



PROPOSALS OF THE COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE (CCBE) TO THE EUROPEAN COURT OF JUSTICE REGARDING PROPOSED CHANGES TO THE RULES OF PROCEDURE

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General Comments

Given that most lawyers who consult the rules do so in the context of a preliminary reference procedure, it may be logical to move the preliminary reference procedure into a separate form of procedure under its own title with a similar section being devoted to direct actions. Although the proportion of direct actions being commenced before the Court is less than in the past, and therefore the need for preparatory inquiries and preparatory measures is correspondingly reduced, it would not in our view be appropriate for provision for preparatory inquiries and preparatory measures to be entirely removed.

As regards the views and proposals which follow, a number of the views relate to items that would normally be dealt with in the Practice Directions of the Court. No change is proposed to the existing balance between procedural rules and practice directions.

The Oral Procedure

The CCBE considers that the oral hearing is of fundamental importance and that any changes to the rules and/or the practice directions should recognise this fact.

- In preliminary reference cases, it is the only opportunity to respond to the arguments of the other parties;
- The lay client knows that resolution of the issues depends on interpretation of EU legislation but many EU citizens regard such legislation as somewhat remote and the product of procedures little known at national level. In such circumstances, justice should not only be done but also be seen to be done. The oral hearing is therefore an important element in the citizens' *perception* of the quality of justice within the EU, an issue which Judge Timmermans touched on in his recent speech on the occasion of his retirement on 10 June 2010 when he said "*la légitimité n'est pas chose acquise*".
- The oral hearing permits the clarification of issues, in particular of EU law, of national law and of the facts – when matters are referred, the issues of EU law may have only been argued in a fairly cursory fashion in the national court and the Court of Justice is both the principal forum for debate on the relevant issue and also a court of first and last instance;
- The oral hearing is capable of stimulating debate on the substance of the matter and including matters which have not been foreseen (or, on occasions, simply avoided) by the parties or Member States in the written pleadings;
- In short, justice is a cooperative task in which judges and advocates work together to achieve a just solution – the oral hearing provides a point in time when the judges, the advocate general and the advocates focus together on the case

In the light of the above, the CCBE makes the following proposals:

1. Where requested, an oral hearing ought to be granted.
2. Given that national courts would frequently fix hearings in cases many months in advance, notice for the oral hearings, can on occasion, be too short. Clients have a reasonable expectation to be represented by the advocate of their choice and requesting dates to avoid from the parties is helpful as well as the Court being prepared to reschedule through unavoidable conflict.

3. When parties or intervening Member States or EU Institutions wish to refer to new elements of case law or doctrine at the oral hearing, they should communicate such new elements by e-mail to other parties attending and, if less than 48 hours in advance of the hearing, bring copies for the other advocates at the hearing.
4. Furthermore it would help there were a clear rule that the admission of new written material (whether facts or journal articles etc) after closure of the written procedure is in the discretion of the President.
5. It is helpful to receive communication in advance of questions which the Court considers important for the resolution of the case.
6. It is not practically possible for advocates to accommodate a request made immediately before the hearing that the oral pleading should concentrate on particular issue(s) – by that time the form of the oral presentation has been determined.
7. Given the reduction in the normal time allotted for oral pleading, it is felt to be even more important that oral pleading is followed by a true debate through questions from the Court and also from the Advocate General – a debate which, it is acknowledged, does occur before certain chambers. By way of example however, if the Advocate General has a draft opinion at the oral hearing, it can come across as unfair to the parties if there are no questions from the Advocate General to probe the opposing views expressed by the parties.

In addition, to further enhance the role of the oral hearing and to safeguard the rights of the defence, it is suggested that a draft of the Advocate-General's Opinion be made available to the parties two to three weeks in advance of the hearing.

8. 15 minutes is, in any event, felt to be too short to provide a meaningful pleading and 20 minutes should be the normal pleading time.
9. The choice of advocate(s) to provide the oral pleading and/or answer questions should be that of the lay client albeit that the use of more than one advocate should not extend the time of pleading.
10. Replies should be heard in reverse order to that adopted for the first round of pleading and should be limited to a true reply to the oral argument before the Court so that the claimant has an opportunity to respond to issues put forward by Member States and the EU Institutions.
11. If and to the extent that new issues arise *at the hearing*, the President should give a short time (e.g. 14 days) for a written response to such arguments.
12. Serious consideration should be given to the introduction of a rule requiring an initial deliberation by the Court immediately after the hearing – as is the case for example in German law (applying the principle of "*Unmittelbarkeit*") or in the Spanish Constitutional Court.

To conclude on the oral hearing, its fundamental position in the procedure before the Court needs to be recognised and reinforced.

Transparency

The increasing range and scope of freedom of information provisions in national and EU law give rise to an increasing expectation among lay clients for transparency of public authorities of all kinds, including courts.

1. It would be a very positive step if basic data could be filed on a case file which is accessible on the internet under the case number including for example:
 - a. Whether an Advocate General has been assigned or not;
 - b. To which chamber the case has been assigned;
 - c. Who is the reporting judge;
 - d. When the written procedure closed;
 - e. That an oral hearing will be held in the case;

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Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.eu – www.ccbe.eu

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- f. The “window” when an oral hearing is *likely* to be fixed, i.e. giving a range of time within which a hearing is likely;
- g. The date of the oral hearing once it is fixed;
- h. Which parties have given notice that they are attending the oral hearing; and
- i. A copy of the Report for the Hearing.

The word “likely” is used advisedly – estimates of when events in the procedure will occur are very helpful even if they remain non-binding estimates.

2. Parties (including EU Institutions and Member States) should not have private communications with the Court/Court Registry. It should be a rule that all communications with the Court are copied at least to the direct parties to the case.
3. The written pleadings before the Court of Justice in preliminary reference procedures should be available for consultation by members of the public or alternatively by those demonstrating an interest. A rule of procedure should be introduced to this effect.

Currently the register under Article 16 is open but this does not include access to pleadings and there are no criteria for identifying “persons having an interest”.

In the past, the Report for the Hearing was a fairly full summary of the arguments put forward by the parties. The Report for the Hearing has been reduced to a summary of the answers which the parties propose to the questions put by the Court and, in consequence, transparency has been reduced. It is generally possible to obtain the pleadings of the EU Institutions under the freedom of information provisions but obtaining the pleadings of Member States would generally require both knowledge of the relevant local language and freedom of information provisions. Yet in practice, knowledge of the basis on which a relevant finding was made can be critical in arguing whether an earlier judgment of the Court determines the issue in a later case.

3A. In any event, the Report for the Hearing should be made available online when it is placed outside the courtroom as per paragraph (1) (i) above.

4. The reports of the Research and Documentation Service prepared for the benefit of the Court on the situation on a relevant issue in national law should be made available (a) to the parties to the case during the case; and (b) as regards non-parties, for consultation on an open database, possibly with a time delay after the judgment.

The practice of the Court in drawing on the constitutional traditions of the Member States is an integral part of the work of the Court and inspires several provisions of the Charter of Fundamental Rights. Whilst there is a certain amount of academic commentary on such traditions, access for advocates to the Research and Documentation Service documents would be an additional element in forging and developing what Commissioner Vivianne Reding has referred to as the “*Rechtsgemeinschaft*”.

5. Transparency would be desirable in the system(s) used for allocation of cases to Judges.

Other Issues

1. Advocate Generals Opinions – we would not be enthusiastic about any further limitation of the cases in which the Court has the benefit of an Opinion from the Advocate General. In a post-Lisbon Treaty EU, the range and scope of EU law has been expanded significantly. It is going to be a challenge to maintain the standard of judgments when the range of fields covered by Community law is increasing significantly. In that context, the work of the Advocate Generals seems fundamental by way of guidance to the Court. Also, the Opinions enrich the understanding of practitioners as to the issues discussed, in particular when the judgment of the Court might not find it necessary to consider all the issues.
2. Legal aid – as the work of the Court evolves (in particular as the scope of the work now includes issues of asylum, family law and criminal law) an increasing number of situations are likely to arise where a party requires the assistance of legal aid in order to plead before the Court.

It seems in principle undesirable for parties to go unrepresented due to genuine lack of funds. To that end, the procedure needs to be clear and accessible with an online form to be completed and it being clear in which classes of case such legal aid will or will not be available. In the current Article 76(1), the “document from the competent authority certifying his lack of means” may well not be readily available. Security for such costs might be sought from the other party to the case.

3. Intervention – due to the increasingly constitutional nature of the issues before the Court in preliminary reference cases, serious consideration needs to be given to accepting applications for intervention by third parties who can demonstrate an interest, possibly with such intervention being limited to the submission of a written brief. Inspiration could be drawn from Rule 44 of the European Court of Human Rights Rules of Procedure. Further or alternatively, renewed consideration could be given to requesting amicus curiae briefs.

Furthermore, it is not always clear whether a “party to a case” includes an intervener – see articles 64(1) and 82a(1).

Also the position of parties participating in or given permission to intervene in the case before the national court should be clearly set out.

4. Time limits – given that time limits are interpreted strictly, clear language is necessary so that cases are not ruled out on the basis of time alone.

Article 80 could usefully be promoted to the front of the rules and also include examples of the calculation of time limits. Article 80(1) can be interpreted as meaning that the day of the event is not counted when there is caselaw that it is counted (Case 152/85 *Misset v. Council* [1987] ECR 223, § 7 and 8; Case C-406/01 *Germany v. Parliament and Council* [2002] ECR I-4561, §14).

Also in Article 81(2), what are the “prescribed time limits”? For Article 82, it may be useful to state to which time limits this does not apply.

5. Priority – Article 55(2). Given the difficulty for the Court of accommodating urgent preliminary references, it may well be helpful to indicate the criteria likely to be considered in relation to priority and how much time might be gained by this procedure.
6. Article 79 – subject to agreement of the parties, service by fax and/or e-mail should be provided for.
7. Written pleadings
 - provision could usefully be made for a second round of written pleadings in preliminary reference cases. In cases of fundamental constitutional importance, such a facility could be of assistance to the Court albeit it would need to be used with care;
 - in other cases, the second round of pleadings ought to be permitted where the parties ask for it with reasons.
8. Length of written pleadings – the current indication of length of pleadings (albeit non-binding) is considered unrealistic save for the most straightforward of cases.