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Dissenting Opinion in the European Court of Justice — Estonia's Possible Contribution to the Democratisation of the European Union Judicial System

1. Introduction. Dissenting opinions in the Supreme Court of Estonia

Estonia has become a member of the European Union. In relation to this, two Estonian judges work in the European Union court system and participate in supranational administration of justice in the European Court of Justice (ECJ) and the Court of First Instance of the European Communities. The judicial practice of the ECJ will definitely benefit from the experience that these judges have gained during their careers in the courts of Estonia, a country that restored democracy not long ago and has, among other things, built up a state based on the rule of law, characterised by ample reform legislation. But there is yet another link between the administration of justice in Estonia and that in the European Union — Estonian courts and judges have become a part of the judicial power of the European Union. Time will tell what the dialogue between the Estonian courts and the ECJ will be like; it is too early to predict how active the Estonian courts will be in seeking preliminary rulings from the ECJ. The co-operation will no doubt be mutually enriching; not only will administration of justice in Estonia become more 'European', but the European Union is in turn likely to find something worth transposing from Estonia.

I would like to focus on one such possible aspect of the Estonian legal system — the opportunity for a judge to present a dissenting opinion. The disclosure of a judge's dissent from the majority opinion is permitted in Estonian court judgements, but this is not allowed in judgements of the ECJ. The European Union as a whole has been criticised for lacking democracy in its judgement procedure, and the criticism is likely justified, considering how decisions are made in the ECJ. A smooth integration of the new member states

into the body of the established members may come under threat when democracy is lacking. The admissibility of dissenting opinions in the ECJ is an issue that has remained intriguing as nobody dares to attempt to change the *status quo* of the ECJ, and thus it has become a taboo area for experts in European law. This article attempts to take pioneering strides in this field and serves as a dissenting opinion on the disallowance of dissenting opinions in the ECJ.

A dissenting opinion is an opinion expressed in a case where a judge who maintains the minority position does not subscribe to the justifications and/or conclusion of the judgement of the majority. As a rule, in Estonia, which belongs to the Continental European legal tradition, judges may maintain a dissenting opinion in administering justice, and the dissenting opinions of judges of the Estonian Supreme Court are published along with the judgements. This is nothing new for Estonian justice, as dissenting opinions were permissible to a certain extent before the Second World War and the concept of dissenting opinions was used even in the procedural codes applicable during the Soviet era. Dissenting opinions have been provided for in the Constitutional Review Proceedings Act¹, Code of Civil Procedure², and Code of Criminal Procedure³, the first being the most precise in its regulation thereof. A judge's expression of a dissenting opinion is common practice in all the chambers of the Supreme Court, especially in the Supreme Court *en banc*. During the period from the first decision of the Supreme Court, in 1993, until 2003, the judges of the Supreme Court have presented a total of 75 dissenting opinions concerning 58 decisions.⁴ The presentation of dissenting opinions shows an increasing rather than a decreasing trend. If there is little precedent or it is contradictory on some points or even backed by poor reasoning, the dissenting opinion of a judge may add to uncertainty. On the one hand, presentation of dissenting opinions may render it difficult for the Supreme Court to direct the other courts, and thus the decision of the Supreme Court may serve as merely one of the arguments in the further development of law. On the other hand, in a new state, a thorough consideration of different positions may only contribute to the interpretation of the Constitution and legislation, filling of the gaps, and establishing of the general principles of law. Not rarely has the Supreme Court had to identify its role in relation with the other Estonian courts and state authorities, especially in its early years. Here the dissenting opinions of the judges of the Supreme Court concerning the nature and functions of the court and the methods of interpretation of constitutional and procedural law, which have facilitated the dynamic interpretation of the Constitution, among other things, serve as an invaluable asset. Dissenting opinions of Supreme Court judges have promoted the internationalisation of justice, relying on the law of other countries as well as on international and European law, among other legal traditions, in their arguments. When some opinions have been too progressive for their day (such as the dissenting opinion supporting abolition of the death penalty and those referring to European Union law)⁵ and considerably more liberal and far-reaching than the majority opinion, the dissenting opinions have also served not just to aid development of the law but also to provide limits to the role of the court and warn the majority against indirect, publicly undeclared

¹ Põhiseaduslikkuse järelevalve kohtumenetluse seadus (Constitutional Review Proceedings Act). – RT I 2002, 29, 174; 2003, 24, 148 (in Estonian).

² Tsiviilkohtumenetluse seadustik (Code of Civil Procedure). – RT I 1998, 43–45, 666; 2003, 23, 140 (in Estonian). An English translation is available at: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=p%F5hiseaduslikkuse (5.07.2004).

³ Kriminaalmenetluse seadustik (Code of Criminal Procedure). – RT I 2003, 27, 166; 83, 558 (in Estonian). An English translation is available at: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=p%F5hiseaduslikkuse (5.07.2004).

⁴ The practice of dissenting opinion in the Supreme Court

Year	Decisions	Dissents	%
1993	8	0	–
1994	305	7	2.23
1995	383	2	0.52
1996	480	8	1.67
1997	472	5	1.06
1998	406	7	1.72
1999	367	1	0.27
2000	425	10	2.35
2001	458	14	3.06

The practice of dissenting opinion in the Supreme Court (as of October 2003)

Procedure	Decisions	Dissents	%
Constitutional review	80	11	13.75
Civil law	1408	26	1.85
Administrative law	473	4	0.85
Criminal law	1848	11	0.60

⁵ R. Maruste eriarvamus (dissenting opinion of R. Maruste), SCebd 3-1-1-97-96 (RT III 1996, 28, 369); R. Maruste eriarvamus (dissenting opinions of R. Maruste): CRCSCd (3-4-1-3-97 (RT I 1997, 74, 1268), SCebd 3-1-1-97-96 (RT III 1996, 28, 369) and CRCSCd 3-4-1-4-98 (RT I 1998, 49, 752); U. Lõhmuse eriarvamus (dissenting opinion of U. Lõhmus) CRCSCd 3-4-1-8-00 (RT III 2000, 21, 232) (all in Estonian).

alteration of earlier practice. In this respect, dissenting opinions can be compared to litmus paper and serve as the internal control of the Supreme Court itself in delimiting its competencies.

The dissenting opinion of a Supreme Court judge may, in a sense, have a proactive legislative function, which is manifested both in its influence on future judicial practice, as the dissenting opinion renders it demonstrably easier to alter earlier approaches, and in its legislative force, which is manifested in the consideration by the legislator of the proposal provided in the dissenting opinion. For example, an explanatory memorandum concerning a draft act relied on the dissenting opinion of judges of the Supreme Court.⁶ To sum up, in Estonian law, the dissenting opinion of a judge of the Supreme Court may be viewed as between a decision of the Supreme Court and legal doctrine.

2. The current situation in the European Court of Justice — absence of dissenting opinion, and the reasons for it

Unlike many international and regional courts, such as the International Court of Justice in the Hague, the European Court of Human Rights, the International Tribunal for the Law of the Sea, and the International Criminal Court, the European Court of Justice does not allow for a judge to issue a dissenting opinion. The EFTA Court also excludes dissenting opinions.

The reasons the publication of a dissenting opinion was not desired when the ECJ was founded may be divided into:

- historical reasons,
- organisational reasons and those related to the selection of judges, and
- fundamental and substantial (almost ideological) reasons stemming from the legal policy of the European Union.

The reason related to the establishment of the European Communities/Union, historical development, and the legal orders of the member states influencing it is the absence of the institution of the dissenting opinion in the internal court systems of the founding member states. The founding member states of the European Communities — France, Germany, Italy, Belgium, the Netherlands, and Luxembourg — come from the Continental European legal tradition; even Germany was not familiar with the concept of dissenting opinions at the time, as the judges of the Federal Constitutional Court of Germany were permitted to present dissenting opinions no more recently than nearly 20 years after the establishment of the Court of the European Coal and Steel Community (ECSC). The founding member states had a conservative attitude with respect to the confidentiality of deliberations of the court, and exceptions to it (a judge's issuance of a dissenting opinion was considered one of these) were extremely limited. According to several authors, even today it is self-evident that dissenting opinions are not allowed in the ECJ because of the confidentiality of deliberations.⁷

Interestingly enough, even the later enlargements of the European Union, especially the accession of Great Britain, the home of the dissenting opinion, and Ireland in 1973 (the states acceding later, with the sole exception of Austria, allow for presentation of a dissenting opinion at least in part — in the highest courts, the constitutional courts⁸), were unable to alter the negative attitude assumed to the notion of dissenting opinions in the ECJ. There were attempts to discuss the topic of permitting judges to express dissenting opinions, part of the preparation for the reforms of the ECJ; *e.g.*, at the intergovernmental conference of 1992, the European Parliament proposed that the practice of dissenting opinions be introduced to the system of legal protection of the European Communities.⁹ These attempts have usually failed or been outweighed

⁶ See the explanatory memorandum, prepared in the Ministry of Justice, appended to the Code of Enforcement Procedure, Local Taxes Act, Public Transport Act, Traffic Act, and Code of Misdemeanour Procedure Act Amendment Act, adopted on 11.12.2002 (RT I 2002, 110, 654) in its draft stage, which relied on dissenting opinion appended to the decision of the Supreme Court *en banc* of 7.12.2001 (RT III 2002, 2, 8) and is available from the Public Law Division of the Ministry of Justice, Tõnismägi 5a, Tallinn (in Estonian).

⁷ See J. Boulouis, M. Darmon, J.-G. Huglo. *Contentieux communautaire*. 2^e éd. Paris: Dalloz 2001, p. 155; C. van Keepinghen, P. Orienne. *La Procédure devant la Cour de Justice des Communautés européennes*. Bruxelles: Maison Ferd. Larcier; Paris: Librairie Dalloz, 1961, pp. 56, 57; W. Hackenberg, Ch. Stix-Hackl. *Handbuch zum Verfahren vor dem Europäischen Gerichtshof*. Wien: Verlag Österreich; Baden-Baden: Nomos Verlagsgesellschaft, 1996, p. 148; H. G. Schermers, D. F. Waelbroeck. *Judicial protection in the European Union*. 6th ed. The Hague, London, New York: Kluwer Law International 2001, pp. 736–737.

⁸ See J. Laffranque's thesis 'Kohtuniku eriarvamus. Selle võimalikkus ja vajalikkus Eesti Vabariigi Riigikohtus ja Euroopa Kohtus' (The possibility and necessity of judicial dissent (dissenting opinion) in the Supreme Court of the Republic of Estonia and in the European Court of Justice). Tartu: Tartu Ülikooli kirjastus 2003, pp. 208–210 (in Estonian).

⁹ Resolution on the Intergovernmental Conferences in the context of the European Parliament's strategy for the European Union. – OJ No. C 324, 1990, p. 219 ff., particularly 231.

by negative final reports.^{*10} The reasons for this are, above all, rooted in the fact that the judicial power of the European Union is still in its structure — the main model being the highest administrative court in France, the Council of State (*Conseil d'Etat*) — and in its proceedings, but also in the style of its judgements as well as other aspects, very strongly influenced by French law. When following the examples of the member states' law, the ECJ has proceeded from the best possible choice, which would be most efficient in contributing to the development of European Union law. For example, *de facto* case law based on precedents was introduced to the ECJ long before the accession of the common law countries while the issuance of dissenting opinions that is also characteristic of the common law countries was not accepted, and thus the Roman legal tradition was followed.

The reasons for the absence of dissenting opinions that relate to organisation depend on the appointment of judges, the guarantee of the independence of judges, the term of office of the judges, and the structure of the judgements of the court. The judges of the ECJ are appointed by common accord of the governments of the member states. The theoretical double legitimisation from the home state and the European Union is purely formal and is not effected in practice, as the member states always approve of the candidates put forth by the other member states and thus each country in fact selects its own candidate. Hence, the appointment of judges is not democratic enough from the standpoint of the European Union as a whole.

A judge may not represent his or her country in the ECJ but rather must be an independent 'European judge', who is obliged to administer justice according to his or her best knowledge and conscience in accordance with the treaties serving as the basis for the European Union and the spirit of the law of the European Union. The judges of the ECJ are bound by an oath, according to which the judge shall perform his or her duties impartially and conscientiously and preserve the secrecy of the deliberations of the court.^{*11}

As judges are appointed for a term of six years and may be re-elected an unlimited number of times (article 223 of the Treaty establishing the European Community (EC))^{*12}, there is a danger that a judge may depend on the member state appointing him or her, regardless of the requirement for judges to remain independent. It is theoretically possible that judges who desire to be re-elected will attempt to please their governments, which, if dissenting opinions were allowed, could be manifested both in issuance of a dissenting opinion for the protection of the judge's member state and *vice versa*, in avoiding issuance of a dissenting opinion unfavourable to the member state. For example, when former German Chancellor Kohl publicly criticised the stance of the ECJ on social security, this clearly exerted pressure, whether deliberate or not, on the German judge of the ECJ.^{*13}

As regards the style of the judgements of the ECJ, their structure represents a synthesis: the judgements are relatively short, which would not always provide sufficient information for counter-arguments to be raised in a dissenting opinion.

The reasons for the absence of dissenting opinions that relate to the principles and legal policy of the European Union, or even ideological reasons, as they might be termed, arise from the fact that the ECJ as a supra-national body above states and nations differs from the ordinary international courts because of its special tasks. According to article 220 EC, the main task of the ECJ is to review the activities of the institutions and member states of the European Union in their application of European Union law in cases of disputes and thereby to interpret and develop European Union law. Hence, the ECJ always has the last say in interpreting the European Union law and deciding on its validity, which ensures legal integration within the European Union. However, according to some authors, dissenting opinions could jeopardise the uniform interpretation of law.^{*14} It would be very difficult for the ECJ to perform its tasks if it were distracted by various national solutions offered in the dissenting opinions of individual judges. Therefore, since the establishment of the ECJ, the publication of a judge's dissenting opinion was sacrificed for the sake of upholding the authority of the new legal order, and the intention also was to avoid internal conflicts within the institutions concerned. At the same time, the ECJ, in contrast to international courts, did not have a problem with its formal authority, as its judgements have been binding on and enforceable for the member states from the very start.

¹⁰ See Délégation des barreaux de France, Conférence intergouvernementale 1996. Suggestion dans les domaines juridictionnel et quasi-juridictionnel. La question des opinions dissidentes dans les arrêts. (Parlement européen: 1997) Available at: http://www.europarl.eu.int/hearings/igc2/doc/75df_fr.htm (20.05.2004).

¹¹ Statute of the European Court of Justice (applicable version: Official Journal of the European Communities (OJ) No. C 325, 24.12.2002, p. 167) art. 2; Rules of Procedure of the European Court of Justice 19.06.1991 (OJ No. L 176, 04.07.1991, p. 7; L 176, 04.07.1991, p. 7; L 383, 29.12.1992; L 44, 28.02.1995, p. 61; L 103, 19.04.1997, p. 1; L 351, 23.12.1997, p. 72; L 122, 24.05.2000, p. 43; L 122, 19.12.2000, p. 1; L 119, 27.04.2001, p. 1; L 272, 10.10.2002, p. 24; L 147, 14.06.2003, p. 17) art. 3.

¹² The references are made to the Nice version of the Treaty establishing the European Community; henceforward, the articles have been cited according to the method of citation introduced by the Court of Justice and the Court of First Instance with effect from 1 May 1999.

¹³ R. Dehousse. *La Cour de Justice des Communautés européennes*. Paris: Montchrestien 1994, p. 15.

¹⁴ See, e.g., A. P. Sereni. *Les opinions individuelles et dissidents des juges des tribunaux internationaux*. – *Revue Générale de Droit International Public* 1964, p. 844; F. G. Jacobs. *Advocates-General and Judges in the European Court of Justice: some personal reflections*. *Liber Amicorum in Honour of Lord Slynn of Hadley*. – *Judicial Review in European Union Law*. D. O'Keefe (ed.). The Hague-London-Boston: Kluwer Law International 2000, p. 25.

Of the reasons that dissenting opinions are absent, the organisational reasons are related to the permissibility of presenting dissenting opinions in the ECJ, while the principal reasons are related to uncertainty as to the necessity of presenting dissenting opinions in the ECJ.

2.1. Opinion of the advocate-general as a replacement for the dissenting opinion

In order to compensate for the lack of a dissenting opinion, the institution of the advocate-general (*Generalanwalt* in German, *avocat général* in French) was established in the ECJ, which is unknown to the majority of the members of the European Union, including Estonia, and the direct model of which may be considered to be the *commissaire du gouvernement*, the office instituted by the French *Conseil d'Etat* in the middle of the 19th century. The institution of the advocate-general was introduced to the future European Community's law on the initiative of France. The French delegation participating in drafting the Treaty establishing the European Coal and Steel Community argued for the need to establish the role of advocate-general in view of his or her possible contribution to the development of judicial practice and legal doctrine.¹⁵ One of the two first advocates-general of the ECJ, Mr. Lagrange, who himself participated in the drafting of the Treaty establishing the European Coal and Steel Community, points out French opposition to permission of dissenting opinions in the ECSC Court as an additional (or the real) motive for the establishment of the advocate-general in the judicial system of the European Communities.¹⁶

According to article 222 EC, it shall be the duty of the advocate-general, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the ECJ, in order to assist the court in the performance of the tasks assigned to it.

At first, two advocates-general worked for the ECJ; with the enlargement of the European Communities and later of the Union, the number of advocates-general has increased to eight. The enlargement of 2004 did not automatically increase the number of advocates-general. Rather, the new member states adopted a joint declaration annexed to the Final Act of Accession according to which should the European Court of Justice so request, the Council, acting unanimously, may increase the number of advocates-general in accordance with article 222 EC and article 138 EA and otherwise the new member states will be integrated into the existing system for their appointment.¹⁷ Both that it has not been indicated how large the number of advocates-general may be and that their number was not increased at the most recent opportunity are regrettable. The new member states should at least have been granted a certain number of advocate-general positions to share amongst them; now, the new member states have to wait for years before they can appoint their own advocate-general. To date, the five large member states (Germany, France, Italy, the United Kingdom, and Spain) have always had one advocate-general's post each, with the remaining advocates-general appointed alternately from the small member states. Henceforth, unless the total number of advocates-general is increased, a general system of rotation should be applied at least to these eight positions, one under which the smaller member states would receive equal treatment with the large member states and the representation of the large member states would not be automatic. This would be a significantly more democratic solution than the current one.

Although advocates-general are elected in the same way as judges and have a similar position to the judges, the opinion of an advocate-general does not replace the dissenting opinion of a judge and does not sufficiently clarify the background for the judgement, as advocates-general do not participate in deliberations. Unlike the dissenting opinion of a judge, the opinion of an advocate-general is an obligation, not a right, and this is presented before the judgement is made. While a dissenting opinion depends on a ruling as the basis for a response, the advocate-general cannot see the ruling of the ECJ at the time of preparing his or her opinion. Unlike the dissenting opinion of a judge, the proposals of the advocate-general can be taken into consideration by the court, and, although the opinion is not binding, it usually has a significant effect on the deliberations. This creates an interesting dilemma — an advocate-general cannot see the judgement but can affect it, whereas a judge maintaining a dissenting opinion can see the ruling but cannot affect it beyond perhaps influencing the disposition of future cases. Coming prior to the ruling as it does, the opinion of an advocate-general is hardly more efficient than the dissenting opinion of a judge, which comes after the judgement, just as it is unlikely that, instead of exporting the practice of dissenting opinions to the ECJ, Estonia should import the institution of the advocate-general into the Supreme Court.

¹⁵ Rapport de la délégation française sur le traité instituant la Communauté Européennes. – *Revue International de droit Compare* 1974, see also A. Barav. Le commissaire du gouvernement près le Conseil d'Etat français et l'avocat général près la Cour de justice des Communautés européennes. – *Revue International de droit Compare* 1974 (26), p. 819.

¹⁶ M. Lagrange. L'organisation, le fonctionnement et le rôle de la Cour de Justice des Communautés européennes. – *Bulletin de l'Association des juristes européennes* 1963 (13–14), pp. 12–13.

¹⁷ Declaration annexed to the Final Act of Accession. – RT II 2004, 3, 8 (p. 1072) (in Estonian).

The advocate-general is not supposed to discuss the case with the judges sitting on the same case and especially not with the judge rapporteur assigned to the case. However, according to Rasmussen it is no secret that such consultations do take place in practice from time to time, and thus the advocate-general and judge rapporteur may agree to the ECJ making a specifically different judgement from that of the advocate-general, in order to determine which is more conducive to the development of law and solicit legal experts' comments.^{*18} Nothing prevents an advocate-general from criticising earlier practice and recommending more daring solutions. For example, in the case *Café Hag II*, when advocate-general Jacobs found that the ECJ should not adhere to the precedent set in the first *Café Hag* case, the court took account of Jacobs's opinion and altered its stance.^{*19}

Of course, opinions of advocates-general only have the connotation of a dissenting opinion when the reasons and/or outcome do not match the majority's view as expressed in the judgement. About 15% of the court's judgements are made contrary to the opinion of the advocates-general, which is not much.^{*20} Tridimas points out the areas where there is consensus between the positions of the advocates-general and those of the court — a notable area of consensus is for example in the case law concerning state liability in damages for breach of Community law, whereas in recent years there has been diversity of views between the ECJ and advocates general in the free movement of goods but also in the questions about the horizontal legal effect of directives and the general principles of European Union law.^{*21} When the first advocates-general held office, the ECJ decided to publish the opinions of advocates-general by means of a decision of the Registrar according to the Instructions to the Registrar and now they are published before the text of the judgement in the European Court Reports.^{*22} Just like a judge offering a dissenting opinion, an advocate general is more independent in his or her opinion than a collegial court: he or she may boldly compare the law of different member states and use the positions of various lawyers with attribution. Thus, similarly to the dissenting opinion of a judge, the opinion of an advocate-general may also serve as a comment and topic for further academic discussions regarding the various specific issues of European law. For example, the opinions of advocate-general Lagrange have been cited more often than the judgements of the court itself during his tenure.^{*23}

In the literature, two important functions have been ascribed to the opinion of advocates-general — to serve in a way as the first instance (this approach mostly applied until the Court of First Instance came into existence) and to replace dissenting opinions.^{*24} One cannot fully agree with respect to either of the functions. The entry into force of the Treaty of Nice creates the possibility that where the ECJ considers that the case raises no new point of law, the Court may decide, after hearing the advocate-general, that the case shall be determined without a submission from the advocate-general.^{*25} Therefore, the opinion of the advocate-general can be compared to permission of dissenting opinions only in higher and/or constitutional courts and only on issues concerning the interpretation of important constitutional acts.

Nevertheless, one need not take such an extreme view as to doubt the necessity of advocates-generals' opinions as a whole. If advocates-general are involved in adjudication of only more important matters, and, in addition, the parties to the dispute are provided with an opportunity to decide whether they want the opinion of an advocate-general or would rather waive that right (as is not currently the case)^{*26}, the system of the ECJ could reasonably accommodate both the opinion of an advocate-general and the dissenting opinion of a judge, since they do not overlap.

¹⁸ Rasmussen claims that this was done in ruling 238/81 of the European Court of Justice (*C.I.L.F.I.T.*). – ECR 1982, 3415. See H. Rasmussen. *The European Court of Justice*. Copenhagen: Gad Jura, Thomson Information 1998, p. 69.

¹⁹ Judgement C-10/89 (*SA CNL-SUCAL NV v. HAG GF AG*) of the European Court of Justice. – ECR 1990, I-3752.

²⁰ See R. Streinz. *Europarecht*. 6. Aufl. Heidelberg: C.F. Müller 2003, p. 127 (Randnummer 328).

²¹ T. Tridimas. *The role of the advocate general in the development of community law: some reflections*. – *Common Market Law Review* 1997 (34), pp. 1371–1380.

²² Article 24 of the Instructions to the Registrar. – OJ No. L 350, 28.12.1974, 33, as amended by OJ No. C 286, 13.11.1986, 4.

²³ See Funeral Oration for Maurice Lagrange, a former Member of the Court, delivered by the (former) President of the Court Lord Mackenzie Stuart, on 3 October 1986. Synopsis of the work of the Court of Justice of the European Communities in 1986 and 1987 and record of formal sittings in 1986 and 1987. Luxembourg 1990, p. 202.

²⁴ Regarding advocates-general as the first instance of the court, see K.-D. Borchardt. *Der Europäische Gerichtshof: Besetzung, Anrufung, Zuständigkeiten, Vorabentscheidungen und einstweiliger Rechtsschutz*. Kommentar zu den Art 220–245 EGV mit Textanhang; aktualisierter Auszug aus den EG-Kommentar. 2. Aufl. C. O. Lenz, K.-D. Borchardt (Hrsg.). Köln: Bundesanzeiger 2000, p. 59; O. Riese. *Erfahrungen aus der Praxis des Gerichtshofs der Europäischen Gemeinschaft für Kohle und Stahl*. – *Deutsche Richterzeitung* 1958, p. 271. Regarding opinions of advocates-general as dissenting opinions, see G. Grementieri. *Il processo comunitario, principi e garanzie fondamentali*. Milano 1973, p. 71; W. Feld. *The Court of the European Communities: A New Dimension in International Adjudication*. The Hague: Martinus Nijhoff 1964, p. 100; U. Klinke. *Der Gerichtshof der Europäischen Gemeinschaften – Aufbau und Arbeitsweise*. 1. Aufl. Baden-Baden: Nomos 1989, p. 62.

²⁵ Statute of the European Court of Justice, article 20, section 5.

²⁶ See ruling C-17/89 of the European Court of Justice (*Ermesa Sugar v. Aruba*). – ECR 2000, I-665.

3. The possibility and necessity of dissenting opinions in the European Court of Justice

Presentation of dissenting opinions is not directly prohibited in the ECJ; *i.e.*, it has not been stated *expressis verbis* in any of the legal acts concerned that the judges of the ECJ must not express dissenting opinions. Articles 35–37 of the Statute of the ECJ, generally applicable with regard to EURATOM and the EC, the newest version of which was adopted and entered into force together with the Treaty of Nice, which prescribe that deliberations of the court shall be and shall remain secret, judgements shall state the reasoning on which they are based, contain the names of the judges who took part in the deliberations, and be signed by the President and the Registrar, may be viewed as one of the potential sources of law for the disallowance of dissenting opinions. Article 64 (2) of the Rules of Procedure of the ECJ specifies, further, that the original of the judgement shall be signed by all the judges who took part in the deliberations — *i.e.*, also those who voted against. The strictest evidence of the impossibility of a dissenting opinion is article 27 of the Rules of Procedure of the ECJ, which regulates deliberations. According to this provision, the court shall conduct deliberations in closed session by majority of votes. Although every judge taking part in the deliberations shall state his or her opinion and the reasons for it, differences of view on the substance, wording, or order of questions or on the interpretation of the voting shall be settled by decision of the court or a relevant chamber.

What would have happened if in the 1970s, after the enlargement of the European Communities to include the common law countries, all the English judges to join the ECJ practised the presentation of dissenting opinions in the ECJ? Would this have been regarded as contrary to European law, or would their dissenting opinions have been published? Now that a judge offering a dissenting opinion is considered generally impossible in the ECJ, it would probably not suffice if the judges of the new member states would start to issue dissenting opinions without legal foundation for doing so. Consequently, the question arises of whether legal bases — the treaties establishing the European Communities, the Statute of the ECJ, the Rules of Procedure of the ECJ, *etc.* — should be supplemented/amended to permit dissenting opinions in the ECJ.

Obviously, there would be no need to provide for the dissenting opinion of a judge in the EC Treaty (to be replaced by the Treaty establishing a Constitution for Europe), as these documents do not specify rules for judgement and secrecy of deliberations. The possibility of permitting dissenting opinions explicitly in the founding treaties could be considered if the intent is to validate this institution with the force of constitutional law in order to ensure the independence of judges; however, the European Union is unlikely to be ready for that yet. Nevertheless, the possibility of publishing the dissenting opinion of a judge could be specified through an addition to article 2 of the Statute of the ECJ, near the text specifying the oath of office of a judge as an exception to the secrecy of the deliberations, or in article 36 where regulation concerning judgement is set forth, and the concept could be addressed as well in articles 27 and 63 of the Rules of Procedure of the court. Would this suffice, or should the rules governing the work of the judges and the court be changed as well, after the introduction of dissenting opinions in the ECJ?

Although the dissenting opinion of a judge is permitted in, *e.g.*, the European Court of Human Rights, whose judges may be re-elected, the provisions concerning the appointment of the judges of the ECJ, particularly those concerning their term of office and re-election, should be amended and supplemented. The judges of the European Court of Human Rights are elected by the Parliamentary Assembly of the Council of Europe, while selection of the judges of the ECJ depends almost fully on the candidates' 'home' member state. The discussion circle of the Convention on the Future of Europe concerning the Court of Justice found in its final report of 25.03.2003 that the *status quo* could be maintained as regards the term of office; however, the discussion circle indicated openness to the introduction of a non-renewable 12-year term for the judges.²⁷ The Treaty establishing a Constitution for Europe does not provide for the alteration of the term of office of judges.²⁸ If the change were made and the judges of the ECJ were appointed for, *e.g.*, a non-renewable nine year-term (the optimum), there would be no impediments to permission of dissenting opinions. However, according to article III-262 of the new Treaty establishing a Constitution for Europe a panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of judge and advocate-general of the ECJ and the Court of First Instance (will be re-named as the High Court) before the

²⁷ CONV 636/03 Circle I 13, p. 3. Available at: [http://european-convention.eu.int/doc_register.asp?lang=EN&Content=CERCLEI\(18.06.2003\)](http://european-convention.eu.int/doc_register.asp?lang=EN&Content=CERCLEI(18.06.2003)).

²⁸ Draft Treaty establishing a Constitution for Europe as of 18.07.2003 (later on agreed at the Meeting of Heads of State or Government, in Brussels, 17/18 June 2004), Chapter 4 of Title 1, the European Union's institutions, art. I–28. Available at: <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (19.04.2004). The draft Treaty establishing a Constitution for Europe still stipulates (art. III-262) that judges are appointed by agreement between the member states only after the Council of the European Union consults a special panel, whose members are chosen from among the former members of the European Court of Justice and the Court of First Instance, representatives of the higher courts of the member states, and lawyers of recognised competence and persons selected on the basis of a proposal of the European Parliament.

governments of the member states make the appointments. The panel shall comprise seven persons chosen from among former members of the ECJ and the High Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. Hopefully this system which will be applied in the future, as the Treaty establishing a Constitution for Europe will enter into force, will make the appointment of the judges of the ECJ more transparent and democratic.

The permissibility of dissenting opinions and, equally, the actual practice of issuing dissenting opinions may be restricted by the fact that the working language of the ECJ, in which the rulings are first formalised, is French and that thus the judge maintaining a dissenting opinion must formalise it on the basis of the French ruling. Neither is it certain whether the judge could prepare a dissenting opinion in the language of his or her own country or should do it in French; the latter would serve as an impediment to dissenting opinions by judges who are less proficient in French, whereas Francophone judges are not accustomed to the tradition of preparing dissenting opinions. Translation of dissenting opinions into all the official languages of the European Union would require additional time.

Even before the 2004 enlargement, the ratio between those supporting and opposing the institution of dissenting opinions of European Union judges, proceeding from the law and practice of the member states, was 9:6 in favour of the countries permitting dissenting opinions.²⁹ In all of the ten new member states except to a certain extent Latvia³⁰ and Lithuania, the dissenting opinion of a judge is recognised mainly in constitutional courts and/or supreme courts. Further to this, candidate countries Bulgaria and, to some extent, even Romania hold a relatively favourable attitude to dissenting opinions, which are also allowed in the constitutional courts of Turkey and Croatia.³¹ Consequently, taking into account that the idea of a judge publishing a dissenting opinion is not entirely unfamiliar to the majority of the member states, and if legal bases are provided for the practice by additional provisions and by changing the terms of office to ensure that dissenting opinions do not jeopardise the independence of the judge, and if the dissenting opinion can actually be matched with the current form and style of judgements, dissenting opinions can be permitted in the ECJ. But are they necessary in the ECJ?

The European Union is a union guided by the rule of law and founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law (article 6 EU). Democracy is also characterised by an open discourse and public debate between the courts and the society; unfortunately, the ECJ is too entangled in its own procedures, captured in its own case law and traditions, sometimes unable to notice how poorly reasoned or contradictory its judgements are. Perhaps the pursuit of artificial unanimity is to be blamed, among other things. Healthy self-criticism in the form of dissenting opinions would help to maintain the institutional balance in the European Union. Sir Slynn, a former advocate-general and judge of the ECJ, speculated, when leaving the ECJ in 1992, that the time would come when dissenting opinions of judges would be permitted in the ECJ as the European legal order matures.³² So far, contrary to the claim that the 'embryonic' nature of the European Union law requires that the judgements of the ECJ be consistent and based on consensus³³, the ECJ, known as the *motor* of European integration, has achieved sufficient authority, and with the accession of new countries, the European Union has a unique opportunity to prove the democratisation of the Union in the ECJ as well. The new member states, particularly Estonia, where the concept of a judge presenting a dissenting opinion is widely recognised, could directly contribute to the democratisation of the ECJ, which would not simultaneously erode but rather reinforce the position of small countries (such as Estonia). The judges who have maintained dissenting opinions often analyse more thoroughly the law of the other member countries, favouring comparative legal treatment in the ECJ. It would be an overreaction to fear that the dissenting opinion of a judge would jeopardise successful adaptation to the judicial system of Europe on the part of the countries that have newly acceded to the European Union. The dissenting opinion of a judge is hardly likely to jeopardise the uniform interpretation and application of European Union law or undermine the principle of legal certainty, for the judgements of the majority, not dissenting opinions, would be decisive and binding.

²⁹ For: Germany, Finland, Sweden, Denmark, Spain, the United Kingdom, Ireland, Greece, Portugal; against: France, Italy, the Netherlands, Belgium, Luxembourg, Austria. This relation holds if partial permissibility of dissenting opinions (permissibility only in higher or constitutional courts) and the somewhat marginal position of Denmark are taken into account.

³⁰ Indeed, dissenting opinions are allowed in the Latvian Constitutional Court, but according to § 33 (2) of the Constitutional Court Act, dissenting opinions are published only in the collection of judgements, published once a year, not with the judgement after the issuing thereof.

³¹ See J. Laffranque's thesis 'The possibility and necessity of judicial dissent...' (Note 8), pp. 208–210.

³² See Sir Slynn. European Court of Justice, formal hearing 10.03.1992. Court of the European Communities. Report of Proceedings 1992–1994. Synopsis of the work of the Court of Justice and of the Court of First Instance of the European Communities. Luxembourg 1995, pp. 92–93.

³³ See, e.g., for 1978: A. Bredimas. *Methods of Interpretation and Community Law*. Amsterdam, New York, Oxford: North-Holland Publishing Company 1978, pp. 14–15 and even for 2002: F. G. Jacobs. *Advocates General and Judges in the European Court of Justice: some personal reflections*. *Liber Amicorum* in Honour of Lord Slynn of Hadley. – *Judicial Review in European Union Law*. D. O'Keeffe (ed.). The Hague, London, Boston: Kluwer Law International 2000, p. 25.

Through the analytical effect of the dissenting opinion of a judge, each judge could make his or her own contribution to the construction of the European Union and ensure respect for the freedom of opinion of judges. Lord Mackenzie Stuart, a former president of the European Court of Justice, did not say in vain upon his retirement from office that '[the European] Court of Justice, at least as far as the judges are concerned, is collegiate one. It speaks with a single voice. It is perhaps ironic that only at the moment of departure is a judge permitted to express an individual view.'³⁴

The dissenting opinion of a judge yields a positive effect only when it is not abused and if its objective is not to foreground the judge as a person. In order to avoid such and other possible abuses of dissenting opinions in the ECJ, a thorough analysis must be conducted to determine the extent to which the protection of the principles — democracy, accessibility, efficient administration of justice, the personal dignity of a judge, and other benefits — is proportional in the European Union court system. Should a judge be allowed to offer a dissenting opinion in all types of proceedings in the ECJ?

In the case of proceedings to establish whether a member state has failed to fulfil an obligation under the EU law (article 226 EC), there is a danger that the judge from the accused member state may always maintain a dissenting opinion. This would, on the one hand, undermine the independence of the judges, but on the other hand, if judges from the member state concerned were deprived of the right to maintain a dissenting opinion, the equality of judges would come under threat. Such a situation could be avoided, at least partially, by amending the provisions concerning the term of office of the judges of the ECJ and their re-election; also, the cases could be divided up so as to avoid the involvement of a judge in proceedings concerning failure to fulfil an obligation on the part of his or her home state. At the intergovernmental conference of 1996, the delegation of French lawyers, who generally maintained a negative attitude toward dissenting opinions, considered dissenting opinions permissible only in cases concerning compensation for damages caused by the institutions of the European Union and its servants in the performance of their duties arising from non-contractual liability, justifying this with the paucity of written European Union law in this area.³⁵ Dissenting opinions would definitely be suitable in the light of the opinion of the court issued on the basis of article 300 (6) EC, just as it is permissible to maintain a dissenting opinion with regard to the advisory opinions of the International Court of Justice in the Hague. Thus, certain types of proceedings may be more suitable and involve fewer risks where dissenting opinions are concerned, yet the fewer dangers accompanying dissenting opinions, the less useful they are. Consequently, dissenting opinions should be preferred in principled disputes, where dissenting opinions may influence future judicial practice and the general principles of law. Thus, perhaps it is not reasonable to permit a judge to offer a dissenting opinion in the Court of First Instance, or, all the more so, in the specialised judicial panels created by the Treaty of Nice, where appending a dissenting opinion to the judgement could delay the proceedings. It would certainly be unreasonable to permit a mere declaration of a dissenting opinion in the ECJ without reasoning being provided in said opinion, although this is permitted in some international courts.

Naturally, it is more difficult to establish dissenting opinions in the ECJ than it is to maintain the already existing tradition; however, the transfer could be carried out smoothly. There are several options for that:

- publicly, there are no dissenting opinions, but the judge of the ECJ who maintains a dissent can write down his or her disagreeing opinion, and it is included in the judicial records that can be accessed only by the members of the court when adjudicating similar matters;
- the results of the voting on the judgement are made public but without indicating the names of the judges (including the dissenters); or
- the content of the dissenting opinion is indicated in the text of the judgement.

In fact, such an option as the last is not unknown to the judicial system of the European Union. In settling disputes falling within the jurisdiction of the Enlarged Board of Appeal related to issues concerning the competence of the European Patent Office and granting of patents, according to article 12a of the Rules of Procedure of the board, the opinions of the minority may also be indicated in the decision of the board, provided that the majority agrees.³⁶ At the same time, the reasons or conclusions of the Enlarged Board of Appeal may not set out the number or names of the minority judges. Finally,

- the most radical but the most efficient way would be to publish the dissenting opinions of the minority judges anonymously during the transfer period, providing them separately at the end of the judgement.

³⁴ Address by Lord Mackenzie Stuart, (former) President of the Court of Justice of the European Communities, on the occasion of his retirement from office. Synopsis of the work of the Court of Justice and the Court of First Instance of the European Communities in 1988 and 1989 and record of formal sittings in 1988 and 1989. Luxembourg 1990, p. 201.

³⁵ See Délégation des barreaux de France (Note 10).

³⁶ Official Journal of the European Patent Office (EPO OJ) 1983, 3; 1989, 362; 1994, 443.

Thereafter, a partial introduction of dissenting opinions into the judicial system of the European Union could be considered, at least for constitutional disputes, as this is permitted by the constitutional courts of the member states. In addition to the political will of the member states, this also presumes finding a solution to the heavy workload of the ECJ, which will certainly be relieved by specialised judicial panels, and the clear evolution of the structure of the European court system, according to which the ECJ in its narrower sense would focus only on adjudication of important fundamental matters concerning constitutional issues and general principles of law. The developments accompanying the Treaty of Nice and the Treaty establishing a Constitution for Europe let us predict that henceforth, the ECJ could develop into a body properly resembling a constitutional court of the European Union. Also, the question of the necessity of dissenting opinions may arise in relation to its possible effect on the relationship between the ECJ and the constitutional courts of the member states, such as in relation to communication concerning the Treaty establishing a Constitution for Europe.

In addition to the above-mentioned points, there is yet one more reason that partial permissibility of dissenting opinions should be considered in the ECJ. Namely, after the possible accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (as set for in the article I-7 section 2 of the Treaty establishing a Constitution for Europe), the European Union may become a state party to the convention, and the European Union would then be subject to the jurisdiction of the European Court of Human Rights in issues concerning the convention. As is widely known, dissenting opinions are allowed in the European Court of Human Rights. Although the European system for legal protection of human rights, established on the basis of the European Convention on Human Rights, signed in 1950 and entering into force in 1953, and the European Court of Human Rights, which acquired permanent status later on (1.11.1998) by replacing the existing part-time court and commission by a single full-time court, were created almost in parallel to the ECJ, founded by the Treaty establishing the European Coal and Steel Community, signed in 1951 and entering into force in 1952, the courts are not fully comparable with each other. Among other bodies, the International Court of Justice in the Hague may be considered to be a model for the European Court of Human Rights, whereas in the case of the ECJ, the *Conseil d'Etat*, mentioned above, played a similar role. There were more founding states involved with the European Court of Human Rights than there were for the ECJ, including several from the common law countries; the similarities and differences in the appointment of judges had already been discussed; and, additionally, unlike the ECJ, the European Court of Human rights lacks the position of advocate-general. However, certain differences between the international/regional court of human rights and the ECJ do not excuse the impermissibility of dissenting opinions in the latter. On the contrary, the European Court of Human Rights could serve as an example to the ECJ here, for would it not be incomprehensible and contradictory if dissenting opinions were permitted in one court and not in another within the same mechanism for the protection of human rights in Europe?

In conclusion, when used in moderation, the option of offering dissenting opinions may not only be permissible in the ECJ but also necessary in certain circumstances. Estonia could consider taking an initiative in introducing the publication of the dissenting opinions of the judges of the European Court of Justice. Estonia as a new member state of the European Union would thus have an extraordinary opportunity to succeed in importing the institution of an open judicial dissent to the European Union and to contribute thereby to the process of democratisation of the European Union.