² Similarly to the role of the Advocate General at the CJEU, the *Commissaire du Gouvernement* performs a function analogous to that of an independent academic who elaborates a more comprehensive legal

⁸⁷ Consolidated Version of the Treaty on the Functioning of the European Union - Protocol (No 3) on the statute of the Court of Justice of the European Union [2008] OJ C 115, Article 2

⁸⁸ Clement-Wilz, 2011-2012, p.605

⁸⁹ Lasser, 2009, p.130

⁹⁰ Sharpston, E., 'The Changing Role of the Advocate General' in Arnall, A., Eeckhout, P. and Tridmas, T. (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008) p. 33

⁹¹ Kosař, D., 'The Strasbourg Court and Domestic Judicial Politics' in Wind., M. (ed.) *International Courts and Domestic Politics* (Cambridge University Press, 2018) p.72

⁹² Latour, B., *The Making of Law: an Ethnography of the Conseil d'État* (Polity Press, 2010) p.7

analysis on the application of the law in a specific case that, however, is not legally binding on the judges who decide on the case.⁹³

The role of the *Commissaire du Gouvernement* was then transplanted to other francophone judicial systems where their function was to integrate the rather limited explanation of the reasoning behind the final decisions of the courts. Accordingly, in the Belgian Court of Cassation, judges seldom provide elaborated reasons for their final decisions and frequently, their judgments merely state the correct interpretation and application of the law.⁹⁴ In this context, the Opinion of the Advocate General (*procureur-général & avocat-général*) provides a highly elaborated argumentation that performs the function of explaining the legal reasoning behind the final decision.⁹⁵ Similarly in the Supreme Court of the Netherlands, the *Advocates-General* is entrusted with the production and delivery of an advisory opinion in *all* cases adjudicated upon by the Court to contribute to the development of the case law and the case management of the Court.⁹⁶ Analogously, the figure of the *Deputy Attorney-General* in the Portuguese Supreme Court working in its capacity as an institution of the judicial system has “[...] no other duty than to assist the court by giving a completely independent, objective and impartial written opinion *super partes* on the legal issues raised”.⁹⁷

Having explained the similar role played by the Advocate General-like figures in these national systems, the following section will proceed with exploring the kind of influence that they exert on final judgments of the European Union and MS’ Courts. For the sake of generalisation, this analysis will henceforth refer to all these national figures as national Advocates General.

⁹³ Ibid. p.8

⁹⁴ Van Hoecke, M., and Elst, M., ‘Basic Features of the Legal System’ in Bocken, H., and de Bondt, W. (eds.), *Introduction to Belgian Law* (Kluwer Law International, 2000) p.28

⁹⁵ Ibid.

⁹⁶ Stolk, R. and Voermans, W., ‘Judicial Organization’ in Chorus, J., Hondius, E. and Voermans, W. (eds.), *Introduction to Dutch Law* (Kluwer Law International, 2016) p.45

⁹⁷ *Lobo Machado v. Portugal*, 1996, para 26.

2.2 What Kind of *Influence*, if Any, Does the Advocate General Exert on the EU and MS' Courts?

Despite the Opinion of the Advocate General not being binding on the EU and MS' Courts and the AG being excluded from the secret deliberations of the Court, its persuasive authority can exert an effective *influence* on the judges' decision-making.⁹⁸ This analysis will seek to demonstrate that the real significance of the Advocates General's Opinions is not determined so much by their legal status, as by the *influence* that they can exert on the Courts. The concept of *influence* attributed to the role played by the Advocate General is here understood as the *significance* of their Opinion in the decision-making process of the CJEU.⁹⁹

Nonetheless, this study will take into account that the *influence* exerted by the Advocate General on the Court is not easy to measure considering that the Court's deliberations are secret and it is, therefore, impossible to know for sure whether their Opinion persuaded the judges or whether the Court would have independently reached the same conclusion as that of the Advocate General.¹⁰⁰ Hence, this analysis will bear in mind that there is not a straightforward method to quantify the *influence* that the AG exerts on the judicial process and it will take into account different methodological approaches based on quantitative, qualitative and statistical studies.

i. The Explicit Influence of the AG

Seldom, has the Luxembourg Court explicitly stated in its judgments that, in reaching the final deliberations, it has adopted the interpretations that the Advocate General had raised *ex officio*.¹⁰¹ Hence, the Opinion of the AG acquires greater legal authority when the Court makes direct reference to it in its decision-making.¹⁰² Accordingly, when the Court considers specific points raised by the AG's Opinions relevant, it endorses their reasonings and makes

⁹⁸ Turenne, S., 'Advocate Generals' Opinions or Separate Opinions: Judicial Engagement in the CJEU' [2011-2012] Cambridge Yearbook of European Legal Studies p.726

⁹⁹ Albers-Llorens, A., 'Securing Trust in the Court of Justice of the EU: the Influence of the Advocates General' [2011-2012] Cambridge Yearbook of European Legal Studies p.516

¹⁰⁰ Ibid. p.515

¹⁰¹ Mortelmans, K., 'The Court Under the Influence of its Advocates General: An Analysis of the Case Law on the Functioning of the Internal Market' [2005] Yearbook of European Law p.141

¹⁰² Ritter, 2006, p.757

direct reference to them, in some instances also without elaborating them further. This is the case of *BPB Industries and British Gypsum* where the decision of the Court reads as follows: “For the reasons given in, respectively, points 20 to 31, points 42 to 69 and points 76 to 86 of the Advocate General’s Opinion, the first, second and third pleas in law must be dismissed as unfounded”.¹⁰³ This approach is also evident in several other instances where the Court directly referred to the points raised by the AG’s Opinion in order to make its case.¹⁰⁴

The influence exerted by the Opinions and submissions filed by the national Advocate General on the courts’ final decisions, also constitute the basis for the Strasbourg Court’s interpretation of the right to adversarial proceedings. Such reasoning is explicit in the *Lazoroski v. The Former Yugoslav Republic of Macedonia* case where the final judgment of the investigating judge was considered to be based on the written evidence submitted by an independent advisor to the court.¹⁰⁵ Similarly, the ECtHR takes into account, to determine whether the ‘fair hearing’ procedural rights are being violated, those instances where complainants are not afforded the possibility to formulate any comments on those reports filed by permanent experts to the national court that constitute the ground for the court’s final decision.¹⁰⁶

Nevertheless, several scholars have expressed their concerns on the interpretation of explicit references to the Opinion of the AG as evidence of its substantive *influence* on the final judgments of the Court.¹⁰⁷ According to this perspective, merely relying on a criterion of result, measuring success on the number of references to the AG’s Opinion, has merits but is not, on its own, exhaustive to provide an accurate assessment of the effective *influence* that the Advocate General exerts in the judicial process.¹⁰⁸

ii. The Implicit Influence of the AG

Where the Court does not explicitly refer to the AG’s Opinion in its final judgments, it is necessary to compare and contrast the entire texts of both the court’s judgment and the

¹⁰³ Case C-310/93P *BPB Industries and British Gypsum v Commission* (1995) E.C.R.1-865 para 11.

¹⁰⁴ See also Case C-220/95, *Boogard v. Laumen*, 1997 E.C.R. 1-147 paras 17,26; Case C-284/91, *Belgium v. Suiker Export*, 1992 E.C.R. 1-5473 para 3.

¹⁰⁵ *Lazoroski v. The Former Yugoslav Republic of Macedonia* [2009] ECHR 4922/04 para 72.

¹⁰⁶ *Feldbrugge v. The Netherlands* [1986] 8 EHRR 425 para 44.

¹⁰⁷ See: Ritter, 2006, p.766; Albors-Llorens, 2011-2012, p.510-16

¹⁰⁸ Tridimas, T., ‘The Role of the Advocate General in the Development of Community Law: Some Reflections’ [1997] Kluwer Law International p.1363

relevant Opinion to determine whether and, if so, to what extent the Court has followed the reasoning of the Advocate General.¹⁰⁹ To do so, previous studies have advanced a qualitative analysis based on four measurable aspects of the case law through which the implicit *influence* of the AG could be detected: the choice of case law, the method of interpretation, the reasoning, and the final outcome.¹¹⁰ Such a method of analysis also reveals that the specific context of judicial decision-making, also determined by the individual characteristics of the Advocates General, significantly limits the *influence* that the AG can exert on the Court.¹¹¹

However, qualitative studies alone cannot fully explain systematic trends concerning the convergence of the AG's Opinions and the Court's judgments. Accordingly, descriptive analyses can only measure and identify the frequency and extent to which the Court's judgments coincide, in a limited sample, with AG's Opinions discarding in this way the *influence* that other variables can exert on the Court's final decision. Instead, a quantitative analysis of *influence*, based on a more refined econometric system, represents a better-suited framework to explore and isolate from the other variables the correlation and causation between the Opinion of the Advocate General and the Court's final judgment.¹¹² Such an econometric model interprets the concept of *influence* as the capacity of the AG Opinion to alter the Court's decision-making. The scholars that carried out this econometric analysis emphasised how the regression models used in their study provided a "statistically significant measure" of the *influence* exerted by the Advocate General that also helped improve previous attempts in the literature.¹¹³ The findings collected in such econometric analysis suggested that in the cases of annulment procedures the ECJ was nearly sixty-seven per cent more likely to annul an act if the AG advised the Court to do so.¹¹⁴ Despite it not being a perfect representation of causality, this econometric analysis has demonstrated that there is some component in the Court's decision-making that is attributable to the recommendations proposed by the Advocate General.¹¹⁵

¹⁰⁹ Mortelmans, 2005, p.142

¹¹⁰ Sadl, U. and Sankari, S., 'The Elusive Influence of the Advocate General on the Court of Justice: The Case of European Citizenship' [2017] Yearbook of European Law p.423

¹¹¹ Ibid., p.440

¹¹² Arrebola et al., 2016, p.91

¹¹³ Ibid., p.82

¹¹⁴ Ibid., p.112

¹¹⁵ Ibid. p.109

2.3 The Possibility to Respond to the Advocate General

A procedural issue that characterises the Courts' interpretation of the 'fair hearing' principle is the extent to which litigants are given the possibility to comment on the files submitted by third parties to the Court. The Strasbourg Court has in fact frequently referred to the right to 'adversarial proceedings' as the "[...] opportunity not only to make known any evidence needed for his claims to succeed but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision [...]".¹¹⁶ Accordingly, given the close relationship between the procedural right to 'equality of arms' and the necessity to guarantee adversarial proceedings, whenever the defendant is denied the possibility to access the entire court record or the full evidence and observations presented to the court the principle of 'fair hearing' is severely compromised.¹¹⁷

However, given the Advocate General status as an independent advisor of the Court, both at the national and at the European levels, it could be argued that Article 6(1) ECHR does not compel the Court to guarantee the litigants the possibility to respond to the Opinion of the Advocate General.¹¹⁸ Accordingly, the Luxembourg Court contended that the "[...] submission of the parties' arguments and their evidence to an adversarial process does not involve requirements of a mandatory nature [and that] [...] there is no need to submit to an adversarial process statements made by a judge, whose impartiality and independence is beyond doubt, *in the exercise of his judicial function*".¹¹⁹

Despite these observations being accurate, what the Court, and more generally those who advocate against the possibility to comment on the AG's Opinion, do not take into consideration is the possibility of the Advocates General raising issues that were not pleaded by the parties throughout the proceedings.¹²⁰ This possibility may trigger a scenario where newly formulated matters concerning the litigants at trial would be presented as part of the legal reasoning to persuade the Court without the parties having the right to respond.¹²¹ This

¹¹⁶ *Mantovanelli v France* [1997] ECHR 21497/93 para. 33; *Jokšas v. Lithuania* [2013] ECHR 25330/07 para. 55.

¹¹⁷ Schabas, W., *The European Convention on Human Rights: A Commentary* (Oxford University Press, 2015) p.288

¹¹⁸ *Emesa Sugar (Free Zone) NV v Aruba*, 2000

¹¹⁹ Case C-466/00 *Arben Kaba v Secretary of State for the Home Department* [2003] Opinion Of Advocate General Ruiz-Jarabo Colomer paras. 92-94.

¹²⁰ Ritter, 2006, p.758

¹²¹ Ryland, 2016, p.6

would create an inadequate state of affairs in the event that the Court decides to rely on the AG's Opinion to reach a final decision. Such circumstance is not merely a hypothetical one as we can see in the *Transocean Marine Paint Association v. Commission* case,¹²² where in its final decision the Court relied on an issue raised by the AG Warner in his Opinion,¹²³ that had not been previously presented by the parties.¹²⁴ The Opinion of the Advocate General Ruiz-Jarabo Colomer then offers the prospect of a situation where "[...] the Advocate General based his remarks on an issue which had not been argued by the parties at any stage of the proceedings, either before the national court or before the Court of Justice", with the risk that such argumentations would find their ways into the Court's final judgment.¹²⁵

2.4 The Strasbourg Court's Approach to the 'Response' Problem

The general approach of the Strasbourg Court to the interpretation of the right to adversarial proceedings can be drawn from its case-law where, in a number of occasions, the Court has interpreted the refusal to guarantee the opportunity to respond to all submissions made before it as a violation of the right to a 'fair hearing'.¹²⁶ According to the Court's reasoning, the concept of a 'fair hearing' also includes the right to adversarial proceedings, namely that "[...] the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the Court's decision".¹²⁷ Such possibility to respond must be given, according to the Court, both when the evidence in question has been submitted by the opposing party, *and* when it has been submitted by a third party such as experts consulted by the Court or independent legal officers attached to the Court, as the Advocate General and Advocate General-like figures assisting national courts.¹²⁸ The Strasbourg Court considers, in fact, an onus of the relevant court to afford the applicant the

¹²² Case 17/74, *Transocean Marine Paint Association v. Commission* [1974] para. 15.

¹²³ Case 17/74, *Transocean Marine Paint Association v. Commission* [1974] Opinion Of Mr Advocate-General Warner

¹²⁴ See also *Case C-304/02 Commission v France* [2005]; *Case C-109/01 Home Secretary v Akrich* [2003]

¹²⁵ *Case C-466/00 Arben Kaba v Secretary of State for the Home Department* [2003] Opinion Of Advocate General Ruiz-Jarabo Colomer, para.55.

¹²⁶ See *Vermeulen v. Belgium*, 2001, para 33; *Lobo Machado v. Portugal*, 1996 para 29; *Nideröst-Huber v. Switzerland* [1997] ECHR 18990/91 para 24; *Mantovanelli v France*, 1997 para 33.

¹²⁷ *Krcmar and others v. The Czech Republic* [2000] ECHR 35376/97 para 40; see also *Ruiz-Mateos v. Spain* [1993] 16 EHRR 505 93/23 para 63; *McMichael v. the United Kingdom* [1995] 20 EHRR 205 para 80.

¹²⁸ Settem, 2016, p.215

possibility to comment on those reasoned opinions on the merits of their appeal that aim at influencing the final decision of the court regardless the actual effect of such opinions on the final decision of the Court.¹²⁹

Furthermore, in assessing the role of the Advocate General, the Strasbourg Court was not only particularly concerned about the fact that litigants were not informed of the AG's Opinion in advance and were not allowed to reply to such submissions, but also that the Advocate General was given the draft judgment of the reporting judge before the hearing, while the parties were not.¹³⁰ Accordingly, infringement of the adversarial principle can also occur as a result of the imbalanced disclosure of specific documents on the merits of the case obtained directly by the judges.¹³¹ A clear example of this disparity has been addressed by the Strasbourg Court in its decision-making on the *Reinhardt and Slimane-Kaid v. France* case.¹³² On this occasion, the file of the reporting judge and one or more draft judgments were communicated to the Advocate General beforehand but not to the parties due to the confidential status of these documents that were part of the final deliberations and were privileged from disclosure.¹³³ Although the core function of the AG is to advise the Court on the correct application of the law, the authority of his office could exercise effective influence on the final decision of the Court in a way that is either favourable or against the appellants' case. Hence, the unfair disclosure of the reporting judge's file combined with the failed release of the AG's Opinion to the parties, who should have had a 'genuine opportunity to respond to it, had created, according to the Strasbourg Court, an imbalanced state of affairs that breached the principles of equality of arms and adversarial proceedings and consequently violated Article 6(1).¹³⁴

2.4.1 The Role of Appearances

Drawing back to the previous section (2.2) concerning the *influence* of the AG on the decision-making of the court, this study will now take into consideration the role of appearances in the Strasbourg Court's general approach to the 'response' issue. Accordingly,

¹²⁹ *K.S. v Finland* [2001] ECHR 29346/95 para 23.

¹³⁰ Kosař, 2018, pp.75-76

¹³¹ Council of Europe, 2019, p.67

¹³² *Reinhardt and Slimane-Kaid v. France* [1998] ECHR 23043/93

¹³³ *Ibid.*, para 105

¹³⁴ *Ibid.* para 103

conferring substantial weight to the ‘appearances’ perspective, the ECtHR has on several occasions restated its interpretation that an opportunity to respond should be granted to the parties whenever a submission is filed with a “view to influencing the national court’s decision”.¹³⁵ The possibility to reply to the Opinions submitted by third parties on the merits of the case does not only depend on the actual influence exerted on the decision-making of the national court, but it is also contingent on the appearance that such Opinions could exert concrete influence on the final judgment. This formalistic perspective, based on the role of appearances, principally stresses the importance of ensuring the “[...] litigants’ confidence on the working of justice which is based on, inter alia, the knowledge that they have had the opportunity to express their views on every document in the file”.¹³⁶ This rule applies even more so to those cases where submissions to the national courts constitute the grounds for their final decision. Hence, on such grounds, according to the Strasbourg Court, it is a prerogative of the parties at trial to determine whether or not a submission to the national court requires to be commented on.¹³⁷

2.5 The Luxembourg Court’s Approach to the ‘Response’ Problem

According to the Statute and the Rule of Procedure of the Court of Justice and the General Court,¹³⁸ the procedural rule governing the CJEU’s interpretation of the right to adversarial proceeding is that the parties at trial are not afforded the possibility to respond to the submissions of the Advocate General.¹³⁹ Differently from the Strasbourg Court’s interpretation of ECHR Article 6(1), the CJEU ruled that, given the role of the Advocate General to make ‘reasoned’ submissions with complete impartiality and independence from the Court bringing the oral procedure to an end, the possibility for the parties to leave written observations in response to the AG’s Opinion was not intrinsic to Article 47 of the Charter.¹⁴⁰ The Court’s interpretation of the Advocate General’s function at the CJEU was clearly asserted in the landmark case *Emesa Sugar* where the Court established that not only was it

¹³⁵ See *Mantovanelli v France*, 1997; *Krcmar and others v. The Czech Republic*, 2000

¹³⁶ *Nideröst-Huber v. Switzerland*, 1997, para 29.

¹³⁷ *Beer v Austria* [2001] ECHR 30428/96 para. 18

¹³⁸ Statute of the Court of Justice of the European Union, 2008, Article 18; Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), Article 82.

¹³⁹ Lenaerts, K., Maselis, I. and Gutman, K., *EU Procedural Law* (Oxford University Press, 2014) p.776

¹⁴⁰ Peers, S. and Ward, A., *The European Union Charter of Fundamental Rights: Politics, Law and Policy, Essays in European Law* (Hart Publishing, 2004) p.134

superfluous for the parties to be able to respond to the AG but also that “[...]if a response to the Opinion was permitted it would further delay the proceedings (given that the texts must be translated) which could lead to an infringement of the right to a hearing in due course of law.”¹⁴¹

However, such a stance of the Luxembourg Court was not uncontested and a legal conundrum on the interpretation of the ‘response issue’ in the right to a Fair Trial arose in later cases.¹⁴² Accordingly, the Court’s approach to the request of the parties at trial to submit written responses to the AG’s Opinion has been challenged and considered not entirely convincing. Firstly, the ECJ’s interpretation of the Advocate General as playing a different role compared to that of the national Procureur General is not very accurate as it does not take into consideration the existence of Advocate General-like figures in the national judicial systems who play very similar functions to that of the AG at the CJEU; secondly, even assuming the existence of fundamental differences between the national and EU Advocates General, this would not automatically influence the problem at stake, as what really matters is not so much the source of the submission as the possibility to address it. Accordingly, what the Strasbourg Court stresses in its case-law is the right of the parties to comment on *all* evidence filed with a *view of influencing* the court’s final decision.¹⁴³

2.6 The Possibility to Reopen the Oral Procedures

Despite its firm stance on denying the parties at trial the possibility to respond to the points raised by the Advocate General, the Luxembourg Court does not exclude the possibility to reopen the oral procedures after the Opinion of the AG has been delivered. Hence, according to the revised Rules of Procedure of the CJEU, “The Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular, if it considers that it lacks sufficient information or where a party has, after the

¹⁴¹ Léger, P. Advocate General, ‘Law in the European Union: The role of the advocate general’ [2004] The Journal of Legislative Studies p.6

¹⁴² See Case C-284/16 *Slowakische Republik v Achmea BV* [2018], paras 26-27; Case C-229/09 *Hogan Lovells International v Bayer CropScience K.K* [2010], para 26; Case C-89/11 *E.ON Energie v Commission* [2012], para 62.

¹⁴³ Lawson, R., ‘Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, Order of the Court of Justice of 4 February 2000, nyr. Full Court’ [2000] Common Law Market Review, p.987

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 Court[...].¹⁴⁴

Nevertheless, although this procedural guarantee being relevant and necessary, it would still be the discretion of the CJEU to decide whether or not to grant such an opportunity to the parties at trial. Hence, this possibility would still be dependent upon the Court's reasoning behind the refusal to offer a chance to respond to the AG's Opinion according to which "[...] since the Court is not bound by it, it is not necessary to re-open the oral procedure each time the Advocate General raises a point with which the parties to the main proceedings disagree".¹⁴⁵ Therefore, the possibility to reopen the oral part of the procedure would not replace the right of the litigants to reply to the AG inasmuch as it would still remain a prerogative of the Court to decide whether or not to order the reopening of the oral procedure and, as a consequence, it would not constitute an effective right of the parties.

¹⁴⁴ Rules of Procedure of the Court of Justice, 2012, Article 83

¹⁴⁵ Case C-438/12 *Weber v Weber* [2014] para. 30

CHAPTER THREE

3 European Constitutional Pluralism and the Right to a Fair Trial

Having explained the implications that divergent interpretations of the right to adversarial proceedings before the Strasbourg and the Luxembourg Court generate, this chapter will proceed to analyse the legal mechanisms for ensuring equal levels of procedural guarantees of the right to a Fair Trial in the context of the CoE and the EU institutional frameworks.

To answer sub-questions *ii.* and *iii.*, as outlined in **section 1.3**, this part of the study will look at the practical implications of the constitutional pluralist legal context determined by the currently missed accession of the EU to the ECHR. Consequently, this study will delve into the analysis of those legal mechanisms, such as the principle of *'equivalent protection'*, that the Strasbourg Court has developed to guarantee those standards of human rights protection as established by the ECHR. Having outlined in **Chapter two** the unequal access to the procedural right to adversarial proceedings determined by the possibility to respond to the Opinion of the Advocate General, this chapter will investigate the extent to which the legal framework set up by the ECtHR is able to guarantee the respect of the right to a Fair Trial in the event of the EU mechanism offering lower levels of protection than those established by the CoE system through the ECHR. Hence, although the EU not being a party to the Convention, claims against the Union concerning deficient standards of human rights protection have been brought before the Strasbourg Court against the Member States instead.¹⁴⁶ Consequently, this chapter will also focus on the responsibility of MS to guarantee the respect of the ECHR's standards of protection even while complying with Union law.

Nonetheless, after having looked at the principles established by the Strasbourg Court, this analysis will consider such mechanisms as not being sufficiently adequate for ensuring the equal protection of the Fair Trial standards before the two Courts.

¹⁴⁶ Alston, P. and De Schutter, O., *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency, Essays in European Law* (Hart Publishing, 2005) p.239

3.1 The Legal Implications of European Constitutional Pluralism on the Protection of the Right to a Fair Trial

The presence of a plurality of supranational constitutional sources concerning human rights protection is not in itself a challenge to the significance and longer-term future of the ECHR mechanisms. It is, however, the possibility of diverging interpretations of similar or interrelated human rights norms that might lead to conflicting obligations for Member States under the multiple mechanisms of international and European Union law.¹⁴⁷ Accordingly, the coexistence of multiple legal sources of human rights protection in the European region has triggered a judicial conundrum regarding the interpretation of the procedural right to adversarial proceedings of the Right to a Fair Trial before the Strasbourg and Luxembourg Courts. Since the Union has not yet acceded to the Convention (nor it is currently envisaged to do so, following the CJEU's Opinion on the incompatibility of the draft Agreement for the accession with EU law),¹⁴⁸ decisions of the Luxembourg Court cannot be appealed before the ECtHR because such complaints would be inadmissible *ratione personae*. Consequently, the ECJ's judgements would be final and the Court's case-law would not be subject to any correction and complaint mechanism.¹⁴⁹ Hence, while human rights complaints directed against national measures can be brought before the ECtHR, actions against the Community institutions cannot and, consequently, no further remedies are offered to the alleged injured party before the ECJ.

Moreover, the absence of institutionalised arrangements between the CJEU and ECtHR has triggered a problematic circumstance where the interaction between the two supranational regional courts is not governed by an ordering principle that would harmonise the interpretation of similar human rights standards. Hence, the possibility of the two Courts holding diverging interpretations of fundamental rights could not only undermine the coherence of the European legal space, but also jeopardise the possibility of complainants to appeal, and seek judicial remedies, in the event of the Courts upholding different levels of procedural guarantees of the right to a Fair Trial.

¹⁴⁷ Kuijer, M., 'The Challenging Relationship Between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession' [2018] *The International Journal of Human Rights* p.2

¹⁴⁸ Case Opinion 2/13,

¹⁴⁹ Lawson, R., 'Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg', in Lawson, R. and de Blois, M. (eds.) *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of H.G. Schemers* (Springer, 1994) p.230

3.2 The Mechanisms of the European Union to Comply with the ECHR Standards

The stalemate of the EU accession to the Convention does not imply that the Union operates in a legal vacuum for the protection of human rights. Instead, since the 1970s the ECJ has been recognising fundamental rights as “[...] an integral part of the general principles of law, the observance of which it ensures”,¹⁵⁰ and asserting that “[t]he protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community”.¹⁵¹ Such a doctrine of protection, started by the ECJ with the *Stauder* case in 1969,¹⁵² is traditionally portrayed as stemming from the pressures that Member States exerted on the Court concerning the allegedly inadequate system for the protection of human rights at the Community level. Instead, the Court’s decision to review human rights claims by itself, mostly reflected a successful attempt to protect the principle of *supremacy* of EU law. Accordingly, the threat posed by the Member States’ allegations that the validity of Community measures was dependent upon its compatibility with fundamental rights as formulated by their Constitutions,¹⁵³ pressured the Court to refer to fundamental rights and continue to develop its human rights case-law.

Successively, the ECJ shifted from merely reviewing the validity of legislative and administrative Acts of the Community institutions with the respect of fundamental rights, to ensuring that Member States would act in compliance with such rights when implementing Community rules.¹⁵⁴ Accordingly, the ECJ assumed the competence for human rights review concerning both the Community institutions and its Member States, consequently moving from merely ‘respecting’ to fully ‘guaranteeing’ human rights.¹⁵⁵ Moreover, the Treaty of Maastricht initiated the codification of fundamental rights in the Community with the introduction of Art. F 2 in the Treaty on the European Union (TEU) that was later renumbered as Article 6 TEU and that reads as follows: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as

¹⁵⁰ Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 507 para. 13

¹⁵¹ Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1134 para. 2 (hereinafter *Solange I*)

¹⁵² Case 26/29 *Stauder v. City of Ulm* [1969] ECR 419

¹⁵³ Case 11/70 *Solange I*, 1970, Grounds of Judgment, para. 2

¹⁵⁴ Case 5/88, *H. Wachauf v. Germany* [1989] ECR 2629

¹⁵⁵ Lawson, 1994, p.224

they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union law”.¹⁵⁶ Art 6 TEU also indicates the genesis and dynamics of the development of fundamental rights in the Union and identifies the adoption of the Charter of Fundamental Rights as the ultimate climax of such process.¹⁵⁷

3.2.1 The Horizontal Clauses of the EU Charter

Chapter VII of the EU Charter comprises those clauses concerning its scope and applicability, the standards of protection, and its relationship to other legal instruments.¹⁵⁸ Article 51(1) indicates that the provisions of the Charter are directed to the various agencies and institutions of the Union and to its Member States but, in this latter case, only when they implement Community measures.¹⁵⁹ Hence, in implementing Union Law MS are still accountable for any infringement or violations of human rights standards embedded in the Charter and the Convention. The purpose of Article 52(3) is, instead, to promote harmony between the Charter provisions and those of the ECHR without preventing the EU from adopting more extensive protective measures than those provided by the Convention.¹⁶⁰ Although not directly addressing the relationship between the CJEU and ECtHR on matters of human rights interpretation, Article 52(3) seems to be intended to promote the deference of the Luxembourg Court concerning the case-law of the Strasbourg Court.¹⁶¹

According to the clarifications expressed in the explanatory memorandum, the objective of Article 52(3) is to ensure consistency between the Charter and the Convention also by establishing the principle that the legislator, if laying down limitations to these rights, must comply with the same standards of the limitation arrangements declared in the ECHR.¹⁶² Following from these standards and in pursuance of Article 52(3), the scope and meaning of Article 47 of the Charter on the right to a Fair Trial should be interpreted as being the same, if

¹⁵⁶ TEU, 2007, Article 6(3)

¹⁵⁷ Blanke, H.-J. and Mangiameli, S., *The Treaty on European Union (TEU)* (Springer, 2013) p.296

¹⁵⁸ Craig, P. and De Burca, G., *EU Law: Texts, Cases and Materials* (Oxford University Press, 2011) p.396

¹⁵⁹ Charter of Fundamental Rights of the European Union, 2007, Art. 51(1)

¹⁶⁰ Ibid., Art. 52(3)

¹⁶¹ Craig, P. and De Burca, G., 2011, p.398

¹⁶² Official Journal of the European Union, Explanations (*) Relating To The Charter Of Fundamental Rights, 2007/C 303/02, 14 December 2007, Article 52

not more extensive, of the scope and meaning of Article 6(1) of the ECHR.¹⁶³ The ECJ in its case-law has reiterated in several instances that Article 47 of the Charter secures in EU law the same protection afforded by Article 6(1) of the Convention.¹⁶⁴ Nevertheless, in interpreting Article 53 of the Charter which ensures that the level of protection granted by the Charter does not adversely affect fundamental rights as recognised by, *inter alia*, the Convention, the CJEU has denied the possibility for MS to apply their constitutional standards of protection in the event of these being more extensive than those granted by the Charter.¹⁶⁵ If that was to be the case, in interpreting the procedural right to adversarial proceedings and the related possibility to respond to the AG's Opinion, the standards of protection afforded by national courts would result more extensive than those derived from the CJEU's interpretation of the Charter. Accordingly, following such reasoning, the Charters' provisions would in turn be considered deficient compared to the ones established by the Convention.

3.2.2 The CJEU's Teleological Interpretation of Fundamental Rights

Having looked at the mechanisms of protection that the EU has developed to ensure compliance with the ECHR's standards, this section will briefly analyse the CJEU's decisions on the application of Articles 52(3) and 53 of the Charter through a method of interpretation that pays attention to the meta-teleological reasoning behind the Court's decision-making as explained in the previous **section (1.5.1.3)**.

In the interpretation and application of the law, one must not forget that the role of the CJEU in a decentralised and multifaced legal order is to provide a thicker normative framework to ensure a coherent understanding of the body of law beyond the decision of each case. Given the necessity to continuously adapt the EU legal order to the fast-moving context of international legal interpretation, the EU Treaties, and its Charter frequently appeal to broad universal principles. Hence, a meta-teleological framework of interpretation constitutes a useful mechanism to explain the Court's reasoning as a balancing process between possible

¹⁶³ Gutman, K., 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best is Yet to Come?' [2019] *German Law Journal* p.888

¹⁶⁴ See Case C-386/10 P *Chalkor AE Epexergasias Metallon v European Commission* [2011] para.51; Case C-199/11 *Europese Gemeenschap v Otis NV and Others* [2012] para 47; Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* [2017] E.C.R. I-373 para 54.

¹⁶⁵ C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] paras 56–60.

conflicting interests. Accordingly, having identified the purpose or end (the “telos”) of a piece of EU legislation, the CJEU tends to interpret and apply it in such a way that it is finalised to promote that specific end.¹⁶⁶

Therefore, the CJEU’s interpretation of Article 52(3) of the Charter, filtered through the canons of practical reasoning, reflects the purpose of the systemic understanding of the EU legal order and EU rules in general.¹⁶⁷ The necessity to preserve the *primacy* of EU law enshrined in the principle of *supremacy* resonates in the Court’s discourses behind the interpretation and application of Articles 52(3) and 53 of the Charter as in compliance with the Convention standards, but also without undermining the effectiveness of EU law. The higher purpose of the EU law to guarantee uniformity, effectiveness, and coherence of the Community legal order by promoting systemic policies also reflects the incorporation of the Charter at the Treaty level to prevent Member States from challenging such an established order.¹⁶⁸

3.3 The ECtHR’s Principle of *Equivalent Protection*

Despite the CJEU’s focus on the primacy of Union law, the necessity to maintain an overall legitimacy of the EU human rights protection system has generated the need to adopt a constitutional understanding of the role of the Strasbourg Court as a guarantor of minimum absolute standards of human rights protection.¹⁶⁹ Hence, the European Commission on Human Rights, although not competent *ratione personae* to review proceedings or decisions of the EU institutions, maintained its jurisdiction under Article 1 of the Convention over Member States that, even if complying with EU law, were in breach of the ECHR’s standards.¹⁷⁰ However, the Commission also acknowledged that, although Acts of the EU and its institutions cannot be challenged before the Strasbourg Court, the Convention does not exclude the transfer of powers to an international organisation “[...] provided that within that organisation fundamental rights will receive equivalent protection.”¹⁷¹ Hence, states’ action

¹⁶⁶ Lasser, 2009, p.207

¹⁶⁷ Maduro, 2007, p.13

¹⁶⁸ Lasser, 2009, p.207

¹⁶⁹ Harmsen, R., ‘The (Geo-) Politics of the EU Accession to the ECHR: Democracy and Distrust in the Wider Europe’ in Kosta, V., Skoutaris, N. and Tzevelekos, V., *The EU Accession to the ECHR* (Hart Publishing, 2014) p.204

¹⁷⁰ *M. & Co. v the Federal Republic of Germany*, 1990

¹⁷¹ *Ibid.*

taken in compliance with the legal obligations derived from the application of EU law are justified as long as the Union and its institutions are considered to protect fundamental rights and to ensure both their substantive guarantees and the mechanisms employed to control their observance in a manner that is at least ‘equivalent’ to that of the Convention.

The substance of such an *equivalent protection* doctrine was later reiterated by the Strasbourg Court in *Matthews v the United Kingdom* where the Court confirmed that as long as Convention rights continue to be secured, a transfer of competences to international organisations is not excluded, while MS remain accountable even after such a transfer.¹⁷² In this case, the Court also demonstrated that, whenever there is no *equivalent protection* available at the Community level, it is in its prerogatives the competency to assume jurisdiction over the domestic implementation of EU law *ratione materiae*.¹⁷³ In applying the *equivalent protection* doctrine, the Strasbourg Court makes strategic use of its judicial review power subjecting those states’ Acts that are in compliance with binding measures of international organisations to the existence of an ‘equivalent’ or ‘comparable’ level of human rights protection in the legal order of such international organisations.¹⁷⁴ Hence, such judicial scrutiny results in an indirect review of the international organisations’ system for guaranteeing fundamental rights and, subsequently, of the legal order of the European Union.

3.3.1 The *Bosphorus* Presumption Test

The language of the Strasbourg Court in the *Matthews* judgment left open the question of whether the mere jurisdiction of the ECJ over a specific case would constitute in itself a satisfactory requirement to prevent the appellants from presenting their case before the ECtHR. Nevertheless, a more comprehensive test was later developed by the Strasbourg Court in the *Bosphorus* case,¹⁷⁵ where the Court first, reiterated the states’ responsibility under ECHR Article 1 when transferring powers to an international organisation, and it then confirmed the principle of *equivalency* according to which “[...] State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered

¹⁷² *Matthews v U.K.*, 1999, para.32

¹⁷³ Garlicki, 2008, p.525

¹⁷⁴ Bianchi, 2016, p.58

¹⁷⁵ *Bosphorus Hava Yollari Turizm v. Ireland*, 2005

and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides”,¹⁷⁶ whereby with *equivalent* the Court expressly intended ‘comparable’ and not ‘identical’. Accordingly, by working on a case-by-case basis, contrary to previous jurisprudence, the presumption of *equivalency* can be rebutted in every specific case and, consequently, the appellants’ applications cannot be rejected in principle as being inadmissible *ratione materiae*.¹⁷⁷ Such an *equivalence* is, in fact, not considered to be continuous unconditionally for every future case but it shall be established every time its validity is brought under question. Hence, according to the *Bosphorus* test, a presumption of *equivalence* can be rebutted by taking into account the circumstances of a specific case if the respect of the ECHR’s standards is considered to be ‘manifestly deficient’.¹⁷⁸ The Court established a two-stage test based on an examination of first, whether the international organisation concerned provides *equivalent protection*, leading to the presumption to apply, but only in those cases where MS have no discretion in implementing such obligations, and second, whether such a presumption test is rebutted because of the ‘manifestly deficient’ system of the organisation itself.

i. The Application of the *Bosphorus* Presumption to Article 6(1) ECHR

Accordingly, as long as the European Union is not a contracting party to the Convention, the Strasbourg Court cannot apply the standards of Article 6(1) directly and it has, instead, resorted to the application of the *Bosphorus* presumption test as it does when dealing with other international organisations. More precisely, the possibility to respond to the Advocate General in a preliminary ruling procedure at the CJEU was dealt with by the Strasbourg Court in the *Kokkelvisserij* case.¹⁷⁹ In this case, the Opinion of the AG concerning the interpretation of an EU Directive was contested by the appellant association as wrongly stating the facts and the principles of law relevant to such circumstances. Consequently, the association requested to either be allowed to submit a response to the Advocate General or to reopen the oral

¹⁷⁶ Ibid., para 155

¹⁷⁷ Muller, C., ‘Fundamental Rights in Multi-Level Legal Systems: Recent Developments in European Human Rights Practice’ [2007] Interdisciplinary Journal of Human Rights Law p.42

¹⁷⁸ *Bosphorus Hava Yollari Turizm v. Ireland*, 2005, para 156.

¹⁷⁹ *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* [2009] ECHR 13645/05 (hereafter: *Kokkelvisserij*)

procedures as afforded by Rule 61, of the ECJ's Rules of Procedures,¹⁸⁰ but both applications were denied by the Court. The association complained that such a refusal would have amounted to a violation of Article 6(1) under the ECHR since it alleged that the AG Opinion included factual and legal errors and did not take into consideration the interests of the applicant association's industry.¹⁸¹

However, the Strasbourg Court recalled how the EU as a legal personality, not being a contracting party to the ECHR, was not subject to the authority of the Court and the association's application was, consequently, inadmissible *ratione personae*. However, applying the *Bosphorus* presumption test, the Court examined whether the procedures of the CJEU were followed by guarantees that ensured standards of protection equivalent to those of the ECHR, and found that, given the possibility to reopen the oral procedures under Rule 83, the protection afforded to the association could not be considered 'manifestly deficient' and that the applicant's request was, therefore, ill-founded.¹⁸²

In assessing the application of the *Bosphorus presumption* test, if one takes into account the procedural safeguards that the Strasbourg Court applies to its contracting parties under Article 6(1), it seems evident that the ones that the Court applied to test the CJEU's protection system are much less extensive.¹⁸³ For instance, differently from the ECtHR, the Luxembourg Court does not afford to the parties at trial the possibility to approach the AG to seek the intention of their submission before the hearing, it does not allow the parties to present a memorandum for the deliberations, even in the event of the national judge recognising the presence of factual or legal errors in the submission of the Advocate General, and although acknowledging the possibility to reopen the oral proceedings, it is usually reluctant to do so.¹⁸⁴ Hence, following the interpretation of the right to adversarial proceedings in the ECHR context, when such standards are not met, the Strasbourg Court should find the proceedings to be unfair and the principle of *equivalent protection* to be lacking. Moreover, the assessment of a 'manifestly deficient' system can easily lead to the assumption that the standards of human rights protection granted by the CJEU legal system can be lower than those established by the ECHR if considering that the presumption of *equivalence* is only rebutted by a 'manifestly'

¹⁸⁰ Ibid., Section B, para. 3.

¹⁸¹ Ibid., Section A

¹⁸² Ibid. Section B, para.3.

¹⁸³ Arold Lorenz, N.-L., Groussot, X. and Petursson, G. T., *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?* (Martinus Nijhoff Publishers, 2013) p.40

¹⁸⁴ Burrows, N. and Graeves, R., 2007, p. 52

deficient system and not a deficient one as such.¹⁸⁵ Additionally, the threshold for rebutting such an *equivalent protection* test remains vague as the Court has not clearly defined standards nor provided a precise definition.

The Strasbourg Court's approach in *Kokkelvisserij* demonstrates the ECtHR's disposition to limit its interference with the procedural mechanisms of the CJEU and to establish a peaceful balance between the two supranational courts by taking into account the possible limitations to its deference.¹⁸⁶ The Court's decision in the *Kokkelvisserij* case was also criticised as being a "Pyrrhic victory" since, instead of buttressing the legitimacy of Advocates General, it left space to thoughts of double standards between Member States and the Union emphasising the current imbalance derived from the divergent interpretations of their role.¹⁸⁷

3.4 Member States' Responsibility to Ensure the Respect of Fundamental Rights for Violations Rooted in the Implementation of EU Law

Having established the jurisdictional competences, defined through the *equivalent protection* principle, that the Strasbourg Court exerts over its Contracting Parties when delegating the protection of fundamental rights to international organisations, this section will investigate Member States' responsibility to observe the Convention's standards also when implementing Community Acts. Accordingly, despite the currently missed accession of the Union to the ECHR, the Strasbourg Court has developed an elaborated case law that allows individuals to hold MS accountable for violations that result from the implementation of Union Law.¹⁸⁸ According to the *Bosphorus* presumption test, MS are considered to have discretion when they implement the legal obligations that derive from their membership to the organisation.¹⁸⁹ However, such discretion does not correspond to the discretion that MS have while applying a preliminary ruling by the ECJ concerning the interpretation of EU law because of its binding nature on Member States.¹⁹⁰

¹⁸⁵ Muller, 2007, p.44

¹⁸⁶ Ibid., p.39

¹⁸⁷ Bobek, M., 'Fourth in the Court: Why Are There Advocates General in the Court of Justice, A' [2011-2012] Cambridge Yearbook of European Legal Studies, p.534

¹⁸⁸ Lock, 2015, p.190

¹⁸⁹ *Bosphorus Hava Yollari Turizm v. Ireland*, 2005, para 156.

¹⁹⁰ Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki to *Bosphorus Hava Yollari Turizm v. Ireland* [2005]

Such a discretion that Member States hold can also be defined as a ‘margin of appreciation’ that is conceptualised as a constitutional principle arising from the necessity to strike a balance between the ECHR’s standards and the respect of EU principles.¹⁹¹ This ‘margin of appreciation’ can also be conceived as a theory of constitutional review that the Strasbourg Court developed to delineate the boundaries of its jurisdiction concerning the international adjudicative function that it exerts.¹⁹² The ‘margin of appreciation’ principle cannot be found in the Convention nor in the *travaux préparatoires*, but it was conceptualised for the first time in the 1958 Commission’s report on a case presented by Greece against the United Kingdom and was later mentioned in over 700 of the Court’s judgments and codified in Protocol 15 to the ECHR, Article 1, although not yet in force.¹⁹³ Specifically, the term ‘margin of appreciation’ refers to the discretion, or room for manoeuvre, that MS are granted by the Strasbourg Court in specific circumstances. According to this doctrine, national authorities are usually better placed to assess whether or not a restriction on certain rights or liberties is justified in compliance with EU law. Thus, it is not always the case that, whenever acting under EC regulations, Member States do not exercise any level of discretion. Although Regulations are both binding in their entirety and directly applicable in the national legal systems, when MS follow EC Acts they are still exercising a level of discretion on deciding how to give effect to such Regulations.¹⁹⁴ Hence, in the observance of the Convention’s standards, it is necessary to guarantee a certain level of domestic leeway especially concerning the principled balancing and practical considerations necessary to the norm of procedural fairness.¹⁹⁵

Nonetheless, such a level of discretion does not necessarily arise from an implementing Act adopted by the Member States’ legislature but, as the *Kokkelvisserij* case demonstrates, it can also result from the national courts’ request for a preliminary ruling to the CJEU.¹⁹⁶ In this case, the Court stressed that “[...] the applicant association’s complaint is based on an intervention by the ECJ which had been actively sought by a domestic court in proceedings pending before it. It cannot, therefore, be said that the respondent party was in no

¹⁹¹ Harmsen, R., 2014, p. 201

¹⁹² Ibid.

¹⁹³ Greer, S., *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing, 2000) p.5

¹⁹⁴ Costello, C., ‘The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ [2006] *Human Rights Law Review* pp. 108-109

¹⁹⁵ Bardsen, 2007, p.114

¹⁹⁶ A similar system exists under the ECHR as established by Protocol No. 16 to the ECHR, 2013

way involved”.¹⁹⁷ Hence, according to the Strasbourg Court, those preliminary rulings of the CJEU that require MS to act in violation of the Convention can be imputable to the Member States themselves.

If that was to be the case, in those instances such as *Emesa Sugar v the Netherlands*, where the applicant was negatively affected by an EC Council decision and brought the issue before a local court that requested a preliminary ruling to the ECJ, the Court’s rejection of the applicant’s request to submit a response to the AG’s Opinion on the case could be deemed as falling under the responsibility of the Member State itself. In this way, while the EU institutions remain immune to the jurisdiction of the Strasbourg Courts, MS would be stuck in a limbo where, on the one hand, they are bound to comply with the bindings rulings of the CJEU and, on the other, they are held accountable under the ECHR for any violations arising from their compliance with Union law that results from any kind of Act including the request for a preliminary ruling. Accordingly, the consequence of having different interpretations of the procedural right to adversarial proceedings of the right to a Fair Trial would result in the possibility for a Member State to find itself in breach of the Convention for an act of implementation over which it has little or no discretion.¹⁹⁸

This situation creates an unfavourable condition both for Member States and for the protection of their citizens’ fundamental rights. First, as this study has explained in the previous paragraph, the Strasbourg Court could find a MS responsible for violating the Convention’s standards of protection by implementing an EU Act over which it might have little or no discretion. A second issue would arise in the event of a violation that stems from the application of EU law but where no national acts are needed to implement it, as for an ECJ’s decision following a request for a preliminary ruling. Third, in the complete absence of national implementation measures, the *Bosphorus* presumption test would constitute the last chance for individuals to appeal against the alleged violations of their fundamental rights. Nonetheless, such a principle leaves room for interpretation of what constitutes a ‘manifestly deficient’ system, of what would qualify as a state Act, and when the *equivalence* test can be effectively rebutted.

Consequently, the existing mechanisms for the protection of fundamental rights standards in Europe do not entirely guarantee a coherent level of protection before the two supranational Courts. Hence, as stressed by the concurring Opinion of judge Ress, the

¹⁹⁷ *Kokkelvisserij*, 2009, Section B, para. 3.

¹⁹⁸ Harmsen, 2001, p.644

judgment in the *Bosphorus* case demonstrate “[...] how important it will be for the European Union to accede to the European Convention of Human Rights in order to make the control mechanism of the Convention complete [...]”.¹⁹⁹ However, as previously discussed, following Opinion 2/13 of the CJEU, the accession of the Union to the Convention is currently not foreseeable, hence, such a level of legal coherence cannot be ensured yet.

¹⁹⁹ *Bosphorus Hava Yollari Turizm v. Ireland*, [2005]-VI Eur. Ct. H.R., Concurring Opinion of Judge Ress, para 2.

CHAPTER FOUR

4 Discussion and Conclusion

This final chapter will be dedicated to briefly discuss the implications derived from the necessity to balance conflicting interpretations of the right to a Fair Trial through the application of the proportionality test. I will also outline the possible ways forward to overcome the legal conundrum arising from the divergent interpretations of fundamental rights and present some final reflections.

4.1 The Proportionality Test

The principle of proportionality is generally applied to determine whether an interference with the protection of a specific right can be justified.²⁰⁰ Several assessments can be conducted to carry out a proportionality test. First, the policy that interferes with the guarantee of the right in question has to pursue a legitimate goal; second, such a policy must be a suitable means for achieving the goal; third, no less intrusive but equivalently effective alternative has to be available, and finally, the right-holder must not be disproportionately burdened by the law.²⁰¹ This latter phase, also defined as the balancing stage is generally the last stage for the resolution of a conflict between the right in question and the competing right or interest. This analysis believes it to be necessary to apply the principle of proportionality to the divergent interpretations of the procedural right to adversarial proceedings of the Fair Trial right of the Strasbourg and Luxembourg Courts. Hence, rather than to competing rights, this test is hereinafter applied to the opposing interpretations of the same right, namely that to adversarial proceedings of the right to a Fair Trial. The test will be aimed at assessing whether the refusal to guarantee a possibility to reply to the submission of the Advocate General of the CJEU, to ensure the coherent application of EU law, can be justified as a legitimate interference to the protection of the Right to a Fair Trial as established by the ECHR.

²⁰⁰ Moller, K., 'Proportionality: Challenging the Critics' [2012] *International Journal of Constitutional Law* p.711

²⁰¹ *Ibid.*

i. Legitimate Goal

To determine if the CJEU interpretation of the right to adversarial proceeding pursues a 'legitimate' goal, it is necessary to assess whether the reasoning behind its decision is objectively justifiable, hence, whether there are any relevant interests rationally connected to the policy that could justify such interference. Accordingly, if taking into consideration the judgment of the *Emesa Sugar* case, the Luxembourg Court's line of reasoning does not in principle deny the applicability of the right to a fair hearing as conceptualised by the Convention nor that a right to adversarial procedure exists,²⁰² but, instead, it relies on the role and function of the Advocate General. However, despite the potential distinctions existing between the various Advocate General-like figures in the different national systems, in all those cases an independent and impartial magistrate submits an observation to the Court with the aim of influencing its final decision.²⁰³ Hence, what actually matters in assessing the fairness of the procedures is not so much the source of the observations submitted to the Court, but the possibility afforded to the parties to be able to address them. As a consequence, the ECJ's focus on the diverging role of the Advocate General in the EU and national systems is not relevant enough to justify an interference with the respect of such procedural right.

ii. Suitability

The suitability assessment is to establish whether and, if so, at what point the protection of the right in consideration and the conflicting interest actually clash. In brief, this stage is to establish what kind of connection exists between the alleged interference and the goal at stake. In this instance, the conflict, hence, the cost of achieving one goal at the expenses of the other, arises at the moment when, in order to ensure the respect of EU law, complainants before the CJEU who request to submit a response to the Opinion of the Advocate General during the oral proceedings as granted by the ECHR, are denied to do so and cannot bring a complaint before the ECtHR.

²⁰² *Emesa Sugar (Free Zone) NV v Aruba*, 2000, para 18.

²⁰³ Lawson, 2000, p.987

iii. Necessity

The principle of necessity requires that there must not be available less restrictive policies that can guarantee the achievement of the goal in question in an equivalent manner. That is to say that the policy to achieve the goal can be unnecessary if it requires measures that go beyond what is effectively needed to realise the goal, or that a different and less restrictive policy is also available to achieve the goal in a similar manner.²⁰⁴ Conversely, if the interference with the realisation of a right is considered proportionate or necessary, then it can be considered that the Convention right has not been violated.²⁰⁵ In the case at study, the possibility to access and comment on all evidence submitted to the Court ‘with a view of influencing’ its final judgment requires, as demonstrated throughout this analysis, that the parties shall be granted the opportunity to respond to the AG’s Opinion. The alternative policy in this case would consist of relying on the Court’s prerogative to reopen the oral procedures that is, however, at the Court’s complete discretion and does not, therefore, guarantee the same procedural right as ensured by the Convention.

iv. Balancing

The last assessment is the balancing phase that is aimed at determining which of the two conflicting goals takes priority in the specific circumstance of a case. This can be evaluated through a cost-benefit analysis, by measuring and comparing the ‘weight’ of the two rights, here the two diverging interpretations of the Courts, or through a reasoning of balancing that consists on making a moral argument to determine which of the competing interest is prioritised by balancing all the relevant considerations against each other.²⁰⁶ In the present case, this analysis has placed a higher ‘weight’ on the protection of fundamental rights standards as established by the Convention rather than on the respect of the procedural role of the Advocate General at the CJEU. Accordingly, it is important to stress that human rights standards are not merely instrumental to facilitate the achievement of other goals, such as EU

²⁰⁴ Ibid., p.713

²⁰⁵ Letsas, G., *A Theory of Interpretation of the European Convention on Human Rights* (Oxford Scholarship Online, 2009) p.86

²⁰⁶ Ibid., p.715

integration, nor are they impediments to the fulfilment of a higher legal order based on the primacy of EU law but, instead, they are the ultimate goal that international institutions should guarantee.²⁰⁷ Hence, despite the importance of recognising and respecting the ECJ's Rules of Procedures, this analysis has shown that granting the possibility to respond to the Advocate General to guarantee the effective protection of the right to a Fair Trial takes precedence over the necessity to respect the procedural role of the Advocate General at the CJEU as established by the legal order of the Union.

4.2 Final Reflections and the Possible Ways Forward

Having applied the proportionality test to determine whether the CJEU's interpretation of the right to adversarial proceedings, although setting a lower standard of protection compared to the one ensured by the ECtHR, could be justified, this study has concluded that the EU mechanism to ensure the protection of the Fair Trial right is, indeed, procedurally defective and that causes difficulties in upholding the right to a Fair Trial.

Such an assessment has been determined by a thorough analysis that has first, taken into consideration the role of the Advocate General in the various national and EU systems and has concluded that, despite the multiple functions that magistrates carry out in the different judicial frameworks, the figure of an independent judge submitting observations to the Court with the aim of influencing its final judgment is common to all of them. Hence, the possibility to respond to such observations should not be limited by the diverging roles that the Advocate General-like figures play at the national level as the ECJ claims in the *Emesa Sugar* case. Moreover, to demonstrate that the opportunity for the parties at trial to respond to the AG's Opinion truly matters, this study has evaluated the extent to which the implicit and explicit influence exerted by the Advocate General affects the final judgments of the Courts. Hence, the **Second Chapter** has compared the Luxembourg and Strasbourg Courts' systems to determine whether the two approaches to the 'response' problem were actually conflicting and, having ascertained so, it has concluded that the CJEU's mechanism to reopen the oral procedures does not compensate for denying to the parties the possibility to submit a response to the AG Opinion.

Consequently, the **Third Chapter** has investigated the implications of the constitutional pluralist framework in Europe on the protection of the Fair Trial right. This

²⁰⁷ Kuijer, 2018, p.11

chapter has examined the existing mechanisms of both the Strasbourg Court to guarantee compliance of the EU with the ECHR standards despite its missed accession to the Convention, and of the Luxembourg Court to ensure equal levels of protection in the Union. Accordingly, the principle of *equivalent protection*, as developed by the ECtHR in the *Bosphorus* case, has been tested on the protection of the procedural right to adversarial proceedings. However, given the impossibility to bring proceedings against the Union and its institutions before the Strasbourg Court, this study has demonstrated that the necessity to guarantee the ECHR standards of protection falls on the Member States even when their acts result from the implementation of Community measures. However, this analysis has also stressed that, given the hazy language of the Court on what concerns a state ‘act’ or a ‘manifestly deficient’ system, such a method of protection cannot guarantee a fully-fledged mechanism of fundamental rights protection. Moreover, in the absence of a certain margin of appreciation, states are to be held accountable for actions derived from compliance with EU law even when merely requesting a preliminary ruling. Consequently, given the conflicting obligations deriving from the diverging interpretation of the procedural right to adversarial proceedings that the two supranational Courts hold, states would find themselves before a legal conundrum where they are bound to respect the ECHR standards but are also accountable for any Act taken in compliance with EU law even in the absence of national measures of implementation.

In order to overcome such a legal impasse and to ensure a coherent and comprehensive system of protection of fundamental rights in Europe, this study will briefly advance the potential alternatives to address such a challenge. The first yet least plausible option would be for the EU to access the Convention and subject its legal order to the judicial review mechanism of the Strasbourg Court. However, for the reasons explained above in this study, this remains the least desirable and conceivable option for the Union to pursue. A more plausible solution would be to amend Article 82 of the Rules of Procedure of the ECJ, according to which the Opinion of the AG brings the oral proceedings to an end, so as to introduce the possibility for the parties to comment on all relevant evidence presented to the Court including the AG Opinion. This would allow the parties to the proceedings to submit a response to the Advocate General on matters that they consider to be relevant for the Court’s decision. Such an alternative could be introduced by setting a limited time-frame for the parties to submit their responses in order to avoid protracting the proceedings for too long and slowing down the ECJ’s work. Either of these options would allow the EU to correct such a

legal impasse and guarantee a more coherent deference of the Convention standards on the right to a Fair Trial.

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